IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE; ABASSIA BOUADJMI, as Next Friend of Lakhdar Boumediene; MOHAMMED NECHLA, BADRA BAOUCHE, as Next Friend of Mohammed Nechla, *Petitioners*, — vs. — GEORGE WALKER BUSH, President of the United States of America; DONALD RUMSFELD, Secretary of the Defense; GENERAL JAY HOOD, Commander, Joint Task Force; COLONEL NELSON J. CANNON, Commander, Camp Delta; *in their individual and official capacities,* *Respondents*.	:	No. 04-1166 (RJL)

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

The government's motion to "coordinate" this *habeas* petition with nine other cases – which involve different detainees held at Guantanamo Bay, Cuba, seized in different locales, in circumstances materially different than those present in this case a – is a transparent attempt to re-litigate a consolidation motion that the government has already argued and lost before Judge Kollar-Kotelly. This Court should deny the motion for this reason, and for the same reasons that Judge Kollar-Kotelly rejected the original consolidation motion.

On July 23, 2004 the government moved to consolidate all *habeas* cases brought in this District by Guantanamo detainees before Judge Kollar-Kotelly, who presides over the first such case by a detainee, and who, therefore, is the Judge designated under the Local Rules to hear

motions for consolidation.[1] LCvR 40.5(d). The Court denied the government's motion, finding "that each of these [*habeas* cases] involves a unique factual scenario" such that "consolidation would be improper." *Rasul v. Bush,* Civ. No. 02-299 and *Al Odah* v. *United States of America*, Civ. No. 2-828, Memorandum and Order (July 26, 2004) at 2, attached hereto as Exhibit A.

Dissatisfied with Judge Kollar-Kotelly's decision, and apparently with the customary reconsideration procedures used in this District, the government now seeks to re-litigate Judge Kollar-Kotelly's determination by moving to "coordinate" (rather than "consolidate") twelve *habeas* cases pending in front of eight judges, and thus in essence to litigate by judicial committee roughly a dozen issues that the government erroneously characterizes as "threshold" and "common" to all the cases. *See* Resp. Br. at 11-12. But the government offers no good reason for this attempted end-run around Judge Kollar-Kotelly's July 26 Order, and there is none. To begin with, though the government styles its motion as one for "coordination" rather than "consolidation," this is a distinction without a difference. The government's motion for "coordination" offers – in some cases verbatim – the same claims about the supposed efficiencies of treating the various detainees cases together that were previously rejected by Judge Kollar-Kotelly. For that reason alone it should be denied.

Moreover, Judge Kollar-Kotelly's reasons for denying the consolidation motion in the first place were sound, and resonate with particular force in this case. These Petitioners do not make universal claims on behalf of all detainees. They challenge the government's right to detain them, *and them alone* – five Bosnian citizens and one Bosnian resident illegally handed over to United States military personnel by Bosnian authorities while in their own country, where they were performing charity work, far from any battlefield, and remote from any combat.

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[1] Pending before Judge Kollar-Kotelly are *Rasul v. Bush*, No. 02-CV-0299; *Al-ddah v. United States of America*, No. 02-CV-0828; and *Habib v. Bush*, No. 02-CV-1130.

The unique circumstances of these detainees are likely to weigh heavily in determining whether their detention is illegal, so the supposed efficiencies from coordination are minimal, if they exist at all. In contrast, after more than two years and one-half years in extremely harsh confinement in Cuba, the prejudice to the Petitioners from the delay in these proceedings that will inevitably flow from the unnecessarily complex "coordination" – among twelve different cases, more than a dozen different counsel, and eight different judges – is unacceptable. And, to the extent some limited cooperation among counsel in these cases makes sense, it can be dealt with as needed. The government's motion should be denied.

