

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*,
Petitioners,

v.

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

Civil Action No. 04-1254 (HHK)

**PETITIONERS' OPPOSITION TO RESPONDENTS'
MOTION TO VACATE TEMPORARY RESTRAINING ORDER**

1. Petitioners oppose Respondents' motion to vacate the temporary restraining order entered by Judge Collyer on March 12, 2005. The TRO by its terms apparently extends to March 25, 2005, the day after the hearing on Petitioners' preliminary injunction motion, because weekend days are not counted for purposes of calculating the ten-day TRO period. *See* Fed. R. Civ. P. 6(a).

2. Respondents represent that no removal of any Petitioner from Guantánamo is imminent, and they argue that the TRO is therefore unnecessary. This representation is worthless (and the argument unsound) because Respondents refuse to provide notice if that situation changes. Moreover, if it is assumed that the situation will not change – an assumption that cannot safely be made – there could be no practical prejudice to Respondents from maintaining or extending the TRO, while the potential harm to Petitioners if the assumption proves infirm could be severe.

3. Indeed, Judge Urbina yesterday issued temporary relief based on that assumption, ordering “that, in recognition of the defendants’ assurances regarding the status of the plaintiffs/detainees during the pendency of the plaintiffs’ motion for temporary restraining order and pre-

liminary injunction, the defendants **SHALL NOT MOVE** the plaintiffs/detainees in this action until the court resolves said motion.”). Order, *Al-Oshan v. Bush*, 05-CV-0520 (RMU) (Mar. 16, 2005) (Ex. A).

4. Respondents also argue that a TRO is unnecessary because it is government “policy” not to transfer detainees to countries where the government believes it is “more likely than not” that they will be tortured. Such a probabilistic representation is both insufficient and unreliable. *See, e.g.,* Dana Priest, *CIA’s Assurances on Transferred Suspects Doubted: Prisoners Say Countries Break No-Torture Pledges*, Wash. Post, Mar. 17, 2005, at A1 (“One CIA officer involved with renditions . . . called the assurances from other countries ‘a farce.’”) (Ex. B).

5. Also yesterday, Judge Roberts issued an order specifying that he would entertain a request for emergency relief if “petitioners have reason to believe that they are facing the possibility of continued detention at the request of the United States in a location that does not provide access to this court.” Order at 3, *Abdullah v. Bush*, 05-CV-0023 (RWR) (Mar. 16, 2005) (Ex. C). The petitioners’ TRO motion in that case lacked specifics because their counsel does not yet have a security clearance.

6. Consistent with their overall stance in these terrible cases, Respondents now equate Petitioners’ struggle to avoid torture and death with a FOIA request. *See* Resp. Mot. at 6 n.8 (citing *Nat. Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004)). But Petitioners have established “more than a bare suspicion” of possible harm, 124 S. Ct. at 1581, and Respondents have refused to provide notice if that harm is about to occur. If ever there were a case in which the Government’s conduct is not entitled to a “presumption of legitimacy,” *id.*, this, sadly, is that case.

CONCLUSION

For the reasons stated, Respondents' motion to vacate the TRO should be denied. In addition, the Court should extend the TRO for an additional 10 days pursuant to Fed. R. Civ. P. 65(b); such an extension does not require Respondents' consent. If the Court desires to advance the date of the hearing on the preliminary injunction motion, Petitioners' lead counsel is able to present argument on March 21, March 23, or the afternoon of March 22.

Dated: Washington, D.C.
March 17, 2005

Respectfully submitted,

COVINGTON & BURLING

/s/

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Exhibit A

Exhibit B

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March 17, 2005

CIA Challenged About Suspects' Torture Overseas

By Dana Priest

WASHINGTON — The system the CIA relies on to ensure that the suspected terrorists it transfers to other countries will not be tortured has been ineffective and virtually impossible to monitor, according to current and former intelligence officers and lawyers, as well as counterterrorism officials who have participated in or reviewed the practice.

To comply with anti-torture laws that bar sending people to countries where they are likely to be tortured, the CIA's office of general counsel requires a verbal assurance from each nation that detainees will be treated humanely, according to several recently retired CIA officials familiar with such transfers, known as renditions.

But the effectiveness of the assurances and the legality of the rendition practice are increasingly being questioned by rights groups and others, as freed detainees have alleged that they were mistreated by interrogators after the CIA secretly delivered them to countries with well-documented records of abuse.

