
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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)
)
) PROSECUTION RESPONSE TO
) DEFENSE MOTION FOR
) DISMISSAL (MILITARY
) COMMISSIONS IMPROPERLY
) CONSTITUTED IN VIOLATION
) OF THE EQUAL PROTECTION
) CLAUSE)
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)
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15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.
2. Position on Motion: The Prosecution submits that the Defense's Motion to Dismiss should be denied.
3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(b) and 4(d) for the purposes of this motion.
4. Facts:
 - a. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
5. Legal Authority Cited:
 - a. The President's Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
 - b. Hampton v. Mow Sun Wong, 426 U.S. 88, (1976)
 - c. Rodriguez v. United States, 169 F.3d 1342, (11th Cir. 1999)
 - d. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)
 - e. United States v. Lopez-Florez, 63 F.3d 1468 (9th Cir. 1995)
 - f. Chesna v. United States Department of Defense, 850 F.Supp. 110 (D.CT. 1994)
 - g. Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

- h. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990)
- i. Johnson v. Eisentrager, 339 U.S. 763 (1950)
- j. In Re Griffiths, 413 U.S. 711 (1973)
- k. Graham v. Richardson, 403 U.S. 365 (1971)
- l. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)
- m. Dandridge v. Williams, 397 U.S. 471 (1970)
- n. U.S. v. Carolene Products Co., 304 U.S. 144 (1938)
- o. Matthews v. Diaz, 426 U.S. 67 (1976)
- p. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)
- q. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974)
- r. Rasul v. Bush, 124 S. Ct. 2686 (2004)

6. Discussion:

The Defense asserts that the case against the Accused should be dismissed because the President's Military Order violates equal protection under the Fifth and Fourteenth Amendments of the United States Constitution as the Commissions are available to try only non-citizens. This assertion is based on the argument that the President's Military Order must be subjected to strict scrutiny and that it would fail under this scrutiny. Alternatively, they argue that the President's Military Order is also invalid under the less exacting rational basis test. The Defense assertion is merit-less because non-resident aliens have no recourse to the United States Constitution and, therefore, the President's Military Order does not interfere with a fundamental constitutional right. Even if the Accused could assert rights under the Fifth and Fourteenth Amendments, the President's Military Order would not violate the guarantee of equal protection. The United States has a proper basis for treating citizens who take up arms against their country differently from non-citizens. In the Treason clause and elsewhere, the Constitution itself recognizes the need for special care when charging citizens with hostile and disloyal acts.

- a. Non-resident aliens are not entitled to Constitutional Protections.

The Supreme Court determined in Johnson v. Eisentrager, 339 U.S. 763 (1950), that the Fifth Amendment does not afford protection to aliens outside the United States. In that case, the United States captured German citizens who were engaged in unlawful

combat in China. Id. at 766. After a military commission convicted them of war crimes, the United States transported them to Germany for imprisonment. Id. While in Germany, they filed habeas corpus petitions challenging their detention on grounds that it violated the Fifth Amendment. Id. Although the Supreme Court ultimately concluded that it lacked jurisdiction to entertain their habeas petitions, Id. at 777-778, the Court asserted that the Fifth Amendment does not apply to non-resident aliens. The Court said:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. Cf. Downes v. Bidwell, 182 U.S. 244 [21 S. Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784.

The Supreme Court has, however, also held that aliens are entitled to some constitutional rights. See United States v. Verdugo-Urquidez, 494 U.S. 259, 270-271 (1990) (Citing Plyer v. Doe, 457 U.S. 202, 211-212 (1982)(illegal aliens protected by Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590-596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); Bridges v. Wixson, 326 U.S. 135, 148 (1945)(resident aliens have First Amendment Rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931)(Just Compensation Clause of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896)(resident aliens entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)(Fourteenth Amendment protects resident aliens). Each of the cases cited by the Verdugo-Urquidez court, though, stand only for the proposition that aliens may gain limited constitutional rights after coming within the territory of the United States and developing substantial connections with this country. Id.

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Id.

In Verdugo-Urquidez, United States and Mexican Official arrested Rene Martin Verdugo-Urquidez in Mexico and brought him to the United States for trial. At the time, Verdugo-Urquidez was a both a citizen and resident of Mexico. Id. at 262. At his trial, Verdugo-Urquidez sought to exclude evidence obtained by searching his residences in Mexico on grounds that the searches violated the Fourth Amendment. Id. The Supreme Court rejected this argument, concluding that the Fourth Amendment does not apply to

the search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country. *Id.* at 274-275. Citing *Eisentrager* to support this proposition, the Court said that “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Id.* at 269.

