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PRACTICE ADVISORY¹

THE IMPACT OF THE SUPREME COURT'S DECISION IN *RUMSFELD V. PADILLA* ON IMMIGRATION HABEAS PETITIONS

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On June 28, 2004, in *Rumsfeld v. Padilla*, No. 03-1027, the Supreme Court addressed the question of who is the proper respondent to a habeas corpus petition filed under 28 U.S.C. § 2241 by a U.S. citizen challenging detention as an enemy combatant. Although the Court expressly refrained from deciding whether the Attorney General or any other immigration official is the proper respondent to a habeas petition filed by a non-U.S. citizen in the immigration context (see *Padilla* footnote 8), the government will likely try to argue that *Padilla* is controlling in circuits where this issue has not been decided. This advisory addresses the potential impact of the *Padilla* decision on immigration habeas petitions.

As a background, Jose Padilla is a U.S. citizen. He was arrested in New York on a material witness warrant issued by a New York district court to secure his testimony before a grand jury. As the result of succeeding events, including the President's designation of him as an enemy combatant associated with the al Qaeda terrorist network, Padilla was transferred to the custody of the Department of Defense and moved to a naval brig in South Carolina. Padilla, through his attorney as next of friend, filed a habeas corpus petition challenging his detention in the Southern District of New York two days after his transfer to South Carolina. The petition named as respondents the President, the Secretary of Defense, and the officer in charge of the brig where petitioner was detained. The Second Circuit's decision, *Padilla v. Rumsfeld*, 352 F.3d 695, 704-710 (2d Cir. 2003), held that Padilla could name Secretary of Defense Rumsfeld as the respondent to his habeas corpus petition. The government argued that the commander of the navy brig where Padilla was physically detained was the only proper respondent and that the

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Southern District of New York could not issue a writ of habeas corpus to a respondent located outside its territorial jurisdiction. Padilla's lawyer argued that New York was the proper forum because the New York judge was familiar with the case since it was considering pending motions on the material witness warrant and because Padilla had been transferred without notice to counsel. Padilla's lawyers also argued that the Secretary of Defense had purposely reached into New York to seize Padilla and take him to South Carolina.

What did the Supreme Court hold in *Padilla*?

The Court issued a 5-4 decision, including an opinion of the Court and a concurrence by two justices in the majority. Because the decision was 5-4, the concurrence is important to understanding the scope of the majority opinion. The majority opinion states that:

The only proper respondent to a traditional habeas corpus petition involving a "core challenge" to "present physical confinement" is the actual or "immediate" custodian of the facility where the individual is detained. In Padilla's case, the Court found that the immediate custodian was the commanding officer in charge of the naval brig in South Carolina, where petitioner was physically located.

Traditional habeas corpus petitions involving "core challenges" must be filed in the district court with territorial jurisdiction over the location of the immediate custodian. Thus, the Court found that the Southern District of New York lacked jurisdiction to issue a habeas writ to Padilla's immediate custodian in South Carolina.

The concurring justices made clear that the ruling was *not* based on subject matter jurisdiction. Rather, the concurrence stated that the ruling was a form of a strict venue or personal jurisdiction rules.

Because the Court concluded that Padilla's counsel had filed in the wrong court, it did not address the merits of Padilla's challenge to the President's authority to detain him without charge pursuant to executive authority as head of the military and a joint resolution. The Court ordered that the case be remanded and dismissed without prejudice.

What is a "core challenge" habeas corpus petition?

The *Padilla* Court defined "core challenges" as habeas challenges to present physical confinement. Chief Justice Rehnquist, who wrote for the majority, emphasized that the court's ruling applied to challenges where physical custody *is* at issue, but acknowledged that numerous cases cited by Padilla "stand for the simple proposition that the immediate physical custodian rule, by its terms, does not apply when a habeas petitioner challenges something other than [] present physical confinement."

Is the "immediate custodian" rule employed by the Supreme Court in *Padilla* applicable to *all* immigration habeas cases?

The Supreme Court did not decide this question. Significantly, in footnote 8 of the decision, the Court expressly stated that it was leaving open the question of whether the Attorney General may be a proper respondent to a habeas corpus petition filed by a noncitizen “detained pending deportation.” The Court observed that the Court reserved the question in *Ahrens v. Clark*, 335 U.S. 188 (1948) but noted that since *Ahrens* the circuit courts have split on whether to apply the immediate custodian rule in the immigration context. Importantly, however, the Court stated “[b]ecause the issue is not before us today, we again decline to resolve it.”

