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JUDICIAL PANEL ON
MULTIDISTRICT
LITIGATION

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE IRAQI/AFGHAN DETAINEE LITIGATION **MDL Docket No. 1686**

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RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER AND, IN THE ALTERNATIVE, SUGGESTION OF TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Pursuant to Rule 7.1(b) of the Rules of the Judicial Panel on Multidistrict Litigation, the United States and the Defendants in their official capacity hereby oppose Plaintiffs' Motion for Transfer Under 28 U.S.C. § 1407 and respond to the numbered paragraphs in Plaintiffs' motion as follows.[1]

[1] Undersigned counsel represents the United States in this matter and, accordingly, represents the Defendants in their official capacity. Although the United States is not a named defendant, Plaintiffs seek declaratory relief against the Defendants for conduct performed in the course of their federal duties. These claims are effectively against the United States, because any declaratory relief awarded would attach to the offices that the Defendants hold and not to them personally. *See McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (suit against a government officer "in his official capacity is the same as a suit against the entity in which the officer is an agent"); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("[T]he declaratory and injunctive relief [plaintiff] seeks is only available in an official capacity suit."). Undersigned counsel does not represent any of the Defendants in their individual capacity at this time, though

1. Defendants admit that Plaintiffs have alleged in their complaints (the "Scheduled Actions") that they are aliens who were detained in facilities in Afghanistan and Iraq in 2003 and 2004 and that they are challenging alleged policies governing the conditions of confinement for detainees in those countries. Defendants deny, however, that discovery will take place in the Scheduled Actions, if at all, anytime soon. Discovery will not occur because Defendants are entitled to submit motions to dismiss the Scheduled Actions based on the defenses of qualified and absolute immunity. Plaintiffs have asserted constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and international law claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Qualified immunity is an affirmative defense to a *Bivens* claim that, once raised in a motion to dismiss, precludes pre-trial proceedings until a final determination, by an appeals court if necessary, that the claim can survive the motion to dismiss. Likewise, absolute immunity is an affirmative defense to Plaintiffs' ATS claim that precludes discovery prior to a final ruling on the validity of the defense. The discovery issues that 28 U.S.C. § 1407 is designed to address are therefore irrelevant at this time.

2. Defendants deny that all of the Scheduled Actions had to be filed in the districts where they are pending because of personal jurisdiction requirements. Plaintiffs could have filed suit against Secretary of Defense Donald Rumsfeld in the Eastern District of Virginia and satisfied the requirements of personal jurisdiction. Federal officials are subject to suit wherever they commit the alleged acts giving rise to the claims against them. Thus, personal jurisdiction

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Plaintiffs have pleaded personal liability claims against all the Defendants and each of the Defendants is entitled to seek individual-capacity representation from the Department of Justice. *See* 28 C.F.R. § 50.15.

would have been proper in the Eastern District of Virginia, where Secretary Rumsfeld allegedly adopted the policies and practices that serve as the basis for Plaintiffs' claims against all four Defendants. Defendants are without knowledge to admit or deny that the remaining Defendants were sued in their "home districts" or that they could not have been sued elsewhere. Defendants admit that eight Plaintiffs have sued Defendant Secretary Donald Rumsfeld in the Northern District of Illinois, and that four Plaintiffs have sued the Army officer Defendants in the districts identified in paragraph two.

3. Defendants admit that the Scheduled Actions challenge alleged policies governing the conditions of confinement for detainees held in Afghanistan and Iraq. Defendants deny the remaining assertions in paragraph 3.

4. Defendants deny that the common factual questions presented by the Scheduled Actions are relevant at this early stage. No discovery will occur, if at all, until Defendants' motions to dismiss based on qualified and absolute immunity are resolved. At the present time, the questions of law common to all four Scheduled Actions predominate. Defendants admit that the Scheduled Actions challenge alleged policies governing the conditions of confinement for detainees held in Afghanistan and Iraq. Defendants deny that facts alleged in the suit against Secretary Donald Rumsfeld pertaining to the treatment of detainees in Afghanistan are necessarily common to the facts alleged in the three other Scheduled Actions against senior Army officers which pertain only to detainees held in Iraq.

