
RECENT CASES

FEDERAL COURTS — ABSTENTION — D.C. CIRCUIT ABSTAINS FROM ADJUDICATING HABEAS PETITION OF GUANTANAMO DETAINEE TRIED BY MILITARY COMMISSION. — *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016).

Various abstention doctrines counsel federal courts against exercising their jurisdiction over otherwise properly presented cases. For habeas petitioners, then, the stakes of abstention are high: when federal courts decline to exercise their habeas corpus jurisdiction, the costs of detention and delay are borne by those in the government's custody. Under the doctrine of abstention first announced in *Schlesinger v. Councilman*,¹ federal courts must refrain from interfering with court-martial via habeas petition or other equitable relief if the petitioner cannot make a showing of extraordinary or unusual circumstances.² Recently, in *In re Al-Nashiri*,³ the D.C. Circuit extended the doctrine of abstention under *Councilman* to the context of military commissions.⁴ But the court's analysis gave short shrift to key structural differences between the military commission system and the court-martial system. A fuller consideration of these differences cautions against applying *Councilman*'s categorical prohibition on federal court exercise of habeas jurisdiction to the proceedings of military commissions.

In the wake of the September 11 attacks, President George W. Bush began authorizing the trial of enemy combatants by military commission at Guantanamo Bay.⁵ In 2006, Congress passed the Military Commissions Act⁶ (MCA), which formalized this system of military commissions. The MCA established the Court of Military Commission Review (CMCR) and invested it with appellate jurisdiction over military commissions.⁷ The Act further invested the D.C. Circuit with appellate review over the CMCR.⁸ The Act expressly limited the jurisdiction of military commissions to offenses "committed in the context of and associated with hostilities."⁹

¹ 420 U.S. 738 (1975).

² *Id.* at 758.

³ 835 F.3d 110 (D.C. Cir. 2016).

⁴ *See id.* at 118.

⁵ *Id.* at 114. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that these military commissions required specific congressional authorization. *Id.* at 620–28.

⁶ Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

⁷ *See* 10 U.S.C. §§ 950d, 950f (2012).

⁸ *See id.* § 950g(a).

⁹ *Id.* § 950p(c). "Hostilities" are "any conflict subject to the laws of war." *Id.* § 948a(9).

Abd Al-Rahim Hussein Muhammed Al-Nashiri, a Saudi national and detainee at Guantanamo Bay, is alleged to be the mastermind behind several terrorist attacks, including the bombing of the U.S.S. *Cole* in 2000.¹⁰ In 2011, a military commission was convened to try Al-Nashiri for his role in the attacks.¹¹ In response, Al-Nashiri filed a motion to dismiss with the commission, arguing that it lacked jurisdiction under the MCA because his alleged offenses were not committed in the context of hostilities.¹² The judge dismissed the motion, ruling that the existence of hostilities was partly an issue of fact for trial.¹³

In 2014, Al-Nashiri filed an amended habeas corpus petition in the United States District Court for the District of Columbia, requesting a preliminary injunction to halt the military commission trial.¹⁴ The district court, finding that adjudication of the petition would improperly interfere with the commission's proceedings, abstained under *Councilman* from considering Al-Nashiri's habeas petition.¹⁵

The D.C. Circuit affirmed. Writing for the panel, Judge Griffith¹⁶ applied *Councilman* and held that abstention was appropriate.¹⁷ *Councilman* involved the court-martial of Army Captain Bruce R. Councilman, who was charged with the wrongful sale and possession of marijuana.¹⁸ Councilman moved in federal court for an injunction halting the court-martial, arguing that the military lacked jurisdiction.¹⁹ On appeal, the Supreme Court held that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention."²⁰

The *Al-Nashiri* court extended *Councilman*'s abstention doctrine to the context of military commissions. In doing so, it focused on *Councilman*'s "two comity considerations" governing the appropriateness of abstention: (1) the "adequacy of the alternative system in protecting the rights of defendants" and (2) the "importance of the interests served by allowing that system to proceed uninterrupted by federal courts."²¹ First, on adequacy, the court concluded that the MCA's review structure would adequately protect Al-Nashiri's rights

¹⁰ *Al-Nashiri*, 835 F.3d at 113–14.

¹¹ *Id.* at 114.

¹² *Id.* at 116.

¹³ *Id.*

¹⁴ *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218, 220 (D.D.C. 2014). Separately, Al-Nashiri filed for a writ of mandamus in the D.C. Circuit. *Al-Nashiri*, 835 F.3d at 117.

