



COURT
YORK

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JERRY ARIAS-AGRAMONTE,

Petitioner,

- against -

COMMISSIONER OF INS,

Respondent.

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00 Civ. 2412 (RWS)

O P I N I O N

A P P E A R A N C E S:

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Sweet, D.J.,

Petitioner Jerry Arias-Agramonte ("Arias") seeks leave to amend both the caption of his habeas corpus petition and this Court's judgment granting the writ by adding Attorney General Janet Reno ("Reno") as a second respondent, pursuant to Fed. R. Civ. P., Rules 59(e) and 19(a). For the reasons discussed below, the motion is granted.

Background and Prior Proceedings

The facts and prior proceedings of this case have been set forth in a prior opinion, Arias-Agramonte v. Commissioner of INS, No. 00 Civ. 2412, 2000 WL 1059678 (Aug. 1, 2000), familiarity with which is assumed.

In brief, the prior opinion found personal jurisdiction over the named respondent, the Commissioner of the Immigration and Naturalization Service (the "INS Commissioner"), and granted the writ, thereby restoring the decision of an Immigration Judge ("IJ") to grant Arias discretionary relief from deportation under former section 212(c) of the Immigration and Nationality Act of 1952 ("INA") (subsequently amended in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110

Stat. 3009-546 et seq. (1996)). The opinion noted in passing that United States Attorney General Janet Reno would be a proper respondent for the same reasons the Commissioner had been found to be a proper respondent subject to the personal jurisdiction of this Court. 2000 WL 1059678, at *7 n.6.

On August 8, 2000, less than ten days after the writ was issued, Arias brought the instant motion to add the Attorney General as a party. The Assistant United States Attorney responded, stating that the Government opposed adding Reno as a party for the same reasons advanced with respect to the Commissioner in its prior submission. The motion was deemed fully submitted on August 30, 2000.

On September 29, 2000, the Commissioner appealed the judgment granting the writ of habeas corpus. That appeal is pending. See Commissioner of INS v. Arias-Agramonte, No. 00-2595 (2d Cir. filed Sept. 29, 2000).

Discussion

I. This Court Has Jurisdiction Over the Instant Motion

Although the appeal of the judgment granting the writ of habeas corpus has already been filed in the Second Circuit, this Court retains jurisdiction to resolve the instant motion.

Although a timely appeal divests district courts of jurisdiction once a final judgment has been entered, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), Rule 59(e), Fed. R. Civ. P., allows parties ten days from the entry of judgment to file a motion in the district court to amend or alter, see Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397, 401 (2d Cir. 2000). Where a notice of appeal has been filed before the disposition of a timely Rule 59 motion, "the notice becomes effective to appeal a judgment . . . when the order disposing of the [Rule 59] motion is entered." Fed. R. App. P. 4(a)(4)(B)(i); see Mendes Junior Int'l Co. v. Banco do Brasil, S.A., 215 F.3d 306, 312 (2d Cir. 2000). Thus, as Arias filed this Rule 59 motion five days from the date judgment was entered, the motion is timely and this Court retains jurisdiction to decide it.

II. The Complaint and Judgment Will Be Amended

A. The Federal Rules of Civil Procedure Provide the Authority to Add a Respondent to a Habeas Corpus Petition After the Entry of Judgment

Arias brings this motion pursuant to Federal Rules of Civil Procedure ("FRCP") Rules 19(a) and 59(e).¹ See Rules Governing Section § 2254 Cases in the United States District Courts Rule 10 (Supp. 2000) (FRCP applies to habeas cases). Whether to grant a motion to amend a judgment is "discretionary" and may be granted if justice so requires. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (citing Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.), cert. denied, 506 U.S. 820, 113 S.Ct. 67, 121 L.Ed.2d 34 (1992)).

Rule 19 is more typically used defensively, as a mechanism through which to seek a dismissal for failure to join an indispensable party, and is rarely, if ever, employed to add parties after judgment has been entered. Adding the Attorney General as a second respondent would have no effect on the traditional venue analysis set forth in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 493, 93 S. Ct. 1123, 1128-

¹ Rule 19(a) provides in relevant part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties ... If the person has not been so joined, the court shall order that the person be made a party... If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 19(a), Fed. R. Civ. P. Rule 59(e) provides that "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. Rule 59(e).

