05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
MILITARY COMMISSION DETAINEE, CAMP ECHO, GUANTANAMO BAY NAVAL BASE, GUANTANAMO BAY, CUBA,

Petitioner,

v.

DONALD H. RUMSFELD, UNITED STATES SECRETARY OF DEFENSE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE CERTAIN FORMER FEDERAL JUDGES IN SUPPORT OF PETITIONER (SEPARATION OF POWERS: ENFORCEABLE AT GUANTANAMO)

PAUL C. SAUNDERS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Counsel of Record

PHILIP M. BOWMAN
CAITLIN M. EDWARDS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Of Counsel

Counsel for Amici Curiae

January 6, 2006.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF AMICI

Amici Hon. John J. Gibbons, Hon. Abraham D. Sofaer, Hon. William S. Sessions and Hon. Timothy K. Lewis are former federal judges. While they express no views on the merits of any of the claims made by Salim Ahmed Hamdan ("Petitioner"), they believe that these claims, especially those alleging violations of the separation of powers doctrine, should be heard in a federal court. They respectfully submit that the Judiciary must be allowed to play its role in reviewing the Executive's use of his power. Furthermore, amici have an interest in ensuring that any person with standing be granted access to a federal court for the purpose of asserting that the constitutional limitations imposed on the three branches of government have been overstepped.[1]

STATEMENT OF FACTS

We adopt the statement of facts set forth in the brief submitted on behalf of Petitioner.

ARGUMENT

Ours is a government of laws. The Executive can take no action that is not authorized, expressly or by implication, by the Constitution or the laws of the United States. If Petitioner cannot argue that his trial by military commission violates the fundamental bedrock of our Constitution, the separation of powers doctrine, then the Executive can act without any constitutional authority and the Judiciary would be powerless to stop it. In the most fundamental way, such a proposition is at odds with our system of government. For

---

[1] All parties to this action have granted written consent for amici to file this brief. Letters of consent have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

that reason, Petitioner must have the right to assert in federal court that his detention and his trial by military commission violate the separation of powers doctrine.[2]

I. PETITIONER HAS A RIGHT TO ASSERT CONSTITUTIONAL VIOLATIONS IN FEDERAL COURT.

This Court has never held that aliens are categorically prohibited from asserting violations of the Constitution. To the contrary, this Court has extended to aliens the right to assert constitutional violations in a variety of circumstances, particularly where those aliens are within the Court's territorial jurisdiction. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that illegal alien schoolchildren were entitled to equal protection under the Fourteenth Amendment); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (noting that the Fifth and Fourteenth Amendments protect each of the "millions of aliens within the jurisdiction of the United States", including illegal aliens); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-99 (1953) (recognizing the well-established precedent that aliens are entitled to constitutional protection); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (noting that the First Amendment protects aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70, 374 (1886) (extending the Fourteenth Amendment to aliens).

In holding that aliens held at the United States Naval Station at Guantanamo have the right to petition for writs of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3), this Court strongly implied that those detainees can assert constitutional violations. *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (stating that "[p]etitioners' allegations—that, although they

---

[2] This brief addresses only whether Petitioner may assert a separation of powers argument in federal court. It expresses no view on whether such an argument would be successful.

have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years . . . *without access to counsel and without being charged with any wrongdoing*—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Kennedy, J., concurring)" (emphasis added)).

The Court's references to access to counsel and the right to be charged once imprisoned suggest that the Court found that the petitioners had legitimately asserted constitutional violations. The Court's reference to Justice Kennedy's concurrence in *Verdugo-Urquidez* makes this clear. The issue in *Verdugo-Urquidez* was whether "the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country". 494 U.S. at 261. The Court held that a nonresident alien did not enjoy Fourth Amendment protection for his property located abroad. *Id*. However, in his concurrence (to which the Court's opinion in *Rasul* refers), Justice Kennedy stated that "[a]ll would agree" that nonresident aliens are entitled to some constitutional protection—for example, the due process guarantee of the Fifth Amendment. *Id*. at 278. The *Rasul* Court's reference to that concurrence makes no sense unless the opinion is read as recognizing the right of aliens detained at Guantanamo to assert violations of the Constitution.[3]

