

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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MAHMOAD ABDAH, *et al.*

Petitioners,

v.

GEORGE W. BUSH,  
President of the United States,  
*et al.*,

Respondents.

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Civil Action No. 04-CV-1254 (HHK)

**RESPONDENTS' MOTION TO POSTPONE RESPONSE TO PETITION FOR WRIT  
OF HABEAS CORPUS PENDING DEVELOPMENT OF COORDINATED SCHEDULE  
FOR PENDING GUANTANAMO BAY DETAINEE CASES**

This case is a petition for writ of habeas corpus on behalf of fourteen aliens detained at Guantanamo Bay as enemy combatants, 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. Respondents hereby request that the Court postpone the deadline for a response to Petitioners' application for writ of habeas corpus. Although the Court previously ordered Respondents to file and serve within ten days "a statement showing why the Writ of Habeas Corpus sought by Petitioners should not be granted," see Court's August 6, 2004 Order (Docket No. 7), the Court possesses the discretion to set a deadline for response to Petitioners' application beyond the twenty-day limit imposed by 28 U.S.C. § 2243, and an extension here is appropriate for a number of reasons. First, there is a need for coordinated scheduling and treatment among the pending cases in order to promote judicial economy and alleviate logistical burdens posed by the absence of a coordinated approach in the litigation of

these multiple, related cases. A global scheduling approach is needed to facilitate the orderly and efficient resolution of the numerous common legal and procedural questions, which could substantially impact how individual cases proceed. To this end, the Court has designated Senior Judge Joyce Hens Green to coordinate and manage all proceedings in the cases, and a joint hearing before Judge Green is scheduled for August 23, 2004. See August 17, 2004 Order signed by Judge Gladys Kessler, Chair of the Court's Calendar and Case Management Committee (Docket No. 9). The timing of responses to the petitions in these thirteen cases should be determined as part of such coordination. Moreover, by extending the deadline for the response to the habeas petition in this case, the Court will also allow time for Department of Justice and Department of Defense ("DoD") personnel to complete the threshold tasks of processing security clearances for petitioners' counsel and forming monitoring determinations with respect to individual detainees, both of which are prerequisites to any initial visits counsel may have with petitioner-detainees. An orderly process that accommodates such visits will advance judicial economy by enabling petitioners to decide, with assistance of counsel, whether they may wish to file amended petitions with the Court before further proceedings in this action, while at the same time avoiding insurmountable logistical burdens that would arise were DoD and counsel required simultaneously to complete the necessary threshold tasks and to assemble and craft full legal and factual responses to the petitions in these cases, including with respect to fourteen separate petitioners in this case.

Pursuant to LCvR 7(m), counsel for Respondents have conferred by telephone with counsel for Petitioners, who have indicated that they oppose the motion.

### **BACKGROUND**

On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, killing approximately 3,000 persons. In response, the President, as Commander in Chief and with Congressional authorization for the use of force, took steps to protect the Nation and prevent additional threats. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Among these steps, the President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported and protected that network. In the course of that campaign – which remains ongoing – the United States and its allies have captured or taken control of a large number of individuals, many of whom are foreign nationals. The United States military has transferred a number of these alien enemy combatants for detention at the United States Naval Base at Guantanamo Bay, Cuba. More than 500 such aliens are currently detained at Guantanamo Bay.

Pending before the Judges of this Court are thirteen cases brought on behalf of approximately sixty alien detainees. The cases uniformly challenge the legality and conditions 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 (Docket No. 4). The organized scheduling of these cases would 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 would 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 DoD personnel who are being called upon to gather and assemble detainee-specific factual information for ongoing administrative hearings for the more than 500 Guantanamo Bay detainees, and who may ultimately be called upon to gather and assemble similar information for these habeas proceedings. 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 (Docket No. 9). 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. A joint hearing before Judge Green is scheduled for August 23, 2004 in order to facilitate this process. See id.

Petitioners' application for writ of habeas corpus is filed on behalf of fourteen alleged Yemeni nationals held as enemy combatants in Guantanamo Bay. See Petition for Writ of Habeas Corpus (Docket No. 1), ¶ 1. Petitioners allege that they were apprehended in Pakistan and eventually taken to Guantanamo Bay. See id., ¶¶ 22-51. Petitioners challenge their confinement and the Military Order of November 13, 2001 as contrary to the Due Process Clause of the Fifth Amendment, see id., ¶¶ 73, 75; the War Powers Clause, see id., ¶ 83; and Article I,

section 9 of the Constitution, regarding suspension of the Privilege of the Writ of Habeas Corpus, see id., ¶ 85. They also allege violations of international treaties, including the Third and Fourth Geneva Conventions, see id., ¶¶ 77, 79, 81, the International Covenant on Civil and Political Rights and the American Declaration on the Rights and Duties of Man, see id., ¶¶ 77, 79, as well as customary international law. The petition also asserts a claim of unlawful detention, see id., ¶ 71, and a claim under the Administrative Procedure Act, 5 U.S.C. §§ 702-706, see id., ¶ 87. Petitioners seek relief in the form of release, orders permitting access to counsel and barring interrogations, and declarations that Petitioners' detention violates the Constitution, treaties and laws of the United States, as well as international law. See id., Prayer for Relief.

