

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS

Petitioner,

v.

GEORGE WALKER BUSH,

President of the United States,

et al.,

Respondents.

Civil Action No. 1:02-CV-00299 (CKK)

RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE HIS
SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND FOR
INJUNCTIVE AND OTHER RELIEF

This case is a petition for a writ of habeas corpus by an alien detained at Guantanamo Bay as an enemy combatant, and is one of fourteen such cases brought on behalf of alien enemy combatants held at Guantanamo Bay in connection with hostilities involving al Qaeda, the Taliban, and their supporters. Petitioner has sought; (1) leave of this Court to file a second amended petition for a writ of habeas corpus; (2) an order directing respondents to answer or otherwise plead pursuant to 28 U.S.C. § 2243; and (3) other relief as may be equitable and just.

1. Without conceding any of the factual and/or legal assertions and claims contained in petitioner's second amended petition for a writ of habeas corpus, and reserving the right to contest any and all issues presented in the petition, respondents do not object to leave being granted to file the second amended petition.

2. With respect to petitioner's second request, it appears that petitioner is asking this Court to order respondents to answer or otherwise plead pursuant to the explicit requirements of

28 U.S.C. § 2243 (i.e., within three days, or twenty days for good cause). For the reasons explained below, the Court should deny petitioner's request that respondents answer or otherwise plead pursuant to those requirements and defer to any schedule developed for responses to the petitions in the Guantanamo Bay cases by Senior Judge Joyce Hens Green, who has been designated by the judge of this Court (through the Calendar Committee) to coordinate and manage all proceedings in these cases. The timing of responses to the petitions in these fourteen cases, including this one, should be determined as part of Judge Green's responsibility to coordinate these cases.

3. There is no other relief warranted at this time, and petitioner's third request should be denied.

BACKGROUND

Pending before the Judges of this Court are fourteen cases brought on behalf of approximately sixty alien detainees. The cases uniformly challenge the legality of the detention of these aliens and, therefore, raise numerous common legal and procedural issues. Consequently, respondents filed a Motion for Joint Case Management Conference, requesting that the Court establish coordinated schedules to allow for the orderly and efficient resolution of the many common questions presented by these petitions. See Respondents' Motion for Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition (filed August 4, 2004).¹

¹ At the time respondents filed their motion, only thirteen Guantanamo Bay detainee cases were pending in this Court. An additional case, Charles Swift as next friend for Salim Ahmed Hamdan, et al., Case No. 1:04-cv-01519-JR, was recently docketed here before Judge Robertson after being transferred from the Western District of Washington. Respondents intend to ask Judge Robertson and Judge Green for guidance with respect to including

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. The Court designated Senior Judge Joyce Hens Green "to coordinate and manage all proceedings in these matters and to the extent necessary, rule on procedural and substantive issues that are common" to the Guantanamo Bay cases. Since the August 17th Order issued, two conferences have been held before Judge Green, on August 23 and 27, 2004, in which the parties and the Court have discussed at some length issues related to the coordination of proceedings in these cases.

A principal topic of discussion has been the timing of submission of factual returns to the petitions in these cases. The government has proposed that factual returns setting forth the bases for the detention of the petitioner-detainees should be filed on a rolling basis (beginning this week, and coming to completion during the week of October 18, 2004) upon the assembly and finalization of administrative records in the ongoing Combatant Status Review Tribunal ("CSRT") process, a process established to more formally determine the status of aliens held at Guantanamo Bay who had been previously determined to be enemy combatants. As the government has explained, this approach will advance the important goal of expeditious resolution of these cases, as it will provide the complete factual basis for detention in each of these cases within a short time frame and avoid interference with the CSRT process. Conversely, any requirement of an immediate factual return would undermine the timely resolution of these cases, as that would interfere with the timely completion of the CSRT process, and any immediate factual return would soon have to be supplemented by the administrative record compiled in the CSRT proceedings.

Swift/Hamdani among the cases being coordinated by Judge Green.

Pursuant to a request from Judge Green, the government memorialized the proposed schedule for submission of the factual basis for detention in an August 31, 2004 letter, copied to counsel in these cases. See Exhibit A. Further, and presumably in light of this proposed schedule, Judge Green indicated her intent to meet with the various Judges of the Court with pending Guantanamo Bay detainee cases to discuss the handling of the cases and how decisions on pending motions in the cases should proceed.