---

[3] The United States tries to blunt the force of footnote 15 in *Rasul v. Bush* by asserting that this Court could not have meant to overrule *Verdugo-Urquidez* in a footnote. (*See* Respondents' Reply Memorandum to Opposition to Cross-Motion to Dismiss, No. 04-CV-1519, at 19-20 (D.C. Cir. 2004).) The United States proceeds from a false premise, however, because recognizing a non-resident alien's ability to assert

Although the Court's opinion in *Rasul* is focused on the petitioners' right to petition for writs of habeas corpus, it is not limited to such petitions. Indeed, the Court stated that it had federal question jurisdiction under 28 U.S.C. § 1331 over petitioners' claims. *Rasul*, 542 U.S. at 484. As the Court held, "nothing in . . . any of [the Court's] other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in United States courts. The courts of the United States have traditionally been open to nonresident aliens". *Id*. (internal citations omitted). Accordingly, under *Rasul*, Petitioner may assert violations of the Constitution in a petition for a writ of habeas corpus, a petition for a writ of mandamus or otherwise.

II. PETITIONER HAS A RIGHT TO ASSERT SEPARATION OF POWERS VIOLATIONS.

A. *Verdugo-Urquidez* Does Not Preclude Petitioner from Arguing That the Military Commissions Violate the Separation of Powers Doctrine.

Allowing Petitioner to assert a violation of the separation of powers doctrine is fully consistent with *Verdugo-Urquidez*. The issue in that case was whether United States agents operating in Mexico violated the Fourth Amendment when they searched the property of Verdugo-Urquidez, a Mexican national, without a warrant. The Court noted that the Fourth Amendment guarantees "[t]he right of *the people* to be secure . . . against unreasonable searches and seizures". *Verdugo-Urquidez* 494 U.S. at 264-65 (quoting U.S. Const. amend. IV) (emphasis added). The Court concluded that "the people" is a term of art in the Constitution and that certain aliens, including Verdugo-

constitutional claims in federal court is not, in and of itself, inconsistent with *Verdugo-Urquidez*.

Urquidez, are not among "the people" whom the Fourth Amendment protects. *Id.* at 265-75. Accordingly, the Court held that no constitutional violation occurred.

Unlike the Fourth Amendment, the separation of powers doctrine does not grant individual rights to the people, but rather circumscribes the respective powers of the branches of government. A separation of powers violation occurs when a branch of government exceeds the scope of the authority granted to it by the Constitution, regardless whom that action affects. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."). Because a violation of the separation of powers doctrine is structural and is independent of the person it affects, there is no need to determine whether Petitioner is within a class of persons protected by the doctrine to determine whether a violation has occurred. Rather, this is more like a jurisdictional challenge that depends not on the status of the person making it but on the status of the court or tribunal whose jurisdiction is challenged.

Unlike in *Verdugo-Urquidez*, there is no question that Petitioner has alleged a constitutional violation. He contends that the President violated the Constitution when he established military commissions outside the limits imposed upon him by Article II of the Constitution. If he is correct, then the President has exceeded his constitutional authority and his actions were lawless in the sense that the Constitution did not authorize them. It matters not whether the person raising the objection is a citizen or an alien. The action is lawless in either case.

Accordingly, the only question is whether Petitioner—as an alien—is entitled to assert that constitutional violation in federal court. Nothing in *Verdugo-Urquidez*, or any other holding by this Court, suggests that he cannot. To the

contrary, as this Court held in *Rasul*, "[t]he courts of the United States have traditionally been open to nonresident aliens". 542 U.S. at 484 (citation omitted).

B. The Suggestion by the Court of Appeals That Petitioner May Not Be Able to Assert a Violation of the Separation of Powers Is Based on a Misapplication of *Verdugo-Urquidez*.

