UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM RODRIGUEZ, Plaintiff, v. GEORGE HERBERT WALKER BUSH, et al., Defendants.	05 CV 5402 (DLC)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for the Government Defendants
86 Chambers Street, 3rd Floor
New York, New York 10007

JEANNETTE A. VARGAS
Assistant United States Attorney
– Of Counsel–

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PRELIMINARY STATEMENT

Defendants United States of America, Department of Homeland Security ("DHS") and the Federal Emergency Management Agency ("FEMA") (collectively, the "Government Defendants") respectfully submit this Reply Memorandum of Law in further support of their motion to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT BECAUSE THE GOVERNMENT HAS NOT WAIVED ITS SOVEREIGN IMMUNITY

There are few principles more firmly entrenched in federal jurisprudence than that of federal sovereign immunity. The doctrine of sovereign immunity is of long standing in this country, see, e.g., State of Kansas v. United States, 204 U.S. 331, 342 (1907); United States v. Lee, 106 U.S. 196, 204 (1882); United States v. Thompson, 98 U.S. 486, 489 (1878), and its continuing validity been repeatedly and consistently affirmed by both the Supreme Court and the Second Circuit, see, e.g., Library of Congress v. Shaw, 478 U.S. 310, 314, 318–21 (1986); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941); Adeleke v. United States, 355 F.3d 144, 150 (2d Cir. 2004).

Under this doctrine, "it is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980). Thus, "in any suit in which the United States is a defendant, a waiver of sovereign immunity with respect to the claim is a prerequisite to subject matter jurisdiction." Up State Fed. Credit Union v. Walker, 198 F.3d 372, 374 (2d Cir. 1999). "[A]bsent a waiver,

sovereign immunity shields the Federal Government and its agencies from suit." Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994); see also Dorking Genetics v. United States, 76 F.3d 1261, 1263 (2d Cir.1996) (same). As the Government Defendants have not waived their immunity from this suit, this Court lacks subject matter jurisdiction over this case. See Memorandum of Law in Support of the Government Defendants' Motion to Dismiss the Complaint ("Def. Br.") at Pt. I.

Plaintiff's wholesale attack on the doctrine of sovereign immunity, see Plaintiff's Memorandum of Law in Opposition to Motion by Defendants United States, Federal Emergency Management Agency and United States Department of Homeland Security ("Pl. Br.") at 3-7, is of a piece with his conduct of this litigation to date. Plaintiff advances an argument that is entirely foreclosed under Supreme Court and Second Circuit precedent, and which this Court is therefore without authority to adopt. See, e.g., Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts.") Thus, plaintiff's legal arguments are as patently frivolous as his factual allegations. Cf. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (1985) (Rule 11 sanctions may be imposed upon an attorney for advancing an argument where it is "patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands")

Plaintiff's argument that this case should be allowed to proceed to discovery and trial notwithstanding that this Court lacks jurisdiction over this matter, see Pl. Br. at 7-13, is similarly without merit. Plaintiff quotes extensively from State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995), which stands for the proposition that the denial of the Government's

motion to dismiss on sovereign immunity grounds is not an immediately appealable interlocutory order. But see In re Sealed Case No. 99-3091, 192 F.3d 995 (D.C. Cir. 1999) (disagreeing with the Ninth Circuit and holding that denial of motion to dismiss on grounds of federal sovereign immunity is independently appealable). Nowhere in that opinion does the Ninth Circuit suggest that district courts have the authority to continue to adjudicate a matter once it has been determined that subject matter jurisdiction over a case is lacking, however.

Indeed, plaintiff's argument makes no logical sense. Denials of motions to dismiss for failure to state a claim are not immediately appealable final orders, for example. See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748 (2d Cir. 1998). Yet plaintiff can hardly suggest that, should this Court determine that a Complaint failed to state a claim, the Court should nonetheless force a defendant to undergo the burden of discovery and trial before ultimately dismissing the case, on the ground that a Rule 12(b)(6) motion does not implicate "immunity from suit." Plaintiff's argument is plainly inconsistent with Rule 12 of the Federal Rules of Civil Procedure. See, e.g., Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF STANDING

Plaintiff has similarly failed to demonstrate that he can satisfy any of Article III's standing requirements. Specifically, plaintiff has not suffered an "'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" plaintiff has not shown that any such injury "is fairly traceable to the challenged action of the defendant;"

and plaintiff has not shown that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000). This Court therefore lacks jurisdiction over the Complaint.