29, 35 L. Ed.2d 443 (1973).² See Arias-Agramonte, 2000 WL 1059678, at *9 (applying the test with respect to the INS Commissioner). However, it is unclear whether Attorney General is "indispensable" to this action. The answer to this question turns on the Second Circuit's forthcoming decision as to whether the named respondent, the INS Commissioner, is a proper respondent in an alien's habeas petition. See id., 2000 WL 1059678, at *7 n.6 (noting that the Second Circuit has never before ruled on whether the INS Commissioner is a proper respondent in an alien's habeas petition).

Arias's motion will be construed as arising under Rules 15 and 21,³ which more appropriately govern adding a party under the circumstances presented in this case. Whether to grant such a motion is within the discretion of the district court. See Foman

² The Braden test requires courts to consider "(1) the location where the material events took place, (2) where records and witnesses pertinent to the claim are likely to be found, (3) the convenience of the forum for respondent and the petitioner, and (4) the familiarity of the court with the applicable laws." Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (citing Braden, 410 U.S. at 493-94, 93 S. Ct. at 1128-29).

³ Rule 15 provides in relevant part: "the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3).

Rule 21 provides in relevant part that "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Fed. R. Civ. P. 21.

v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

Leave to amend a complaint under Rule 15(a) "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A Rule 15 motion is appropriate when filed after judgment has been entered where, as here, the petitioner has filed a Rule 59 motion. See Sparrow v. Heller, 116 F.3d 204, 205 (7th Cir. 1997) (holding that Rule 15 motion to amend complaint may be made once Rule 59 motion has been filed and the case reopened); Lindauer v. Rogers, 91 F.3d 1355, 1357 (9th Cir. 1996) (same); Firestone, 76 F.3d at 1208 (same).

1. The Attorney General Was on Notice

In this case, Reno had notice that the action had been instituted because process was delivered to United States Attorney's office, and to Reno's subordinate, the INS Commissioner. See Fed. R. Civ. P. 15(c) (stating that an amendment changing a party relates back to the date of the original pleading if the party being added is a federal officer and process was timely served on the United States Attorney or her designee); 8 C.F.R. §§ 2.1, 100.2; Jean v. Nelson, 727 F.2d 957, 966 n.7 (11th Cir. 1984) ("[i]n practice, the Attorney General's authority is delegated to

the Commissioner of the INS") (citing 2 K. Davis, Administrative Law Treatise § 8:10 (2d ed. 1979).

Notice of allegations against proposed defendants may be imputed to them through a shared attorney if the attorney knew or should have known that but for a mistake concerning the identity of the proper party, the proposed defendants would be added. See Gleason v. McBride, 869 F.2d 688, 693 (2d Cir. 1989); Hutnik v. Security Messenger Serv., Inc., No. 89 Civ. 6481, 1999 WL 619592, at *6 (S.D.N.Y. Aug. 16, 1999)(MBM); Byrd v. Abate, 964 F. Supp. 140, 146 (S.D.N.Y. 1997). Here, the same Assistant United States Attorney acting as counsel for the Commissioner has responded to the instant motion on behalf of Reno, who, but for the petitioner's mistake, would have been named as a respondent when the petition was filed. Thus, Reno is considered to have been on notice of the pendency of this action (and the likelihood that she would be named) since the petition was originally filed, and her addition will relate back to the time of service. Fed. R. Civ. P. 15(c)(3).

Finally, the grounds raised in opposition to this motion are the same as those raised in an earlier submission with respect to the Commissioner. (See Rspd't Letter Response of Aug. 21, 2000; Rspd't Letter of April 24, 2000 (Document 9).) This factor, combined with their common representation and the close agency relationship between the Attorney General and INS Commissioner in

such matters, see 8 C.F.R. § 2.1, establishes that Reno and the Commissioner have an "identity of interests" such that the Commissioner's defense to this action is necessarily identical to Reno's. See Viking Industrial Security, Inc. v. National Labor Relations Board, 225 F.3d 131, 134 (2d Cir. 2000) ("Only where there is an identity between the charged party and a later added party can it be said that the newly added party has had notice and an opportunity to contest the charge.") (citation and internal quotations omitted); Wilson v. United States Government, 23 F.3d 559, 563 n.6 (1st Cir. 1994) ("the institution of the action serves as constructive notice of the action to the parties added [later] . . . when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced.") (citation and internal quotations omitted).

