. **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.**	)	**C.A. 01-2481 (JR)**

AMENDED COMPLAINT FOR DEPRIVATION OF CONSTITUTIONAL AND STATUTORY RIGHTS[1]

I. INTRODUCTION

1. This is an action to obtain declaratory and injunctive relief to invalidate certain old and new 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

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[1] No responsive pleading having been filed (Fed.R.Civ.P. 7(a)), plaintiff hereby amends her complaint as of right pursuant to Fed.R.Civ.P. 15(a). Reiss v. Richardson, 455 F.2d 1287, 1289 n.2 (D.C.Cir. 1971); Stein v. Royal Bank of Canada, 239 F.3d 389, 392 (1st Cir. 2001). New material is underscored and addresses the January 24, 2002 policy change, the force protection rationale offered by General Dylewski's affidavit, the religious basis for plaintiff's conduct, more facts underlying retaliation for free speech, a retaliation Count and Relief against the old and new policies.

customs. Plaintiff seeks a declaration that the prior regulation is invalid and an injunction against the present regulation.

2. Under both old and new regulations, 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, by force of a military order and command, 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 36 years old and a career military officer, having graduated 25th 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 was previously 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 when this action was originally filed, McSally expected 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 regulations that were in effect at the time of the original filing, attached to the original complaint as Exhibit 1, are issued under the authority of the Commander of the 363rd 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. As was explained in the February 27, 2002 Declaration of Major General Gary R. Dylewski which has been filed in this case, this regulation for the time being has been abandoned but the defendant reserves the right to reinstate it at any time. In its place a January 24 and February 6, 2002 regulation has been substituted and which are attached to that Declaration. The new regulation is still a military order which simply uses cosmetic or different terminology in an attempt to moot this case and to prevent relief. The new regulation is designed to attempt to avoid legal oversight while still coercing and violating the rights of plaintiff and female members of the armed services. The new regulation is the same policy as before in its purpose and effect. It is the same policy which has on six or more occasions forced

plaintiff to wear Islamic religious garb and to ride in the back of vehicles accompanied by males. It is the same policy which plaintiff will have to obey upon pain of military punishment when she returns to Saudi Arabia in the near future. There is no material change or difference in the old and new regulations.

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. Major General Dylewski admits in his Declaration and would otherwise testify that the requirements of the past and present regulations are imposed "for both cultural and religious reasons." Declaration ¶ 6.

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. More specifically, and in retaliation for protected speech on matters of public concern, in August of 2001 plaintiff's superior officer and supervisor, the Director of Combat Operations, gave her a negative Officer Performance Report (OPR) because of her speech. For OPRs in the Air Force, the last line of a supervisor's comments is the most important line, where the supervisor makes an overall assessment of the officer's performance and potential and recommends the next step. On the plaintiff's August 2001 OPR, her supervisor refused to recommend her for squadron command

which would be the next step in her career path. He used code words which block her future advancement. He only deemed her fit for a staff and not a command position. If a Lt. Col. does not have an endorsement for squadron command in the last line of his/her performance report, it is a very obvious negative flag that will be highlighted to all commander boards and promotion boards. The absence of this endorsement is especially remarkable for an officer promoted four years ahead of her peers. The plaintiff's previous OPR from 1999 contained the command recommendation. To now have it glaringly missing communicates that she failed in her officer duties in a major way. The supervisor via e-mail told plaintiff that he specifically omitted a command recommendation because of her choices about the abaya policy.

