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ROTHE DEVELOPMENT CORPORATION V. UNITED STATES DEPARTMENT OF DEFENSE 262 F.3D 1306 (FED. CIR. 2001)

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FACTS

Plaintiff Rothe Development Corporation ("Rothe") submitted the lowest bid for a contract to service an Air Force Base telecom system.[1] Despite submitting the lowest bid, Rothe lost the contract to another firm, ICT because the bid solicitor invoked the § 1207 program[2].[3] This program permits the United States Department of Defense ("DOD") to give preference to bids submitted by businesses owned by socially and economically disadvantaged individuals[4] ("SDB's").[5] The bid solicitor for each contract has the discretion to decide whether or not to invoke the § 1207 program.[6] If choosing to apply the program, the solicitor increases the bids submitted by all non-SDB's by a uniform factor, up to ten percent.[7] The application of this "price-evaluation adjustment" resulted in the award of the government contract to ICT, an SDB, rather than to Rothe, a non-SDB that had submitted the lowest pre-adjustment bid.[8]

Congress originally passed the § 1207 program in 1989.[9] It was initially intended to be in effect for three years.[10] However, minority involvement in the defense industry did not reach the stated objective, and Congress

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[1]Rothe Dev. Corp. v. D.O.D., 262 F.3d 1306, 1312 (Fed. Cir. 2001).

[2]Section 1207 of the National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986) (as amended), codified at 10 U.S.C. § 2323 (1994).

[3]Rothe, 262 F.3d at 1315.

[4]*Id.* at 1314 n.4. (The § 1207 program identifies five groups (consisting of a total of 37 subgroups) of minorities, members of which are presumed to be among the socially and economically disadvantaged class this legislation is intended to assist. The identified groups are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian Americans.).

[5]*Id.* at 1315.

[6]*Id.*

[7]*Id.*

[8]*Id.*

[9]*Id.* at 1312.

[10]*Id.* at 1313.

reauthorized the program in 1992 for seven more years.[11] Rothe filed this action during the reauthorization period.[12] Because the court treats statutory reauthorization as a distinct legislative proceeding, it reviewed the congressional proceedings in 1992 to determine the constitutionality of this statute.[13] In support of the constitutionality of the statute, the defendant also submitted evidence to the trial court that had emerged since 1992.[14]

Rothe commenced this action in the Western District of Texas to challenge the constitutionality of the § 1207 program under the implied equal protection provision of the Fifth Amendment[15].[16] The district court granted the government's motion for summary judgment.[17] Plaintiff Rothe appealed the decision to the Fifth Circuit, which transferred the action to the Federal Circuit as a matter of subject matter jurisdiction.[18] The circuit court considered both the level of judicial scrutiny required in reviewing the constitutionality of the § 1207 program as well as the admissibility of evidence which had emerged since 1992.[19]

HOLDING

The Federal Circuit Court of Appeals held that the district court improperly applied a deferential standard of review, when the appropriate standard was strict scrutiny.[20] The district court also impermissibly based its decision on post-reauthorization evidence supporting the statute's constitutionality.[21] The circuit court remanded the case to the trial court for findings of fact within the established parameters.[22]

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[11] *Id.* at 1314.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1322.
[15] U.S. CONST. amend. 5.
[16] *Rothe*, 262 F.3d at 1315.
[17] *Id.* at 1316.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1332.
[21] *Id.*
[22] *Id.*

ANALYSIS

Congress drew upon its spending authority under Article I[23] when it included race-based conditions for appropriating federal funds for the armed forces under the § 1207 program.[24] Its stated goal was to increase participation of small, disadvantaged businesses in fulfilling defense contracts.[25] Congress would consider the DOD compliant with the stated goal when it had achieved a rate of five percent SDB participation in the total dollar amount of contracts awarded.[26]

