
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE MOTION TO
) DISMISS FOR VIOLATION OF
) 42 U.S.C. § 1981
)
) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commission's on 24 August 2004.
2. Relief Sought. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the laws of the United States and dismiss the charge against Mr. Hamdan.
3. Overview. The President's Military Order (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) issued 13 November 2001 is illegal because it is in direct contravention of 42 U.S.C. § 1981.
4. Facts.
 - a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.
 - b. That the President's Military Order of 13 November 2001, applies exclusively to non-citizens of the United States.
 - c. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.
 - d. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.
 - e. On 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. 42 U.S.C. § 1981, a historic law passed right after the Civil War, guarantees equal rights for all persons to give evidence, to receive the equal benefit of all laws and proceedings for the security of persons, and to receive like punishment.

b. The prerequisite to Mr. Hamdan's eligibility for trial by Military Commission is the fact that he is a non-citizen. A citizen who committed the very same acts under the same circumstances as Mr. Hamdan would be entitled to either the rules governing courts-martial or Federal Court. The President's Military Order, therefore, violates the laws of the United States by the equal benefit of law and proceedings. *See Bowers v. Campbell*, 505 F.2d 1155, 1157 (9th Cir. 1974) (holding that "§ 1981 applies to employment discrimination by federal officials; it is not confined to state or private action").¹ When it comes to rights such as to "give evidence" and "like punishment [and] pains," the Government owes Mr. Hamdan a clear and nondiscretionary duty to treat Mr. Hamdan in the same way as they treat American citizens.

c. 42 U.S.C. § 1981 was originally part of the Voting Rights Act of 1870. It forbids exactly the type of distinction made by the President's Order establishing military tribunals:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, *give evidence*, and to the *full and equal benefit of all laws and proceedings for the security of persons* and property as is enjoyed by *white citizens*, and shall be subject to *like punishment, pains, penalties*, taxes, licenses, and *exactions* of every kind, and to no other.²

d. Section 1981 makes clear that the government cannot change our nation's fundamental rules only for aliens, either in the States or in the "Territories." Yet the Government has sought

¹ In 1991, however, Congress added a new subsection with the following language: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(c)). Accordingly, some courts have found that § 1981 does not apply to the federal government. *E.g., Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998). The holding in *Lee* is quite odd, however, for the 1991 language is expansive rather than restrictive in thrust, and Congress did not delete the word "territory" from the existing statute. It thus seems plain that Congress did not intend to limit, but only to supplement, existing civil rights laws by confirming their applicability to non state as well as state actors. *See La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F. Supp. 1242, 1251 (D.N.M. 1995) (arguing that the 1991 amendments did not undercut the applicability of § 1981 to the federal government because the amendments were "intended to expand the scope of civil rights protection, not limit it").

² 42 U.S.C. § 1981(a) (1994) (emphasis added). The law began as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27, but was later modified in 1870 to protect not only "citizens," but *all* "persons." *See* Voting Rights Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144; *Yick Wo*, 118 U.S. at 369 (stating that the provisions of the Equal Protection Clause "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws," and that the predecessor statute to § 1981 was "accordingly enacted").

to do exactly that to Mr. Hamdan. There is no way that he has "the full and equal benefit of all laws and proceedings for the security of persons and property." Instead, he has been shunted into an inferior, illegal process by dint of his nationality. This is strikingly different treatment than that in World War II, for the United States treated the Nazi Saboteurs equally, even though at least one of them was a citizen, *Quirin*, 317 U.S., at 20.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defenses support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

- a. President's Military Order, 13 Nov 2001
- b. 42 U.S.C. Sec. 1981
- c. *Bowers v. Campbell*, 505 F.2d 1155, 1157 (9th Cir. 1974)
- d. *Ex Parte Quirin*, 317 U.S. 1, 20
- e. Voting Rights Act, 31 May 1870, ch. 114, Sec 16, 16 Stat. 140, 144
- f. *Yick Wo v. Hopkins*, 118 U.S. 356, 369

9. Witnesses and/or Evidence Required. The Defense intends to call Professor XXXX. (Curriculum Vitae attached). As an expert witness in the area of equal protection, specifically protections provided by 42 U.S.C. § 1981. Professor XXXX's expert testimony is probative to a reasonable person under the circumstances presented, specifically, based on the Professor's skill, knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to equal protection. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons as such Professor XXXX's specialized knowledge will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates 42 U.S.C. § 1981.

10. Additional Information. None.

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