### **ARGUMENT**

#### **I. The Court May Extend a Deadline for a Response to a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 Beyond Twenty Days.**

In 1976, the United States Supreme Court promulgated the Rules Governing Section 2254 Cases in the United States District Courts (the "2254 Rules").<sup>1</sup> Pursuant to those rules, this Court may extend the deadline for Respondents' response to Petitioners' application for writ of habeas corpus beyond the twenty-day maximum response time set forth in 28 U.S.C. § 2243.<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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."

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 Petitioners’ 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.”); 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.”); 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.”).

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.”). 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 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”).<sup>3</sup>

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<sup>3</sup> 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.

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 . . .”).

**II. This Court Should Exercise Its Discretion to Postpone the Deadline for a Response to Petitioners’ Application for Writ of Habeas Corpus.**

A postponement of the deadline for filing a response to Petitioners’ application for writ of habeas corpus is warranted in this case, particularly in light of the joint hearing before Judge Green scheduled for August 23, 2004, as well as the sheer number of petitioners involved in this case.

In the Absence of a Coordinated Schedule, the Burdens of Litigation are Substantial.

Pending before the Judges of this Court are thirteen cases involving approximately sixty Guantanamo Bay detainees, most of which were filed within a span of a few weeks. The cases raise numerous common questions, and a global schedule facilitating the orderly and efficient resolution of those issues, which could have a substantial impact on how the cases, individually and otherwise, proceed, is warranted, as explained in Respondents’ Motion for Joint Case Management Conference.<sup>4</sup> In addition, coordinated scheduling and treatment among the pending

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<sup>4</sup> Respondents filed a motion to dismiss the petition in Gherebi v. Bush, No. 04-CV-1164 (RBW), pursuant to direction of the Court received prior to the filing of Respondents’ Motion for Joint Case Management Conference. In Gherebi, the Court required Respondents to either file in short order a detailed factual submission in response to the petition (or an enlargement based on



cases is needed in order to alleviate potentially overwhelming logistical burdens that will arise in the absence of a coordinated approach. For example, a number of preliminary determinations must be made before the substantive issues in the petitions in these cases, including this case, can be properly addressed. To promote the organized and orderly litigation of these cases, the government has agreed to allow counsel to visit and communicate with petitioners. In connection with that undertaking, the government is in the process of conducting background checks and providing security clearances to qualified counsel to permit such visits. In addition, DoD officials must determine whether it may be necessary for personnel unconnected with the habeas litigation to monitor the visits that each petitioner-detainee has with counsel. Such determinations are being made on a case-by-case basis, by assessing the potential threat to national security exhibited by each detainee. The decisions concerning monitoring are requiring the use of resources that are also involved in the processing of more than 500 detainees for Combatant Status Review Tribunal (“CSRT”) hearings,<sup>5</sup> responding to collateral requests by

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the contents of such a submission), or declare an intent to file a motion to dismiss. See Order of July 29, 2004 in Gherebi v. Bush, No. 04-CV-1164 (RBW). Given that the petition in Gherebi involved a limited number of claims, as well as logistical burdens concerning the use of classified information needed to respond to the petition, Respondents elected to file a motion to dismiss. Nonetheless, Respondents maintain that a coordinated global schedule for all of the Guantanamo Bay detainee cases is warranted both as to scheduling appropriate motions to resolve the cases on legal grounds as well as any ultimately needed proceedings to address individual factual matters, especially because most of the petitions in these cases present claims greater in number and complexity than the petition filed in Gherebi.

<sup>5</sup> The CSRT hearings were established to more formally determine the status of aliens held at Guantanamo Bay who had previously been determined to be enemy combatants. The CSRT process involves a tribunal of three military officers which will determine the status of the detainees through presentation of testimony and evidence by the detainee, if he desires, and other reasonably available witnesses. See generally Respondents’ Response to Emergency Motion to Stay Military Tribunal Proceedings filed on August 5, 2004 in El-Banna v. Bush, No. 04-1144 (RWR); DoD website at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

petitioners concerning their medical condition, as well as gathering and analyzing intelligence in the continuing military mission. To the extent that Respondents are simultaneously required to assemble and present factual information to answer the petitions, explaining the cause of each petitioner's apprehension and justifying continued detention, the resource burdens with respect to these cases could reach crisis levels. Such information would involve data related to ongoing military operations and intelligence activities originating from various government agencies that would have to be reviewed and assembled into an organized presentation appropriate for submission to the Court.<sup>6</sup> Some of the information could be classified or otherwise protected, which would require establishment of mechanisms for the segregation and handling of such information in consultation with the originating agencies, including the entry of any appropriate protective order. This petition alone requires the government to address the claims of fourteen detainees, and the current response schedule requires the response for all at one time. The task of gathering and assembling information concerning fourteen detainees in this case, and at least sixty detainees in all the cases, for presentation to the Court would undoubtedly be a substantial one, and could be overwhelming in the absence of a coordinated approach in these cases.<sup>7</sup>