¹⁵ *Al-Nashiri*, 76 F. Supp. at 222–23.

¹⁶ Judge Griffith was joined by Senior Judge Sentelle.

¹⁷ *Al-Nashiri*, 835 F.3d at 118.

¹⁸ See *Schlesinger v. Councilman*, 420 U.S. 738, 741 (1975).

¹⁹ *Id.* at 741–42.

²⁰ *Id.* at 758.

²¹ *Al-Nashiri*, 835 F.3d at 121.

because it was “virtually identical” to the review structure approved in *Councilman*.²² Both systems, the court observed, are “integrated system[s] of military courts” that contemplate appellate review by civilian judges.²³

Second, on importance, the court identified at least one “vital interest” served by abstention: “the need for federal courts to avoid exercising their equitable powers in a manner that would unduly impinge on the prerogatives of the political branches in the sensitive realm of national security.”²⁴ The court argued that the MCA’s scheme intentionally delays Article III review until after a detainee exhausts her appeals to the CMCR; it concluded that deference to the “political branches’ instruction as to the timing of Article III review” qualifies as an important interest, “at least where that instruction is based on those branches’ assessment of national security needs.”²⁵ The court rejected Al-Nashiri’s assertion that *Councilman* abstention applies only to court systems that are “wholly separate” from the federal judiciary.²⁶ Further, while the court acknowledged that military commissions might not initially possess any “special expertise” meriting deference “in addressing questions related to the laws of war,” it noted the possibility that commissions could build such expertise over time.²⁷ Finally, the court rejected that the projected delay Al-Nashiri faced was so unreasonable that abstention was improper.²⁸ The court concluded that application of *Councilman* was appropriate.

Next, the court held that neither prong of *Councilman*’s “extraordinary circumstances” exception applied. Under *Councilman*, a federal court must abstain unless a plaintiff demonstrates that circumstances “both present the threat of ‘great and immediate’ injury and render the alternative tribunal ‘incapable of fairly and fully adjudicating the federal issues before it.’”²⁹ First, the court rejected that the psychological harm alleged by Al-Nashiri resulting from the commission proceedings was a sufficiently grave injury.³⁰ Second, the court argued that no circumstances raised the suggestion that a military commission

²² *Id.* at 122.

²³ *Id.* at 119 (quoting *Councilman*, 420 U.S. at 758).

²⁴ *Id.* at 124.

²⁵ *Id.* at 125.

²⁶ *Id.* at 126; *see id.* at 126–27.

²⁷ *Id.* at 127. The court also noted that the availability of Article III review lessened the need for immediate relief because the reviewing court “can remedy any errors on appeal.” *Id.*

²⁸ *Id.* at 134–35.

²⁹ *Id.* at 128 (quoting *Kugler v. Helfant*, 421 U.S. 117, 123–24 (1975)).

³⁰ *Id.* at 128–29.

would be incapable of fairly adjudicating his trial.³¹ Without either showing, the court held, the district court correctly abstained.³²

Judge Tatel dissented.³³ Noting “material differences” between military commissions and courts-martial, he observed that a primary concern underlying *Councilman*’s abstention doctrine was the importance of “avoiding judicial interference in the military’s unique relationship with its servicemembers” — an interest that has no applicability in the context of a military commission.³⁴ But even assuming that *Councilman* abstention applies in general, Judge Tatel contended that abstention was inappropriate in the “unique and troubling circumstances of this case,” where “years of brutal detention and interrogation tactics” have left Al-Nashiri vulnerable to permanent harm should the government subject him to a military commission trial.³⁵ On these facts, Judge Tatel argued, the gravity of the alleged harms qualified as sufficiently extraordinary to defeat application of *Councilman*.³⁶

The *Al-Nashiri* court’s analysis rested on its finding that *Councilman*’s two comity considerations of adequacy and importance were both present. But the court’s analysis discounted certain structural differences between the military commission system and the courts-martial system that call into question the applicability of either factor. First, unlike in *Councilman*, the *adequacy* of the alternative system — here, the trial and appellate structure established by the MCA — is undermined by the absence of a procedural protection to ensure prompt appellate review of the threshold jurisdictional question. Second, the *importance* of permitting the alternative system to proceed uninterrupted is undermined by the eventual availability of appellate review by an Article III tribunal. These differences lessen the force of either comity consideration and counsel in favor of prompt exercise of habeas jurisdiction.