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. The Declaration of the Major General now contends that the new regulation is necessary in an ever changing environment as a force protection measure to prevent American military personnel from terrorist attack. On examination this claim is irrational. Imagine a terrorist who has in the sights of his weapon a jeep with two male officers in front accompanying two female officers riding in the rear, as the regulation requires. The males are dressed conservatively and have blond short hair and blue eyes. The females from the shoulder down are covered with the black abaya. The terrorist identifies the males as Americans and wishes to kill them. But he sees two American females in the rear seat obeying Islamic religious practice and customs. The Declaration would have one believe that the terrorist will not shoot to kill but will leave them alone and so the females and males have been protected. That is irrational. The terrorist will by definition kill any American he finds, whether he is accompanying an abaya clad female or not. Terrorists kill by definition, hate Americans and the regulations do not protect lives. As Major General Dylewski describes in his Declaration, there are many effective measures in place to ensure American troops are protected from terrorist attack when they go off base in Saudi Aribia. The wear of the abaya is simply not one of them. The force protection rationale is merely a subterfuge for a cultural religious requirement imposed to please religious forces in Saudi Arabia, as such it cannot survive close judicial scrutiny.

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. More specifically, as a matter of conscience and religious scruple plaintiff refuses to obey a command of the State which conflicts with her religious beliefs and practices. She cannot engage in an act of a foreign religion or symbolically indicate that she is a follower of that religion's god. She is a follower of Jehovah and Jesus Christ. The Holy Bible to which she subscribes teaches this. The First Commandment found in Exodus 20:2-3 states -- "I am the Lord thy God ... Thou shalt have no other gods before me." "For I the Lord am a jealous God." vs. 5. Jesus Christ said in the New Testament in Matthew 4:10 –"Thou shalt worship the Lord thy God, and him only shalt thou serve." Jesus also said in Matthew 22:21 –"Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." The state cannot take away from God what is his due and a Christian cannot allow this to happen. Plaintiff follows Jesus Christ and not Mohammad. The Apostles Peter and Paul were crucified for refusing to acknowledge that the Roman emperor was god. Then Nero and others threw Christians to the lions for refusing to give priority to demands of the State over their religion. He just wanted them to be good citizens and ignore the requirements of their God. These same demands to be good citizens and adhere to the State are found throughout the Old Testament with the Persian Kings. King Darius threw Daniel into the lion's den when he refused to not follow requirements of his religion and not to pray. Daniel 6. Finally three Hebrew boys, Shadrach,

Meshach and Abednego refused to bow to the requirements of the state. They were thrown into a fiery furnace from which they were delivered. Daniel 3. In conscience plaintiff cannot wear the abaya for sincerely held paramount religious reasons.

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.

COUNT VI - RETALIATION FOR FREE SPEECH

41. Plaintiff spoke out on issues of public concern under the First Amendment. All of her speech was protected speech and it was non-disruptive of any interest of her employer. There is a causal link between First Amendment protected activity on matters of public concern and direct and proximate adverse employment action which is demonstrated by (a) the temporal proximity of events, (b) circumstantial evidence of a pattern of antagonism following protected activity, (c) personal knowledge and awareness of protected activity by her supervisors, (d) the fact that plaintiff has been singled out for mistreatment, and (e) the evidence as a whole. First Amendment protected activity was a substantial or motivating factor in the adverse employment action. The defendant cannot prove by a preponderance of the evidence that absent a constitutional violation he would have ground for the adverse employment action.

42. Plaintiff's right to freedom of speech has been denied.

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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 January 24 and February 6, 2002 regulations, specifically including in text or effect 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 previous challenged regulation which was suspended in 2002 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,

/s/ Randall Shaheen
RANDALL SHAHEEN, ESQUIRE
D.C. Bar No. 409292
Arnold & Porter
555 Twelfth Street, NW
Washington, DC 20004-1202
(202) 942-5734

May 3, 2002

/s/ Thomas Stephen Neuberger
THOMAS STEPHEN NEUBERGER, ESQUIRE
Delaware Bar No. 243
Thomas S. Neuberger, P.A.
Two East Seventh Street, Suite 302
Wilmington, Delaware 19801-3707
(302) 652-3792

(Cooperating Attorneys for the Rutherford Institute)

OF COUNSEL:

JOHN W. WHITEHEAD
STEVEN H. ADEN
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, Virginia 22906
434-978-3888