

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Guantanamo Detainee Cases

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)
) Civil Action Nos.
) 04-CV-1142 (RJL)
) 04-CV-1144 (RJR)
) 04-CV-1166 (RJL)
) 04-CV-1254 (HKK)
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RIDOUANE KHALID, *et al.*,

Petitioners,

v.

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) Civil Action No. 04-CV-1142 (RJL)
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GEORGE W. BUSH,
President of the United States, *et al.*,

Respondents.

JAMIL EL-BANNA, *et al.*,

Petitioners,

v.

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) Civil Action No. 04-CV-1144 (RJR)
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GEORGE WALKER BUSH,
President of the United States, *et al.*,

Respondents.

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1166 (RJL)

PETITIONERS' MOTION FOR CLARIFICATION
AND FOR RECONSIDERATION

Pursuant to Fed. R. Civ. P. 7(b), Petitioners in the coordinated Guantanamo Detainee Cases, 04-CV-1142 (RJL), 04-CV-1144 (RJR), 04-CV-1166 (RJL), and 04-CV-1254 (HKK), respectfully move this Court to clarify its Order of August 17, 2004 to the extent that Order appears to be inconsistent with the Court's November 15, 2004 Order retransferring cases 04-CV-1142 (RJL) and 04-CV-1166 (RJL), to Judge Leon in connection with the pending motion to dismiss. Petitioners in 04-CV-1142 (RJL) (*Khalid v. Bush*), 04-CV-1144 (RJR) (*El-Banna v. Bush*), and 04-CV-1166 (RJL) (*Boumediene v. Bush*) respectfully move this Court to reconsider only so much of its Order of November 15, 2004, that retransferred those cases to Judge Leon in connection with the pending Motion to Dismiss. In support of their Motion, Petitioners state as follows.

On July 23, 2004, Respondents moved to consolidate these *habeas* proceedings. Pursuant to local rule, the Motion was submitted to Judge Kollar-Kotelly, the Judge presiding over the earliest numbered of the cases, *Rasul v. United States*, No. 02-CV-0299. *See* LCvR 40.5(d). In their supporting Memorandum, Respondents cited a number of reasons for consolidation. *See* Respondents' Motion to Consolidate and Memorandum in Support Thereof ("Consolidation Motion"), attached hereto as *Exhibit A*. The Consolidation Motion was denied.

On August 4, 2004, Respondents filed a Motion for Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition (“Coordination Motion”), attached hereto as *Exhibit B*.¹ On August 17, 2004, Judge Kessler, writing on behalf of the Calendar and Case Management Committee, entered an Order granting the Coordination Motion in part and designating Judge 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 *habeas* cases. *See* Calendar and Case Management Committee Order at ¶ 1. That Order was issued pursuant to LCvR 40.5(e), which provides:

Upon a finding by the Calendar Committee that two or more cases assigned to different judges should be referred for a specific purpose to one judge in order to avoid a duplication of judicial effort, the Calendar Committee may enter such an order of referral. The order shall be with the consent of the judge to whom the cases will be referred and shall set forth the scope of authority of said judge. Unless otherwise provided, such an order shall not transfer any cases nor affect the assignment of future cases.

LCvR 40.5(e).

Local Rule 40.5(e) concerns the procedures used by the Court to determine, *inter alia*, when cases are “related,” *see* LCvR 40.5(a), and provides the Calendar Committee with authority to make a finding that two or more cases assigned to different judges should be referred for a specific purpose to a particular judge. *See* LCvR 40.5(e). The August 17 Order referred the *habeas* cases to Judge Green for ruling, to the extent necessary, on “procedural and substantive issues that are common to the [*habeas*] cases.” No authority other than LCvR 40.5(e) was cited

¹ Petitioners variously denied, withheld consent, or believed these motions to be premature. However, at that time, Petitioners could not have foreseen that Respondents—in contravention of the Supreme Court’s ruling in *Rasul*—would move, as they ultimately did, to *dismiss* all of the cases on the very same grounds as those briefed, and decided by, *Rasul*. As a result, Petitioners have been pressed to address those common fundamental issues, and have done so with the reasonable expectation that those common issues would be adjudicated before this Court, pursuant to Judge Kessler’s Order of August 17 and this Court’s Order of September 20, so that the cases may quickly proceed to the merits of each Petitioner’s *habeas* claims. While many individual issues distinguish and may support separate litigation of the merits of these cases, that is not the case in the context of the Respondents’ pending Motion to Dismiss.

to support the Court's August 17 Order. Any order severing cases expressly for determination of such common issues would appear to be at odds with both the plain language and the intent of the Calendar and Case Management Committee Order.

On September 20, 2004, this Court issued an Order confirming that:

By Order dated August 17, 2004, the Calendar and Case Management Committee of the United States District Court for the District of Columbia designated this Judge to coordinate and manage all proceedings in these matters and *to the extent necessary rule on common procedural and substantive issues.*

Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence

Previously Submitted to the Court ("Coordination Order") at 1. The Coordination Order stated that, pursuant to the September 14, 2004, Resolution of an Executive Session of the U.S.D.C. for the District of Columbia, current and future-filed *habeas* cases "are to be transferred by the Judge to whom they are assigned, pursuant to LCvR 40.6(a) and 40.5(e) to [] Judge [Green] for coordination and management and that the transferring Judge will retain the case for all other purposes." *Id.* The Coordination Order further stated:

Among other terms, the Resolution further provides that this Judge will identify and delineate both procedural and substantive issues that are common to all or some of the Guantanamo Bay cases and, to the extent possible and as consented to by the transferring Judge, Judge Green will rule on procedural issues that are common to these cases. As to substantive issues, to the extent possible and provided that consent is given by the transferring Judge, this Judge will address specified substantive issues that are common to the Guantanamo Bay detainee cases.

Id.

The Coordination Order (and the Resolution of the Executive Session appended to it), unlike the Calendar and Case Management Committee Order, includes as authority (in addition to LCvR 40.5(e)) for the transfer of the cases to this Court LCvR 40.6(a), which appears in a section of the Local Rules addressing "Other Transfers and Reassignments," and states:

(a) **TRANSFERS BY CONSENT.**

A judge, upon written advice to the Calendar Committee, may transfer directly all or part of any case on the judge's docket to any consenting judge.

The Coordination Order creates some ambiguity with respect to the scope of this Court's authority to the extent it appears inconsistent with the Calendar and Case Management Committee's Order, which referred the cases to this Court for ruling on common issues, without reference to the consent of the transferring judge, as appears in the Coordination Order.

Nevertheless, and pursuant to those Orders, the *habeas* petitioners have proceeded before this Court for over three months, coordinating and managing common legal and procedural issues, and participating in joint briefing of such issues raised before this Court during that time.

On November 15, after the Petitioners had filed their joint reply and opposition to Respondents' Motion to Dismiss, this Court issued an order re-transferring the *Boumediene* and *Khalid* cases back to Judge Leon "for resolution of the pending motions to dismiss and for all other purposes." Order Retransferring Cases for All Purposes at 2.

Respondents' pending Motion to Dismiss, as well as the replies and oppositions Petitioners have filed in response to that Motion, raise threshold legal issues which are both common and fundamental to all of the pending petitions.

As the Respondents' Consolidation Motion stated, these "pending habeas petitions . . . involve not just 'a common question of law or fact' . . . they involve a number of common questions of law and fact." *See* Consolidation Motion at 8. That Motion also pointed out that:

[T]he cases present a number of common legal questions or issues, including whether petitioners' detention violates the Constitution, laws, or treaties cited in the petitions; whether the November 13, 2001 Military Order pursuant to which petitioners are detained violates the Constitution, laws or treaties cited in the petitions; whether the treaties and international law principals cited by petitioners are enforceable in a habeas proceeding; potential

challenges to and the significance of the Combatant Status Review Tribunal process to be afforded Guantanamo Bay detainees for review of their status as enemy combatants; and the nature and scope of judicial review of the military's determination of a detainee's status.

See Consolidation Motion at 9 (footnote omitted). In fact, every one of those common legal questions has been raised, to some degree, in the pending Motion to Dismiss and Petitioners' opposition to that Motion.

In their Coordination Motion, Respondents again pointed out that all of the petitions present a number of common questions of law. Some of those common questions identified in the Coordination Motion include “. . . (3) whether the detainees, who were not captured in the United States or its territories and are not detained there, are protected by the Due Process Clause of the Fifth Amendment, and by other provisions of the Constitution; (4) whether the detainees may challenge their detention under various treaties and conventions to which the United States is signatory, and under principles of ‘customary international law’. . . .” *See* Coordination Motion at 2.

Respondents' Coordination Motion followed Judge Kollar-Kotelly's Order denying the Motion to Consolidate. Respondents' Coordination Motion focused, therefore, on a different, more open procedure, and recognized that:

Even if one assumes that the varying circumstances of the Petitioners' capture may ultimately require individualized attention by the Court, it will promote judicial economy and convenience for the parties to order coordinated briefing, argument, and consideration on the important questions of law and procedure that will shape these habeas proceedings. Absent such coordinated treatment, all parties will be prejudiced, both by the potential for inconsistent rulings on similar issues pertaining to Guantanamo Bay detainees, as well as by the practical and logistical difficulties presented by briefing and arguing the same legal issues before [different district judges].

