IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 02-CV-0828 (CKK)

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO COMPEL RESPONSIVE PLEADING AND RETURN FORTHWITH

INTRODUCTION

This case is one of thirteen similar cases brought on behalf of alien enemy combatants held at Guantanamo Bay in connection with hostilities involving al Qaeda, the Taliban, and their supporters. Petitioners have moved the Court to require a response to the petition-complaint[1] addressing factual matters in the petition and providing the factual basis for the detention of petitioner-detainees. Petitioners' motion to require an immediate factual response to the petition argues that the prior Court-ordered response provided by the government addressing, primarily, issues of counsel access to the detainees is inadequate under the Court's Order of July 23, 2004, 28 U.S.C. § 2243, and FED. R. CIV. P. 12(a)(4)(A). The government's response, however, fully complied with the Court's order, and neither 28 U.S.C. § 2243 nor FED. R. CIV. P. 12(a)(4)(A)

[1] The Court has characterized petitioners' complaint, for all essential purposes, as a petition for a writ of habeas corpus. See, e.g., Rasul v. Bush, 215 F. Supp. 2d 55, 62-64 (D.D.C. 2002); see also infra § I.

was in any way violated. More importantly, petitioners' motion completely ignores the fact that the Court has designated Senior Judge Joyce Hens Green to coordinate and manage all proceedings in these Guantanamo Bay detainee cases, including the submission of factual responses to the petitions in these cases. For these reasons, as further explained below, the Court should deny petitioners' motion and defer to any schedule developed for responses to the petitions in the Guantanamo Bay cases by Judge Green. The timing of responses to the petitions in these thirteen cases, including this one, should be determined as part of Judge Green's responsibility to coordinate these cases.

BACKGROUND

Pending before the Judges of this Court are thirteen cases brought on behalf of approximately sixty alien detainees. The cases uniformly challenge the legality of the detention of these aliens and, therefore, raise numerous common legal and procedural issues. Consequently, respondents filed a Motion for Joint Case Management Conference, requesting that the Court establish coordinated schedules to allow for the orderly and efficient resolution of the many common questions presented by these petitions. See Respondents' Motion for Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition (filed August 4, 2004).

On August 17, 2004, respondents' motion was granted in part by Judge Kessler, Chair of the Court's Calendar and Case Management Committee. See August 17, 2004 Order signed by Judge Kessler, Chair, Calendar and Case Management Committee. The Court designated Senior Judge Joyce Hens Green "to coordinate and manage all proceedings in these matters and to the extent necessary, rule on procedural and substantive issues that are common" to the Guantanamo

Bay cases. Since the August 17 Order issued, two conferences have been held before Judge Green, on August 23 and 27, 2004, in which the parties have discussed at some length the prospects for coordination of proceedings in these cases. A principal topic of discussion has been the timing of submission of factual returns to the petitions in these cases. The government has proposed that factual returns setting forth the bases for the detention of the petitioner-detainees should be filed on a rolling basis (beginning in the next two weeks, and coming to completion during the week of October 18) upon the assembly and finalization of administrative records in the ongoing Combatant Status Review Tribunal ("CSRT") process, a process established to more formally determine the status of aliens held at Guantanamo Bay who had been previously determined to be enemy combatants. As the government has explained, this approach will advance the important goal of expeditious resolution of these cases, as it will provide the complete factual basis for detention in each of these cases within a short time frame and avoid interference with the CSRT process. Conversely, any requirement of an immediate factual return would undermine the timely resolution of these cases, as that would interfere with the timely completion of the CSRT process, and any immediate factual return would soon have to be supplemented by the administrative record compiled in the CSRT proceedings. Moreover, the petitions filed in these cases likely will be subject to amendments as initial counsel visits (which are just beginning) proceed. It makes little sense to require an immediate factual return to next-friend petitions that are likely to be amended, particularly where the requirement of such a return can only delay the ultimate resolution of these cases.

Pursuant to a request from Judge Green, the government memorialized the proposed schedule for submission of the factual basis for detention in an August 31, 2004 letter, copied to

counsel in these cases.[22] See Exhibits A & B. Further, and presumably in light of this proposed schedule, Judge Green indicated her intent to meet with the various Judges of the Court with pending Guantanamo Bay detainee cases to discuss the handling of the cases and how decisions on pending motions in the cases should proceed.

The organized scheduling of these cases will facilitate the expeditious and coordinated resolution of common legal and procedural questions in these cases, which will shape and determine how individual cases and issues pertaining to individual detainees proceed, if at all. Further, coordinated scheduling will alleviate the logistical burdens inherent in responding to multiple petitions on overlapping issues with divergent schedules. These burdens are magnified by the limited resources of counsel, the Court and its personnel, government staff involved in processing security clearances for petitioners' counsel and otherwise facilitating counsel visits to Guantanamo Bay, as well as Department of Defense ("DoD") personnel who are being called upon to gather and assemble detainee-specific factual information for ongoing CSRT hearings.