2. The Attorney General Will Suffer No Prejudice

The Government has not alleged that the Attorney General will suffer prejudice from being added to the case at this time. In fact, no prejudice will arise from adding her as a second respondent in this habeas case granting relief from deportation, unlike the sort of case in which a private individual is added as a defendant after a monetary judgment has already been entered for

the plaintiff. By providing more lenient government notice rules, Rule 15(c) recognizes the qualitative difference between private actions and cases involving federal officials acting in their official capacities. See Fed. R. Civ. P. 15(c). The Government notice provision in Rule 15 "renders "[m]istakes in naming parties . . . far less likely to have drastic consequences in official rather than individual capacity actions." Delgado-Brunet v. Clark, 93 F.3d 339, 344 (7th Cir. 1996). Cf. Nelson v. Adams USA, Inc., --- U.S. ----, 120 S. Ct. 1579, 1583, 1585, 146 L. Ed.2d 530 (2000) (holding that adding a private party after judgment impermissibly afforded the plaintiff the power "to reach beyond [the existing defendant's] corporate till into [the plaintiff's] personal pocket" in violation of due process).

Although the Supreme Court warned in Nelson that "judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords ever party against whom a claim is stated," id., 120 S. Ct. 1587, the Attorney General has already had the opportunity to defend this action through the submissions of her subordinate, the INS Commissioner, see, e.g., 8 C.F.R. §§ 100.2(e) and 212.5, through their common counsel. The Attorney General is not prejudiced under these circumstances.

3. The Interests of Justice Require the Attorney General to be Added

Finally, like Rule 15, Rule 21 allows a district court to add a party "at any stage of the action and on such terms as are just," in the court's discretion. Fed. R. Civ. P. 21; see Mullaney v. Anderson, 342 U.S. 415, 417, 72 S. Ct. 428, 96 L. Ed. 458 (1952) (granting petitioner's Rule 21 motion to add parties to the Supreme Court proceedings, in order to avert "needless waste" that would arise from dismissing the petition and forcing the petitioner to begin anew). The Government has not raised any procedural grounds for opposing this motion. As stated above, if the Attorney General were not added and the Second Circuit held that the Court did not have personal jurisdiction over the INS Commissioner, Arias would have no avenue of relief here and would have to refile in Pennsylvania, a "needless waste" of resources for all involved. See Mullaney, 342 U.S. at 417. Arias endured 21 months in custody as his case made its way through the administrative process and on to this Court. The IJ first granted Arias 212(c) relief over a year ago, on July 9, 1999. Justice would not be served by the additional delay involved in refiling in another jurisdiction. Given the compelling facts of his case as set forth in the prior opinion, justice requires that the Attorney General be added as a second respondent.

In sum, it makes little difference which Rule the Court applies. See Clarke v. Fonix Corp., 98 CIV. 6116, 1999 WL 105031, at *6 (S.D.N.Y. March 1, 1999) ("Although Rule 21, and not Rule 15(a) normally governs the addition of new parties to an action, the same standard of liberality applies under either Rule.") (internal quotation marks and citation omitted), aff'd without published opinion, 199 F.3d 1321 (2d Cir. 1999). Arias has properly presented a motion to add a second respondent to the pleading and to the judgment.

While the motion is therefore procedurally appropriate, the motion will be granted only if (1) the Attorney General is a proper respondent for an alien's habeas claim and (2) is subject to the personal jurisdiction of this Court.

B. The Attorney General is a Proper Respondent in Alien Habeas Cases

1. Open Question

The Supreme Court has declined to address the question whether the Attorney General is a proper respondent in immigration habeas cases, see Ahrens v. Clark, 335 U.S. 188, 193, 68 S. Ct. 1443, 92 L.Ed. 1898 (1948) (addressing prior INA), as has the Second Circuit on at least two occasions, see Henderson v. INS, 157

F.3d 106, 130 (2d Cir. 1998) (current version of IIRIRA); Rudick v. Laird, 412 F.2d 16, 21 (2d Cir. 1969) (prior INA). Most recently, after considering the question in some detail, the Henderson Court “decline[d] . . . to resolve the issue of whether the Attorney General is a proper respondent for habeas actions brought by aliens facing deportation.” 157 F.3d at 130. Although the Second Circuit certified this question to the New York Court of Appeals for personal jurisdiction analysis under New York’s long-arm statute, that court also declined to address the issue. See Yesil v. Reno, 92 N.Y.2d 455, 682 N.Y.S.2d 663, 705 N.E.2d 655 (1998).⁴

