

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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SUHAIL ABDU ANAM, et al.,	:	
	:	
Petitioners,	:	04-CV-1194 (HHK)
v.	:	
	:	
GEORGE W. BUSH, et al.,	:	
	:	
Respondents.	:	
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**PETITIONERS’ REPLY MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR PRELIMINARY INJUNCTION REQUIRING 30-DAYS’ NOTICE  
OF ANY INTENDED REMOVAL OF PETITIONERS FROM GUANTANAMO**

Petitioners hereby submit this reply to “Respondents’ Memorandum in Opposition to Petitioner’s Motion for Preliminary Injunction.” Petitioners’ Motion for Preliminary Injunction (the “Motion”) seeks the modest relief of an order requiring Respondents to provide the Court and Petitioners’ counsel with advance notice of thirty (30) days of any intended removal of Petitioners from Guantánamo Bay Naval Base in Cuba (“Guantánamo”). As demonstrated in the Motion, substantial classified and unclassified evidence exists that the Respondents intend to transfer certain Anam Petitioners from Guantánamo to third countries for the purpose of continued detention and torture. Respondents’ opposition to Petitioners’ motion is a recital of the same failed legal arguments that this Court rejected in Abdah and Al-Mohammed.<sup>1</sup>

**STATEMENT OF FACTS**

Petitioners’ memorandum in support of the motion for a preliminary injunction sets out

<sup>1</sup> See March 29, 2005 Memorandum in Abdah v. Bush, No. 04-CV-1254 (HKK); March 30, 2005 Order in Al-Mohamed v. Bush, No. 05-CV-247 (HHK).

in full the facts showing definitively that Petitioners are at risk of transfer from Guantánamo for the purpose of their continued detention and interrogation, a process also known as “rendition.” See Petitioners’ Motion For Preliminary Injunction at 3-4.

Respondents rely on testimony in the Waxman and Prosper declarations stating that, prior to transferring detainees, Respondents receive adequate assurances that the detainees will not be tortured. However, a CIA official involved with prisoner transfers has called these assurances “a farce,” and another U.S. official has said, “they say they are not abusing them, and that satisfies the legal requirement, but we all know they do.” Dana Priest, CIA’s Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges, Wash. Post, Mar. 17, 2005, at A1.

At no point do Respondents challenge Petitioners’ allegations that the factual returns for two of the Petitioners contain formal recommendations for their rendition, the particulars of which are set out in the Motion. Nor do Respondents challenge the allegation that a third Petitioner has reported that he was threatened during interrogation with being sent to an Egyptian prison. Respondents cannot challenge these allegations because they cannot be truthfully denied. Further, this Court has granted preliminary injunctions in Abdah and Al-Mohammed, in nearly identical circumstances, despite the Respondents’ submission of the Waxman and Prosper declarations in those cases.

## **ARGUMENT**

Respondents’ opposition memorandum completely ignores the fact that this Court, and a multitude of judges, has repeatedly found that a preliminary injunction requiring notice of transfer is necessary to ensure meaningful process for hearing the claims of Guantánamo detainees. Instead, Respondents’ opposition is based on the reiteration, through incorporation of their consolidated opposition memorandum, of failed arguments, and a misapprehension as to the purpose and impact of a footnote in Petitioners’ Motion.

**1. Case precedent definitively rejects Respondents' legal arguments.**

The arguments that the Respondents incorporate into their opposition have been decisively rejected. In eighteen cases, the Government has put forth the same erroneous arguments while a series of U.S. federal judges, including Your Honor, have required the government to provide pre-transfer notification to counsel. Abdah v. Bush, Civ. Action No. 04-cv-1254 (D.D.C. March 29, 2005) (H.H. Kennedy, D.J.); Al-Mohammed v. Bush, Civ. Action No. 05-cv-247 (D.D.C. March 30, 2005) (H.H. Kennedy, D.J.); Al-Oshan v. Bush, Civ. Action No. 05-cv-520 (D.D.C. March 31, 2005) (R.M. Urbina, D.J.); Al-Wazan v. Bush, Civ. Action No. 05-cv-329 (D.D.C. April 1, 2005) (P.L. Friedman, D.J.); Al-Shthry v. Bush, Civ. Action No. 05-cv-490 (D.D.C. April 1, 2005) (P.L. Friedman, D.J.); Al Joudi v Bush, Civ. Action No. 05-cv-301 (D.D.C. April 4, 2005) (G. Kessler, D.J.); Al-Marri v. Bush, Civ. Action No. 04-cv-2035 (D.D.C. April 4, 2005) (G. Kessler, D.J.); Qayed v. Bush, Civ. Action No. 05-cv-454 (D.D.C. April 6, 2005) (R.M. Urbina, D.J.); Tumant v. Bush, Civ. Action No. 05-cv-526 (D.D.C. April 6, 2005) (R.M. Urbina, D.J.); El-Mashad v. Bush, Civ. Action No. 05-cv-270 (D.D.C. April 7, 2005) (J. Robertson, D.J.); El Banna v. Bush, Civ. Action No. 04-cv-1144 (D.D.C. April 8, 2005) (R.W. Roberts, D.J.); Al Rashaidan v. Bush, Civ. Action No. 05-cv-586 (D.D.C. April 8, 2005) (R.W. Roberts, D.J.); Kurnaz v. Bush, Civ. Action No. 04-cv-1135 (D.D.C. April 12, 2005) (E.S. Huvelle, D.J.); Ameztane v. Bush, Civ. Action No. 05-cv-392 (D.D.C. April 12, 2005) (E.S. Huvelle, D.J.); Qassim v. Bush, Civ. Action No. 05-cv-497 (D.D.C. April 13, 2005) (J. Robertson, D.J.).