Prior to the issuance of the August 17 Order, and before the parties' discussions with Judge Green regarding coordinated scheduling, this and other cases have proceeded on separate tracks. On July 23, 2004, this Court held a telephonic conference with the parties in this case, in which it required respondents to file in writing by July 30, 2004, "(1) all proposed procedures with respect to access to counsel that the Government intends to apply to the Guantanamo Bay detainees and to Petitioners in this case; (2) which proposed procedures will apply to each

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[2] Judge Green also asked the government to report to her this week on several other issues, including procedures established for visits by petitioners' counsel with detainees at Guantanamo Bay and the timing of other determinations by the government as to whether a petitioner-detainee, though properly detained as an enemy combatant, may nonetheless be released.

petitioner, including proposed monitoring of any of Petitioners' conversations with counsel; and (3) a written response to the Petitioners' underlying petitions for writs of habeas corpus, specifically addressing, among other things, the legal merits of the Government's entitlement to monitor any Petitioners' conversations with counsel." See Order (July 23, 2004) (Doc. #38). Respondents did so, and the Court held a hearing regarding the counsel access issues on August 16, 2004. (The next day, the order designating Judge Green to coordinate the proceedings in these cases issued.)

After the August 27 conference with Judge Green, and without any mention of the prospects for coordination under Judge Green's direction, petitioners filed the motion to compel an immediate factual response to the petition-complaint. Petitioners contend that the government violated the Court's Order of July 23, 2004, 28 U.S.C. § 2243, and FED. R. CIV. P. 12(a)(4)(A) by not submitting a response to the petition-complaint that petitioners consider appropriate.

ARGUMENT

I. Respondents Complied Fully With The Court's July 23, 2004 Order.

Petitioners' contention that respondents' July 30, 2004 filing violated the Court's July 23, 2004 Order is without merit. Both the transcript of the Court's July 23, 2004 telephonic hearing in this case and the Court's July 23, 2004 Order establish that the Court directed the parties to file responsive briefs on issues related to counsel access to the Guantanamo Bay detainees. Respondents complied fully with the Court's Order by filing a "Response to Complaint In Accordance With The Court's Order of July 25 [sic], 2004" (Doc. #46), which addressed the legal basis for the access procedures that respondents intend to apply to the petitioners in this

case, as well as other matters. Contrary to petitioners' present position, nothing in either the Court's telephonic hearing or written Order directed respondents to file the factual return to the petition-complaint that petitioners demand. Indeed, the questioning and argument at the August 16, 2004 hearing, which focused exclusively on the counsel access issues, supports this understanding. During the hearing, the issue of the alleged inadequacy of the government's filing was raised neither by petitioners' counsel nor by the Court. Any argument by petitioners that respondents violated the Court's Order is wholly without merit.

On July 23, 2004, the Court conducted a telephone conference with counsel for both petitioners and respondents regarding issues related to access to counsel to the Guantanamo Bay detainees. At the conclusion of this conference, the Court directed respondents to "file three things" related to counsel access. See Transcript of Telephone Conference (July 23, 2004), at 34:15 (Exhibit C) First, the Court ordered that respondents file the procedures for access to detainees at Guantanamo Bay. See id. at 34:14-25. Second, the Court ordered that respondents explain how the procedures would be applied to each detainee. See id. at 35:2-7. Third, the Court ordered that respondents file a response to the habeas petition "in terms of the access [to counsel issues]." See id. at 35:8-14.

The Court memorialized the telephonic proceedings in its July 23, 2004 Order. This Order directed respondents to file: "(1) all proposed procedures with respect to access to counsel that the Government intends to apply to the Guantanamo Bay detainees and to Petitioners in this case; (2) which proposed procedures will apply to each petitioner, including proposed monitoring of any of Petitioners' conversations with counsel; and (3) a written response to the Petitioners' underlying petitions for writs of habeas corpus, specifically addressing, among other things, the

legal merits of the Government's entitlement to monitor any Petitioners' conversations with counsel." See Order (July 23, 2004) (Doc. #38). Respondents filed a brief in response to the Court's order on July 30, 2004, explaining the counsel access procedures in general and the specific access procedures that will be applied to petitioners in this case. Additionally, respondents addressed the legal basis for its position that the procedures for counsel access are entirely reasonable in light of national security interests at stake in the Guantanamo litigation. The brief also addressed petitioners' various legal claims.[3] This filing complied fully with the three requirements outlined in the Court's July 23 Order.

