

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MARTHA McSALLY  
JTF-SWA/J3 JSRC  
APO AE 09871  
Saudi Arabia,

Plaintiff,

v.

DONALD H. RUMSFELD  
Secretary of Defense  
1400 Defense Pentagon, Room 1E757  
Washington, D.C. 20301-1400,

Defendant.

CASE NUMBER 1:01CV02481

JUDGE: James Robertson

DECK TYPE: Civil Rights (non-employment)

DATE STAMP: 12/03/2001

COMPLAINT FOR DEPRIVATION OF  
CONSTITUTIONAL AND STATUTORY RIGHTS

I. INTRODUCTION

1. This is an action to obtain declaratory and injunctive relief to invalidate certain regulations promulgated by the United States Department of Defense, regulations which require female military personnel in Saudi Arabia to adopt Islamic dress and adhere to Islamic customs.

2. All female enlisted and commissioned military personnel in the United States Air Force, Army, Navy, and Marines in the Kingdom of Saudi Arabia are required, when leaving their base, and whether on-duty or off-duty, to wear traditional Islamic religious female clothing, whereas similarly situated male personnel are neither required, nor permitted, to wear Islamic male religious clothing. Female military personnel may

leave their base only if accompanied by a male and must ride in the back seat of any vehicle. Only military personnel are subject to these regulations; no restrictions apply to other federal personnel stationed in Saudi Arabia, including male and female employees of the Department of State.

3. The challenged military regulations violate the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution, as well as the Religious Freedom Restoration Act, as they require women to wear clothing and engage in customs foreign to their own religion and mandated by a religion other than their own. The regulations are irrational, promulgated without sufficient governmental justification, and do not evenhandedly regulate dress and conduct.

4. Through their applicability to women, but not men, these regulations unconstitutionally discriminate against women in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. They also force women to engage in symbolic speech, and to communicate the message that they adhere to Islamic beliefs and tenets, including the doctrinal teachings that women are subservient to men.

5. The plaintiff in this case, Lt. Col. Martha McSally, is a fighter pilot in the United States Air Force, and subject to the challenged regulations. She has protested the regulations through her chain of command, to no avail. Five United States Senators have asked the defendant, Donald Rumsfeld, to rescind these regulations, to no avail. Lt. Col. McSally now seeks relief in this Court.

## II. JURISDICTION

6. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. §§ 1331 and 1361 and the First and Fifth Amendments to the United States Constitution. This action arises under the constitution and laws of the United States, including the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000-bb-1(c).

## III. PARTIES

7. The plaintiff, Martha McSally, is a citizen of the United States and a resident of the State of Texas. She is 35 years old and a career military officer, having graduated 25<sup>th</sup> in her class from the Air Force Academy.

8. McSally is a Lieutenant Colonel and the highest ranking female fighter pilot in the United States Air Force. She was one of the first seven women trained by the Air Force as a fighter pilot. During a 1995-1996 tour of duty in Kuwait, she became the first woman in Department of Defense history to fly a combat sortie in a fighter aircraft. She has flown 100 combat hours over Iraq and has served as flight commander and trainer for combat pilots deployed to Kosovo and South Korea. She was promoted to the rank of Major two years ahead of her peers, an honor and endorsement received by only three percent of eligible officers. The Air Force continued to recognize her tremendous performance and potential by promoting her an additional two years early to the rank of Lieutenant Colonel. As such, McSally has now been promoted four years ahead of her peers. This is a rare endorsement that is given to the most capable, competent, and

professional officers, and only to those who are identified as future leaders of the Air Force.

9. As a fighter instructor pilot, McSally has invested in her students' lives as a commander, mentor, instructor and friend. She is currently stationed at the Prince Sultan Air Base in Saudi Arabia, where she is responsible for combat search and rescue missions for operations in the Middle East.

10. McSally adheres to the Christian faith and is a member of her military base non-denomination Chapel. Throughout her military career she has been a leader or participant in women's Bible studies, choir and music for Chapel religious services, and base prayer breakfasts.

