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## Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation

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# DETENTION DECISIONS AND ACCESS TO HABEAS CORPUS FOR IMMIGRANTS FACING DEPORTATION

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**Abstract:** In the wake of the recent Supreme Court decisions on the legal rights of “enemy combatants,” this Article highlights the continuing problems of immigration detainees and their lack of access to adequate judicial process. Based on the author’s extensive research into habeas corpus actions filed by inmates in the Oakdale Federal Detention Facility, this Article explores the consequences of limiting habeas actions to courts in the territorial site of the prison. Because the Federal District Court for the Western District of Louisiana refuses to issue stays of removal, detainees are deported before their habeas actions can be judged on the merits, and consequently are denied an adequate remedy for illegal government action.

## INTRODUCTION

The year 2004 will be remembered for the landmark cases that decided whether the government can create a legal black hole in which the claims of “enemy combatants” are either fully insulated from the courts or are subjected to review that lacks any element of standard conceptions of due process. In *Rasul v. Bush*, the Supreme Court rejected the government’s argument that detainees held in Guantanamo Bay, Cuba, cannot bring habeas corpus claims to challenge their detention.<sup>1</sup> In *Hamdi v. Rumsfeld*, it rejected the government’s effort to limit drastically the degree to which habeas courts can review claims brought

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<sup>1</sup> 124 S. Ct. 2686, 2688–89 (2004). Individuals held in custody “in violation of the Constitution or the laws and treaties of the United States” may apply to the courts for a writ of habeas corpus to secure judicial review of the Executive action responsible for their detention. *Id.* at 2692 (citing 28 U.S.C. § 2241(a), (c) (3) (2000)).

by U.S. citizens held as “enemy combatants.”<sup>2</sup> The Court’s rulings were widely hailed as preserving the rule of law.<sup>3</sup> While commentators recognized the importance of the *Rasul* and *Hamdi* decisions, they gave short shrift to the decision in a companion case, *Rumsfeld v. Padilla*. The press viewed the *Padilla* decision as a “nonruling,” in which the Court had simply concluded that Padilla’s lawyers had chosen the wrong court.<sup>4</sup> The underlying implication was that, should the case be filed in the correct court, all of Padilla’s substantive rights, as well as those of other U.S. citizens held as enemy combatants, would be protected.

But the seemingly technical ruling in *Padilla* is, in fact, of enormous importance.<sup>5</sup> The Court held that Padilla had to file his habeas claim wherever the government chose to detain him.<sup>6</sup> According to the Court, because he was taken to South Carolina and held there in a military brig, the only proper respondent to a habeas petition was the brig’s commander, and the only proper court was the district court in South Carolina.<sup>7</sup>

The practical question left open by the *Padilla* decision is whether the government’s power to choose the site of detention, and hence the venue for a habeas action, will leave petitioners with adequate access to judicial review.<sup>8</sup> Some may suspect that the government selected the South Carolina site for Padilla’s detention precisely because it helped to compel litigation in a court that was sympathetic to the government.

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<sup>2</sup> See 124 S. Ct. 2633, 2648 (2004).

<sup>3</sup> Linda Greenhouse, *Access to the Courts*, N.Y. TIMES, June 29, 2004, at A1; Charles Lane, *Justices Move to Define Detainees’ Court Access: Order Seeks Opinion From 9th Circuit About Where a Case Should Be Heard*, WASH. POST, July 1, 2004, at A7; Editorial, *The Due Process Rights Affirmed*, HARTFORD COURANT, June 30, 2004, at A12.

<sup>4</sup> See Greenhouse, *supra* note 3; see also Andrew McCarthy, *A Mixed Bag*, NAT’L REV. ONLINE, June 30, 2004, ¶¶ 2, 5–6, 23 at <http://www.nationalreview.com/mccarthy/mccarthy200406300915.asp>. (“In the most interesting case, *Rumsfeld v. Padilla*, the court issued its least interesting decision—ducking [the question] on procedural grounds . . .”). At least one legal commentator, however, has recognized the significance of the procedural issues in the court of appeals’ decision in *Padilla*. See Brian O’Donoghue, *Who’s the Boss?: Armentero, Padilla and the Proper Respondent in Federal Habeas Corpus Law*, 22 YALE L. & POL’Y REV. 441, 441 (2004).

<sup>5</sup> See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2727 (2004) (Stevens, J., dissenting).

<sup>6</sup> See *id.* at 2722.

<sup>7</sup> *Id.* at 2716, 2724. The court applied the “immediate custodian” rule, under which habeas claims that are “core challenges” to physical custody must be brought against the detainee’s warden in the absence of any applicable exceptions to the rule. *Id.* at 2718, 2724.

<sup>8</sup> See *id.*

Time will tell what kind of a hearing Padilla and others similarly situated will receive in the government's chosen court.

With respect to detainees in immigration cases, however, a factual record is developing of the impact of limiting habeas claims to courts sitting in the territorial site of the detained individual. Before the *Padilla* decision was issued, many courts, including the circuit where this conference was held, took the position that habeas actions by noncitizens who are challenging their deportation must be filed in the court where those individuals are detained.<sup>9</sup> Since the government has broad authority to detain immigrants challenging deportation orders, the courts that followed this approach essentially allowed the government to select the district court that would review habeas challenges to the legality of deportation orders.<sup>10</sup>

The impact of these pre-*Padilla* decisions has not been studied exhaustively. Evidence indicates, however, that the pre-*Padilla* decisions that transferred immigration cases to the site of detention allowed the government to execute removal orders prior to any judicial scrutiny of those orders' legality.<sup>11</sup> This record demonstrates the grave dangers of extending the rule of *Padilla* beyond that case and into any situation in which the government has the power to choose the situs of detention. It also demonstrates the wisdom of the Court's conclusion that any rule on the locus of habeas actions is not a matter of subject matter jurisdiction and should be relaxed when it would reward abuse by the government or otherwise fail to provide fair access to the writ.<sup>12</sup>

The Oakdale Federal Detention Facility ("Oakdale"), built in a remote region of Louisiana, houses over eight hundred detainees at any one time.<sup>13</sup> Local parish jails and private facilities in the area house

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<sup>9</sup> See *Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000); *Roman v. Ashcroft*, 340 F.3d 314, 316 (6th Cir. 2003).

<sup>10</sup> See, e.g., *Vasquez*, 233 F.3d at 694 (asserting, ironically, that to allow habeas petitioners to name the Attorney General rather than their immediate custodian as respondent would encourage rampant forum shopping among petitioners).

<sup>11</sup> See discussion *infra* Section I.

<sup>12</sup> See *Padilla*, 124 S. Ct. at 2717 n.7 (noting that subject matter jurisdiction is not involved); *id.* at 2729 (Kennedy, J., concurring) (suggesting circumstances in which the *Padilla* rule would not be applied). Justice Kennedy explains that, because the locus of habeas actions turns on personal jurisdiction or venue, other federal courts still retain subject matter jurisdiction and might be able to hear cases, for example, when the government is obstructive. *Id.* (Kennedy, J., concurring).

<sup>13</sup> See generally Federal Bureau of Prisons, *Weekly Population Report*, at [www.bop.gov/weekly.html](http://www.bop.gov/weekly.html) (last visited Sept. 2, 2004) (providing weekly updates on prison populations at various federal prison sites).

additional detainees.<sup>14</sup> In a study of habeas actions docketed in the courts in the Western District of Louisiana (WDLA), I learned that the federal district court that handles cases of *pro se* Oakdale detainees takes the position that immigration law bars a habeas court from issuing a stay of deportation.<sup>15</sup> As a result, little doubt exists that when the government chooses to transfer a detainee to Oakdale, it greatly increases the chances that the individual will be deported prior to any substantive review of the case.<sup>16</sup>

The consequences of these stay practices were magnified when the reviewing court for cases from the WDLA, the Court of Appeals for the Fifth Circuit, issued its decision in *Zalawadia v. Ashcroft*.<sup>17</sup> In *Zalawadia*, the court held that if a person is deported during the pendency of a habeas action, the court loses jurisdiction to provide a judicial remedy other than vacating the illegal removal order.<sup>18</sup> Zalawadia's claim was similar to that of Enrico St. Cyr, who had prevailed in 2001 in his case before the Supreme Court.<sup>19</sup> Like St. Cyr, Zalawadia argued that he should have been allowed to present equities that counseled against his deportation, and that the Attorney General improperly concluded that she lacked the power to conduct a hearing into such equities.<sup>20</sup>

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<sup>14</sup> See MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 176–77 (2004) (describing Pine Prairie facility).

