IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH,** **President of the United States, *et al.*,** **Respondents.**	**Civil Action No. 04-CV-1166 (RJL)**

PETITIONERS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE PROFFERED BY RESPONDENTS TO DEMONSTRATE CHARACTER OR PROPENSITY

Petitioners hereby move *in limine* for an order excluding evidence proffered by Respondents as purported proof of Petitioners' character or propensity.

INTRODUCTION

The Government's case against most of the Petitioners has shrunk to an allegation that they were "planning" to travel to Afghanistan to fight U.S. forces. Recognizing the weakness of its evidence on that score, the Government attempts to engage in "profiling," arguing that, because Petitioners have engaged in certain types of conduct in the past, the Court should find that they were planning to engage in combat in the future (even absent direct or circumstantial evidence of such a plan).

The Government's evidence is inadmissible under the Federal Rules of Evidence, which are fully applicable to this habeas case. *See* Fed. R. Evid. 1101(b),(e).[1] First, the Government's evidence is improper character or propensity evidence under Rule 404(b), which forbids just the type of profiling that the Government is engaging in here. Second, even if the Government's evidence had any probative value, it would be outweighed by the significant waste of time that it poses. *See* Fed. R. Evid. 403. Finally, even if the evidence is admitted, it should be accorded no weight in the Court's analysis, because the Government's propensity evidence is equally consistent with entirely innocent conduct.

Accordingly, the Court should prohibit the Government from arguing that any of the following evidence demonstrates a propensity to travel to Afghanistan to fight U.S. troops: (1) evidence relating to Petitioners' history of traveling to countries where conflict was occurring or later erupted; (2) evidence that some of the Petitioners held more than one passport; (3) evidence of the customary use of Arabic nicknames; and (4) evidence of Petitioners' employment or affiliation with relief or charitable organizations.

---

[1] Fed. R. Evid. 1101(b) provides: "These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code." Fed. R. Evid. 1101(e) provides, in relevant part: "In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: . . . habeas corpus under sections 2241-2254 of title 28, United States Code."

ARGUMENT

I. The Evidence Should Be Excluded Under Rules 404(b) and 403 of the Federal Rules of Evidence.

The introduction of evidence in habeas hearings under 28 U.S.C. § 2241 is governed by the Federal Rules of Evidence, except where statute or rule provide otherwise. *See* Fed. R. Evid. 1101(e) (Federal Rules of Evidence apply to "habeas corpus under sections 2241-2254 of title 28, United States Code" unless matters of evidence are "provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority"); *see also id.* Rule 1101(b) (Federal Rules of Evidence "apply generally to civil actions and proceedings"). No statute or Supreme Court rule or holding alters the operation of Rules 404(b) or 403 of the Federal Rules of Evidence in this case. And while this Court has ruled that hearsay shall be generally admissible, it has never suggested that the Government was exempt from the standard federal requirement that parties refrain from offering improper evidence of character or propensity that is of doubtful probity and that wastes time.

The Respondents' Amended Factual Return includes extrinsic evidence of prior, non-wrongful acts of the Petitioners. Specifically, Respondents proffer evidence relating to: (1) Petitioners' history of traveling to what the Government calls "hot spots," a term that appears to mean any Muslim country where there was some unrest or conflict; (2) the fact that some Petitioners, many of whom are dual citizens, held multiple passports; (3) the use of commonplace Arabic nicknames by Petitioners; and (4) Petitioners' employment or affiliation with Islamic relief organizations. This evidence should be held inadmissible.

1. *Improper Evidence of Propensity Under Rule 404(b).* The Government's evidence of these prior activities, none of which is alleged to be wrongful, is not related to the Government's allegation that these men planned to travel to Afghanistan in October 2001, which

is the Government's principal basis for claiming that Petitioners are "enemy combatants."[2] It is thus of doubtful relevance under Fed. R. Evid. 401 (evidence is relevant only if it has a tendency to make more or less probable the existence of any fact that is of consequence to the determination of the action). The Government has never explained why its claim of planned travel to Afghanistan is made more probable through the facts that the Government seeks to prove—that Petitioners possessed more than one passport, worked for Islamic relief agencies, used commonplace Arabic nicknames, or had previously traveled to countries where conflict existed or later erupted (but notably, not conflict against the United States). Those facts may well be true—indeed, some of them are undisputed—but they do not make it more likely that Petitioners had conspired to leave their families, homes, and jobs in Bosnia to travel to a war zone to fight against the United States military in October 2001.

Instead, the Government's evidence of Petitioners' prior, non-wrongful acts is nothing more than character or propensity evidence. The only purpose for which the Government offers this evidence is its not-so-subtle attempt to convince the Court that Petitioners fit the Government's profile of *the type of person* who would plan to travel to Afghanistan in 2001 to engage in combat. Such propensity evidence "may not be received unless it is relevant to an actual issue in the case and unless its probative value on that issue is not outweighed by its unfair prejudice" to the opposing party. *United States v. Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979).

