IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ***et al.*****,**	)	
Plaintiffs,	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, ***et al.*****,**	)	
Defendants.	)	

AL ODAH PETITIONERS' MOTION TO STRIKE THE GOVERNMENT'S "RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS"

The Al Odah Petitioners hereby move to strike the Government Respondents' "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss" because, for the reasons elaborated in the attached memorandum, it violates this Court's order of September 20, 2004, the Supreme Court's express instructions in R*asul v. Bush*, and the Federal Rules.

Respectfully submitted,

/s/ Thomas B. Wilner
Thomas B. Wilner (D.C. Bar #173807)
Neil H. Koslowe (D.C. Bar #361792)
Kristine A. Huskey (D.C. Bar #462979)
Jared A. Goldstein (D.C. Bar #478572)
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100
Attorneys for Al Odah Petitioners

Dated: October 22, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,	)	
Plaintiffs,	)	
	)	
v.	)	**No. CV 02-0828 (CKK)**
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	
	)	

AL ODAH PETITIONERS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE THE GOVERNMENT'S "RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS"

On October 5, 2004, the government filed a document captioned "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss." That motion should be struck from the record because it does not respond to the merits of petitioners' allegations, in violation of this Court's order of September 20, 2004, the Supreme Court's express instructions in *Rasul v. Bush*, and the Federal Rules. Petitioners allege that they are innocent civilians detained indefinitely by mistake, without adequate process, without access to counsel, and without charges.[1] In rejecting the government's motion to dismiss for lack of jurisdiction, the Supreme Court remanded the case to this Court "to consider in the first instance the merits of petitioners' claims." *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004). Rather than responding to petitioners' allegations that they are innocent civilians, the government's motion continues to argue, as it has for the last two and a half years, that petitioners have no rights and therefore are entitled to no relief, regardless whether they are wholly innocent. In failing to respond to petitioners' claims, the government

[1] *See Rasul*, 124 S. Ct. at 2691 ("All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been

flouts the Supreme Court's express instruction in this case that upon remand the government respondents must "make their response to the *merits* of petitioners' claims." *Id.* (emphasis added).

The government attempts to justify its failure to respond to petitioners' claims of innocence by misquoting the *Rasul* decision, declaring that "the Court expressly declined to address '*whether* and what further proceedings' would be appropriate after remand." *See* Gov't Mot. at 1 (quoting 124 S. Ct. at 2699) (emphasis supplied by the government). The government misleadingly leaves out a critical part of that sentence. The full sentence makes clear the government's obligation to respond to the merits of petitioners' claims: "Whether and what further proceedings may become necessary *after respondents make their response to the merits of petitioners' claims* are matters that we need not address now." 124 S. Ct. at 2699 (emphasis added).

The government's motion is also in direct violation of this Court's September 20 order that it file a "responsive pleading." It is well-established that a motion to dismiss is not a "responsive pleading." *See Miles v. Department of Army*, 881 F.2d 777, 781 (9th Cir. 1989) ("[A] motion to dismiss the complaint is not a responsive pleading."); *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir.1989) (same); *Zaidi v. Ehrlich*, 732 F.2d 1218, 1219 (5th Cir. 1984) ("The term "responsive pleading" should be defined by reference to the definition of 'pleading' in Rule 7(a), which includes neither a motion to dismiss nor a motion for summary judgment."); *Kroger Co. v. Adkins Transfer Co.*, 408 F.2d 813 (6th Cir. 1969); *see generally* 6 Charles A. Wright, *et al.*, Federal Practice & Procedure § 1475.

---

charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal."); *id.* at 2698 n.15.

The government's order is also inconsistent with the Rules Governing Habeas Cases. The order to file a "responsive pleading" flows out of Rule 5, in which Congress directed that when a court orders the government to respond to a habeas petition, the government "shall respond to the allegations of the petition."[2] Rule 5 requires the government to present in one filing the legal basis for the petitioner's detention. As the Advisory Committee Notes indicate, the Rule was adopted specifically to prevent "a series of delaying motions such as motions to dismiss," precisely what the government now attempts. The Rule seeks to prevent habeas proceedings from dragging on through a series of piecemeal motions.

Without express leave of court, a motion to dismiss is emphatically not an appropriate response to a habeas petition, as the Supreme Court has held:

> Respondent's conception . . . seems to have been that a Rule 12(b)(6) motion is an appropriate motion in a habeas corpus proceeding, and that upon denial of such a motion, the case should proceed through answer, discover, and trial. This view is erroneous. . . . The custodian's response to a habeas corpus petition is not like a motion to dismiss.

Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 n.14 (1978).[3]

---

[2] Although the Habeas Rules directly govern only habeas petitions brought by state prisoners under Section 2254, the rules may be applied in other habeas cases at the discretion of the district court. *See* Rule 1(b). When it has suited its purposes (such as opposing discovery), the government has asserted that these cases should proceed under the Habeas Rules. *See, e.g.*, Memorandum of Points and Authorities in Support of Respondents' Motion to Quash Petitioners' Notice of Deposition and Fed. R. Civ. P. 34 Request at 4 n.1; Respondents' Opposition to Petitioners' Motion to Compel Responsive Pleading and Return Forthwith at 9-11.

