

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.

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As to Motion for Reconsideration

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