What arguments are available if the government takes the position that *Padilla* controls in immigration cases?

It is likely the government will move to dismiss pending immigration habeas corpus petitions, arguing that *Padilla* should control. There are viable arguments that the holding is limited to “core” habeas challenges, i.e. those that challenge physical custody, and that the holding should be limited to the prisoner or enemy combatant context.

Argument: Immigration habeas challenges seeking review of final orders of removal, deportation or exclusion are not “core” habeas corpus challenges.

The majority opinion consistently refers to the immediate custodian rule as the “general,” “default” or “traditional” rule which applies in the “core habeas context.” The opinion recognizes several case law exceptions to the rule, for example, when physical custody is not at issue; when American citizens are confined overseas; when the petitioner has been transferred after filing; or when the custodian is “present” in the district through his agents’ conduct.

In addition, the majority acknowledged that in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) and *Strait v. Laird*, 406 U.S. 341 (1972) the Court permitted the petitioners to name as respondents the parties who had legal control over their “custody.” The *Padilla* Court noted that “identification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged ‘custody.’”

Arguably, immigration habeas corpus petitions filed by immigration petitioners that seek review of final orders of deportation, exclusion or removal are *not* within Justice Rehnquist’s definition of “core challenges” because they are not primarily challenging present physical custody. Rather, in many cases, the habeas corpus petition primarily challenges a final agency decision, from the Attorney General, the Board of Immigration Appeals or the Department of Homeland Security, to remove the petitioner from the US. Thus, these types of habeas challenges are challenges to a form of ‘custody’ other than present physical confinement and, therefore, petitioners should arguably be permitted to name the party exercising legal control over their final removal, deportation or exclusion order.

Argument: Immigration cases are distinct from prisoner and enemy combatant cases.

There are many arguments for treating immigration habeas corpus cases differently, including the frequency of transfers,³ the nature of the cases, and the lack of counsel in remote facilities. Application of the immediate custodian rule in the immigration context is troubling for several reasons. Under the immediate custodian rule, an action can be brought only in the district where the petitioner is detained. Because DHS routinely transfers immigration detainees to remote detention centers, permitting suit only in the district of confinement gives the government complete control over where the action can be filed and, thus, the corresponding circuit court law that will govern the action. Moreover, potential immigration habeas petitioners face enormous obstacles in obtaining pro bono as well as paid counsel in remote and unfamiliar areas. In addition, filing habeas corpus petitions primarily in districts where detention facilities are located leads to docket overcrowding in those districts and places a disproportionately large number of immigration habeas decisions in the control of judges in those districts. These “policy” considerations are discussed in further detail in *Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003).

Additional policy considerations include the fact that a challenge to removal often continues after the person is removed from the country. In these situations, the place of detention at the time of filing has extremely attenuated connections to the case, and neither the immigrant’s family nor counsel (where available) is likely to be situated anywhere near that court. Furthermore, many detainees are detained in private detention facilities and private jails, where the local or state warden of the facility has little interest or reason to defend the immigration decisions of the federal government.

Argument: Application of the immediate custodian rule in the immigration context would not prevent forum-shopping.

The *Padilla* Court stated that upholding the applicability of the immediate custodian rule to *Padilla* and requiring that district courts issue the writ only “within their respective jurisdictions” “serves the important purpose of preventing forum shopping by habeas petitioners.”

However, in the immigration context, the immediate custodian rule creates problematic incentives for forum-shopping, since it empowers the government, through liberal use of its transfer power, to unilaterally determine the district of the petitioner’s confinement, and, thus, the identity of his or her “immediate” custodian.

AILF believes that, in the immigration context, custodian/respondents should be any officials with the power to release a petitioner from the custody he contends is unlawful, including the Attorney General and Secretary of the Department of Homeland Security. Under this functional approach, traditional venue considerations dictate where habeas relief may be sought.⁴ This

³ See e.g. *Verissimo v. INS*, 204 F. Supp. 2d 818 (D.N.J. 2002) (case transferred from Pennsylvania to Rhode Island to New Jersey to Massachusetts due to petitioner’s repeated transfer).