See Coordination Motion at 3-4. The Respondents' Coordination Motion went on to state:

Perhaps most important, coordinated treatment would additionally minimize the risk of conflicting determinations on the fundamental legal questions that unite the petitions. Even if the Court were simply to accept coordinated briefing and argument on the common legal questions present in these cases, with each district judge reserving their discretion to reach his or her own conclusion and enter separate orders, the mere fact of coordinated scheduling and joint hearing, with consequent deliberations among the various judges of the Court, the opportunities for conflicting rulings would be reduced. The seriousness of the issues raised in these petitions and the sensitive national security context in which they arise, makes avoidance of conflicting rulings—if at all possible—imperative.

See Coordination Motion at 13 (emphasis supplied).

Respondents' points are particularly apt now, because Respondents' Motion to Dismiss places these fundamental legal issues squarely before the Court—simultaneously—in all of the pending *habeas* cases. It is difficult even to conceive of a set of issues with respect to which consistent rulings from the Court would be more important than those now pending, which reach the very heart of the Petitioners' cases.

Petitioners' Motion for Clarification and for Reconsideration is limited to that portion of the Court's November 15 Order retransferring the two cases for resolution of the pending Motion to Dismiss. Granting the relief requested here will result in only a single ruling on that Motion, avoiding the possibility, however remote, that two judges in this district would issue inconsistent rulings on the threshold legal issues common to all of these cases. Denying the relief requested opens the door to the prospect of conflicting interpretations on these fundamental issues, raising the specter of potential confusion among Petitioners, Respondents, and the Department of Defense personnel stationed at Guantanamo Bay. Petitioners respectfully request that the Court clarify and reconsider its Orders to avoid that possibility, and request that the Court do so in advance of the oral arguments scheduled to take place in these cases on December 1 and 2, 2004.

CONCLUSION

For the reasons set forth above, this Court should grant Petitioners' Motion for Clarification and for Reconsideration and restore these cases to the coordinated proceedings solely for the purpose of ruling on the pending Motion to Dismiss.

CONSULTATION

Petitioners' counsel have consulted with Respondents' counsel on this motion. Respondents' counsel has not taken a position on the motion, and reserved Respondents' right to oppose the motion.

Dated: November 24, 2004

As to Motion for Reconsideration

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RIDOUANE KHALID, *et al.*,

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.*,

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1144 (RJR)

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1166 (RJL)

**[PROPOSED] ORDER GRANTING PETITIONERS' MOTION FOR
RECONSIDERATION**

Petitioners move pursuant to Federal Rule of Civil Procedure 7(b) for reconsideration of this Court's November 15, 2004, order transferring the above-referenced cases for resolution of Respondents' pending Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law.

Having reviewed Petitioners' Motion, and taking into consideration the substantial interests that would be served by issuance of a single decision on Respondents' Motion to Dismiss, Petitioners' Motion is hereby GRANTED.

IT IS SO ORDERED

November ____, 2004

JOYCE HENS GREEN
United States District Judge

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SHAFIQ RASUL, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 02-CV-0299 (CKK)
)	
GEORGE WALKER BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	
FAWZI KHALID ABDULLAH FAHAD)	
AL ODAH, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-CV-0828 (CKK)
)	
UNITED STATES OF AMERICA,)	
<i>et al.</i> ,)	
)	
Defendants.)	
_____)	
MAMDOUH HABIB, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 02-CV-1130 (CKK)
)	
GEORGE WALKER BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

MURAT KURNAZ, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1135 (ESH)

OMAR KHADR, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1136 (JDB)

MOAZZAM BEGG, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1137 (RMC)

MOURAD BECHELLALI, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1144 (RWR)

FALEN GHEREBI, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,

et al.,

Respondents.

Civil Action No. 04-CV-1164 (RBW)

<hr/>)	
LAKHDAR BOUMEDIENE, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1166 (RJL)
)	
GEORGE WALKER BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
<hr/>)	
SUHAIL ABDUL ANAM, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1194 (HHK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
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**NOTICE OF FILING OF MOTION TO CONSOLIDATE
IN RASUL V. BUSH, NO. 02-CV-0299 (CKK)**

The Court and parties in the above-named cases are hereby notified that respondents have filed a motion to consolidate these cases. Pursuant to local rule, the motion has been submitted to Judge Kollar-Kotelly, as the judge presiding over the earliest numbered case, *Rasul v. United States*, No. 02-CV-0299. *See* LCvR 40.5(d) (“Motions to consolidate cases assigned to different judges of this court shall be heard and determined by the judge to whom the earlier-numbered case is assigned.”). A copy of the motion to consolidate is attached as Exhibit 1.

Dated: July 23, 2004

Respectfully submitted,

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Attorneys for Respondents

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 02-CV-0299 (CKK)

FAWZI KHALID ABDULLAH FAHAD
AL ODAH, *et al.*

Plaintiffs,

v.

UNITED STATES OF AMERICA,
et al.,

Defendants.

Civil Action No. 02-CV-0828 (CKK)

MAMDOUH HABIB, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 02-CV-1130 (CKK)

MURAT KURNAZ, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1135 (ESH)

OMAR KHADR, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1136 (JDB)

MOAZZAM BEGG, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1137 (RMC)

MOURAD BECHELLALI, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1144 (RWR)

FALEN GHEREBI, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,

et al.,

Respondents.

Civil Action No. 04-CV-1164 (RBW)

_____)	
LAKHDAR BOUMEDIENE, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1166 (RJL)
)	
GEORGE WALKER BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	
SUHAIL ABDUL ANAM, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1194 (HHK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' MOTION TO CONSOLIDATE
AND MEMORANDUM IN SUPPORT THEREOF**

Currently pending before various judges of this Court are a number of petitions for writs of habeas corpus, as styled above, brought on behalf of foreign nationals detained or taken into custody by United States authorities as enemy combatants in connection with hostilities involving al Qaeda, the Taliban, and their supporters, and held at the United States Naval Base at Guantanamo Bay, Cuba. For the reasons explained below, these cases – as well as any after-filed actions of the same nature – should be consolidated under FED. R. CIV. P. 42. The cases present

common questions of law and fact, and consolidation will promote judicial economy and convenience for the parties. Absent such consolidations, all parties will be prejudiced, both by the potential for inconsistent rulings on similar issues pertaining to Guantanamo Bay detainees, as well as by the practical and logistical difficulties presented by multiple cases, many, if not all, of which may involve the presentation of highly classified materials, proceeding before different judges on possibly divergent schedules.

By local rule, this motion is submitted to Judge Kollar-Kotelly, as the judge presiding over the “earlier numbered” of the Guantanamo Bay detainee cases, *Rasul v. United States*, No. 02-CV-0299. See LCvR 40.5(d) (“Motions to consolidate cases assigned to different judges of this court shall be heard and determined by the judge to whom the earlier-numbered case is assigned.”). Notification of this motion, along with a copy of the motion, is being submitted to each of the judges in the related cases. See Notice of Filing of Motion to Consolidate in *Rasul v. Bush*, No. 02-CV-0299 (CKK) (filed July 23, 2004, in each of the related cases).

Counsel for respondents have conferred or attempted to confer by telephone with counsel for petitioners in the related cases regarding this motion. Counsel for petitioners in *Kurnaz v. Bush*, No. 04-CV-1135 (ESH), opposes the motion. Counsel for petitioners in *Al Odah v. United States*, No. 02-CV-0828 (CKK); *Habib v. Bush*, No. 02-CV-1130 (CKK); *Khdar v. Bush*, No. 04-CV-1136 (JDB); *Benchellali v. Bush*, No. 04-CV-1142 (RJL); and *Boumediene v. Bush*, No. 04-CV-1166 (RJL), believe the motion is premature, pending access to their clients, and either oppose the motion or are not in a position to consent to the motion. As of the filing of this motion, counsel for petitioners in the other cases have not informed counsel for respondents of their final position regarding 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. 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 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. As authorized by, *inter alia*, a Military Order of November 13, 2001 issued by the President,¹ 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, an area within the sovereign territory of Cuba leased for an indefinite term by the United States, and over which the United States exercises exclusive control.² Approximately 600 such aliens are currently detained at Guantanamo Bay.

Pending before this Court are a number of cases brought on behalf of aliens detainees in the control of the Department of Defense and held at Guantanamo Bay. The cases commonly challenge the legality and conditions of the detention and confinement of the aliens on whose behalf the cases are brought. Of the cases of which respondents are now aware, before Judge Kollar-Kotelly are *Rasul v. Bush*, No. 02-CV-0299; *Al Odah v. United States*, No. 02-CV-0828;

¹ See 66 Fed. Reg. 57,831 (Nov. 16, 2001).