[3] *See also Ukawabutu v. Morton*, 997 F. Supp. 605, 609 (D.N.J. 1998) ("[U]nless the Court grants a respondent's request for leave to file a motion to dismiss, the answer should respond in an appropriate manner to the factual allegations of the petition *and* should set forth legal arguments in support of respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits.") (emphasis in original); *Chavez v. Morgan*, 932 F. Supp. 1152, 1153 (E.D. Wisc. 1996) ("The appropriate response is an 'answer' which responds to each allegation contained in the petition."); *White v. Cockrell*, 2001 WL 1335779 (N.D. Tex. Oct. 19, 2001) (denying answer because "[i]t does not answer the petition in substance as required by Rule 5 . . . It simply asserts a defense that respondent deemed appropriate."); *United States ex rel. Emerson v. Warden, Pontiac Correctional Center*, 1994 WL 11054 (N.D. Ill. Mar. 29, 1994); *United States ex rel. Martin v. Chrans*,

The government's motion reflects a basic misunderstanding of habeas procedures, under which the government believes that it should be accorded numerous opportunities to challenge various aspects of the petition without ever addressing the merits of petitioners' claims. The government first moved to dismiss for lack of jurisdiction; now the government seeks dismissal based on the alleged failure to state a claim; and, once this motion too is denied, the government undoubtedly will attempt to file additional motions in further attempts to put off petitioners' day in court. The prospect that anyone could be imprisoned without legal justification, however, strikes at the heart of the rule of law, and as a result, habeas procedures are designed to be far more streamlined than those provided by the Federal Rules of Civil Procedure.[4] For this reason, Congress directed that the government must ordinarily file a response to a habeas petition within three days. *See* 28 U.S.C. § 2243. Yet, almost three years after petitioners have been imprisoned, and two and a half years after petitioners filed their petition, the government has yet to offer any justification for the detentions.

The government's motion is also in direct violation of the Federal Civil Rules of Procedure.[5] Under Fed. R. Civ. P. 12(g), a party must consolidate all motions to dismiss in a single pre-answer motion and may not file successive pre-answer motions to dismiss. More than two years ago, the government filed a pre-answer motion, in which it moved to dismiss this

---

1986 WL 7076 *2 (N.D. Ill., June 11, 1986) ("After a respondent answers . . . [w]e simply proceed to rule on the petition."); *see also Purdy v. Bennett*, 214 F. Supp.2d 348, 352-353 (S.D.N.Y. 2002) (holding that under Habeas Rule 4 a district court may grant leave to file a motion to dismiss).

[4] *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973) ("[T]he federal habeas statute provides for a swift, flexible, and summary determination of his claim."); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (The "province [of habeas corpus jurisdiction], shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."); *Stack v. Boyle*, 342 U.S. 1, 4 (1952) ("Relief in this type of case must be speedy if it is to be effective.").

[5] Under Fed. R. Civ. P. 81(a), the Civil Rules apply to habeas proceedings to the extent not inconsistent with the habeas statute.

action for lack of jurisdiction. That motion has been denied. The government has no right to delay these proceedings further by filing another pre-answer motion to dismiss. As with Rule 5 of the Habeas Rules, Rule 12 of the Civil Rules was adopted to prevent exactly the sort of delay the government clearly seeks here. *See* Wright, Miller, et al., Federal Practice & Procedure § 1384 ("Rule 12 was drafted by the Advisory Committee to prevent the dilatory motion practice fostered by common law procedure and many of the codes under which numerous pretrial motions could be made, many of them in sequence—a course of conduct that was pursued often for the sole purpose of delay.").[6]

In short, the government's "response" is no response at all. It violates this Court's order, the Supreme Court's express instructions in this case, and the federal rules governing both habeas and civil actions.[7] It should be struck from the record.

---

[6] Under Fed. R. Civ. P. 12(h)(2), the government has not waived the alleged failure to state a claim as a defense, but it may not file a second pre-answer motion to dismiss on that basis. *See* Wright, Miller, et al., Federal Practice & Procedure § 1392 ("[I]f a party makes a preliminary motion under Rule 12 and fails to include one of the Rule 12(h)(2) objections, she has not waived it, even though, under Rule 12(g), the party may not assert the defense by a second pre-answer motion.").

[7] Separate from its purported "response" to the petitions, the government has submitted "factual returns" for a number of petitioners, which purport to provide a factual basis for the government's designation of petitioners as "enemy combatants." Although the government's "response" to the petitions is improper and inadequate because it seeks to dismiss plaintiffs' claims without reaching their merits, the factual returns at least address (in some limited measure) the basis for plaintiffs' detention. Plaintiffs submit that the proper focus of the habeas proceeding should be on the adequacy of those factual returns. At present, plaintiffs note that the evidence purportedly supporting the factual returns cannot support petitioners' detention as that evidence is based exclusively on the Combatant Status Review Tribunals ("CSRTs"), discussed below, which were established by the government almost three years after detaining petitioners and which, inter alia, prevent detainees from confronting the evidence against them, do not allow the detainees legal representation, are not heard by impartial decisionmakers, and which allow the introduction of confessions that result from physical coercion. In any event, once the obstacles the government has established to prevent petitioners' counsel from discovering the facts are resolved, such as the government's attempt to monitor petitioners' communications with counsel, petitioners will respond to the factual returns in an appropriate manner.

Respectfully submitted,

/s/ Thomas B. Wilner
Thomas B. Wilner (D.C. Bar #173807)
Neil H. Koslowe (D.C. Bar #361792)
Kristine A. Huskey (D.C. Bar #462979)
Jared A. Goldstein (D.C. Bar #478572)
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100
Attorneys for Al Odah Petitioners

Dated: October 22, 2004