A. Standard of Review

In *Adarand Constructors v. Pena* ("*Adarand*")[27], the Supreme Court settled the question of the level of scrutiny required for race-based classifications.[28] Before *Adarand*, courts had routinely applied differing levels of judicial scrutiny to suspect classifications, depending upon what governmental body had enacted them.[29] *Adarand* determined that a race-based classification established by any government actor, whether federal or state, necessarily implicates the rights of those affected.[30] According to *Adarand*, courts must hold all race-based classifications to the highest level of judicial scrutiny.[31] *Adarand* also included a requirement that the measure be remedial in nature.[32] Having identified the need to apply strict scrutiny, the circuit court looked to a prior case, *City of Richmond v. J. A. Croson Co.* ("*Croson*")[33] for a definition.[34] In *Croson*, the Court determined that to satisfy strict scrutiny, a race-based classification must serve a "compelling interest" and be "narrowly tailored" to suit that interest.[35]

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[23]U.S. CONST. art. I, § 8, cl. 12.
[24]*Rothe*, 262 F.3d at 1317.
[25]*Id.* at 1313.
[26]*Id.*
[27]Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[28]*Rothe*, 262 F.3d at 1318.
[29]*Id.*
[30]*Id.* at 1319.
[31]*Id.*
[32]*Id.*
[33]City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).
[34]*Rothe*, 262 F.3d at 1319.
[35]*Id.* at 1318.

Here, however, the district court determined that a race-based classification established by Congress deserved greater deference from the reviewing court than one imposed by other legislative bodies.[36] The district court perceived in the dissent and plurality of *Adarand* that deference to congressional proceedings was still permissible and reviewed the § 1207 program under a standard much more deferential than what strict scrutiny would allow.[37] The appellate court determined that this was an error on the part of the district court and remanded the case, specifically requiring that it conduct an analysis according to the *Croson* strict scrutiny test.[38]

B. Sufficiency of the Evidence

The appellate court also specifically instructed the district court that, on remand, it was to conduct a more thorough examination of the evidence used by Congress in determining the need for remedial race-based measures.[39] In the original trial, the court failed to take the necessary steps required as part of independent judicial review.[40]

In order to determine that Congress was serving a "compelling interest" and responding to a situation deserving of remedial measures, the district court must examine the factual basis upon which Congress acted.[41] In this case, the district court had done little more than verify that Congress had done some research; the court's opinion contained a list of some of the documents that Congress relied upon in enacting the § 1207 program.[42] *Croson* makes clear that in order to uphold the affirmative action program, the court must find a "strong basis in evidence" for the conclusions of the legislative authority.[43] In *Rothe*, the appellate court required that, "the district court set forth detailed findings as to the scope and content of the reports" and the inferences drawn upon those facts, so that the reviewing court may determine on the record alone, whether the necessary "strong basis" was present.[44] The district court must point to facts within the reports to determine whether the conclusions

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[36]*Id.* at 1319.
[37]*Id.* at 1320.
[38]*Id.* at 1321.
[39]*Id.* at 1323.
[40]*Id.* at 1322.
[41]*Id.* at 1329.
[42]*Id.* at 1328.
[43]*Id.* at 1329.
[44]*Id.*

drawn by Congress were appropriate.[45] A simple recitation of sources and deference to Congressional judgment does not satisfy the test for a strong basis in evidence.[46]

C. Review of "Post-enactment" Evidence

The district court had the responsibility to determine if the § 1207 program was unconstitutional as enacted.[47] The court should only have considered the evidence available at the time Congress passed the statute and should not have relied on any evidence that has developed since that time.[48] Here, however, the district court had relied on evidence presented by defendant which was not available until after the statute was enacted.[49] The appellate court found that the district court erred in deferring to the Congressional determination that a compelling interest did exist.[50]

The debate over the use of post-enactment evidence arose because of ambiguity in the standard for review.[51] Courts must find a "strong basis in evidence" at the litigation stage, but there was some question as to whether the same standard is required of legislatures enacting laws.[52] Though some circuits have found that less evidence is required for the enactment than is required for the court review[53], the Federal Circuit followed the Supreme Court opinion in *Shaw v. Hunt*,[54] which found no difference.[55] The standard requiring a "strong basis in evidence" exists to make sure that legislatures do not use race-based classifications for illegitimate reasons.[56] The court is only able to review legislative decisions for legitimacy if the legislatures are held

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 1325.

[48] *Id.* at 1327.

[49] *Id.* at 1328.

