

Case 11-001

Omar del Rosario, Appellant

v.

Janet Napolitano et al., Appellee

RECORD

Prepared for NAPABA

by

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Chancellor & Dean

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## INSTRUCTIONS

For purposes of this moot court competition, you should assume that all filings and appeals have been made in a proper and timely manner; that there are no issues raised related to subject matter jurisdiction, personal jurisdiction, or venue, and that material that would appear (e.g., in the district opinion) on such issues has been omitted; that the case is properly before the United States Supreme Court; and that the date is today's actual date. Any real measures passed by Congress or any other government authority after May 1, 2010 which affect the issues raised herein are not retroactive and have no effect on this case.

Napaba is a fictitious state. The Thirteenth Circuit is fictitious. Otherwise, you may assume that all facts that are relevant in this competition correspond to those of the real world.

UNITED STATES DISTRICT COURT  
DISTRICT OF NAPABA

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OMAR DEL ROSARIO,	:	
Plaintiff,	:	
- against -	:	No. CV-11-888-EHM
JANET NAPOLITANO, et al.,	:	ORDER
Defendant.	:	

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PARTIES

Plaintiff Omar del Rosario is an 18 year-old living in Central City, Napaba. He was scheduled to be a high school senior at the Thomas Tang High School in Central City. He is a national of the Republic of the Philippines, having been born on the island of Mindanao of mixed ancestry. He is a lawful permanent resident of the United States. His parents, also lawful permanent residents, are both employed at the Central City Hospital as physicians.

Defendants are Janet Napolitano, Secretary of the Homeland Security, and Michael Rhee, Superintendent of Schools for Napaba, an appointed state-wide official.

PROCEDURAL BACKGROUND

This matter comes before the Court on cross-motions for summary judgment pursuant to FRCP 56. Under the scheduling order, entered into with consent of all parties, no discovery was taken prior to filing of the cross-motions (without prejudice in the event the matter should proceed to trial or other evidentiary hearing).

## FINDINGS OF FACT

The Court makes the following findings of fact, based on stipulations, undisputed evidence presented in support of the motions, and judicial notice. The facts set forth with respect to the parties, *supra*, also are not contested.

1. On or about August 20, 2010, federal and state law enforcement officials in coordination with their military intelligence counterparts apprehended 25 individuals in Operation Kindred Spirit Revisited, all but two of whom were under the age of 18 and enrolled in high schools throughout the United States. Of these 25 individuals, 10 were of Indonesian background; 5 were Malaysian; 3 were Pakistani; 3 were Chinese; 3 were Filipino; and 1 was Bangladeshi. It is believed that all were Muslim. All but the two adults were foreign nationals: 11 were lawful permanent residents; 5, present on non-immigrant visas; 2, dual nationals (the other nationality being that of the United States); and 5, without valid documentation entitled them to be present. The two adults were naturalized citizens of the United States.

2. The 25 individuals apprehended in Operation Kindred Spirit Revisited allegedly were planning suicide attacks in major metropolitan areas, including New York City, Los Angeles, Washington, D.C., Chicago, and Denver, on the tenth anniversary of the September 11, 2001 terrorist acts. Since the alleged plot was discovered, twenty-three have been indicted; one has accepted immunity from prosecution concomitant to an arrangement to appear as a government witness at trial; one has died, apparently of a self-inflicted wound. The prosecutions are pending.

3. At a special joint hearing of the House and Senate, on August 23, 2010, legislators considered credible evidence that an undetermined number of additional individuals, estimated to be as many as 100, likely also under the age of 18 and enrolled in high schools throughout the United States, have received training to carry out similar acts of violence and agreed to do so in a coordinated manner. The effort to identify these additional individuals is ongoing, and it has required the dedication of substantial public resources.

4. On August 25, 2010, with one vote against, cast by Representative Jean Rankin, the House and Senate passed the Anti-Terrorism Act of 2010. There is no evidence in the record that any member of Congress was motivated by racial animus in supporting the challenged legislation.

5. On August 27, 2010, the legislation was vetoed by the President, and, on August 30, 2010, the veto was in turn overridden.

6. There is no evidence in the record that Plaintiff del Rosario has any relationship to the individuals who are arrested, other than his ethnic background. There have been no allegations that Plaintiff del Rosario has been, is, or will be disloyal to the United States.

On or about September 1, 2010, Plaintiff del Rosario, along with 23 others, and their parents or guardians, received a notice from Defendant Rhee to the effect that he would not be entitled to enroll in the Thomas Tang High School in the upcoming academic year, scheduled to begin September 7, 2010. The notice read in full as follows.

