IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED ABDULLAH TAHA MATTAN (ABDAL RAZAK ALI) (ISN 685),	
Petitioner,	
v.	**Civil Action No. 09-CV-0745 (RCL)**
BARACK H. OBAMA, President of the United States, *et al.*,	
Respondents.	

RESPONSE TO PETITIONER'S MOTION FOR
RECUSAL PURSUANT TO 28 U.S.C. SECTION 455(a)

On January 29, 2010, Petitioner moved pursuant to 28 U.S.C. Section 455(a) and the Code of Judicial Conduct, Canon 3, to recuse the presiding judge from the instant case. Specifically, Petitioner alleges that two remarks made by the Court in a recent interview have cast in doubt the judge's capacity to serve impartially here, and that, as a result, recusal is required. In filing his Motion for Recusal, however, Petitioner's counsel failed to meet and confer with Respondents' counsel pursuant to Local Rule 7(m). On that basis alone, his motion should be denied. Moreover, as discussed below, the facts of this matter present no grounds for recusal under 28 U.S.C. Section 455(a), or the applicable case law, and Petitioner's Motion for Recusal should be denied on the merits as well.

BACKGROUND

According to a published report cited by Petitioner, several Members of the Court recently gave interviews in which they expressed the view that the Guantanamo habeas cases "raise[ ] unprecedented questions about security and liberty that need to be addressed by

lawmakers." Petitioner Abdal Razak Ali's Motion for Recusal Pursuant to 28 U.S.C. 455(a) ("Recusal Motion"), Exh. 1("Judges Urge Congress to Act on Indefinite Terrorism Detentions," *ProPublica* (Jan. 24, 2010)) (also available at http://www.propublica.org/ feature/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122).

On January 29, 2010, without first seeking to meet and confer with Respondents' counsel, Petitioner filed his Recusal Motion. The motion is based in principal part on the following two statements in the *ProPublica* article which purport to quote remarks made by the presiding judge during the interview:

1. "If [Guantanamo Detainees] meet the definition of enemy combatant, then under our traditional legal authority they're held for the duration of hostilities," but "how long will the duration of hostilities here last? I don't know, and I don't think anybody on the face of the earth knows. So it makes it difficult for a legal judgment, and I think better suited for a legislative judgment about what other kinds of options might be available."

Recusal Motion, ¶ 4 (quoting January 24, 2010 *ProPublica* article) (Recusal Motion, Exh. 1, at 9).

2. "[T]he judges are struggling 'to adapt legal principles to a whole new sphere of human existence that we've never witnessed in history as far as I know' … 'How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?'"

Id. at ¶ 5 (citing to January 24, 2010 *ProPublica* article) (Recusal Mot. Exh. 1, at 10).

It does not appear from the *ProPublica* article, nor does Petitioner cite any other evidence, that the Court was discussing the above-captioned action or commenting on the merits of the case. Nevertheless, based solely upon the two statements quoted above, Petitioner maintains that recusal is required

> "because the actions of this Court in announcing in a public setting its discomfort in its ability to handle Petitioner's case and also to rule fairly after a hearing on all of the evidence, this Court's apparent request seeking the intervention of the Congress of the United States to codify the law as it relates to "indefinite

> detention," and because the statements attributed to this Court go not only to the merits of this pending case but to the possible disposition in this case, this Court's impartiality has been called into question . . . .

Id. at 7.

ARGUMENT

A. Petitioner's Motion for Recusal Should Be Denied for Failure to Meet and Confer as Required by Local Rule 7(m).

As a threshold matter, the Court should deny Petitioner's Motion for Recusal because Petitioner failed to comply with Local Rule 7(m), which required Petitioner's counsel to meet and confer with Respondents' counsel prior to the filing of his motion.

Local Rule 7(m) provides that "[b]efore filing any non-dispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement." Petitioner has disregarded this obligation in respect of his Motion for Recusal, having made no effort to contact Respondents' counsel to determine their position on this motion, or to explore possible limitation of the issues. Petitioner's conduct in this instance is especially unpardonable because the Court only recently reminded Petitioner's counsel of the duty to meet and confer when it denied Petitioner's Motion for Additional Discovery (dkt. no. 1316) for failing to comply with Local Rule 7(m). January 5, 2010 Order (dkt. no. 1353) at 2. Petitioner is without excuse for once again failing to comply with his meet and confer obligations. *See Alexander v. FBI,* 186 F.R.D. 197, 199 (D.D.C. 1999) (observing that counsel whom the Court had previously "been forced to remind" about the duty to meet and confer lacked substantial justification for continued failure observe the rule).

Because Petitioner has failed to comply with Local Rule 7(m), his Motion for Recusal should be denied.

