

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|-------------------------|---|-----------------------------------|
| MAHMOAD ABDAH, et al. |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | Civil Action No. 04-CV-1254 (HHK) |
| |) | |
| GEORGE W. BUSH, et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |
| <hr/> | | |
| MAHMOAD SALIM AL- |) | |
| MOHAMMED, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | Civil Action No. 05-CV-247 (HHK) |
| |) | |
| GEORGE W. BUSH, et al., |) | |
| |) | |
| Respondents. |) | |
| |) | |
| <hr/> | | |

**RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO
ABDAH PETITIONERS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to the Court's invitation at the March 22, 2005 oral argument on petitioners' motion for a preliminary injunction, respondents submit this supplemental brief in response to the Notice of Supplemental Authority filed by Abdah petitioners on March 21, 2005.¹

Petitioners argue that Federal Rule of Appellate Procedure 23(a)² "precludes Respondents

¹ At the March 22, 2005 oral argument, counsel for Al-Mohammed petitioners stated that they join in the arguments of Abdah petitioners. However, in addition to the reasons expressed below, any argument based on Federal Rule of Appellate Procedure 23(a) would not apply to the Al-Mohammed petitioners for the reason that their case is not on appeal.

² Rule 23(a) provides:

from removing Petitioners from Guantanamo without authorization from this Court." Petrs' Notice of Supp. Auth. at 2.³ However, Rule 23(a) is designed to ensure that, in situations where a prisoner is transferred from one custodian subject to federal habeas jurisdiction to another custodian subject to federal habeas jurisdiction, but remains in the custody of the United States (or relevant state thereof), the court is able to appropriately substitute the successor custodian as the respondent. See Fed. R. App. Proc. 23(a) ("the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party"); Wood v. United States, 873 F. Supp. 56, 57 (W.D. Mich. 1995) (declining to adopt expansive construction of Rule 23(a) where "the purposes of Rule 23(a) would not be furthered," which purposes are "reflected in the provisions of the rule for substituting the successor custodian as a party"). Critically, nothing in Rule 23(a), nor any other provision of law, operates to restrict the United States from relinquishing custody of an individual, which, after all, is the ultimate object of a habeas corpus case.

In light of its focus on "substitut[ing] the successor custodian as a party," Fed. R. App. Proc. 23(a), it does not make sense to read the Rule, as petitioners apparently do, to cover

Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, 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 a party.

³ While petitioners at oral argument attempted to minimize the relief they were seeking as simple and modest, their reliance on Fed. R. App. Proc. 23(a) – which, if it applied, would require not just advance notice, but court authorization – belies this characterization and underscores that they are seeking judicially ordered advance notice purely to set the stage for judicial intervention.

situations that involve not a transfer from one United States custodian to another United States custodian, but rather a relinquishment of United States custody altogether in connection with a transfer or repatriation to a foreign nation. In that situation, there is no "successor custodian" subject to federal habeas jurisdiction who could be substituted as a party.⁴ Moreover, upon relinquishment of United States custody, the relief available in habeas would have been received and the habeas case therefore would be moot, making substitution of a successor custodian unnecessary. See, e.g., Soliman v. United States ex rel. INS, 296 F.3d 1237, 1242-43 (11th Cir. 2002).

Indeed, our research has not uncovered a single case where Federal Rule of Appellate Procedure 23(a) has been held to apply to the transfer of a detainee to a foreign country and concomitant relinquishment of custody by the United States, even assuming arguendo that petitioners could be considered "prisoners" within the meaning of the Rule. To the contrary, the published cases where Rule 23(a) has been applied universally have involved transfers from one United States (or state) custodian to another United States (or state) custodian where the prisoner remained in the custody of the United States (or state authorities). This is reflected, for example, in the only case cited by petitioners actually involving Rule 23(a), in which the transfer implicating the rule consisted of moving the petitioner from a federal correctional facility in Miami, Florida to a federal penitentiary in Terre Haute, Indiana. Goodman v. Keohane, 663 F.2d

⁴ This is so regardless of whether the foreign nation to which the former Guantanamo detainee is repatriated or transferred may opt to detain the individual as a function of its own law enforcement or criminal justice interests, as would be its prerogative.

1044, 1047 (11th Cir. 1981).⁵

As mentioned at oral argument, that Rule 23(a) does not cover a transfer or repatriation resulting in an individual being released from United States custody is underscored by the Supreme Court's handling of the issue in Rasul v. Bush, 124 S. Ct. 2686 (2004). While Rasul was pending, the United States transferred two named petitioners therein to the custody of the United Kingdom. See Press Release dated Mar. 9, 2004, at <<<http://www.defenselink.mil/releases/2004/nr20040309-0443.html>>> ("The Department of Defense announced today that it transferred five British detainees from Guantanamo Bay, Cuba, to the British government today."). Even though the Supreme Court has a rule virtually identical to Rule 23(a),⁶ the Court did not give any hint of perceiving any violation of its rule. Instead, it simply noted the transfers and moved on to consider the claims of the petitioners who remained before the Court. See

⁵ The other two cases cited by petitioners do not involve Rule 23(a) or transfers between custodians at all. Rather, they involve other subsections of Federal Rule of Appellate Procedure 23 that are not relevant here. See Jago v. U.S. Dist. Ct., 570 F.2d 618, 623 (6th Cir. 1978) (addressing district court's authority to order prisoner released on bail pending appellate review of decision granting writ; decided under subsections (c) and (d) of Rule 23); Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985) (dealing with application for release on bail pending Supreme Court review of court of appeals decision in prisoner's favor; decided under subsections (b) and (c) of Rule 23).

⁶ See Fed. R. App. P. 23(a), adv. comm. note, 1967 Adoption (noting that the FRAP provision "is the same as Supreme Court Rule 49 [now numbered 36]"). Supreme Court Rule 36(1) and 36(2) provide:

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.
2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

Rasul, 124 S. Ct. at 2690 n.1. The notable absence of any suggestion that Supreme Court Rule 36 came into play in these circumstances strongly militates against petitioners' expansive construction of the identically worded Federal Rule of Appellate Procedure.

For the foregoing reasons, as well as those stated in prior briefing,⁷ respondents respectfully request that petitioners' motions for preliminary injunction be denied.

Dated: March 23, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DAVID B. SALMONS
Assistant to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

[signature block continued on next page]

⁷ As respondents explained in their principal briefs, judicial intervention in the Executive's decisions about transferring and repatriating enemy combatants would run afoul of the separation of powers. Pursuant to the canon of constitutional avoidance, the Court should not adopt a strained construction of Fed. R. App. Proc. 23(a) that would raise these concerns. See generally United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) (when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

/s/ Robert J. Katerberg

JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)

TERRY M. HENRY

JAMES J. SCHWARTZ

PREEYA M. NORONHA

EDWARD H. WHITE

ROBERT J. KATERBERG

ANDREW I. WARDEN

NICHOLAS J. PATTERSON

Attorneys

United States Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Ave., N.W.

Washington, DC 20530

Tel: (202) 616-8298

Fax: (202) 616-8460

Attorneys for Respondents