IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*, *Petitioners*, v. GEORGE W. BUSH, President of the United States, *et al.*, *Respondents*.	Civ. No. 04-1254 (HHK)

PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR JOINT CASE MANAGEMENT CONFERENCE, ENTRY OF COORDINATION ORDER, AND REQUEST FOR EXPEDITION

Respondents' motion is an improper attempt to obtain from several other judges of this Court a slightly more limited version of the relief that Judge Kollar-Kotelly, in the sound exercise of her discretion, has already denied them. Moreover, the requested relief, if granted, would cause Petitioners severe prejudice by submerging, under the "common" questions posited by Respondents, the unique factual circumstances that bear directly on their legal rights. That prejudice would outweigh any marginal gain in efficiency. The motion should be denied.

BACKGROUND

On information and belief, Petitioners are Yemeni nationals who have been "detained" by Respondents at Guantánamo since they were seized in Pakistan, outside of the Afghan war zone, nearly three years ago. At the time of their seizure, Petitioners were living in Pakistan, where they were studying the Arabic language and religion, performing missionary work, seeking medical care, or seeking employment. Petitioners have never had ties to the

Taliban in Afghanistan; they were not bearing arms against the United States; and, as Yemenis, they are not nationals of a state engaged in active hostilities with the United States and therefore are not presumptive "enemy aliens." Petitioners filed their petition in this Court on August 4, 2004.

On July 23, 2004, Respondents submitted to Judge Kollar-Kotelly a motion under Fed. R. Civ. P. 42(a) to consolidate the eleven detainee habeas actions then pending before several judges of this Court, and any other such actions as might thereafter be filed. They submitted their motion to Judge Kollar-Kotelly because she was the judge to whom the earliest-numbered case had been assigned. *See* Local Civ. R. 40.5(d). On July 26, 2004, Judge Kollar-Kotelly denied the motion, finding that "each of these cases involves a unique factual scenario" and that "the interests of judicial economy [would not] be furthered by consolidation." Memorandum Opinion at 2, 4, *Rasul v. Bush*, No. 02-CV-0299 (attached as Exhibit A).

ARGUMENT

I. Respondents' Motion is an Improper Attempt to Obtain *En Banc* Review and Overruling of a Decision of a Single Judge of This Court.

Respondents seek to avoid the consequences of Local Civil Rule 40.5(d), which requires them to submit a Rule 42(a) motion to Judge Kollar-Kotelly, by asking her colleagues to grant under a different name a slightly more limited version of the relief they sought from her in their earlier Rule 42(a) motion. In effect, Respondents are asking Judge Kollar-Kotelly's colleagues to review—and overrule—her denial of their earlier motion. This Court long ago recognized, however, that allowing such intra-Court review "would inevitably lead to hopeless confusion and embarrassment in the administration of justice." *Hearst Radio, Inc. v. FCC*, 73 F. Supp. 308, 309 (D.D.C. 1947). The Court has made abundantly clear that it "does not believe it

is appropriate for a party to be able to seek review of a decision of one judge of this court by . . . that judge's co-equal colleagues." Comment to Local Civ. R. 40.5(c)(3) (explaining revision of local rules to disallow appeals of "related case" ruling).

Instead of asking that a *single* judge hear all of the detainee habeas cases, Respondents now ask that *several* judges of the Court decide huge chunks of the cases in a single stroke—through "coordinated disposition" of assertedly "common questions of law" and assertedly "common procedural questions." Resp. Motion at 2–3. In filing their earlier Rule 42(a) motion, however, Respondents presented Judge Kollar-Kotelly with an opportunity to grant exactly that relief. Respondents chose not to do so, asking *only* for consolidation. If Respondents, appreciating that half a loaf is better than none, now wish to make a more limited request under Rule 42(a), they should file a motion for reconsideration with Judge Kollar-Kotelly, not a motion for overruling addressed to this Court sitting *en banc*.

Respondents ask the Court to look beyond the Federal Rules to "broad principles of inherent authority as to case management issues." Resp. Motion at 11. This is a makeweight. Case management here is governed by Rule 42(a). If procedural relief is not appropriate under the Rule that governs such relief, a court may not sidestep the Rule in the name of exercising its "inherent authority" without rendering that Rule—and by extension all other Rules—pointless. *Cf. United States v. Hasting*, 461 U.S. 499, 505 (1983) ("in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules *not* specifically required by the Constitution or the Congress") (emphasis added). The "broad principles" that Respondents invoke are not a substitute for Rule 42(a), and under Local Civil Rule 40.5(d) the place for Respondents to invoke Rule 42(a) is before Judge Kollar-Kotelly.

II. Institutional Considerations Aside, the Requested "Coordination" is Not Merited and Would Be Highly Prejudicial to Petitioners.

In deciding whether to grant Rule 42(a) relief, a court must weigh "considerations of convenience and economy against considerations of confusion and prejudice." *Chang v. United States*, 217 F.R.D. 262, 265 (D.D.C. 2003). The prejudice that Petitioners will suffer from the Rule 42(a) action requested here outweighs any marginal benefit to judicial economy.

A. The Government's "Common" Legal Questions are Not Susceptible to Common Answers.

Among other things, Respondents assert that a common "threshold" legal question is "whether the detainees, who were not captured in the United States or its territories and are not detained there, are protected by the Due Process Clause of the Fifth Amendment, and by other provisions of the Constitution." Resp. Motion at 2. Respondents' assertion that this issue is "common" to all of the detainees presupposes that all of the detainees stand on the same legal footing, and that the place and circumstances of their capture have no bearing on the Constitutional rights they may claim.

