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Date 9/26/2013

[ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

IN RE ABD AL-RAHIM HUSSEIN AL-NASHIRI

No. ____________________

PETITION FOR A WRIT OF MANDAMUS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Dated: September 23, 2014

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND *AMICI* APPEARING BELOW

The parties and *amici* who appeared before the U.S. District Court were:

1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*
2. Charles Hagel, Paul Oostberg-Sanz, Barack Hussein Obama, II, Richard Cheney, Condoleeza Rice, Michael Hayden, George Tenet, Robert Gates, Donald Rumsfeld, David Thomas, and Bruce Vargo, *Respondents*
3. Retired Generals, Admirals, and Colonels (James Brosnahan, *et al.*, Morrison & Foerster, on brief), *Amicus Curiae*
4. David Glazier (Thomas J. McIntosh, *et al.*, Holland & Knight, on brief), *Amicus Curiae*

II. PARTIES AND *AMICI* APPEARING IN THIS COURT

1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*
2. Charles Hagel, Paul Oostberg-Sanz, Barack Hussein Obama, II, Richard Cheney, Condoleeza Rice, Michael Hayden, George Tenet, Robert Gates, Donald Rumsfeld, David Thomas, and Bruce Vargo, *Respondents*

III. RULINGS UNDER REVIEW

This case involves a mandamus petition seeking an order to compel the lower court to rule.

IV. RELATED CASES

This case has not previously been filed with this court or any other court. Counsel are aware of no other cases that meet this Court's definition of related.

Dated: September 23, 2014

By: /s/ Nancy Hollander
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INTRODUCTION

Petitioner, Abd al Rahim Hussen al Nashiri ("Nashiri"), is a detainee held in the Guantanamo Bay Naval Station. He has been in U.S. custody for twelve years. The Convening Authority for the Department of Defense, Office of Military Commissions, has issued orders to convene a military commission to try him and sentence him to death under the Military Commissions Act of 2009, 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq.*) ("2009 Act"). The offenses charged were allegedly committed in Yemen between 2000 and 2002. At all times relevant to these allegations, there was no armed conflict in Yemen. Indeed, when addressing the most significant allegation made against Nashiri – his alleged participation in the bombing of the U.S.S. COLE in October 2000 – the President publicly reaffirmed "American is not at war."

On April 21, 2014, Nashiri moved the U.S. District Court for the District of Columbia to supplement his then-pending petition for a writ of habeas corpus. This supplement raised statutory and constitutional challenges to the legality of this military commission. Specifically, an alleged offense "is triable by military commission under [the 2009 Act] only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c). This statutory limit codifies nearly two centuries of constitutional law limiting military commission jurisdiction to offenses arising during a conflict subject to the law of war.

Along with his motion to supplement, Nashiri moved for a preliminary injunction to temporarily suspend proceedings by the military commission until the District Court ruled on the merits of his supplemental petition. Respondent government officials opposed the motion to supplement as well as the motion for a preliminary injunction and cross-moved to hold Nashiri's habeas case in indefinite abeyance. On June 6, 2014, Nashiri duly notified the District Court of dates in early July, which were agreeable to the parties for a hearing on the motions filed.

The District Court has entered no substantive orders, held no hearings, and taken no action on any of the pleadings presently before it. While Nashiri understands the caseload of the trial judges in this Circuit, the District Court's failure to take any action has had the practical effect of denying him the right to seek timely and meaningful relief through habeas corpus. This has obstructed this Court's appellate jurisdiction and rendered effectively unreviewable the Department of Defense's effort to conduct an *ad hoc* capital trial in violation of explicit Congressional and the Constitutional laws.

Nashiri therefore asks this Court to issue a writ of mandamus ordering the District Court to rule on the merits of his motion for a preliminary injunction within thirty (30) days. Alternatively, he asks this Court to treat the District Court's failure to rule as a refusal to grant injunctive relief under 28 U.S.C. § 1292(a)(1) and to docket this case as a direct appeal from that refusal.

JURISDICTION

Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia. 28 U.S.C. § 2241(a). This Court has jurisdiction to issue all writs in aid of its appellate jurisdiction under 28 U.S.C. § 1651. This Court has jurisdiction to review Petitioner's entitlement to relief via habeas corpus and the district court's refusal to enter a preliminary injunction under 28 U.S.C. §§ 1292(a)(1) & 2241(a).

RELIEF SOUGHT

Petitioner seeks an order directing the U.S. District Court for the District of Columbia to decide his motion for a preliminary injunction, filed April 21, 2014, within thirty (30) days. In the alternative, he asks this Court to docket this case as an appeal from the refusal of a district court to enter a preliminary injunction under 28 U.S.C. §§ 1292(a)(1) & 2241(a) .