In *Verdugo-Urquidez*, the respondent – like the Accused in the present case – argued that treating him differently from United States citizens and residents would violate equal protection. The Court emphatically dismissed this contention. The Court said:

Respondent also contends that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution. . . . But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens. *Cf. Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens”).

Id. at 273.

Finally, in *Verdugo-Urquidez*, the Court emphasized that applying the Constitution to aliens living abroad would have “significant and deleterious consequences for the United States in conducting activities beyond its boundaries.” *Id.* The Court explained that the United States regularly employs Armed Forces outside this country, and that Armed Forces engage in many activities that might constitute searches and seizures. *Id.* at 273-274. The same reasoning applies to the Fifth Amendment. The United States unavoidably treats U.S. citizens differently from foreign citizens when it uses its military power abroad.

Saying that the Constitution does not afford rights to non-resident aliens does not mean that the United States can act unrestrained by any law. The United States must abide by the law of war. The law of war requires that the Accused receive a full and fair trial by military commission. But it does not require the United States to treat him exactly as it would treat a U.S. citizen.

The Accused in this case is not a resident of the United States, nor has he ever been, either legally or otherwise. He has no contacts whatsoever with the United States other than engaging in conspiracies to attack it and being detained at the U.S. Naval Station at Guantanamo Bay, Cuba. The fact that he is detained in Guantanamo does not help him because, “this sort of presence – lawful but involuntary – is not the sort to

indicate any substantial connection with our country.” *Id.* at 271. Therefore the Accused has no recourse at all to the Fifth or Fourteenth Amendments and his motion must, therefore, fail at its inception.^{1 2}

b. The President’s Military Order doesn’t deny an accused a fundamental right.

The conduct of Military Commissions pursuant to the President’s Military Order does not discriminate in the allocation of fundamental rights. The Defense claims that Military Commissions discriminate in the allocation of fundamental rights. However, heightened scrutiny applies only to the differential allocation of *constitutionally guaranteed* rights. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it has already been established by the Supreme Court that the Accused has no right to equal protection under the Fifth Amendment, indeed he has no constitutionally guaranteed rights, there is no deprivation upon which heightened scrutiny may be applied. Thus, the Accused’s claim must also fail in this regard.

c. Even if the Accused had a colorable equal protection claim, federal action regarding aliens is subjected only to the rational basis test.

“The concept of equal justice under law is served by the Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.” See Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Although both amendments typically require the same analysis, the two protections are not always coextensive. *Id.* The fact that all persons, aliens, and citizens alike, have some protections under the amendments does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. See Matthews v. Diaz, 426 U.S. 67, 77 (1976).

Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.

¹ The Supreme Court’s recent decision in Rasul v. Bush, 124 S.Ct. 2686 (2004), in no way affects the validity of the Eisentrager and Verdugo-Urquidez holdings denying constitutional protections to non-resident aliens. Rasul merely interpreted 28 U.S.C. § 2241 to provide a vehicle for persons detained by the United States to challenge the circumstances of their detentions. The Court’s holding was based on statutory construction and did not rely on the existence of any constitutional right.

² The fact is the United States has always given its citizens more rights than non-citizens when it comes to constitutional rights. The Constitution is the social compact between the United States and its citizenry. To hold that it has unfettered and equal application to all persons, wherever situated and regardless of alienage, would provide the full penumbra of procedural and substantive protections guaranteed to citizens via the Constitution to all people of the world.

Id. at 80. Therefore, while it is generally true that the strict scrutiny standard applies to Fourteenth Amendment equal protection challenges to a state's classification of aliens, courts have firmly rejected the argument that the same standard also applies to a Fifth Amendment challenge to federal classification of aliens. See Rodriguez v. United States, 169 F.3d 1342, 1347 (11th Cir. 1999) (Citing Matthews v. Diaz). That is so because the equal protection analysis involves significantly different considerations when it concerns the relationship between aliens and the States rather than between aliens and the Federal Government. Id. In situations where the federal government treats aliens differently than citizens, that treatment is normally subjected only to a rational basis test.³ See Hampton at 103.

Because the President's Military Order is action by the Executive of the federal government, the Military Commission in which the Accused finds himself is created by federal action treating citizens and non-citizens differently. According to all federal case law, this order must be subjected only to the rational basis test.

The defense has argued that the rule in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) requires the same analysis under the Fifth and Fourteenth Amendments with only a minor exception carved out for the federal government when dealing with

³ Thus there are a multitude of federal provisions that rest on the premise that the legitimate distinction between citizens and aliens can justify attributes and benefits for one class not accorded to the other.

The Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amdts. 15, 19, 24, 26. It requires that Representatives have been citizens for seven years, Art. I, § 2, cl. 2, and Senators citizens for nine, Art. I, § 3, cl. 3, and that the President be a "natural born Citizen." Art. II, § 1, cl. 5. A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens, e.g., 10 U.S.C. § 5571; 22 U.S.C. § 1044(e), upon private employment of aliens, e.g., 10 U.S.C. § 2279; 12 U.S.C. § 72, and upon investments and businesses of aliens, e.g., 12 U.S.C. § 619; 47 U.S.C. §17; statutes excluding aliens from benefits available to citizens, e.g., 26 U.S.C. § 931 (1970 ed. and Supp. IV); 46 U.S.C. § 1171(a), and from protections extended to citizens, e.g., 19 U.S.C. § 1526; 29 U.S.C. § 633a (1970 ed., Supp IV); and statutes imposing added burdens upon aliens, e.g., 26 U.S.C. § 6851(d); 28 U.S.C. § 1391(d). Several statutes treat certain aliens more favorably than citizens. e.g., 19 U.S.C. § 1586(e); 50 U.S.C. App. § 453 (1970 ed., Supp IV). Other statutes, similar to the one at issue in this case provide for equal treatment of citizens and aliens lawfully admitted for permanent residence. 10 U.S.C. § 8253; 18 U.S.C. § 613(2) (1970 ed., Supp IV). Still others equate citizens and aliens who have declared their intention to become citizens. e.g., 43 U.S.C. § 161; 30 U.S.C. § 22. Yet others condition equal treatment of an alien upon reciprocal treatment of United States citizens by the alien's own country. e.g., 10 U.S.C. § 7435(a); 28 U.S.C. § 2502.

See Diaz at 78, note 12.

immigration issues. That is simply not the case.⁴ The cases cited above stand firmly for the proposition that federal regulation of aliens is normally given great deference with higher scrutiny being the exception that is applied only when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved. See Hampton at 100. In fact, the Adarand case is distinguishable in that the Adarand Court dealt with a race-based classification rather than a classification based on alienage. In that case, the court properly held that for purposes of race-based classifications, the analyses under the Fifth and Fourteenth amendments were the same. There is no basis to argue that Adarand's holding can be extended to the line of cases dealing with the treatment of aliens, otherwise the cases above would have been overruled by Adarand. That is not the case. Rodriguez v. United States was decided the same year as Adarand and the Supreme Court has since denied *certiorari*. See Hernandez v. U.S., 516 U.S. 1082 (1996) and Perez v. Garcia, 516 U.S. 1092 (1996).

Therefore, because the President's Military Order is federal action, because it involves national interests, and because deference to the federal branch is the norm in the area of law dealing with aliens, the President's Military Order should be reviewed under the rational basis test.

d. Even if Fourteenth Amendment Equal Protection analysis is applied, the Accused does not belong to a suspect class and the President's Military Order must still be reviewed under the rational basis test.

As stated above, the Defense suggests that the Supreme Court's holding in Adarand dictates that the analysis of the Fifth and Fourteenth Amendment for purposes of Federal action regarding aliens should be the same. That would allow the defense to use cases where *states* have passed laws involving aliens and have had them struck down using the strict scrutiny standard. Even if that were the case and the President's Military Order were subject to Fourteenth Amendment analysis, the test applied would still have to be the rational basis because non-resident aliens are not a suspect class under the Fourteenth Amendment.

The Accused alleges that he is a member of a suspect class, citing In re Griffiths, 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971). The Defense's statement of the applicability of these cases is overbroad. In fact, the cases stand for two narrower propositions. First, that *lawful resident* aliens are a suspect

⁴ Not only is the Defense's assertion legally inaccurate, it is also disingenuous. None of the cases cited by the Prosecution in this brief concern immigration. Diaz deals with the extension of welfare benefits to aliens. Hampton deals with the denial of federal jobs to aliens and, despite the fact that the law was found to violate equal protection, the rational basis test was applied. It is fair to note that dicta in Hampton suggested that if Congress or the President had made the rule that was found invalid, as opposed to the Civil Service Commission or the General Services Administration, the rule would have been upheld. Hampton at 103. Rodriguez v. United States deals with withholding of certain social security benefits to aliens. Finally, United States v. Lopez-Florez, 63 F.3d 1468 (9th Cir. 1995), cited by the defense, dealt with a criminal law that provided harsh punishments for smuggling aliens. In that case, the rule was subjected only to the rational basis test, and the rule was found not to violate equal protection.