BACKGROUND

Petitioners, acting through next friends, are five citizens and one permanent resident of Bosnia and Herzegovina ("Bosnia"). Each Petitioner was apprehended by Bosnian civilian law enforcement authorities in October 2001 at the request of the United States government, but then ordered released in January 2002 by the Bosnian Supreme Court. *See generally, Boudellaa v. Bosnia and Herzegovina*, Nos. CH/02/8679; CH/02/8689; CH/02/8690; CH/02/8691, H.R. Chamber for Bosnia and Herzegovina (Oct. 11, 2002), attached to the Petition (July 8, 2004) as Exhibit C. *See* Decision and Order of the Supreme Court of the Federation of Bosnia and Herzegovina, No. Ki-1001/01 (Sarajevo, Jan. 17 2002) (J. Eterovic), attached hereto as Exhibit B.

Notwithstanding that decision by the Bosnian civilian courts, the U.S. military, with the unlawful aid of certain Bosnian officials, abducted Petitioners and immediately flew them to Guantanamo as soon as they were released by the Bosnian courts. Since that time, Petitioners have not had access to counsel or the benefit of any judicial process that could possibly justify their unlawful seizure and detention – especially in light of the Bosnian Supreme Court's determination that no evidence existed that could justify holding them more than 90 days. In

addition, while press reports indicate that the general conditions at Guantanamo are extraordinarily harsh,[2] the mistreatment of Petitioners appears to be uniquely awful: three detainees have indicated in eye-witness statements that the Petitioners were "treated particularly badly."

> They [the Bosnians] were moved every two hours. They were kept naked in their cells. They were taken to interrogation for hours on end. They were short shackled for sometimes days on end. They were deprived of sleep. They never got letters, nor books, nor reading materials . . . . They told us that the interrogators said if they didn't cooperate that they could ensure that something would happen to their families in Algeria and Bosnia.

See Composite Statement : Detention in Afghanistan and Guantanamo Bay by Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed at ¶ 300 (July 26 2004), *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.

On July 8, 2004, following the Supreme Court's decision in *United States v. Rasul,* 124 S.Ct. 2686 (2004), Petitioners filed *habeas* petitions in this Court. At least eleven other *habeas* petitions are pending in this District before seven other judges on behalf of different detainees, represented by different counsel, seized in different circumstances. These include, among others, petitions by French citizens apparently arrested in Pakistan (*Khadr v. Bush*, No. 04CV1136), a fifteen year-old Canadian seized in Afghanistan (*id.)*, Iraqi and Palestinian citizens (both British permanent residents) seized in the Gambia while developing a peanut oil processing plant (*El-Banna v. Bush,*04CV1144), a dual citizen of the United Kingdom and Zambia seized in Zambia after a militant in Afghanistan was found with his lost passport (*Id.)*, a UK citizen present in

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[2] According to published reports, most detainees have been held in seven-by-eight foot cells with wire mesh fronts with only thirty minutes of exercise, in leg irons, per week. They are interrogated for up to 16 hours per day. No fewer than thirty-two detainees had attempted suicide as of the end of September, 2003. *See generally* Jeffery Toobin, *Inside the Wire,* The New Yorker, Feb. 8, 2004, at 36; David Rose, *Operation Take Away My Freedom*, Vanity Fair, Jan. 2004.

Afghanistan in September 2001 and later arrested in Pakistan (*Begg v. Bush*, 04CV1137), a UK citizen seized in Afghanistan (*Id.)*, and a Turkish citizen and German resident arrested on a trip to Pakistan (*Kurnaz v. Bush*, 04CV1135).

On August 4, 2004 the government filed the instant Motion for Joint Case Management Conference, Entry of Coordination Order, And Request For Expedition. The motion, brought before eight judges currently hearing *habeas* petitions by Guantanamo detainees, calls for the judges in these cases collectively to address a number of issues that the government asserts are or may later become "common legal questions that would plainly benefit from coordinated consideration and resolution." Resp. Br. at 11. The government further identifies other "common procedural questions" that it claims "must be addressed at the outset of these proceedings." Resp. Br. at 12. The motion, however, does not identify (1) which issues require coordinated briefing schedules, (2) which issues, if any, require coordinated decision-making and, most importantly, (3) which of these issues, if any, the government has not been able to resolve simply by speaking to counsel for various detainees. Instead, the motion is entirely vague as to what issues now demand coordinated treatment or how the eight judges would collectively address theses varying issues, urging only "some form of coordinated scheduling and consideration of these issues, including where appropriate, a joint hearing." Resp. Br. at 13.