TO ALL ALIENS OF THE ENUMERATED NATIONALITIES (Bangladesh, China excepting the Republic of China, Indonesia, Malaysia, Pakistan, and the Philippines):

Under the provisions of the Anti-Terrorism Act of 2010 and by authority vested in me under the Constitution of Napaba, as Superintendent of Schools, I hereby advise you that you are ineligible to attend high school in this or any other U.S. jurisdiction. This ineligibility is effective immediately and shall be in force until December 31, 2010, or such date as is determined by the appropriate authorities.

/s/ Michael Rhee, Superintendent of Schools for NAPABA

August 26, 2010

On September 3, 2010, Plaintiff del Rosario sought to comply with the administrative requirements (e.g., registering on the web or in person) imposed on all students who wished to register for high school, and he was prevented from doing so by officials relying on the Anti-Terrorism Act of 2010 and the notice sent by Defendant Rhee.

The complaint in this case was filed on September 7, 2010. Plaintiff del Rosario seeks declaratory and injunctive relief, striking down the Anti-Terrorism Act of 2010 as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as the Fifth Amendment. The complaint is pled as a “facial challenge” to the constitutionality of the legislation. Plaintiff del Rosario seeks as further relief an order ensuring he will be able to attend high school on the same terms as others whom he claims are similarly situated, viz., eighteen year-old residents of Napaba.

The Anti-Terrorism Act of 2010, which is challenged in this litigation, provides in its operative sections as follows.

Section 1. Foreign nationals, regardless of immigration status (or lack thereof), who are citizens of the nations listed in Section 5 of this Act, must register with the Department of Homeland Security (DHS). The registration, which shall be maintained in a separate National Security Registry, shall include fingerprinting, iris scans, and securing of other biometric information as deemed appropriate by the DHS Secretary under regulations to be promulgated hereunder. They must advise DHS within ten (10) calendar days of any change in their residence, academic or employment status, immigration status, marital status; within ten (10) calendar days of any arrest or commencement of criminal proceedings; and at least ten (10) calendar days in advance of any international travel (including departures from the United States, regardless of the nature of the travel, the duration, or intentions as to any return to the United States).

Section 2. Foreign nationals, regardless of immigration status (or lack thereof), who are citizens of the nations listed in Section 5 of this Act, including but not limited to those also possessing United States citizenship, shall not be allowed to attend any public high school between the date of enactment of this Act and December 31, 2010, pending further consideration of appropriate measures to be taken for the purposes of national security.

Section 3. Violations of this Act shall be felonies punishable by imprisonment not in excess of five years and a fine of no more than \$100,000.

Section 4. All provisions of this Act are independent and severable.

Section 5. The nations to which this Act applies are: Bangladesh, China (not including the Republic of China, the status of which it not affected hereby), Indonesia, Malaysia, Pakistan, and the Philippines. The individuals to which the Act applies are nationals of the aforementioned nations, regardless of the individual's race or ethnicity.

### ANALYSIS

The case presents two distinct issues, corresponding to Sections 1 and 2 of the statute. They are analyzed in turn.

The first issue is the constitutionality of the registration provision of the Anti-Terrorism Act (ATA) of 2010. The controlling precedent is *Korematsu v. United States*, 323 U.S. 214 (1944). Although the Supreme Court has disapproved of the outcome of this case, and the actual conviction has been vacated on a rare *writ of coram nobis*, it nonetheless remains the most significant authority applicable to government actions that rely on a “suspect classification.” See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 2106 (1995) (implicitly disapproving of *Korematsu*) and *Korematsu v. United States*, 584 F. Supp 1406 (N.D. Cal. 1984) [granting *writ of coram nobis*]. The doctrine it established requires that the judicial branch apply “strict scrutiny,” meaning this court should inquire into the existence of a “compelling state interest” and whether “narrow tailoring” has been used.

This Court finds that national security is such a “compelling state interest.” It also finds that the use of immigration status and national origin, however lamentable, is more than rational given the threat that has been presented by terrorism. Unlike the



internment of Japanese Americans during World War II, which extended to aliens and citizens alike if they were of Japanese ancestry, but did not include aliens and citizens of German or Italian backgrounds [at least on a group basis, notwithstanding many individual cases], the present measure is limited to aliens (and a *de minimus* number of dual nationals who are effectively foreign nationals) and encompasses individuals belonging to all groups that have been identified as hostile. Moreover, the court believes that *Korematsu*, so long as it remains good law, indicates that during wartime decisions of this nature, duly made by the legislative and executive branches, should be given deference.