First, under *Councilman*, abstention is appropriate only when the alternative system “adequately” protects the petitioner’s rights.³⁷ The *Al-Nashiri* court concluded that the MCA’s appellate scheme was adequate because it was “virtually identical” to the review system approved in *Councilman*.³⁸ But this overlooks at least one procedural

³¹ *Id.* at 129.

³² *Id.* at 135. The court also denied Al-Nashiri’s mandamus petition because it was not “clear and indisputable” that his alleged conduct did not take place in the context of hostilities. *Id.* at 136 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004)).

³³ *Id.* at 138 (Tatel, J., dissenting).

³⁴ *Id.*

³⁵ *Id.* at 140. On the uncontested facts, Al-Nashiri “suffers from psychological disorders that will be aggravated by a capital trial in a military commission.” *Id.* at 144.

³⁶ *Id.* at 144.

³⁷ *Id.* at 122 (majority opinion).

³⁸ *Id.*

protection afforded to Councilman but denied to Al-Nashiri: the guarantee of prompt appellate review. Rule 707 of the Rules for Courts-Martial, for instance, guarantees a trial and potential appeal within 120 days of charging.³⁹ No such protection, however, exists for military commission proceedings.⁴⁰ As a result, trials in the military commission system are often characterized by decade-long delays.⁴¹ Here, because the court abstained from deciding Al-Nashiri's habeas claim, it is possible that a definitive answer to whether the military commission has jurisdiction will be unavailable until 2024.⁴² And if the D.C. Circuit were to find that the commission lacked jurisdiction all along, the commission's judgment would be vacated.⁴³ In the meantime, the military commission would have tried Al-Nashiri without jurisdiction — which is, “in effect, another form of executive detention.”⁴⁴ This implicates the core of the habeas remedy.⁴⁵

The MCA's review structure presents a substantial risk that detainees will face undue delay before final adjudication of their claims that the military commission is acting *ultra vires*. This risk renders abstention inappropriate. As the Supreme Court noted in *Boumediene v. Bush*,⁴⁶ in determining whether “suitable alternative processes” permit a federal court to abstain,⁴⁷ “*speed* is an important aspect of the habeas remedy.”⁴⁸ That is, while it would be impractical to permit habeas review at the moment a prisoner is taken into custody, at some point a delay in the process becomes unreasonable and begins to counsel in fa-

³⁹ RULES FOR COURTS-MARTIAL 707 (2012). At the time of *Councilman*, the Court of Military Appeals applied a ninety-day speedy trial clock. *See, e.g.*, *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993). Violations of this rule in a pending court-martial presumptively result in a “dismissal of the affected charges and specifications with prejudice.” *Id.*

⁴⁰ The MCA expressly provides that “any rule of courts-martial relating to speedy trial” does not apply to trial by military commission. 10 U.S.C. § 948b(d)(1)(A) (2012).

⁴¹ *See, e.g.*, *Al Bahlul v. United States*, 767 F.3d 1, 6–8 (D.C. Cir. 2014).

⁴² *See Al-Nashiri*, 835 F.3d at 135 (recognizing “that appellate review in [the D.C. Circuit] might not occur until 2024”).

⁴³ Benjamin Wittes, *Thoughts on Al Nashiri II*, LAWFARE (Aug. 31, 2016, 10:38 AM), <https://lawfareblog.com/thoughts-al-nashiri-ii> [<https://perma.cc/C7TB-A69D>].

⁴⁴ Stephen I. Vladeck, Eisentrager's (*Forgotten*) Merits: Military Jurisdiction and Collateral Habeas, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 193, 211 (Kevin Jon Heller & Gerry Simpson eds., 2013).

⁴⁵ *See* RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1194 (7th ed. 2015) (noting that habeas corpus originally “focused . . . on whether extra-judicial detention — most often by the executive — was authorized by law”).

⁴⁶ 553 U.S. 723 (2008).

⁴⁷ *Id.* at 794.