ARGUMENT

I. The Government Should Not Be Permitted To Relitigate A Motion It Already Lost Before Judge Kollar-Kotelly

The issue the government raises – whether the detainee cases share enough in common to be susceptible to joint proceedings – has already been litigated, and decided. In its original Motion for Consolidation, the government proposed a bifurcated process in which the Court would first consider "a number of common questions of law and fact" (Respondents Motion to Consolidate Br. at 8), and then potential deconsolidation in the event the cases "reach a stage that

might call for consideration of the circumstances of individual detainees or their separate claims" (*Id.* at 11). Now, in language lifted (in some cases verbatim) from that rejected motion, the government again proposes a bifurcated process in which the Court first addresses "common" legal questions in a consolidated fashion and then provides whatever "individualized adjudication" that may be required (Resp. Br. at 3) – simply ignoring the fact that Judge Kollar-Kotelly has already found that the legal issues which the government referred to in both motions as "common" are *not* susceptible to adjudication *en masse* because "the different circumstances of each Petitioner's capture and the individualized reasons offered for that Petitioner's confinement will require individualized adjudication." Ex. A at 3-4.

The government is proceeding in the wrong manner in effectively seeking to relitigate commonalities (or lack thereof) amongst Guantanamo detainee cases. In this District, the consolidation determination is vested solely in the judge with the earliest-assigned case that is sought to be consolidated. *See* LCvR 40.5(d) ("Motions to consolidate cases assigned to different judges of this court shall be heard and determined by the judge to whom the earlier-numbered case is assigned."). Judge Kollar-Kotelly's ruling on consolidation is committed to the "broad discretion of the trial court." *Stewart v. O'Neill*, 225 F.Supp.2d 16, 20 (D.D.C.2002). "The Court 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 three of the judge's co-equal colleagues." Comment to LCvR. 40.5(c)(3) (addressing assignment of related cases). Parties dissatisfied with consolidation determination should therefore seek reconsideration, review in the DC Circuit, or move before the Chief Judge under his authority "take such other administrative actions, after consultation with appropriate committees of the Court, as in his/her judgment are necessary to assure the just, speedy and inexpensive determination of cases, and are not inconsistent with these Rules." LCvR 40.7(h).

The fact that the government's latest motion is styled as one for "coordination" rather than "consolidation" does not alter the reality that the government is now seeking an impermissible end-run around Judge Kollar-Kotelly's findings. Nor does the fact that the present motion is brought under the court's "inherent authority" and not just Federal Rule of Civil Procedure 42(a).[3] While district courts unquestionably enjoy inherent authority to manage their dockets, the Local Rules of this District, enacted pursuant to Fed. R. Civ. Pro. 83(a), set out both this District's processes through which consolidation motions are addressed and the powers of the Chief Judge to insure the determination of cases is handled in a manner that is just and efficient. *See also* 28 U.S.C. § 137 ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall . . . divide the business and assign the cases so far as such rules and orders do not otherwise preclude."). There is no reason to depart from these well-established procedures here. However the government styles its motion, it remains an obvious effort to relitigate – in front of eight different district court judges – a judgment that Judge Kollar-Kotelly reached regarding the necessity for individual determinations when a similar motion was properly made to her alone. For this reason by itself, the motion should be rejected.

II. In Any Event, "Coordination" Of These Disparate Cases Is Inappropriate

Even if the government's instant motion were to be heard by this Court, it should still be denied for the same reasons given by Judge Kollar-Kotelly when she denied the government's original Motion to Consolidate. In that motion, as in the present one, the government pointed to various legal issues common to multiple detainees. The Court, however, found that while "each

[3] Notably though, this motion is also governed by Rule 42(a), which provides not just for complete consolidation but also more limited consolidation such as a "joint hearing or trial of any or all the matters in issue in the actions" or coordination of issues through the execution of "such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Petitioner may challenge his detention" using "similar legal arguments" and "press[ing] for similar relief," the "analysis of the propriety of that detention will require unique and fact-specific analysis." Exhibit A at 4. The Court further recognized that detainees in the various cases were not represented by a single attorney pursing a single strategy, "which further distinguishes the cases from one another and weakens Respondents' argument for consolidation." *Id* at 5.[4]

