UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE, Petitioners, v. BARACK OBAMA, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-CV-0392 (ESH)

GOVERNMENT'S RESPONSE TO COURT'S ORDER OF DECEMBER 19, 2008

The Government hereby responds to the Court's December 19, 2008 Order and respectfully requests that Petitioner's Motion for Summary Judgement be denied as it is not a proper motion for this constitutional habeas proceeding. In the event the Court is inclined to proceed to the merits of the summary judgment motion, the Government requests an extension of time in which to file an additional response as is required by this Court's Order of December 19, 2008, Doc. 134 (hereinafter "Order").

INTRODUCTION

On February 6, 2009, Petitioner filed a motion to exclude two documents contained within Respondent's Factual Return. *See* Dkt. 160. On February 13, 2009, Petitioner filed his Preliminary Traverse and Motion for Summary Judgment. *See* Dkt. 165. In both pleadings, Petitioner asserts that he is entitled to judgment, relying upon Rule 56 of the Federal Rules of Civil Procedure as interpreted by this Court in *Nnadili v. Chevron U.S.A. INC.*, 435 F. Supp. 2d

93, 97 (D.D.C. 2006). Specifically, Petitioner contends that only admissible evidence (that is, properly authenticated evidence), may be considered by a trial court in ruling on a motion for summary judgment. *See* Petitioner's Preliminary Traverse and Motion for Summary Judgment ("PPT/MSJ"), p. 26, *citing Nnadili v. Chevron U.S.A. INC.*, 435 F.Supp.2d at 104-105.

Petitioners' motion is styled as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. However, in these proceedings - based solely on the constitutional habeas right recognized in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) - the Federal Rules do not necessarily apply and, indeed, application of the Federal Rules in this context would impose the type of burdens that *Boumediene* cautioned against. Rather, the appropriate procedural mechanism for resolving these matters on the pleadings is contained in the Case Management Order governing the Guantanamo Bay habeas cases. *In Re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-MC-0442 (Nov. 6 and Dec. 16, 2008) (hereinafter "CMO").

A. The Federal Rules of Civil Procedure, and in Particular Rule 56, Do Not Apply to These Proceedings .

In June 2008, the Supreme Court in *Boumediene* held for the first time that Guantanamo Bay detainees have a constitutional right to seek writs of habeas corpus protected by the Suspension Clause. *Boumediene*, 128 S. Ct. at 2277 (holding that petitioners are entitled to "fundamental" habeas rights). The right recognized in *Boumediene*, based on the Court's interpretation of the Suspension Clause, is thus limited to the narrow area of purely constitutional habeas. *See id.* (Souter, J., concurring) ("[L]egislation eliminated the statutory habeas jurisdiction over these claims, so now there must be constitutionally based jurisdiction or none at all.").

As an initial matter, the Federal Rules of Civil Procedure do not necessarily apply to *statutory* habeas petitions, let alone constitutionally-based habeas claims such as in this case.

While statutory habeas corpus proceedings generally are civil actions, they are not subject to all rules or statutes governing civil actions. Rule 81 of the Federal Rules of Civil Procedure limits the applicability of the Civil Rules in habeas proceedings to circumstances where the practice in those proceedings (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions. Fed. R. Civ. P. 81(a)(4); *see, e.g.*, *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971); *Harris v. Nelson*, 394 U.S. 286, 293 (1969). Given the *sui generis* nature of these proceedings, it cannot be said that constitutional habeas practice has "previously conformed" to the civil rules and, in particular, Rule 56. There is no established practice or procedure for these novel habeas proceedings. By their terms, the Federal Rules do not apply in adjudicating these novel constitutionally-based petitions.

Indeed, the summary judgment standard, applicable when assessing the need for a civil trial, conflicts with the Supreme Court's guidance regarding the parameters of these habeas proceedings, as expressed and limited in *Boumediene*, 128 S.Ct. 2229, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Notably, the application of Rule 56 or other rules of Civil Procedure to these proceedings conflicts with the Court's admonition in *Boumediene* that habeas courts make "[c]ertain accommodations . . . to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ" (128 S. Ct. at 2276) and modify habeas corpus procedures to address "practical barriers." *Boumediene*, 128 S.Ct. at 2262; *see id.* at 2278 ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.").

For this reason, in an analogous situation, the Court in *Hamdi* required implementation of much narrower procedures even in statutory habeas. In *Hamdi*, the plurality expressly rejected

the imposition of a "process [that] would approach the process that accompanies a criminal trial" including "quite extensive discovery of various military affairs." *Hamdi*, 542 U.S. at 528, 531-33. In turn, *Boumediene* rejected the notion that "[h]abeas corpus proceedings need . . . resemble a criminal trial, even when the detention is by executive order." *Boumediene*, 128 S.Ct. at 2269. Rather, the Court noted that "habeas corpus procedures" should be "modified to address" "practical barriers." *Id.* at 2262. At the same time, *Hamdi* advised that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi*, 542 U.S. at 33.