The few courts to have decided whether the Attorney General is a proper respondent in an immigration habeas case have

⁴ The New York Court of Appeals stated, “Without implying any view on the availability of CPLR § 302(a)(1) as the proffered jurisdictional predicate with respect to the individuals and circumstances involved in this case, we note our uncertainty whether the certified questions can be determinative of the underlying matters. Alternative possibilities for obtaining jurisdiction, flowing from other potential Federal and State sources, seem far reaching.” Id., 92 N.Y.2d at 456.

split on the appropriate result,⁵ and the balance of district courts addressing this question have declined to resolve it.⁶

As of this moment, then, the "highly complex issue" of whether the Attorney General is a proper respondent subject to personal jurisdiction in a case such as the one presented here is an open question. See Henderson, 157 F.3d at 124.

**2. The Attorney General is Arias's
"Custodian" for the Purposes of his
Habeas Petition**

Section 2243 of Title 28 requires the writ of habeas corpus to be directed to the "person having custody of the person

⁵ Compare Pena-Rosario v. Reno, 83 F. Supp.2d 349, 362 (E.D.N.Y. 2000) (Gleeson, J.) (Attorney General is proper respondent); Sivongxay v. Reno, 56 F. Supp.2d 1167, 1167 (W.D. Wash. 1999) (same); Pottinger v. Reno, 51 F. Supp.2d 349, 357 (E.D.N.Y.1999) (Weinstein, J.) (same) (citing Mojica v. Reno, 970 F. Supp. at 137 (E.D.N.Y. 1997) (Weinstein, J.)); Nwankwo v. Reno, 828 F. Supp. 171, 176 (E.D.N.Y.1993) (Korman, J.) (same); with Yi v. Mauqans, 24 F.3d 500, 507 (3d Cir. 1994) (Attorney General is not a proper respondent); Blango v. Thornburgh, 942 F.2d 1487, 1491-92 (10th Cir. 1991); Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir.1986); Tejeda v. Reno, No. 00 Civ. 6338, 2000 WL 1280969, *2 (S.D.N.Y. Sept. 11, 2000) (Scheidlin, J.) (same); Guerrero-Musla v. Reno, 97 Civ. 2779, 1998 WL 273038, *2 (S.D.N.Y. May 28, 1998) (Baer, J.) (same); Carvajales-Cepeda v. Meissner, 966 F. Supp. 207, 208-209 (S.D.N.Y.1997) (Stein, J.) (same); Wang v. Reno, 862 F. Supp. 801, 813 (Sifton, S. J.) (E.D.N.Y. 1994) (same).

⁶ See, e.g., Perez v. Reno, No. 97 Civ. 6712, 2000 WL 686369 (S.D.N.Y. May 25, 2000) (Wood, J.); Santos-Gonzalez v. Reno, 93 F. Supp.2d 286 (E.D.N.Y. 2000) (Sifton, S. J.); Yesil v. Reno, 958 F. Supp. 828, 835 n.5 (S.D.N.Y. 1997) (Chin, J.).

detained," 28 U.S.C. § 2243, but does not indicate who the proper custodian is. The Second Circuit has held that a determination of who is the proper custodian depends "primarily upon who has power over the petitioner and . . . on the convenience of the parties and the court." Henderson, 157 F.3d at 122.⁷ As the Henderson Court noted, the Attorney General is commonly named as a respondent in immigration habeas cases, even where there is personal jurisdiction over a custodian lower in the INS chain of command. Id., 157 F.3d at 126.

a. IIRIRA Specifically Designates the Attorney General With the Power Over Alien Custody

On a broad level, the Attorney General is the custodian of alien detainees because she has primary authority for enforcing IIRIRA and is the "ultimate decisionmaker" as to all INS matters. See 8 U.S.C. § 1102(a)(1); Henderson, 157 F.3d at 126. More

⁷ This analysis is not changed now that Arias has been released pursuant to the granting of his writ. Because the motion to amend and add Reno as a second respondent will relate back to the time of the original filing, see supra; Fed. R. Civ. P. 15(c), the relevant inquiry is who Arias's custodian was at the time the petition was filed and judgment issued. See Mojica v. Reno, 970 F. Supp. 130, 165 (E.D.N.Y. 1997) ("Personal jurisdiction is fixed at the time that the habeas petition is filed."), aff'd sub nom. Henderson v. I.N.S., 157 F.3d 106 (2d Cir. 1998), cert. denied sub nom. Navas v. Reno, 526 U.S. 1004, 119 S.Ct. 1141, 143 L.Ed.2d 209 (1999); Ledesma-Valdes v. Sava, 604 F. Supp. 675, 679 (S.D.N.Y. 1985) (same).