B. Petitioner's Motion Advances No Valid Grounds for Recusal.

Petitioner's Motion for Recusal should also be denied on its merits. Petitioner has moved for recusal under 28 U.S.C. Section 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." [1] The standard for recusal "is an objective one" that involves ascertaining "whether a reasonable and informed observer would question the judge's impartiality.'" *Ramos v. U.S. Dep't of Justice*, 2010 WL 198521, *2 (D.D.C. Jan. 21, 2010) (Urbina, J.) (quoting *In re Brooks*, 383 F.3d 1036, 1043 (D.C. Cir. 2004) and *United States v. Microsof Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001)).

Under this standard, "[j]udges are presumed to be impartial," *Tripp v. Executive Office of the President,* 104 F. Supp. 2d 30, 34 (D.D.C. 2000), and the Supreme Court has made clear that a party seeking recusal under Section 455(a) thus bears a heavy burden:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994) (emphasis in original); *see also Ramos,* 2010 WL 198521 at *2 ("'Bias' and 'prejudice' as used in recusal statutes 'connotes a favorable or

[1] While Petitioner has also moved for recusal pursuant to the Code of Judicial Conduct Canon 3, the Code is a set of ethical precepts applicable to federal judges that are intended to be self-enforcing or to be applied in disciplinary proceedings. The Code does not otherwise provide an enforcement mechanism. Although the Canons of the Code are informative in discussing ethical questions, standing alone they cannot serve as the premise for disqualification. *United States v. Microsoft Corp.*, 253 F.3d 34, 111-14 (D.C. Cir. 2001).

unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undisclosed, or because it rests upon knowledge that the subject ought not possess…or because it is excessive in degree.'") (quoting *Liteky*, 510 U.S. at 550). Disqualification is not appropriate where there is no evidence that the judicial mind is closed to the merits of the case. *United States v. Haldeman*, 559 F.2d 31, 36 (D.C. Cir. 1976) (citing United *States v. Grinnell Corp*. 384 U.S. 563, 583 (1966)). Therefore, to succeed under 28 U.S.C. Section 455(a), the moving party must demonstrate either "the court's reliance on an 'extrajudicial source' that creates an appearance of partiality or, in rare cases, where no extrajudicial source is involved . . . a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Tripp*, 104 F.Supp.2d at 34 (citing *Liteky*, 510 U.S. at 555).

Petitioner cannot make either showing on the facts presented. First, Petitioner's argument rests on a mischaracterization of the Court's remarks as reported. The Court did not express "discomfort" regarding its ability "to handle Petitioner's case," or any other, or to "rule fairly" based "on all of the evidence." See Recusal Motion at 7. To the contrary, the Court made no statements whatsoever regarding "the merits of this pending case," or any other case pending before it. *See id.* Rather, in the statements with which Petitioner takes issue the Court merely observed as a general matter that, on the one hand, legislative consideration might well be given to options other than indefinite wartime detention of Guantanamo detainees, and on the other hand that the erroneous release of a detainee runs the risk that he will commit further acts of aggression against the United States.

Neither statement would objectively lead "a reasonable and informed observer" to question the "judge's impartiality." *Ramos*, 2010 WL 198521 at *2. Although the Court's comments were made in an extrajudicial setting, Petitioner does not allege (much less

demonstrate) that the Court's views, rulings, or disposition in this or any other habeas case are based upon extrajudicial sources of any kind, *Liteky*, 510 U.S. at 550, much less a source "that creates an appearance of partiality." *Tripp*, 104 F. Supp. 2d at 34. Thus, recusal on grounds of bias or partiality would only be required here if the Court's remarks exhibited "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Ramos,* 2010 WL 198521 at *2 (internal citations and quotations omitted). To the contrary, however, the Court's suggestion that Congress ought to consider legislative options other than indefinite wartime detention reflects an appreciation for the liberty interests advanced by the petitioners in these habeas cases, *see* Recusal Motion, Exh. 1, at 11-12, in addition to its grasp of the risk to national security if a detainee, once released, returns to the field of battle, *see id.,* at 10.

The Court of Appeals' decision in *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992), provides an instructive point of comparison. There it was not only plain that the trial judge held strong views about the defendant's culpability and veracity, but he conveyed those views during a public meeting held prior to the defendant's resentencing hearing. *Id.* at 262-65. Nevertheless, the Court of Appeals refused to entertain a motion for disqualification, explaining that "[a judge's] remarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based on his own observations during the performance of his judicial duties." *Id.* at 263. The Court of Appeals found no basis for recusal as the trial judge's views did not stem from an extrajudicial source, the matters discussed were in evidence at trial, and the court's pre-sentencing memorandum, with one exception, already incorporated everything that was discussed at the meeting. *Id*. at 263-264. Here, the Court has expressed no public views whatsoever about the Petitioner, much less the sort of "profound disapproval" that the Court of Appeals held was insufficient to compel recusal in *Barry*. *A fortiori*, recusal is uncalled for on

the facts presented in Petitioner's motion. *See also United States v. Jackson*, 627 F.2d 1198 (D.C. Cir. 1980) (holding that disqualification was not required where the judge's earlier statement that narcotics dealers similar to the defendant "should receive substantial sentences" indicated no personal bias against the defendant).

