[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AHMED BELBACHA, *Petitioner/Appellee*, v. BARACK OBAMA, *et al.*, *Respondents/Appellants*.	Case No. 08-5350

PETITION FOR INITIAL HEARING EN BANC

The questions in this case are questions of life and death. If transferred to Algeria, Mr. Belbacha faces torture at the hands of the government and terrorist organizations that have him in their sights. The ultimate question is whether courts have power to enjoin the transfer. The human stakes could not be higher.

1. Introductory statement pursuant to FRAP 35(b)(1)

At issue is a preliminary injunction enjoining the government from transferring the appellee-petitioner, Ahmed Belbacha, a Guantánamo detainee, to Algeria, where he faces torture at the hands of the Algerian government or a terrorist organization. The government has appealed the injunction.

The government contends that *Kiyemba v. Obama* ("*Kiyemba II*") (Exhibit A),[1] decided after the injunction was entered, controls this case and compels that the injunction be vacated.[2] *Kiyemba II*, however, was wrongly decided, ignored the petitioners' Due Process claims, and conflicts with decisions of the Supreme Court, including *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) ("*Boumediene*"), *Swain v. Pressley*, 430 U.S. 372 (1977) ("*Swain*"), and *United States v. Hayman*, 342 U.S. 205 (1952) ("*Hayman*"). Moreover, *Kiyemba II* was an inadequate vehicle for deciding the questions involved in a case such as this, where the threatened harms are real and not hypothetical, and emanate not only from the government but also from terrorist organizations.

The proper resolution of this case requires that *Kiyemba II* be overruled, which only this Court en banc or the Supreme Court can do. *United States v. Carson*, 455 F.3d 336 n.43 (D.C. Cir. 2006). Mr. Belbacha therefore respectfully petitions the Court to hear the government's appeal en banc.[3]

Kiyemba II involved, and therefore *this* case involves, the following questions of exceptional importance:

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[1] 561 F.3d 509 (D.C. Cir.) (Nos. 05-5487, 05-5489) (Ginsburg, Kavanaugh, Griffith, JJ.), *reh'g and reh'g en banc denied* (July 27, 2009), *cert. denied*, 2010 WL 1005960 (U.S. Mar 22, 2010) (No. 09-581).

[2] Opp. to Pet'r's Mot. to Govern Future Proceedings, at 1 (filed Sept. 18, 2009) ("US Opp.").

1. Whether § 242(a)(4) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1252(a)(4), precludes a district court exercising habeas jurisdiction from enjoining a Guantánamo detainee's transfer to another country on the ground that the transfer would violate the Convention Against Torture (CAT), and, if so, whether § 242(a) violates the Suspension Clause, in contravention of *Boumediene*, and the Equal Protection Clause.

2. Whether *Munaf v. Geren*, 128 S. Ct. 2207 (2008), a case in which detainees were transferred "to the very sovereign on whose behalf, and within whose territory, they [were] being detained," precludes a district court from exercising habeas jurisdiction to enjoin the transfer of a detainee from Guantánamo to another country where he is likely to face torture at the hands of the government and terrorist organizations.

3. Whether, as a matter of substantive and procedural due process, the United States may transfer an unwilling Guantánamo detainee to another country where the detainee is likely to face torture at the hands of the government or a terrorist organization, without affording the detainee a meaningful opportunity to contest his transfer.

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[3] This petition is timely. Briefing has yet to be scheduled. FED. R. APP. 35(c).

2. Factual Background

Ahmed Belbacha, 40, is an Algerian citizen who has been "detained" at Guantánamo for more than eight years. He is one of scores of Guantánamo detainees with pending habeas cases challenging the lawfulness of their detentions.

After finishing mandatory national service in the Algerian army, Mr. Belbacha worked as an accountant at Sonatrach, the government-owned oil company. While working there, Mr. Belbacha was recalled for a second tour of military duty. The Groupe Islamique Armé (GIA) – then at the height of its violent campaign for an Islamic Algeria – found out about the recall notice.[4] The GIA threatened to kill Mr. Belbacha if he rejoined the army, and ordered him to quit his job with Sonatrach. The GIA was notorious for killing soldiers and had also murdered a number of Sonatrach employees.[5] Mr. Belbacha never reported for his recall, making him a deserter in the eyes of the Algerian government.