specifically, IIRIRA designates the Attorney General as the person responsible for taking deportable aliens into custody, see 8 U.S.C. § 1222(a) (“whenever the Attorney General has received information showing that any aliens are coming from a country [hosting certain diseases], such aliens shall be detained by the Attorney General”); § 1226(c)(1) (“The Attorney General shall take into custody any alien who [is deportable or inadmissible for having committed a crime]”); and for releasing them, see 8 U.S.C. § 1126(b) (“The Attorney General at any time may revoke a bond or parole . . . , rearrest the alien . . . and detain the alien”); § 1126(c)(2) (“The Attorney General may release an alien”).

The clear statutory language granting the Attorney General authority over custodial immigration matters is presumed to mean what it says. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, 112 S.Ct. 2589, 2594 (1992) (“In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.”); cf. Reno v. Arab-American Anti-Discrimination Committee, 525 U.S. 471, 483, 119 S.Ct. 936, 943 (1999) (holding that limit of judicial review in IIRIRA 8 U.S.C. § 1252(g) to Attorney General’s decisions to “commence proceedings, adjudicate cases, and execute removal orders” meant exactly what it said).

Nonetheless, some would argue that this statutory language is just a legal fiction naming the Attorney General as a proxy for other immigration officials. Yet the drafters of IIRIRA were capable of conferring duties on other named officials in a variety of provisions. See, e.g., 8 U.S.C. § 1222(b) ("The physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service"); 8 U.S.C. § 1225(a)(3) ("All aliens . . . seeking admission . . . shall be inspected by immigration officers"); 8 U.S.C. § 1225(b)(1)(B)(i) ("An asylum officer shall conduct interviews of aliens referred . . . at a port of entry"). The fact that specific officials have been given responsibilities in other provisions of IIRIRA suggests that when Congress named the Attorney General as the person with authority over the custody and release of deportable and removable aliens, it intended that she, rather than some other official, be responsible. See Rusello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotations omitted).

Thus, although the Attorney General may delegate many of the responsibilities conferred upon her by IIRIRA to the INS

Commissioner and others, see 8 U.S.C. § 1103(a)(6) (1996); 8 C.F.R. § 2.1 (1996); St. Cyr v. INS, No. 99 -2614, 2000 WL 1234850, *3 n.2 (2d Cir. Sept. 1, 2000), she remains the person with the statutorily-conferred custodial power over the petitioner.

b. Naming the Attorney General as the Respondent in an Alien's Habeas Petition is Consistent with Congressional Intent

It is reasonable to conclude that naming the Attorney General as the respondent in an alien's habeas case would achieve Congressional intent. See Almandarez-Torres v. INS, 523 U.S. 224, 228, 118 S.Ct. 1219, 1223) (courts must look to "statute's language, structure, subject matter, context, and history" to glean congressional intent). IIRIRA limits judicial review of immigration judge and Board of Immigration Appeals (BIA) decisions to final orders of removal, 8 U.S.C. § 1252(b)(9), and specifically provides that "the respondent is the Attorney General." 8 U.S.C. § 1252(b)(3)(A); see Westover v. Reno, 202 F.3d 475, 477 (1st Cir. 2000). A plain reading of this provision suggests that Congress intended the Attorney General to be the respondent in the narrow class of cases in which removal orders were reviewed in Article III courts.

Section 1252(a)(2)(C) forecloses § 1252(b)(9) review for criminal aliens, whose removal orders “no court shall have jurisdiction to review.” 8 U.S.C. § 1252(a)(c). Arias falls under this provision due to his prior conviction. Courts have construed this language to mean that although direct judicial review of criminal aliens’ removal orders has been abolished, § 2241 habeas review is still available. See Calcano-Martinez v. INS, Nos. 98-4033, 98-4214, 98-4246, 2000 WL 1336611, *1, 17 (2d Cir. Sept. 1, 2000); Henderson, 157 F.3d at 119. Because “judicial review [as set forth in § 1252(b)(9)] and habeas corpus have distinct technical meanings under the law,” Calcano-Martinez, 2000 WL 1336611, at *11, the directive in § 1252(b)(3)(A) that the Attorney General be the respondent in cases involving “judicial review” does not directly apply to habeas petitions. However, finding that the Attorney General is an appropriate respondent in an alien’s habeas case would be true to Congressional intent that she should be the respondent in cases involving the review of deportation orders, as evidenced in sections 1252(b)(3)(A) and (b)(9).⁸