5. Defendants deny that "extensive discovery" will occur in the Scheduled Actions. The affirmative defenses of qualified and absolute immunity, once raised in a motion to dismiss, preclude discovery until a final ruling on the motion. In the event that discovery takes place in

the future, Defendants deny that the Scheduled Actions will necessarily involve the same or similar documents and witnesses. Plaintiffs in the lawsuit against Secretary Rumsfeld challenge policies related to detainees in Afghanistan and Iraq, while the three other Scheduled Actions are against Army officers and pertain only to Iraq.

6. Defendants admit that the Scheduled Actions assert identical legal theories and causes of action. These commonalities confirm that Defendants' motions to dismiss will need to be resolved prior to reaching the issues of fact identified by Plaintiffs.

7. Defendants admit that no proceedings have occurred in the Scheduled Actions. Defendants deny that no prejudice or inconvenience will result from transfer and centralization of discovery proceedings. Service on only two Defendants has been confirmed and none of the Defendants has had time to retain counsel to represent them in their individual capacity. Thus, the Panel should delay ruling on Plaintiffs' transfer motion until all Defendants have been properly served and had a fair and reasonable opportunity to respond to Plaintiffs' motion.

8. Defendants deny that the FOIA case referenced in paragraph eight and captioned *American Civil Liberties Union v. Department of Defense*, No. 04 Civ. 4151 (S.D.N.Y.) (Hellerstein, J.), is sufficiently relevant to the Scheduled Actions to have any bearing on the matter presently before the Panel. In particular, Defendants deny the implication that the FOIA case represents the beginning of discovery in the Scheduled Actions. Defendants admit that a significant number of government documents have been produced in the FOIA case, but deny that the entire production in that case is relevant to the claims alleged in the Scheduled Actions. Rules governing the production of documents in response to a FOIA request are quite different from the Federal Rules of Civil Procedure that would govern the production of documents in the

Scheduled Actions. Moreover, because all pre-trial proceedings, including discovery, would be stayed in the Scheduled Actions pending resolution of Defendants' motions to dismiss, the federal agencies' production of documents in the FOIA case will occur on a schedule wholly distinct from that governing any discovery that may subsequently occur in the Scheduled Actions.

9. Defendants admit that the FOIA case has resulted in the production of documents by several federal agencies. This underscores, however, the difference between the FOIA case, which seeks documents from several federal agencies under the FOIA, and the Scheduled Actions, which seek damages from four individuals under *Bivens*.

10. Defendants admit that the legal standards governing FOIA exemption claims and discovery privilege claims are different. Defendants admit that the assertions regarding the rulings and proceedings in the FOIA case are fair and accurate but deny that the FOIA case has any bearing on this matter. Defendants also admit that, if discovery were to occur in the Scheduled Actions, it might be possible to use procedures for *in camera* review of classified documents. But this and all other issues relating to discovery are irrelevant unless the Scheduled Actions survive Defendants' immunity-based motions to dismiss.

11. Defendants deny that early transfer and centralization of pretrial proceedings in the Scheduled Actions would promote the convenience of the parties and witnesses or help ensure the just and efficient conduct of the Scheduled Actions. Defendants deny in particular that transfer to the Southern District of New York would convenience the parties and witnesses. As noted, service on only two Defendants has been confirmed and none of the Defendants has had time to retain counsel to represent them in their individual capacity. Thus, the preferences of

these individuals cannot be known at this time. But in any event, none of the Plaintiffs or Defendants resides or works in the Southern District of New York. Nor does the Southern District have any connection to the allegations in the Scheduled Actions. The allegations all pertain to actions taken at the Pentagon or overseas. Indeed, it reasonably appears that most of the non-party witnesses and documents relevant to the Scheduled Actions are located at the Pentagon in the Eastern District of Virginia. In contrast to the Southern District of New York, the Eastern District of Virginia has a substantial connection to the allegations in the Scheduled Actions and is more convenient for the parties.

12. Defendants admit that, if the Scheduled Actions proceed to discovery, they should be consolidated in one district. Such centralization should occur in a district that, unlike the Southern District of New York, bears some relationship to the allegations in the Scheduled Actions and is convenient to the parties and witnesses. The Eastern District of Virginia has a strong connection to the allegations in the Scheduled Actions and is convenient for the parties and witnesses.

WHEREFORE the United States and Defendants in their official capacity oppose Plaintiffs' motion to transfer the Scheduled Actions to the Southern District of New York and, in the alternative, suggest transfer to the Eastern District of Virginia if the Panel determines that transfer is appropriate.

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Respectfully submitted,

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