IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIF el-MASHAD, et al. Petitioners, v. GEORGE W. BUSH, et al., Respondents.	)	Civil Action No. 1:05-CV-270 (JR)

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO FILE SUPPEMENTAL AFFIDAVIT OUT OF TIME

Respondents file this memorandum in opposition to petitioners' motion for leave to file a new affidavit with their reply brief in support of their motion for a preliminary injunction. Respondents respectfully request that petitioners' motion be denied and the affidavit be stricken from the record, for the reasons set forth below.

1. On February 4, 2005, petitioners filed this action and simultaneously filed a motion for preliminary injunction that would require the United States Government to keep petitioners confined at Guantanamo for the duration of this case and prevent their repatriation, transfer, or release, in anticipation of ultimately receiving an order from the Court directing the United States to set them free in a third country of their choice (dkt. no. 3). With their motion for a preliminary injunction, petitioners filed 10 exhibits.

2. On February 25, 2005, respondents filed an opposition to petitioners' motion for a preliminary injunction (dkt. no. 13).

3. On March 11, 2005, petitioners filed their reply brief in support of their motion for a preliminary injunction (dkt. no. 18). Simultaneously with their reply brief, they filed their

Motion for Leave to File Affidavit of Geoffrey Mock Pursuant to Local Rule 65.1 (dkt. no. 19).

4. The relevant sentence of Local Civil Rule 65.1 provides that, in connection with briefing on a motion for a preliminary injunction, "[s]upplemental affidavits either to the application or the opposition may be filed only with permission of the Court." The obvious policy behind this provision is to prevent movants from sandbagging their opponents by submitting evidence for the first time in their reply brief, after their opponents already have responded. In keeping with this policy, a party seeking leave to introduce a new affidavit at the reply brief stage should, at the least, be required to state good cause for why the affidavit could not have been obtained and submitted previously.

5. Petitioners do not state good cause explaining why they could not have previously obtained the supplemental affidavit and filed it with their motion like their other 10 exhibits, and no such cause exists.[1] That failure, in and of itself, is sufficient grounds to deny petitioners' motion. The affidavit is also improper and should be stricken for the separate and independent reasons set forth below.

6. The affidavit consists of speculative opinion testimony from a self-styled "expert"

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[1] Petitioners' suggestion that waiting until their reply brief was justified because the affidavit was prompted by unanticipated arguments made in respondents' opposition (see Petrs' Mot. for Leave at ¶ 3) is makeweight. Any reasonable reading of the Mock Affidavit shows that it does not go to any issues newly raised by respondents; rather, it is just an attempt to "pile on" the same kind of allegations that were made in petitioners' original motion papers and exhibits. Indeed, far from legitimately responding to respondents' opposition, the Mock Affidavit in fact skirts the arguments in respondents' opposition: Respondents argued that the circumstances and conditions in a prospective transferee country, and the reliability of a foreign sovereign government's confidential assurances to senior United States officials, are matters committed to the Executive and not an appropriate subject for testimony, evidentiary exploration, and judicial fact-finding. See also infra ¶¶ 8, 9. Yet, the Mock Affidavit, obliviously, addresses itself entirely to those very matters.

who candidly admits that "I have no personal knowledge of our involvement with the particular situation facing the Petitioners in the above-captioned matter," and has done nothing to acquaint himself with the circumstances of this case except read three pleadings. Mock Aff. ¶¶ 7, 8. Despite this tenuous basis, Mr. Mock makes sweeping assertions such as that "should Petitioners be returned to Egypt," even apparently, in Mr. Mock's view, if for release, "they are very likely to face denial of their due process rights, arbitrary detention, torture, and possible death." Mock Aff. ¶ 9 (emphasis added).[2] Mr. Mock also baldly declares under penalty of perjury that "the U.S. government has apparently colluded in such practices" although he does not profess to have any more personal knowledge about the historical incident he describes (or alleged U.S. "apparent[] collus[ion]" in it) than he has about petitioners' own circumstances. Mock Aff. ¶¶ 17-21.