⁸ Whether this argument succeeds depends on whether the habeas remedy is interpreted consistently with congressional intent as evidenced by IIRIRA, or as a distinct remedy that should be construed as entirely independent from the immigration laws. On one hand, as described above, the remedy of habeas could be viewed (by implication) as part of the new immigration regime enacted in IIRIRA, which should be applied as consistently with congressional intent as possible. Thus, the requirement in § 1252(b)(3)(A) that the Attorney General be the respondent would have to be reconciled with the requirement in 28 U.S.C. § 2243 that habeas petitions be directed to the person who has “custody” of the petitioner, see supra at (I)(B)(2). While this view would have the benefit of

C. The Custodians of Detained Aliens Include Officials Who do Not Have Day-to-Day Physical Control over the Petitioner

Courts taking a more narrow view of this question have typically applied the "day-to-day control" test from the federal prisoner context to establish who is the proper custodian of alien detainees. See Henderson, 157 F.3d at 122 (citing Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 948 (2d Cir. 1976)). Applying this test, courts have found the proper respondent to be either the warden of the facility in which the detainee is held, see Yi, 24 F.3d at 507; Chukwurah v. INS, 813 F. Supp. 161, 168 (E.D.N.Y.1993), or the local INS District Director, see Yesil v. Reno, as: 958 F. Supp. 828, 835 (S.D.N.Y. 1997); Eltayeb v. Ingham, 950 F. Supp. 95, 99 (S.D.N.Y. 1997); Ledesma-Valdes v. Sava, 604 F. Supp. 675, 679 (S.D.N.Y. 1985). See United States ex rel. Sadiku v. INS, No. 95 C 1487, 1995 WL 215050, at *3 (N.D.Ill. Apr. 11, 1995) (custodian is either the INS District Director responsible for the district of confinement or the warden of the detention facility).

streamlining the judicial approach to aliens' habeas cases, it also poses the danger of further eroding the availability of the Great Writ, which has of late been restricted by Congress. On the other hand, habeas review for aliens might be seen as an entirely distinct avenue of relief in which congressional intent as evidenced by the immigration laws does not enter into play.

If the test were not so limited, these courts have reasoned, "the Attorney General of the United States could be considered the custodian of every alien and prisoner in custody because ultimately she controls the district directors and the prisons." Yi, 24 F.3d at 507. Although the government has not raised this argument, three important distinctions between the law and practice of alien custody and federal prisoner custody should be noted that allow courts to find that the Attorney General is the custodian of alien habeas petitioners without necessarily also finding that she is the custodian of other federal prisoners.

First, in immigration cases, the warden or district director who has "day-to-day control" is merely an agent of the Attorney General, who has the statutorily authorized power over aliens' custody and release, as discussed above. In Billeteri, which other courts have cited in adopting the "day-to-day control" test for aliens, the Second Circuit held that a parole board was not the custodian of a federal prisoner who had not yet been paroled, and that the warden of the prison was the proper respondent. However, as the Honorable Jack Weinstein of the Eastern District noted in Mojica, "Billeteri is inapplicable because the warden of a prison is not a delegate or agent of the Parole Board, whereas a District Director of the INS acts only

pursuant to powers delegated by the Attorney General.”⁹ Mojica, 970 F. Supp. at 167; accord Nkwankwo, 828 F. Supp. at 174 (holding that Attorney General is custodian because she can “direct her subordinates to carry out any order directed to her to produce or release the petitioner.”).

Second, federal statutes employ different language in establishing who has custodial power over aliens and of federal prisoners. As described above, IIRIRA specifically designates the Attorney General with control over taking aliens into custody, transferring them, and releasing them. See 8 U.S.C. §§ 1222(a); 1226(b), (c)(1), (c)(2). On the other hand, while the statute regarding federal prisoners grants the Attorney General “control and management of Federal penal and correctional institutions,” 18 U.S.C. § 4001(a), the Bureau of Prisons has “charge of the management and regulation of all Federal penal and correctional institutions,” 18 U.S.C. § 4042(a)(1). In light of the unique, “extraordinary and pervasive role that the Attorney General plays in immigration matters,” finding that she is a proper respondent in alien habeas cases should by no means lead any one to the conclusion that she is a proper respondent in prisoner habeas cases. Henderson, 157 F.3d at 126.

