IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	**Misc. No. 08-442 (TFH)**
GUANTANAMO BAY	:	
DETAINEE LITIGATION	:	**Nos. 02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1937, 04-cv-2022, 04-cv-2035, 04-cv-1254, 04-cv-2046, 04-cv-2215, 05-cv-23, 05-cv-0247, 05-cv-270, 05-cv-280, 05-cv-329, 05-cv-359, 05-cv-392, 05-cv-492, 05-cv-520, 05-cv-526, 05-cv-569, 05-cv-634, 05-cv-748, 05-cv-763, 05-cv-764, 05-cv-877, 05-cv-883, 05-cv-889, 05-cv-892, 05-cv-993, 05-cv-994, 05-cv-998, 05-cv-999, 05-cv-1048, 05-cv-1189, 05-cv-1124, 05-cv-1220, 05-cv-1347, 05-cv-1353, 05-cv-1429, 05-cv-1457, 05-cv-1458, 05-cv-1490, 05-cv-1497, 05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1509, 05-cv-1555, 05-cv-1592, 05-cv-1601, 05-cv-1602, 05-cv-1607, 05-cv-1623, 05-cv-1638, 05-cv-1639, 05-cv-1645, 05-cv-1646, 05-cv-1678, 05-cv-1704, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088, 05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249, 05-cv-2349, 05-cv-2367, 05-cv-2370, 05-cv-2371, 05-cv-2378, 05-cv-2379, 05-cv-2380, 05-cv-2381, 05-cv-2385, 05-cv-2444, 05-cv-2479, 06-cv-618, 06-cv-1668, 06-cv-1684, 06-cv-1758, 06-cv-1759, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710, 07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1085, 08-cv-1101, 08-cv-1104, 08-cv-1153, 08-cv-1185, 08-cv-1207, 08-cv-1221, 08-cv-1223, 08-cv-1224, 08-cv-1227, 08-cv-1228, 08-cv-1229, 08-cv-1230, 08-cv-1231, 08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237, 08-cv-1238, 08-cv-1310, 08-cv-1360, 08-cv-1440, 08-cv-1733, 08-cv-1805, 08-cv-2083, 08-cv-1828, 08-cv-1923, 08-cv-2019, 09-cv-0031, 04-cv-1194, 05-cv-765, 05-cv-879, 05-cv-886, 05-cv-891, 05-cv-1234, 05-cv-1244, 05-cv-1487, 05-cv-1493, 05-cv-1667, 05-cv-1679, 05-cv-2348, 05-cv-2384, 05-cv-2386, 05-cv-2387, 06-cv-1675, 06-cv-1690, 06-cv-1725, 06-cv-1761, 08-cv-1222, 08-cv-1789, 09-cv-0745**
	:	

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE, AND IN OPPOSITION TO, RESPONDENTS' MOTION FOR RECONSIDERATION OF ORDERS REGARDING DISCOVERY FROM THE GUANTANAMO REVIEW TASK FORCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Executive Orders

Orders

Petitioners in the above-captioned matters ("Petitioners")[1] move to strike Respondents' Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force ("Motion"), and oppose the Motion as an improper attempt to evade the orders of other District Court judges. In the alternative, Petitioners oppose the Motion on its merits.

Preliminary Statement

On May 12, Respondents filed a motion with this Court, requesting that it "reconsider," on a consolidated basis, multiple orders issued over the course of several months by other District Court Judges ("Merits Judges") concerning discovery of information assembled pursuant to Executive Order 13,492, issued by President Barack Obama on January 22, 2009 ("Executive Order"). Respondents made this filing despite this Court's clear directive, in its order dated December 16, 2008 ("December Order"), that all future motions regarding case management issues be filed with the Merits Judges. For all but a few of the underlying orders, months or weeks have passed without a reconsideration motion addressed to the Merits Judges and Respondents appear to be forum-shopping at this point. Respondents also chose to file their motion without fulfilling their meet-and-confer obligations under Local Rule 7(m), and instead propose, without substantial basis, that the Court approve a mechanism for the parties to meet and confer after the fact.

This Court should not countenance Respondents' disregard of the local rules, the

[1] The petitioners in Case No. 08-cv-0864 (EGS) are not before this Court. The petitioner in Case No. 04-2022 joins in this cross-motion and opposition but wishes to be exempt from any decision of this Court since he has already filed an opposition to the Motion with the Merits Judge for his case. Despite joining this consolidated brief, all Petitioners object to the requirement that they file a consolidated opposition to Respondents' motion, since each Petitioner has individual arguments that cannot be presented as effectively in a consolidated filing.

Court's own order, and the orders of Merits Judges. The Court should strike Respondents' motion in light of its procedural defects or, in the alternative, deny it.

Moreover, on its merits, the Motion seeks to solve problems that appear to be of Respondents' own invention, misreading orders of the Merits Judges to require a more burdensome review than a reasonable reading of the orders supports. In order to solve this self-imposed problem, Respondents suggest a blanket solution for all Petitioners that would be neither efficient nor just. In the alternative, the Court should deny the Motion on the merits or defer to the Merits Judges whose orders are the subject of this Motion.

I. FACTS

On January 22, 2009, President Obama issued the Executive Order, in which he directed the Attorney General to:

> [A]ssemble all information in the possession of the Federal Government that pertains to any individual currently detained by Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual.

Executive Order, § 4(c), 74 Fed. Reg. at 4898-99 (Jan. 27, 2009). The Executive Order requires "prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice." *Id.*, § 2(d), 74 Fed. Reg. at 4898. The Attorney General created the Guantanamo Review Task Force ("Task Force") to perform this review.