The Court in *Hamdi* provided concrete examples: Hearsay may be accepted as the most reliable evidence available from the Government, the court could accept a presumption (subject to rebuttal), in favor of the Government's evidence, and a knowledgeable affiant may summarize military records kept in the ordinary course of affairs to the Court. *Hamdi*, 542 U.S. 534-535. These narrower procedures are at odds with Petitioner's use of the Rule 56 summary judgment standard which allows the Court to consider only evidence admissible in a trial when deciding the motion. *Cf. Nnadili v. Chevron U.S.A. INC.*, 435 F.Supp.2d at 104-105.

The Supreme Court in *Hamdi* made clear that the procedures and fact-finding mechanisms available to detainees should reflect their "'probable value' and the burdens they may impose on the military." *Id.* at 533 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)); *see Boumediene*, 128 S. Ct. at 2262. By analogy, the discussion of procedural requirements in *Boumediene* and *Hamdi* demonstrate that the Federal Rules of Civil Procedure should not apply here.

The inapplicability of the Federal Rules of Civil Procedure to these *sui generis* proceedings does not, of course, mean that they are litigated without a governing framework. Indeed, the orderly litigation of more than two-hundred habeas petitioners, and the balancing of

burdens required by *Boumediene*, necessitates a standard procedural framework. The CMO provides such a framework to govern these proceedings. Notably, in the drafting of the amendment to the CMO, Judge Hogan was presented with authorities and arguments by both the Government and the petitioners. The result is an orderly procedure fair to the interests of all parties, and petitioners have not established cause as to why they should deviate from the procedures that the CMO sets forth for litigating a complete record.

The CMO clearly delineates the process to be employed in these cases. It requires, firstly, that the Government "shall file [factual] returns and proposed amended [factual] returns containing the factual basis upon which it is detaining the petitioner." CMO ¶ I.A. After the filing of the factual return or amended factual return, the CMO offers the parties the opportunity to conduct discovery. CMO ¶ I.E. Additionally, "in response to the government's factual return, the petitioner shall file a traverse containing the relevant facts and evidence supporting the petition." CMO ¶ I.G. In short, the traverse is the proper vehicle under the CMO for detainees, like the petitioner, seeking to challenge their detention to rebut the Government's factual assertions. Following the filing of the traverse, the matter proceeds to "Judgment on the Record," which the CMO describes as the Court's "review of both the cause of the detention and the Executive's power to detain.'" CMO ¶ III.A. (*citing Boumediene*, 128 S.Ct. at 2269).

It is entirely appropriate that the CMO does not provide for the intermediate step of summary judgment and hearing, especially where - as here- the petitioner raises factual disputes and has not yet filed a final traverse rebutting the government's factual assertions.

The Court should proceed in the manner established by the CMO rather than entertaining a Motion for Summary Judgment filed in advance of a final traverse. Proceeding to the merits of Petitioner's motion at this stage would require the Court to explicitly abandon the CMO's procedural framework to the potential detriment of all parties.

As of this date, the Government has filed an amended factual return for the petitioner. The amended factual return in this case sets forth the factual bases upon which the Government relies in detaining the petitioner.[1] However, petitioner has yet to file a final traverse, and has made no concession that he intends to forego discovery. Therefore, petitioner's Preliminary Traverse and Motion for Summary Judgment does not satisfy or comply with the procedure outlined in the CMO. To the extent that the petitioner challenges factual assertions made by the Government and reserves the right to seek future discovery - such as he does in his motion, the CMO requires that he file a final traverse and then proceed to Judgment on the Record.[2]

Allowing the petitioner to proceed on his motion for summary judgment and requiring the Government to respond *even before* petitioner files a final traverse, places an unreasonable burden solely on the Government. Unless the petitioner expressly waives his rights under the CMO - such as the right to file a final traverse and request additional discovery - Judgment on the Record under the CMO is presumably still available. The present course allows petitioner to file a Motion for Summary Judgment and, if unsuccessful, proceed again to Judgment on the Record and/or an evidentiary hearing. The burden of this process thus falls solely on the Government, while it litigates these approximately 200 cases proceeding simultaneously. The

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[1] Indeed, the evidence proffered in the amended factual return, properly construed at this stage in the light most favorable to the Government, as the non-moving party, presents evidence that establishes the legality of the petitioner's detention as an enemy combatant, or is, at the very least, sufficient to turn aside petitioner's motion.

[2] Should petitioner explicitly forego discovery and ask this Court to construe their motion as one for Judgment on the Record under the CMO, the Government would still require additional time to formulate a response for the reasons set forth below. In addition, the Government is in the process of preparing a motion to amend the Statement of Material Facts to include certain classified evidence discovered during the exculpatory search process. Petitioner's counsel has been previously advised of this and expressed his objection due, in part, to the Government's inability to discuss the specifics as some of the documents were still in the process of being cleared for use in this case. The filing of the anticipated motion to amend would also require additional time for petitioner to respond and for the Court to issue a ruling.

orderly litigation of these habeas petitions requires adherence to the CMO's procedural framework. Accordingly, in order to minimize the burdens involved in litigating these cases, the Court should deny petitioner's motion which seeks application of a procedure and a remedy that is inconsistent with the CMO's governing framework.