The court of appeals implied that it was "doubtful" that a person in Petitioner's position is permitted to assert a separation of powers violation. *Hamdan v. Rumsfeld*, 415 F.3d 33, 37 (D.C. Cir. 2005). However, that statement by the court of appeals is based upon two cases that misinterpret *Verdugo-Urquidez*: *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) and *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002). Those cases misquote *Verdugo-Urquidez*, and—based on that misquotation—conclude that aliens do not enjoy *any* constitutional rights unless they have established substantial and voluntary connections to the United States. *Verdugo-Urquidez* states that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country". 494 U.S. at 271. In *People's Mojahedin*, the court inserted the word "only" in brackets after the word "protections". *People's Mojahedin*, 182 F.3d at 22. However, *Verdugo-Urquidez* did not so hold. Indeed, the Court in *Verdugo-Urquidez* repeatedly stated that its opinion was limited to the narrow question whether the petitioner enjoyed Fourth Amendment rights in Mexico. *Verdugo-Urquidez*, 494 U.S. at 264-66, 269. The Court devoted substantial attention to distinguishing the Fourth Amendment from the Fifth Amendment, thus emphasizing the limits of its holding. *Id.*

Moreover, other circuits have properly recognized that *Verdugo-Urquidez* is limited to the Fourth Amendment. *See, e.g.*, *Lamont v. Woods*, 948 F.2d 825, 834-40 (2d Cir. 1991) (finding that the Establishment Clause prevents government funding of foreign religious organizations); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) (noting that in *Verdugo-Urquidez*, the Court "expressly refused to rule on the issue of whether . . . a seizure could violate an accused's Fifth Amendment due process rights, holding only that Fourth Amendment rights are not implicated"). Accordingly, the suggestion by the court of appeals that it is "doubtful" that a person in Petitioner's position is permitted to assert a separation of powers violation should be disregarded.

C. *Verdugo-Urquidez* Does Not Prevent a Person in Petitioner's Position from Asserting a Constitutional Violation.

Because Petitioner's separation of powers argument is what we have termed a structural one—that the Executive is without constitutional authority to act as he did—it can be raised by any person with standing and is therefore very different from the claim that was made in *Verdugo-Urquidez*. Even if this Court should conclude that *Verdugo-Urquidez* is of some relevance, we submit that just as it is limited to Fourth Amendment concerns, *Verdugo-Urquidez* should also be limited to the unique facts of that case, facts which are absent from Petitioner's situation. Indeed, the circumstances of Petitioner's detention differ in several significant respects from those of Verdugo-Urquidez, so that he should be permitted to assert any constitutional violation.

First, unlike Verdugo-Urquidez, who had been in federal custody for only a few days, *Verdugo-Urquidez*, 494 U.S. at 272, Petitioner has been imprisoned in United States territory for more than four years. One reason the Court held against Verdugo-Urquidez was because he had not established a "significant voluntary connection" in order to

enjoy constitutional protections. *Id.* at 271.[4] However, the Court did not create a blanket requirement of a "significant voluntary connection". It merely held that a person who had been in federal custody for only a few days was not entitled to Fourth Amendment protections. *Id.* at 271-72. The Court explicitly reserved the question whether a person whose "lawful but involuntary" stay in the United States were prolonged "by a prison sentence, for example" might be entitled to such protections. *Id.* at 271-72. Petitioner falls outside the scope of *Verdugo-Urquidez*—even within the context of the Fourth Amendment—because his detention has lasted several years. Moreover, this Court has granted other constitutional protections to aliens who had not developed a "significant voluntary connection". *See*, *e.g.*, *Mathews*, 426 U.S. at 78 (noting that even an alien "whose presence in this country is unlawful, involuntary, or transitory is entitled" to the protection of the Fifth and Fourteenth Amendments).

Second, there is no concern that federal law will conflict with local law in Cuba. The *Verdugo-Urquidez* Court noted the difficulty of applying the Fourth Amendment in a society governed by a different set of laws. For example, a warrant obtained in the United States to search property in Mexico would be a "dead letter". *Verdugo-Urquidez*, 494 U.S. at 274. Furthermore, implementing a warrant would or could require the cooperation of Mexican officials. *Id.* at 262 (noting that federal agents had initially been impeded in their attempts to gain authorization for the search from Mexican officials). Here, however, the United States exercises exclusive jurisdiction and control over the detainees at

---

[4] In any event, the "significant and voluntary connection" factor is inapplicable here, because, as discussed, the separation of powers doctrine is not a provision of the Constitution that is limited in its application to "the people". *See Verdugo-Urquidez*, 494 U.S. at 273. ("[R]espondent had no voluntary connection with this country that might place him among 'the people' of the United States.")