<sup>15</sup> See discussion *infra* Section I.

<sup>16</sup> Transfer to Oakdale has many other consequences. As others have documented, detention generally limits access to counsel. See Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1664–65 (1997). Although there is a modest project to provide representation to these detainees during their immigration proceedings, there is no legal service provider who will take a case to court. See Frank Etheridge, *Exile in Oakdale*, GAMBIT WKLY., Aug. 10, 2004, ¶ 22, at [http://www.bestofneworleans.com/dispatch/2004-08-10/cover\\_story.html](http://www.bestofneworleans.com/dispatch/2004-08-10/cover_story.html) (reporting that the Catholic Legal Immigration Network's attorney who provides legal rights presentations at the Oakdale facility is not permitted to engage in any one-on-one consultations with detainees). In addition, those transferred do not have access to witnesses and documents for their hearings and lack basic human contact with friends and family. See *id.*

<sup>17</sup> See *Zalawadia v. Ashcroft*, 371 F.3d 292, 301 (5th Cir. 2004). The WDLA refused to grant Zalawadia a stay of deportation and dismissed his habeas claim. *Id.* at 296. Zalawadia was deported while his Fifth Circuit appeal was pending. *Id.*

<sup>18</sup> *Id.* at 301.

<sup>19</sup> See *id.* at 295–96; *INS v. St. Cyr*, 533 U.S. 289, 292, 325 (2001) (holding that discretionary relief extends to aliens whose convictions were obtained through plea agreements and who would have been eligible for such relief at the time of their plea).

<sup>20</sup> See *St. Cyr*, 533 U.S. at 292; *Zalawadia*, 371 F.3d at 295–96.

Zalawadia did all he could to preserve his rights; he retained counsel and pursued appeals up through the court system, including to the Supreme Court.<sup>21</sup> His case was held in abeyance pending the outcome in *St. Cyr*, after which it was remanded for reconsideration.<sup>22</sup> Through counsel, Zalawadia continued to argue his case through both the district court and the Fifth Circuit, ultimately persuading the court that he had been deported improperly.<sup>23</sup> The court issued an opinion with broad language stating that the only relief Zalawadia could obtain was vacatur of his removal order. The court refused to order Zalawadia's return or any other relief to ensure preservation of his rights<sup>24</sup>

The combined effect of the stay practices of the Western District of Louisiana and the *Zalawadia* decision is to give the government the power to move noncitizens to a law-free zone.<sup>25</sup> Although immigration detainees can nominally take their case to court, the court can neither protect them from removal prior to, nor at the conclusion of their case.<sup>26</sup>

As of this writing, the circuit courts are considering whether immigration habeas cases fit within the "territorial" jurisdiction rule that was applied in *Padilla*.<sup>27</sup> However that issue is decided, the reality that

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<sup>21</sup> *Zalawadia*, 371 F.3d at 295–96.

<sup>22</sup> *Id.* at 296.

<sup>23</sup> *Id.* at 296, 301.

<sup>24</sup> The government appears to recognize the far-reaching and troubling implications of the language used in the *Zalawadia* opinion. In its opposition to rehearing in that case, the government argued that it made no practical difference for Zalawadia whether the court exercised broader remedial power. Response of Respondent-Appellee to Petition for Panel Rehearing, *Zalawadia* (No. 03-30155). Zalawadia himself did not object to purchasing his own ticket, and, in the context of that case, the government had already made arrangements with Zalawadia's counsel that would ease proof of his status for purposes of traveling to the United States. Furthermore, the legal error in Zalawadia's case was denial of a hearing, for which he remained eligible under the government's promised restoration of lawful permanent resident status. One can only hope that the sweeping language of the court's opinion will be read in light of these specific circumstances. For petitioners of lesser means in cases with lower profiles, only a court order requiring the government to arrange their return and requiring the provision of travel documents has any chance of remedying a wrongful removal.

<sup>25</sup> I am indebted to Hiroshi Motomura, for coining a similar phrase in connection to a discussion of this paper at the University of Maryland's 2004 Immigration Professors Workshop.

<sup>26</sup> See *St. Cyr*, 533 U.S. at 325; *Zalawadia*, 371 F.3d at 301.

<sup>27</sup> See, e.g., *Armentero v. INS*, 382 F.3d 1153 (9th Cir. 2004) (vacating prior decision on proper custodian and deferring resubmission of case pending oral argument); *Bell v. Ashcroft*, 2003 WL 22358800, *appeal docketed*, No. 03-2737 (2d Cir. 2004).

no petitioner can obtain a stay in the WDLA and real possibility that the Fifth Circuit will deny a full judicial remedy at the end of the proceedings means that the WDLA is a far different habeas forum from those that offer petitioners a chance to prevent inappropriate deportations and to be released into their communities when they prevail in their cases.

Part I of this Article reviews the results of the study of stay practices in the WDLA. Part II discusses the *Zalawadia* case and how it has magnified the consequences of application of a rule mandating that habeas actions be brought where the government has chosen to detain immigrants. Part III explores the implications of the WDLA's stay practices and *Zalawadia* for rules governing the choice of forum in immigration habeas actions.

### I. STAY PRACTICES IN THE WESTERN DISTRICT OF LOUISIANA

All Oakdale detainees whose cases are transferred to the WDLA face a court that, as a matter of policy, will not provide a stay of removal.<sup>28</sup> The district court for the WDLA takes the position that under INA § 242(g), no power exists to stay deportation irrespective of the merits of the case.<sup>29</sup> As a result, no one who seeks a stay in the court that handles Oakdale detainees succeeds. Similarly, as a matter of *sua sponte* practice, the district court vacates stays entered by other courts.<sup>30</sup>

This study looked systematically at cases during two specific time intervals: the six months following the decision in *INS v. St. Cyr* and the three months following the Fifth Circuit's decision in *Flores-Garza v. INS*.<sup>31</sup> The first period represents the time in which the Supreme

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<sup>28</sup> This finding was reported in an earlier publication, Nancy Morawetz, *Oakdale Justice: Routine Vacatur of Stays in the Western District of Louisiana*, 8 BENDER'S IMMIGR. BULL. 6 (2004).

<sup>29</sup> See Immigration and Nationality Act (INA) § 242(g), 8 U.S.C. § 1252(g) (1998) ("Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."). Pursuant to the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, this provision only bars review over discretionary decisions regarding the commencement, continuation or execution of removal orders. See 525 U.S. 471, 471-72 (1999).

<sup>30</sup> See, e.g., *Solis v. Ashcroft*, No. 2:01 Civ. 1732, at 1, 2 (W.D. La. Dec. 21, 2001); *Bennett v. Ashcroft*, No. 2:01 Civ. 1747, at 1, 2 (W.D. La. Dec. 7, 2001); *Bello v. Reno*, No. 2:01 Civ. 1297, at 1, 2 (W.D. La. Aug. 7, 2001).

<sup>31</sup> See generally *INS v. St. Cyr*, 533 U.S. 289 (2001); *Flores-Garza v. INS*, 328 F.3d 797 (5th Cir. 2003). The first period included all cases on PACER that were docketed in the WDLA between July 1, 2001 and December 31, 2001, and in which the words "Reno," "Ashcroft,"

Court had made it clear that habeas jurisdiction existed as a means to challenge the legality of deportation orders.<sup>32</sup> Over the course of these six months, detainees' arguments often contended that their cases should fall within the ambit of the *St Cyr* ruling.<sup>33</sup> The second time period focuses on the time in which the Fifth Circuit had further clarified the scope of habeas jurisdiction, rejecting government requests to dismiss not only petitions for review, but also habeas actions by individuals who argued that their removal orders were illegal.<sup>34</sup> For both intervals, I examined cases that had been transferred from other courts. Cases from both time periods revealed that, when confronted with a question of whether a habeas petitioner can obtain a stay of removal, the district court judges handling the cases of detainees at Oakdale uniformly ruled that they lacked jurisdiction to enter a stay.<sup>35</sup> As a result, stays entered by the transferring court were consistently vacated and applications for stays denied.

