

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE:)	
)	
U.S. DEPARTMENT OF STATE FOIA)	Misc. No. 15-1188
LITIGATION REGARDING EMAILS)	
OF CERTAIN FORMER OFFICIALS)	
<hr style="width: 100%;"/>)	

**RESPONDENT JUDICIAL WATCH, INC.’S MOTION
FOR RULE 11 SANCTIONS**

Respondent Judicial Watch, Inc. (“Judicial Watch”), by counsel and pursuant to Rule 11 of the Federal Rules of Civil Procedure (“Rule 11”) respectfully requests that the U.S. Department of State (“State Department”) be sanctioned for filing a meritless action entirely unwarranted by existing law. As grounds therefor, Judicial Watch states as follows:

STATEMENT OF POINTS AND AUTHORITIES

1. Rule 11 sanctions may be imposed where a party files a pleading, motion or other paper with the court for an improper purpose, that is unwarranted by existing law, or that is lacking in evidentiary support. Fed. R. Civ. P. 11(b)(1)-(3). “[T]he district court is accorded wide discretion’ in determining whether sanctions are appropriate.” *Gomez v. Aragon*, 705 F. Supp. 2d 21, 23 n.2 (D.D.C. 2010) (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)). “Rule 11 sanctions are an extreme punishment for filing pleadings that frustrate judicial proceedings.” *Brown v. FBI*, 873 F. Supp. 2d 388, 408 (D.D.C. 2012) (quoting *Wasserman v. Rodacker*, 2007 U.S. Dist. LEXIS 51873 at *24 (D.D.C. July 18, 2007)). “The test [for sanctions] under Rule 11 is an objective one: that is, whether a reasonable inquiry would have revealed that there was no basis in law or fact for the asserted claim.” *Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 100 (D.D.C. 2007) (quoting *Reynolds v. U.S.*

Capitol Police Bd., 357 F. Supp. 2d 19, 23 (D.D.C. 2004)). Further, Rule 11 includes a “safe harbor provision” which requires that the motion must be first served on the non-movant to allow an opportunity to withdraw the challenged assertion. Fed. R. Civ. P. 11(c)(2). “This procedural rule must be satisfied before the Court considers the substantive aspects of plaintiff’s motion.” *Brown*, 873 F. Supp. 2d at 408.

2. On September 2, 2015, the State Department initiated this lawsuit, purportedly as a “miscellaneous action,” seeking to have the Chief Judge order as many as 17 District Judges to transfer more than 30 Freedom of Information Act (“FOIA”) lawsuits, including at least 16 lawsuits filed by Judicial Watch, to a “coordinating judge” at least for a period of time. *See* United States Department of State’s Motion for Designation of Coordinating Judge and Memorandum in Support at 15. Judicial Watch recognizes the extraordinary nature of Rule 11 relief, but respectfully submits that the State Department’s extraordinary lawsuit is one the rare cases that warrants such relief.

3. The State Department’s lawsuit suffers from numerous fatal flaws, not the least of which are the State Department’s failure to identify any basis for the Court’s subject matter jurisdiction or demonstrate why the relief the agency seeks is properly the subject of a miscellaneous action. The State Department also has failed to identify any basis for the Court to assert personal jurisdiction over respondents – the FOIA requestors who bought the more than 30 lawsuits in question. There plainly has been no service of process, and mere notice of an action is no substitute for proper service of process. *See, e.g., Omni Capital Int’l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *see also Ibiza Business Ltd. v. United States*, 2010 U.S. Dist. LEXIS 70903 (D.D.C. July 8, 2010) (Lamberth, J.) (denying motion for default judgment in miscellaneous action due to insufficiency of service of process). The State Department also

failed to join at least 17 indispensable parties, namely the district judges against whom they seek relief.

4. Most fatal of all, however, is the complete absence of any substantive legal basis for the State Department's claim. It is beyond peradventure that one district judge cannot order another district judge to take action in a case pending before that judge. *Klayman v. Kollar-Kotelly*, 2013 U.S. App. LEXIS 10148 (D.C. Cir. May 20, 2013), *reh'g denied* 2013 U.S. App. LEXIS 16769 (D.C. Cir. Aug. 12, 2013), *reh'g en banc denied* 2013 U.S. App. LEXIS 16770 (D.C. Cir. Aug. 12, 2013); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Jones v. Supreme Court of the United States*, 405 Fed. Appx. 508 (D.C. Cir. 2010) (per curium); *Prentice v. United States District Court*, 307 Fed. Appx. 460 (D.C. Cir. 2008) (per curium); *Adams v. United States District Court*, 2014 U.S. Dist. LEXIS 151044 (D.D.C. Oct. 23, 2014) (Berman Jackson, J.); *Mason v. Kahn* 2008 U.S. Dist. LEXIS 50258 at *1 (D.D.C. June 30, 2008). Not only does a district judge lack such power, but the Court lacks subject matter jurisdiction to consider a claim that it does. *Klayman*, 2013 U.S. App. LEXIS 10148 at *2.

