

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MOURAD BECHELLALI, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1142 (RJL)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' OPPOSITION TO MOTION FOR IMMEDIATE ISSUANCE OF
WRIT OF HABEAS CORPUS OR FOR AN ORDER TO SHOW CAUSE**

This case is a petition for writ of habeas corpus on behalf of an alien detained at Guantanamo Bay as an enemy combatant, and is one of thirteen such cases brought on behalf of alien enemy combatants held at Guantanamo Bay in connection with hostilities involving al Qaeda, the Taliban, and their supporters. Petitioner has moved the Court for issuance of a writ of habeas corpus, returnable in three days, in order to proceed to hearing on the merits of this case, or alternatively, for an order to show cause why a writ of habeas corpus should not be granted, also returnable in three days.¹ For the reasons explained below, the Court should deny the motion and defer to any schedule developed for responses to the petitions in the Guantanamo Bay cases by Senior Judge Joyce Hens Green, who has been designated by the Court to coordinate and manage all proceedings in these cases. The timing of responses to the petitions in

¹ Although the petition in this case is brought on behalf of three detainees, the present motion is submitted only on behalf of Ridouane Khalid. See Petitioner's Motion to Issue Writ of Habeas Corpus or Order to Show Cause.

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

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.

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.

In contrast to these efforts to develop a coordinated approach in these cases, petitioner seeks to put this case on its own track and has moved for the issuance in his case of a writ of habeas corpus, returnable in three days, in order to proceed to hearing on the merits of the case, or alternatively, for an order to show cause why a writ of habeas corpus should not be granted, also returnable in three days.

ARGUMENT

Petitioner's motion is grounded almost solely upon the argument that the timing of a response to a petition for habeas corpus is governed exclusively by 28 U.S.C. § 2243, which provides that a habeas writ or order to show cause should be returnable within three to twenty days. Petitioner's argument, however, ignores that a court has authority beyond § 2243 to control both the nature and timing of any response to a habeas petition. Moreover, petitioner's argument disregards the necessity and appropriateness of coordinating the handling of all the Guantanamo

Bay cases, including the filing of responses to the petitions – a necessity recognized by this Court in its designation of Judge Green to coordinate the cases.

I. The Court Has Discretion to Control the Timing and Nature of a Response to a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241.

In 1976, the United States Supreme Court promulgated the Rules Governing Section 2254 Cases in the United States District Courts (the “2254 Rules”).³ Pursuant to those rules, this Court may extend the deadline for respondents’ response to petitioner’s application for writ of habeas corpus beyond the twenty-day maximum response time set forth in 28 U.S.C. § 2243.⁴

First, it is clear that the 2254 Rules are applicable to petitions filed pursuant to 28 U.S.C. § 2241, such as the petition 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 not covered by subdivision (a) [involving persons in state custody], these rules may be applied at the discretion of the United States district court.”). Thus, because petitioner’s application is brought pursuant to § 2241, the 2254 Rules may be applied to this case. See 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.”).⁵

³ 28 U.S.C. § 2254 provides jurisdiction for federal courts to entertain petitions for writ of habeas corpus by persons in custody pursuant to the judgment of a state court.

⁴ Under 28 U.S.C. § 2243, the respondent must make 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 See also 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

It is also well-established that the 2254 Rules, which do not indicate a fixed deadline for responding to habeas petitions, supersede the time limits set forth in 28 U.S.C. § 2243. Rule 4 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.” 2254 Rule 4. 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. 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.”).⁶

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.”); Kramer v. Jenkins, 108 F.R.D. 429, 431 (N.D. Ill. 1985) (“[A]lthough [petitioner’s] petition is under section 2241, and not section 2254, the court may properly apply Rule 4 of the 2254 Rules.”).

⁶ 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 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.”); Castillo, 162 F. Supp. 2d at 577 (denying § 2241 petitioner’s request for expedited consideration because “[t]he discretion afforded by Rule 4 of the 2254 Rules ‘prevails’ over the strict time limits of 28 U.S.C. § 2243 . . .”); Hudson, 948 F. Supp. at 811 (stating that it was within court’s discretion to give warden 45 days to respond to petition for habeas corpus pursuant to § 2241 because Rule 4 “takes precedence

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 . . .”).

Accordingly, the Court has authority beyond § 2243 to control both the nature and timing of any response to a habeas petition.

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

Not only does a court have authority beyond 28 U.S.C. § 2243 to control both the nature and timing of any response to a habeas petition, here the Court has recognized the exceptional circumstances presented by these Guantanamo Bay cases and has directed that proceedings in 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

over 28 U.S.C. § 2243 and gives the Court reasonable discretion to set the deadline for a response”); Kramer, 108 F.R.D. at 431 (denying § 2241 petitioner’s motion for correction of court scheduling order because “in the conflict between Rule 4 of the 2254 Rules and 28 U.S.C. § 2243, Rule 4 must prevail”).

Courts have also determined that Rule 4 prevails over the forty-day time limit that was previously set forth in Federal Rule of Civil Procedure 81(a)(2). See, e.g., Clutchette v. Rushen, 770 F.2d 1469, 1473-75 (9th Cir. 1985); Castillo, 162 F. Supp. 2d at 577; Wyant, 952 F. Supp. at 352; Kramer, 108 F.R.D. at 432. Fed. R. Civ. P. 81(a)(2) was amended in 2002 to eliminate the time limits for responses to petitions for habeas corpus because they were inconsistent with the 2254 and 2255 Rules. See Advisory Committee Notes to Fed. R. Civ. P. 81.

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 more than sixty detainees in these cases for presentation to the Court is a substantial one,⁷ 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.⁸

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

⁷ 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.

⁸ 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.

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 petitioner's 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, the motion for immediate issuance of a writ of habeas corpus or for an order to show cause should be denied.

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Respectfully submitted,

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