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Al-Nashiri, the Cole Bombing, and the Start of the Conflict with Al-Qaeda

By Peter Margulies Tuesday, May 6, 2014, 10:00 AM

The habeas challenge to military commissions recently filed by Abd Al Rahim Al-Nashiri is a loser on both procedure and substance. Al-Nashiri, the alleged mastermind of the 2000 bombing of the USS Cole, argues that a federal court can, and should, enjoin his pending commission trial because the charges against him concern acts that occurred before the start of hostilities between the US and Al Qaeda. Therefore, he suggests, his conduct was not a war crime and the commission lacks jurisdiction. Unfortunately for Al-Nashiri, his arguments on both federal and commission jurisdiction lack merit.

The weakest link in Al-Nashiri's petition is his plea that the DC District Court enjoin his military commission proceeding. Al-Nashiri's claim (supported by Steve here) repackages a position found wanting by the Ninth Circuit. In that earlier case, the court found that a provision of the Military Commissions Act of 2006 (MCA) which barred non-habeas efforts to challenge military commission trials precluded Al-Nashiri's claim. Al-Nashiri's attorneys apparently drew renewed inspiration from the DC Circuit's recent decision in *Aamer v. Obama* that the Supreme Court's *Boumediene* decision struck down all of the MCA's limits on habeas, including those seeking relief other than outright release. Al-Nashiri's attorneys have now framed their allegations as a habeas petition in DC's federal district court. However, aggressive lawyering cannot mask the claims' stale bouquet: Al-Nashiri's arguments remain old wine in new bottles.

Al-Nashiri shouldn't succeed, even if one concedes that the DC Circuit was right in *Aamer* to hear a habeas challenge to forced-feeding procedures for Gitmo hunger strikers (I agree the court was correct but on narrower grounds than those offered). Al-Nashiri's argument rests on a dramatic overreading of the Supreme Court's decision in *Hamdan v. Rumsfeld*, where the Court ruled that President Bush lacked power to unilaterally establish military commissions. Separation of powers was the key to both the Court's ruling on the merits (based on President Bush's failure to comply with Congress's requirement that commission procedures be as close as "practicable" to courts martial) and its ruling that federal courts need not abstain pending Hamdan's commission trial. Justice Stevens, writing for the majority on this point (but only for a plurality on questions of military jurisdiction), hitched his rationale on abstention to the lack of express congressional approval for the commissions. Justice Stevens strongly suggested that express authorization by Congress would have provided indicia of reliability and fairness, allowing the commission process to take its course. Al-Nashiri's case is distinguishable, since in the MCA Congress expressly authorized commissions.

Moreover, the merits of Al-Nashiri's claim hinge, as we shall see, on subtle factual questions involving US measures against Al Qaeda prior to the USS Cole bombing. Those questions deserve the full development of a record, which the military commission proceeding is well-situated to provide. Judge Robertson reached a similar conclusion in denying Salim Hamdan analogous relief in 2008; Judge Robertson's reasoning is relevant here, as well.

Justice Stevens' footnote 16 in *Hamdan* does not cut against this result. Justice Stevens recognized, as the Court had indicated in the 1955 case of *United States ex rel. Toth v. Quarles*, that a defendant in a military tribunal could seek the intervention of a federal court on the issue of the defendant's "status." However, the *Toth* decision dealt with a U.S. civilian (a former service member). A determination of civilian "status" in such a case is a relatively uncomplicated application of law to facts in which military tribunals have no special claim to expertise. Difficult questions entailing the indicia of armed conflict are, in contrast, precisely the matters in which military courts' expertise is most valuable in creating a record. Recognizing this, in the MCA Congress expressly found (see 10 USC sec. 948d) that commissions have the power and competence to make jurisdictional findings like those sought by Al-Nashiri. That congressional determination is surely entitled to some deference, given the prudential reasons for abstention.

Deference is also important, although not dispositive, regarding the substantive question of when hostilities with Al Qaeda commenced. Under international law, the existence of a noninternational armed conflict depends on the intensity and duration of violence and the existence of an organized armed group (OAG) responsible for the violence. The OAG criterion is readily met: "core" Al Qaeda ordered the Cole attack and used it as a basis for recruiting more terrorists. The geographic distance between Yemen and Afghanistan is irrelevant given the centrality of Al Qaeda's planning, which placed Osama bin Laden and Al-Nashiri in the same OAG.