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or "immigration" appeared in the caption. The second period includes all cases docketed between May 1, 2003 and August 1, 2003 in which the words "Ashcroft" or "immigration" appear in the caption.

<sup>32</sup> See *St. Cyr*, 533 U.S. at 312 (holding that federal courts have habeas jurisdiction under 28 U.S.C. § 2241 notwithstanding the provisions of 8 U.S.C. § 1252).

<sup>33</sup> See, e.g., *Flores-Garza*, 328 F.3d at 801; *Zalawadia*, 371 F.3d at 296.

<sup>34</sup> *Flores-Garza*, 328 F.3d at 799, 802–03.

<sup>35</sup> Cases in the WDLA are assigned to one of five divisions of that court. Interview with Robert Shemwell, Clerk of the Court, The District Court for the Western District of Louisiana (Nov. 24, 2003). Cases of detainees housed at the Federal Detention Center in Oakdale are assigned to the Lake Charles Division. *Id.* During the time period following the *St. Cyr* decision, Judge James T. Trimble, Jr. and Judge Edwin F. Hunter, Jr. served as the district court judges in that division. Currently, Judge Trimble and Judge Patricia Minaldi handle the cases in this division. See ROBERT H. SHEMWELL, GUIDE TO PRACTICE IN THE WESTERN DISTRICT OF LOUISIANA, at v (2003), available at <http://www.lawd.uscourts.gov/guide/guide.pdf> (showing that the only judges currently in the Lake Charles Division are Senior Judge Trimble, Judge Minaldi, and Magistrate Judge Alonzo P. Wilson). In all cases in the study, Magistrate Judge Wilson wrote the recommended decisions in the cases of Oakdale detainees whose cases were transferred to the WDLA. See *id.* I have identified one case filed by counsel in another division of the WDLA where a temporary restraining order was granted in a removal case that included Oakdale detainees among the petitioners. See *Mohamed v. Ashcroft*, No. 02 Civ. 2484, slip op. at 1 (W.D. La. Aug. 4, 2003) (granting petitioners' motion to stay removal); *Mohamed*, No. 02 Civ. 2484, slip op. at 1, 5–6 (W.D. La. July 27, 2003) (denying petitioners' motion to stay removal in case challenging removal of Somalis to a country without a functioning government). *Mohamed* was filed in the Monroe Division of the WDLA by attorneys on behalf of detainees in the WDLA with claims regarding removal to Somalia. See *Mohamed*, No. 02 Civ. 2484, slip op. at 1, 5–6 (W.D. La. July 27, 2003). When cases are filed by individuals *pro se* or are transferred by other courts, they are invariably assigned to the Lake Charles Division.

Table 1 presents data on cases transferred in the six-month period following the *St. Cyr* decision.

| Table 1: Stay Decisions by the WDLA in cases of Oakdale detainees transferred from other courts and docketed between 7/1/01 and 12/31/01 |                       |                                  |  |
|--|-----------------------|----------------------------------|--|
|  | WDLA rulings on stays | Finding no jurisdiction for stay | Finding jurisdiction and deciding stay issue on merits |
| Ruling in cases transferred with stays   | 9 <sup>36</sup>       | 9 <sup>37</sup>                  | 0  |
| Rulings in cases transferred without stays   | 9 <sup>38</sup>       | 9 <sup>39</sup>                  | 0  |
| Total WDLA rulings of stay requests in transferred cases   | 18                    | 18                               | 0  |

Every opinion issued by the WDLA on the stay issue for Oakdale detainees states the same view: that there is no jurisdiction to issue a stay in a case that challenges a removal order.<sup>40</sup> In every opinion re-

<sup>36</sup> *Solis*, No. 2:01 Civ. 1732, at 1 (W.D. La. Dec. 21, 2001); *Bennett*, No. 2:01 Civ. 1747, at 1 (W.D. La. Dec. 7, 2001); *Olandan-Moore v. Ashcroft*, No. 01 Civ. 1893, at 1 (W.D. La. Dec. 7, 2001); *Riley v. Ashcroft*, No. 01 Civ. 1549, at 1 (W.D. La. Dec. 7, 2001); *Jacques v. Ashcroft*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001); *Bettune v. Ashcroft*, No. 01 Civ. 1474, at 1 (W.D. La. Sept. 13, 2001); *Sanchez v. Ashcroft*, No. 01 Civ. 1476, at 1 (W.D. La. Sept. 13, 2001); *Rezzouq v. Ashcroft*, No. 01 Civ. 1262, at 1 (W.D. La. Sept. 7, 2001); *Bello v. Reno*, No. 2:01 Civ. 1297, at 1 (W.D. La. Aug. 7, 2001).

<sup>37</sup> See cases cited *supra* note 36.

<sup>38</sup> *Gelin v. Ashcroft*, No. 01 Civ. 2243, at 1 (W.D. La. Jan. 24, 2002); *Llewellyn v. Ashcroft*, No. 2:01 Civ. 2244, at 1 (W.D. La. Jan. 22, 2002); *Williams v. Ashcroft*, No. 01 Civ. 2319, at 1 (W.D. La. Jan. 18, 2002); *Gajadhar v. INS*, No. 2:01 Civ. 2157, at 1 (W.D. La. Jan. 2, 2002); *Benavides-Rodriguez v. Ashcroft*, No. 01 Civ. 2032, at 1 (W.D. La. Dec. 26, 2001); *Balfour v. Ashcroft*, No. CV-2:01 Civ. 1519, at 1 (W.D. La. Dec. 21, 2001); *Tavares v. Ashcroft*, No. CV-2:01 Civ. 1521, at 1 (W.D. La. Dec. 21, 2001); *Llewellyn v. Ashcroft*, CV-01-2244 (W.D. La. Jan. 22, 2002); *Gomes v. Reno*, No. CV-01 Civ. 2069, at 1 (W.D. La. Nov. 16, 2001); *Ozuru v. Reno*, No. CV-2:01 Civ. 1983, at 1 (W.D. La. Nov. 7, 2001).

<sup>39</sup> See cases cited *supra* note 38.

<sup>40</sup> See *Gelin*, No. 01 Civ. 2243, at 1 (W.D. La. Jan. 24, 2002); *Llewellyn*, No. 2:01 Civ. 2244, at 1 (W.D. La. Jan. 22, 2002); *Williams*, No. 01 Civ. 2319, at 1 (W.D. La. Jan. 18, 2002); *Gajadhar*, No. 2:01 Civ. 2157, at 1 (W.D. La. Jan. 2, 2002); *Benavides-Rodriguez*, No. 01 Civ. 2032, at 1 (W.D. La. Dec. 26, 2001); *Balfour*, No. 2:01 Civ. 1519, at 1 (W.D. La. Dec. 21, 2001); *Solis*, No. 2:01 Civ. 1732, at 1 (W.D. La. Dec. 21, 2001); *Tavares*, No. 2:01 Civ. 1521, at 1 (W.D. La. Dec. 21, 2001); *Bennett*, No. 2:01 Civ. 1747, at 1 (W.D. La. Dec. 7, 2001); *Olandan-Moore*, No. 01 Civ. 1893, at 1 (W.D. La. Dec. 7, 2001); *Riley*, No. 01 Civ. 1549, at 1 (W.D. La. Dec. 7, 2001); *Gomes*, No. 01 Civ. 2069, at 1 (W.D. La. Nov. 16, 2001); *Ozuru*, No. 2:01 Civ. 1983, at 1 (W.D. La. Nov. 7, 2001); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001); *Bettune*, No. 01 Civ. 1474, at 1 (W.D. La. Sept. 13, 2001); *Sanchez*, No. 01 Civ. 1476, at 1 (W.D. La. Sept. 13, 2001); *Rezzouq*, No. 01 Civ. 1262, at 1 (W.D. La. Sept. 7, 2001); *Bello*,

ferred to in Table 1, the district court states that INA § 242(g) bars courts from interfering with the execution of a removal order.<sup>41</sup> After concluding that there is no jurisdiction under any circumstances to issue a stay, the opinions issued during this time period generally also cited INA § 242(a)(2)(B) as making stay decisions purely discretionary and INA § 242(f) as requiring a showing that the removal order is prohibited as a matter of law.<sup>42</sup> Notably, however, these alternative grounds were often merely footnoted.<sup>43</sup>

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No. 01 Civ. 1297, at 1 (W.D. La. Aug. 7, 2001). Similar language is found in a published decision from the WDLA, issued prior to *St. Cyr*. See *Naidoo v. INS*, 39 F. Supp. 2d 755, 762 (W.D. La. 1999).