At least since the *Insular Cases*, however, the Supreme Court has engaged in contextual analysis to determine whether—and to what extent—the Constitution protects non-citizens located outside the geographic bounds of the United States. As Justice Harlan, analyzing the *Insular Cases*, explained in his concurring opinion in *Reid v. Covert*, "the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the *particular* circumstances of a *particular* case." 354 U.S. 1, 75 (1957) (concurring opinion) (emphasis added). Justice Kennedy made a similar observation more recently in his concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In that case the Court held that Fourth

Amendment protections were not available to a Mexican national whose home was searched in Mexico. Writing separately, Justice Kennedy emphasized that the majority's conclusion about *which* Constitutional rights were available to *this* defendant had required the Court to analyze "the particular circumstances of a particular case." *Id.* at 278 (1990) (concurring opinion) (quoting Justice Harlan).

The status of the Guantánamo detainees' Constitutional rights may well depend on such "contextual" analysis of facts unique to individual detainees or, possibly, groups of detainees. In important ways Petitioners here are not similarly situated to other detainees who have habeas petitions pending in this Court. As noted earlier, on information and belief, Petitioners are Yemeni nationals who were present in Pakistan either to study the Arabic language and religion, to perform missionary work, to seek medical care, or to seek employment; never had ties to the Taliban in Afghanistan; did not bear arms against the United States; were taken into custody in Pakistan, outside of the Afghan war zone; and are not nationals of a state engaged in active hostilities with the United States. All of these idiosyncratic facts may bear on the Constitutional rights they are entitled to claim.

To take just one example, Petitioners stand on a different legal footing than some of the other Guantánamo detainees because Petitioners are not presumptive "alien enemies." In *Johnson v. Eisentrager*, the Supreme Court held that, at least in certain circumstances, the protections of the Constitution may be unavailable to captured individuals who are citizens of a state engaged in hostilities with the United States. As the Court explained, we may *presume* that such individuals are our enemies because "'every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country.'" 339 U.S. 763, 772–73 (1950) (citations omitted). The citizenship of the petitioners in *Eisentrager*

was thus a determinative factor in the Court's narrow holding—that the Constitution "does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." *Id.* at 785 (emphasis added).

Whether or not this holding of *Eisentrager* should be deemed applicable to *any* of the Guantánamo detainees need not be decided on the instant motion. The holding is relevant, however, because it demonstrates that one of the Government's "threshold" questions—whether detainees captured outside of the territorial jurisdiction of the United States are entitled to the protections of the Constitution—is not susceptible of generic analysis in a factual vacuum. Consolidation of argument and briefing for all detainees would be highly prejudicial because it would inevitably submerge the crucial legal differences that arise from the unique factual situations presented by Petitioners and other detainees. No doubt the petititioners in *Boumediene v. Bush*, No. 04-1166 (Algerians captured in Bosnia), *El-Banna v. Bush*, 04-1164 (Iraqi, Palestinian and Zambian residents of the United Kingdom captured in Gambia), and *Khadr v. Bush*, 04-1136 (Canadian captured in Afghanistan), entertain similar concerns.

B. Respondents' "Common" Questions Do Not Predominate.

Even if any factual or legal question arising from the multiple petitions could properly be viewed as "common," Respondents have failed to demonstrate that those questions predominate and thus merit consolidated or coordinated treatment of these cases. Although there is no explicit "predominance" requirement in Rule 42(a), as there is in Fed. R. Civ. P. 23(b)(3), courts have read such a requirement onto Rule 42(a) "because it is only when common issues are central that substantial economies of scale can be gained through consolidation." Charles Silver, *Comparing Class Actions and Consolidations* (1991), 10 Rev. Litig. 495, 502 & n.26 (citing

cases). Courts routinely invoke predominance when deciding whether consolidation is appropriate. *See, e.g., In re Consol. Parlodel Litig.*, 182 F.R.D. 441 (D.N.J. 1998) (denying consolidation because "it is clear that individual issues in these cases will predominate"); *Close v. Am. Honda Motor Co.*, 1994 WL 761957, at *3 (D.N.H. 1994) ("On the basis of the record before it, the court finds that the plaintiffs have not met their burden of showing that a Rule 42(a) consolidation is appropriate here . . . [b]ecause individual issues in the civil actions predominate over common issues . . . ."); *Scardino v. Amalgamated Bank*, 1994 WL 408180, at *2 (E.D. Pa. 1994) ("Although there are common questions of law or fact in both actions . . . these questions are not sufficiently predominant in this action to warrant consolidation."); *Henderson v. Nat. R.R. Passenger Corp.*, 118 F.R.D. 440, 441 (N.D. Ill. 1987) ("Although certain common issues of fact may exist in both actions, the variety of individual issues predominate."). No common issues of fact or law "predominate" in these habeas cases.

CONCLUSION

Respondents' request—that the several judges of this Court grant the same Rule 42(a) relief that was and is available from the judge to whom Local Civil Rule 40.5(d) obliges the request be submitted—is improper. Moreover, the prejudice to Petitioners that would result from the requested "coordination" outweighs any marginal efficiency that such "coordination" might achieve. Accordingly, the motion should be denied.

Dated: Washington, DC
August 16, 2004

Respectfully submitted,

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