The First and Tenth Circuit decisions cited by Petitioner are factually distinct from the case at hand. In *United States v. Cooley*, the court found that disqualification was merited when, during active proceedings, the trial judge appeared on *Nightline* and stated that the defendants, having been enjoined from blocking access to abortion clinics, were "breaking the law" by continuing to surround the clinics. 1 F.3d 985, 990-95 (10th Cir. 1993). The Tenth Circuit found that the judge's decision to express such strong views about a pending case on national television "unavoidably created the appearance that the judge had become an active participant" in enforcing the law against the defendants, "rather than remaining as a detached observer." *Id.* at 995. *In re Boston's Children First,* 244 F.3d 164, 167-168, 171 (1st Cir. 2001), concerned a trial judge who wrote a letter to the local newspaper, and submitted to an interview, in order to respond to what she perceived to be inaccurate public statements about the case made by the plaintiffs' counsel. The First Circuit concluded that recusal was necessary because the trial judge may have created the impression that she was "preview[ing] a ruling on the merits" of an important and contentious issue in the case that was still being briefed. *Id*. at 170. In contrast to *Cooley* and *Boston's Children*, it cannot be argued here that the Court's general observations about the difficult issues of liberty and security presented by these habeas cases reflect a loss of detachment, or that they pre-ordain the Court's ruling in a particular case.[2]

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[2] As also reported in the media, on December 17, 2009, the presiding judge spoke at a breakfast meeting sponsored by the ABA Standing Committee on Law and National Security. It has come to Respondents' attention that a Department of Defense attorney then assigned to the

In short, the statements at issue here do not exhibit a deep-seated favoritism or antagonism that would make fair judgment impossible. They were not made in regard to this or any other particular habeas case. Rather, the Court directed its remarks to the unprecedented public policy questions implicated by the Guantanamo habeas litigation, and the role the political branches should play in addressing those issues.[3] Petitioner's attempt to portray the Court's statements as a public announcement that it cannot rule fairly on his claims is factually

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defense of this case was in attendance at the ABA breakfast meeting. Following the conclusion of the Court's formal remarks, she approached the presiding judge, introduced herself as a Defense Department attorney working on this case, and stated that she had what she believed to be a general, procedural question regarding discovery, but that the Court should let her know if her question was inappropriate for discussion. The attorney then asked whether the government's discovery obligations in the habeas cases generally require Respondents to search for and produce exculpatory evidence related to the contents of declarations provided by subject matter experts. The Court answered no. The attorney then asked if there is anything unique about the Court's July 2, 2009, order regarding the disclosure of exculpatory evidence that requires Respondents to search for exculpatory evidence when amending a factual return with an expert declaration. Again, the Court answered no. The attorney then mentioned an aspect of the interagency discussion that had taken place regarding this issue – the substance of which is privileged – and the Court responded that if there is any confusion regarding the issue, the parties should feel free to schedule a status conference to clarify the issue. At that point, the conversation between the Court and the Defense Department attorney concluded.

Respondents' decisions regarding exculpatory disclosures related to expert declarations in this case preceded this conversation, and the scope of such disclosures made by Respondents in this case were unaffected by the conversation. Moreover, Respondents informed Petitioner's counsel of the conversation by letter dated February 22, 2010. Inasmuch as the Court expressed its willingness to address the issue raised by the Defense Department attorney in a status conference involving all parties to the case, this conversation exhibits no degree of favoritism or antagonism that would support an order of recusal, *Liteky*, 510 U.S. at 555, whether considered alone, or in conjunction with the statements reported in *ProPublica*.

[3] Judges may engage in extrajudicial activities, including speaking, writing, and teaching. Code of Judicial Conduct, Cannon 4(a)(1); *see, also*, Commentary to Canon 4, Code of Judicial Conduct; Advisory Opinion No. 93, Committee on Codes of Conduct: Extrajudicial Activities Related to the Law, United States Judicial Conference, June, 2009, *available at:* http://www.uscourts.gov/guide/Vol02B-Ch02-OGC-Post-PublAdvisoryOps.pdf ("the Code encourages judges to involve themselves in extrajudicial law related activities … [a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to such endeavors.").

unsupportable, and to maintain on the basis of such statements that a reasonable and informed observer would question the Court's impartiality is all the more so. That being the case, no grounds are presented here that compel recusal.

CONCLUSION

For the reasons stated herein, Petitioner's Motion for Recusal should be denied.

Dated: February 22, 2010

Respectfully submitted,

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