On February 9, 2009, Judge Bates issued the first case management order that Respondents ask this Court to reconsider, denying in part and granting in part

Respondents' motion to reconsider an order issued on January 22, 2009. *See Zaid v. Obama*, 05-1646 (JDB) (Dkt. No. 146). The *Zaid* order agreed with Respondents' request to limit searches to "consolidated assemblages of information," *id.* at 3 (internal quotation marks omitted), but recognized that the Executive Order would "presumably add to the consolidated files now in respondents' possession or create a new, more comprehensive set of consolidated files for each detainee," and identified these new files as "a resource the Court should not ignore." *Id.* at 5.

Judge Bates issued orders in two additional *habeas* cases on March 4, 2009, similarly holding that "Respondents' obligations under both section I.D. and I.E are impacted as well by President Obama's January 22, 2009 Executive Order . . . . The Executive Order will presumably add to the information that is reasonably available to respondents and may include information responsive to sections I.D. and I.E." *Khan v. Obama*, 08-1101 (JDB), at 1-2 (Dkt. No. 85); *Dokhan v. Obama*, 08-0987 (JDB) (Dkt. No. 89). Respondents did not ask Judge Bates to reconsider the *Zaid* order issued in February or the March orders in *Khan* and *Dokhan*.

On April 6, Judge Kollar-Kotelly issued a written order memorializing certain decisions made on the record at a hearing on March 12. *See, e.g., Alsawam v. United States*, 05-1244 (CKK) (Dkt. No. 158). One of those rulings addressed the effect of the Executive Order: "As the Court stated at the Status Hearing, to the extent the Attorney General will be gathering and reviewing additional materials, such material must be made available to Respondents for review and disclosure pursuant to the terms of the CMO." Order at 7. Judge Kollar-Kotelly thus granted Petitioner's request to expand the scope of discovery to include material collected and reviewed pursuant to the Executive Order if

not previously available to DOJ attorneys. *Id.* at 7. In an April 17 order in *Alsawam*, Judge Kollar-Kotelly set a May 27 deadline for disclosure of, *inter alia*, the materials gathered and reviewed pursuant to the Executive Order. *Alsawam v. United States*, 05-1244 (CKK) (Dkt. No. 156). In a different matter, *Al Odah v. United States*, No. 02-828 (CKK), April 7, 2009 (Dkt. No. 531), Judge Kollar-Kotelly also ordered production of "materials relating to Petitioners [that] have been collected or otherwise assembled in connection with this Executive Order," excluding materials already reviewed or produced by Respondents. Respondents did not ask Judge Kollar-Kotelly to reconsider either of the *Alsawam* orders or the *Al Odah* order.

On April 8, Judge Kennedy issued an order in *Abdah v. Obama*, 04-01254 (HHK), (Dkt. No. 477) that, "[i]n addition to the information that is 'reasonably available' as defined by the Consolidated CMO, the court considers any information that the government reviews or obtains while implementing the Executive Order to be reasonably available under the Consolidated CMO." Respondents did not seek Judge Kennedy's reconsideration of this portion of his order.

On April 23, Judge Urbina issued an Omnibus Order governing seven detainee cases and an Amended Omnibus Order governing four additional cases. *See* Omnibus Order, 05-0520, 05-0526, 05-0993, 05-1220, 05-1429, 05-1607 & 05-1983 (RMU) (Dkt. No. 145 in 05-1983); Amended Omnibus Order, 06-1767, 08-1237, 08-1805 & 08-1828 (RMU) (Dkt. No. 145 in 05-1983). In both, Judge Urbina ordered that "the government shall construe the definition of 'reasonably available evidence' as including . . . information compiled pursuant to Executive Order 13,492[.]" Respondents did not seek Judge Urbina's reconsideration of either omnibus order.

On April 27, Judge Walton issued an order providing each petitioner in the detainee cases pending before him "with the option of staying his case until such time as counsel for the respondents could independently review the information regarding that petitioner compiled pursuant to Executive Order No. 13,492 and produce any exculpatory evidence discovered therein" or proceeding with a more limited subset of information identified pursuant to the Executive Order. *Gherebi v. Obama*, 04-1164, 05-883, 05-891, 05-999, 05-1493, 05-1667, 05-2104, 05-2386, 06-1675, 06-1690, 07-1710, 08-2019 (RBW) (Dkt. No. 221 in 04-1164), at 5. Respondents did not seek reconsideration of the *Gherebi* order.

From April 27 to May 4, Judge Huvelle issued orders addressing the Executive Order in two cases involving five detainees. *See Al Halmandy v. Obama*, No. 05-2385, April 27, 2009 (Jawad) (Dkt. No. 238); April 30, 2009 (Saleh) (Dkt. No. 243); April 30, 2009 (Mohammed) (Dkt. No. 242); May 4, 2009 (Nargeri) (Dkt. No. 245); *Ameziane v. Obama*, 05-392, April 30, 2009 (Dkt. No. 198). Each of the four *Al Halmandy* orders explicitly amended the case management order to include "any evidence discovered during the ongoing review of Guantanamo cases ordered by President Obama on January 22, 2009" in the definition of "reasonably available evidence." The *Ameziane* order expanded the definition of "reasonably available evidence" in the same manner. Respondents did not ask Judge Huvelle to reconsider any of these orders.

Most recently, on May 11, 2009, Judge Kessler entered orders in *Alhami v. Obama*, 05-359 (GK) (Dkt. No. 189) and *Al Razak v. Obama*, 05-1601 (GK) (Dkt. No. 209), specifically decided based on her assessment of "the present state of the litigation" and taking into account her "experience in other Guantanamo Bay litigation." Both

orders provide that "reasonably available evidence" under the case management order includes "any evidence discovered during the ongoing review of Guantanamo cases ordered by President Obama on January 22, 2009." Respondents did not seek Judge Kessler's reconsideration of either order.