Judge Kollar-Kotelly's reasoning remains valid. Unsurprisingly, as the government points out in detail, most claims for relief are asserted by more than one detainee. But that hardly establishes that the various legal issues raised by detainees are therefore subject to common resolutions. Tellingly, the "common" issues the government offers as examples include such case-specific questions as "whether the detention, *as described in the pleadings*, violates the Constitution and laws cited in the petitions" and "whether *based on the factual allegations in the petitions*, the detainees may challenge their detention under various treatises and conventions." Resp. Br. at 11 (emphasis added). In fact, even the issue of "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" is not the "common" "threshold" question that the government claims it is. (Resp. Br. at 2). 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.[5] Thus, even if certain Constitutional rights are unavailable to citizens of nations at war

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[4] Indeed, the nine petitions which the government seeks to consolidate have been brought by more than a dozen separate law firms or attorneys.

[5] *See Reid v. Covert*, 354 U.S. 1, 75 (1957) ("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*

with the United States, it does not follow that such rights are unavailable to citizens of countries not at war with the United States, not seized in combat, and not found on any battlefield. *See Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (limiting rights of "enemy alien engaged in the hostile service of a government at war with the United States."). Moreover, the Supreme Court has made clear in *Hamdi* that the extent of due process rights afforded to alleged enemy combatants can be derived only through a delicate balance, one that may well vary among prisoners. *See Hamdi*, 124 S.Ct. at 2644-48.

What the government ignores is that counsel for Petitioners and, presumably independent counsel representing other detainees, will make fact-specific arguments about the circumstances of confinement and the procedures available to challenge it *as applied to their own clients and in light of their unique factual circumstances*. For instance, in *Hamdi*, the Supreme Court found that the Executive had authority to detain those, like Hamdi, who had been captured on the battlefield in Afghanistan pursuant to a Congressional resolution authorizing the use force against those who "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." *Hamdi,* 124 S.Ct. at 2639, *citing* Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"). Petitioners here, however, present unique factual issues as to whether the Executive has statutory or Constitutional authority to detain them. Unlike Hamdi and many other Guantanamo detainees, Petitioners:

- were not captured in or even near Afghanistan;
- were not captured in any country where the United States was engaged in offensive military operations;
- were not captured in combat of any kind, or even near a battlefield;

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case.") (concurring opinion). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (noting that Constitutional rights of non-citizens must be determined based on "the particular circumstances of a particular case." *Id.* at 278 (1990) (concurring opinion).

- were not armed;
- were arrested by the local authorities of a sovereign country (Bosnia) on criminal charges under the laws of that country;
- were processed through a civilian court of a sovereign country which was not at war with the United States; and
- were ordered *released* by that sovereign country's civilian judicial authorities for lack of evidence after detention and investigation; and
- were not released but were instead unlawfully seized by certain officials who handed them over to the United States military in that sovereign country based solely on a diplomatic note and without the benefit of extradition proceedings.

Petitioners will submit that in light of these unique facts and circumstances there is no valid authority for their military seizure, much less for their continued detention at Guantanamo Bay.[6] Nothing would be served, therefore, in formally coordinating this case with other, different *habeas* cases pending in this district, involving other detainees, captured in different circumstances, and bringing their own unique claims.

And much could be lost from the delay that would inevitably follow from a "coordinated" proceeding in which different issues raised by more than a dozen law firms pursuing as many cases are considered by eight different judges. The Supreme Court has stated that *habeas* petitions should "provide a swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia,* 372 U.S. 391, 400 (1963), overruled on other grounds. Rule 42(a) too states that joint proceedings should be implemented where they would *avoid* – not cause – delay. *See* also *City of St. Louis v. Department of Transp.,* 936 F.2d 1528 (8th Cir. 1991). (District court properly denied Rule 42(a) motion where grant would cause delay); S*ervants of*

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[6] Neither the AUMF nor any other statutes, such as those authorizing military trial or court-martial of spies (10 U.S.C. § 836), nor those authorizing detention and trial by military commissions "with respect to offenses that may be tried by those bodies pursuant to statute or law of war" (10 U.S.C. § 821) have any application to the detentions of civilians in the circumstances alleged here. Nor does the Constitution authorize the Executive to use its authority as commander in chief to seize and indefinitely detain as "enemy combatants" those, like Petitioners, who are found not on a battlefield but in a sovereign country not party to any conflict with the United States.

