Legal Backgrounder

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RULING EXPANDS JUDICIARY'S ROLE IN TRANSFER OF TERROR DETAINEES

by

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On March 29, 2005, the United States District Court for the District of Columbia granted a preliminary injunction barring the government from removing a group of detainees held at the U.S. Naval Station at Guantànamo Bay ("GTMO") without first providing their counsel and the court with thirty days' notice. *See Abdah v. Bush*, No. 04-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005). The decision attracted considerable media attention due to the petitioners' allegation that the government intended to transfer them to foreign custody in order to subject them to torture and prolonged detention, but ultimately the case did not turn on these sensational claims. Instead, *Abdah* is significant for its conclusion that federal courts have authority to bar the international transfer of detainees – regardless of the prospect of torture – in order to preserve jurisdiction over detainees' petitions for habeas corpus.

Background. The Supreme Court's June 2004 decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (which held that statutory habeas corpus jurisdiction extends to non-citizens held at GTMO), precipitated an avalanche of habeas filings in the United States District Court for the District of Columbia, each alleging that the U.S. government's detention of these persons is unlawful under a variety of theories as well as calling for the detainees' release. As of late June 2005, approximately 110 petitions had been filed on behalf of some 228 individual detainees. The government has had mixed results in its efforts to have these petitions dismissed. On January 19, 2005, Judge Richard Leon granted a motion to dismiss the two GTMO petitions pending before him. *See Khalid v. Bush*, 355 F. Supp.2d 311 (D.D.C. 2005). Twelve days later, however, Senior Judge Joyce Hens Green partially denied the same motion with respect to another batch of petitions (including the *Abdah* petitioners), finding that they stated viable claims under the Fifth Amendment and the Geneva Conventions. *See In re Guantanamo Detainees*, 355 F. Supp. 2d 443 (D.D.C. 2005). Both decisions are now on appeal to the United States Court of Appeals for the District of Columbia Circuit, with oral argument expected in October.

In the interim, a remarkable dispute has emerged concerning the government's power to *release* GTMO detainees to the custody of their country of origin. Since the establishment of detention facilities at GTMO in 2002, the government has released 234 detainees. *See* U.S. Department of Defense News Release, Apr. 29, 2005, at http://www.defenselink.mil/releases/2005/nr20050426-2821.html (accessed on May 16, 2005). Of these, 167 were released outright. But 67 detainees were transferred from U.S. control to the control of foreign governments.[1] This practice garnered little comment in the past, but has given rise to much concern of late, particularly in the aftermath of lurid news accounts concerning the similar-sounding but distinct practice

[1]Specifically, twenty-nine detainees have been transferred to Pakistan, nine to Great Britain, seven to France, seven to Russia, five to Morocco, four to Saudi Arabia, two to Belgium, and one each to Australia, Kuwait, Spain, and Sweden. *See id.*

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generally known as "extraordinary rendition," *see*, *e.g.*, Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14/21, 2005, at 106 (describing allegations surrounding the CIA's rendition program), as well as reports that the Pentagon intends to shrink GTMO's population in the near future by repatriating substantial numbers of detainees for continued custody by their own governments, *see* Douglas Jehl, *Pentagon Seeks to Transfer More Detainees from Base in Cuba*, N.Y. TIMES, Mar. 11, 2005, at A1 (describing custodial repatriation plans).

On March 1, 2005, while awaiting resolution of the pending appeal of Judge Green's decision in *In re Guantanamo Detainees*, the *Abdah* petitioners filed a motion for a preliminary injunction requiring the government to provide thirty days' notice to counsel and the court before removing petitioners from GTMO. Petitioners explained that they believed the government was considering "removal of some or all Petitioners from Guantanamo to foreign territories for torture or indefinite imprisonment without due process of law," and that advance notice was required to enable their counsel to "contest any such removal" and to "preserve the jurisdiction of the Court in this matter." Petitioners' Motion at 1.

The Decision. The opinion in *Abdah* follows the traditional four-factor framework for analysis of a motion for a preliminary injunction under Federal Rule of Civil Procedure 65: (1) Would petitioners face irreparable injury without the relief requested?; (2) Have they established a substantial likelihood of success on the merits?; (3) Would the relief requested substantially harm the government?; and (4) Would the public interest be served by granting the requested relief?