Despite this wave of cases rejecting the Respondents' arguments, the Respondents suggest that a lone decision providing for post-transfer notice, Almurbati et al., v. Bush, et al., should govern this Court's decision. Almurbati, Civ. Action No. 04-1227 (D.D.C. April 13, 2005) (Judge R.B. Walton). Respondents make this assertion without providing any explanation as to why the Almurbati decision should trump the numerous cases that preceded it, including Your Honor's decisions in Abdah and Al-Mohammed. Further, Respondents ignore factual distinctions between

Almurbati and the Anam Petitioners. First, the petitioners in Almurbati provided no specific evidence of a threat of harm, whereas there is uncontradicted evidence that three Petitioners have been threatened with, or considered for, rendition. Second, the Almurbati Petitioners were from Bahrain, where diplomatic and human rights circumstances may differ substantially from those in Yemen.

Petitioners also vehemently disagree as a matter of law with the reasoning in Almurbati. Respondents attempt to rely upon Almurbati for the proposition that the Prosper and Waxman declarations require this Court to find that Petitioners do not face irreparable harm upon their rendition. Your Honor found in Abdah that these declarations did not entirely refute the Abdah Petitioners' claims that they would be transferred to countries for torture or indefinite imprisonment without due process of law, noting that media reports quoted former Guantánamo detainees, former high-level officials from the United Kingdom and Pakistan, and current and former employees of the United States government who themselves were involved in transferring detainees. Further, while in Abdah there was specific evidence of the threat of rendition relating to one petitioner, here there is specific evidence relating to three Petitioners.

**2. Petitioners' preservation of argument on Court jurisdiction does not affect their substantive right to this preliminary injunction.**

The only new argument Respondents provide in their opposition is based on a mischaracterization of footnote 2 in Petitioners' Motion. Respondents wrongly suggest that this footnote repudiates the Court's reasoning on the preliminary injunction motion in Abdah. See Respondents Opp. at 2. In the footnote, Petitioners noted that they do not concede that transfer of a Petitioner out of Guantánamo automatically strips this Court of its jurisdiction, regardless of the facts and circumstances. See Petitioners Motion for Preliminary Injunction at 5, n. 2. The footnote was added because of the uncertainty and myriad possibilities that surround the terms upon which Petitioners may be transferred out of Guantánamo, and Petitioners wish to preserve their right to argue, based on the particular facts of a given case, that the Court has not lost jurisdiction as a result of

transfer. For instance, if a Petitioner were transferred from Guantánamo to another U.S. military facility on foreign soil (the Marine Corps Base in Okinawa, Japan, for instance), the Petitioner should not be precluded from arguing that the Court retains jurisdiction in such circumstances, given continued U.S. custody and control over the Petitioner.<sup>2</sup>

Whatever danger of loss of the Court's jurisdiction existed in Abdah also exists here, and provides an ample foundation upon which to grant the Motion. Petitioners do not deny that there are situations in which the Court would lose jurisdiction over a Petitioner as a result of a transfer<sup>3</sup> but merely observe that the effect of transfer on jurisdiction may depend on the particular circumstances of the transfer. The petitioners in Abdah argued that, absent notice, the Government's transfer of detainees is an improper attempt to circumvent court jurisdiction over the petitioners' claims. See Abdah, March 29, 2005, Mem. of Opinion at 9. Petitioners advance the same argument here. In footnote 2, Petitioners observe that, even in circumstances where there is an argument that the Court has not lost jurisdiction, the Petitioner's practical ability to advance habeas claims, through, for instance, reasonable access to counsel, and his right to timely and meaningful adjudication by the Court will likely be impaired. This observation, however, does not in any way detract from the simple fact that the danger of loss of jurisdiction over Petitioners exists to the same extent that such danger existed in Abdah. As a result, Petitioners face the same threat of irreparable harm as the Abdah petitioners and should be granted the same relief.

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<sup>2</sup> In Al-Joudi, et al v. Bush, Judge G. Kessler found that it was "unclear" whether transferring petitioners would strip the Court of jurisdiction. Al-Joudi, et al v. Bush, Civ. Action No. 05-301at 9-10 (D.D.C. April 4, 2005) (citing Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 54 (D.D.C. 2004) for the proposition that "an individual detained in Saudi Arabia could survive a motion to dismiss based on the theory of constructive custody."). Despite this finding that automatic loss of the Court's jurisdiction was not clear, Judge Kessler held that "the danger that, upon transfer, the Court could lose jurisdiction to adjudicate Petitioners' claims...would certainly constitute a threat of irreparable harm." Al-Joudi, Apr. 5, 2005 Mem. Opinion at 10.

<sup>3</sup> Indeed, Petitioners' Motion requested advance notice in order to "preserve the Jurisdiction of the Court in this matter." Motion at 1.

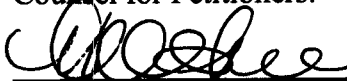
## CONCLUSION

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

Dated: April 21, 2005.

Respectfully submitted,

Counsel for Petitioners:



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