Plaintiff's opposition papers confirm that plaintiff does not seek redress for any particularized, concrete injury he himself has suffered. Rather, plaintiff instead wishes to use this lawsuit as a mechanism for conducting a far-flung inquiry into various perceived abuses by the current Republican administration. See Pl. Br. at 27-28 ("[D]eclarations that the President may imprison, "render" overseas to secret prisons, torture and wiretap anyone he pleases, the President's de jure 'emergency powers,' and his de facto power . . . to impose martial law essentially at will, make Rodriguez's interests more extensive, more fundamental, and more imminent . . . ."). Plaintiff thus presents allegations regarding human rights abuses abroad, see Affidavit of William Rodriguez, dated January 5, 2006, at ¶¶ 88-98, and election fraud, see id. at ¶¶ 65-81. Indeed, plaintiff claims that the critical issue in this case is whether a "greatly extensive web of extraordinary powers empowers the President to effectively nullify the Constitution at will," Pl. Br. at 21 n.20, and speculates at length that these powers may be used at some future date by the President to declare martial law. Pl. Br. at 14-22.

Leaving aside the wholly speculative nature of this latter claim, which is far from the type of "actual or imminent" harm that is required under standing jurisprudence, plaintiff's allegations present precisely the type of generalized grievance regarding Government conduct that is insufficient to confer standing. "[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or

threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-21 (1974).

Plaintiff's reliance on Flast v. Cohen, 392 U.S. 83 (1968), for the proposition that he has standing to bring this suit as a taxpayer, see Pl. Br. at 26-28, is misplaced. The Supreme Court in Flast held that a taxpayer has standing qua taxpayer to challenge a legislative enactment in the limited circumstance where (1) the taxpayer has challenged a statute under the Tax and Spending Clause of Article I of the Constitution and (2) the challenged enactment exceeded a specific Constitutional limitation imposed upon Congress's tax and spending power, such as the Establishment Clause. 293 U.S. at 102-03; see also Schlesinger, 418 U.S. at 227-28 (describing holding in Flast). Taxpayer standing does not extend, however, to situations in which an individual seeks to challenge the actions of the Executive branch, as opposed to legislative enactments. Schlesinger, 418 U.S. at 228; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 479-81 (1982). Thus, Flast's narrow holding is of no assistance to him.

The complaint must be dismissed for the additional reason that plaintiff nowhere addresses how the declaratory and injunctive relief he seeks could redress the only specific injuries he has alleged in his Complaint — personal injuries and loss of employment as a result as a result of the September 11, 2001, attack. See Def. Br. at 10-12. Because plaintiff lacks standing to maintain this suit, the Complaint should be dismissed.

III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE FACTUAL ALLEGATIONS ARE PATENTLY FRIVOLOUS

Plaintiff's opposition papers continue in much the same vein as his Complaint. Both plaintiff and plaintiff's counsel submit affidavits totaling 117 pages in length in an attempt to substantiate their fantastical allegations of a right-wing government conspiracy responsible for the attacks on the World Trade Center on September 11, 2001. Not surprisingly, the vast majority of the allegations contained in those affidavits are not based on personal knowledge, but rather are summaries of third-party publications and argument. These affidavits are therefore inadmissible. See Hollander v. American Cyanamid Co., 172 F.3d 192, 198 (2d Cir. 1999) ("A court may therefore strike portions of an affidavit that are not based on personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements."). In any event, the affidavits submitted do little more than confirm that the Complaint is so attenuated, implausible and devoid of merit that the Complaint must be dismissed. See, e.g., Affidavit of Philip J. Berg, dated January 5, 2006, at ¶¶ 93-111 (alleging that the CIA uses "Popular Mechanics" magazine as a "front publication" to spread disinformation regarding the September 11 attacks); see also Def. Br. at Pt. II (citing cases).

CONCLUSION

For the reasons stated above and in the Government Defendants' moving papers, the Government Defendants respectfully request that the Court dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim.

Dated: January 19, 2006
New York, New York

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for the Government Defendants

By: /s/
JEANNETTE A. VARGAS (JV-7111)
Assistant United States Attorney
Tel.: (212) 637-2678
Fax: (212) 637-2702

CERTIFICATE OF SERVICE

I, Jeannette A. Vargas, Assistant United States Attorney for the Southern District of New York, hereby certify that on January 19, 2006, I caused a copy of the foregoing Reply Memorandum of Law in Further Support of the Government Defendants' Motion to Dismiss the Complaint to be served by Federal Express upon the following:

Philip J. Berg, Esq.
706 Ridge Pike
Lafayette Hill, PA 19444-1711

Dated: January 19, 2006
New York, New York

_____/s/_____
JEANNETTE A. VARGAS (JV-7111)
Assistant United States Attorney