² See *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686, 2690-93 (2004).

and *Habib v. Bush*, No. 02-CV-1130.³ Before Judge Huvelle is *Kurnaz v. Bush*, No. 04-CV-1135. Before Judge Bates is *Khadr v. Bush*, No. 04-CV-1136.⁴ Before Judge Collyer is *Begg v. Bush*, No. 04-CV-1137. Pending before Judge Leon are *Benchellali v. Bush*, No. 04-CV-1142, and *Boumediene v. Bush*, No. 04-CV-1166. Before Judge Roberts is *El-Banna v. Bush*, No. 04-CV-1144. Before Judge Walton is *Gherebi v. Bush*, No. 04-CV-1164.⁵ And before Judge Kennedy is *Anam v. Bush*, No. 04-CV-1194.

Each of these cases is a petition for habeas corpus, or, in one case, a complaint essentially constituting a habeas petition,⁶ filed by “next friends” on behalf of alien detainees at Guantanamo Bay. The cases include as respondents the President, the Secretary of Defense, the commander of Joint Task Force-GTMO responsible for Guantanamo Bay, and the commander of the particular

³ The Court initially dismissed these cases on jurisdictional grounds, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and subsequent appeals led to the Supreme Court’s *Rasul* decision.

⁴ A Guantanamo Bay detainee case dismissed by Judge Bates prior to the Supreme Court’s decision in *Rasul* is, *Sassi v. Bush*, No. 04-CV-0547. An appeal is presently pending in that case. The petitioners in that case are petitioners in either the *Benchellali* case before Judge Leon or the *Khadr* case before Judge Bates.

⁵ *Gherebi* was recently transferred to this District from the Ninth Circuit. Unlike the petitions in the other pending cases, the *Gherebi* petition is not yet posted on the Court’s ECF system; accordingly, a copy of the operative habeas petition in the case is attached as Exhibit A. The petition was initially filed by petitioners in the Ninth Circuit Court of Appeals, which transferred the petition for disposition by the district court for the Central District of California. *See Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003). After the case was appealed, decided, then vacated by the Supreme Court, the Ninth Circuit transferred the case to the District of Columbia. *See Gherebi v. Bush*, ___ F.3d ___, 2004 WL 1534166 (July 8, 2004).

⁶ *See Rasul v. Bush*, 215 F. Supp. 2d 55, 62-64 (D.D.C. 2002) (noting that claims asserted in *Al Odah* case are “within the exclusive province of the writ of habeas corpus”).

camp housing the detainees in Guantanamo Bay, and/or other government officials.⁷ Allegations in the petitions typically include that petitioners were apprehended in connection with hostilities involving al Qaeda, the Taliban, and their supporters or otherwise and were taken involuntarily to Guantanamo Bay;⁸ that petitioners are not enemy combatants and have not been informed of charges against them;⁹ that petitioners have been housed in inadequate housing, without meaningful access to families or counsel, and without opportunity to fully exercise their religious beliefs;¹⁰ and that petitioners have been forced to provide involuntary statements to interrogators.¹¹ Petitioners challenge their confinement, as well as the Military Order of

⁷ The *Gherebi* petition names the President, the Secretary of Defense, and “1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials.” The *Al Odah* complaint also includes the United States as respondent-defendant.

⁸ See *Rasul* First Amended Petition ¶¶ 23-24, 27, 32; *Al Odah* Amend. Compl. ¶ 16; *Habib* Pet. ¶¶ 16-19, 21-22; *Kurnaz* Pet. ¶¶ 6, 16-17, 19, 23-24; *Khadr* Pet. ¶¶ 16, 21-22; *Begg* Pet. ¶¶ 22-26; *Bechellali* Pet. ¶¶ 28, 30, 32; *El-Banna* First Amend. Pet. ¶¶ 19-26, 27-28; *Gherebi* Amend. Pet. ¶ 2; *Boumediene* Pet. ¶¶ 16-18, 20; *Anam* Pet. ¶¶ 26, 31, 36, 40-41, 44, 46, 52, 58, 61.

⁹ See *Rasul* First Amended Petition ¶¶ 22, 29-30, 47; *Al Odah* Amend. Compl. ¶¶ 15, 18; *Habib* Pet. ¶¶ 15, 23-24, 44; *Kurnaz* Pet. ¶¶ 13-15, 34; *Khadr* Pet. ¶¶ 13, 30; *Begg* Pet. ¶¶ 17-18, 47, 52; *Bechellali* Pet. ¶¶ 25-26, 48; *El-Banna* First Amend. Pet. ¶¶ 15-16, 43; *Boumediene* Pet. ¶¶ 13-14, 25; *Anam* Pet. ¶¶ 23, 28, 33, 37, 59, 71, 73, 78.

¹⁰ See *Rasul* First Amended Petition ¶¶ 33, 49; *Al Odah* Amend. Compl. ¶¶ 28-29; *Habib* Pet. ¶¶ 27, 44-45; *Kurnaz* Pet. ¶¶ 8, 34-35; *Khadr* Pet. ¶ 31; *Begg* Pet. ¶¶ 47-48; *Bechellali* Pet. ¶¶ 48-49; *El-Banna* First Amend. Pet. ¶¶ 43-44; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶ 25; *Anam* Pet. ¶¶ 73-74.

¹¹ See *Rasul* First Amended Petition ¶ 32; *Habib* Pet. ¶¶ 26, 44; *Kurnaz* Pet. ¶¶ 34-35; *Khadr* Pet. ¶¶ 30-31; *Begg* Pet. ¶ 48; *Bechellali* Pet. ¶ 49; *El-Banna* First Amend. Pet. ¶ 44; *Boumediene* Pet. ¶ 25; *Anam* Pet. ¶ 73-74.

November 13, 2001, as contrary to the Constitution¹² and international treaties, including the Third and Fourth Geneva Conventions,¹³ the International Covenant on Civil and Political Rights and the American Declaration on the Rights and Duties of Man,¹⁴ as well as customary international law.¹⁵ Some of the petitions additionally assert claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Administrative Procedure Act (APA), 5 U.S.C. § 702-706.¹⁶

Petitioners commonly seek relief in the form of release,¹⁷ orders permitting access to counsel and barring interrogations, and declarations that petitioners' detention and the November 13, 2001 military order violate the Constitution, treaties, and laws of the United States, as well as

¹² Constitutional provisions relied upon typically include the Due Process Clause of the Fifth Amendment, the War Powers Clause, and Article I, section 9, regarding suspension of the Privilege of the Writ of Habeas Corpus. *See Rasul* First Amended Petition ¶¶ 52-54, 62-64; *Al Odah* Amend. Compl. ¶ 37; *Habib* Pet. ¶¶ 48-51, 59-61; *Kurnaz* Pet. ¶¶ 39-41, 63-65; *Khadr* Pet. ¶¶ 35-37, 59-61; *Begg* Pet. ¶¶ 54-56, 64-66, 71; *Bechellali* Pet. ¶¶ 53-56, 77-79; *El-Banna* First Amend. Pet. ¶¶ 48-50, 72-74; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶¶ 33-35, 43-45; *Anam* Pet. ¶¶ 80-82, 90-92, 97.

¹³ *See Habib* Pet. ¶¶ 56-57; *Kurnaz* Pet. ¶ 61; *Khadr* Pet. ¶ 57; *Begg* Pet. ¶¶ 22, 73; *Bechellali* Pet. ¶ 75; *El-Banna* First Amend. Pet. ¶ 70; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶ 41; *Anam* Pet. ¶ 88.

¹⁴ *See Kurnaz* Pet. ¶¶ 43-45; *Khadr* Pet. ¶¶ 39, 41; *Begg* Pet. ¶¶ 58, 60; *Bechellali* Pet. ¶¶ 57, 59; *El-Banna* First Amend. Pet. ¶¶ 52-54; *Boumediene* Pet. ¶¶ 37, 39; *Anam* Pet. ¶¶ 84-86.

¹⁵ *See Rasul* First Amended Petition ¶¶ 56-60; *Habib* Pet. ¶¶ 52-55; *Kurnaz* Pet. ¶¶ 43-45; *Khadr* Pet. ¶¶ 39, 41; *Begg* Pet. ¶¶ 58, 60; *Bechellali* Pet. ¶¶ 57, 59; *El-Banna* First Amend. Pet. ¶¶ 52-54; *Boumediene* Pet. ¶ 37; *Anam* Pet. ¶¶ 84-86.

¹⁶ *See Al Odah* Amend. Compl. ¶¶ 38-39; *Kurnaz* Pet. ¶¶ 48, 53, 57, 67; *Khadr* Pet. ¶¶ 44, 49, 53, 63; *Begg* Pet. ¶ 68; *Bechellali* Pet. ¶¶ 62, 67, 71, 81; *El-Banna* First Amend. Pet. ¶¶ 57, 62, 66, 76; *Anam* Pet. ¶ 94.