---

[2] For purposes of these hearings, this Court has defined "enemy combatant" as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Mem. Order at 3-4 (Oct. 27, 2008).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, *or acts* is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b) (emphasis added). Under this rule, evidence of prior acts cannot be admitted if the sole purpose of the evidence is to demonstrate the character of the person, or show that the person acted in conformity therewith. *United States v. Lawson*, 410 F.3d 735, 741 (D.C. Cir. 2005); *United States v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1510-11 (D.C. Cir. 1995) (concluding that district court abused its discretion in admitting character evidence in civil case); *Jankins v. TDC Management Corp., Inc.*, 21 F.3d 436, 440 (D.C. Cir. 1994) (excluding prior acts evidence in civil case under Rule 404(b)) . Only evidence that "is offered as proof of a matter other than the defendant's character or propensity" may be admitted under Rule 404(b). *United States v. Long*, 328 F.3d 655, 660 (D.C. Cir. 2003).

Rule 404(b) was promulgated because the use of "profiling" evidence to suggest guilt or culpability—which is exactly what the Government intends to do here—is by definition unfairly prejudicial. *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5239 (2008) ("'[P]rofile evidence' . . . should be held to be 'character evidence' when it is offered on the issue of guilt."). As Wigmore says, it "has long been accepted in our law . . . [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' . . . ." 1 Wigmore, Evidence § 192, at 642 (3d ed. 1940). The Government should make its case on whatever evidence (if any) it has that tends to show that Petitioners *actually did* plan to travel to Afghanistan in 2001.[3]

---

[3] Petitioners do not believe that a mere "plan" to travel to Afghanistan would make them "enemy combatants" under any reasonable application of the Court's definition, or any other definition.

It is not enough for the Government to show facts that it believes are *consistent with* such a plan—even though also consistent with the absence of a plan—and then invite the Court to draw an adverse inference based on Petitioners' profile. *See Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) (recognizing as improper the practice of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)"); *see also Carter v. District of Columbia*, 795 F.2d 116, 131 (D.C. Cir. 1986) (condemning the use of prior acts evidence in a civil case to "establish[] the bad character of the defendants and that the defendants were likely to have acted in the same way on the night in question" as being "precisely what Rule 404(b) proscribes"). Evidence of Petitioners' character or propensity is not admissible for the purpose of proving that Petitioners acted in conformity therewith on a particular occasion. *Neuren*, 43 F.3d at 1511.

To be sure, Rule 404(b) allows use of character or propensity evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Here, the only arguable grounds for admissibility are to show "plan" or "intent." But Petitioners' prior acts are unrelated to the alleged plan to travel to Afghanistan, and so remote in time, that the evidence cannot be properly admitted for either of these purposes. Here, "[t]here is no '*such concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations*.'" *Jankins*, 21 F.3d at 440 (quoting 1 Wigmore, Evidence § 304, at 202-03 (3d ed. 1940) (emphasis in Wigmore)). Indeed, the evidence of Petitioners' prior acts demonstrate only that Petitioners lived, worked, and traveled in Muslim countries in the years

leading up to their detention in 2001. Such an attenuated link does not give rise to evidence of a plan to travel to war-torn Afghanistan to fight in 2001.

The same lack of similarity, as well as remoteness in time, also preclude use of the evidence to show Petitioners' intent. Although the "degree of similarity that is necessary to make other crimes evidence admissible to prove intent depends very much on the circumstances of the case," 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5242 (2008), evidence of a prior act must meet a threshold level of similarity in order to be admissible to prove intent. *See, e.g.*, *Jankins*, 21 F.3d at 440-41 (excluding plaintiff's proffered evidence on fraud claim of subsequent disputes between defendant and other subcontractors where such disputes did not involve fraud); *United States v. Foskey*, 636 F.2d 517, 524 (D.C. Cir. 1980) (holding that district court erred in admitting as evidence of intent an unrelated crime committed two-and-one-half years before).

Petitioners' prior activities, which occurred many years before the relevant timeframe, are entirely unrelated to any purported plan to travel to Afghanistan in 2001. *See Jankins*, 21 F.3d at 441 (holding that similar events ranging from four months to two-and-one-half years after action in question was too remote); *see also United States v. Watson*, 894 F.2d 1345, 1349 (D.C. Cir. 1990) ("The temporal (as well as the logical) relationship between a defendant's later act and his earlier state of mind attenuates the relevance of such proof...."); *United States v. Jimenez*, 613 F.2d 1373, 1376 (5th Cir. 1980) (where cocaine possession followed the charged heroin transaction by a year, the lapse "depleted the extrinsic offense of any relevance which could have outweighed the peril of jury prejudice"). Petitioners' prior activities are thus too dissimilar and too remote in time to have any bearing on questions involving Petitioners' supposed plans or intent. *See Jankins*, 21 F.3d at 441 ("[W]hen one must, in order to find

similarity, define the character of the acts at such a high level of generality . . . and many of the events occur years after the conduct in dispute, we cannot find the conditions of admissibility under Rule 404(b) satisfied."). The only purpose for which the Government can plausibly offer the challenged evidence is to prove propensity, which is prohibited by Rule 404(b).