Although not specifically mentioned by Respondents, there are other orders requiring Task Force-related discovery that might be affected by the relief sought by Respondents. *See, e.g.*, *Hamlily v. Obama*, 05-763 (JDB), Feb. 27, 2009 (sealed order).

II. ARGUMENT

The orders represent the well-reasoned efforts of the Merits Judges to address individual issues that arose in the *habeas* cases assigned to them and to address issues not specifically resolved by the previously entered Case Management Orders. To the extent that Respondents wished to challenge any of these orders, the proper mechanism would have been a timely motion for reconsideration addressed to the Merits Judge who issued the order. A consolidated motion for "reconsideration" addressed to this Court is procedurally improper and should be stricken. Respondents' failure to meet and confer prior to filing this motion is an additional procedural defect and separate reason to strike.

To the extent that this Court elects to reach the merits of Respondents' filing, which presents a policy proposal in the guise of a reconsideration motion, but offers no adequate legal or factual basis for reconsideration itself, the Motion should be denied. Respondents' request for reconsideration fails to meet the standards set forth in Rule 54, Rule 59 or Rule 60 of the Federal Rules of Civil Procedure.

A. The Court Should Strike The Motion Due To Respondents' Disregard For Prior Orders Of This Court And Rules Of Civil Procedure.

A court has "liberal discretion" to strike a motion for procedural inadequacies.

Pigford v. Veneman, 215 F.R.D. 2, 4 (D.D.C. 2003). Failure to comply with the rules of civil procedure, including local rules, is a sufficient basis to strike a filing. *See, e.g.*, *McFadden v. Ballard, Spahr, Andrews & Ingersoll, LLP*, No. 05-21401, 2008 WL 2569418, at *1 (D.D.C. June 24, 2008) (striking motion for failure to comply with Local Rule 7(m)); *Superior Prod. P'ship v. Gordon Auto Body Parts Co., Ltd*., No. 06-cv-916, 2008 WL 2230774, at *1 (S.D. Ohio May 28, 2008) ("[T]he Court may choose to strike a filing that is not allowed by local rule[.]"). While a motion to strike is a strong remedy that should not be exercised lightly, Respondents' lack of regard for explicit court orders and federal and local rules is so pronounced that this remedy is warranted.

1. Respondents' Motion Disregards Prior Orders of This Court.

On November 6, 2008, this Court entered a consolidated Case Management Order (the "November Order") that set forth general procedures to govern the litigation of the Guantanamo detainee cases in light of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and its directive "to provide the petitioners in these cases with prompt habeas corpus review." November Order at 1. Following a motion for reconsideration by Respondents, which this Court granted in part and denied in part, the initial Case Management Order was amended by the December Order.

The December Order clearly was intended to be this Court's first and only effort at amending the procedural framework, since the Court ordered "that any future motions to amend the Case Management Order be directed to the Merits Judges." December Order at 4. Respondents' failure to abide by an explicit order of this Court is reason to strike the Motion.

2. Respondents' Motion Disregards Principles of Comity.

Respondents' Motion asks this Court, in effect, to supersede the functions of the

Merits Judges and to take on a quasi-appellate role by reviewing and withdrawing orders issued by peer District Court Judges.[2] In all, Respondents ask this Court reconsider more than twenty orders issued by at least seven peer Merits Judges over the last few months. *See* Memorandum of Points and Authorities in Support of Respondents' Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force and Motion for Consolidated Order Regarding Task Force Discovery ("Mem.") at 12-13, nn. 2 & 3. Beyond that, Respondents' requested relief would apply to cases where the Merits Judges have not entered any orders relating to the Task Force, restricting in advance the ability of the Merits Judges to manage their own cases.

The "principle of comity requires federal district courts – courts of coordinate jurisdiction and equal rank – to exercise care to avoid interference with each other's affairs." *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (D.C. Cir. 1985). Respondents' request that this Court reconsider the orders of other District Court Judges, withdraw those orders, and enter a consolidated order contrary to the orders entered by peer judges over the last few months is an invitation to interfere in the affairs of other district courts.[3] *See Brooks Transp. Co. v. McCutcheon*, 154 F.2d 841, 842 (D.C. Cir. 1946) ("It is well settled that as a matter of comity between Federal courts of equal jurisdiction one district court will not go forward where proceedings have been

[2] In fact, the Motion asks this Court to assume a role beyond the jurisdiction of the U.S. Court of Appeals for the District of Columbia, since it is highly unlikely that the Court of Appeals would agree to hear interlocutory appeals from routine discovery orders.

[3] Local Rule of Civil Procedure 40 permits some or all aspects of a case to be transferred from one judge to another, and this Court was designated to coordinate and manage certain procedural issues relating to the Guantanamo habeas cases pursuant to subsections 40.6(a) and 40.5(e) of the Local Rule. However, this Court's December Order returned issues relating to the amendment of the case management order to the Merits Judges. Subsections 40.6(a) and 40.5(e) additionally require the consent of the transferring court, and it does not appear that the Merits Judges have consented to reconsideration of their orders by this Court.

begun previously on the same cause in another district court."). Here, the Merits Judges have not only begun proceedings on the discovery obligations stemming from the Executive Order – they have concluded those proceedings by issuing orders beginning in February of this year. After Respondents filed this Motion, one Merits Judge ordered Respondents to comply with all terms of his recent omnibus case management order, which includes a provision for Task Force discovery, "unless and until the court orders otherwise." *Al-Oshan v. Obama*, 05-520 (RMU), May 19, 2009, at 1 (Dkt. No. 246). Given that "[c]onsiderations of comity preclude [a] court from resolving [a] claim when the same claimant could raise it simultaneously in front of another court of equal authority," *Action for Childrens Television v. FCC*, 827 F. Supp. 2d 4, 15 (D.D.C. 1993) (citing *Washington Met. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980)), the same considerations should even more strongly preclude this Court from resolving claims that have already been raised and resolved by the Merits Judges. Comity concerns counsel that this Court strike the Motion.