⁹ And, it should be noted that the prison warden, too, acts as a delegate or agent of the Attorney General with regard to the placement and custody of alien detainees pending deportation.

Finally, the nature of alien detention warrants a broader view of custodianship in immigration habeas cases that will not spill over to federal prisoner cases. Detained aliens are routinely transferred to facilities in other INS districts, often a great distance away, under the Attorney General's authority. See, e.g., Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1251, 1256 (4th Cir. 1995) ("there is nothing inherently irregular . . . about the [deportable alien's] transfer from Virginia to Louisiana."); Sasso v. Milhollan, 735 F. Supp. 1045, 1047 n.6 (S.D. Fla. 1990) (transfer of 35-40 alien felons three or four times each month from Miami to Oakdale, Louisiana or Laredo, Texas); Committee of Cent. Am. Refugees v. INS, 682 F. Supp. 1055, 1060 (N.D. Cal. 1988) (regular transfers from San Francisco district to El Centro, California or Florence, Arizona); Louis v. Meissner, 544 F. Supp. 973, 983-84 n.27 (S.D. Fla. 1982) (transfer of hundreds of Haitian refugees from a detention facility outside of Miami to remote locations across the country, including Fort Allen, Puerto Rico; Brooklyn, New York; and to the Bureau of Prisons' facilities in places such as Otisville and Raybrook, New York; Latuna and Big Springs, Texas; Lexington, Kentucky; Morgantown and Alderson, West Virginia). Although Arias's circumstances are not as severe as those in some of the other transfer cases, Arias was transferred to a facility in Pennsylvania despite the fact that he lives with his family in New York and was initially detained at New York's John F. Kennedy

Airport.¹⁰ Transferring resident aliens to distant locations rather than keeping them nearer to their own communities further

¹⁰ See Michele R. Pistone, "Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers," 12 Harv. Hum. Rts. J. 197, 214 & n.101 (Spring 1999) ("[A]sylum seekers are sometimes transferred from one detention center to another... . Transfers are motivated by space availability, as asylum seekers may be transferred to facilities that have available beds."); Cheryl Little, "INS Detention in Florida," 30 U. Miami Inter-Am. L. Rev. 551, 570 (Winter-Spring 1999) ("The INS transfers detainees to distant locations ... Even the INS has had trouble locating detainees."); Human Rights Watch Report Vol. 10, No. 1(G) (Sept. 1998) "Locked Away: Immigration Detainees in Jails in the United States,

http://www.hrw.org/reports98/us-immig/Ins989-03.htm#P346_51123 ("INS detainees are routinely transferred from jail to jail and state to state") (accessed Oct. 25, 2000); Margaret H. Taylor, "Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform," 29 Conn. L. Rev. 1647, 1669 n.86 (Summer 1997) ("Transfer decisions are made at the district level. Some districts transfer detainees apprehended locally to some far away facility whenever a critical mass is reached... Other transfers are arranged on an ad hoc basis, in response to daily fluctuations in detention facility populations. Aliens apprehended in New York City, for example, might be detained at the INS's Varick Street facility right in Manhattan or sent all the way to Oakdale, Louisiana. The fate of each individual ... depends on where there is an empty bed on any given day.").

In contrast, the United States Bureau of Prisons ("BOP") policy with regard to non-alien federal prisoners is to limit non-emergency and non-medical transfers, and to engage in "routine" transfers only in order to accomplish penological goals such as moving the prisoner closer to family or to the location in which he will soon be released and ensuring proper security. "Ordinarily, the inmate may be considered for a nearer release transfer after serving 18 months within the facility with clear conduct. Redesignations between same security level institutions are discouraged ... A "nearer to release" transfer should be incorporated with "lesser security" transfers whenever possible." PS 5100.07, Ch. 10, p.4 (Sept. 3, 1999) (accessed at <http://www.bop.gov> on October 25, 2000)). Thus, since detained aliens are transferred so often in comparison to non-alien federal prisoners, limiting the proper respondent to the "day-to-day" custodian will create more procedural difficulties for aliens than non-alien federal prisoners.

complicates the already complex process of finding competent counsel and initiating proceedings.

