IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*<br><br>Petitioners,<br><br>v.<br><br>UNITED STATES OF AMERICA, *et al.*,<br><br>Respondents. | Civil Action No. 02-CV-0828 (CKK) |

**RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO STRIKE**

Ironically, after chiding respondents for allegedly obstructing and delaying consideration of the merits in this case, the Al Odah Petitioners' latest motion – to strike on various technical grounds respondents' October 4, 2004 Response to the Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law ("Response") – plainly seems calculated to avoid and distract from consideration of the important substantive legal issues in this habeas litigation. The Response was entirely proper and respondents' motion to strike should be denied.

**A. Relevant Procedural History**

At the outset, it is useful to review the recent background leading up to the filing of the Response. Pursuant to an Order of the Calendar and Case Management Committee dated August 17, 2004, as well as the September 15, 2004, Resolution of the Executive Session, Senior Judge Joyce Hens Green was designated to coordinate and manage proceedings in this and other coordinated Guantanamo Bay detainee matters. During the latter half of August, there were extensive discussions among respondents' counsel, petitioners' counsel, and Judge Green about

how the cases should proceed, and, in particular, when respondents should be required to make "returns" in the various cases. Respondents consistently took the position, both in discussions with the various petitioners' counsel and before the Court, that such returns would have both a factual component, which would consist of the record of the proceedings of Combatant Status Review Tribunals ("CSRTs"), and a legal component, which would consist of legal grounds why the writs of habeas corpus and other relief sought by petitioners should not be granted.

On September 20, 2004, Judge Green entered a Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court (dkt. no. 87) (hereinafter "September 20 Order"). The September 20 Order provided in pertinent part:

> To ensure proper coordination, the Court herein sets a briefing schedule for formal responses to petitioners' applications for writs of habeas corpus or other relief. The Court emphasizes that the formal responses shall be in addition to the factual bases that respondents have committed to deliver to petitioners and to the Court . . . .

Id. at 7 (emphasis added). The Court thus ordered that "pursuant to 28 U.S.C. § 2243, Respondents shall file with the Court and serve on Petitioners' counsel in all coordinated cases on or before October 4, 2004 responsive pleadings showing cause why Writs of Habeas Corpus and the relief sought by Petitioners should not be granted." Separately, the Court also ordered that "Repondents shall file the factual returns for each detainee as they are provided to counsel for the Petitioners on a rolling basis in accordance with Respondents' proposed schedule."

On September 28, 2004, respondents moved for leave for the October 4 filing to exceed the page limit applicable to memoranda of points and authorities under Local Civil Rule 7(e), which indicated that the forthcoming Response would give "extended analysis and treatment" to various constitutional, statutory, and treaty provisions, given the novelty and complexity of the

issues involved. The motion was unopposed by the Al Odah Petitioners and by most of the other petitioners, subject to respondents' agreement not to oppose a reciprocal extension, and the Court granted the motion.

On October 4, 2004, respondents filed the Response (dkt. no. 100). In light of the overwhelming commonality of issues and claims in the coordinated cases,[1] the Response was designed as a global document applicable to all of the coordinated cases, and was filed in all of the coordinated cases save for one.[2] Pursuant to the September 20 Order, the Response set forth legal grounds "showing cause why Writs of Habeas Corpus and the relief sought by Petitioners should not be granted." Because exactly the same set of legal grounds also compels dismissal or judgment as a matter of law for respondents, respondents incorporated within the Response a motion to dismiss or for judgment as a matter of law.

Respondents have also been filing factual returns on a rolling basis as contemplated by the September 20 Order – an important matter that petitioners fail to mention until the final footnote of their motion to strike (Petrs' Mem. at 5 n.7). In the Al Odah case, the unclassified portions of the factual returns for eleven of the twelve petitioners have been filed with the Court and served on petitioners' counsel.[3]

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[1] See Appendix to Response (chart showing claims made in each case).

[2] See Order dated Oct. 4, 2004, in Hamdan v. Rumsfeld, Civil Action No. 04-CV-1519 (JR) (exempting Hamdan from most aspects of September 20 Order).