3. Respondents' Motion Disregards the Local Rules.

Local Rule 7(m) states that "[b]efore filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a goodfaith [*sic*] effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement." Respondents have disregarded this requirement.

In a footnote to their Motion, Respondents note that due to the purportedly "unique circumstances of this filing," they unilaterally request *ex post* permission to modify the meet and confer procedures mandated by Local Rule 7(m). *See* Mot. at n.3. However, Respondents are not justified in making an "independent determination that a

meet and confer session was unnecessary," and such a unilateral determination "does not provide a basis to ignore the clear mandates of Local Rule 7.1(m)." *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 27 (D.D.C. 2001) (Hogan, J.). There is also nothing unique about the number of counsel involved – the same number are involved in any omnibus motion regarding the habeas cases – and certainly no unique time-sensitivity prevented Respondents from complying with this rule.[4]

In fact, Respondents did not attempt to confer with *any* Petitioners' counsel before making this Motion – not even the counsel representing Petitioners in the relatively small number of cases where an order has been issued that Respondents wish to revisit. While Respondents did send out a generalized e-mail request to Petitioners' counsel to meet and confer about the Motion, they did so only *after* the Motion had been filed. This belated e-mail was not a good faith effort to engage Petitioners' counsel in a discussion of the issues presented by the Motion. As can be expected, the after-the-fact e-mail yielded a host of objections, rather than the narrowing of issues in dispute that likely would have been achieved by the dialogue (in person or by phone) required by the local rule.[5] The Court should strike Respondents' motion due to its failure to comply

[4] Respondents' own proposed "modification" to Local Rule 7(m) contemplates outreach to all counsel within one week of filing with an additional week for Petitioners' response. *See* [Proposed] Order Regarding Local Rule 7(m) Procedure. Thus, compliance with the meet-and-confer requirement would have delayed the motion by seven days at most. Given that Respondents were willing to grant Petitioners an additional seven days to file a response, it is equally clear that there was no significant time pressure to present this Motion to this Court.

[5] This is a motion where adherence to the meet and confer requirements of Rule 7(m) very well may have been productive in the underlying cases where specific orders are being challenged. Counsel for at least some of the Petitioners are amenable to placing the burden of identifying and disclosing exculpatory information on government attorneys rather than agency personnel. In those cases, this concession would have redressed the bulk of Respondents' concerns about burden and obviated the need for much of the relief sought.

with these simple, straightforward requirements, with permission to re-file in individual cases, if appropriate, following the meaningful meet and confer process required by Local Rule 7(m). *See U.S. v. Science Applications Intern. Corp.*, 555 F. Supp. 2d 40, 47 (D.D.C. 2008) (granting motion to strike for failure to meet and confer as required by Local Rule 7(m)); *Alexander v. FBI*, 186 F.R.D. 6, 9 (D.D.C. 1998) (same); *Penobscot Indian Nation v. U.S. Dep't of Housing & Urban Dev.*, No. 07-1282, 2008 WL 635740, at *1 (D.D.C. Mar. 5, 2008) (same).

B. The Court Should Deny Respondents' Motion On The Merits.

In addition to the procedural problems that should result in this Court striking the Motion, the Motion is premised on two substantive errors that require its denial on the merits. Both of these errors prevent the Motion from satisfying the legal standard for reconsideration on the merits. *First*, the Motion presupposes that the recent orders of the Merits Judges addressing the Executive Order are inconsistent with the November and December case management orders issued by this Court and such "inconsistency" will cause this Court to order a different result. *Second*, the Motion proposes that this Court institute a "one size fits all" approach, when a tailored approach by the Merits Judges is more appropriate given the individualized circumstances of the various Petitioners and indeed is the governing approach established by the existing case management Orders.

1. The Motion Provides No Cognizable Basis for Reconsideration.

Respondents fail to identify any rule of civil procedure that warrants reconsideration of the Merit Judges' orders. This is not surprising, since the Federal Rules do not include a mechanism by which one district court judge can review and reverse orders entered by other district court judges. Rule 54(b) is only mechanism for "a

district court [to] revise *its own* interlocutory decisions" prior to entry of a final judgment. *Casanova v. Marathon Corp.*, 246 F.R.D. 376, 378 (D.D.C. 2007) (emphasis added). Within this Circuit, motions to reconsider that fail to specify the applicable Federal Rule sometimes are "construed as motions to clarify or alter or amend judgment under Rule 59(e)." *Piper v. U.S. Dep't of Justice*, 312 F. Supp. 2d 17, 20-21 (D.D.C. 2004) (citing *Emory v. Sec'y of the Navy*, 819 F.2d 291, 293 (D.C. Cir. 1987)).[6] Respondents are time-barred from seeking relief pursuant to Rule 59 for all but two or three of the Merits Judges' orders, but "[a]n untimely motion under Rule 59(e) may be considered as a motion under Rule 60(b) if it states grounds for relief under the latter rule." *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996). As analyzed below, Respondents' Motion fails to state recognized grounds for relief under Rule 54, Rule, 59, or Rule 60. Respondents' primary argument is undue burden, which is not recognized as a basis for relief under any of these Federal Rules, particularly when the actual burden is quite modest.

According to Respondents, review of the Task Force database ("TF Network") would require the re-assignment or hiring of 10-20 additional attorneys – a minor staffing difficulty at most, since the DOJ is "the largest legal employer in the world," with "more than 9,500 attorneys,"[7] would require approximately one month to assemble that team of attorneys, would require some coordination among those attorneys to schedule database

[6] Consideration under Rule 59 "is appropriate even though the movant does not specify under which rule relief is sought, because any motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label." *Emory*, 819 F.2d at 293 (internal citation and quotations omitted).