Notwithstanding respondents' filing, petitioners now contend that the Court's July 23 Order required respondents to file a factual response to the merits of the petition-complaint. Petitioners, however, ignore the fact that the Court rejected such a comprehensive response during the July 23 telephone conference. At one point in the conference, counsel for respondents informed the Court that petitioners' petition-complaint raised a number of legal theories and the relief requested by petitioners "was quite broad and included the potential order of release of the detainees which would get into may issues besides just access to counsel." See Transcript of Telephone Conference (July 23, 2004) (Exhibit C), at 8:9-12. Accordingly, respondents informed the court that a comprehensive return or answer on the merits of the petition . . . would likely need to be addressed [to these issues] in addition to the issues about access to counsel." Id. at 8:1-8. The Court specifically dismissed such a comprehensive return: "We can deal with that

[3] Because the Court directed briefing on the issues related to counsel access, respondents did not undertake full briefing of all issues potentially raised in this case, and respondents reserved the right to submit such briefing, as appropriate. See Response to Complaint In Accordance With The Court's Order of July 25, 2004, at 30 n.14.

at a later point. Obviously, the initial issue is access so they can supplement these petitions." Id. at 8:13-15. Because counsel for petitioners had not yet visited Guantanamo Bay, the Court explained that the case had not reached a point where a full return on the merits would be necessary because counsel have not been in "a position to talk to their clients to basically set out more information" in an amended petition. Id. at 9:1-6. ("So I'm assuming an initial response of some sort would be around the access so the lawyers can get to see these individuals, but I don't think we need to decide that at this point."). In light of these statements by the Court, petitioners cannot credibly contend that the Court's July 23 Order required respondents to submit a complete factual return to the petition-complaint.

The Court's focus on the counsel access issues during the August 16, 2004 hearing also supports respondents' position that the July 23 Order directed briefing only on counsel access issues. See Transcript of Motions Hearing (August 16, 2004) (Exhibit D), at 5:13-22 ("In terms of the issues to discuss this morning, there are a number of issues that have been raised and I'm going to focus on what I view as the principal ones, which is the monitoring of attorney/client discussions, . . . [and] the review by the privilege team of notes by attorneys from meetings with the client detainee, leaving the meeting with the notes, and bringing to the meeting notes or any other kind of material."). In fact, petitioners own arguments during this hearing support this view. Instead of contesting the sufficiency of respondents' filing at the August 16 hearing, petitioners devoted their argument entirely to merits of the counsel access issues. At no point in the hearing did counsel for petitioners argue that respondents failed to comply with the Court's July 23 Order. More importantly, the Court never suggested that respondents' filing violated the Order.

For these reasons, respondents have complied fully with the Court's Order and any contrary argument by petitioners should be rejected.

II. The Court has Discretion to Issue Orders Establishing the Nature and Timing of a Response to a Petition for Writ of Habeas Corpus.

Petitioners also argue that respondents violated 28 U.S.C. § 2243[4] and FED. R. CIV. P. 12(a)(4)(A)[5] by not filing a responsive pleading addressing the factual merits of the petition-complaint within the times proscribed by these provisions. As an initial matter, it is not clear that FED. R. CIV. P. 12(a)(4)(A) even applies to this matter, which the Court has characterized as a petition for habeas corpus, see supra note 1. But in any event, respondents' compliance with the Court's July 23, 2004 Order easily satisfies FED. R. CIV. P. 12(a)(4)(A), which permits a court to establish a time for submission of a responsive pleading.

Further, with respect to 28 U.S.C. § 2243, petitioners overlook the fact that the specific rules governing habeas petitions in federal court supersede the time limits set forth in 28 U.S.C. § 2243. Rule 4 of the habeas rules provides that "the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate."[6] See Rule 4 Governing Section 2254 Cases in the United States

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[4] 28 U.S.C. § 2243 provides for the submission of a return to a petition for writ of habeas corpus "within three days [of being so ordered,] unless for good cause additional time, not exceeding twenty days, is allowed."

[5] FED. R. CIV. P. 12(a)(4) provides that "[u]nless a different time is fixed by court order," a responsive pleading to a complaint shall be served within 10 days after denial of a motion to dismiss.

[6] It is well established that the 2254 Rules are applicable to habeas petitions filed pursuant to 28 U.S.C. § 2241, such as the petition-complaint in this case. Rule 1 provides that courts, in their discretion, may apply the 2254 Rules to petitions for writ of habeas corpus other than those arising under 28 U.S.C. § 2254. See 2254 Rule 1(b) ("In applications for habeas corpus in cases

