

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 264B

RULING

**DEFENSE MOTION TO STRIKE
DEATH AS A VIOLATION OF DUE
PROCESS (DISCRIMINATION)**

12 August 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 because it discriminates against the Accused since he is not a U.S. citizen and violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution (AE 264). The Prosecution requested the motion be denied because the issue has been decided by the Commission in AE 046B, dated 19 June 2012 (AE 264A). A reply was not filed. The parties did not conduct oral argument. Both parties relied on their briefs and their positions taken in AE 046.¹

3. The Commission, in AE 046B, noted the appellate courts have decided this issue and held the alienage limitation under the 2006 M.C.A. was valid under the equal protection component of the Due Process Clause of the Fifth Amendment.² The 2006 M.C.A. and 2009 M.C.A. are

¹ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 27 April 2014 from 09:02 A.M. to 10:57 A.M. at pp. 4168 - 69.

² *Hamdan v. United States*, 801 F. Supp. 2d 1247 (C.M.C.R. 2011), *rev'd on other grounds*, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012); *United States v. al Bahlul*, 820 F.Supp.2d 1141, 1256 (C.M.C.R. 2011), Case No. 11-1324 (D.C. Cir. July 14, 2014)(affirming, *en banc*, on certified issue unrelated to equal protection).

identical with respect to the alienage limitation.³ Based on Supreme Court jurisprudence⁴ as well as the cases previously cited in AE 046B, the Commission will not re-visit this issue. The law has not changed since the Commission issued its order in AE 046.

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

So **ORDERED** this 12th day of August, 2014.

//s//

VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

³ Compare 10 U.S.C. § 948c (2006) and 10 U.S.C. § 948c (2009).

⁴ *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (holding “[i]f a federal statute is valid under the equal protection component of the Fifth Amendment, it is perforce valid under the Due Process Clause of that Amendment.”).