[7] *See* http://www.usdoj.gov/oarm/images/lateralhiringguideforweb.pdf at 1 (visited March 28, 2009). There is also no logical reason why the DOJ could not re-assign and/or hire more than 20 additional attorneys to further expedite the process.

searches, would take one to two weeks per case, and ultimately "would take 10-40 weeks, or two to nine months, once begun, for all 200 petitioners." Mem. at 23-25. Given that this is Respondents' worst-case scenario, these are not particularly impressive statistics. Nor do Respondents address why the apparently arbitrary number of search attorneys they propose could not be increased to reduce the search period.

Moreover, Respondents in fact concede that the actual burden will be considerably less than this worst-case scenario. The Task Force's compilation of information is "now nearing completion." Mem. at 9. Respondents' burden analysis assumes 200 petitioners, but, as Respondents acknowledge, 30 detainees have already been approved for transfer as a result of the Task Force's efforts, negating any need for further habeas proceedings if the transfers are carried out in a timely manner; the Task Force continues to review detainees "to maximize the number of detainees approved for transfer or release"; and 50 petitions are currently stayed. Mem. at 3, 11, 25, n.11. Respondents' additional review responsibilities are limited to 120 detainees at most, a number that likely will continue to decrease. And it seems highly unlikely that Respondents will be starting from scratch, since they have been subject to orders from the Merits Judges to conduct such reviews for several weeks or months and presumably have abided by those orders.[8] Respondents also assume that the Merits Judges will order review of Task Force information for every detainee, rather than quantifying the burden imposed by the orders that they currently challenge. Those orders involve only 34 petitioners, far fewer than 200 petitioners Respondents' burden analysis is based upon.

[8] For example, Judge Kollar-Kotelly initially ordered Respondents to complete its production of additional exculpatory material discovered as a result of the Task Force's review by May 27, 2009. *See Alsawam v. United States*, 05-1244 (CKK), Apr. 17, 2009 (Dkt. No. 156).

Using Respondents' method of calculation – and without any increase in the number of search attorneys from Respondents' assumed scenario – search and review with respect to those petitioners would require only 10 days to six or seven weeks.

In addition, Respondents' worst-case scenario contains some red herrings that could be summarily addressed by the individual Merits Judges, if not resolved through a proper meet-and-confer process with counsel for individual Petitioners. For instance, Respondents' recitation of the declassification burden also seems overstated. *See* Mem. at 26. They claim they will be obligated to declassify materials that are "cumulative, duplicative, or . . . already produced in some other form," Mem. at 26, yet several of the Merits Judges' orders specifically exempt such materials.[9] Respondents also assume that the review obligations will fall on non-attorney members of the Task Force – as opposed to, for example, DOJ line attorneys litigating the habeas cases or re-assigned for the purpose of conducting such reviews, *see* Mem. at 24, n.10 & 29-33 – but again, fail to point to any specific language in any Merits Judges' order that dictates such an outcome. At most, Respondents suggest that certain orders "appear, in effect, to direct the Task Force itself" to take a primary role. Mem. at 29. Such an "appearance" may be erroneous and could have been readily clarified with the responsible Merits Judge.

a. Respondents fail to satisfy the standard for relief under Rule 54.

"Under Rule 54(b), a trial court may grant reconsideration as justice requires." *Marshall v. Honeywell Tech. Solutions*, 598 F. Supp. 2d 57, 59 (D.D.C. 2009) (internal

[9] *See, e.g., Alsawam v. United States*, 05-1244 (CKK), April 6, 2009 (Dkt. No. 158); *Al Odah v. United States*, No. 02-828 (CKK), April 7, 2009 (Dkt. No. 531); *Zaid v. Obama*, 05-1646 (JDB), Feb. 9, 2009 (Dkt. No. 146) at 5 (ordering Respondents to advise whether the Task Force process has yielded "additional information" so as to "allow petitioner's case to proceed with minimal burden to the government yet at the same time enable petitioner to develop his case[.]").

quotation marks omitted). However, such reconsideration does not allow a district court to revisit orders entered by other judges and "'as a rule [a] court should be loathe to [revisit its own prior decisions] in the absence of extraordinary circumstances[.]'" *Id.* (quoting *Lederman v. U.S.*, 539 F. Supp. 2d 1, 2 (D.D.C. 2008) (alterations in *Marshall*). Here, Respondents ask the Court to revise the discovery orders of several other district judges out of a desire to avoid discovery obligations, not the "extraordinary circumstances" required by Rule 54.

"In the Circuit, '[a]s justice requires' indicates concrete consideration of whether the court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the [c]ourt by the parties, has made an error not of reasoning, but apprehension, or where a controlling or significant changes in the law or facts [has occurred] since the submission of the issue to the court." *Casanova*, 246 F.R.D. at 378 (quoting *Judicial Watch v. Dep't of the Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006)). There is no basis for this Court to hold that the Merits Judges misunderstood Respondents, made extra-judicial decisions, or failed to apprehend the significance of their decisions. Nor has there been any significant change in the law and the only potential significant factual change – the creation of the Task Force and its database – was fully taken into account by the Merits Judges. Rule 54 does not provide any basis for the relief Respondents seek.

b. Respondents fail to satisfy the standard for relief under Rule 59.