Guantanamo. *Rasul*, 542 U.S. at 480. No government or law would interfere with a decision to try Petitioner in a federal court.

Third, enforcing the separation of powers doctrine in Guantanamo does not present the practical difficulties associated with applying the Fourth Amendment to searches in Mexico. In his *Verdugo-Urquidez* concurrence, Justice Kennedy noted that applying the Fourth Amendment in a territory that the United States does not govern was not always feasible. "The absence of local judges or magistrates available to issue warrants, the differing and perhaps ascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico." *Verdugo-Urquidez*, 494 U.S. at 278.

D. To Deny Petitioner the Right to Assert a Violation of the Separation of Powers Doctrine Would Allow the President's Power to Go Unchecked.

Under the standing doctrine established by this Court, a person must allege that he suffered an "injury in fact" to gain access to the federal courts. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact is an actual or imminent invasion of a legally protected interest that is concrete and particularized. *See id.*, 504 U.S. at 560 (citing *Warth v. Selden*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972)).

Petitioner asserts that the Military Order that established the military commissions violates the separation of powers doctrine. The Military Order by its terms applies only to non-citizens. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, Sec. 2(a) (Nov. 13, 2001). No citizen of the United

States will therefore ever be tried by a military commission such as the one Petitioner faces; and, accordingly, no citizen will be injured by those commissions. Thus only an alien detainee such as Petitioner could possibly challenge the commissions or the constitutional authority of the President who created them.

To deny standing to Petitioner would therefore preclude the Court from determining whether the President exceeded his powers under Article II of the Constitution when he established the military commissions. Such a result should not be permitted. Courts must have the ability to consider separation of powers challenges in order to curtail the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power", a force which even if used "to accomplish desirable objectives, must be resisted". *INS v. Chadha*, 462 U.S. 919, 951 (1983).

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). *See also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) ("The conception of liberty embraced by the Framers was not so confined [to the 5th and 14th Amendments]. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (noting that the purpose of separation of powers was to "diffus[e] power the better to secure liberty") (Jackson, J., concurring); *Reid*, 354 U.S. at 40 ("Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny.")

Indeed, the Framers believed that diffusing governmental power among three branches of government was the key element in protecting against a tyrannical regime and securing individual liberty. "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which [separation of powers] is founded . . . . There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates". Federalist No. 47 (Madison). *See also* Federalist No. 51 (Madison) ("[A] due foundation for that separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty".)

Furthermore, our nation's history has long distrusted the fusing of executive and judicial power, and separation of powers concerns have often been at the core of this Court's decisions in cases where individuals face trials by military tribunals. For example, in *Reid v. Covert*, the Court noted that "[i]f the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." 354 U.S. at 38-39.

This principle is no less significant where the President's "purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger". *Youngstown Sheet & Tube*, 343 U.S. at 614 (Frankfurter, J., concurring). "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of

the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594.[5]

[5] Indeed, the separation of powers doctrine is particularly relevant in the context of a petition for a writ of habeas corpus. The purpose of the writ of habeas corpus is to protect against tyranny by the Executive. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Brown v. Allen*, 344 U.S. 443, 533 (1953) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.") (Jackson, J., concurring). *See also Rasul*, 542 U.S. at 474. That notion was recognized by members of this Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Indeed, in his dissent, Justice Scalia stated that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive". *Id*. at 554-55.

CONCLUSION

Petitioner must be permitted to challenge the military commissions as a violation of the separation of powers doctrine. *Rasul* implied that a person in Petitioner's position may assert constitutional violations in federal court. Allowing Petitioner to assert a separation of powers violation is consistent with this Court's prior cases discussing applicability of the Constitution to aliens. Finally, only alien detainees at Guantanamo will be able to challenge the military commissions as a violation of separation of powers since they are the only ones being tried. Allowing Petitioner to assert such a challenge is therefore fundamental to the protection of the separation of powers and to the system of government that our Constitution mandates.

January 6, 2006.

Respectfully Submitted,

PAUL C. SAUNDERS

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Counsel of Record

PHILIP M. BOWMAN
CAITLIN M. EDWARDS

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Of Counsel

Counsel for Amici Curiae