11. The challenged regulations have harmed McSally by denying her the ability to freely exercise her own religious beliefs, by requiring her to adopt the dress and practices of a religion to which she does not belong, by forcing her to communicate the coerced and false message that she adheres to the belief that women are subservient to men, by according her different treatment and status based solely upon her gender, and by undermining her authority as an officer. The challenged regulations result in a direct and substantial burden upon her core religious beliefs and her rights of free speech and expression. Although McSally expects to be transferred in the near future, her commission will require her to return to Saudi Arabia, and thus to remain subject to the challenged regulations. The constitutional deprivations at issue in this case remain capable of repetition and demand review.

12. Defendant Donald H. Rumsfeld is the Secretary of the Department of Defense of the United States of America. He is a civilian who is sued in his official

capacity. On information and belief, defendant Rumsfeld is, in his official capacity, responsible for the promulgation and enforcement of the challenged regulations.

#### **IV. FACTS APPLICABLE TO ALL CLAIMS**

13. Since 1995, military personnel in Saudi Arabia have been subject to certain dress and conduct regulations. The most current regulations in effect, attached to this complaint as Exhibit 1, are issued under the authority of the Commander of the 363<sup>rd</sup> Air Expeditionary Wing, and designated as 363 AEW INSTRUCTION 34-103. Compliance with these regulations is mandatory, and failure to comply may result in punishment under Article 92, Uniform Code of Military Justice.

14. Instruction 1.12.3.1 requires all women, while traveling off-base, to wear an abaya. The abaya is an article of female clothing, similar to a full length robe. It is dark in color. It covers the body from neck to ankle, and the arm to the wrist. The abaya head cover or scarf must be carried at all times and immediately worn if requested by the host nation people.

15. Instruction 1.12.3.4 requires all women, while traveling off-base, to ride in the rear seat when there are more than two people traveling in a vehicle.

16. Instruction 1.12.3.5 requires all women, while traveling off-base, to have at least one male companion at all times.

17. Instruction 4.4 prohibits females from operating vehicles off-base except in an emergency.

18. Male military personnel are not subject to the restrictions set forth in the paragraphs above. They are not required to wear traditional religious Islamic clothing. In fact, all male military personnel, while traveling off-base, are prohibited from wearing

any host nation attire, specifically including the thobe or long robe, or the gutra or headdress.

19. The instructions set forth above apply only to military personnel, and only in Saudi Arabia. Neither these instructions, nor any other regulations of like substance, apply in any other country of the world. Neither these instructions, nor any other regulations of like substance, apply to non-military personnel in Saudi Arabia. Female employees of the United States Department of State are not required to wear the abaya, or to ride in the back seat of vehicles. Nor are they prohibited from traveling alone. The Saudi Arabian government does not require foreign non-Islamic women to wear the abaya or to ride in the rear seat of vehicles. It does not prohibit foreign non-Islamic women from traveling alone. No women in Saudi Arabia may drive a car.

20. The clothing and customs addressed in the Instructions specified above (the "challenged regulations") are mandated by the Islamic faith. The wearing of the abaya by women is a tenet of that faith. The abaya is a mode of dress imposed upon Saudi women solely for religious reasons under provisions of the Koran which, by text and tradition, requires women to wear a head covering and an overgarment. It is based, at least in part, upon the Prophet's reply to A'isha: "When a woman reaches puberty no part of her body should remain uncovered except her face and the hand up to the wrist joint." Other customs addressed in the challenged regulations are similarly dictated by principles of the Islamic faith.

21. McSally objects to wearing the abaya for sincerely held and substantial religious reasons. It conflicts with her Christian faith since to wear it denies that she is a Christian but instead states that she is an adherent of Islam. To wear it forces her to

choose between (a) following military orders whenever she leaves her base, and in so doing to act in contradiction of her religious beliefs and to represent that she is a follower of Islam, or (b) following the dictates of her conscience, refusing to wear abaya, and disobeying military orders and subjecting herself to a military court martial and imprisonment. Even before being sent to Saudi Arabia, McSally was warned by her superiors of the "serious consequences" if she refused to comply with the policy at issue.

22. McSally also objects to wearing the abaya because it requires her to communicate the coerced message that she has adopted Islam as her religion, particularly including the Islamic tenet that women are subservient to men. She has worked tirelessly to achieve equality with men, and to be forced to communicate the message, even through non verbal means, that men are superior to women, is inimical to her sincerely held beliefs. For similar reasons, McSally objects to the other provisions of the challenged regulations which prevent her from traveling without a male escort, from operating vehicles, and from riding in the front seat of vehicles. These regulations discriminate against McSally solely on the basis of her gender.