⁴⁸ Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 57 (emphasis added); *see Boumediene*, 553 U.S. at 793 (“Practical considerations [such as speed] inform the definition and reach of . . . habeas corpus.”); *see also* FALLON ET AL., *supra* note 45, at 1194, 1243–44.

vor of habeas review.⁴⁹ In *Boumediene*, for instance, the Court found that a six-year delay in the review process of detainees under the Detainee Treatment Act (DTA) justified a “prompt habeas corpus hearing.”⁵⁰ Here, Al-Nashiri faces an *eight*-year delay.⁵¹ As in *Boumediene*, if prompt appellate review of the jurisdictional question were assured, “the case for requiring temporary abstention . . . would be much stronger.”⁵² But the military commission system has not provided any such guarantee. This inadequacy weighs against abstention.

Second, under *Councilman*, abstention is appropriate only when it would “clearly serve an important countervailing interest.”⁵³ The *Al-Nashiri* court identified this interest to be “the need for federal courts to avoid exercising their equitable powers in a manner that would unduly impinge on the prerogatives of the political branches in the sensitive realm of national security.”⁵⁴ Indiscriminate application of this comity consideration, however, ignores certain consequences entailed by the availability of appellate review by an Article III tribunal. Under the MCA, the military commission system contemplates review by the D.C. Circuit of all final judgments rendered by a military commission.⁵⁵ In contrast, courts-martial are subject to review by the Army Court of Criminal Appeals and then the Court of Appeals for the Armed Forces (CAAF), neither of which is an Article III tribunal.⁵⁶ Furthermore, at the time of *Councilman*, the Supreme Court lacked appellate jurisdiction over the CAAF,⁵⁷ indicating that direct Article III review was never available to *Councilman*.

⁴⁹ See Meltzer, *supra* note 48, at 56 (“The Court’s opinion in *Boumediene* could be read as resting on a constitutional requirement of expedition.”).

⁵⁰ *Boumediene*, 553 U.S. at 795. Notably, the *Boumediene* Court did not distinguish between habeas petitioners challenging the *lawfulness* of their detention and those challenging the *conditions* of their detention. See *id.* at 793–95; *Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009).

⁵¹ The *Al-Nashiri* court refused to label this delay excessive because of Al-Nashiri’s failure to contest the postponement of his trial. *Al-Nashiri*, 835 F.3d at 135. He did not, for instance, oppose a stay during the pendency of the government’s interlocutory appeals. *Id.* But the petitioner’s own role in creating delay does not bear on the question of abstention. In *Boumediene*, for instance, the Court did not abstain despite the habeas petitioners’ refusal to “use the [alternative review] process that ha[d] been available to them for 2 1/2 years.” 553 U.S. at 807 (Roberts, C.J., dissenting). Similarly, here, the delay arose because Al-Nashiri “opted to litigate rather than pursue [the military commission’s] procedures.” *Id.* at 807 n.1. Under *Boumediene*, then, Al-Nashiri’s litigation choices pose no equitable bar to adjudication of his habeas petition.

⁵² 553 U.S. at 794.

⁵³ *Al-Nashiri*, 835 F.3d at 121 (quoting *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)).

⁵⁴ *Id.* at 124.

⁵⁵ 10 U.S.C. § 950g(a) (2012). Further appellate review by the Supreme Court is available via a writ of certiorari. *Id.* § 950g(e).

⁵⁶ See *id.* §§ 866(b), 867.

⁵⁷ See Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06 (codified as amended at 10 U.S.C. § 867a and 28 U.S.C. § 1259 (2012)) (establishing the Supreme Court’s appellate jurisdiction over the “Court of Military Appeals [CAAF]”). *Councilman* was decided in 1975.

It is true that the political branches ordinarily receive deference regarding the scope and timing of federal court intervention, especially in the national security and foreign affairs contexts.⁵⁸ The *Al-Nashiri* court, for instance, acknowledged the availability of Article III review under the MCA but argued that it was “crucial[]”⁵⁹ that the court “[h]eed[] the political branches’ instruction as to the *timing* of Article III review.”⁶⁰ But federal courts need not abstain out of deference to a congressional scheme when it does not contain “suitable alternative processes . . . to protect against the arbitrary exercise of governmental power.”⁶¹ The *Boumediene* Court expressly relied on this logic in rejecting abstention, holding that detainees need not exhaust the review process established by Congress and the President in the DTA before obtaining habeas relief because that scheme — which contemplated eventual review by the D.C. Circuit⁶² — did not guarantee “prompt review.”⁶³ That is, in cases of “undue delay,” courts need not abstain out of deference to “the mechanism Congress and the President set up.”⁶⁴ Here, as already noted, the undue delay faced by detainees in obtaining appellate review of jurisdiction renders the MCA’s review structure inadequate. As in *Boumediene*, then, adjudication of Al-Nashiri’s habeas petition would not cause any *undue* interference with “the prerogatives of the political branches.”⁶⁵ This renders abstention inappropriate.