Rule 59 of the Federal Rules of Civil Procedure mandates that "[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Given this time limitation, Respondents' May 12, 2009 motion was untimely when filed

for all but two or three of the orders that it challenges,[10] and the time to file a motion for reconsideration in the proper forum – before the Merits Judge who issued the order(s) – has now passed as well. To the extent that Respondents are seeking reconsideration or amendment of this Court's November and December Orders, months have elapsed rather than the 10 days allowed by Rule 59. The law within this Circuit is clear: "'the District Court simply has no power to extend that time limitation.'" *Elliott v. Fed. Bureau of Prisons*, 547 F.Supp.2d 15, 20 -21 (D.D.C. 2008) (quoting *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regul. Comm'n*, 781 F.2d 935, 941 (D.C. Cir. 1986)). Respondents' failure to meet this jurisdictional deadline in nearly all cases prevents consideration of their Motion pursuant to Federal Rule of Civil Procedure 59 and requires review under the more stringent standard of Rule 60.

Even for those few orders potentially subject to Rule 59, Respondent must show "(1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice." *Zyko v. Dep't of Defense*, 180 F. Supp. 2d 89, 91 (D.D.C. 2001). Respondents do not even attempt to argue that they meet this standard.

There has been no change to the controlling law – these habeas proceedings continue to be governed by the Supreme Court's decision last year in *Boumediene*, implemented by this Court's November and December Orders and the discovery and case management orders of the Merits Judges. Nor is there any new evidence available that

[10] *See Almami v. Obama*, 05-359 (GK), May 11, 2009 (Dkt. No. 189); and *Al Razak v. Obama*, 05-1601 (GK), May 11, 2009 (Dkt. No. 209). Judge Huvelle issued her most recent order in *Al Halmandy v. Obama*, 05-2385 (ESH) on May 4, 2009 (Dkt. No. 245), but also issued identical orders regarding different detainees in the same case on April 27 and April 30, 2009 (Dkt. Nos. 242, 243).

would undermine these orders – any new evidence available via the Task Force is relevant to individual detainees' status only, but does not provide a basis to abandon the existing case management framework. Finally, there is no clear error or manifest injustice stemming from orders concerning information compiled by the Task Force. Respondents argue only potential delay and burden may result from court-ordered requirements relating to the Task Force's compilations, but those administrative difficulties do not rise to the level of clear error or manifest injustice.[11]

A motion for reconsideration also will be denied "if the court suspects the losing party is using the motion as an instrumentality of arguing the same theory or asserting new arguments that could have been raised prior to final judgment." *Zyko*, 180 F. Supp. 2d at 91.[12] The Executive Order was issued in January. Orders addressing the Executive Order and its implications for Respondents' discovery obligations have been in effect since early February. The arguments made by Respondents here are thus either

[11] Petitioners rely on Respondents' Memorandum and the attached unclassified declarations to assess this purported burden. Petitioners object to Respondents' filing of an additional *ex parte* declaration, despite the fact that numerous counsel for Petitioners have security clearances at the Secret or Top Secret level. To the extent that the Court views any information in the *ex parte* declaration as material to its ruling, Petitioners respectfully request that appropriately cleared counsel be permitted to review and rebut that declaration.

[12] Judge Urbina and Judge Walton both have standing orders governing motions for reconsideration. Judge Urbina's standing order states, "Motions for reconsideration are not opportunities to take a second bite at the apple already rejected. If you file such a motion, be aware that a motion which simply seeks to relitigate already decided issues or raises issues for the first time which should have been advanced in the original motion will be considered a submission in violation of this order. Consequently, the court may impose sanctions against the offending attorney." Judge Walton's standing order states that motions for reconsideration "are strongly discouraged." Pursuant to his standing order, Judge Walton "will not entertain: (a) motions that simply reassert arguments previously raised and rejected by the court; and (b) arguments that should have been previously raised, but are being raised for the first time in the "'Motion for Reconsideration.'" Respondents' efforts to circumvent these standing orders by pursuing a motion for reconsideration in front of this Court further highlight the comity and forum-shopping concerns that make the Motion procedurally problematic.

reiterations of arguments rejected by the Merits Judges or arguments generally relating to the purported burden related to the Executive Order that could have been made to the Merits Judges at any time after January 22, 2009.

c. Respondents fail to satisfy the standard for relief under Rule 60.

Respondents are unable to demonstrate the existence of "extraordinary circumstances" needed to obtain relief pursuant to Rule 60. "[I]n most cases, the bar stands even higher for a party to prevail on a motion for relief from judgment, which permits relief when a party demonstrates fraud, mistake, extraordinary circumstances, or other enumerated situations." *Zyko*, 180 F. Supp. 2d at 91.

Of the enumerated bases for relief provided by Rule 60, only the sixth – "any other reason that justifies relief" – has possible application to Respondents' Motion. The Supreme Court has held that courts should grant Rule 60(b)(6) motions only in "extraordinary circumstances." *Ackermann v. U.S.*, 340 U.S. 193, 199 (1950); *see also Empagran S.A. v. F. Hoffman-La Roche Ltd.*, 453 F. Supp. 2d 1, 4 (D.D.C. 2006) (Hogan, J.) ("The relief afforded by Rule 60(b)(6) is not freely given, however, and is reserved for those circumstances that are deemed to be 'extraordinary.'"). The administrative burden that Respondents claim does not rise to such an "extraordinary" level.

The D.C. Circuit has observed that Rule 60(b)(6) "may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.'" *Kramer v. Gates*, 481 F.3d 788, 791-92 (D.C. Cir. 2007) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C.Cir.1980)). In December, Respondents sought and obtained an amendment of this Court's case management order that limited their obligation to provide exculpatory evidence and such documents, objects, and statements

that "the government relies on to justify detention," a narrower subset than Respondents were obligated to disclose pursuant to the November Order. *Compare* November Order at 3 (§ E.1) *with* December Order at 2 (§ E.1). One of the main arguments that Respondents advanced when seeking reconsideration of the November Order was the burden of collecting information from disparate sources. Task Force materials, however, are compiled in the TF Network database and indisputably are relied on to justify detention, since the entire purpose of the Executive Order is "the prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantanamo[.]" Executive Order, § 4(c), 74 Fed. Reg. at 4898.