<sup>41</sup> See INA § 242(g), 8 U.S.C. § 1252(g); *Gelin*, No. 01 Civ. 1262, at 1 (W.D. La. Jan. 24, 2002); *Llewellyn*, No. 2:01 Civ. 2244, at 1 (W.D. La. Jan. 22, 2002); *Williams*, No. 01 Civ. 2319, at 1 (W.D. La. Jan. 18, 2002); *Gajadhar*, No. 2:01 Civ. 2157, at 1 (W.D. La. Jan. 2, 2002); *Benavides-Rodriguez*, No. 01 Civ. 2032, at 1 (W.D. La. Dec. 26, 2001); *Balfour*, No. 2:01 Civ. 1519, at 1 (W.D. La. Dec. 21, 2001); *Solis*, No. 2:01 Civ. 1732, at 1 (W.D. La. Dec. 21, 2001); *Tavares*, No. 2:01 Civ. 1521, at 1 (W.D. La. Dec. 21, 2001); *Bennett*, No. 2:01 Civ. 1747, at 1 (W.D. La. Dec. 7, 2001); *Olendan-Moore*, No. 01 Civ. 1893, at 1 (W.D. La. Dec. 7, 2001); *Riley*, No. 01 Civ. 1549, at 1 (W.D. La. Dec. 7, 2001); *Gomes*, No. 01 Civ. 2069, at 1 (W.D. La. Nov. 16, 2001); *Ozuru*, No. 2:01 Civ. 1983, at 1 (W.D. La. Nov. 7, 2001); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001); *Bettune*, No. 01 Civ. 1474, at 1 (W.D. La. Sept. 13, 2001); *Sanchez*, No. 01 Civ. 1476, at 1 (W.D. La. Sept. 13, 2001); *Rezzouq*, No. 01 Civ. 1262, at 1 (W.D. La. Sept. 7, 2001); *Bello*, No. 01 Civ. 1297, at 1 (W.D. La. Aug. 7, 2001).

<sup>42</sup> See INA § 242(a)(2)(B), (f), 8 U.S.C. § 1252(a)(2)(B), (f); *Gelin*, No. 01 Civ. 1262, at 1 (W.D. La. Jan. 24, 2002); *Llewellyn*, No. 2:01 Civ. 2244, at 1 (W.D. La. Jan. 22, 2002); *Williams*, No. 01 Civ. 2319, at 1 (W.D. La. Jan. 18, 2002); *Gajadhar*, No. 2:01 Civ. 2157, at 1 (W.D. La. Jan. 2, 2002); *Benavides-Rodriguez*, No. 01 Civ. 2032, at 1 (W.D. La. Dec. 26, 2001); *Balfour*, No. 2:01 Civ. 1519, at 1 (W.D. La. Dec. 21, 2001); *Solis*, No. 2:01 Civ. 1732, at 1 (W.D. La. Dec. 21, 2001); *Tavares*, No. 2:01 Civ. 1521, at 1 (W.D. La. Dec. 21, 2001); *Bennett*, No. 2:01 Civ. 1747, at 1 (W.D. La. Dec. 7, 2001); *Olendan-Moore*, No. 01 Civ. 1893, at 1 (W.D. La. Dec. 7, 2001); *Riley*, No. 01 Civ. 1549, at 1 (W.D. La. Dec. 7, 2001); *Gomes*, No. 01 Civ. 2069, at 1 (W.D. La. Nov. 16, 2001); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001); *Bettune*, No. 01 Civ. 1474, at 1 (W.D. La. Sept. 13, 2001); *Sanchez*, No. 01 Civ. 1476, at 1 (W.D. La. Sept. 13, 2001); *Rezzouq*, No. 01 Civ. 1262, at 1 (W.D. La. Sept. 7, 2001).

<sup>43</sup> See, e.g., *Gelin*, No. 01 Civ. 1262, at 1 nn.1, 2 (W.D. La. Jan. 24, 2002); *Williams*, No. 01 Civ. 2319, at 1 nn.1, 2 (W.D. La. Jan. 18, 2002); *Balfour*, No. 2:01 Civ. 1519, at 1 nn.1, 2 (W.D. La. Dec. 21, 2001); *Tavares*, No. 2:01 Civ. 1521, at 1 nn.1, 2 (W.D. La. Dec. 21, 2001); *Olendan-Moore*, No. 01 Civ. 1893, at 1 nn.1, 2 (W.D. La. Dec. 7, 2001); *Riley*, No. 01 Civ. 1549, at 1 nn.1, 2 (W.D. La. Dec. 7, 2001); *Gomes*, No. 01 Civ. 2069, at 1 nn.1, 2 (W.D. La. Nov. 16, 2001); *Jacques*, No. 01 Civ. 2160, at 1 nn.1, 2 (W.D. La. Oct. 30, 2001); *Bettune*, No. 01 Civ. 1474, at 1 nn.1, 2 (W.D. La. Sept. 13, 2001); *Sanchez*, No. 01 Civ. 1476, at 2 nn.1, 2 (W.D. La. Sept. 13, 2001); *Rezzouq*, No. 01 Civ. 1262, at 2 nn.1, 2 (W.D. La. Sept. 7, 2001). This study did not seek to assess whether stays ought to have been granted in these cases. This question turns on a number of factors, including the proper standard for the issuance of stays. According to the WDLA's stated policy, no stay would be granted regardless of the strength of the claim. See cases cited *supra* note 41.

In the more recent time period studied—cases docketed between May 1, 2003 and August 1, 2003—the WDLA judges hearing *pro se* cases from Oakdale detainees as well as cases transferred from other courts continued to reiterate the view that they lack jurisdiction to stay a removal order.<sup>44</sup> During this time period, the WDLA issued four opinions and one additional report and recommendation on stays of removal sought by Oakdale detainees.<sup>45</sup> Three of these cases involved cases transferred from other districts with a stay of removal.<sup>46</sup> Two involved stay requests adjudicated in the WDLA.<sup>47</sup> All of the opinions concluded that a habeas court has no power to issue a stay, and none stated any alternative grounds for denial.<sup>48</sup> This conclusion is found in opinions issued by both of the current judges in the Lake Charles Division of the WDLA, the court that handles all habeas petitions filed by Oakdale detainees.<sup>49</sup> In any case wherein the transferring court had issued a stay, the WDLA predictably lifted the stay.<sup>50</sup>

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<sup>44</sup> See *Andrade*, No. 2:03 Civ. 1307, at 1 (W.D. La. Aug. 25, 2003); *Byfield v. Ashcroft*, No. 2:03 Civ. 1283, at 1 (W.D. La. Aug. 14, 2003); *Telfort v. Ashcroft*, No. 2:02 Civ. 801, at 1 (W.D. La. June 23, 2003); *Roberts v. Ashcroft*, No. 03 Civ. 1115, at 2 (W.D. La. June 21, 2003) (report and recommendation); *Roberts*, No. 03 Civ. 1115 (W.D. La. Aug. 27, 2003); *Lopez-Jaramillo v. Ashcroft*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003).

<sup>45</sup> See cases cited *supra* note 44.

<sup>46</sup> *Andrade*, No. 2:03 Civ. 1307, at 1 (W.D. La. Aug. 25, 2003); *Byfield*, No. 2:03 Civ. 1283, at 1 (W.D. La. Aug. 14, 2003); *Roberts*, No. 03 Civ. 1115, at 2 (W.D. La. June 21, 2003) (report and recommendation).

<sup>47</sup> *Telfort*, No. 2:02 Civ. 801, at 1 (W.D. La. June 23, 2003); *Lopez-Jaramillo*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003). Many more petitioners might have sought a stay if the standard *pro se* habeas form indicated that it was available. The WDLA requires *pro se* petitioners to file their habeas petition on a standard form. It treats habeas filings that are not on such forms, including those in transferred cases, as “deficient pleadings.” On the standard form, there is no space to mark that one is seeking a stay nor is there any indication that the petitioner could seek a stay.

<sup>48</sup> See cases cited *supra* note 44.