⁴ Traditional venue considerations include: (1) where the material events occurred; (2) where records and witnesses pertinent to the claim are likely to be found; and (3) the convenience of the

approach to choice of respondent is consistent with the dissent in *Padilla*, which was written by Justice Stevens and joined by Justices Souter, Ginsberg, and Breyer. The dissent stated that it would have found the Secretary of Defense to be a proper respondent and focused on “venue, *i.e.*, in which federal court the habeas inquiry may proceed.” This approach is also consistent with numerous post-*Henderson* district court decisions within the Second Circuit and the Ninth Circuit’s decision in *Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003).

Reliance on venue principles has the advantage of not only identifying the most convenient and efficient forum for resolution of a habeas action but also minimizing forum-shopping by both parties. This is especially true in immigration cases, where there may only be one forum that is convenient for the petitioner and no forum that is inconvenient for the federal government.

Is the “immediate custodian” rule applicable to *some* immigration case?

Yes, depending on the governing circuit law.

Which circuits have adopted the “immediate custodian” rule in immigration cases and who have they identified as the immediate custodian?

The First and Sixth Circuits have adopted the immediate custodian rule in immigration cases. In *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000), the First Circuit held that the immediate custodian of an immigration detainee is the superintendent of the detention facility. In *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003), the Sixth Circuit held that the immediate custodian rule is applicable absent extraordinary circumstances and found the immediate custodian of an immigration detainee to be the District Director for the district where the detention facility is located.

In *Padilla*, the Supreme Court cited to the Third and Seventh Circuits decisions in *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994) and *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003) as having decided that the Attorney General is not a proper respondent in an immigration case. On close review of those decisions, these rulings could be considered *dicta*.⁵ However,

forum to respondent and petitioner. See *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 493-94 (1973).

⁵ *Yi* involved a consolidated appeal from a district court decision denying nationwide habeas class certification to Chinese nationals who were passengers on the Golden Venture ship and who sought asylum based on China’s one couple, one child policy. The district court denied the request for class certification for lack of subject matter jurisdiction to certify a class under 8 U.S.C. §§ 1329 and 1331, and the Administrative Procedures Act. The district court also found that it lacked personal jurisdiction over proposed class members who had not exhausted their administrative appeals and who were outside the court’s territorial jurisdiction. The Third Circuit affirmed, holding that the district court lacked the authority to grant class certification. Thus, the Third Circuit arguably did not need to address and affirm the district court’s conclusion that its habeas jurisdiction was limited to its territorial jurisdiction nor did it need to discuss whether the immediate custodian rule was applicable because it had already held that the district

notably, both courts favored the immediate custodian rule and suggested that the warden of the detention facility is the proper respondent to an immigration habeas petition.

The fact that there is not agreement among the circuits as to whether the warden or the District Director is “the” immediate custodian demonstrates that there is unpredictability inherent in the rule.

How does *Padilla* affect the law in circuits that have adopted the “immediate custodian” rule?

Both the majority’s (see footnote 7) and the concurrence in *Padilla* found that the identity of the proper respondent to a habeas action and choice of venue is *not* an issue of subject matter jurisdiction. Thus, the propriety of a habeas respondent and choice of habeas forum can be waived if the government’s fails to timely raise an objection. *See* the question below regarding arguments to counter motions to dismiss and waiver.

In addition, unlike subject matter jurisdiction which must be present for adjudication on the merits, *Padilla* affirmed the existence of several types of exceptions to the immediate custodian rule. In so doing, *Padilla* confirms the First and Sixth Circuit’s findings that departure from the immediate custodian rule may be warranted under “extraordinary circumstances.” Moreover, *Padilla*’s recognition of exceptions to the immediate custodian rule lends support to fashioning similar exceptions in the Third and Seventh Circuits.

Finally, the *Padilla* Court held that, when the immediate custodian rule applies, habeas petitions must be filed in the district court with territorial jurisdiction *over the location of the immediate custodian*. Thus, it is the location of the immediate custodian *not* the location of petitioner that controls. This can be a significant point in some cases, for example, where a habeas petition within the Sixth Circuit is dismissed pursuant to *Roman* for failure to name the immediate custodian and the petitioner is physically located in Oakdale, Louisiana. Oakdale is located within the jurisdiction of the Western District of Louisiana. The District Director, however, who is the immediate custodian of that petitioner pursuant to *Roman*, is physically located in New Orleans, which is within the jurisdiction of the Eastern District of Louisiana. Thus, the habeas petition should be re-filed in, *or transferred to*, the Eastern District of Louisiana (and *not* the Western District of Louisiana).

