

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

Civil Action No. 04-CV-1254 (HHK)

**PETITIONERS' EX PARTE MOTION FOR TEMPORARY RESTRAINING
ORDER TO PREVENT RESPONDENTS FROM REMOVING PETITIONERS
FROM GUÁNTANAMO UNTIL PETITIONERS' MOTION FOR
PRELIMINARY INJUNCTION IS DECIDED**

Pursuant to Federal Rules of Civil Procedure 64 and 65, petitioners hereby apply for an *ex parte* temporary restraining order requiring respondents not to transfer petitioners from Guántanamo Bay to a foreign country until the outstanding "Motion for Order Requiring Respondents to Provide Counsel for Petitioners and the Court with 30-Days' Advance Notice of Any Intended Removal of Petitioners from Guántanamo" ("Preliminary Injunction Motion," attached as Exhibit A) is decided. A hearing for argument on petitioners' Preliminary Injunction Motion has been scheduled by the Court for March 24, 2005.

A temporary restraining order is necessary to maintain the status quo of the instant litigation. Without a temporary restraining order, respondents could transfer petitioners from Guantánamo Bay without allowing counsel for petitioners the opportunity to contest the legality of such a transfer, thus denying petitioners precisely the relief that petitioners have sought in their pending Preliminary Injunction Motion.

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Such a transfer also would subject petitioners to the possibility of torture or indefinite detention, and would arguably strip this Court of its habeas jurisdiction.

Petitioners feel compelled to file for a temporary restraining order after learning from today's New York Times that the government intends to transfer hundreds of detainees to prisons in Saudi Arabia, Pakistan and Yemen. See Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. Times, Mar. 11, 2005, at A1 (attached as Exhibit E). The report relies on a leaked February 5, 2005 memorandum written by Defense Secretary Donald H. Rumsfeld, as well as statements from anonymous Defense Department officials indicating for the first time that such a transfer may be imminent. Government lawyers have refused to provide petitioners' counsel with any information about the timing of a mass removal from Guantánamo, just as they have refused to provide counsel with any advance notice of the transfer of any individual detainee. Moreover, co-counsel from the Center for Constitutional Rights has learned – albeit from a person who, for professional reasons, refuses to make her sources public – that the government intends to transfer many detainees very quickly.

Petitioners are filing the application *ex parte* because they are apprehensive that a public filing will provoke respondents to initiate the exact dark-of-night transfers that petitioners seek to prevent.

STATEMENT OF FACTS

The relief petitioners ask for in the Preliminary Injunction Motion itself is very limited. In that Motion, petitioners seek an order requiring respondents to give advance notice to the Court and counsel before they remove petitioners from Guantánamo to a foreign country where, petitioners fear, they might be tortured or else

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detained indefinitely without any legal process. In making that Motion, petitioners asked for no more than maintenance of the status quo in this litigation and an opportunity to contest the legality of their removal before it becomes a *fait accompli*. Without an order to this effect, the continued jurisdiction of the Court in this matter would remain subject to respondents' whim. The instant motion for a temporary restraining order seeks even less: maintenance of the status quo for just two weeks, while petitioners' previously filed Motion is pending.

Petitioners, who fear they will be the latest subjects of the government's "extraordinary rendition" policy, found no solace in the Opposition Memorandum filed by respondents. Petitioners have expressed anxiety that a threat made to petitioner Abd Al Malik Al Wahab – that he would be removed to Egypt or Jordan for interrogation under torture – might be carried out on Mr. Wahab or other petitioners. According to respondents, however, such concerns are "pure speculation" that are "refuted" by the proffered declarations of two "high level" government officials. Opp. Mem. at 1 (attached as Exhibit B). These high level officials state that it is government "policy" not to transfer detainees to countries where it is "more likely than not" that they will be tortured. Prosper Decl. ¶ 4 (attached as Exhibit C); Waxman Decl. ¶ 6 (attached as Exhibit D).

These assurances ring hollow. At no point in their opposition papers or supporting declarations have respondents denied that the U.S. government renders terrorism suspects to foreign countries for the purpose of extracting information by torture. At no point do they deny the accuracy of Mr. Wahab's statement, as reported through counsel, that he was threatened with rendition. At no point do they deny that

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government agents contemplated the removal of Mr. Wahab or other petitioners to foreign countries for interrogation under torture. Respondents make no such denials because they cannot truthfully be made.

A classified document in the factual return of petitioner Majid Mahmud Abdu Ahmad,¹ for example, demonstrates beyond doubt that the Department of Defense, as recently as March 17, 2004, contemplated rendering Mr. Ahmad to a foreign country for interrogation under torture. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] There is only one meaning that can be gleaned from this short passage: The government believes Mr. Ahmad has information that it wants but that it cannot extract without torturing him. Because torture is not [REDACTED] allowed personnel at Guantanamo, the recommendation is that Mr. Ahmad should be sent to another country where he can be interrogated under torture.

Respondents likewise deny that the U.S. government removes detainees to foreign countries for the express purpose of continued detention. "It is important to recognize," they have stated in their Opposition Memorandum, "that when the Department of Defense transfers a Guantanamo detainee to the control of another

¹ Mr. Ahmad is listed in the habeas petition as Majid Mahmud Ahmad. To avoid confusion, we have endeavored in all papers to use the names used by the government in identifying the petitioners.