<sup>49</sup> See *Andrade*, No. 2:03 Civ. 1307, at 1 (W.D. La. Aug. 25, 2003) (Trimble, J.); *Byfield v. Ashcroft*, No. 2:03 Civ. 1283, at 1 (W.D. La. Aug. 14, 2003) (Minaldi, J.); *Telfort v. Ashcroft*, No. 2:02 Civ. 801, at 1 (W.D. La. June 23, 2003) (Minaldi, J.); *Telfort*, No. 2:02 Civ. 801 (W.D. La. Aug. 27, 2003) (accepting proposed conclusions of law) (Trimble, J.); *Roberts v. Ashcroft*, No. 03 Civ. 1115, at 2 (W.D. La. June 21, 2003) (report and recommendation); *Roberts*, No. 03 Civ. 1115 (W.D. La. Aug. 27, 2003); *Lopez-Jaramillo*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003) (Minaldi, J.).

<sup>50</sup> *Andrade*, No. 2:03 Civ. 1307, at 1 (W.D. La. Aug. 25, 2003); *Byfield*, No. 2:03 Civ. 1283, at 1 (W.D. La. Aug. 14, 2003); *Roberts*, No. 2:03 Civ. 1115, at 2 (W.D. La. June 21, 2003) (report and recommendation).

The following quotation from *Lopez-Jaramillo v. Ashcroft* is exemplary.<sup>51</sup> Lopez challenged his removal on the ground that the ruling in *St. Cyr* should extend to cases in which the individual made a decision to go to trial.<sup>52</sup> With respect to his request for a stay, the court stated:

This court lacks jurisdiction to grant petitioner the relief he seeks. Title 8 U.S.C. § 1252(g) deprives federal courts of jurisdiction to entertain claims directed towards the “commencement of proceedings,” the “adjudication of cases,” or the “execution of a removal order.” *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999); *Alvidres-Reyes v. Reno*, 180 F.3d 199 (5th Cir. 1999); *Sharif v. Ashcroft*, 280 F.3d 786 (7th Cir. 2002). Petitioner’s request for a stay is directed at the Attorney General’s decision to execute petitioner’s deportation/removal order. *Sharif, supra* at 787.<sup>53</sup>

Accordingly, the court rejected the request for a stay.<sup>54</sup>

What is striking about these decisions is that they adopt a reading of INA § 242(g) that, to my knowledge, has not been advanced by the government in any case, including those cases in which the WDLA has announced that it has no power to issue a stay. In many cases, the government argued that INA § 242(f) requires clear and convincing evidence that the remand order is illegal.<sup>55</sup> But it has never, to my knowledge, argued that a habeas court has no jurisdiction to order a stay in a case that challenges the legality of the removal order itself. Furthermore, of the courts that have considered the question, a clear majority have rejected the idea that INA § 242(f) imposes such a high standard for stays, finding instead that stays of removal in habeas cases

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<sup>51</sup> See *Lopez-Jaramillo*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003).

<sup>52</sup> See *Lopez-Jaramillo*, No. 2:03 Civ. 1013 (W.D. La. July 11, 2003) (report and recommendation). Courts are divided on the issue of whether *St. Cyr* extends to cases where the detainee sought a trial, or whether it is limited to cases where the individual pleaded guilty to a deportable offense. Compare *Pommapula v. Ashcroft*, 373 F.3d 480, 494–97 (3d Cir. 2004) (extending the holding of *St. Cyr*), with *Rankine v. Reno*, 319 F.3d 93, 100–02 (2d Cir. 2003) (limiting *St. Cyr* to its facts).

<sup>53</sup> *Lopez-Jaramillo*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003).

<sup>54</sup> *Id.*

<sup>55</sup> See *Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003); *Maharaj v. Ashcroft*, 295 F.3d 963, 965 (9th Cir. 2002); *Mohammed v. Reno*, 309 F.3d 95, 98 (2d Cir. 2002); *Beijani v. INS*, 271 F.3d 670, 687 (6th Cir. 2001).

should be issued under the traditional standard for preliminary injunctions.<sup>56</sup>

The published cases the WDLA relied on in its general opinion asserting its lack of jurisdiction to issue stays all involved challenges to removal that did not question the legality of the removal itself.<sup>57</sup> For instance, in *Sharif v. Ashcroft*, the petitioners had already pursued an administrative reopening through which a stay was available.<sup>58</sup> Thus, the Seventh Circuit was not presented with a challenge to the underlying removal order, but was asked only to stay removal.<sup>59</sup> In contrast, in cases where petitioners challenged the removal itself, the Seventh Circuit has issued stays of removal.<sup>60</sup> Similarly, the Fifth Circuit found in *Alvidres-Reyes v. Reno* that it lacked jurisdiction over a suit that it construed as seeking to require commencement of proceedings against individuals eligible to apply for a suspension of deportation.<sup>61</sup> Specifically, it concluded that INA § 242(g) precluded suits that involved the commencement of proceedings.<sup>62</sup> Neither of these published opinions concerned a challenge to the legality of a removal order.<sup>63</sup>

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<sup>56</sup> Four courts of appeals have ruled that the standard for a stay is similar to the standard for a preliminary injunction. See *Arevalo*, 344 F.3d at 7 (First Circuit); *Maharaj*, 295 F.3d at 965 (Ninth Circuit); *Mohammed*, 309 F.3d at 100 (Second Circuit); *Beijani*, 271 F.3d at 687–88 (Sixth Circuit). The Court of Appeals for the Eleventh Circuit has adopted the view that a stay requires a showing of clear and convincing evidence that the removal is illegal. See *Weng v. U.S. Atty. Gen.*, 287 F.3d 1335, 1337 (11th Cir. 2002). In each of these cases, the reported decisions describe the government's position as advocating a higher standard of proof. See *Arevalo*, 344 F.3d at 7; *Maharaj*, 295 F.3d at 965; *Mohammed*, 309 F.3d at 100; *Weng*, 287 F.3d at 1337; *Beijani*, 271 F.3d at 687–88. There is, however, no suggestion that the district court lacks jurisdiction to enter a stay. See *Arevalo*, 344 F.3d at 7; *Maharaj*, 295 F.3d at 965; *Mohammed*, 309 F.3d at 100; *Weng*, 287 F.3d at 1337; *Beijani*, 271 F.3d at 687–88.

<sup>57</sup> See *Reno v. AADC*, 525 U.S. 471 (1999); *Sharif v. Ashcroft*, 280 F.3d 786, 787 (7th Cir. 2002); *Alvidres-Reyes v. Reno*, 180 F.3d 199 (5th Cir. 1999).

<sup>58</sup> See *Sharif*, 280 F.3d at 788 (holding that an administrative basis existed for issuing a stay).

<sup>59</sup> See *id.* at 787. These factors distinguish the *Sharif* case from a typical habeas case that challenges the legality of a removal order. Even in situations where the petitioner is only seeking a stay, however, other courts have recognized the power of courts to enter stays where necessary to preserve their jurisdiction. See, e.g., *Michael v. INS*, 48 F.3d 657, 663–64 (2d Cir. 1994).

<sup>60</sup> See *Arevalo*, 344 F.3d at 7 (citing unpublished opinion of the Seventh Circuit).

<sup>61</sup> *Alvidres-Reyes*, 180 F.3d at 205–06 (5th Cir. 1999).

<sup>62</sup> See *id.* at 206.

<sup>63</sup> See *id.* at 205; *Sharif*, 280 F.3d at 787. The WDLA decisions also cite to *Reno v. AADC*, 525 U.S. 471 (1999). See, e.g., *Andrade v. Ashcroft*, No. 2:03 Civ. 1307, at 1 (W.D. La. Aug.