23. McSally has attempted to change these regulations, and in particular the regulation mandating the wearing of the abaya. Her attempts to address the abaya policy began five years before she was transferred to Saudi Arabia. In 1995, she unsuccessfully raised the issue with then Secretary of Defense, William Perry. In 1997, she addressed the issue with the Defense Advisory Committee on Women in the Services, to no avail. In 2000, the same result obtained after meeting with then Secretary of the Air Force, Whit Peters.

24. In the summer of 2000, McSally discussed her research and convictions with the Joint Task Force South West Asia Commander, Maj. Gen Victor Renuart, as he was considering her for assignment to Saudi Arabia. He brought her to the assignment and led her to believe she could possibly influence a change to the policy from the inside. In December 2000, McSally met again with Gen Renuart, who informed her that he would not change the policy because the "cost of changing the policy outweighed the benefits" and that, although he was the legal authority to rescind the policy, felt he could not do so without "higher level government support."

25. On April 26, 2001, McSally unsuccessfully met with her new commander, Maj. General Gary Dylewski, in a futile effort to abolish the regulation. On May 25, 2001, five United States Senators failed in their attempt to change the policy after they sent a letter to Defendant Rumsfeld on plaintiff's behalf. On June 20, 2001, The Rutherford Institute, took the issue to President George W. Bush, and defendant Rumsfeld. Still the policy stands, and will not be changed by the defendant without the intervention of this Court.

26. McSally's public statements on the issues raised in this case have resulted in negative feedback by her chain of command. For the first time in her stellar career, McSally's professionalism, loyalty, leadership, and character have been called into question. This is in stark contrast to all previous characterizations and endorsements that rated her with the highest level as to all of these qualities. This negative feedback was received specifically because of her convictions on these policies and her willingness to stand up for American values.

27. There is no sufficient governmental need for the maintenance or enforcement of these regulations. They achieve no legitimate military ends, and do not evenhandedly regulate dress and conduct. The challenged regulations are not based on any congressional directive, and raise constitutional questions that are not appropriately left to the military or executive branch of the government. The reasons offered for the challenged regulations are irrational and do not justify the substantial burdens they impose on religious freedoms and free speech.

A. For example, the government has asserted that the regulations are necessary "force protection" measures. Were this a valid concern, the regulations would be irrational and under-inclusive because they do not apply to men, and men are not required to wear Islamic clothing. Restrictions of this nature also do not apply to non-military personnel in Saudi Arabia, who are in no less danger than military personnel. Restrictions of this nature do not apply to any other United States citizen, and are not mandated by the Saudi Arabian government. Moreover, "force protection" was not a rationale for the policy when it was adopted in 1995. It is an after the fact justification.

B. The government has also asserted that the regulations are necessary to prevent "cultural conflict." This justification is similarly irrational and under-inclusive because the regulations do not apply to men, to non-military female personnel, nor to other United States citizens. Moreover, Islamic values and cultures in other countries, such as Kuwait, Pakistan, and Afghanistan, are as strong as they are in Saudi Arabia--yet there are no regulations of a similar nature applicable to female military personnel stationed in those, or any other, countries.

C. To the extent "force protection" and the prevention of "cultural conflict" are valid concerns, the challenged regulations are not the least restrictive means to accomplish those goals, and are not designed to sufficiently accommodate the individual's constitutional rights. Both goals could be achieved by simply requiring women to dress conservatively and modestly, similar to the policies applicable to non-military female personnel stationed in Saudi Arabia, and similar to the policies applicable to military female personnel stationed in other countries.

28. The foregoing allegations are re-plead, and made a part of the following causes of action. The specific allegations in each of these causes of action are re-plead into each of the other causes.

#### **COUNT I: VIOLATION OF THE FIRST AMENDMENT--FREE EXERCISE CLAUSE**

29. The First Amendment to the United States Constitution provides that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.

30. By requiring McSally to wear clothing of a religion not her own and adhere to Islamic customs demeaning to the status of women, the challenged regulations prevent McSally from freely exercising her own Christian faith, in violation of the Free Exercise Clause of the First Amendment. The regulations further burden her rights under the Establishment and Free Speech Clauses of the First Amendment.