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government, the Department of Defense does not ask or direct the receiving government to hold the individual on behalf of the United States. As such, once transferred, a detainee is no longer subject to the control of the United States." Opp. Mem. at 6 (citing Waxman Decl. ¶ 5).

Again, classified documents from the factual returns in this habeas case demonstrate that respondents' assertions are not credible:

- [REDACTED]
- [REDACTED]
- [REDACTED]

These examples demonstrate the falsity of respondents' claim that the transfer of detainees to foreign countries effectively releases them from the grasp and

² Mr. Bussays is listed in the habeas petition as Adil Saeed el Haj Obaid.

³ Mr. Ismail is listed in the habeas petition as Yasein Khasem Mohammad Esmail.

⁴ Mr. Abd is listed in the habeas petition as Adnan Farhan Abdul Latif.

control of the U.S. government. They make plain that the Department of Defense dictates to the receiving government when and whether the detainees will be released – a policy that has given birth to its own military acronym, “TRCD.”

ARGUMENT

Federal Rule of Civil Procedure 65(b) provides that a temporary restraining order “may be granted without written or oral notice to the adverse party or that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition.” The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing can be held. See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974).

In considering a request for a preliminary injunction or temporary restraining order, a court must examine whether: “(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will substantially injure the other party; and (4) the public interest will be furthered by an injunction.” *Davenport v. Int’l Brotherhood of Teamsters, AFL-CIO*, 166 F.3d 356, 360 (D.C. Cir. 1999). These factors interrelate on a sliding scale and must be balanced against each other. *Id.* at 361.

Where the balance of hardships tips decidedly toward the movant, it will “ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Washington Metro. Area Transit Comm’n*

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v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." *Washington Metro.*, 559 F.2d at 844.

Petitioners have a strong likelihood of success on the merits. They have properly invoked the jurisdiction of this Court. See *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004). Judge Joyce Hens Green has already ruled in this case that petitioners have rights under the Due Process Clause of the Fifth Amendment and the Geneva Conventions. To allow respondents to bodily remove petitioners from Guantánamo Bay and place them in the hands of a foreign government for the purpose of interrogation by torture or indefinite detention without due process of law would be a patent violation of these rights. It would violate basic international legal norms embodied not only in the Geneva Conventions but also in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel and Degrading Treatment and Punishment. Removal without notice would also represent a brazen attempt to strip this court of its jurisdiction over the matter. As such, this Court is empowered pursuant to the All Writs Act, 28 U.S.C. § 1651(a), to issue an injunction against respondents to protect its jurisdiction. See *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996).

Petitioners stand to suffer immeasurable and irreparable harm – from torture to possible death – if they are transferred into the hands of a foreign government

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like Egypt or Jordan. Transfer to another country, even "if only" for continued imprisonment, also circumvents petitioners' right to adjudicate the legality of their detention in this Court. In stark contrast to the actual bodily harm and loss of opportunity for legal redress that petitioners face, respondents can articulate no actual harm that they will suffer by being restrained from transferring petitioners out of Guantánamo between now and the hearing date set by this Court for March 24, 2005. To the extent respondents contend that maintenance of the status quo in this litigation "illegitimately encroach[es] on the foreign relations and national security prerogatives of the Executive Branch," Opp. Mem. at 1, their argument is nothing but the same assertion of unreviewable Executive power that was rejected by Judge Green and that has found little traction with other courts.

Finally, public policy favors requiring respondents to refrain for a mere two weeks from removing petitioners from Guantánamo – where they have been incarcerated for more than three years – to foreign countries outside of the jurisdiction of this Court. No matter how satisfied the Executive Branch may be that its actions are lawful, the public good requires that a federal litigant – properly before the Court and represented by counsel – be provided with a meaningful opportunity to contest his transfer into the hands of those who might torture him or detain him indefinitely.

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CONCLUSION

For the reasons discussed above, the motion should be granted.

Dated: Washington, DC
March 11, 2005

Respectfully submitted,

COVINGTON & BURLING

/s/

David H. Remes
D.C. Bar No. 370782
1201 Pennsylvania Ave. NW
Washington, DC 20004
202-662-5212 (tel)
202-778-5212 (fax)

Marc D. Falkoff, *pro hac vice*
D.C. Bar No. 491149
1330 Avenue of the Americas
New York, NY 10019
212-841-1166 (tel)
646-441-9166 (fax)

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TEMPORARY RESTRAINING ORDER

IT IS HEREBY ORDERED that Respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having knowledge of this Order by personal service or otherwise, be, and are, hereby immediately and temporarily restrained from removing Petitioners from Guantanamo Bay Naval Base until Petitioners' Motion for Preliminary Injunction is decided.

DONE AND ORDERED this ____ day of March, 2005 at ____ o'clock, ____m.

United States District Judge

Presented by:
COVINGTON & BURLING

By:


David H. Remes

Mark D. Falkoff, *pro hac vice*

Attorneys for Petitioners