Irreparable Injury. The opinion, by Judge Henry H. Kennedy, Jr., began by emphasizing the centrality of the injury inquiry in this context, noting that the asserted harm must be more than speculative. In this instance the petitioners identified two potential harms. First, they argued that they faced the prospect both of torture and indefinite detention at the hands of a foreign government. Second, they contended that irrespective of these risks, transfer would harm them by mooting their pending habeas petitions and thus preventing them from obtaining a judicial determination of the legality of their detention (by the U.S. government).

With respect to the torture argument, the government responded to petitioners' allegations by clarifying that "it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured," a position supported by declarations from senior officials who explained the procedures used to enforce this policy, and who added that the U.S. does not maintain de facto control over transferred detainees. *See* Respondents' Opp. at 19; Declaration of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Department of State, at para. 4; Declaration of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs, Department of Defense, at para. 5. Judge Kennedy acknowledged these statements, but found that they "do not entirely refute Petitioner's claims or render them frivolous" in light of news articles cited by the petitioners which claimed as sources "former Guantanamo detainees, former high-level officials from the United Kingdom and Pakistan, and current and former employees of the United States government who were themselves involved in transferring detainees." *Abdah*, slip op. at 7.[2] Notwithstanding this skepticism, however, the court ultimately chose not to decide whether petitioners' torture concerns constituted irreparable injury, explaining that petitioners' alternative injury argument more than sufficed. *See id.*

The parties had agreed that in the event of an international transfer, the court would lose jurisdiction over a petitioner's habeas claims for the simple reason that in that circumstance, the United States would no longer exercise control over him. *See id*. An international transfer thus "would eliminate any opportunity for Petitioners to ever obtain a fair adjudication of their 'fundamental right to test the legitimacy of [their] executive detention.'" *Id.* According to the court, such transfers would constitute an "attempt[] to wrongfully deprive" the petitioners of their habeas corpus rights. *Id.* (citations omitted). The court did not explain why the deprivation would be wrongful, nor why a determination of the legality of the original U.S. detention would remain relevant once that detention had ended. Nevertheless, the court found that this concern established irreparable injury for purposes of Rule 65.

[2]The court did not note that the news articles upon which petitioners relied were commenting on the CIA's rendition program and not on Department of Defense transfer practices.

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Likelihood of Success on the Merits. The court next turned its attention to the question of whether petitioners had established a likelihood of success on the merits of their claim, noting that the parties disagreed as to which issues even counted for purposes of this analysis. The petitioners, hoping for the benefit of Judge Green's partially-favorable ruling in *In re Guantanamo Detainees*, argued that the issue should be viewed as whether they had a likelihood of success on their underlying challenge to the legality of their detention by the U.S. government (on Fifth Amendment and Geneva Convention grounds). The court agreed with the government, however, that the relevant question instead was whether petitioners were likely to prevail in any attempt to actually prohibit an international transfer. *See id.* at 8 (observing that "*if* there are no circumstances under which Petitioners could obtain a court order preventing a contemplated transfer, a preliminary injunction should not be granted").

The government took the position that courts have no authority to prevent an international transfer, arguing that there "is no legal basis for judicial intervention in the processes by which enemy combatants are repatriated or transferred," and that "any such interference would illegitimately encroach on the foreign relations and national security prerogatives of the Executive Branch." Respondent's Mem. at 1. In response, petitioners cited Federal Rule of Appellate Procedure 23(a), which provides as follows:

> pending review of a decision in a habeas corpus proceeding . . . the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as party.

The government replied that the purpose of Rule 23(a) was not to preclude the government from relinquishing custody of a petitioner altogether but, instead, merely to ensure that habeas review could continue despite changes in the identity of the particular custodian *within* the government. *See* Respondents' Supp. Mem. at 2.

The court rejected this narrowing interpretation. Judge Kennedy acknowledged that Rule 23(a) "is not typically applied in situations involving the transfer of prisoners to the custody of foreign nations," but found that fact to be "of no moment." Slip op. at 9. What mattered was that the plain language of the rule contained no exception, and that in the court's view the purpose of the rule was to prevent the loss of habeas jurisdiction while an appeal is pending. *See id.* The fact that an international transfer would divest all U.S. courts of habeas jurisdiction merely reinforced the need to apply the rule in this instance. *See id.*[3] Accordingly, the court found that petitioners were likely to succeed on the merits.