5. In *Klayman*, the plaintiff filed an action seeking, among other relief, to have one district judge issue an injunction against another district judge. Then Assistant United States Attorney Rudolph Contreras – now Judge Contreras – argued to Judge Leon that he had no authority to issue an order to Judge Kollar-Kotelly: “This Court lacks jurisdiction to order a District Judge to take judicial action in cases pending before that judge.” Defendants’ Memorandum in Support of Motion to Dismiss at 6, *Klayman v. Kollar-Kotelly, et al.*, Case No. 11-1775 (RJL) (D.D.C. Dec. 5, 2011) (ECF No. 11). Judge Leon agreed. *Klayman v. Kollar-Kotelly*, 892 F. Supp.2d 261 (D.D.C. 2012). So did the appellate court, which summarily affirmed. *Klayman*, 2013 U.S. App. LEXIS 10148 at *1. The relief the State Department seeks

– that a district judge order as many as 17 other district judges to transfer more than 30 FOIA lawsuits to a single “coordinating judge” – is unwarranted by any existing law. Fed.R.Civ.P. 11(b)(2). Nor is it warranted by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. *Id.*

6. The Guantanamo Bay detainee cases heard by this Court following the United States Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008) are inapposite. Regarding those cases, the Court resolved by Executive Session to designate a single judge to coordinate and manage some 249 petitions for writs of habeas corpus filed by Guantanamo Bay detainees. *See* Order at 1-2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-422 (TFH) (D.D.C. July 2, 2008) (ECF No. 1); *see also* Resolution of the Executive Session, U.S. District Court for the District of Columbia (July 1, 2008), attached as Exhibit 1. The Court’s Executive Session resolution was an administrative act, not a judicial act. No district judge was ordered by another district judge to do anything. Two district judges “opted out” of the coordination process, a fact the State Department readily admits. *See* Motion at 10, n.7. The fact that two judges could “opt out” of the “coordination process” established by the Court for the Guantanamo Bay detainee litigation further confirms that the process was a consensual, voluntary process to which the participating judges agreed, not court-ordered relief.

7. Local Civil Rules 40.5(c) and 40.6(a), both of which the State Department cites, also do not provide a legal basis for the relief the State Department seeks. Both rules make clear that the assignment and transfer processes they establish are effectuated only with the consent of the judges involved. Again, no district judge is ordered by another district judge to do anything.

8. Before the State Department initiated its miscellaneous action on September 2, 2015, Judicial Watch asked it to identify the basis for its action. It could not do so. The State

Department's counsel wrote in an email earlier that same day, "There is no precise rule that provides for what we are seeking. Since we will be filing a notice with the motion attached in each case, all 17 judges and 13 plaintiffs will receive notice, and the Court will be able to respond as it sees fit." *See* Exhibit 2. Counsel continued, "We will, of course, follow directions from the Court if it turns out a miscellaneous action is inappropriate." *Id.* In short, the State Department knew its action had no basis in law – certainly none that it could identify – but nonetheless filed the action despite the time and expense Judicial Watch would be forced to incur as a result.

9. That time and expense has already been substantial and will only continue to increase. As a result of the State Department's initiation of its miscellaneous action, Judicial Watch has had to divert its scarce time and not-for-profit resources away from other matters so that they might be expended on the State Department's miscellaneous action. In addition, the State Department has filed (or declared its intention to file) motions to stay in each of the underlying FOIA lawsuits brought by Judicial Watch, pending the outcome of the agency's miscellaneous action. Obviously, responding to as many as 16 motions to stay will require (and already has required) the expenditure of substantial resources. One response is due September 9, 2015. *See* Minute Order, *Judicial Watch, Inc. v. U.S. Dep't of States*, Case No. 13-1363 (EGS) (D. District of Columbia) (Sep. 3, 2015). A hearing on the State Department's motion to stay in that particular matter has been set for September 16, 2015. Minute Order, *Judicial Watch, Inc. v. U.S. Dep't of States*, Case No. 13-1363 (EGS) (D. District of Columbia) (Sep. 4, 2015). None of these expenditures would have been necessary were it not for the State Department's clearly baseless miscellaneous action. The State Department should be required to make Judicial Watch whole by paying Judicial Watch reasonable attorney's fees and any associated costs.