ISSUE PRESENTED

Petitioner filed a motion for a preliminary injunction in the lower court that has now languished five months without any action, thereby obstructing his ability to seek timely relief through habeas corpus and this Court's appellate jurisdiction.

STATEMENT OF FACTS

The Military Commissions Act of 2009 is the product of lawmakers' decade-long effort to balance genuine military necessity against the constitutional requirement that the trial of all crimes occur in courts of law. It authorizes the President, through the Secretary of Defense, to "establish military commissions," but only "for offenses triable by military commission as provided in this chapter." *Id.* §§ 948b(b), 948h. The Secretary of Defense has delegated this responsibility to the "Convening Authority," a civil servant in the Department of Defense. Congress put express statutory limits on the offenses the Convening Authority can make triable by mandating that "[a]n 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." *Id.* §950p(c). "Hostilities" is defined as a "conflict subject to the laws of war." *Id.* §950a(9).

At all times relevant to this case, the United States had its armed forces stationed in or near Yemen for peacetime training, cooperation, and logistical operations. Neither the President nor Congress ever found that this placed U.S. forces in an area of actual or likely hostilities. To the contrary, at all times relevant to the allegations against Nashiri, the President and Congress explicitly determined that Yemen was a nation at peace governed by peacetime laws.

The legal status of Yemen remained consistent in the period around the bombing of the USS COLE in October 2000, which is the central event underlying the charges Respondents have sought to try in a law-of-war military commission. President Clinton explicitly declined to recognize the bombing as implicating the law of war. In his address to the nation, for example, President Clinton made a special point of reminding the country of the sacrifices the Armed Forces make "even when America is not at war[.] … 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." *The President's Radio Address*, 36 Wkly. Comp. Pres. Doc. 2464 (Oct. 14, 2000) (Attachment B).

President Clinton reported to Congress on the actions his Administration took in response. At no point did he invoke the law of war or otherwise indicate that U.S. forces were in a theater of hostilities. Instead, he reported on the deployment of additional U.S. personnel to Yemen "solely for the purpose of assisting in on-site security ... forces will redeploy as soon as the additional security support is determined to be unnecessary." *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the USS COLE*, 36 Wkly. Comp. Pres. Doc. 2482 (Oct. 14, 2000) (Attachment C). Notably absent from the public record is any statement from the President or the Congress that the USS COLE incident occurred during a "conflict," "in the context

of hostilities," or was "subject to the laws of war" as required by §950p(c). Instead, the government's official response was to send the FBI to conduct a criminal investigation, which led to an indictment in the Southern District of New York that remains pending. *United States v. al-Badawi, et al.*, No. 98-CR-1023 (S.D.N.Y., unsealed May 15, 2003).

Nashiri is a Saudi national. He was seized in 2002 by local authorities in the United Arab Emirates. *Al-Nashiri v. Obama*, Case No. 08-1207, Supplemental Petition for a Writ of Habeas Corpus, at ¶ 13 (D.D.C., April 21, 2014) ("Supp. Pet.") (Attachment A). He was thereafter taken into the custody of the Central Intelligence Agency ("CIA"), whose agents tortured him over the course of four years. (*Id.*). In May 2003, while Nashiri was in CIA custody, the United States named him as an unindicted co-conspirator in the indictment unsealed in the Southern District of New York. (*Id.*). This still-pending and death-eligible indictment alleges that he was part of a terrorist group in Yemen that conspired to bomb marine vessels, including the U.S.S. COLE. Nashiri has never been alleged to have had any involvement in the September 11th attacks, to have done anything in the context of and associated with the subsequent war in Afghanistan, or to have been involved in any other hostilities. In September 2006, Nashiri was publicly transferred to the U.S. Naval Station at Guantanamo Bay. (*Id.*).

Over two years later, on December 19, 2008, the Convening Authority issued orders to create a military commission to try Nashiri for offenses largely drawn from the indictment pending in the Southern District of New York. (Supp. Pet. ¶ 14). This commission was scheduled to commence its proceedings in February 2009. Following the inauguration of President Obama, however, military prosecutors sought a four-month continuance of the arraignment. (*Id.*). This continuance was denied to the extent it would violate a 30-day time limit that Department of Defense's regulations had placed on the time between a military commission being convening and the arraignment of the defendant. (*Id.*). The Convening Authority consequently disbanded the commission by withdrawing the charges without prejudice. (*Id.*). Three years later, the Convening Authority issued new orders creating a second military commission to try Nashiri. (*Id.* ¶ 23).

On August 30, 2012, Nashiri asked the presiding military judge to dismiss all charges on the ground that the Nashiri Orders were *ultra vires* because none of the allegations occurred in the context of or were associated with a conflict subject to the law of war as required by 10 U.S.C. § 950p(c). (Supp. Pet. ¶ 25). On January 15, 2013, the commission denied this request and ruled that the legality of the Nashiri Orders was self-evident because the Convening Authority issued them without being personally countermanded by the now-sitting President. (*Id.* ¶ 24).