B. Should the Court Be Inclined to Proceed to Judgment, the Government Respectfully Requests Time to Assess Its Position on Threshold Issues.

Should the Court be inclined to proceed to summary judgment, the Government respectfully requests time to assess its position on threshold issues. The parties disagree as to which issues of fact are necessarily material to the legal issue of whether petitioner is lawfully detained as an enemy combatant and dispute the appropriate legal definition of "enemy combatant," a point petitioners appear to concede. Petitioner's position is that, nevertheless, he could not be deemed an enemy combatant under any definition of the term. Conversely, the Government asserts that it possesses the appropriate legal authority to detain the petitioner.

The standard for lawful detention constitutes a threshold legal issue affecting the Court's resolution of this case on the merits, even if it could proceed on the appropriate record. As explained below, the Government is assessing its position on this issue. Thus, should the Court proceed on this motion - which is based on an incomplete record - the Government respectfully requests additional time to consider whether to refine its position.

On January 22, 2009, the President issued Executive Order 13,492: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). This Executive Order, inter alia, commands "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]." As an initial matter, that Review is to determine, on a rolling basis, whether each detainee can be

transferred or released. This Court may not have to entertain the habeas petitions of detainees who are subject to such actions. As for detainees who cannot be released or transferred, the Review will consider whether they can be prosecuted for criminal conduct. To the extent any current detainees are not transferred, released, or subject to prosecution, the Review will determine another lawful disposition consistent with "the national security and foreign policy interests of the United States, and . . . the interests of justice." Id. at §§ 2(d), 4.

The President has also established, by another Executive Order, a deliberative process to address more generally questions concerning Executive detention authority and options. *See* Executive Order 13,493: Review of Detention Policy Options, 74 Fed. Reg. 4901 (Jan. 22, 2009). That Executive Order commands the creation of a Special Interagency Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." *Id.* § 1(e). The Task Force is to provide preliminary reports the President and a final report within 180 days of the date of the Order.

The Government is now assessing how it will proceed in the above-captioned Guantanamo Bay detainee *habeas corpus* case in light of the change in Administrations and the requirements of the Executive Orders. Time is needed to make and carry out that assessment and determination. To the extent that the Court intends to reach the merits through this motion, however, the Government respectfully requests time to consider and, if appropriate, refine its position according to the schedule adopted by Judge Bates in other Guantanamo Bay habeas corpus proceedings, before responding to the petitioners' submission.

As the Court is aware, the Government is now considering how it will proceed in this case and other Guantanamo Bay detainee habeas corpus cases, in light of the change in Administrations. In this unprecedented situation, time is needed to make such an assessment and determination, particularly to the extent that it involves consideration of the novel issues described above. The Government has briefed similar positions at the invitation of Judge Bates in cases before him, see, e.g., Civ. Action No. 05-763, dkt. no. 151, as well as in cases before Judge Kessler, see, e.g., Civ. Action No. 05-1678, dkt. no. 149. Judge Bates subsequently ordered "that by not later than March 13, 2009, respondents shall submit any refinement of their position on the appropriate definition of 'enemy combatant.'" Civ. Action No. 05-763, dkt. no. 154 at 3.

The Government's need for time to assess its position, if necessary, applies here as well. To the extent that this Court requires the Government to refine its position on the appropriate definition of "enemy combatant" in a merits proceeding, to include responding to the merits of the petitioner's motion for summary judgment, the Government respectfully requests that the Court at the very least adopt a time line consistent with that ordered by Judge Bates. Additionally, as described above, the Government intends to file a motion to amend the statement of material facts to add additional inculpatory documents discovered while searching for exculpatory documents. This will also necessitate additional time for the Petitioner's response and the Court's ruling. The Government would request an additional two weeks after the deadline established by Judge Bates, that is, March 27, 2009, to complete its response to the instant motion given the need for some additional time after any refinement of the "enemy combatant" definition to apply that definition to the facts of this case.

CONCLUSION

Petitioner's motion is contrary to the procedural framework established by the CMO. Consideration of the merits under the framework governing these cases, requires that Petitioner file a complete traverse if he challenges the Government's factual assertions, and that the petitioner either complete or forego additional discovery. However, should the Court be inclined to consider the merits, the Government respectfully requests additional time to respond, until March 27, 2009, while considering whether to refine its position on threshold issues.

Counsel for the Government has conferred with counsel for the petitioner. Counsel for the Petitioner advises that he objects to this request.

WHEREFORE, the Government requests that the Court deny the Petitioner's Motion for Summary Judgment or, in the alternative, allow the Government to respond on or before March 27, 2009, and postpone the hearing scheduled for March 5, 2009 accordingly.

Dated: February ____, 2009

Respectfully submitted,

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