10. A copy of this motion was served on counsel for the State Department, and all other counsel of record, at least 21 days before the motion was filed. As of the date of filing, the State Department has failed or refused to withdraw its baseless action.

WHEREFORE, Judicial Watch respectfully requests that Rule 11 sanctions be entered against the State Department and that Judicial Watch be awarded reasonable attorney's fees and costs sufficient to make it whole not only for the time and expense it was unnecessarily forced to incur in this matter, but also in the underlying FOIA lawsuits affected by the State Department's baseless action.

Dated: September 5, 2015

Respectfully submitted,

/s/ Paul J. Orfanedes

Paul J. Orfanedes

D.C. Bar No. 429716

JUDICIAL WATCH, INC.

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Counsel for Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2015 a true and correct copy of the foregoing RESPONDENT JUDICIAL WATCH, INC.'S MOTION FOR RULE 11 SANCTIONS was served on the following by email and by first class U.S. mail, postage prepaid:

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/s/ Paul J. Orfanedes

EXHIBIT 1

TO

RESPONDENT JUDICIAL WATCH, INC.'S MOTION

FOR RULE 11 SANCTIONS

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RESOLUTION OF THE EXECUTIVE SESSION

July 1, 2008

WHEREAS, some 249 cases pertaining to more than 643 individual detainees who have been or are being held at Guantanamo Bay are pending with this Court (the “Guantanamo Bay cases”); and

WHEREAS, it is expected that up to several dozen more new Guantanamo Bay cases could be filed with this Court in the near future; and

WHEREAS, it is in the interests of the litigants, as well as the public, the Court, and counsel, to provide the most expeditious and efficient handling of these cases;

IT IS HEREBY RESOLVED by the Executive Session of the United States District Court for the District of Columbia that:

1. Senior Judge Thomas F. Hogan is designated to coordinate and manage proceedings in all Guantanamo Bay cases so that these cases can be addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush*. No. 06-1195, slip op. at 66 (U.S. June 12, 2008).
2. All Guantanamo Bay cases, both those which have been filed and those which may be filed in the future, are to be transferred by the Judge to whom they are assigned, pursuant to LCvR 40.6(a) and 40.5(e), to Senior Judge Thomas F. Hogan for coordination and management. The transferring Judge will retain the case for all other purposes.
3. Senior Judge Thomas F. Hogan will identify and delineate both procedural and

substantive issues that are common to all or some of these cases.

4. To the extent possible, Senior Judge Thomas F. Hogan will rule on procedural issues that are common to these cases.
5. As to substantive issues, Senior Judge Thomas F. Hogan will confer with those Judges whose cases raise common substantive issues. To the extent possible, and provided that consent is given by the transferring Judge, one of the transferring Judges or Senior Judge Thomas F. Hogan will address specified substantive issues that are common to the Guantanamo Bay cases.¹ A Judge who does not agree with any substantive decision reached in this manner may resolve the issue in his or her own cases as he or she deems appropriate.

¹ LCvR 40.6(a) provides that: "A Judge, upon written advice to the Calendar Committee, may transfer directly all or part of any case on the Judge's docket to any consenting Judge" (emphasis added).

EXHIBIT 2

TO

RESPONDENT JUDICIAL WATCH, INC.'S MOTION

FOR RULE 11 SANCTIONS

Paul Orfanedes

From: Prince, Robert (CIV) <Robert.Prince@usdoj.gov>
Sent: Wednesday, September 02, 2015 11:01 AM
To: Paul Orfanedes
Subject: RE: Seeking Judicial Watch's Position on Motion to Designate a Coordinating Judge and Corresponding Stay Motions in 16 cases v. State Department
Attachments: In re Dept of State FOIA Coordination Motion Proposed Order v01.docx

Paul,

The plan is to seek to coordinate 30+ cases (a specific list will be included in the motion).

What we're proposing is actually very simple. We plan to leave the involved questions to the coordinating judge, whom I assume would seek input from the parties. I've attached the proposed order and, as you can see, it simply asks for the designation of a coordinating judge to "to resolve and manage issues of law, fact, and procedure arising in the Coordinated Cases from the search and production of responsive records within the recently provided documents" ("recently provided documents" is defined in the order). That is the relief we're requesting.