The duration and hostility factors also break against Al-Nashiri. In the MCA, Congress gave military commissions jurisdiction over acts committed before September 11, recognizing that Al Qaeda's military efforts against the US predated that event. The conduct of the US prior to the Cole bombing buttresses Congress's finding. In August, 1998, President Clinton responded to the Al Qaeda-planned East African Embassy bombings, which killed over 250 persons, with a wave of Cruise missile strikes in Afghanistan and Sudan. That sounds pretty intense to me, although the intensity seems lost on Al-Nashiri's advocates.

President Clinton informed Congress of the strikes using the language of armed conflict: he cited Article 51 of the UN Charter, which permits self-defense against an armed attack, describing the strikes as a "necessary and proportionate response to the imminent threat of further terrorist attacks against U.S personnel and facilities... intended to prevent and deter additional attacks by a clearly identified terrorist threat." Subsequently, as the 9/11 Commission Report relates at pp. 132-33, President Clinton issued a Memorandum of Notification authorizing CIA-affiliated tribal assets in Afghanistan to seek to capture Osama bin Laden. And it happens that the contacts the CIA developed during the period from 1998 onward

later facilitated the swift deposal of the Taliban following the September 11 attacks. Defining armed conflict pragmatically, as Geoff Corn and Laurie Blank urge in their paper on Syria, would peg the start of the US armed conflict with Al Qaeda as the launching of Cruise missiles in August, 1998, more than two years before the Cole bombing.

Admittedly, there are two sides to the debate about when armed conflict with Al Qaeda began. Corn and Blank themselves might disagree with my analysis of Al-Nashiri's claim, and other scholars have taken a narrower view of whether, and when, the conflict commenced. Deborah Pearlstein has suggested in an insightful piece that courts have not invariably deferred to the Executive in determining the temporal boundaries of armed conflicts. A comprehensive new article by Steve argues that established precedents do not yield a clear rationale for military tribunals, counseling caution in future cases. There's evidence to support this camp's arguments. In the Cole case, President Clinton did not order a concrete military response, instead sending in the FBI. Al-Nashiri makes the most of President Clinton's decision not to respond militarily, although Al-Nashiri's brief does not address the larger pattern of US military measures against Al Qaeda detailed above.

Al-Nashiri's brief also seizes on a statement by President Clinton shortly after the attack on the Cole that the bombing Cole occurred in a "time of peace." However, this isolated quotation cannot bear the weight that Al-Nashiri attaches to it. President Clinton asserted that the attack was an "act of terrorism," and that the U.S. would track down the attackers and hold them "accountable." The reference to a "time of peace" was not a characterization of the United States' conflict with terrorists. President Clinton's language was simply a matter of fact observation that the U.S. was not at the time of the attack engaged in a traditional international armed conflict involving contending armies on the field of battle.

Indeed, President Clinton's statement suggested that the attack on the Cole was actually akin to one of the oldest war crimes: perfidy, which entails an adversary's exploitation of overtures toward peace as a ruse for lethal force against opposing combatants. The perfidy analogy dovetailed with President Clinton's description of the attack as a "despicable and cowardly act." President Clinton's insistence on holding the attackers "accountable" was not materially different from language used by President Bush after 9/11. Clinton's language, like Bush's, implied a range of responses, from law enforcement to military means. President Clinton's statement certainly did not preclude any U.S. action that would be necessary and appropriate to promote accountability for the Cole bombing, including the military strikes that the U.S. had already used in the struggle against Al Qaeda. Those ongoing efforts to secure accountability also include charging Al-Nashiri himself with perfidy and "murder in violation of the laws of war" – two of the charges that Al-Nashiri currently faces.

More broadly, Al-Nashiri's argument relies on a stylized view of the nature of armed conflict that bears little similarity to actual wars. Wars frequently feature peaks and valleys. Consider the "Phony War" between Germany and the Allies in 1939-40 after Germany's conquest of Poland. In current events, consider the uneasy impasse that prevailed in the Ukraine between Russia's March move into Crimea and Friday's fighting between Ukraine's government and pro-Russian militias – not peace, to be sure, but a pause with little actual violence. Israel's continuing armed conflict with Hamas has the same episodic character. Sporadic violence may not fit the stereotype of war, but it has always been part of war's reality. Developing a record in Al-Nashiri's commission trial is the most effective way to counter that stereotype. The DC District Court should decline Al-Nashiri's premature and ill-conceived invitation to characterize armed conflict with a rigidity that war itself has lacked.

Topics: Terrorism Trials & Investigations, Detention & Guantanamo, International Law, International Law: LOAC, Terrorism Trials: Civilian Court, Guantanamo: Litigation, Terrorism Trials: Military Commissions, Guantanamo Litigation: District Court, Detention: Law of

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