In addition, the case of *Narenji v. Civiletti* is instructive as well. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) *cert. denied* 446 U.S. 957 (1980). There, the court upheld a national origin based classification, targeting Iranians, during the hostage crisis in which student radicals seized the United States Embassy in Tehran. In this instance, especially considering the registration requirements imposed on all foreign nationals as a matter of routine practice, *see* 8 U.S.C. §1302 *et seq.*, the additional burden posed by the 2010 ATA are *de minimus*.

The second issue is the constitutionality of the public education provision of the Anti-Terrorism Act (ATA) of 2010. The controlling precedent is *Plyler v. Doe*, 457 U.S. 202 (1982). It may have been possible to distinguish *Plyler* on the basis of the statute in that instance having been enacted by a state government rather than the federal government, but given the Supreme Court's clear indication that equal protection norms should be "congruent" as between the various state governments and the federal government, this argument is unavailing. *Adarand*, 515 U.S. at 2112. For this reason, there is no meaningful distinction to be made between the actions of the federal defendants on the one hand and the state defendants on the other hand.

There is no general right to education in the United States, *San Antonio Independent School Dist. V. Rodriguez*, 411 U.S. (1973), but once primary and secondary public education is provided it is impermissible to exclude individuals on the basis of their immigration status. If students who are not documented must be allowed, it follows *a fortiori* that students who are lawful permanent residents also must be allowed. The temporary nature of their exclusion does not render it permissible.

It is not for this Court to concern itself with the efficacy of these policies. It is this Court's responsibility to adjudge their constitutionality. It also is not for a United States District Court to speculate as to whether or not the United States Supreme Court will overrule its own precedent. Ironically, each of the parties in this litigation finds itself in the position of urging that one line of case law remains the black-letter doctrine while another line of case law has ceased to be controlling.

Therefore, section 1 of the ATA is upheld and plaintiff's complaint is dismissed as to it; section 2 of the ATA is struck down and plaintiff's request for declaratory and injunctive relief is granted. The decision of this court is stayed pending appeal.

IT IS SO ORDERED.

Dated:

September 13, 2010

/s/ E. Hobart Morris  
United States District Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT

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OMAR DEL ROSARIO,	:	
Plaintiff-Appellant,	:	
- v. -	:	No. 11-91687
JANET NAPOLITANO, et al.,	:	FILED BY K. PATEL, CLERK
Defendant-Appellee.	:	

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Appeal from the United States District Court for the District of Napaba

E. Hobart Morris presiding

Argued and submitted Eastgate, Napaba, September 17, 2010

BEFORE Cho, Chief Judge; Nguyen; Polamalu, Circuit Judges.

The nation is at war. The parties agree there is no racial animus motivating the legislation at hand. This case is thus controlled by well-established precedent.

*Korematsu v. United States*, 323 U.S. 214 (1944); *Plyler v. Doe*, 457 U.S. 202 (1982). The judgment below is AFFIRMED.

IN THE  
SUPREME COURT  
OF THE UNITED STATES

No. C10-042-1

Omar Del Rosario, Petitioner

v.

Janet Napolitano et al., Respondent.

ORDER GRANTING WRIT OF CERTIORARI

The petition for a writ of certiorari to the United States Court of Appeals for the Thirteen Circuit is hereby granted.

It is ordered that the above-captioned matter be set down for argument in the current term of this Court, said argument to be limited to the following issues.

- I. WHETHER THE ANTI-TERRORISM ACT OF 2010 AND STATE ACTION TAKEN TO ENFORCE IT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN ITS REQUIREMENT THAT NON-CITIZENS OF SPECIFIED NATIONAL ORIGINS SUBMIT IDENTIFYING INFORMATION TO LAW ENFORCEMENT AUTHORITIES.
- II. WHETHER THE ANTI-TERRORISM ACT OF 2010 AND STATE ACTION TAKEN TO ENFORCE IT VIOLATE THE GUARANTEE OF DUE PROCESS IN ITS TEMPORARY WITHHOLDING OF SECONDARY EDUCATION FROM NON-CITIZENS OF SPECIFIED NATIONAL ORIGINS.

Dated: September 24, 2010

*The Gotham Times* is a newspaper of general circulation, based in Napaba. It has the greatest number of subscribers of any newspaper of general circulation in Napaba, and it also is the oldest, having been founded a century ago.