District Courts (the "2254 Rules"). The 2254 Rules were promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, by which Congress delegated to the Supreme Court the power to make supervisory rules of procedure for federal courts. This enabling statute provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Therefore, because Rule 4 has the force of a superseding statute pursuant to 28 U.S.C. § 2072(b), it takes precedence over the strict time limits of 28 U.S.C. § 2243 and gives courts reasonable discretion to set the deadline for a response to a petition for writ of habeas corpus filed pursuant to § 2241.[7] See Advisory Committee Notes to Habeas Corpus Rule 4 ("In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made."). See also Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir. 1994) ("[T]he Rules Governing Section 2254 Cases in the United States District Courts, which have the force of a superseding

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not covered by subdivision (a) [involving persons in state custody], these rules may be applied at the discretion of the United States district court."); Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) ("The Supreme Court intended the 2254 Rules to apply to petitions filed under § 2241."); Ukawabutu v. Morton, 997 F. Supp. 605, 608 n.2 (D.N.J. 1998) (The 2254 Rules "apply to petitions filed pursuant to 28 U.S.C. § 2241 as well as 28 U.S.C. § 2254."); Wyant v. Edwards, 952 F. Supp. 348, 352 (S.D. W.Va. 1997) ("[T]he Court has concluded that the § 2254 Rules were intended to apply to § 2241 cases . . ."); Hudson v. Helman, 948 F. Supp. 810, 811 (C.D. Ill. 1996) ("Thus, while the instant Petition is brought pursuant to 28 U.S.C. § 2241, not 28 U.S.C. § 2254, and involves a prisoner in federal custody, the Rules Governing Section 2254 Cases may still be applied here.").

[7] Furthermore, the 2254 Rules have provided courts with the discretion to consider the burdens involved in filing responses to habeas petitions when implementing briefing and case management schedules. See Advisory Committee Notes to 2254 Rules; see also Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (stating that the 2254 Rules confer "ample discretionary authority" on district courts "to tailor the proceedings" in habeas cases); Wyant, 952 F. Supp. at 350 ("The Court recognizes that 28 U.S.C. § 2243 and Rule 81(a)(2) set time limits that may be unrealistic, given the volume of prisoner habeas corpus litigation . . .").

statute, 28 U.S.C. § 2072(b) . . . loosened up the deadline for responses. Rule 4 leaves it up to the district court to fix the deadline.").

Here, the Court issued the July 23 Order, which specifically addressed both the content of and the deadline for respondents' response to the petition-complaint. Because respondents complied with the Court's Order, petitioners' argument that respondents violated the provisions of 28 U.S.C. § 2243, as well as FED. R. CIV. P. 12(a)(4)(A), should be rejected.

III. The Court Should Defer to any Coordinated Schedule Being Developed by Judge Green For the Submission of Responses to the Petitions in These Cases.

A point wholly ignored in petitioners' motion is that the Court has recognized the exceptional circumstances presented by these Guantanamo Bay cases and has directed that proceedings in all of the cases be coordinated. Indeed, the cases raise numerous common questions, and a global schedule facilitating the orderly and efficient resolution of the issues is warranted. Such coordinated scheduling and treatment among the pending cases is needed in order to alleviate potentially overwhelming logistical burdens that will arise in the absence of a coordinated approach. As noted above, DoD is involved in the processing of more than 500 detainees for CSRT hearings. There is a limited set of DoD personnel who are involved with these hearings and are most familiar with the information concerning each detainee. To the extent that respondents are simultaneously required, in short order, to assemble and present factual information to respond to individual petitions such as this one, explaining the reason for each petitioner's apprehension and justifying continued detention, the resource burdens with respect to these cases could reach crisis levels. And to the extent any such individualized treatment of one or more of the pending cases would require a reordering of particular detainees

within the CSRT queue or the interruption of CSRT proceedings in order to facilitate a partial explanation of the factual basis for detention in one or more individual cases, such treatment would necessarily impact adversely the schedule with respect to other pending cases. The task of gathering and assembling information concerning the twelve petitioners in this case, not to mention the more than sixty detainees in these cases together, for presentation to the Court is a substantial one,[8] and, in the absence of a coordinated approach in these cases, the task could become overwhelming, adversely impacting the timely resolution of all these cases.[9]

These arguments warranting a coordinated plan for factual responses to the petitions in these cases, as well as petitioners' argument for an expeditious submission of the factual bases for the detention of petitioners in these cases, have all been raised with Judge Green. This Court should defer to Judge Green regarding the scheduling of such matters and other responses to the petitions in these cases. The Court should reject petitioners' invitation to disregard Judge Green's role in these matters and to potentially disrupt the coordinated handling of these cases.

CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

Dated: September 1, 2004

Respectfully submitted,

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[8] In addition, there are more than 500 foreign nationals currently detained at Guantanamo Bay, so it is very likely that more petitions for writ of habeas corpus will be filed.

[9] Similarly, coordination of the numerous procedural and other issues in these cases, such as procedures applicable for counsel visits and establishment of a suitable protective order governing the use of classified information, will advance the efficient and timely resolution of these cases.

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