Harm to the Government. With respect to the third prong of the Rule 65 analysis, the government contended that judicial intervention in the international transfer process (particularly judicial inquiry into the conditions imposed on the transfer) would unduly intrude upon the sensitive diplomatic negotiations conducted by the Executive Branch to enable such transfers to take place, and as a consequence, would diminish the government's ability to manage and reduce the GTMO population. In contrast to the credibility the court gave to the petitioners' claims of anticipated harm, the court dismissed these government concerns as mere "vague premonitions." *Id.* at 10. The court noted, moreover, that the relief actually requested in this instance – advance notification only – would not lead to such harms, and in any event that the potential harms to the government would remain small in comparison to the potential harms to petitioners. *See id.* at 10-11.

The Public Interest. While acknowledging a strong public interest in the successful pursuit of terrorism suspects, the court found the more relevant interest in this context to be the public's "strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process." *Id.* at 12.

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[3]The government had also argued that Rule 23(a) should not be interpreted to apply to international transfers in light of the fact that the Supreme Court had not invoked its own version of that rule in *Rasul v. Bush* despite the transfer of several of the petitioners in that case to British custody while the decision was pending. Respondents' Supp. Mem. at 4 (citing 124 S. Ct. at 2691 n.1 (acknowledging the transfer of some of the *Rasul* petitioners)). The court declined to draw any inference from *Rasul* on the ground that this issue had not been briefed in that case, and that the court in any event was not certain that the men had been transferred to British custody rather than released outright. *See* slip op. at 9-10.

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The Injunction. In light of the fact that the analysis in *Abdah* rests on relatively narrow grounds – Rule 23(a)'s prohibition on unapproved transfers while an appeal is pending – one might have expected the resulting preliminary injunction to be similarly narrow. It is not, however. Judge Kennedy's order obliges the government to "provide Petitioners' counsel and the court with 30 days' notice prior to transporting or removing any of Petitioners from Guantanamo Bay Naval Base," and it specifies that this obligation "shall remain in effect until the *final resolution of Petitioners' habeas claims* unless otherwise modified or dissolved." *Abdah v. Bush*, No. 04-1254 (D.D.C. Mar. 29, 2005) (order) (italics added). From this we can conclude that even in the absence of the Rule 23(a) argument, Judge Kennedy's view is that courts have the authority to prevent international transfers that would moot petitioners' habeas claims.

A Split of Authority and the Prospect of Further Review. The *Abdah* ruling, which rests entirely on the narrow ground that the court must act to preserve habeas jurisdiction, is unpersuasive. Petitioners presented no evidence to suggest that custodial repatriation would actually be a sham designed to perpetuate U.S. custody under the guise of foreign control,[4] nor does it appear that Judge Kennedy understood them to be making such an argument. Instead, the decision depends on the incorrect proposition that the court may oblige the U.S. military to continue to hold a person in custody – despite the government's wish to end that custody – until such time as the court determines whether the custody was lawful *ab initio.*

It should be noted that the *Abdah* petitioners were not the only ones who moved for injunctive relief designed to prevent an international transfer in the spring of 2005. On the contrary, motions requesting comparable relief have been filed in the context of 35 other GTMO petitions, on behalf of approximately 93 detainees. At least 27 of these motions have been granted, while five have been denied and three were pending at the time of this writing.[5] The government has appealed the adverse decisions, but is negotiating with petitioners' attorneys to have those proceedings stayed pending the outcome of the cross-appeals from the decisions by Judges Leon and Green mentioned above (concerning the extent to which GTMO detainees have enforceable rights under the Constitution and various treaties to which the U.S. is a party).

With much litigation still to come, and a substantial number of transfers planned for the near future, *see* Josh White and Robin Wright, *Afghanistan Agrees to Accept Detainees*, WASH. POST, Aug. 5, 2005, at A1 (describing plans to transfer approximately 68% of current GTMO detainees to the custody of Afghanistan, Saudi Arabia, and Yemen), the issue of judicial power to supervise and even prohibit these transfers will only become more prominent.

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[4] *Cf. Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004) (rejecting motion to dismiss habeas petition alleging that U.S. citizen, held by the government in Saudi Arabia in that country, was within the constructive custody of the U.S.)

[5] Most of the granted motions have relied in some way on the habeas jurisdiction protection ground forming the basis for *Abdah*, but it should be noted that some of these decisions rely in the alternative on distinct grounds associated with the detainees' claims that they are at risk of being tortured if repatriated (an argument that does not depend on the continuation of actual or constructive U.S. custody), an argument that presents decidedly more complicated issues.

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