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[4] The GIA has carried out attacks in Algeria against civilians and regime officials and employees for years. *See* Lauren Vriens, Backgrounder, *Armed Islamic Group (Algeria, Islamists)* (Council on Foreign Relations, New York, N.Y.), May 27, 2009, http://www.cfr.org/publication/9154/. The GIA later spawned a splinter group now called "al-Qaeda in the Islamic Maghreb." *See id.* In 2008, according to the State Department, "Armed groups committed a significant number of abuses against civilians, government officials, and members of security forces." U.S. Dep't of State, *Country Report on Human Rights Practices in Algeria* (2008), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119112.htm

[5] *See Algeria: Political and Human Rights Update* (Immigration and Refugee Board of Canada, Issue Paper, Nov. 1996) (detailing threats and attacks against

Mr. Belbacha tried to hide from the GIA inside Algeria, but the group pursued him, going at least twice to his home and threatening him and his family. Deciding he had to leave Algeria, Mr. Belbacha obtained a foreign visa and fled. Mr. Belbacha fears that if the United States returns him to Algeria, he faces torture and persecution by the Algerian government and the GIA. He believes that his outspoken and widely-publicized efforts to avoid return to Algeria for fear of torture have made him even more of a government target. *See* Exhibit B (under seal). Mr. Belbacha reasonably fears that the United States intends to return him to Algeria. *See* Exhibit C (under seal).

Mr. Belbacha's fears were intensified when the Algerian government tried him *in absentia* last November, convicted him of belonging to an "overseas terrorist group," and sentenced him to 20 years in prison.[6] No evidence has been produced to support his conviction. Moreover, despite extensive efforts, Mr. Belbacha's lawyers have been unable to discover exactly what Mr. Belbacha is

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Sonatrach employees beginning in 1996), http://www2.irb-cisr.gc.ca/eng/publications/index_e.cfm?docid=115&cid=71.

[6] *Algiers court jails Guantánamo inmate who won't go home*, Agence France Press, Nov. 29, 2009, http://www.google.com/hostednews/afp/article/ALeqM5hBRpCfZG_9FsNOKFUiF6-ymIdfXg.

supposed to have done. Mr. Belbacha faces especially grave danger from the Algerian government given its dismal human rights record.[7]

Caught between domestic terror groups and a government that has already decreed a harsh sanction for him, Mr. Belbacha cannot safely return to Algeria.

3. Pertinent history of the case

Mr. Belbacha filed his habeas petition on December 8, 2005.[8] As his Fifteenth Claim for Relief, Mr. Belbacha alleged:

> Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of the Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a direct violation of Petitioner's rights under the Covenant Against Torture and the 1954 Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 *entered into force* Apr. 22, 1954.

Pet. 27, ¶ 106.

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[7] Torture, abuse and long-term incommunicado detention are prevalent in Algeria. *See, e.g.*, Briefing: *Amnesty International opposes forcible return to Algeria of Algerian nationals detained by US authorities at Guantánamo Bay, Cuba*, Sept. 18, 2009, http://www.amnestyusa.org/document.php?id=ENGMDE 280062009&lang=e, at 4 (despite laws prohibiting torture, "[t]orture and other forms of ill-treatment against individuals suspected of terrorism take place in Algeria in a climate of virtually total impunity."); Algeria: Researched and Compiled by the Refugee Documentation Centre of Ireland on 1 July 2009, http://www.unhcr.org/refworld/pdfid/ 4a360c790.pdf; *Algeria: Torture Remains A Common Practice*, Report Submitted to the Committee Against Torture in the Context of the Review of the Periodic Report for Algeria, Al Karama for Human Rights, Apr. 2008, http://www2.ohchr.org/english/bodies/cat/docs/ngos/Report Alkarama_CAT4apr08.pdf.

On July 27, 2007, Mr. Belbacha's lawyers, having been given to understand that the United States was poised to return Mr. Belbacha to Algeria, moved for a temporary restraining order.[9] Judge Collyer denied the motion for lack of jurisdiction, citing this Court's then-extant decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).[10] Mr. Belbacha appealed. On appeal, this Court held that Mr. Belbacha was entitled to an injunction pending the Supreme Court's decision in *Boumediene*. *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008).

On June 13, 2008, the day after the Supreme Court decided *Boumediene*, Judge Collyer issued a preliminary injunction enjoining the government "from transferring [Mr. Belbacha] from Guantánamo Bay to Algeria pending briefing and resolution of the issues left unresolved in *Boumediene* which the Supreme Court left to be decided by the District Court in the first instance." *See* Exhibit D. The government brought this appeal.

On appeal, the government argues that *Kiyemba II* requires that Judge Collyer's preliminary injunction be vacated.[11] In *Kiyemba II*, the panel held that, because the government's *policy* is not to transfer Guantánamo detainees to

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[8] Pet. for Writ of Habeas Corpus, D.D.C. Civ. No. 05-2349 (Doc. 1).