President Bush weighed in on the matter for the first time Wednesday, defending renditions as vital to the nation's defense.

In "the post-9/11 world, the United States must make sure we protect our people and our friends from attack," he said at a news conference. "And one way to do so is to arrest people and send them back to their country of origin with the promise that they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves." One CIA officer involved with renditions, however, called the assurances from other countries "a farce."

Another U.S. government official who visited several foreign prisons where suspects were rendered by the CIA after the attacks of Sept. 11, 2001, said: "It's beyond that. It's widely understood that interrogation practices that would be illegal in the U.S. are being used."

The CIA inspector general recently launched a review of the rendition system, and some members of Congress are demanding a thorough probe. Canada, Sweden, Germany and Italy have started investigations into the participation of their security services in CIA renditions.

The House voted 420 to 2 Wednesday to prohibit the use of supplemental appropriations to support actions that contravene anti-torture statutes. The measure's co-author, Rep. Edward Markey, D-Mass., singled out renditions, saying "diplomatic assurances not to torture are not credible, and the administration knows it."

Rendition, a form of covert action that is supposed to be shrouded in the deepest secrecy, was first authorized by President Reagan in 1986 and was used by the Clinton administration to transfer drug lords and terrorists to the United States or other countries for military or criminal trials.

After the 2001 attacks, Bush broadened the CIA's authority and, as a result, the agency has rendered more than 100 people from one country to another without legal proceedings and without providing access to the International Committee of the Red Cross, a right afforded all prisoners held by the U.S. military.

The CIA general counsel's office requires the station chief in a given country to obtain a verbal assurance from that country's security service. The assurance must be cabled back to CIA headquarters before a rendition takes place.

CIA Director Porter Goss told Congress a month ago that the CIA has "an accountability program" to monitor rendered prisoners. But he acknowledged that "of course, once they're out of our control, there's only so much we can do."

Asked to explain Goss' statement, an intelligence official said: "There are accountability procedures in place. For example, in some cases, the U.S. government is allowed access and can verify treatment of detainees." The official declined to elaborate.

Attorney General Alberto Gonzales said in an interview last week that, once a transfer occurs, "we can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us. If you're asking me 'Does a country always comply?', I don't have an answer to that."

In practice, though, the CIA has little control over prisoners once they leave CIA custody, said three recently retired CIA officials and other intelligence officials who have dealt with foreign intelligence services on detainee matters.

"These are sovereign countries," said Michael Scheuer, a recently retired CIA officer who favors the use of renditions to disrupt terrorist networks. "They are not going to let you into their prisons."

"Once they are in the jurisdiction of another country, we have no rights to follow up," said Edward S. Walker Jr., a former assistant secretary of state for Near Eastern affairs and now president of the Middle East Institute.

The U.S. official who visited foreign detention sites said the issue "goes far beyond" the assurance: "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do."

For a country offering assurances, following up could imply the United States does not trust its leaders.

"We wouldn't accept the premise that we would make a promise and violate it," said the Egyptian ambassador to the United States, Nabil Fahmy, whose country has accepted rendered terrorism suspects. He denied that Egyptian officers employ torture in interrogations. "I don't accept the premise that if you want to torture someone, you send them to Jordan or Egypt. That would be the exception to the rule." Egypt, he added, "is becoming more and more rigorous" in prosecuting officers who use excessive force.

But Mamdouh Habib, an Australian citizen, has alleged he was tortured in Egypt for

six months after U.S. officials sent him there. Habib had been detained in Pakistan in October 2001 as a suspected al-Qaida trainer. In Egypt, he alleges, he was hung by his arms from hooks, shocked, nearly drowned and brutally beaten. He was then sent to the U.S. military prison at Guantanamo Bay, Cuba, and was released in February.

Another Arab diplomat, whose country is actively engaged in counterterrorism operations and shares intelligence with the CIA, said it is unrealistic to believe the CIA really wants to follow up on the assurances. "It would be stupid to keep track of them because then you would know what's going on," he said. "It's really more like 'Don't ask, don't tell.'"

Questions about assurances have stalled the release of prisoners from Guantanamo.

Guarantees of humane treatment by Yemen notwithstanding, a federal court in the District of Columbia prohibited on Saturday the transfer of 13 Yemeni prisoners from Guantanamo to Yemen until a hearing is held on their attorneys' assertion that they could be tortured if returned there.

And despite assurances by China, State Department officials have been unwilling to send 22 Chinese Muslims from Guantanamo to China for fear they would be tortured.