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

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

ARGUMENT

Petitioner's second request is grounded upon the argument that the timing of a response to a petition for habeas corpus brought pursuant to 28 U.S.C. § 2241 is governed exclusively by 28 U.S.C. § 2243, which provides that a habeas writ or order to show cause should be returnable within three to twenty days. Petitioner's argument, however, ignores that a court has authority beyond § 2243 to control both the nature and timing of any response to a habeas petition. Moreover, petitioner's request disregards the necessity and appropriateness of coordinating the handling of all the Guantanamo Bay cases, including the filing of responses to the petitions – a necessity recognized by this Court in its designation of Judge Green to coordinate the cases.

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

In 1976, the United States Supreme Court promulgated the Rules Governing Section 2254 Cases in the United States District Courts (the "2254 Rules").² Pursuant to those rules, this Court may extend the deadline for respondents' response to petitioner's application for writ of habeas corpus beyond the twenty-day maximum response time set forth in 28 U.S.C. § 2243.³

First, it is clear that the 2254 Rules are applicable to petitions filed pursuant to 28 U.S.C. § 2241, such as the petition in this case. Rule 1 provides that courts, in their discretion, may apply the 2254 Rules to petitions for writ of habeas corpus other than those arising under 28 U.S.C. § 2254. See 2254 Rule 1(b) ("In applications for habeas corpus in cases not covered by

² 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.

³ 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."

subdivision (a) [involving persons in state custody], these rules may be applied at the discretion of the United States district court.”). Thus, because petitioner’s application is brought pursuant to § 2241, the 2254 Rules may be applied to this case. See Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) (“The Supreme Court intended the 2254 Rules to apply to petitions filed under § 2241.”).⁴

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

⁴ See also Ukawabutu v. Morton, 997 F. Supp. 605, 608 n.2 (D.N.J. 1998) (The 2254 Rules “apply to petitions filed pursuant to 28 U.S.C. § 2241 as well as 28 U.S.C. § 2254.”); Wyant v. Edwards, 952 F. Supp. 348, 352 (S.D. W.Va. 1997) (“[T]he Court has concluded that 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.”).

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.”).⁵

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

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

⁵ 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”).

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.

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

Not only does a court have authority beyond 28 U.S.C. § 2243 to control both the nature and timing of any response to a habeas petition, here the Court has recognized the exceptional circumstances presented by these Guantanamo Bay cases and has directed that proceedings in the cases be coordinated. Indeed, the cases raise numerous common questions, and a global schedule facilitating the orderly and efficient resolution of the issues is warranted. Such coordinated scheduling and treatment among the pending cases is needed in order to alleviate potentially overwhelming logistical burdens that will arise in the absence of a coordinated approach. Similarly, coordination of the numerous procedural and other issues in these cases, such as procedures applicable for habeas counsel visits and establishment of a suitable protective order governing the use of classified information, will advance the efficient and timely resolution of these cases.

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

That the second amended petition raises claims challenging the legality of the ongoing military commission proceedings, see Amended Petition, Counts One through Five and Count Seven, in which petitioner is being charged with war crimes, does not negate the need for deference to Judge Green and coordination with the other pending cases. This case, like the other

cases being coordinate by Judge Green, challenges the legality of petitioner's detention as an enemy combatant, independent of the military commission matters. See Amended Petition Counts Six and Eight. Thus it includes issues common to all the cases. Furthermore, at least one other case, Swift, see supra note 1, also presents challenges similar to petitioner's with respect to ongoing military commissions. Accordingly, coordination of all these cases and the issues presented by them is appropriate and necessary. The Court should reject petitioner's invitation to disregard Judge Green's role in these matters and to potentially disrupt the coordinated handling of these cases.

CONCLUSION

For the foregoing reasons, petitioner's request for a response in accordance with the requirements of 28 U.S.C. § 2243 and for other relief should be denied.

Dated: September 13, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

THOMAS R. LEE
Deputy Assistant Attorney 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
ANDREW I. WARDEN
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