[3] One of the twelve factual returns due in Al Odah remains outstanding. As explained more fully in Respondents' Status Report on the Submission of Factual Returns to Petitions for Writ of Habeas Corpus, filed Oct. 22, 2004 (dkt. no. 121), the CSRT for Omar Rajab Amin has not yet been completed due to outstanding attempts to obtain documentary evidence that Mr. Amin requested be presented to the Tribunal. As respondents have informed the Court, they are working diligently to try to complete the remaining CSRTs, and file the corresponding factual

**B. The Asserted Grounds for Striking the Response are Specious**

Petitioners first argue that the Response's very existence "flouts" the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). Petrs' Mem. at 1-2. Apparently, petitioners derive this contention from the following sentence in Rasul: "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now." Rasul, 124 S. Ct. 2699. Obviously nothing in that sentence can even remotely be read to impose some kind of ban on the filing of a brief like the Response, as petitioners apparently contend. Moreover, any contention that respondents are eluding making a "response to the merits of petitioners' claims" is willfully blind to the activity that has occurred in these cases over the last two months. As contemplated by the September 20 Order, there are dual facets of respondents' "response to the merits of petitioners' claims": (1) legal arguments why petitioners' claims fail on the merits, and (2) factual returns discussing the specific facts supporting the classification of each petitioner as an enemy combatant. The former was provided on October 4 in the form of the Response, and the latter have been furnished on a rolling basis for eleven of the twelve Al Odah petitioners, as noted above. Petitioners' contention that there has been a violation of the Rasul mandate is nonsensical and should be rejected.

Petitioners next claim that the Government has engaged in a "direct violation" of the September 20 Order because "a motion to dismiss is not a 'responsive pleading.'" Petrs' Mem. at 2 (citing cases addressing what filings constitute "responsive pleadings" extinguishing a plaintiff's ability to amend a complaint as of right under Fed. R. Civ. P. 15). However, there is

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returns, as expeditiously as possible.

no reason to construe the September 20 Order's use of the words "responsive pleading" in the surrounding context to mean anything other than the response called for by 28 U.S.C. § 2243, which is supposed to include any legal reasons why the petition should be dismissed.[4] Moreover, this objection ignores that respondents did not file just a motion to dismiss. Rather, they filed a Response setting forth the legal grounds "why Writs of Habeas Corpus and the relief sought by Petitioners should not be granted."[5] Nothing in the September 20 Order prohibited respondents from appending to their Response a formal request for the relief that naturally and ineluctably flows from those same legal grounds (i.e., dismissal or judgment). Indeed, by joining motions for dismissal and/or judgment in their response, respondents obviated separate, redundant motion

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[4] See Ukawabuto v. Morton, 997 F. Supp. 605, 608-09 (D.N.J. 1998) ("The answer to a habeas petition is not like an answer to a civil complaint. . . . [T]he answer should respond in an appropriate manner to the factual allegations of the petition and should set forth legal arguments in support of the respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits."); see also 28 U.S.C. § 2243.

[5] This obvious point that petitioners did not just file a bare motion to dismiss also disposes of petitioners' argument based on several cases discouraging the filing of motions to dismiss in routine habeas cases (i.e., habeas cases brought by state or federal prisoners collaterally challenging criminal convictions). Petrs' Mem. at 3-4 & n.3. Assuming arguendo that the rationales of those cases are transferable to a situation involving wartime detention of enemy aliens and presenting a host of threshold legal issues of first impression, the common denominator in those cases appears to be that the respondents filed only a motion to dismiss (generally on purely technical grounds having nothing to do with the merits of the petition) and nothing else. See, e.g., Ukawabutu v. Morton, 997 F. Supp. 605, 608 (D.N.J. 1998) ("Instead of filing an answer, . . . Respondents filed this second motion to dismiss . . . ." (emphasis added)); White v. Cockrell, 2001 WL 1335779, *4 (N.D. Tex. Oct. 19, 2001) ("It does not answer the petition in substance . . . . It simply asserts a defense that respondent deemed appropriate."). As noted above, respondents did not merely file a motion to dismiss, but a Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law. Moreover, respondents have filed and are continuing to file and serve the separate factual returns pursuant to the Court's directions in the September 20 Order. In combination, the Response and factual returns fully "answer the petitions in substance." White, 2001 WL 1335779, *4. Therefore, petitioners' cited cases discouraging filing a motion to dismiss in lieu of any other form of response have no relevance here.