¹⁷ In *Al Odah*, plaintiffs previously disclaimed seeking release, but the Court determined that plaintiffs "plainly challenge the lawfulness of their custody." *Rasul*, 215 F. Supp. 2d at 62.

international law.¹⁸ Indeed, except with regard to averments concerning the circumstances of petitioners' capture, attempts by family or friends to contact a detainee, and the occasional additional legal theory, the petitions in these cases are essentially the same. Furthermore, many of the cases involve the same litigation counsel or coordinating counsel.¹⁹

ARGUMENT

Federal Rule of Civil Procedure 42(a) provides that “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”²⁰ The Rule encourages consolidation where cases present questions of law or fact in common; thus, consolidation is appropriate “[i]f two cases appear to be of like nature and relative to the same question” and consolidation would promote judicial economy. *See Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491, 499 (C.D. Ill. 1983); *Judicial Watch, Inc. v.*

¹⁸ *See Rasul* First Amended Petition § VI; *Al Odah* Amend. Compl. (Prayer for Relief); *Habib* Pet. § V; *Kurnaz* Pet. § V; *Khadr* Pet. § V; *Begg* Pet. § V; *Bechellali* Pet. § V; *El-Banna* First Amend. Pet. § V; *Gherebi* Amend. Pet. ¶¶ 5-6; *Boumediene* Pet. § VI; *Anam* Pet. (Prayer for Relief).

¹⁹ For example, in a significant number of the cases petitioners are represented by counsel from the Center for Constitutional Rights. And the *Kurnaz*, *Khadr*, and *Begg* cases were filed by the same law firm.

²⁰ Of course, petitions for a writ of habeas corpus are civil in nature, *see Hilton v. Braunskill*, 481 U.S. 770, 775-76 (1987), and, though different in respects from general civil litigation, habeas petitions are subject to the Federal Rules of Civil Procedure to the extent not inconsistent with statute. *See* FED. R. CIV. P. 81(a)(2); *see also Hilton*, 481 U.S. at 776 (“[w]here . . . the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to use . . . [general civil] rules by analogy or otherwise.”) (internal quotation marks and citation omitted). Thus, FED. R. CIV. P. 42 applies with respect to these cases.

United States Dep't of Energy, 207 F.R.D. 8, 8 (D.D.C. 2002) (Friedman, J.). A court has discretion to consolidate cases when it will “help it manage its caseload with economy of time and effort for itself, for counsel, and for litigants.” *Mylan Pharmaceuticals Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000) (Urbina, J.) (internal quotation marks and citation omitted), *vacated on other grounds sub nom., Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627 (D.C. Cir. 2002). Consolidation relieves the Court and parties of the burden of duplicative filings and orders. *See New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 147-48 (D.D.C. 2002) (Kollar-Kotelly, J.). It does not, however, “merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *Id.* (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933)); *see also Midwest Community Council*, 98 F.R.D. at 499 (consolidation can economize time and effort “without circumscribing the opportunity for full litigation of all relevant claims”).

The pending habeas petitions by Guantanamo Bay detainees involve not just “a common question of law or fact” as required by FED. R. CIV. P. 42; they involve a number of common questions of law and fact. Of course, the cases present common fact scenarios in that each and every petitioner is an alien who was apprehended in some manner overseas in connection with hostilities involving al Qaeda, the Taliban, and their supporters; is considered an enemy combatant; and is held outside of the United States and the territorial jurisdiction of United States courts at Guantanamo Bay, an area over which the government exercises exclusive jurisdiction but not ultimate sovereignty. Further, each and every petitioner challenges the nature of his confinement, allegedly without access to counsel or family and without a statement of charges against him.

Moreover, the cases present a number of common legal questions or issues, including whether petitioners' detention violates the Constitution, laws, or treaties cited in the petitions; whether the November 13, 2001 Military Order pursuant to which petitioners are detained violates the Constitution, laws, or treaties cited in the petitions; whether the treaties and international law principles cited by petitioners are enforceable in a habeas proceeding; potential challenges to and the significance of the Combatant Status Review Tribunal process to be afforded Guantanamo Bay detainees for review of their status as enemy combatants;²¹ and the nature and scope of judicial review of the military's determination of a detainee's status. In addition, the cases will share common questions on procedural matters such as the nature and extent of detainees' access to counsel; the scope and method of any inquiry, if appropriate, into confinement conditions; or the need, if any, for the physical presence of petitioners in court for their case.

Because these cases share such issues in common, consolidation will promote interests of efficiency and economy for both the Court and the parties. Judicial resources will be conserved with one judge considering and resolving, presumably once, the various common issues; multiple judges of the Court should not duplicate their efforts by dealing with common issues of this nature in multiple cases, thus devoting resources of multiple chambers to the same issues. Indeed, this Court initially consolidated, on motion of plaintiffs, the *Rasul* and *Al Odah* cases for the limited purpose of considering the Court's jurisdiction, an issue subsequently addressed by

²¹ The Department of Defense recently created a such a process for alien detainees at Guantanamo Bay. See Department of Defense website at:

<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>

the Supreme Court. *See* Order of July 30, 2002 (in *Rasul* and *Al Odah*). As noted above, a number of common issues still must be resolved in these and the other cases, and consolidation is accordingly warranted.²²

Consolidation will also promote efficiency and economy to the extent the cases require the Court to have access to classified information. The fewer the number of Court chambers needing such access, the more quickly and efficiently appropriate security arrangements can be made for access to and storage of such information by or for the Court.

Furthermore, consolidation would serve to avoid the very real risk of inconsistent adjudications in these cases. *See International Paving Systems v. Van-Tulco, Inc.*, 806 F. Supp. 17, 22 (E.D.N.Y. 1992) (a primary purpose of consolidation is to avoid inconsistent results in separate actions). This factor takes on special significance given the serious Constitutional issues involving the President's war powers raised in these cases, as well as the possibility that these cases may ultimately require the presentation of highly classified materials. Even with respect to other common procedural or merits-related issues, inconsistent adjudications on such issues could result in the administration of conflicting rulings with respect to the Guantanamo Bay detainees, such that the detainees would be subject to inconsistent treatment that might be occasioned by such rulings. Consolidation would avoid such difficulties. In addition, consolidation similarly would avoid the potential for multiple interlocutory appeals that might

²² Also, to the extent that only certain cases involve certain claims, *e.g.*, claims under the Alien Tort Statute, 28 U.S.C. § 1350, issues pertaining to those claims, such as whether such claims can be properly asserted in the cases, can be jointly resolved in the cases to which they pertain, as needed. The existence of such claims in some cases should not be a barrier to consolidation given the economies and conservation of judicial resources that consolidation would promote with respect to the common questions in those and the other cases.

arise from multiple rulings on the same issues from different judges, to the extent such appeals might be appropriate.

Consolidation also would not prejudice the parties.²³ With respect to respondents, consolidation would help alleviate the logistical burdens respondents face in responding to multiple habeas petitions before different judges on potentially divergent schedules. Efficiencies gained by consolidation would promote the speediest and most efficient resolution of these cases overall, and, thus, would be in the interest of all concerned, including petitioners. Further, should the cases reach a stage that might call for consideration of the circumstances of individual detainees or their separate claims, the Court can consider an appropriate response, including potential de-consolidation, at that time. *See New York v. Microsoft*, 209 F. Supp. 2d at 147-48; FED. R. CIV. P. 42(b).

Finally, the cases that are the subject of this motion are those of which respondents' counsel are now aware. Respondents request that the Court exercise its power to consolidate, *sua sponte*, any subsequently filed petitions with the pending cases. *See Mylan*, 94 F. Supp. 2d at 43 (noting the court's power to consolidate *sua sponte*); *Midwest Community Council*, 98 F.R.D. at 499-500 (same). For the reasons explained above, consolidation of future-filed similar petitions by Guantanamo Bay detainees is warranted.

CONCLUSION

For the reasons set forth above, the Court should grant respondents' motion and consolidate these cases and similar cases filed in the future.

²³ While prejudice to a party is a factor to be taken into account in considering consolidation, *see Judicial Watch*, 207 F. Supp. 2d at 8, a court can order consolidation over the objection of one, or even all, parties. *See Midwest Community Council*, 98 F.R.D. at 499-500.

Dated: July 23, 2004

Respectfully submitted,

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EXHIBIT A

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8 Attorneys for Petitioner, BELAID GHEREBI,
as next friend of FALEN GHEREBI
9

10 UNITED STATES COURT OF APPEALS

11 NINTH CIRCUIT
12

13 BELAID GHEREBI, as next friend) No.
of FALEN GHEREBI,)

14)
15) Petitioner,)

16)
17) vs.)