The WDLA also relies on an unpublished opinion issued in 2003 by the Fifth Circuit, *Idokogi v. Ashcroft*.<sup>64</sup> The petitioner challenged his removal on several bases, including a claim that he was not convicted of an aggravated felony, and that he was therefore eligible for a hearing on the cancellation of removal.<sup>65</sup> In this way, Idokogi's claim resembled Enrico St. Cyr's claim, as both petitioners alleged that they had been denied an opportunity for a hearing on relief from removal.<sup>66</sup> Idokogi filed his case originally in the Eastern District of New York, where the court concluded that the case should be transferred to the WDLA because Idokogi lacked ties to its jurisdiction.<sup>67</sup> The court transferred the case with a stay, which the WDLA promptly vacated.<sup>68</sup> On appeal, the Fifth Circuit affirmed the decision in an unpublished opinion.<sup>69</sup> The panel acknowledged that the legal issue in the case was whether the petitioner was properly classified as an "aggravated felon," a classification that would render him ineligible for cancellation of removal.<sup>70</sup> Nonetheless, the panel stated that "the relief sought by Idokogi is connected 'directly and immediately' with the Attorney General's decision to commence removal proceedings against him . . . . The district court therefore correctly determined that it lacked jurisdiction to stay the order of removal."<sup>71</sup> In subsequent decisions, the WDLA district court has read this statement from a nonprecedential unpublished opinion as endorsing its view that removal orders cannot be stayed.<sup>72</sup>

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25, 2003); *Byfield v. Ashcroft*, No. 2:03 Civ. 1283, at 1 (W.D. La. Aug. 14, 2003); *Telfort v. Ashcroft*, No. 2:02 Civ. 801, at 1 (W.D. La. June 23, 2003); *Lopez-Jaramillo v. Ashcroft*, No. 2:03 Civ. 1013, at 1 (W.D. La. July 17, 2003) The *AADC* court, however, drew a sharp distinction between its power when asked to review a discretionary decision to commence removal proceedings and its powers when asked to review the outcome of those proceedings. See 525 U.S. at 486–88. Nothing in *AADC* suggests that the removal order itself cannot be reviewed. See *id.*

<sup>64</sup> See, e.g., *Andrade*, No. 03 Civ. 1307; *Byfield*, No. 03 Civ. 1283.

<sup>65</sup> See *Idokogi v. Ashcroft*, No. 02-30553, at 1 (5th Cir. 2003) (per curiam).

<sup>66</sup> See *id.* at 1, 2; *St. Cyr*; 533 U.S. at 293.

<sup>67</sup> See Docket Proceedings at 3, *Idokogi v. Ashcroft*, No. 02 Civ. 205, PACER v.2.3a-WDLA (docket as of Aug. 28, 2003).

<sup>68</sup> See *Idokogi*, No. 02-30553, at 1.

<sup>69</sup> See *id.* at 3.

<sup>70</sup> *Id.* at 1; INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

<sup>71</sup> *Idokogi*, No. 02-30553, at 2–3.

<sup>72</sup> See, e.g., *Andrade v. Ashcroft*, No. 2:03 Civ. 1307 (W.D. La. Aug. 15, 2003).

Once stays are denied or lifted, a petitioner may be deported prior to the adjudication of his or her habeas case, and the case may be dismissed for failure to prosecute.<sup>73</sup> Often, the last entry on the docket sheet discloses that mail has been returned to the court because the petitioner is no longer at the Oakdale facility.<sup>74</sup> In some cases, the entry specifically states that the person was removed or deported.<sup>75</sup>

No evidence in any of the cases suggests that the transferring court was aware the WDLA's refusal to grant stays, or that the government attorneys informed the court of this practice. Indeed, the WDLA's standard practice starkly contrasts with the norms regarding stays as understood by many transferring courts. In the District of Connecticut, for example, the court has noted the procedures instituted by the local United States Attorney's Office that assure the court of notification of potential deportation of a person seeking a stay, even if the court has yet to rule on the stay.<sup>76</sup> That court plainly presumes that there will be an adjudication on the merits of stay requests.<sup>77</sup> Similarly, in the Southern District of New York, *pro se* cases of Oakdale detainees in the study were typically transferred with stays by the Chief Judge's order, with a proviso allowing the government to seek vacatur of the stay for good cause shown.<sup>78</sup> This mechanism was designed to assure an adjudication on the merits of a stay request.<sup>79</sup> Once transferred to the WDLA, however, the stay is vacated *sua sponte* by the WDLA based on its absolute position that jurisdiction to issue a stay is never present.<sup>80</sup> The Southern

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<sup>73</sup> See, e.g., Docket Proceedings at 3–4, *Roberts v. Ashcroft*, No. 03 Civ. 1115, PACER v2.3a-WDLA (Sept. 9, 2003); Docket Proceedings at 3, *Jacques v. Ashcroft*, No. 01 Civ. 2160, PACER v2.3a-WDLA (Nov. 6, 2002).

<sup>74</sup> See sources cited *supra* note 73.

<sup>75</sup> See sources cited *supra* note 73.

<sup>76</sup> See *Dennis v. INS*, No. 301CV279SRU, 2002 WL 295100, at \*2 (D. Conn. Feb. 19, 2002); *Fuller v. INS*, 144 F. Supp. 2d 72, 75 (D. Conn. 2000).

<sup>77</sup> See *Fuller*, 144 F. Supp. 2d at 79.

<sup>78</sup> See, e.g., *Byfield v. Ashcroft*, No. 03 Civ. 4666, at 1 (S.D.N.Y. July 3, 2003) (renumbered No. 2:03 Civ. 1283).

<sup>79</sup> See *Smabaly v. Ashcroft*, No. 02 Civ. 9353, 2002 WL 31729591, at \*1 (S.D.N.Y. Dec. 3, 2002) (issuing a stay to preserve the court's jurisdiction).

<sup>80</sup> In the six months following *St. Cyr*, the Southern District of New York transferred several cases with stays to the WDLA. See, e.g., *Solis v. Ashcroft*, No. 2:01 Civ. 1732, at 1 (W.D. La. Dec. 21, 2001); *Bennett v. Ashcroft*, No. 2:01 Civ. 1747, at 1 (W.D. La. Dec. 7, 2001); *Riley v. Ashcroft*, No. 01 Civ. 1549, at 1 (W.D. La. Dec. 7, 2001); *Sanchez v. Ashcroft*, No. 01 Civ. 1476, at 1 (W.D. La. Sept. 13, 2001). Four stays were vacated *sua sponte*. See *Solis*, No. 2:01 Civ. 1732, at 1; *Bennett*, No. 2:01 Civ. 1747, at 1; *Riley*, No. 01 Civ. 1549, at 1; *Sanchez*, No. 01 Civ. 1476, at 1.

District has now altered its practice of *sua sponte* transfers and now refers such cases to individual judges.<sup>81</sup>

The consequences of the WDLA's practice are illustrated by a case transferred from the U.S. District Court for the District of Connecticut. In *Jacques v. Ashcroft*, a Connecticut resident filed a habeas petition in the District of Connecticut shortly after the *St. Cyr* decision, based on the denial of eligibility for relief under section 212(c) of the INA, a claim of derivative citizenship and other claims regarding eligibility for relief from removal.<sup>82</sup> The District of Connecticut stayed removal.<sup>83</sup> In response, the government sought transfer of the case to the WDLA.<sup>84</sup> It acknowledged that Jacques had a legitimate claim for INA § 212(c) relief, because his removal order was based on a plea that pre-dated the 1996 changes in the immigration laws.<sup>85</sup> The government argued, however, that the case should be transferred to WDLA because Jacques was detained in the Oakdale facility.<sup>86</sup> The district judge transferred the case, stating that on transfer, any remanded proceeding could consider the citizenship claim.<sup>87</sup> Five days

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<sup>81</sup> Interview with James C. Francis IV, Magistrate Judge for the Southern District of New York (Oct. 8, 2004).

<sup>82</sup> See *St. Cyr*, 533 U.S. at 289; Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief and Stay of Deportation at 4–10, *Jacques v. Ashcroft*, No. 3:01 Civ. 958 (filed D. Conn. May 25, 2001; renumbered No. 01 Civ. 2160). According to the papers in the case, Jacques came to the United States at the age of five and was raised in Stamford, Connecticut by his father and stepmother. Letter Re: Emergency Stay of Deportation at 1, *Jacques* (received D. Conn. June 19, 2001) (No. 3:01 Civ. 958; renumbered No. 01 Civ. 2160). His father naturalized when he was ten. *Id.* Jacques had filed two prior habeas petitions, one in Connecticut and one in the WDLA. See Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief and Stay of Deportation at 4–10, *Jacques* (W.D. La. Oct. 30, 2001) (No. 01 Civ. 2160). The Connecticut petition was transferred to the WDLA. See *id.* In both cases, the WDLA dismissed the case following the Fifth Circuit's pre-*St. Cyr* rule that there was no habeas jurisdiction for those persons barred by state from pursuing a petition for review in the court of appeals. See *Max-George v. Reno*, 205 F.3d 197 (5th Cir. 2000), *vacated and remanded*, 533 U.S. 945 (2001) (articulating the pre-*St. Cyr* rule); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001) (dismissing first habeas petition); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Jan. 28, 2002) (dismissing second habeas petition).