Similarly, in *Zaid v. Obama*, 05-1646 (JDB), Feb. 9, 2009 (Dkt. No. 146), Judge Bates upon reconsideration agreed that Respondents' proposed interpretation of the case management order limiting automatic discovery to "searches of the 'consolidated assemblages of information,'" was a "sensible" compromise and granted in part Respondents' motion for reconsideration on that specific basis. Respondents now seek to undo that compromise, with their new-found opposition to searching the Task Force's "consolidated assemblages." *Id.* at 3. Respondents' current dissatisfaction with case management orders and their past strategic choices is an insufficient ground to revisit previously entered orders under Rule 60.

2. The Orders of the Merits Judges Are Easily Reconciled with this Court's Case Management Orders.

Respondents assume that the Merit Judges' orders misinterpret or are otherwise in conflict with this Court's November and December Orders. *See* Mem. at 7-8, 12-13. The reality is otherwise.

To effectuate *Boumediene*'s holding that the habeas courts "'must have the

authority to admit and consider relevant exculpatory evidence,'" this Court entered a case management order in November requiring that the "government . . . disclose to the petitioner all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner." November Order at 2 (quoting *Boumediene*, 128 S. Ct. at 2270). The November Order requires Respondents to certify that they have disclosed all exculpatory evidence in their possession and places Respondents under a continuing obligation to provide Petitioners with any additional exculpatory evidence that becomes known to Respondents at a later date. *See* November Order at 3.

The framework set forth in the November Order was designed to provide the Merits Judges with flexibility: "[T]he judges to whom the cases are assigned for final resolution ('Merits Judges') may alter the framework based on the particular facts and circumstances of their individual cases." November Order at 2, n.1. Additionally, the November Order evidently was never intended to govern all possible case management issues: it specifically noted that "the Merits Judges will address procedural and substantive issues not covered in this Order." *Id.* The November Order also left open the possibility of additional discovery: "The Merits Judge may, for good cause, permit the petitioner to obtain limited discovery beyond that described in the preceding paragraph." *Id.*

Following a motion for reconsideration by Respondents, which this Court granted in part and denied in part, the initial Case Management Order was amended by the December Order. The December Order in no way modified the provisions permitting the Merits Judges to order additional discovery for good cause. Nor did it in any way rescind

this Court's acknowledgment of the authority of the Merits Judges to tailor the Case Management Order's provisions to the particular facts and circumstances of a case and to resolve procedural and substantive issues not addressed in the Case Management Order.

Respondents mischaracterize the amendments in the December Order as a sharp limitation on their obligation to provide exculpatory evidence and other discovery, claiming that the amendment "relieved the government of *any obligation* to engage in time-consuming (and unwarranted) searches for exculpatory materials and other evidence across multiple agencies." Mem. at 8 (emphasis added).[13] A line-by-line comparison of the November and December Orders demonstrates that this Court has not granted Respondents such wholesale relief from their duty to provide exculpatory materials. Under both versions, the section governing exculpatory evidence states that Respondents are required to disclose "all reasonably available evidence in [their] possession." *Compare* November Order at 2 (§ D.1) *with* December Order at 2 (§ D.1).[14] Similarly, the automatic discovery requirements in both versions require disclosure of documents, objects, and statements "in the government's possession." November Order at 3 (§ E.1); December Order at 2 (§ E.1).

Respondents concede that the Task Force established by the Attorney General has been asked to "assemble and examine relevant information" for each detainee, and that

[13] In *Zaid*, Judge Bates rejected Respondents' narrow interpretation of their discovery obligations, noting that Respondents have "overstate[d] their success in persuading Judge Hogan to reconsider his earlier case management orders," and, in any event, such orders did not control in *Zaid*. *See Zaid v. Obama*, 05-1646 (JDB), Feb. 9, 2009 (Dkt. No. 146) at 2 & n.1.

[14] At least some Petitioners would have agreed with Respondents' proposed clarification that the review of Task Force documents for exculpatory evidence and other documents required to be disclosed pursuant to the case management orders is a task for government attorneys. If the Respondents had made a meaningful effort to meet and confer with petitioners' counsel, the scope of the motion would have been narrowed considerably.

the Task Force is "nearing completion" of its efforts "to gather . . . the disparate information that various national security, law-enforcement and intelligence agencies maintain on the detainees." Mem. at 9. Respondents admit that the TF Network is a single, searchable database. *Id.* at 22. On its face, this is "reasonably available information," in possession not just of the "government" as a whole, across multiple agencies, but in the possession of the Attorney General and Department of Justice. Moreover, while Respondents claim that "[m]uch of this information is likely duplicative or cumulative of the materials the DOJ habeas team has already reviewed," Mem. at 19, they ultimately admit "[i]t is true that the TF Network database contains information from sources that have not been made available to Respondents." Mem. at 20.

Respondents concede that orders requiring them to "explore this body of information," specifically compiled to determine the rationale for detaining each Petitioner, and at least in part not previously reviewed by Respondents, are "understandable." Mem. at 13. They nevertheless urge the Court to relieve them of any such orders already entered by the Merits Judges, based on a purported "four to twelve months" delay. *Id.* That delay pales in comparison with Petitioners' prior years of detention and the possibility of additional years of wrongful detention due to the non-disclosure of exculpatory information. As discussed below, the timing and logistical roadblocks thrown up by Respondents are best resolved by the Merits Judges as they arise – if they arise at all – in the individual Petitioners' cases.