Nor should the court abstain out of comity to the military tribunal system itself. As an initial matter, Article III courts need not abstain out of comity to an *inferior* Article I tribunal on questions of *jurisdiction*.⁶⁶ To the contrary: the very purpose of “common law supervisory tools” like the writ of habeas corpus is to “confine inferior tribunals within their proper jurisdictions.”⁶⁷ The definition of an inferior tribunal “seemingly requires judicial review of [jurisdictional] boundary issues,”⁶⁸ which includes “considering petitions for writs of habeas corpus by those claiming to have been wrongly detained for trial” like

⁵⁸ See Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 946–50 (2004).

⁵⁹ *Al-Nashiri*, 835 F.3d at 124.

⁶⁰ *Id.* at 125 (emphasis added).

⁶¹ *Boumediene v. Bush*, 553 U.S. 723, 794 (2008).

⁶² See *id.* at 735, 806–07.

⁶³ *Id.* at 794.

⁶⁴ *Id.* at 795.

⁶⁵ *Al-Nashiri*, 835 F.3d at 124.

⁶⁶ See, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 583 (1985) (defining “comity” as “mutual respect between two entities that are, at least to some degree, *independent* of each other” (emphasis added)).

⁶⁷ James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 745 (2004).

⁶⁸ *Id.*; see Shapiro, *supra* note 66, at 572 n.174 (“The writ of habeas corpus was used to inquire into the lawfulness of detention, to remove a prisoner from confinement by an inferior court . . .”); see also FALLON ET AL., *supra* note 45, at 1193–94 & 1193 n.1.

Al-Nashiri.⁶⁹ Abstention in these cases would defeat the purpose of the habeas writ. Thus, where direct Article III review is expressly contemplated, abstention out of comity to the inferior court's jurisdictional determination is unwarranted.

As for the possibility that the commissions might possess *some* expertise about questions of law or build it up over time, as the *Al-Nashiri* court argued,⁷⁰ the relevance of any such expertise to the question of comity is obviated by the standard of review. The D.C. Circuit has appellate jurisdiction over questions of law,⁷¹ which on appeal are subject to de novo review.⁷² Under this standard, the D.C. Circuit reviews the commission's threshold jurisdictional rulings "without any deference to the underlying military process."⁷³ These jurisdictional determinations therefore become "superfluous yet time-consuming" if the appellate scheme does not provide a "judicial decision-maker at the front end of the process" via a mechanism like habeas review.⁷⁴ Abstention in cases like Al-Nashiri's deprives the process of such a "front end" habeas remedy and creates needless inefficiency, an "undesirable state of affairs."⁷⁵

In sum, the D.C. Circuit's decision not to hear Al-Nashiri's habeas petition possibly delayed a clear answer to the threshold question of jurisdiction for almost a decade. The court abstained out of deference to an inferior Article I tribunal unconstrained by any procedural protection ensuring prompt appellate review and lacking any relevant expertise in deciding questions of law. Further, the tribunal's jurisdictional determination will not receive any deference on appeal. These unpleasant and unnecessary consequences of *Councilman* abstention can be remedied by returning the doctrine to its roots. Where a federal court contemplates equitable interference with a wholly separate, self-contained judicial system, abstention under *Councilman* is appropriate out of comity to that separate system of adjudication. But where equitable interference with an inferior court does not implicate comity concerns arising from federalism⁷⁶ or unique military exigencies,⁷⁷ *Councilman* abstention on a question of jurisdiction is compelled by neither enacted law, nor doctrine, nor policy.

⁶⁹ Pfander, *supra* note 67, at 652. Again, Al-Nashiri's claim that the commission lacks jurisdiction is equivalent to a claim of unlawful executive detention.

⁷⁰ *Al-Nashiri*, 835 F.3d at 127.

⁷¹ 10 U.S.C. § 950g(d) (2012).

⁷² See, e.g., *Al Bahlul v. United States*, No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016) (en banc) (per curiam) (applying de novo review).

⁷³ Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1131 (2008).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975); Shapiro, *supra* note 66, at 583.

⁷⁷ That is, does the separate judicial system adjudicate legal questions "without counterpart in civilian life"? *Councilman*, 420 U.S. at 757.