Because alien detainees are so routinely transferred, naming only the local INS District Director as a respondent under the narrow "day-to-day control" approach is impracticable. Once a petitioner is transferred, the originally named District Director no longer has day-to-day control, so the petition could be dismissed for lack of personal jurisdiction under the narrow view of custodianship.¹¹ In this regime where alien detainees are moved between districts so frequently, it is appropriate to name a respondent higher up in the INS chain of command.

IIRIRA mandates the Attorney General to "arrange for appropriate places of detention for aliens detained pending removal," 8 U.S.C. § 1231(g)(1), and gives her the discretionary power to transfer aliens, see Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999). Thus, with the authority to detain, transfer and release aliens, the Attorney General has specifically authorized "custodial power over the petitioner," and is high enough in the INS chain of command to remain so notwithstanding any transfers the petitioner might undergo during the habeas proceedings.¹²

¹¹ Arias's transfer did not give rise to this problem.

¹² In a related tenor, the Mojica court also noted that the Attorney General's role in deciding where to transfer alien

Naming the Attorney General as a respondent in an alien habeas petition will allow the proceedings to continue uninterrupted even if the petitioner is transferred between local districts or if naming another, lower-level official would otherwise result in a jurisdictional dismissal.

C. This Court has Personal Jurisdiction Over the Attorney General

Finally, a habeas petitioner's custodian may only be named a respondent if she is within the personal jurisdiction of the court. See Henderson, 157 F.3d at 123. A court has personal jurisdiction "so long as the custodian can be reached by service of process." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 495, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Henderson, 157 F.3d at 122. As Rule 4(e)(1) of the FRCP provides that service of process may be made under the rules of the state in which the court sits, New York law will govern. See United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1127-28 (2d Cir. 1974); Mojica, 970 F. Supp. at 166.

detainees rendered her a proper respondent. "[W]ere the government correct that a habeas petition may be heard only where the petitioner is detained then the Attorney General could seriously undermine the remedy of habeas corpus by detaining illegally a large group of persons in one facility so that the resulting torrent of habeas corpus petitions would overwhelm the local court." Mojica, 970 F. Supp. at 167 (citations and internal quotations omitted).

Under New York's long-arm statute, process may be served upon a non-domiciliary who, either in person or through an agent, "transacts any business within the state." N.Y. C.P.L.R. § 302(a)(1). Non-domiciliaries are subject to the jurisdiction of New York courts when the claim arises out of the non-domiciliary's purposeful activity. See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 787 (2d Cir. 1999); Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988).

The acts of a non-domiciliary's agent confer jurisdiction over his principal under C.P.L.R. § 302(a)(1) if the agent acted in the state "for the benefit of, and with the knowledge and consent of" the non-resident principal. Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981); see also Galgay v. Bulletin Co., 504 F.2d 1062, 1065 (2d Cir. 1974) (stating that an agent must act "at the request and for the business purposes of" the principal). Here, the act of the Attorney General's agents in transferring Arias from detention at John F. Kennedy airport to an INS facility in York, Pennsylvania satisfy § 302(a)(1). See Mojica, 970 F. Supp. at 166-67; Yesil, 958 F. Supp. at 835; Nkwankwo, 828 F. Supp. at 174.

In addition, service reaches a non-domiciliary who regularly transacts business in New York, even where there is no nexus between the claim and the state, pursuant to C.P.L.R. § 301.

As the Henderson Court noted, “[b]ecause the Attorney General transacts business in New York on a regular basis, she is unquestionably subject to long-arm jurisdiction under New York law.” 157 F.3d at 124 n.19. See Mojica, 970 F. Supp. at 167; Nwankwo, 828 F. Supp. at 175 (citing Commentary, N.Y. C.P.L.R. § 301 (McKinney 1990)). Thus, because New York’s long-arm jurisdiction reaches the Attorney General, she is subject to the personal jurisdiction of this Court.

Conclusion

The Attorney General is a proper respondent in a detained alien’s habeas corpus proceeding and, pursuant to Rules 15, 21 and 59, may properly be added as a second respondent to a petition and judgment granting relief from deportation.

Arias is hereby granted leave to amend the petition in accordance with this opinion. Once the petition has been amended, an amended judgment shall be entered forthwith.

It is so ordered.

New York, NY
October 30, 2000

ROBERT W. SWEET
U.S.D.J.