In the email I sent yesterday morning, I gave some specific examples of what those issues would include ("scheduling of searches of the recently provided documents, requests for information and discovery about those documents, and requests for orders relating to preservation"); the motion explains why the Court and the parties would benefit from coordination of these issues that have arisen in multiple cases in the district. But we are not specifically asking the Court to manage those issues in a particular way. So the motion we're addressing here does not seem particularly involved.

Given that there are 12 other plaintiffs (all but one of whom have responded with a position statement to include in the motion), it is not feasible to engage in detailed discussions about how these cases will proceed once coordinated. This is one of the reasons that our motion contemplates that the coordinating judge resolve the detailed, involved questions, with input from all parties. We've described the relief we are seeking; discussing questions not addressed by the motion are not necessary to meaningfully confer.

Regarding the use of a miscellaneous action, there is no precise rule that provides for what we are seeking, which is not traditional consolidation. Since we will be filing a notice with the motion attached in each case, all 17 judges and 13 plaintiffs will receive notice, and the Court will be able to respond as it sees fit. We will, of course, follow direction from the Court if it turns out a miscellaneous action is inappropriate.

Rob
Robert Prince
Trial Attorney
U.S. Department of Justice, Civil Division
Federal Programs Branch
(202) 305-3654

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From: Paul Orfanedes [mailto:POrfanedes@JUDICIALWATCH.ORG]
Sent: Tuesday, September 01, 2015 9:26 PM
To: Prince, Robert (CIV)
Subject: RE: Seeking Judicial Watch's Position on Motion to Designate a Coordinating Judge and Corresponding Stay Motions in 16 cases v. State Department

Robert:

I'm familiar with miscellaneous actions relating to discovery subpoenas, administrative subpoenas, judgment enforcement, registration of foreign judgments, etc. Frankly, I've never heard of a party to an ongoing lawsuit opening a miscellaneous action in the same court to move for the designation of a "coordinating judge." In order to better understand what you propose, can you explain, as a preliminary matter, how you settled on this particular procedure? What rule or statute are you relying on? I recall that a coordinating judge was designated for the Guantanamo Bay detainee cases, but it was my understanding that was done administratively by the court – I think it was by resolution of the Executive Session – not by a party or motion. Also, which other cases do you propose to include in this miscellaneous action? All 35 or so? As I indicated previously, what you propose is a involved question and it's going to take some time for us to even understand it. I'm sure we'll have more question, but don't think we can say we've "met and conferred" unless we understand it better.

Elizabeth Shapiro told Judge Contreras on July 9th, "And there are approximately 35 at various stages and in various forms. There are difficulties in terms of how they would be consolidated, and since some of them are different claims, there are different parties, there are different stages. So the mechanics of that have eluded us to date, but we haven't given up on the idea." I asked her after the hearing if DOJ wanted to try to talk about it. There was no real response, and we never heard anything further until your email of this morning. Not only do I not understand what you are proposing, but I don't understand why there seems to be a sudden rush to file something.

PJO

From: Prince, Robert (CIV) [mailto:Robert.Prince@usdoj.gov]
Sent: Tuesday, September 01, 2015 3:44 PM
To: Paul Orfanedes; Ramona Cotca; Michael Bekesha; Jason Aldrich; Lauren Burke; Chris Fedeli
Cc: Elliott, Stephen (CIV); Edney, Marsha (CIV); Wechsler, Peter (CIV); Todd, James (CIV); Thurston, Robin F. (CIV); Carmichael, Andrew E. (CIV); Anderson, Caroline J. (CIV); Olson, Lisa (CIV); Riess, Daniel (CIV)
Subject: RE: Seeking Judicial Watch's Position on Motion to Designate a Coordinating Judge and Corresponding Stay Motions in 16 cases v. State Department

Paul, can I put your position down as "has not yet taken position" (or, if you prefer, "needs to see motion before taking position")?

From: Paul Orfanedes [mailto:POrfanedes@JUDICIALWATCH.ORG]
Sent: Tuesday, September 01, 2015 10:43 AM
To: Prince, Robert (CIV); Ramona Cotca; Michael Bekesha; Jason Aldrich; Lauren Burke; Chris Fedeli
Cc: Elliott, Stephen (CIV); Edney, Marsha (CIV); Wechsler, Peter (CIV); Todd, James (CIV); Thurston, Robin F. (CIV); Carmichael, Andrew E. (CIV); Anderson, Caroline J. (CIV); Olson, Lisa (CIV); Riess, Daniel (CIV)
Subject: RE: Seeking Judicial Watch's Position on Motion to Designate a Coordinating Judge and Corresponding Stay Motions in 16 cases v. State Department

Robert:

We'll give it some thought. We won't decide by your 4:00 p.m. deadline. At this point, it's a more involved question than that.