31. The challenged regulations lack any sufficient justification to impose such burdens on McSally's exercise of her faith. The regulations lack neutrality and general applicability, and violate the Free Exercise Clause, alone and in conjunction with their infringement on her protections under the Establishment and Free Speech Clauses.

**COUNT II: VIOLATION OF THE FIRST AMENDMENT:  
ESTABLISHMENT CLAUSE**

32. By requiring McSally to wear Islamic religious clothing and to adhere to other tenets of the Islamic faith, the challenged regulations have the effect, and the purpose, of advancing a religion to which she does not belong, in violation of the Establishment Clause of the First Amendment.

33. The challenged regulations lack a sufficiently secular purpose, and foster an excessive entanglement with the Islamic faith.

**COUNT III: VIOLATION OF THE  
RELIGIOUS FREEDOM RESTORATION ACT**

34. The Religious Freedom Restoration Act (RFRA) provides that the:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . The government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

— is in the furtherance of a compelling governmental interest; and

— is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000bb-1(a), (b).

35. The challenged regulations substantially burden McSally's exercise of religion by forcing her to wear clothing and adopt customs that are foreign to her own religion and expressive of a religion she has not adopted. The challenged regulations are not justified by any compelling governmental interest, and are not the least restrictive means of furthering any asserted governmental justification.

**COUNT IV: VIOLATION OF THE FIRST AMENDMENT:  
FREE SPEECH CLAUSE**

36. By requiring McSally to wear Islamic clothing and to adhere to Islamic customs demeaning to the status of women, the challenged regulations coerce her to communicate the non-verbal message that she has adopted this faith and has accepted the Islamic tenet that women are subservient to men.

37. This message is inimical to McSally's own views and beliefs, and such coerced speech violates the Free Speech Clause of the First Amendment.

**COUNT V: VIOLATION OF THE DUE PROCESS CLAUSE OF  
THE FIFTH AMENDMENT**

38. The Due Process clause of the Fifth Amendment forbids unjustifiable discrimination by the United States, including discrimination on the basis of gender classification.

39. The challenged regulations, through their facial applicability to women, but not men, discriminate unconstitutionally against women, including McSally, and subject her to treatment and restrictions to which men are not subjected.

40. The challenged regulations fail to demonstrate an exceedingly persuasive justification for the policy and cannot overcome the strong presumption that such official classifications are invalid.

\* \* \*

**PRAYER FOR RELIEF**

Lt. Col. Martha McSally hereby demands, and seeks judgment as follows:

A. That defendant, and all agents, representatives, officers, and others in his chain of command, including all others acting in concert or participation with him:

1. be preliminarily and permanently enjoined and restrained from enforcing the challenged regulations, specifically including Instructions 4.4 (operating vehicles); 1.12.3.1 (abaya); 1.12.3.4 (riding in rear seat); and 1.12.3.5 (male escort).

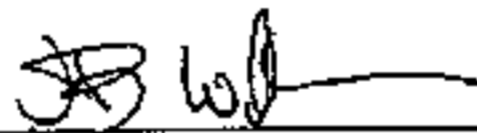
2. be preliminarily and permanently enjoined from reprimanding, disciplining, or taking any personnel action whatsoever with respect to the plaintiff by virtue of her objections to any of the challenged regulations, and to remove any and all adverse material in her personnel files relating to her objections to the challenged regulations.

B. That this Court declare the challenged regulations to be unconstitutional, invalid, and of no force or effect;

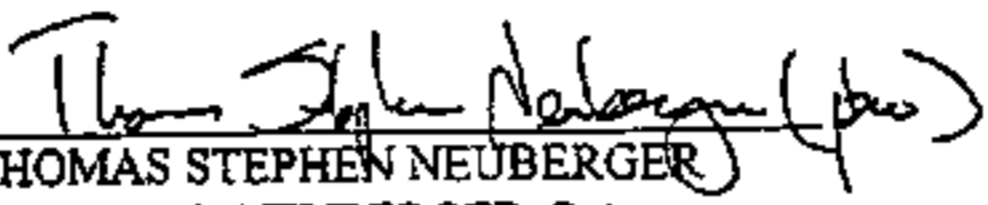
C. That plaintiff be awarded her costs and reasonable attorneys fees; and

D. That plaintiff be granted such other and further relief as this Court finds just.

Respectfully submitted,



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