18) GEORGE WALKER BUSH, DONALD H.)
19) RUMSFELD, and 1,000 UNKNOWN)
20) NAMED UNITED STATES MILITARY)
21) PERSONNEL and GOVERNMENT)
22) OFFICERS AND/OR OFFICIALS,)

23)
24) Respondents.)
25)
26)
27)
28)

AMENDED VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS
(February 01, 2003)

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1 TO: A UNITED STATES COURT OF APPEALS JUDGE:

2 Petitioner, by and through his counsel of record, alleges
3 that:

4 1. Petitioner, Belaid Ghorebi, is the brother and next
5 friend of Faleh Ghorebi (hereinafter "Ghorebi"), and files this
6 petition on his brother's behalf, and is a resident of the State
7 of California.

8 2. Beginning on or about January 11, 2002, and continuing to
9 date, respondents under force of arms and involuntary brought to
10 U.S. Naval Station, Guantanamo Bay, Cuba (hereinafter "GITMO"),
11 under the exclusive and complete jurisdiction of respondents in
12 the nation of Cuba. Ghorebi, whom respondents captured in the
13 nation of Afghanistan.

14 3. Ghorebi continues to be held against his will,
15 illegally, under force of arms, incommunicado, and in violation
16 of the United States Constitution and the third Geneva
17 Convention, and he has been denied access to legal
18 representatives.

19 4. Respondents have characterized Ghorebi as an "unlawful
20 combatant," and have denied him status as a prisoner of war, have
21 denied him rights under the United States Constitution, and have
22 denied him access to the United States Courts. See Memorandum,
23 *infra*.

24 5. Ghorebi is unlawfully detained.

25 6. Respondents are the persons who have illegal and
26 exclusive custody of Ghorebi.

27 I declare the foregoing to be true and correct based upon
28 the information I have, and, pursuant to 28 U.S.C. 1746, declare

1 the same to be true under penalty of perjury on February 1, 2003,
2 at Venice Beach, California.

3
4 
5 STEPHEN YAGMAN

6
7 MEMORANDUM OF LAW

8 Petitioner, Belaid Gherebi, is the brother and next friend
9 of Faleh Gherebi (hereinafter "Gherebi"), supra, and therefore,
10 has standing to bring this petition on behalf of his brother.
11 *Coalition of Clergy, Lawyers & Professors v. Bush*, 320 F.3d 1153
12 (9th Cir. 2002).

13 Issuance of a writ of habeas corpus is sought because
14 Gherebi was taken prisoner by the respondents in Afghanistan,
15 acting on behalf of the United States of America, and under force
16 of arms involuntarily was transferred to Guantanamo, Cuba, and
17 is at Guantanamo held by force of arms, against his will.

18 What is sought by this petition is: acknowledgment that
19 Gherebi is detained by respondents; that the reason for Gherebi's
20 detention be stated; that Gherebi be brought physically before
21 the court for a determination of his conditions of detention,
22 confinement, and status, which conditions are contended to be in
23 violation of the Due Process Clauses of the Fifth and Fourteenth
24 Amendments and the cruel and unusual punishment clause of the
25 Eighth Amendment, and be ordered to be brought into compliance
26 with those Amendments; that Gherebi be accorded his right under
27 the Sixth Amendment of access to legal counsel; that Gherebi be
28

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1 released; and, for any and all appropriate other and further
2 action.

3 The United States Constitution provides that:
4 [t]he privilege of the writ of habeas corpus shall
5 not be suspended, unless when in cases or
6 rebellion or invasion the public safety may require
7 it.

8 Id. at Article I, Section 9, paragraph 2.

9 To implement the right to habeas corpus, Congress enacted 28
10 U.S.C. §§ 2241-43.

11 Section 2241(a) provides that "[w]rits of habeas corpus may
12 be granted by . . . the district courts and any circuit judge
13"

14 Section 2241(c) provides that "[t]he writ of habeas corpus
15 shall not extend to a prison unless--(1) [h]e is in custody under
16 or by color of the authority of the United States . . . , (3) [h]e
17 is in custody in violation of the Constitution or laws or
18 treaties of the United States; or (4) [h]e, being a citizen of a
19 foreign state, and domiciled therein is in custody for an act
20 done or omitted under any alleged right, title, authority,
21 privilege, protection, or exemption claimed under the commission,
22 order or sanction of any foreign state, or under color thereof,
23 the validity of and effect of which depend upon the law of
24 nations"

25 Section 2242 provides that "[a]pplication for a writ of
26 habeas corpus shall be in writing signed and verified by . . .
27 someone acting on [the] behalf" of "the person for whose relief
28 it is intended . . . , " and that "[the] petition shall allege

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1 facts concerning the applicant's commitment or detention, the
2 name of the person who has custody over him and by virtue of what
3 claim or authority, if known."

4 Section 2243 provides that the judge, "shall forthwith award
5 the writ or issue an order directing the respondent to show cause
6 why the writ should not be granted," that "[t]he writ, or order
7 to show cause shall be directed to the person having custody of
8 the person detained[,] " that "[t]he person to whom the writ or
9 order is directed shall make a return certifying the true cause
10 of the detention[,] " that "[w]hen the writ or order is returned a
11 day shall be set for hearing[,] " and that "[u]nless the
12 application for the writ and the return present only issues of
13 law the person to whom the writ is directed shall be required to
14 produce at the hearing the body of the person detained."

15 (Emphasis added.)

16 1. The person on whose behalf relief is sought is "in
17 custody under or by color of the authority of the United States
18" 28 U.S.C. § 2241(c)(1).

19 2. The person for whom relief is sought is "in custody in
20 violation of the Constitution or laws or treaties of the United
21 States." 28 U.S.C. § 2241(c)(3). Specifically, Gherebi is held in
22 violation of the Fifth and Sixth Amendments of the Constitution
23 in that he is, respectively, deprived both of due process of law
24 in that he is deprived of liberty without due process of law, and
25 in that he has not been informed of the nature and cause of the
26 accusations against him and has not been afforded the assistance
27 of counsel. Specifically, Gherebi is a citizen of a foreign state
28 who was domiciled therein and is in custody, apparently, for acts

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1 done under alleged right, authority, privilege, and commission,
2 or order or sanction of a foreign state, or under color thereof,
3 the validity and effect of which depend upon the law of nations,
4 to wit, the Geneva Convention, and, at minimum in violation of
5 the prohibition of transferring persons taken prisoner in war
6 from the country of their capture.

7 Hence relief is warranted.

8 3. Sufficient facts are alleged concerning Gherebi's
9 detention and the names of the persons who detain him, though the
10 authority for their detention is unknown, but is unconstitutional
11 and in violation of international laws and treaties to which the
12 United States of America is a signatory.

13 Wherefore, it is demanded that:

- 14 1. A writ or order to show cause be directed to each and
15 all respondents directing them to show the true cause(s)
16 of the detention of Gherebi.
- 17 2. That a date for return and hearing be set, forthwith.
- 18 3. That, since it clearly is not the case that "only issues
19 of law" are presented, respondents be directed to
20 produce Gherebi at the hearing .
- 21 4. That, when a hearing be held, it be held "not more than
22 five days after the return," as required by law.
- 23 5. That respondents and any person in concert with them, or
24 under their direction, command, control, or orders, be
25 ordered not to remove Gherebi from GITMO to any location
26 other than GITMO.
- 27 6. That service of the writ or order to show cause be made
28 in a manner to be directed by the court.

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1 7. That respondents be ordered to serve, forthwith, both
2 an English-language copy and a copy respondents shall translate
3 into all the language of petitioner this petition and all other
4 papers served and to be served in this proceeding.

5
6 YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD

7
8 By 
9 STEPHEN YAGMAN

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DECLARATION OF SERVICE

I am employed in Los Angeles County, California by a member of the Bar of this Court named at lines 1-3 of page 1 hereof, at whose direction the service declared herein is made, am over the age of 18, am not a party to the within action, and my business address is 723 Ocean Front Walk, Venice, California 90291. On the date set forth on the signature line below, I served the preceding papers on all interested parties whose names and whose addresses are listed below the signature line, by placing a true copy thereof enclosed in a sealed envelope with full postage thereon fully prepaid in the United States mail at Los Angeles, California, and also where a fax number is indicated by transmitting a true copy thereof to the indicated facsimile terminal number, and then receiving a facsimile receipt showing receipt thereof by counsel's terminal.

I declare the foregoing to be true under the penalty of perjury at Los Angeles, California on February 3, 2003.


SIGNATURE

SERVICE LIST

United States Attorney
312 North Spring Street
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FAX (213) 894-0141

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Donald Rumsfeld
Secretary of Defense
The Pentagon
Washington, D.C. 20301-1155

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 02-CV-0299 (CKK)

FAWZI KHALID ABDULLAH FAHAD
AL ODAH, *et al.*

Plaintiffs,

v.

UNITED STATES OF AMERICA,
et al.,

Defendants.

Civil Action No. 02-CV-0828 (CKK)

MAMDOUH HABIB, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 02-CV-1130 (CKK)

MURAT KURNAZ, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1135 (ESH)

OMAR KHADR, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1136 (JDB)

MOAZZAM BEGG, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1137 (RMC)

MOURAD BENCHELLALI, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1144 (RWR)

FALEN GHEREBI, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,

et al.,

Respondents.