PJO

From: Prince, Robert (CIV) [<mailto:Robert.Prince@usdoj.gov>]
Sent: Tuesday, September 01, 2015 9:38 AM
To: Ramona Cotca; Paul Orfanedes; Michael Bekesha; Jason Aldrich; Lauren Burke; Chris Fedeli
Cc: Elliott, Stephen (CIV); Edney, Marsha (CIV); Wechsler, Peter (CIV); Todd, James (CIV); Thurston, Robin F. (CIV); Carmichael, Andrew E. (CIV); Anderson, Caroline J. (CIV); Olson, Lisa (CIV); Riess, Daniel (CIV)
Subject: Seeking Judicial Watch's Position on Motion to Designate a Coordinating Judge and Corresponding Stay Motions in 16 cases v. State Department

Dear counsel,

This email is in reference to the following cases:

Judicial Watch v. U.S. Dep't of State, et al., Civil No. 12-893 (JDB)
Judicial Watch v. U.S. Dep't of Defense, et al, Civil No. 14-812 (KBJ)
Judicial Watch v. U.S. Dep't of State, Civil No. 12-2034 (RW)
Judicial Watch v. U.S. Dep't of State, Civil No. 13-1363 (EGS)
Judicial Watch v. U.S. Dep't of State, Civil No. 13-772 (CKK)
Judicial Watch v. U.S. Dep't of State, Civil No. 14-1242 (RCL)
Judicial Watch v. U.S. Dep't of State, Civil No. 14-1511 (ABJ)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-1128 (EGS)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-321 (CKK)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-646 (CKK)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-684 (BAH)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-687 (JEB)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-688 (RC)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-689 (RDM)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-691 (APM)
Judicial Watch v. U.S. Dep't of State, Civil No. 15-692 (APM)

I seek your position on two motions. First, the Department of State intends to file a motion with the Chief Judge seeking designation of a coordinating judge for resolution and management of common issues of law, fact, and procedure across numerous FOIA suits, including these cases, that implicate the search and production of documents that were provided to the Department by former Secretary of State Hillary Clinton and, to the extent applicable, certain other former employees (Cheryl Mills, Huma Abedin, Jacob Sullivan, and Phillippe Reines). In each case, the transferring judge would retain the case for all other purposes, including searches for responsive records other than the provided documents. The motion envisions coordination of common issues such as the scheduling of searches of the recently provided documents, requests for information and discovery about those documents, and requests for orders relating to preservation.

This coordination motion will be filed in a miscellaneous action. Once it is filed, the Department will file a notice in each of the above-listed cases, along with a copy of the motion itself.

Second, the Department will be filing a motion in each of the above-listed cases seeking a stay of those portions of each case addressing the documents provided to the Department by former Secretary Clinton and the other former employees until the coordination motion is decided, and, if it is granted, until the coordinating judge issues an order determining how to proceed in the cases listed in that motion. The stay sought would not affect those portions of the cases that deal with the search and production of other documents.

Could you please let me know your position with respect to each above-listed case by 4 PM today?

Best,

Rob

Robert Prince

Trial Attorney

U.S. Department of Justice, Civil Division

Federal Programs Branch

(202) 305-3654

The information in this transmittal (including attachments, if any) is intended only for the recipient(s) listed above and contains information that is confidential. Any review, use, disclosure, distribution, or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately and destroy all copies of the transmittal. Your cooperation is appreciated.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE:)	
)	
U.S. DEPARTMENT OF STATE FOIA)	Misc. No. 15-1188
LITIGATION REGARDING EMAILS)	
OF CERTAIN FORMER OFFICIALS)	
_____)	

**[PROPOSED] ORDER GRANTING RESPONDENT JUDICIAL WATCH, INC.’S
MOTION FOR RULE 11 SANCTIONS**

Upon consideration of Respondent Judicial Watch, Inc.’s Motion for Rule 11 Sanctions, any opposition thereto, and the entire record herein, it is hereby ORDERED that:

1. The motion is GRANTED; and
2. The U.S. Department of State shall be and hereby is required to pay reasonable attorney’s fees and costs incurred by Judicial Watch, Inc., in an amount to be determined upon submission by Judicial Watch, Inc. of a verified itemization of its attorney’s fees and costs.

Dated: _____
U.S. District Judge

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All other counsel of record