Have any courts rejected the “immediate custodian” rule?

court lacked subject matter jurisdiction. Thus, there is some debate whether the Court’s discussion is *dicta* or an alternative holding.

Similarly, in *Robledo-Gonzales*, the Seventh Circuit’s discussion of the immediate custodian rule is arguably *dicta* because the Court had already found that the petitioner was not “in custody” for habeas purposes.

Yes, the Ninth Circuit and several district courts, many within the Second Circuit, have rejected the immediate custodian rule. In *Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003), the Ninth Circuit held that the Attorney General and the Secretary of Homeland Security are appropriate custodians/respondents to immigration habeas corpus petitions because each are in charge of the agencies ultimately responsible for the custody that petitioners contend is unlawful. *En banc* rehearing is currently pending in *Armentero*.

In addition, as mentioned above, several district courts have rejected the immediate custodian rule.⁶ In *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), the Second Circuit weighed arguments for and against the Attorney General being a respondent but ultimately declined to decide the issue. Instead, the Court certified the question to the New York Court of Appeals. 157 F.3d at 124. The New York Court of Appeals declined to resolve the question and referred it back to the Second Circuit. *Yesil v. Reno*, 92 N.Y.2d 455 (1998) (per curiam). The government then proposed settlement of the case on the merits and the case was settled before the Second Circuit had the opportunity to reconsider the question. *Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999).

Are there any arguments to counter motions to dismiss based on *Padilla* in pending habeas actions?

Yes, if the litigation has already commenced on the merits and the government did not previously object to choice of respondent or venue. In Justice Kennedy's concurrence in *Padilla*, in which Justice O'Connor joined, Kennedy clearly stated that "[b]ecause the immediate-custodian and territorial-jurisdiction rules are like personal jurisdiction or venue rules, objections to the filing of petitions based on those grounds can be waived by the Government."

In general, objections to venue and personal jurisdiction are waived if the government failed to raise such objections through a defensive motion (such as a motion to dismiss) or initial responsive pleading. *See generally* Fed. R. Civ. Proc. 12(h). Based on the concurrence in *Padilla*, courts should find that objections to choice of respondent and forum are waived in habeas corpus cases if the government failed to raise them through a defensive motion or initial responsive pleading.

The argument that the government has waived its right to object to choice of respondent or venue is presumably applicable in both circuits that have adopted the immediate custodian rule and circuits that have not addressed the issue.

Does *Padilla* affect the timing of filing future habeas petitions?

⁶ *See e.g. So v. Reno*, 251 F. Supp 2d 1112 (E.D.N.Y. 2003); *Small v. Ashcroft*, 209 F. Supp 2d 294 (S.D.N.Y. 2002); *Barton v. Ashcroft*, 152 F. Supp. 2d 235 (D. Conn. 2001); *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000); *Pottinger v. Reno*, 51 F. Supp. 2d 349 (E.D.N.Y. 1999); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997); *Lee v. Ashcroft*, 216 F. Supp. 2d 51 (E.D.N.Y. 2002).

Yes, if at all possible, habeas petitions should be filed *before* transfer to a remote location. In *Padilla*, the Court found that its decision in *Ex parte Endo*, 323 U.S. 283 (1944) “stands for the important but limited proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release.” Thus, if a habeas petition naming the then “immediate custodian” and individuals with continuing legal authority over the petitioner (such as the Attorney General and Secretary of the Department of Homeland Security) is filed while petitioner is physically located within the district court’s territorial jurisdiction, the district court should retain jurisdiction to issue a writ of habeas corpus even if petitioner is subsequently transferred out of the jurisdiction.

Are there any additional materials on this topic?

Yes. For additional reading on the issue of the proper custodian/respondent to an immigration habeas petition, *see* Megan A. Ferstenfeld-Torres, “Who Are We to Name? The Applicability of the “Immediate-Custodian-As-Respondent” Rule to Alien Habeas Claims Under 28 U.S.C. § 2241, 17 *Geo. Immigr. L.J.* 431 (2003) and Rachel E. Rosenbloom, “Is the Attorney General the Custodian of An INS Detainee? Personal Jurisdiction and the “Immediate Custodian” Rule in Immigration-Related Habeas Actions, 27 *N.Y.U. Rev. L. & Soc. Change* 543 (2002).

In addition, AILF previously issued a practice advisory entitled “Whom to Sue and Serve in Immigration-Related District Court Litigation” addressing this issue and suggesting potential respondents. http://www.aif.org/lac/lac_pa_111203.pdf.