3. The Flexible Approaches Adopted by the Merits Judges are Preferable to the "Choice" Proposed by Respondents.

The orders of the Merits Judges addressing exculpatory evidence discovered as a result of the activities of the Task Force reflect precisely the sort of individual tailoring or

resolution of issues outside the Case Management Order that the November Order contemplated. Respondents' attempt to revisit those orders "in favor of a global proposal," Mem. at 3, thus is an effort to circumvent the flexible framework established by this Court and implemented by the Merits Judges. Contrary to Respondents' assertions, their global proposal is a far inferior method of "reaching fair and expeditious resolution of these cases, while at the same time ensuring a rational allocation of judicial [and other] resources," Mem. at 3-4, than the orders issued by the Merits Judges and tailored to the circumstances of particular cases.

Respondents propose giving every Petitioner the following binary choice: (1) proceed without waiting for discovery from the Task Force; or (2) agree to a delayed disposition in exchange for discovery limited to the exculpatory evidence, if any, cited in the written recommendation of the Task Force regarding the detainee. *See* Mem. at 4. A Petitioner would be allowed access to additional exculpatory evidence in the Task Force database "only in limited circumstances" – including a further delay in the resolution of his habeas petition. Mem. at 5.

Respondents imply that Judge Walton adopted a similar approach in *Gherebi v. Obama*, 04-1164, 05-883, 05-891 (RBW), April 27, 2009 (Dkt. No. 22). *See* Mem. at 5. Respondents, however, propose a much more limited choice for Petitioners than Judge Walton ordered in *Gherebi*. Judge Walton "provide[d] each petitioner with the option of staying his case until such time as counsel for the respondents could independently review the information regarding that petitioner compiled pursuant to Executive Order No, 13,492 and produce *any* exculpatory evidence discovered therein" or proceeding with a more limited subset of information identified by the Task Force's Review Board in

determining a Petitioner's disposition. *Id.* at 5 (emphasis added). Respondents, in contrast, would require Petitioners to wait even for the limited subset of information that Judge Walton opined could be produced promptly without the need for a stay, or proceed with no exculpatory evidence from the Task Force whatsoever. *See* Mem. at 4.

Respondents seek full reversal of the remaining orders, all of which require provision of exculpatory evidence compiled by the Task Force without forcing the Petitioners to make a Hobson's choice between the prompt resolution required by *Boumediene* and the provision of "reasonably available" exculpatory evidence required by the November Order and subsequent orders entered by the Merits Judges. However, these orders strike a more effective balance than the Respondents' "global proposal."

Respondents would give Petitioners a limited choice of two options, to be made in a factual vacuum, irrespective of the individual nuances of that Petitioner's case and the discovery available through the Task Force process related to that specific Petitioner. The Merits Judges, on the other hand, have issued orders based on "the present state" of the litigation before them;[15] whether the Task Force process has "procured additional information regarding [a] petitioner;"[16] whether a full review of Task Force information might "require re-trial of cases already decided" by the Merits Judge;[17] when the Task Force's "process is estimated to be done" for a particular petitioner;[18] and the substance and outcome of past "discussions, motions, and orders pertaining to the production of

[15] *Alhami v. Obama*, 05-359 (GK), May 11, 2009 (Dkt. No. 189) and *Al Razak v. Obama*, 05-1601 (GK), May 11, 2009 (Dkt. No. 209), at 1.

[16] *Zaid v. Obama*, 05-1646 (JDB), Feb. 9, 2009 (Dkt. No. 146) at 5.

[17] *Gherebi v. Obama*, 04-1164, 05-883, 05-891 (RBW), April 27, 2009 (Dkt. No. 221 in 04-1164), at 5.

[18] *Dokhan v. Obama*, 08-0987 (JDB), March 4, 2009 (Dkt. No. 89), at 2.

exculpatory evidence" in a particular case.[19] They are better positioned than this Court to take into account such issues in the specific factual context of the cases before them. Moreover, when proceeding before the Merits Judges, Petitioners have the opportunity to be heard through their own counsel and to make arguments appropriate to their situation, rather than merely joining a consolidated and necessarily general brief as in this case.

Allowing the Merits Judges to manage Petitioners' cases on a case-specific basis is preferable and ultimately achieves a better balance of efficiency and justice. "As the D.C. Circuit recently explained, '[d]istrict judges must have authority to manage their dockets.'" *Al Odah v. U.S.*, No. 02-828, 2009 WL 909708, at *6 (D.D.C. Apr. 6, 2009) (quoting *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 822 (D.C. Cir. 2009)). Especially in complicated proceedings, district court judges are "owe[d] deference to their decisions whether and how to enforce the deadlines they impose." *In re Fannie Mae Sec. Litig.*, 552 F.3d at 822. Respondents' attempt to usurp the case management functions of the individual Merits Judges and persuade this Court to impose a discovery and scheduling regime of Respondents' choosing should be denied.

[19] *Zuhair v. Bush*, 08-0864 (EGS), May 1, 2009 (Dkt. No. 179), at 3.

Conclusion

For the foregoing reasons, Respondents' Motion should be stricken or denied on procedural grounds or, in the alternative, denied on the merits.

Dated: May 29, 2009

Respectfully submitted,

/s/Daniel C. Malone

Alexander Breckinridge
D.C. Bar No. 983736
Dechert LLP
1775 I Street, N.W.
Washington, DC 20006
Tel: (202) 261-3329
Fax: (202) 261-3057

Joseph Hetrick (*pro hac vice*)
Peter M. Ryan (*pro hac vice*)
Juliet Sarkessian (*pro hac vice*)
Abraham J. Rein (*pro hac vice*)
Karen C. Daly (D.C. Bar. #472188)
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19104-2808
Tel: (215) 994-4000

Daniel C. Malone (*pro hac vice*)
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
Tel: (212) 698-3500

Counsel for Petitioners in Case Nos. 05-cv-1124(RMC), 05-cv-1601 (GK), and 05-cv-2367 (RWR),

And, for purposes of this request only, on behalf of Counsel for all Petitioners in the above-captioned matters