<sup>83</sup> See *Jacques*, No. 2:01 Civ. 875, at 1 (W.D. La. May 11, 2001) (renumbered No. 01 Civ. 2160) (vacating stay issued by transferring court).

<sup>84</sup> Response to Court Order to Show Cause at 1, *Jacques* (W.D. La. May 24, 2002) (No. 01 Civ. 2160).

<sup>85</sup> See *id.* at 4.

<sup>86</sup> *Id.* at 1–3.

<sup>87</sup> See *Jacques*, No. 3:01 Civ. 958, at 1 (D. Conn. Sept. 26, 2001) (renumbered No. 01 Civ. 2160) (ordering transfer).

later, the WDLA vacated the stay in accordance with its position that no jurisdiction exists to grant stays in habeas petitions.<sup>88</sup> The WDLA later dismissed the citizenship claim with prejudice, stating that it should have been pursued in a petition for review to the court of appeals.<sup>89</sup> Regarding the INA § 212(c) claim, the WDLA concluded that the petitioner should seek to reopen before the Board of Immigration Appeals (BIA).<sup>90</sup> It therefore dismissed that claim as well.<sup>91</sup> Jacques, who, despite the vacatur of the stay, had not yet been deported, filed a motion to reopen, which the BIA denied.<sup>92</sup> Jacques then filed a supplemental pleading in the district court.<sup>93</sup> The court rejected it on the ground that the case was closed.<sup>94</sup> According to the docket sheet, Jacques was removed before he received notice of the court's rejection of his last pleading.<sup>95</sup>

Had the Connecticut district court known that the WDLA would summarily vacate the stay and then dismiss rather than remand the case, it might have retained jurisdiction to assure that Jacques received a hearing on the merits of his claims.<sup>96</sup> Indeed, given the government's position in its papers filed in the district court in Connecticut, the transferring court likely presumed that there would be a stipulated remand, and that the only question was which court would "so order" the remand.<sup>97</sup> Instead, Jacques lost the protection of the stay and was deported without an adjudication of either his claim of citizenship or his claim for relief under INA § 212(c).<sup>98</sup>

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<sup>88</sup> See *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001) (denying motion for stay).

<sup>89</sup> *Jacques*, No. 01 Civ. 2160, at 2 (W.D. La. Dec. 26, 2001) (report and recommendation).

<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.*; *Jacques*, No. 01 Civ. 2160 (W.D. La. Jan. 28, 2002).

<sup>92</sup> Information on the BIA motion was obtained through the BIA case information phone number.

<sup>93</sup> See *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. May 24, 2002).

<sup>94</sup> *Id.*

<sup>95</sup> See Docket Proceedings at 3, *Jacques*, No. 01 Civ. 2160, PACER v2.3a-WDLA (W.D. La. Nov. 6, 2002).

<sup>96</sup> See *Jacques*, No. 01 Civ. 958, at 1 (D. Conn. Oct. 16, 2001) (renumbered No. 01 Civ. 2160) (ordering transfer).

<sup>97</sup> See Response to Court's Order to Show Cause at 5, *Jacques* (No. 01 Civ. 958) (renumbered No. 01 Civ. 2160).

<sup>98</sup> See *Jacques*, No. 01 Civ. 2160, at 3, 5 (W.D. La. Dec. 26, 2001) (report and recommendation); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Jan. 28, 2002).

In another case, *Roberts v. Ashcroft*, the petitioner claimed that he was born in St. Thomas and was therefore a United States citizen and not subject to deportation.<sup>99</sup> Roberts filed his habeas petition in Washington, D.C., and asserted that venue was proper in that district because it was his place of residence.<sup>100</sup> The government, however, sought transfer of the case to the WDLA, where the petitioner was detained.<sup>101</sup> The government opposed a stay, but stated that it had been informed that deportation would not happen for sixty days; it asserted as well that if a plan to deport Roberts materialized, the government would notify the transferee court.<sup>102</sup> No mention was made of the WDLA's practice of denying stays, which rendered such notice meaningless.<sup>103</sup> The U.S. District Court for the District of Columbia transferred the case to the WDLA and ordered a stay of deportation.<sup>104</sup> Following transfer, the magistrate judge in the WDLA recommended dismissal on the ground that the proper court was not the habeas court but rather the court of appeals through a petition for review.<sup>105</sup> He also recommended vacatur of the stay.<sup>106</sup> Upon this recommendation, the petitioner abandoned his legal battle and was deported despite his citizenship claim.<sup>107</sup>

Had the D.C. district court known that the WDLA would view itself as lacking jurisdiction over the citizenship claim, perhaps it would have retained the case or transferred it to another court that would exercise jurisdiction. Indeed, the D.C. district court likely assumed that the transferee court would be similarly concerned with assuring an adjudication of the merits of a claim of citizenship and, if necessary, would

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<sup>99</sup> Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus and With Stay of Deportation Until Final Decision at 5, *Roberts v. Ashcroft*, No. 02 Civ. 2171 (D.D.C. Nov. 5, 2002) (renumbered No. 03 Civ. 1115).

<sup>100</sup> *Id.* at 2.

<sup>101</sup> United States' Opposition to Petition to Stay Deportation at 1–2, *Roberts*, No. 02 Civ. 2171 (D.D.C. June 6, 2003) (renumbered No. 03 Civ. 1115).

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See Roberts*, No. 03 Civ. 1115, at 1 (W.D. La. July 21, 2003) (report and recommendation).

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.*

<sup>107</sup> *See* Docket Proceedings at 3, *Roberts*, No. 03 Civ. 1115, PACER v2.3a-WDLA (Sept. 9, 2003).

transfer the case again with a stay.<sup>108</sup> But the WDLA saw no need to assure that any court would adjudicate the merits of the case.<sup>109</sup>

## II. ZALAWADIA AND THE CONSEQUENCES OF STAY DENIALS

Without a stay, Oakdale detainees with cases in the Western District of Louisiana are subject to deportation prior to the adjudication of their cases.<sup>110</sup> In many cases, the last entry on the docket simply states that mail from the court was returned stamped “removed.”<sup>111</sup> Those contesting their deportation, generally without counsel or resources, appear simply to have given up.

In a few rare cases, detainees have been represented by counsel who continued to argue their cases even after deportation. Once such detainee was Jaysukh Zalawadia, who received no stay and continued to challenge his removal after he had been deported.<sup>112</sup> Zalawadia was represented by the same counsel who represented some of the individuals in the consolidated cases heard in *St. Cyr*.<sup>113</sup> Zalawadia’s counsel petitioned for writ of certiorari and continued to represent him after his case was remanded to the lower courts.<sup>114</sup> Ultimately, the Fifth Circuit ruled that Zalawadia should have had a hearing on the equities of his case prior to his deportation.<sup>115</sup> But because he had been deported, the court ruled that it would only vacate the removal

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<sup>108</sup> There is a division of authority on whether a habeas court can entertain claims of citizenship and nationality. Compare *Lee v. Ashcroft*, No. 01 CV. 0997, 2003 WL 21310247, at \*6 (E.D.N.Y. May 27, 2003) (finding district court jurisdiction), with *Marquez-Almanzar v. Ashcroft*, No. 03 Civ. 1601, 2003 WL 21283418, at \*2 (S.D.N.Y. June 03, 2003) (finding no district court jurisdiction and transferring to the Second Circuit). Those courts that view the court of appeals as the proper jurisdiction frequently transfer cases to that court when there is a citizenship question. See, e.g., *Marquez-Almanzar*, 2003 WL 21283418, at \*7; *Alvarez-Garcia v. INS*, 234 F. Supp. 2d 283, 290 (S.D.N.Y. 2002); see also *Andrade v. Ashcroft*, 270 F. Supp. 2d 344, 346 (E.D.N.Y. 2003) (stating expectation that the WDLA would determine whether transfer of a citizenship claim was appropriate).

<sup>109</sup> See *Roberts*, No. 03 Civ. 1115, at 2 (W.D. La. July 21, 2003) (report and recommendation).