class for equal protection purposes. Second, that policies that differentiate between *lawful resident* aliens and other similarly situation persons are subject to “close judicial scrutiny.” Graham at 372. Nothing in these cases suggests that the same rationale would apply to a non-resident alien with no substantial contacts to the United States. In fact, every equal protection case applying strict scrutiny to a law with disparate effects on aliens involves resident aliens. The Defense will not be able to produce one case where a law affecting non-resident aliens was subjected to strict scrutiny. That is because non-resident aliens are not a suspect class. Further, similarly to the argument found above, the Accused’s detention at Guantanamo Bay, Cuba cannot be argued to make him a resident alien because, “this sort of presence – lawful but involuntary – is not of the sort to indicate any substantial connection with our country.” See Verdugo-Urquidez at 271.

While it may be argued that nothing currently prohibits Military Commissions from trying both resident and non-resident aliens, the Accused does not have standing to seek invalidation of the Commissions on this ground as he is not a member of the group, resident aliens, who might have Fifth Amendment rights as related to the Commission. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Therefore, as a member of the unprotected class of non-resident aliens, the Accused’s claim would be subject only to a “rational basis” review.⁵ See Dandridge v. Williams, 397 U.S. 471, 485 (1970) and U.S. v. Carolene Products, 304 U.S. 144, 152 (1938).

e. Applying the Rational Basis Test, the President’s Military Order must be upheld.

Under the rational basis standard, a court must uphold a rule if a court can identify any rational basis for it. Carolene Products at 152. “Absent the use of a suspect classification or the implication of a fundamental right, a governmental classification will pass constitutional muster if it bears a rational relationship to a legitimate governmental interest.” See Chesna v. United States Department of Defense, 850 F.Supp. 110, 118 (D.CT. 1994). If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. Hampton at 103. “Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that *any* interest which *might* rationally be served by the rule did in fact give rise to its adoption.” Id. Furthermore, the burden would be on the Accused to show that the classification had no rational basis, and the standard of review would be an extremely deferential one. Chesna at 118 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).

Thus the rational basis need not be specifically articulated. However a rational basis for the exclusion of citizens from the purview of Military Commissions is easily articulated. The commission of any criminal act triable before this Commission when committed by a U.S. citizen necessarily implicates the crime of treason. Treason is the

⁵ Again, this argument is only relevant if the Commission finds that Fourteenth Amendment analysis applies in the first instance.

only constitutional crime specifically enumerated and described in Article III, § 3 and it may be committed only by a U.S. citizen. As such, there is a compelling interest in prosecuting a crime, originating in Article III of the Constitution, in an Article III court. This compelling interest easily furnishes a rational basis for excluding citizens from the Military Commission process.

Because the rational basis test is easily met in this case, the Defense's Motion should be denied.⁶

f. Conclusion.

The Accused, as a non-resident alien has no constitutional rights. Thus his motion must be dismissed in the first instance. Even if he had a right under the Fifth Amendment, that analysis would be different than that under the Fourteenth and would only afford him a review of the President's Military Order under the rational basis test. Even were Fourteenth amendment analysis to apply, non-resident aliens are not a suspect class and the rational basis test would still apply. Finally, the rational basis test is easily met in this case. For these reasons, the Defense Motion should be denied.

7. Attachments: None

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: The Prosecution has already objected via motion to the calling of legal experts. Should the Commission allow expert testimony on the law, the Prosecution reserves the right to call an expert to rebut assertions of Defense experts.

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Captain, U.S. Army
Prosecutor

⁶ Even if this Commission found that the Fifth and Fourteenth Amendment analyses of the question presented were the same and the Accused belonged to a suspect class and that the Accused was deprived of a fundamental constitutional right, the President's Military Order is still valid and constitutional. If that were the case, the President's Military Order would be subject to the strict scrutiny test. Under this test, government enactments are constitutional so long as they are narrowly tailored to serve a compelling government interest. See Grutter v. Bollinger, 123 S.Ct. 2325, 2337-2338 (2003).

In the present case, the interest cited above is not only rationally related to the President's Military Order, but is also a compelling government interests. The government has a compelling interest in having its citizenry tried in an Article III court for an Article III offense. Given this compelling government interest, the President's Military Order is narrowly tailored to address it and allows the trial of Americans for treason in Article III courts while allowing war crimes committed by aliens to be tried at Military Commissions.