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Researcher Julie Tate contributed to this report.

----- INDEX REFERENCES -----

NEWS SUBJECT: (International Terrorism (1IN37); Sept 11th Aftermath (1SE05))

INDUSTRY: (Security (1SE29))

REGION: (Cuba (1CU43); Middle East (1MI23); USA (1US73); Africa (1AF90); North Africa (1NO44); Americas (1AM92); Yemen (1YE36); Egypt (1EG34); North America (1NO39); Caribbean (1CA06); Arab States (1AR46); Mediterranean (1ME20); Latin America (1LA15))

Language: EN

OTHER INDEXING: (ARAB; CIA; CHALLENGED; CONGRESS; INTERNATIONAL COMMITTEE; RED CROSS; STATE DEPARTMENT) (Alberto Gonzales; Bush; Clinton; Edward Markey; Edward S. Walker Jr.; Goss; Habib; Mamdouh Habib; Michael Scheuer; Nabil Fahmy; Porter Goss; Qaida; Reagan; Researcher Julie Tate)

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Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH)	
<u>et al.</u> ,)	
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Petitioners,)	
)	
v.)	Civil Action No. 05-23 (RWR)
)	
GEORGE W. BUSH <u>et al.</u> ,)	
)	
Respondents.)	

ORDER

Petitioners Rami Bin Saad Al-Oteibi, Hani Saleh Rashid Abdullah, and Abdullah's sister as next friend, filed a petition for habeas corpus, alleging that Abdullah and Al-Oteibi are being detained unlawfully by the United States at Guantanamo Bay. Respondents filed a motion to stay all proceedings in this case pending resolution of the appeals pending before the United States Court of Appeals for the District of Columbia Circuit in In re Guantanamo Detainee Cases, - F. Supp. 2d - , 2005 WL 195356 (D.D.C. Jan. 31, 2005), appeal docketed, No. 05-8003 (D.C. Cir. March 10, 2005), and Boumediene v. Bush et al., - F. Supp. 2d - , 2005 WL 100924 (D.D.C. Jan. 19, 2005), appeal docketed, No. 05-5062 (D.C. Cir. March 10, 2005), although they have not confirmed in any filings that Abdullah is, or ever was, detained at Guantanamo.

Petitioners oppose respondents' motion but specifically request that any stay entered be flexible enough to permit petitioners to seek appropriate interim relief, short of release, where warranted. By way of example, petitioners would seek relief if respondents sought to "render" petitioners to another country for continued detention or move petitioners to a secret detention facility, effectively placing petitioners beyond the jurisdiction of this court. See Opp'n, 2/15/2005, at 5-6. In addition, petitioners emphasize their concern that they could be involuntarily transferred from Guantanamo such that they would no longer have access in this court to a review of the legality of their detention. Id.; Supplemental Opp'n, 3/11/2005, at 1-2, and Ex. A. Respondents have not addressed these concerns.¹

After consideration of the submissions made by both parties regarding the stay sought by respondents, it is hereby

ORDERED that respondents' motion for a stay be, and hereby is, is GRANTED in part and DENIED in part. The proceedings in this case are STAYED pending resolution of the appeals pending before the United States Court of Appeals for the District of

¹ On March 14, 2005, petitioners filed a motion for a preliminary injunction, seeking an order from this court requiring respondents to provide 30 days notice of any intended removal of petitioners from Guantanamo. That motion is not yet ripe and is not addressed by this order.

Columbia, in In re Guantanamo Detainee Cases and Boumediene v. Bush et al., except that petitioners may seek emergency relief from this court in appropriate circumstances, such as when petitioners have reason to believe that they are facing the possibility of continued detention at the request of the United States in a location that does not provide access to this court. It is further

ORDERED that, on or before March 21, 2005,² respondents shall file with this court a statement with respect to each of petitioners Abdullah and Al-Oteibi (i) confirming whether he is presently, and has been since the filing of petitioners' habeas petition, in the custody of the United States at Guantanamo, or confirming his past and present custody status and location if he is not presently in United States custody at Guantanamo, and (ii) disclosing whether, at the time the statement is filed, respondents have plans, or reasonably anticipate making plans prior to April 19, 2005, to move petitioner, and if so, to where, when, and under what terms and conditions.

² Local Civil Rule 65.1(c) requires respondents to file their response to the petitioners' motion for preliminary injunction on or before March 21, 2005. This order does not alter that requirement.