<sup>110</sup> See sources cited *supra* note 73.

<sup>111</sup> See, e.g., Docket Proceedings at 3, *Jacques*, No. 01 Civ. 2160, PACER v2.3a-WDLA (docket as of Nov. 6, 2002).

<sup>112</sup> *Zalawadia v. Ashcroft*, 371 F.3d 292, 296 (5th Cir. 2004).

<sup>113</sup> See *id.* at 293. The law firm of Bretz and Coven, LLP represented the petitioners in *Calcano-Martinez*, which was consolidated with *St. Cyr*.

<sup>114</sup> See *Zalawadia*, 371 F.3d at 296.

<sup>115</sup> *Id.* at 301.

order and would not order *Zalawadia's* return or the provision of a new hearing.<sup>116</sup>

*Zalawadia* underscores the critical role that stays play. Without a stay, a noncitizen faces not just deportation but lack of access to a practical remedy for the deportation.<sup>117</sup> Those who had stays when *St. Cyr* was decided received the benefit of that decision.<sup>118</sup> Those who did not and were deported, at least in the Fifth Circuit, will not obtain relief.<sup>119</sup> Of course, powerful arguments refute *Zalawadia's* broad language. The general habeas statute provides that the court “may dispose of the matter as law and justice requires.”<sup>120</sup> Where the challenge is to the removal order, it seems fairly obvious that the broad power to do as “law and justice require” includes a remedy to the removal itself.<sup>121</sup> But even if the Fifth Circuit retreats from the broad language of the *Zalawadia* opinion, Oakdale detainees who are transferred to the Western District of Louisiana presently face a district court that, as a matter of policy, vacates stays and then refuses to provide adequate relief even for those who continue to fight their cases from abroad.<sup>122</sup>

### III. IMPLICATIONS OF STAY PRACTICES FOR CHOOSING AN APPROPRIATE FORUM

The study of transferred cases shows that district courts should understand that when they transfer a case of an Oakdale detainee to the WDLA, they are basically allowing the government to deport that individual without the possibility of a stay and without the possibility

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<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See* *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

<sup>119</sup> *See, e.g., Zalawadia*, 371 F.3d at 296.

<sup>120</sup> 28 U.S.C. § 2243 (2000).

<sup>121</sup> *See id.* The *Zalawadia* court makes several errors in its analysis. First, it assumes that limits on the scope of review translate into limits on the remedial power of the court. *See Zalawadia*, 371 F.3d at 300. The fact that habeas courts are limited in the kinds of issues they can address, however, has no particular implication for what they can do once they find a violation. Second, the *Zalawadia* court makes the mistake of assuming that jurisdiction for a person who is no longer in physical custody is dependent on collateral consequences. *See id.* Collateral consequences may be enough to keep jurisdiction, but they are not the only restraints on liberty that give rise to habeas jurisdiction. Since habeas serves as a method to review the legality of the removal order, it is the removal order itself that is properly at issue, and for which the court can issue a remedy. *See Morawetz, supra* note 28, at 10.

<sup>122</sup> *See supra* note 24.

of a judicial remedy requiring that person's return. The question is: does this matter? Do the consequences of the transfer have any bearing on what courts should do?

After *Padilla*, there can be little question that it does matter. *Padilla* makes it clear that rules for choosing the forum in habeas challenges are not a matter of subject matter jurisdiction.<sup>123</sup> Instead they are matters of convention in which an "immediate custodian" rule has emerged for core cases that are simple challenges to physical custody.<sup>124</sup> The cases of Oakdale detainees illustrate how far immigration challenges are from "core challenges" to present physical custody and how great the danger is of distorting the rule of law through mindless application of an "immediate custodian" rule.<sup>125</sup> For Oakdale detainees, courts applying a version of the immediate custodian rule have sent cases to be heard by the court with the least connection to the case.<sup>126</sup> The Western District of Louisiana's physical connection to the detainee is, at most, happenstance. Its practices seek to sever that physical relationship from the start by failing to do anything to prevent deportation pending resolution of the case.<sup>127</sup> Meanwhile, allowing the government to achieve this result through detention in Louisiana provides the Executive with the frightening power to choose a court that will prevent the petitioner from obtaining relief. Hopefully, the greater message of the triumvirate of cases announced in June 2004—namely that no government is above the law—will prevent procedural rules that provide such insulation from judicial scrutiny.<sup>128</sup>

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<sup>123</sup> See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2724 (2004).

<sup>124</sup> See *id.* at 2718, 2724.

<sup>125</sup> See, e.g., *Jacques v. Ashcroft*, No. 3:01 Civ. 958 (D. Conn. Sept. 26, 2003) (renumbered No. 01 Civ. 2160) (ordering transfer); *Roberts v. Ashcroft*, No. 03 Civ. 1115, at 1 (W.D. La. July 21, 2003) (report and recommendation); *Jacques*, No. 01 Civ. 2160, at 3, 5 (W.D. La. Dec. 26, 2001) (report and recommendation); see also sources cited *supra* note 73.

<sup>126</sup> See, e.g., *Lopez-Jaramillo v. Ashcroft*, No. 02 Civ. 0205, at 3 (N.D. Ga. May 22, 2003) (renumbered No. 2:03 Civ. 1013) (ordering transfer); *Jacques*, No. 01 Civ. 958, at 1 (D. Conn. Oct. 16, 2001) (renumbered No. 01 Civ. 2160) (ordering transfer).

<sup>127</sup> See, e.g., *Roberts v. Ashcroft*, No. 03 Civ. 1115, at 1 (W.D. La. July 21, 2003) (report and recommendation); *Jacques v. Ashcroft*, No. 01 Civ. 2160, at 3, 5 (W.D. La. Dec. 26, 2001) (report and recommendation); Docket Proceedings at 4, *Roberts*, No. 03 Civ. 1115, PACER v2.3a-WDLA (docket as of Sept. 9, 2003); Docket Proceedings at 3, *Jacques*, No. 01 Civ. 2160, PACER v2.3a-WDLA (docket as of Nov. 6, 2002).

<sup>128</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (denying U.S. government attempts to limit degree to which habeas courts can review claims brought by U.S. citizens held as "enemy combatants"); *Rasul v. Bush*, 124 S. Ct. 2686, 2688–89 (2004) (rejecting

Outside of the immigration field, the experience of the Oakdale detainees should serve as a sober reminder of the degree to which substantive protection from illegal government action depends not just on substantive judicial rulings, but also on the procedural rules that will determine whether courts ever reach the merits of a case and will have the power to remedy legal wrongs. Padilla-like rules, which allow the government to choose the court that will review the legality of controversial government policies, lend themselves to abuse.<sup>129</sup> They provide an easy means for government forum shopping that limits judicial scrutiny. Whether or not the Oakdale experience is the product of a conscious effort to choose a forum that would deprive access to a fair ruling on the merits, or the happenstance of government detention policies that had no connection to efforts to secure a litigation advantage, the result is clear. When it is able to compel litigation in the Western District of Louisiana, the government—whose powers the writ of habeas corpus is designed to limit—has access to a court that views itself as largely without power. These experiences should not be repeated.

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U.S. government argument that detainees held in Guantanamo Bay, Cuba cannot bring habeas corpus claims to challenge their detention); *Padilla*, 124 S. Ct. at, 2717 (acknowledging the Second Circuit's analysis of limits on executive power, but not reaching the merits for lack of jurisdiction).

<sup>129</sup> See *Padilla*, 124 S. Ct. at 2718 (discussing immediate custodian rule); *Jacques*, No. 3:01 Civ. 958 (D. Conn. Sept. 26, 2003) (renumbered No. 01 Civ. 2160) (ordering transfer); *Jacques*, No. 01 Civ. 2160, at 1 (W.D. La. Oct. 30, 2001) (denying stay for lack of jurisdiction); *Roberts*, No. 03 Civ. 1115, at 1 (W.D. La. July 21, 2003) (report and recommendation) (denying stay for lack of jurisdiction); Docket Proceedings at 4, *Roberts*, No. 03 Civ. 1115, PACER v2.3a-WDLA (docket as of Sept. 9, 2003) (indicating deportation of petitioner); Docket Proceedings at 3, *Jacques*, No. 01 Civ. 2160, PACER v2.3a-WDLA (docket as of Nov. 6, 2002) (indicating removal of petitioner).