Paraclete v. Great American Ins. Co., 866 F.Supp. 1560 (denying consolidation in part because of risk of delay) (D.C.N.M. 1994); *Natural Resources Defense Counsel v. Hughes*, 454 F. Supp. 148 (D.D.C. 1978) (denying motion to consolidate where "prejudicial delay" outweighed any advantages from consolidation); *Bascom Launder Corp v. Telecoin Corp,* 15 F.R.D. 277 (S.D.N.Y. 1953) ("[A] consolidation of actions may not be granted where it may result in prejudice to one or more of the parties."). Where, as here, the Petitioners are currently subject to the undeniably harsh conditions of confinement in Guantanamo Bay, delay would be that much more unjust.

III. The Court Has Other Means Of Addressing Any Legal Issues Common Among Detainees

Even assuming that the Court has some need to address issues common to multiple detainees in tandem, that need can be satisfied without the proposed and ill-defined Joint Case Management Conference and Coordination Order.

First, many procedural coordination issues can be resolved simply, without burdening the Court, through cooperative efforts between the government and counsel for various detainees. For example, counsel for various detainees and the government have already cooperated by establishing a standard procedure for security clearance. Such informal coordination can address procedural issues referenced in the government's brief without judicial intervention.

Second, should the government wish to move with respect to what it claims are "common" and "threshold" issues that relate to multiple detainees, it can file an identical motion before those judges hearing those issues and, for the purpose of that motion, propose a joint schedule and/or hearing. Similarly, the government can make the same request for combined hearing in opposing particular motions, as it plainly could have but did not when opposing TRO requests by multiple detainees. Communication between counsel may also address such scheduling issues in a way that minimizes the need for judicial intervention.

Finally, if and when an important issues arises that is truly susceptible to common treatment and that cannot be resolved cooperatively by counsel, then the merits of judicial coordination can be assessed in that context. At the present, though, the government has moved for a process so vague that its proposed order states only that the eight judges should convene a joint conference to "coordinate" matters, without further specifics as to how they are to do so or what is to be addressed. Simply gathering eight judges and dozens of lawyers together for an open-ended "coordination" session when the government cannot point to specific issues where coordination is needed immediately and where it has been unable to reach agreement with counsel is unproductive. It will hinder, not expedite, the resolution of Petitioners rights after over two and one-half years of unlawful detention.

CONCLUSION

For the reasons stated above, the government's Motion for Joint Case Management Conference, Entry of Coordination Order and Request for Expeditions should be denied.

Dated: New York, New York
August 16, 2004

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP

By: /s/ Douglas F. Curtis_____

Douglas F. Curtis (D.C. Bar No. 420270)
Peggy Kuo (Bar. No. 449271), *pro hac vice* pending
Robert W. Trenchard, *pro hac vice* pending
399 Park Avenue
New York, NY 10022
(212) 230-8800

Stephen H. Oleskey, *pro hac vice* pending
Robert C. Kirsch, *pro hac vice* pending
Melissa A. Hoffer, *pro hac vice* pending
60 State Street
Boston, MA 02109
(617) 526-6000
Lead Counsel for Petitioners

MARGULIES & RICHMAN, PLC
Joseph Margulies
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900
(612) 872-4967
Counsel for Petitioners

CENTER FOR CONSTITUTIONAL RIGHTS
Michael Ratner
Barbara Olshansky
Steven Macpherson Watt
666 Broadway, 7th Floor
New York, NY 10012
(212) 243-3805
Counsel for Petitioners

JUSTICE IN EXILE
Clive Stafford-Smith
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867
Counsel for Petitioners