Respondents expect that the joint hearing before Judge Green will facilitate a schedule that will

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There is a limited set of DoD personnel who are involved with these hearings and are most familiar with the information concerning each detainee.

<sup>6</sup> Although some petitioners have been detained for a period of time, the information concerning their seizure and detention has not been maintained in a manner that would facilitate presentation to the Court or a format that is appropriate for submission to the Court. Thus, a significant review and assembly process is necessary to formulate appropriate responses to these petitions.

<sup>7</sup> Moreover, 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.

attempt to alleviate the various logistical burdens presented by these cases. Thus, a postponement of the deadline to respond to the order to show cause is reasonable, in order to allow Judge Green to consult with the parties and create a streamlined schedule for the processing of all of the petitioners' claims.

The Existence of Threshold Legal Issues Supports Postponement of a Factual Response.

In the interests of judicial economy and the conservation of resources, the threshold monitoring determinations upon which counsel visits are conditioned should precede the filing of responses to the petitions so that petitioners can decide, with assistance of counsel, whether they wish to file amended petitions with the Court. A postponement of the deadline for responses would allow petitioners time to make such decisions with the benefit of counsel, and obviate the need for Respondents to file multiple responses. Further, such a schedule would facilitate the presentation, in short order, of specific legal grounds that may exist for resolution of the cases, which would be appropriate for consideration in the first instance. In addition, the Court would have the opportunity to consider whether, out of deference to the Commander in Chief's ability to process and make factual determinations concerning the continuing status of captured alien enemy combatants during a conflict, any factual return should be deferred pending completion of the CSRT process.<sup>8</sup> Respondents expect to raise such issues with Judge Green for coordinated scheduling and consideration.

Because of these resource concerns and the desire for economy of litigation, Respondents have requested a coordinated schedule for all of the Guantanamo Bay detainee cases pending in

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<sup>8</sup> Cf. United States ex rel. New v. Perry, 919 F. Supp. 491, 496 (D.D.C. 1996) (deference "may avert unnecessary or duplicative proceedings in the event the military outcome obviates the need for judicial intervention").

this Court so that these tasks may be organized in an efficient manner. The Court recognized these concerns and has assigned all of the cases to Judge Green for coordination and management. Thus, Respondents have demonstrated good cause for the Court to postpone the deadline for a response to Petitioners' application for writ of habeas corpus until the Court has set a reasonable schedule taking into account all of the Guantanamo Bay detainee cases. See, e.g., Hudson, 948 F. Supp. at 811 (establishing deadline for response to petition by "taking into account the complexity of the Petition, the ability of Respondent to acquire the relevant documentary evidence, and the current caseload of the United States Attorneys").

Respondents request that the Court postpone the deadline for a response to Petitioners' application for writ of habeas corpus set forth in the Court's August 6, 2004 Order until Judge Green has had the opportunity to consider all of the Guantanamo Bay cases and has set a reasonable schedule taking into account all of the common legal and procedural issues presented by the petitions, as well as the substantial logistical burdens inherent in the litigation of these multiple, related cases.

### **CONCLUSION**

For the foregoing reasons, Respondents' Motion to Postpone Response to Petition for Writ of Habeas Corpus Pending Development of Coordinated Schedule for Pending Guantanamo Bay Detainee Cases should be granted.

Dated: August 20, 2004

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

KENNETH L. WAINSTEIN  
Interim United States Attorney

THOMAS R. LEE  
Deputy Assistant Attorney General

DAVID B. SALMONS  
Assistant to the Solicitor General

DOUGLAS N. LETTER  
Terrorism Litigation Counsel

ROBERT D. OKUN  
D.C. Bar No. 457-078  
Chief, Special Proceedings Section  
555 Fourth Street, N.W.  
Room 10-435  
Washington, D.C. 20530  
(202) 514-7280

/s/ Terry M. Henry  
JOSEPH H. HUNT (D.C. Bar No. 431134)  
VINCENT M. GARVEY (D.C. Bar No. 127191)  
TERRY M. HENRY  
PREEYA M. NORONHA  
Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W. Room 7144  
Washington, DC 20530  
Tel.: (202) 514-4107  
Fax: (202) 616-8470

Attorneys for Respondents