2. *Wastefulness Under Rule 403.* Even if the Court rules the evidence is not excludable *per se* under Rule 404(b), the Court should nonetheless exclude it under Rule 403 because any probative value "is substantially outweighed by the danger of . . . waste of time." Fed. R. Evid. 403; *see Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981) ("Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power . . . ."). The Rule 403 inquiry in each case involving Rule 404(b) evidence is case-specific; there is no *per se* rule. *Long*, 328 F.3d at 664 (citing *United States v. Crowder*, 141 F.3d 1202, 1210 (D.C. Cir. 2003)). The D.C. Circuit has "consistently stated that Rule 403 may bar evidence otherwise admissible under Rule 404(b)." *Bowie*, 232 F.3d at 931 (citing *United States v. Mathis*, 216 F.3d 18, 26 (D.C. Cir. 2000)).

As discussed above, the "profiling" evidence proffered by Government has no probative value on the question whether Petitioners are enemy combatants. *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5239 (2008) ("The basic reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question."). Evidence that some of the Petitioners have traveled to so-called "hot spots" in the past, carried multiple passports, used customary Arabic nicknames, or were employed or affiliated with Islamic relief organizations is unrelated to any alleged plan to travel to Afghanistan in 2001. The evidence is also remote in time from the events of October

2001: travel to so-called "hot spots" in the late 1980s or early 1990s for purposes unrelated to combat or terrorism cannot possibly raise a plausible inference of a willingness, let alone a "plan," to travel to Afghanistan in October 2001 to fight the United States. Nor is it uncommon or nefarious for people with dual citizenship to possess two passports. Such evidence of prior, innocent, and wholly unrelated activities does not make a determination of enemy combatancy more or less likely.

Admission of this evidence, however, will waste the time of the Court and the parties. The Court and the parties will spend hours, if not days, sifting through the Petitioners' travel documents and employment history. By the end of that process, the Court will be no closer to determining whether Petitioners were actually planning the specific travel the Government alleges, namely travel to Afghanistan in October 2001 to engage in combat against the United States. The Government's only plausible purpose for introducing this evidence is to argue that, because Petitioners traveled to troubled countries in the past, used Arabic nicknames, and have more than one travel document, Petitioners fit what the Government believes is the "profile" of an enemy combatant. Instead of dwelling on evidence of dubious relevance, the Court should focus its attention and resources on whatever evidence the Government has (if any) of an actual "plan," and whether that evidence shows that Petitioners were "part of or supporting Taliban or al Qaeda forces."

II. The Court Should Give No Weight To The Propensity Evidence If Admitted

If the Court admits the challenged propensity evidence proffered by Government, the Court should accord it no weight. Evidence that some of the Petitioners have traveled to so-called "hot spots," carried multiple passports, used customary Arabic nicknames, or were employed or otherwise affiliated with humanitarian organizations equally supports an inference

of Petitioners' innocence. The question of whether Petitioners were planning to travel to Afghanistan in 2001 cannot be resolved by reference to evidence of prior, non-wrongful activities of Petitioners, many of which occurred long before the relevant timeframe. Accordingly, the Court in its role as fact-finder should ignore the Government's proffered evidence in determining whether Petitioners meet the Court's definition of enemy combatant. Instead, the Court should focus on whatever evidence the Government offers of whether Petitioners actually had any such plan.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court enter an order excluding and precluding argument based on the evidence challenged herein, namely evidence concerning Petitioners' previous travel to countries where conflict existed or later erupted, possession of multiple passports, use of Arabic nicknames, or affiliation or employment with Islamic relief agencies.

Respectfully submitted,

/s/ Allyson J. Portney

Stephen H. Oleskey (*admitted pro hac vice*)
Robert C. Kirsch (*admitted pro hac vice*)
Mark C. Fleming (*admitted pro hac vice*)
Gregory P. Teran (*admitted pro hac vice*)
Allyson J. Portney (*admitted pro hac vice*)
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Seth P. Waxman (*admitted*)
Paul Wolfson *(admitted)*
Robert McKeehan (*admitted*)
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6800

November 3, 2008

Douglas F. Curtis *(admitted)*
Paul M. Winke *(admitted pro hac vice)*
Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

CERTIFICATE OF SERVICE

I, Allyson J. Portney, hereby certify that on November 3, 2008, I electronically filed and served the foregoing PETITIONERS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE PROFFERED BY RESPONDENTS TO DEMONSTRATE CHARACTER OR PROPENSITY.

/s/ Allyson Portney______________
Allyson Portney