Civil Action No. 04-CV-1164 (RBW)

LAKHDAR BOUMEDIENE, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 04-CV-1166 (RJL)

SUHAIL ABDUL ANAM, *et al.*

Petitioners,

v.

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

Respondents.

Civil Action No. 04-CV-1194 (HHK)

ISA ALI ABDULLA ALMURBATI, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 04-CV-1227 (RBW)

MAHMOAD ABDAH, <i>et al.</i>)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1254 (HHK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**RESPONDENTS' MOTION FOR JOINT CASE MANAGEMENT CONFERENCE,
ENTRY OF COORDINATION ORDER, AND REQUEST FOR EXPEDITION**

Respondents hereby request a Joint Case Management Conference involving each of the judges presiding over complaints or petitions for habeas corpus brought on behalf of foreign nationals detained or taken into custody by United States authorities as enemy combatants in connection with hostilities involving al Qaeda, the Taliban, and their supporters, and held at the United States Naval Base at Guantanamo Bay, Cuba. The requested Joint Case Management Conference would allow the Court to develop and enter a coordination order to allow for the orderly and efficient resolution of the many common questions of law presented by these petitions. While the petitions have not been consolidated, the Court's inherent authority to manage its docket permits coordinated consideration of legal issues where judicial economy would be served, and where – as here – consistent resolution of those legal issues is desirable. Respondents are presenting this Motion simultaneously to each of the judges to whom a

Guantanamo habeas petition has been assigned. Given the important concerns that underlie this Motion, Respondents respectfully request that the Court expedite its consideration.

Although proceedings on all of these petitions are at their inception, and despite the fact that each petition alleges some facts unique to individual detainees, it is already clear that the cases present a number of important common questions of law. The common questions include threshold issues whose resolution will determine the fundamental character of the proceedings that follow, including: (1) whether, under the U.S. Constitution, the detainees have a right to consult with Petitioners and their counsel for purposes of prosecuting these habeas petitions, and for other purposes; (2) whether the Constitution, and other applicable legal principles, permit Respondents to place conditions on such attorney-detainee consultations, including whether Respondents may require certain attorney-detainee consultations to be monitored for national security purposes;¹ (3) whether the detainees, who were not captured in the United States or its territories and are not detained there, are protected by the Due Process Clause of the Fifth Amendment, and by other provisions of the Constitution; (4) whether the detainees may challenge their detention under various treaties and conventions to which the United States is signatory, and under principles of “customary international law”; (5) whether these habeas proceedings must be deferred pending completion of the Combatant Status Review Tribunal (“CSRT”) process that the Department of Defense has recently formalized to reach fresh determinations on the status of the detainees, most particularly whether their circumstances of

¹ This issue is presently under consideration by Judge Kollar-Kotelly. *See Response to Complaint in Accordance with Court’s Order of July 25, 2004* filed in *Al Odah v. United States*, No. 02-CV-828 (July 30, 2004).

capture and other factors qualify them as “enemy combatants”;² and (6) whether and to what extent the status determinations reached in the CSRT process merit deference in this Court’s consideration of the habeas petitions. In addition, there are common procedural questions to be addressed in these cases, including appropriate procedures for handling classified submissions in the cases, the propriety of and limitations on discovery, and procedures for any hearings in those matters.

Respondents previously moved for consolidation of all such petitions before a single judge of this Court pursuant to FED. R. CIV. P. 42. By order dated July 26, 2004, Judge Kollar-Kotelly (the judge presiding over the lowest-numbered of the Guantanamo Bay cases) declined to exercise her discretion to consolidate, concluding that “the different circumstances of each Petitioner’s capture and the individualized reasons offered for that Petitioner’s confinement will require individualized adjudication.” (Mem. Op. at 3-4.) Respondents do not challenge that determination in this Motion, but instead respectfully suggest an alternative procedure. Even if one assumes that the varying circumstances of the Petitioners’ capture may ultimately require individualized attention by the Court, it will promote judicial economy and convenience for the parties to order coordinated briefing, argument, and consideration on the important questions of law and procedure that will shape these habeas proceedings. Absent such coordinated treatment, all parties will be prejudiced, both by the potential for inconsistent rulings on similar issues pertaining to Guantanamo Bay detainees, as well as by the practical and logistical difficulties

² In at least three cases, Petitioners have filed motions seeking to temporarily enjoin the implementation of the CSRT process and challenging the conduct of hearings without access to counsel. See *Gherebi v. Bush*, No. 04-CV-1164; *Boumediene v. Bush*, No. 04-CV-1166; *El-Banna v. Bush*, No. 04-CV-1144.

presented by briefing and arguing the same legal issues before at least eight separate district judges.

Accordingly, Respondents urge that the judges presiding over the above-captioned petitions schedule a Joint Case Management Conference, with all judges present, in order to identify the common questions of law presented by the pending petitions, and to develop a schedule for coordinated pretrial proceedings, including briefing and argument on those questions. A proposed order is attached.

Pursuant to LCvR 7(m), counsel for Respondents have conferred or attempted to confer by telephone and e-mail with counsel for Petitioners in the related cases regarding this motion. Counsel for Petitioners in *Habib, El-Banna, Gherebi, Anam, Almurbati, Boumediene* and *Begg* have indicated that they oppose or do not consent to the motion. Counsel for Petitioners in *Benchellali* have indicated that they reserve judgment but expect to oppose the motion. Respondents would note that with respect to the previous motion for consolidation, counsel for Petitioners who expressed a position either opposed or did not consent to 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. 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 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. As authorized by, *inter alia*, a Military Order of November 13, 2001 issued by the President,³ 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, an area within the sovereign territory of Cuba leased for an indefinite term by the United States, and over which the United States exercises exclusive control.⁴ Approximately 600 such aliens are currently detained at Guantanamo Bay.

Pending before this Court are a number of cases brought on behalf of alien detainees in the control of the Department of Defense and held at Guantanamo Bay. The cases commonly challenge the legality and conditions of the detention and confinement of the aliens on whose behalf the cases are brought. Of the cases of which Respondents are now aware, before Judge Kollar-Kotelly are *Rasul v. Bush*, No. 02-CV-0299; *Al Odah v. United States*, No. 02-CV-0828; and *Habib v. Bush*, No. 02-CV-1130.⁵ Before Judge Huvelle is *Kurnaz v. Bush*, No. 04-CV-1135. Before Judge Bates is *Khadr v. Bush*, No. 04-CV-1136.⁶ Before Judge Collyer is *Begg v. Bush*, No. 04-CV-1137. Pending before Judge Leon are *Benchellali v. Bush*, No. 04-CV-1142 and *Boumediene v. Bush*, No. 04-CV-1166. Before Judge Roberts is *El-Banna v. Bush*, No. 04-

³ See 66 Fed. Reg. 57,831 (Nov. 16, 2001).

⁴ See *Rasul v. Bush*, 124 S. Ct. 2686, 2690-93 (2004).

⁵ The Court initially dismissed these cases on jurisdictional grounds, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and subsequent appeals led to the Supreme Court's *Rasul* decision.

⁶ A Guantanamo Bay detainee case dismissed by Judge Bates prior to the Supreme Court's decision in *Rasul* is *Sassi v. Bush*, No. 04-CV-0547. An appeal is presently pending in that case. The petitioners in that case are petitioners in either the *Benchellali* case before Judge Leon or the *Khadr* case before Judge Bates.

CV-1144. Before Judge Walton are *Gherebi v. Bush*, No. 04-CV-1164 and *Almurbati v. Bush*, 04-CV-1227.⁷ And before Judge Kennedy are *Anam v. Bush*, No. 04-CV-1194 and *Abdah v. Bush*, No. 04-CV-1254. Based on the number of foreign nationals detained at Guantanamo Bay, it is highly likely that numerous additional petitions will be filed.

Each of these cases is a petition for habeas corpus, or, in one case, a complaint essentially constituting a habeas petition,⁸ filed by “next friends” on behalf of alien detainees at Guantanamo Bay. The cases include as respondents the President, the Secretary of Defense, the commander of Joint Task Force-GTMO responsible for Guantanamo Bay, and the commander of the particular camp housing the detainees in Guantanamo Bay, and/or other government officials.⁹ Allegations in the petitions typically include that Petitioners were apprehended in connection with hostilities involving al Qaeda, the Taliban, and their supporters or otherwise and were taken involuntarily to Guantanamo Bay;¹⁰ that Petitioners are not enemy combatants and have not been informed of

⁷ *Gherebi* was recently transferred to this District from the Ninth Circuit. The petition was initially filed by petitioners in the Ninth Circuit Court of Appeals, which transferred the petition for disposition by the district court for the Central District of California. *See Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003). After the case was appealed, decided, then vacated by the Supreme Court, the Ninth Circuit transferred the case to the District of Columbia. *See Gherebi v. Bush*, 374 F.3d 727, 2004 WL 1534166 (July 8, 2004).