On November 3, 2011, Nashiri filed a declaratory judgment action in the Western District of Washington, where the Convening Authority's office was located, challenging the lawfulness of the Nashiri Orders as *ultra vires*. The district court dismissed the case on the ground that, *inter alia*, 28 U.S.C. § 2241(e)(2) stripped the federal courts of jurisdiction over non-habeas actions brought by Guantanamo detainees. *Al-Nashiri v. MacDonald*, 2012 WL 1642306 (W.D.Wa. 2012). Nashiri timely appealed. On December 20, 2013, the Ninth Circuit Court of Appeals affirmed, finding that §2241(e)(2) stripped the district court of jurisdiction over non-habeas actions. *Al-Nashiri v. MacDonald*, 741 F.3d 1002 (9th Cir. 2013).

On April 21, 2014, Nashiri filed a supplemental habeas petition in the U.S. District Court for the District of Columbia, seeking judicial review of Respondents' effort to try him by military commission. The same day, he filed a motion for a preliminary injunction to temporarily suspend proceedings before the military commission while his supplemental habeas petition was decided.

Respondents opposed both requests for relief and cross-moved to hold Nashiri's habeas in abeyance. On June 6, 2014, Nashiri duly filed a notice with the District Court of dates for a hearing on the motions before it that were amenable to the parties. Since that time the District Court has held no hearing, issued no orders, and otherwise taken no action on Nashiri's case.

REASONS WHY THE WRIT SHOULD ISSUE

Under the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), Nashiri has the right to petition for a writ of habeas corpus. That right includes the opportunity to seek all of the remedies that have traditionally sounded in habeas. *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014). Enjoining military tribunals from acting beyond the lawful jurisdiction conferred by Congress and the Constitution is at the traditional core of habeas corpus. "[T]he Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *In re Yamashita*, 327 U.S. 1, 9 (1946); *see also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 4 Wall. 2 (1866).

Five months ago, Nashiri moved the District Court to issue a preliminary injunction, enjoining his trial by a military commission because the tribunal convened to try him lacks any colorable claim of lawful authority to do so. The District Court has taken no action on that or any other motion filed since that time.

"Repeated decisions of [the Supreme Court] have established the rule that [the appellate courts have] power to issue a mandamus, in the exercise of its

appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270 (1872); *see also Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 666-67 (1978) (mandamus by an appellate court is the appropriate remedy to compel judicial action where a lower court "refuses to adjudicate a matter properly before it[.]"); *Virginia v. Rives*, 100 U.S. 313, 323 (1879) (mandamus is "an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.").

Mandamus is required here to protect this Court's appellate jurisdiction and Petitioner's right to seek timely and meaningful judicial review. Given the five months of inexplicable inaction in this case, Nashiri asks this Court to exercise its established supervisory power in this case to compel the District Court "to proceed to final judgment in order that [this] court may exercise the jurisdiction of review given by law." *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

Courts have exercised, and should exercise, their supervisory authority to ensure that a lower court does not abdicate its duty to hear the cases properly within its jurisdiction or to thwart a habeas petitioner's right to seek meaningful judicial review via inaction. In *McClellan v. Young*, 421 F.2d 690 (6th Cir. 1970), for example, a district court allowed four months to elapse before ruling on a prisoner's petition for habeas corpus. Citing *La Buy v. Howes Leather Co.*, 352

U.S. 249 (1957), the Sixth Circuit issued the writ and ordered the district judge to render his decision within ten days of the mandate being issued. *Id.* at 691; *see also In re Sharon Steel Corp.*, 918 F.2d 434, 437 (3d Cir. 1990) (writ issued to a district judge who declined to rule on a dispositive motion, where "the district court's inaction [was] an unexplained abdication of judicial power" because the district judge "had a duty to dispose of that motion, a duty inherent in a judicial system which guarantees a conditional right to an appeal."); *In re Funkhouser*, 873 F.2d 1076, 1077 (8th Cir. 1989) (mandamus granted to remedy lower court's year-long delay in ruling on prisoners' *in forma pauperis* motion and to order court to rule on the merits of the case).

This Court, in particular, has been vigilant in ordering relief where delay threatens to allow administrative agencies to evade the letter or spirit of a Congressional law. *See, e.g.*, *In re People's Mojahedin Organization of Iran*, 680 F.3d 832, 837-38 (D.C. Cir. 2012); *In re Core Communications, Inc.*, 531 F.3d 849, 859 (D.C. Cir. 2008). In this case, the issues raised are substantial, they go to the Executive Branch's compliance with Congressional law, and they raise a matter of life and death to Nashiri.

