

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 185B

ORDER

**Defense Motion To Strike The Death
Penalty From This Case Because The
Imposition Of Death For War Crimes Is No
Longer Civilized Under International Law
In Violation Of The Eighth Amendment**

9 June 2014

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009) (hereafter “2009 M.C.A.”). He was arraigned on 9 November 2011.

2. Procedural History. The Defense requested the Commission strike the death penalty as a potential punishment because the imposition of death for war crimes is no longer civilized under international law in violation of the Eighth Amendment (AE 185). The Prosecution response requested the motion be denied because “both domestic and international law have long permitted capital punishment for serious war crimes.” (AE 185A at 1). A reply was not filed. The motion was argued on 21 February 2014.¹

3. Issue. Is imposition of the death penalty for war crimes inconsistent with international law?

¹ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 21 February 2014 from 10:39 A.M. to 2:04 P.M. at 2894 - 2908.

4. Law. Although AE 185 is styled as a motion implicating the Eighth Amendment of the United States Constitution, the Commission does not decide whether the Accused has a right to the protections of the Constitutional prohibition of cruel or unusual punishment.² The Accused is, however, afforded the protections contained in 10 U.S.C. § 949s, which states,

“Punishment by flogging, or by branding, marking, or tattooing on the body, *or any other cruel or unusual punishment*, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.” (emphasis added).

The Accused is also afforded the protections in the Detainee Treatment Act, which provides,

“(a) In general No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(d) In this section, the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, *Eighth*, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.”³ (emphasis added).

5. The Supreme Court held the imposition of the death penalty is not cruel and unusual as long as the capital sentencing framework used “genuinely narrows the class of persons eligible for the death penalty and reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”⁴

² The Commission analyzes the Defense arguments utilizing the statutory (10 U.S.C. § 949s) protection against cruel and unusual punishment and guidance of the Supreme Court’s Eighth Amendment jurisprudence. The Commission specifically does not make a determination as to what, if any, Constitutional protections the Accused enjoys before the Commission.

³ Detainee Treatment Act of 2005, 42 U.S.C. §2000dd., Pub. L. No. 109-148, §1003(a)-(d) (2005).

⁴ *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *See also Gregg v. Georgia*, 428 U.S. 153 (1976) and *Furman v. Georgia*, 408 U.S. 238 (1972).

6. Under its authority in the Define and Punish Clause,⁵ Congress, in enacting the 2009 M.C.A., explicitly enumerated 15 offenses for which the death penalty is authorized.⁶ “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷

7. Findings and Conclusion. The Accused is afforded protection from cruel, inhuman, or unusual punishment under both the Detainee Treatment Act of 2005 and 10 U.S.C. § 949s. Congress explicitly found specific offenses under the 2009 M.C.A. allow for a sentence of death to be adjudged. Congress’ intent is unambiguous. Death is an authorized punishment under the M.C.A.’s capital sentencing scheme (*See* orders for AE 180 and AE 183). Finally, the Defense has not satisfied its burden of proof as it failed to provide any evidence to show international law, from any generally accepted source, does not permit the imposition of capital punishment.

8. Accordingly, the Defense Motion is **DENIED**.

So ORDERED this 9th day of June, 2014.

//s//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge

⁵ U.S. Const. art. I, § 8, cl. 10. (“To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

⁶ 10 U.S.C. § 949t, subsections 1, 2, 7, 8, 9, 11, 12, 13, 14, 15, 17, 23, 24, 27, and 29.

⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).