⁸ *See Rasul*, 215 F. Supp. 2d at 62-64 (D.D.C. 2002) (noting that claims asserted in *Al Odah* case are “within the exclusive province of the writ of habeas corpus”).

⁹ The *Gherebi* petition names the President, the Secretary of Defense, and “1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials.” The *Al Odah* complaint also includes the United States as respondent-defendant.

¹⁰ *See Rasul* First Amended Petition ¶¶ 23-24, 27, 32; *Al Odah* Amend. Compl. ¶ 16; *Habib* Pet. ¶¶ 16-19, 21-22; *Kurnaz* Pet. ¶¶ 6, 16-17, 19, 23-24; *Khadr* Pet. ¶¶ 16, 21-22; *Begg* Pet. ¶¶ 22-26; *Benchellali* Pet. ¶¶ 28, 30, 32; *El-Banna* First Amend. Pet. ¶¶ 19-26, 27-28; *Gherebi* Amend. Pet. ¶ 2; *Boumediene* Pet. ¶¶ 16-18, 20; *Anam* Pet. ¶¶ 26, 31, 36, 40-41, 44, 46, 52, 58, 61; *Almurbati* Pet. ¶¶ 8, 10, 12; 19-22; *Abdah* Pet. ¶¶ 19-20, 22-51.

charges against them;¹¹ that Petitioners have been housed in inadequate housing, without meaningful access to families or counsel, and without opportunity to fully exercise their religious beliefs;¹² and that Petitioners have been forced to provide involuntary statements to interrogators.¹³ Petitioners challenge their confinement, as well as the Military Order of November 13, 2001, as contrary to the Constitution¹⁴ and international treaties, including the Third and Fourth Geneva Conventions,¹⁵ the International Covenant on Civil and Political Rights and the American Declaration on the Rights and Duties of Man,¹⁶ as well as customary

¹¹ See *Rasul* First Amended Petition ¶¶ 22, 29-30, 47; *Al Odah* Amend. Compl. ¶¶ 15, 18; *Habib* Pet. ¶¶ 15, 23-24, 44; *Kurnaz* Pet. ¶¶ 13-15, 34; *Khadr* Pet. ¶¶ 13, 30; *Begg* Pet. ¶¶ 17-18, 47, 52; *Benchellali* Pet. ¶¶ 25-26, 48; *El-Banna* First Amend. Pet. ¶¶ 15-16, 43; *Boumediene* Pet. ¶¶ 13-14, 25; *Anam* Pet. ¶¶ 23, 28, 33, 37, 59, 71, 73, 78; *Almurbati* Pet. ¶¶ 18, 36, 41; *Abdah* Pet. ¶¶ 15-16, 63.

¹² See *Rasul* First Amended Petition ¶¶ 33, 49; *Al Odah* Amend. Compl. ¶¶ 28-29; *Habib* Pet. ¶¶ 27, 44-45; *Kurnaz* Pet. ¶¶ 8, 34-35; *Khadr* Pet. ¶ 31; *Begg* Pet. ¶¶ 47-48; *Benchellali* Pet. ¶¶ 48-49; *El-Banna* First Amend. Pet. ¶¶ 43-44; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶ 25; *Anam* Pet. ¶¶ 73-74; *Almurbati* Pet. ¶ 41; *Abdah* Pet. ¶¶ 63-64.

¹³ See *Rasul* First Amended Petition ¶ 32; *Habib* Pet. ¶¶ 26, 44; *Kurnaz* Pet. ¶¶ 34-35; *Khadr* Pet. ¶¶ 30-31; *Begg* Pet. ¶ 48; *Benchellali* Pet. ¶ 49; *El-Banna* First Amend. Pet. ¶ 44; *Boumediene* Pet. ¶ 25; *Anam* Pet. ¶ 73-74; *Almurbati* Pet. ¶ 41; *Abdah* Pet. ¶¶ 63-64.

¹⁴ Constitutional provisions relied upon typically include the Due Process Clause of the Fifth Amendment, the War Powers Clause, and Article I, section 9, regarding suspension of the Privilege of the Writ of Habeas Corpus. See *Rasul* First Amended Petition ¶¶ 52-54, 62-64; *Al Odah* Amend. Compl. ¶ 37; *Habib* Pet. ¶¶ 48-51, 59-61; *Kurnaz* Pet. ¶¶ 39-41, 63-65; *Khadr* Pet. ¶¶ 35-37, 59-61; *Begg* Pet. ¶¶ 54-56, 64-66, 71; *Benchellali* Pet. ¶¶ 53-56, 77-79; *El-Banna* First Amend. Pet. ¶¶ 48-50, 72-74; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶¶ 33-35, 43-45; *Anam* Pet. ¶¶ 80-82, 90-92, 97; *Almurbati* Pet. ¶¶ 43, 45, 53, 55; *Abdah* Pet. ¶¶ 73, 75, 83, 85.

¹⁵ See *Habib* Pet. ¶¶ 56-57; *Kurnaz* Pet. ¶ 61; *Khadr* Pet. ¶ 57; *Begg* Pet. ¶¶ 22, 73; *Benchellali* Pet. ¶ 75; *El-Banna* First Amend. Pet. ¶ 70; *Gherebi* Amend. Pet. ¶ 3; *Boumediene* Pet. ¶ 41; *Anam* Pet. ¶ 88; *Almurbati* Pet. ¶ 51; *Abdah* Pet. ¶¶ 77, 79, 81.

¹⁶ See *Kurnaz* Pet. ¶¶ 43-45; *Khadr* Pet. ¶¶ 39, 41; *Begg* Pet. ¶¶ 58, 60; *Benchellali* Pet. ¶¶ 57, 59; *El-Banna* First Amend. Pet. ¶¶ 52-54; *Boumediene* Pet. ¶¶ 37, 39; *Anam* Pet. ¶¶ 84-86;

international law.¹⁷ Some of the petitions additionally assert claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Administrative Procedure Act (APA), 5 U.S.C. § 702-706.¹⁸ Petitioners commonly seek relief in the form of release,¹⁹ orders permitting access to counsel and barring interrogations, and declarations that Petitioners' detention and the November 13, 2001 military order violate the Constitution, treaties, and laws of the United States, as well as international law.²⁰ Indeed, aside from specific allegations regarding the circumstances of each Petitioners' capture, the petitions are substantially alike. Furthermore, many of the cases involve the same litigation counsel or coordinating counsel.²¹

In *Al-Odah*, briefing is underway concerning whether Respondents may require certain attorney-detainee consultations to be monitored for national security purposes. In *Gherebi*, the Court has established a briefing schedule for a motion to dismiss by Respondents. And in *El-*

Almurbati Pet. ¶¶ 47, 49; *Abdah* Pet. ¶ 77, 79.

¹⁷ See *Rasul* First Amended Petition ¶¶ 56-60; *Habib* Pet. ¶¶ 52-55; *Kurnaz* Pet. ¶¶ 43-45; *Khadr* Pet. ¶¶ 39, 41; *Begg* Pet. ¶¶ 58, 60; *Benchellali* Pet. ¶¶ 57, 59; *El-Banna* First Amend. Pet. ¶¶ 52-54; *Boumediene* Pet. ¶ 37; *Anam* Pet. ¶¶ 84-86; *Almurbati* Pet. ¶ 51; *Abdah* Pet. ¶¶ 77, 79, 81.

¹⁸ See *Al Odah* Amend. Compl. ¶¶ 38-39; *Kurnaz* Pet. ¶¶ 48, 53, 57, 67; *Khadr* Pet. ¶¶ 44, 49, 53, 63; *Begg* Pet. ¶ 68; *Benchellali* Pet. ¶¶ 62, 67, 71, 81; *El-Banna* First Amend. Pet. ¶¶ 57, 62, 66, 76; *Anam* Pet. ¶ 94; *Almurbati* Pet. ¶¶ 57-59, 61-64, 66; *Abdah* Pet. ¶ 87.

¹⁹ In *Al Odah*, plaintiffs previously disclaimed seeking release, but the Court determined that plaintiffs "plainly challenge the lawfulness of their custody." *Rasul*, 215 F. Supp. 2d at 62.

²⁰ See *Rasul* First Amended Petition § VI; *Al Odah* Amend. Compl. (Prayer for Relief); *Habib* Pet. § V; *Kurnaz* Pet. § V; *Khadr* Pet. § V; *Begg* Pet. § V; *Benchellali* Pet. § V; *El-Banna* First Amend. Pet. § V; *Gherebi* Amend. Pet. ¶¶ 5-6; *Boumediene* Pet. § VI; *Anam* Pet. (Prayer for Relief); *Almurbati* Pet. (Prayer for Relief); *Abdah* Pet. (Prayer for Relief).

²¹ For example, in a significant number of the cases Petitioners are represented by counsel from the Center for Constitutional Rights.

Banna, a hearing on a TRO sought by Petitioners is scheduled for August 6, 2004, with a return to the petition currently due on August 12, 2004.