The 2009 Act clearly states that "[a]n 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). This limit on

what is triable is based on over a century-and-a-half of precedent that prohibits the military from exercising jurisdiction over non-service members unless the offenses charged arose under the law of war. *McElroy*, 361 U.S. at 285-86; *Reid*, 354 U.S. at 35; *Milligan*, 4 Wall. at 127-28. The offenses for which the Department of Defense seeks to try Nashiri are all alleged to have occurred at a time when the public record unequivocally demonstrates the political branches' judgment that events in Yemen were governed by the laws of peace, not the laws of war. Without judicial intervention, an administrative agency will put a man through the paces of an *ad hoc* capital trial that Congress and the Constitution have forbidden and whose judgment is likely – indeed certain – to be vacated on appeal.

Nashiri has raised "substantial arguments denying the right of the military to try [him] at all." *Hamdan*, 548 U.S. at 36, n.16 (internal quotations omitted); *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) *rev'd on other grounds* 548 U.S. 557 (2006) (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)). Whether the District Court agrees or disagrees, Nashiri has a right to have his claims heard on the merits. The District Court's failure to rule amounts to a pocket-veto of Nashiri's right to habeas corpus and this Court's appellate jurisdiction. *La Buy*, 352 U.S. at 264. This Court should therefore issue a writ of mandamus to the District Court to decide Nashiri's motion within thirty (30) days.

ALTERNATIVELY, THIS COURT SHOULD DOCKET THIS CASE AS AN APPEAL FROM THE REFUSAL TO ENTER A PRELIMINARY INJUNCTION

This Court has appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States … granting, continuing, modifying, *refusing* or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). By allowing five months to elapse without any hearing or substantive order on Nashiri's motion for a preliminary injunction, the district court has refused to enter an injunction for the purposes of §1292.

"[W]hen a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2962 (3d ed.). The "practical effect" of the District Court's refusal to rule in this case is the same as if it had denied Nashiri's motion and it creates the same "serious, perhaps irreparable, consequence[s]" his requested injunction sought to prevent. *Carson v. American Brands*, 450 U.S. 79, 84 (1981). This Court, like other Circuit Courts of Appeal, should therefore treat the District Court's failure to rule as an appealable refusal to grant.[1]

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[1] *See, e.g.*, *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449-50 (9th Cir. 1992) ("By delaying a hearing on Sierra Club's motion to enjoin construction …

Accordingly, short of issuing a writ of mandamus to the District Court to act on Nashiri's motion for a preliminary injunction, Nashiri asks this Court to docket this case as an appeal from the refusal to enter that injunction under 28 U.S.C. § 1292(a)(1).

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the district court effectively denied the motion"); *Computer Care v. Service Systems Enterprises*, 982 F.2d 1063, 1075 (7th Cir. 1992) ("Although the district court did not explicitly deny Computer Care's request that it enjoin the false advertising, the court's failure to grant such relief when it was sought by Computer Care has the substantive effect of a denial, and therefore is reviewable by this court."); *Cedar Coal Co. v. United Mine Workers of America*, 560 F.2d 1153, 1161 (4th Cir. 1977) ("indefinite continuance amounted to the refusing of an injunction and is appealable"); *United States v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962) ("[T]he trial judge did not enter a formal order 'refusing' a temporary injunction. He simply failed to do so … The movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a 'refusal,' so as to satisfy the requirements of Section 1292, 28 U.S.C.A. We hold, therefore, that the failure of the trial judge to grant the temporary injunction constituted an 'interlocutory order of the district court … refusing … an injunction.' Such order is appealable."). *But see Smith v. Freeman*, 129 F.3d 1260 (4th Cir. 1997) (per curiam) (summarily finding no jurisdiction in the absence of an order from the district court). *Cf. Obaydullah v. Obama*, 609 F.3d 444 (D.C. Cir. 2010) (reversing a summary order holding a Guantanamo detainee's habeas case in abeyance).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus to the U.S. District Court for the District of Columbia, ordering it to enter a final judgment within thirty (30) days on Petitioner's motion for a preliminary injunction, filed with that Court on April 21, 2014. In the alternative, this Court should construe the District Court's failure to rule as a refusal to grant relief under 28 U.S.C. § 1292(a)(1) and docket this case as a direct appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2014, I caused copies of this Petition for Writ of Mandamus and Attachments to be served on the following counsel, who appeared on behalf of Respondents below:

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ATTACHMENTS

A. *Al-Nashiri v. Obama*, Case No. 08-1207, Supplemental Petition for a Writ of Habeas Corpus (D.D.C., April 21, 2014).

B. *The President's Radio Address*, 36 Wkly. Comp. Pres. Doc. 2464 (Oct. 14, 2000)

C. *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the USS COLE*, 36 Wkly. Comp. Pres. Doc. 2482 (Oct. 14, 2000)