[50] *Id.*

[51] *Id.* at 1326.

[52] *Id.*

[53] Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994); Contractors Ass'n of E. Penn., Inc. v. City of Phila., 91 F.3d 586 (3d Cir. 1996).

[54] Shaw v. Hunt, 517 U.S. 899 (1996).

[55] *Rothe*, 262 F.3d at 1326.

[56] *Id.* at 1327.

to the same standards when enacted as they are when reviewed.[57] Therefore, in reviewing the constitutionality of the statute, the court should search for a "strong basis in evidence" in the materials used by the legislature in making their decision to enact the law.[58]

CONCLUSION

This case serves to solidify the rulings of the Supreme Court regarding the review of race-based classifications enacted by Congress. It makes clear that such congressional action must be reviewed with strict scrutiny. Deference to the findings of Congress would effectively negate the requirement for strict scrutiny in reviewing federally established race-based classifications. Suspect classifications run a grave danger of abridging equal protection rights. Congress may employ race-based classifications, but only to serve the compelling interest of remedying past wrongs. Deference to Congressional determinations gives no recourse to those whose rights are transgressed if Congress acts beyond the scope of its authority. The Federal Circuit was right to push this case back in line with precedent and not allow the trial court to carve out a different standard based on the plurality opinion in *Adarand*.[59]

The troubling aspects of this opinion are the requirements established for finding a compelling interest. The Federal Circuit would require a legislative body which is considering race-based remedial programs to have specific findings of prior discrimination with lingering effects, or present discrimination in *each* industry, for *each* minority which is to be favored.[60] The court also seems to favor the use of statistical data to establish inequity worthy of remedial action.[61]

The § 1207 program relied upon previous work done by the Small Business Administration to identify groups of socially and economically disadvantaged people.[62] Congress should be allowed to rely upon these findings unless they are invalidated or shown to be outdated. The inclusion of the five racial groups in the enactment of the § 1207 program is merely a

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[57] *Id.*
[58] *Id.*
[59] *Id.* at 1320.
[60] *Id.* at 1330.
[61] *Id.* at 1323.
[62] *Id.* at 1314.

presumption that individual members of these groups qualify as SDB's.[63] The structure of the program allows either unsuccessful bidders or authorized government actors to challenge the SDB status of another competitor and allows rightful SDB's to waive their status as such.[64] For the sake of administrative economy, the § 1207 program made a predetermination that members of certain minority groups would likely qualify for the race-based privileges.[65] There may not always be a significantly large sample size for a government actor to determine the degree of discrimination present for each racial group within each industry. The Small Business Administration, exercising authority in its field of expertise, found that certain groups tended to be disadvantaged.[66] This evidence reasonably supports a presumption that the listed minority groups are indeed at a social and economic disadvantage. The inclusion of a provision to expel from SDB status businesses that do not rightfully belong in that class justifies the program's use of that presumption.

The court's assertion that statistical data will serve as the best evidence of racial inequality exacerbates the problem in requiring a showing of discrimination against each racial group in every industry. It is quite reasonable to expect that the population of certain specific minorities in a given industry may be negligible, and yet that the few involved will face racial discrimination. Requiring statistical data specific to each minority in each industry may permit widespread discrimination, without hope for remedial action, against all truly marginal populations. There is no ideal barometer for determining the racial climate of any geographic region, in any particular industry for any specific minority. Statistical data can be evidence, as can anecdotal data. To overemphasize either of these categories of evidence is no less of a danger than underemphasizing them all, which may allow rampant discrimination to go unchecked.

If discrimination against a minority population in any region in a given industry exists, it is at least as reasonable to expect that other minorities suffer similar discrimination as it is to presume that all other minorities are treated fairly. Any minority group not presumed to be an SDB has no opportunity for aid from this program. However, because status as an SDB is merely a presumption and not a truism, any individual business that does not satisfy the requisite qualifications may be challenged and prohibited from receiving the aid of the § 1207 program. There is recourse against individual businesses

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

erroneously included within the SDB classification, but no recourse for those erroneously excluded; therefore, there is less harm in initially over-applying SDB status than in initially under-applying it.

Summary and Analysis Prepared by:
Glenn Thompson