ARGUMENT

District courts have both express and inherent authority to coordinate proceedings on cases pending before them in the interest of justice and in the service of judicial economy. It has long been recognized that there is a “power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Airline Pilots Ass’n v. Miller*, 523 U.S. 866, 880, n.6 (1998) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936)). One specific codification of this authority is FED. R. CIV. P. 42(a), a provision that recognizes not only the notion of formal consolidation, but also the power of the Court to “order a joint hearing . . . o[n] any or all the matters in issue,” and to “make such orders concerning proceedings [in the several actions] as may tend to avoid unnecessary costs or delay.” FED. R. CIV. P. 42(a).²²

Moreover, the district courts’ inherent authority to manage their dockets goes beyond the measures expressed in Rule 42. As the Federal Judicial Center’s Manual for Complex Litigation (Fourth) explains, even when cases sharing common issues are pending in *different* judicial districts, “judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts.” MOORE’S FED. PRACTICE, MANUAL FOR COMPLEX LITIGATION (FOURTH) 227 (2004). Coordination measures that district courts can employ

²² Petitions for a writ of habeas corpus are civil in nature, *see Hilton v. Braunskill*, 481 U.S. 770, 775-76 (1987), though different in respects from general civil litigation. *See id.* at 776 (“[w]here . . . the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to use . . . [general civil] rules by analogy or otherwise.”) (internal quotation marks and citation omitted).

include “joint hearings or conferences” on common legal issues, followed by “joint or parallel orders by the several courts in which the cases are pending.” *Id.*²³ In addition, the Judicial Panel on Multidistrict Litigation, in exercising its discretion to deny pretrial consolidation of multiple actions pending in different districts under 28 U.S.C. § 1407, has recognized that the goals of judicial economy and minimization of “inconsistent pretrial rulings” can at times be achieved simply through “consultation and coordination between the . . . concerned district courts[.]” *In re Royal Am. Indus., Inc. Sec. Litig.*, 407 F. Supp. 242, 244 (J.P.M.L. 1976).

The reach of district courts’ authority to manage their own dockets is illustrated by the procedures adopted by the District Court for the Central District of California in resolving constitutional challenges to the Sentencing Reform Act of 1984, and the sentencing guidelines promulgated thereunder by the U.S. Sentencing Commission. There, the district court convened an en banc panel of the court to consider the common question of the Sentencing Guidelines’ constitutionality – a question that had surfaced in 22 separate criminal cases. The court ordered the common issue “transferred . . . from each of the [separate] cases . . . to the Court as a whole,” and accepted joint briefing, conducted a joint hearing, and issued an en banc opinion on the constitutional challenge, from which a number of district judges dissented. *See United States v. Ortega Lopez*, 684 F. Supp. 1506, 1508 (C.D. Cal. 1988), *abrogated by United States v. Brady*, 895 F.2d 538 (9th Cir. 1990).

²³ Indeed, district courts have used such cooperative approaches even in matters where related cases are pending simultaneously in state and federal court, “jointly presid[ing] over hearings on pretrial motions, based on a joint motions schedule,” relying on “coordinated briefs so that one set of briefs can be used in both state and federal courts” MOORE’S FED. PRACTICE, MANUAL FOR COMPLEX LITIGATION (FOURTH) at 236.

This court's local rules include provisions premised on similarly broad principles of inherent authority as to case management issues. Under LCvR 40.5(e), this court's Calendar Committee has the authority to refer "two or more cases assigned to different judges" to "one judge" for a "specific purpose . . . in order to avoid duplication of judicial effort," so long as the assignment is "with the consent of the judge to whom the cases will be referred" and the "scope of authority of said judge" is identified. More broadly, LCvR 40.7(h) recognizes the authority of the Chief Judge to "take such other administrative actions, after consultation with appropriate committees of the Court, as in his/her judgment are necessary to assure the just, speedy and inexpensive determination of cases, and are not inconsistent with these Rules."

The habeas petitions before the Court here present a number of common legal questions that would plainly benefit from coordinated consideration and resolution, whether in a "joint hearing" under FED. R. CIV. P. 42(a) or under a coordinated schedule determined jointly by all of the district judges presiding over the cases. These issues include: (1) whether the detention, as described in the pleadings, violates the Constitution and laws cited in the petitions, and, underlying this question, whether detainees have rights under the Constitution notwithstanding the alleged facts that they are not United States citizens, that they were captured outside the United States, and are currently detained outside the United States and its territories; (2) whether, based on the factual allegations in the petitions, the detainees may challenge their detention under various treaties and conventions to which the United States is signatory, and under principles of "customary international law," and, underlying this question, whether the cited treaties and conventions are self-executing and claims thereunder cognizable in a habeas proceeding; (3) whether these habeas proceedings must, or should in the exercise of the Court's discretion, be

deferred pending completion of the CSRT hearings on the status of the detainees, which will produce formal determinations (and factual records) by the Department of Defense on the circumstances of the detainees' capture and whether those circumstances qualify them as "enemy combatants," *see Hamdi*, 124 S. Ct. at 2648-50 (plurality opinion) (describing contours of acceptable military process for determining the status of United States citizens detained as "enemy combatants");²⁴ and (4) whether and to what extent the status determinations reached in the CSRT process merit deference in this Court's consideration of the habeas petitions. *See id.* at 2649 (plurality opinion) (stating that, in military review process, government's evidence concerning circumstances of capture should be entitled to "presumption" of validity). Moreover, Petitioners in at least three cases have filed motions seeking to temporarily enjoin the implementation of the CSRT hearings. *See supra* note 2.

In addition, there are common procedural questions that must be addressed at the outset of these proceedings. These include whether, under the U.S. Constitution, the detainees have a right to consult with Petitioners and their counsel for purposes of prosecuting these habeas petitions, and for other purposes, and whether Respondents may place conditions on such attorney-detainee consultations, including whether Respondents may require certain attorney-detainee consultations to be monitored for national security purposes. Other common procedural questions involve appropriate procedures for the handling of any classified factual or other submissions that may be required in these cases, the propriety of and limitations on discovery, and hearing procedures.

²⁴ The Department of Defense recently created a such a process for alien detainees at Guantanamo Bay. *See* Department of Defense website at:
<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>

Because these cases share such issues in common, some form of coordinated scheduling and consideration of these issues, including, where appropriate, a joint hearing, will promote interests of efficiency and economy for both the Court and the parties. Joint briefing will conserve the parties' resources by relieving them of the burden of preparing separate sets of briefs on the same issues. A joint hearing or argument will provide all of the judges presiding over these actions with a comprehensive oral presentation on the important, common legal and procedural questions presented by the petitions. And a joint hearing or another form of coordinated treatment will minimize delay in the resolution of these questions.

Perhaps most important, coordinated treatment would additionally minimize the risk of conflicting determinations on the fundamental legal questions that unite the petitions. Even if the Court were simply to accept coordinated briefing and argument on the common legal questions presented in these cases, with each district judge reserving the discretion to reach his or her own conclusion and enter separate orders, the mere fact of coordinated scheduling and joint hearing, with consequent deliberations among the various judges of the Court, the opportunities for conflicting rulings would be reduced. The seriousness of the issues raised in these petitions, and the sensitive national security context in which they arise, make avoidance of conflicting rulings – if at all possible – imperative.

There can be no serious argument that the coordination sought by Respondents would prejudice the parties. With respect to Respondents, coordinated presentation and resolution of the common legal issues in the petitions would help alleviate the logistical burdens Respondents face in responding to multiple habeas petitions on potentially divergent schedules. Although there are currently just over a dozen cases filed, and despite the fact that only a handful of those have

required any briefing or hearings at this point, the logistical difficulties that lie ahead already are apparent. For instance, Respondents are presently simultaneously preparing briefs regarding a TRO challenging the CSRT process, the conditions of access for counsel, and the merits in a motion to dismiss in different cases. Respondents have already argued two motions for a TRO in a single day. Furthermore, there are approximately 600 foreign nationals detained at Guantanamo Bay, so additional petitions are certain to be filed. At some point in the not-too-distant future, the logistical difficulties presented today will become insurmountable – not only to Petitioners’ and Respondents’ Counsel, but to this Court and its personnel, Department of Justice personnel involved in processing security clearances for Petitioners’ counsel, and Department of Defense personnel who (in addition to being called upon to process requests related to these cases) have pressing responsibilities related to their core duties in connection with the ongoing hostilities in Afghanistan and elsewhere. A coordinated schedule would be undeniably preferable to multiple filings and hearings on overlapping issues in an increasing number of cases with various schedules. Moreover, once the common legal issues are resolved, and the shape that these habeas proceedings must therefore take determined, Petitioners can proceed efficiently to tee up any remaining issues pertaining to individual detainees before the individual judges presiding over their actions.

CONCLUSION

For the reasons set forth above, the Court should grant this Motion and order a Joint Case Management Conference for purposes of cataloging the common questions presented by these petitions, and entering a joint scheduling order allowing for the orderly and coordinated resolution of these questions.

Dated: August 4, 2004

Respectfully submitted,

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