*The Gotham Times*

August 21, 2010

A1

## Two Dozen Terrorists Apprehended!

The Federal Bureau of Investigation, assisted by more than a dozen other law enforcement and military intelligence agencies, arrested at least two dozen individuals who were alleged to be planning suicide attacks on major American cities to commemorate the tenth anniversary of the 9/11 terrorist acts. According to reliable sources, almost all of the individuals who were apprehended in the nationwide operation appear to be high school students from various Asian nations, of the Muslim faith, recruited by two naturalized citizens from Indonesia, the world's largest Islamic nation.

"We have successfully prevented what would have been one of the largest acts of aggression on United States, on a scale similar to 9/11," said Attorney General Deric Ohler. Sources within the administration who have requested anonymity have indicated that the investigation, which began only a week earlier, was able to identify the would-be perpetrators, because one of them turned himself in.

Except for the two masterminds of the operation, all of the individuals apparently are minors. Their identities have been withheld at this time. The *Gotham Times* has learned, however, that they included persons from Indonesia, Malaysia, China, and India. The two adults who appeared to have been responsible for recruiting them were based in the metropolitan Washington, D.C. area. None of them reside in Napaba.

Ohler refused to confirm reports that the investigation is ongoing.

*The Gotham Times*

August 22, 2010

A1

## More Terrorists At Large

"Dozens, perhaps hundreds, of 'sleeper agents,' trained from a young age, most likely teenagers now, are believed to be preparing to engage in suicide attacks against targets in the United States," said Attorney General Deric Ohler in a press conference yesterday in Washington, D.C. "We are conducting ongoing investigations to apprehend these individuals as a top priority of all law enforcement agencies," Ohler indicated. Citing national security, Ohler refused to offer further details. *The Gotham Times* has been informed by reliable sources that there may be as many as 10,000 individuals involved in the plot.

The brief press conference occurred a day after the Federal Bureau of Investigation announced the arrest of a total of 25 individuals suspected of participating in a nationwide scheme to perpetrate suicide attacks. Officials have indicated that all of the persons who were apprehended were Indonesian, Malaysian, Pakistani, Chinese, Filipino, or Bangladeshi. All of them are Muslim. According to reliable sources, intelligence agencies believe that the remaining terrorists also are predominantly of Asian origin and the Islamic faith.

"This shows the need to reform our immigration policies, to prevent these people from coming in the first place," said Tom Goddard, an activist with "America for Americans," a leading advocacy group. "We have to realize many people who are trying to come here now do not have any interest in traditional American values, but instead are radicals who seek to destroy our way of life. That goes for the so-called 'citizens,' too, who have somehow sneaked into the system, because it is so liberal," continued Goddard.

Civil liberties groups expressed concern about the risk of racial profiling as a result of recent arrests.

*The Gotham Times*

August 23, 2010

A10

Corrections

In a news article yesterday, the *Gotham Times* reported that credible sources had indicated as many as 10,000 Asian high school students were involved in the terrorist plot against the United States. The *Gotham Times* has since learned that the individual who provided the information is not a credible source. We regret the error.



*The Gotham Times*

August 24, 2010

A1

## Congress Passes Anti-Terror Bill

Yesterday, following emergency hearings on the alleged plot of Asian high school students in the United States to conduct terrorist attacks on the tenth anniversary of 9/11, the United States Congress passed a new anti-terror bill. The House of Representatives passed the bipartisan bill with no floor debate, with a vote of 430 to 1; the Senate, with only a statement from the co-sponsors, by a vote of 98 to 0. The key aspects of the legislation are summarized in the sidebar.

Key legislative leaders offered many reasons for supporting the new law.

"We must understand that this is a war of civilizations. We are confronted with radical Islam, and it's about time we do what we need to fight back rather than worrying about civil rights," said Congressman Tad Killeam.

"There are just too many Asians coming – Latinos and Arabs, too, and I worry about how our nation is changing. I don't have anything against Asians. They should just be in Asia. I am sure if there were too many Americans moving to Asia, they wouldn't just allow that to change their cultures," said Congresswoman Aurvilla Faubus. "I'm glad this happened, because it makes us realize the threat to our way of life comes from inside," she added.

The lone representative from Napaba in the House, Vidkun Quo, stated, "Obviously, I have nothing against Asians. This is just a reasonable measure that we have to take, based on all the information we have. It's temporary. I'm confident."

The President is expected to veto the bill.