filings on the same grounds down the road. This approach serves judicial economy and avoids the needless proliferation of docket entries and multiplication of paper that occurs when, for example, the Al Odah Petitioners file a motion to strike that is a carbon copy of the first section of their October 20 reply brief. And, because the proceedings are moving forward, with the filing of unclassified factual returns nearly complete at this time, it cannot reasonably be argued that the Response was interposed for purposes of delay.

Petitioners also accuse respondents of violating Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, which they contend contains a requirement that "the government present in one filing the legal basis for the petitioner's detention." Petrs' Mem. at 3 (emphasis added). However, one searches Rule 5 in vain for any such "one filing" requirement. More importantly, the September 20 Order, which is customized and tailored for the unique circumstances of these coordinated cases, clearly overrides any inconsistent default procedure in Rule 5. See 2254 Rule 4 ("[T]he 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 actions as the judge deems appropriate."). The September 20 Order clearly sets a two-track schedule, with factual returns being submitted on a rolling basis and legal arguments "why Writs of Habeas Corpus and the relief sought be Petitioners should not be granted" to be presented by October 4. To the extent petitioners insist on "one filing," their real grievance lies with the September 20 Order, not with the Response submitted in compliance therewith.

Finally, petitioners allege a "direct violation" of the Federal Rule of Civil Procedure 12(g) on the basis that respondents filed a motion to dismiss for lack of jurisdiction earlier in Al Odah.[6] Petrs' Mem. at 4-5. To the extent the Federal Rules of Civil Procedure even apply in this habeas case at this stage for this purpose, the Response did not violate them. Even if the motion to dismiss incorporated in the Response is construed, as petitioners implicitly suggest, as a motion under Rule 12, petitioners ignore that respondents alternately moved for judgment as a matter of law, which is not a motion under Rule 12 and need not be consolidated. See Fed. R. Civ. P. 12(g). Moreover, as petitioners concede, the Government has not waived any of the legal defenses set forth in the Response, nor does Rule 12(g) preclude anything other than successive "pre-answer motions to dismiss." Petrs' Mem. at 4-5 & n.6 (emphasis added). Here, as envisioned by the September 20 Order, the Response and the factual returns together constitute what in habeas corpus practice is considered an "answer." See supra note 4. Therefore, to the extent Rule 12(g) applies, a motion to dismiss incorporated within an answer is simply not a "pre-answer" motion. Indeed, it would elevate form over substance to prohibit a response presenting legal grounds why a writ of habeas corpus should be denied from being accompanied

[6] It should be noted that respondents had not filed any previous motion to dismiss in most of the other twelve cases in which the Response was filed, making petitioners' Rule 12(g) argument wholly inapplicable in those cases. Thus, the upshot of petitioners' Rule 12(g) argument would seem to call for severing Al Odah and placing it on a one-off, separate track of its own. That would frustrate coordination and efficient administration of common issues, contrary to the spirit of the Calendar and Case Management Committee's August 17, 2004, Order and the September 15, 2004, Resolution of the Executive Session. Indeed, the purpose of coordination was to bring together cases in disparate states of progression so that their common procedural and substantive issues could be dealt with in an orderly and consistent fashion. In any event, for the reasons given in text, petitioner's Rule 12(g) argument is without merit and does not require the substantial benefits of coordination to be unreasonably sacrificed by detaching Al Odah from motion practice generally applicable to all of the cases.

by a request that the petition be dismissed on the exact same grounds. Again, the motion to dismiss was not interposed for the purpose of delay, will not and cannot have the effect of delay, and combining it in the Response serves judicial economy and simplifies the proceedings by obviating a separate, duplicative motion down the road.

**C. Conclusion**

The Al Odah Petitioners' motion to strike lacks foundation and simply distracts from the genuine procedural and substantive issues before the Court. The motion should be denied.

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Respectfully submitted,

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