7. Petitioners are not clear about whether the Mock Affidavit is intended as fact testimony or as expert testimony. Either way, it is improper and should be stricken. To the extent Mr. Mock is testifying as a fact witness, his admission that he has no personal knowledge of the circumstances at issue decimates any probity his testimony might have. Expert testimony is appropriate "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and then, only from "a witness qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The state of due process standards, conditions of confinement, and the fairness of the judicial

[2] Later in his affidavit, Mr. Mock drops the "very," asserting that in the event of any "return" (again, not limited to a return in which further detention is contemplated), petitioners are "likely to face torture and imprisonment without legal protection," but adds a dramatic prediction that "their legal rights [and] physical safety will be placed in grave jeopardy." Mock Aff. ¶ 23.

system in a foreign sovereign nation have not been shown to be a proper subject for "expert" testimony in this case, even if Mr. Mock could be duly qualified.[3] Indeed, the very notion of a trier of fact consulting expert testimony to determine such matters collides head-on with the Rule of Non-Inquiry, providing yet another independent reason for denying petitioners' motion.

8. As discussed in respondents' opposition, the separation of powers, as embodied in the Rule of Non-Inquiry, forbids judicial inquiry into "'the fairness of a requesting nation's justice system'" and "'the procedures or treatment which await a surrendered fugitive in the requesting country,'" because those matters are inextricably intertwined with foreign relations and are committed to the Executive Branch. United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)); see also Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990); see generally Respondents' Memorandum in Opposition to Petitioners' Motion for Preliminary Injunction ("PI Opp.") at 14-18. In three sentences of their reply brief that are devoid of citation of any authority, Petitioners brush off these constitutional considerations as "simply beside the point" because "[t]his is not merely an 'extradition' case." Reply Memorandum in Support of Petitioners' Motion for a Preliminary

[3] Further, the value of any "expert" testimony Mr. Mock could provide is dubious given that his "analysis" simply disregards and fails to take into account essential matters set forth in respondents' opposition papers that he claims to have read. Specifically, respondents made very clear that (1) petitioners will not be repatriated if the Executive Branch determines that it is more likely than not that they will be tortured if returned; (2) the United States Government would seek appropriate assurances from their country of nationality and would evaluate whether they are sufficient or whether additional assurances or other measures are necessary to conclude that they are not likely to be tortured; and (3) if specific concerns about the treatment after transfer could not be resolved satisfactorily, the United States would not transfer the individual. See Respondents' Memorandum in Opposition to Petitioners' Motion for Preliminary Injunction, at 20. The Mock Affidavit completely ignores that no transfer would go forward except in accordance with this policy and these extensive safeguards.

Injunction, at 14. However, by submitting the Mock Affidavit, petitioners have unwittingly provided a perfect demonstration of the separation-of-powers problem at the core of their motion for a preliminary injunction. Petitioners would have the Court disregard and cast aside the Executive Branch's elaborate inter-agency process for evaluating the propriety of transfers, which involves senior level officials and includes consideration of the detainee's particular circumstances, an informed and well-rounded analysis of the current situation on the ground in the prospective transferee country, the input of various State Department offices with relevant knowledge, personal interactions and negotiations with senior officials of the prospective transferee government, and consideration of assurances provided by the prospective transferee country, as well as their sufficiency and any mechanisms for verifying them. See PI Opp. at 2-6. In petitioners' view, the Court should supplant the Executive's role in this integral aspect of foreign policy, discard the elaborate, high-level, inter-agency process described above, and, instead, credit and adopt the subjective personal opinion of a private individual who has "no personal knowledge of or involvement with the particular situation facing the Petitioners" except for having read a few pleadings.

9. The type of evidentiary exploration typified by the Mock Affidavit offends the separation of powers and international comity. In Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990), "the district court proceeded to take testimony from both expert and fact witnesses and received extensive reports, affidavits, and other documentation concerning Israel's law enforcement procedures and its treatment of prisoners." Id. at 1067. The Second Circuit declared this inquiry improper because "[t]he interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the

fairness of its laws and the manner in which they are enforced." Id.; accord Holmes v. Laird, 459 F.2d 1211, 1225 (D.C. Cir. 1972). The Mock Affidavit defies this admonition by leading the Court down the path of exactly such an inquiry. Thus, it is improper and the Court should not grant petitioners leave to file it, particularly where, as here, petitioners have no credible excuse for waiting until their reply brief to file it.

WHEREFORE, respondents respectfully request that petitioners' motion for leave to file their supplemental affidavit out of time be denied.

Dated: March 15, 2005

Respectfully submitted,

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