

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 295B

RULING

**DEFENSE MOTION TO DISMISS ALL
CHARGES BECAUSE THE
MILITARY COMMISSIONS ACT
WAS DESIGNED TO DISCRIMINATE
AGAINST MUSLIMS**

22 SEPTEMBER 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) (hereinafter M.C.A.). He was arraigned on 9 November 2011.

2. The Defense in AE 295 alleged the charges in this case must be dismissed because the M.C.A. violates the First Amendment's Free Exercise Clause as "[i]t was passed for the purpose of depriving Muslims, particularly Muslim men, of basic due process. ... [T]he M.C.A. is neither 'neutral' nor 'generally applicable' with respect to religion. Far from narrowly tailored to serve a compelling state interest, the law's rights deprivations were motivated, at least in part, by basic animus toward Muslims." (AE 295 at 1). The Prosecution in AE 295A urged denial of the request to dismiss the charges as "[c]onsistent with the controlling legal standard in Free Exercise Clause jurisprudence, the M.C.A. on its face and as applied is neutral and generally applicable. ... The language of the M.C.A. on its face, and as applied, is void of reference to religion." (AE 295A at 1-2). A reply was not filed. The motion was argued on 5 August 2014.¹

¹ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 5 August 2014 from 1:57 P.M. to 4:20 P.M. at pp. 4979 - 94.

3. The parties point the Commission to the Supreme Court case of *Church of the Lukumi Babalu Aye v. City of Hialeh*, 508 U.S. 520 (1993) and its analytical framework.²

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). Neutrality and general applicability are interrelated, and, ... failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. (*Lukumi* at 531 – 32.)

4. The Commission finds no references to the Islamic religion or to Muslims in the text of the statute discussing the Military Commissions Act. In 10 U.S.C. § 948a(7)(C), there is a reference to the al Qaeda organization as a part of the definition of an unprivileged enemy belligerent, which is a basis for personal jurisdiction. The Commission specifically finds this reference does not invoke the Islamic faith nor does it operate to limit an individual's ability to practice the Islamic faith or be a Muslim. The M.C.A. is facially neutral.

5. Congress in 10 U.S.C. § 948b established the purpose of the M.C.A. when it stated, "(a) PURPOSE.-This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." In 10 U.S.C. § 948c, Congress denoted who could appear before a military commission by writing, "Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter." While the M.C.A. does not have universal applicability, it is equally

² In applying the analytical framework of *Lukumi*, the Commission does not acknowledge the applicability of the Constitution to the Accused being detained at Guantanamo Bay, Cuba and being tried by a Military Commission.

applicable to any “alien unprivileged enemy belligerent,” without regard to an individual’s specific religious belief or system, race, or sex.

6. Given the M.C.A.’s facial neutrality and its general applicability to any alien unprivileged enemy belligerent, the Commission does not need to delve into whether Congress had a compelling governmental interest in passing the M.C.A.

7. The Commission finds the M.C.A. does not single out or discriminate against Muslims or Muslim men, and thus dismissal of charges against the Accused is not warranted based on an alleged violation of First Amendment Free Exercise Clause jurisprudence.

Accordingly, AE 295 is **DENIED**.

So **ORDERED** this 22nd day of September, 2014.

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