[9] Mot. for Order Enjoining Transfer of Pet'r to Likely Abuse and Torture in Algeria (Doc. 26).

[10] Order dated July 27, 2007 (Doc. 27) .

[11] US Opp., at 1.

countries where they are likely to be tortured, a court may not consider evidence that a particular detainee, if transferred to a particular country, *in fact* is likely to be tortured. 561 F.3d at 514-15. The panel rested this holding on *Munaf*, which the panel read to preclude a court "from second-guessing the Executive's assessment of the likelihood that a particular detainee will be tortured if transferred to a particular country." *Id.* at 515.[12]

The panel also held, without any analysis, that the petitioners could not prevail on their CAT claims because Congress had "limited judicial review under the Convention to claims raised in a challenge to a final order of detention." *Id.* at 514 (citing INA § 242(a)(4), 8 U.S.C. 1252(a)(4)). (The Supreme Court declined to reach the CAT issue in *Munaf*. *See* 128 S. Ct. at 2226.) The panel did not consider whether its construction of INA § 242(a)(4) raised potential Supension Clause or Equal Protection Clause problems.

4. Posture of this appeal

This appeal was docketed on August 11, 2008. On October 28, 2008, on the government's motion, the Court ordered that the case be held in abeyance pending the court's disposition of *Kiyemba II*. The Court decided *Kiyemba II* on April 7, 2009. The *Kiyemba II* petitioners moved for rehearing and rehearing en banc,

[12] A majority of the *Kiyemba II* panel also held that this rule applies to claims by a detainee that the government plans to transfer him to another country for prosecu-

which the Court denied on July 27, 2009. (Judges Rogers, Tatel, and Griffith would have reheard the case en banc.) On September 8, 2010, the *Kiyemba II* mandate issued. That same day, Mr. Belbacha asked the Court to continue to hold the case in abeyance pending the Supreme Court's disposition of the petition for certiorari filed by the *Kiyemba II* petitioners. The Supreme Court denied certiorari on March 22, 2010. This case remains in abeyance.[13]

5. Reasons for granting initial hearing en banc

a. Kiyemba II mistakenly held CAT claims barred, giving rise to Suspension Clause issues under Boumediene, Swain, and Hayman, and Equal Protection issues.

The *Kiyemba II* panel held, without any analysis, that the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(4), repealed habeas jurisdiction over statutory claims under the Convention Against Torture (CAT). 561 F.3d at 514-15.[14] Under the panel's construction, the only individuals who may raise CAT

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tion or detention. 561 F.3d at 515-16.

[13] Entangled with this case is an *ultra vires* order issued by District Judge Thomas F. Hogan on February 4, 2010 purporting to vacate Judge Collyer's preliminary injunction on the authority of *Kiyemba II*. *See* Exhibit E (under seal). The order is *ultra vires* because Judge Hogan lacked jurisdiction to vacate the injunction while the government's appeal from the injunction was pending. On April 19, 2010, Judge Hogan denied Mr. Belbacha's motion to reconsider. *See* Exhibit F. Judge Hogan reasoned that Judge Collyer's preliminary injunction expired by its terms because *Kiyemba II* resolved the pertinent issue left unresolved in *Boumediene*. Mr. Belbacha intends to appeal Judge Hogan's orders of February 4 and April 19.

[14] Section 242(a)(4) provides:

claims are those seeking review of an immigration removal order. Whether INA § 242(a)(4) precludes a court exercising habeas jurisdiction from considering a Guantánamo detainee's CAT claims – and whether, so construed, § 242(a) violates the Suspension Clause or Equal Protection Clause, is a question of exceptional importance.

As we will show in our merits brief, § 242(a)(4) does not divest the district courts of their traditional § 2241 habeas jurisdiction to review CAT claims. As an initial matter, the panel did not even address, much less explain, why it believed that § 242(a)(4), a provision of the Immigration and Naturalization Act (INA), applies extraterritorially to Guantánamo.[15] Moreover, even assuming that

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> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment . . . .

Claims for CAT violations are asserted under the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), 8 U.S.C. § 1231 note, which implements CAT. *Munaf* and *Kiyemba II* refer to the petitioners' CAT claims as "FARR Act" claims. For present purposes, we refer to them simply as "CAT Claims."

[15] *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (holding that a provision of INA had no extraterritorial application, reaffirming "the presumption that Acts of Congress do not ordinarily apply outside our borders"); *see also* 8 U.S.C. § 101(a)(38) (defining the term "United States" in the INA as limited to certain areas, not including Guantánamo).

§ 242(a)(4) applies to Guantánamo, the provision was intended to govern judicial review of garden-variety immigration "removal orders," as the title of § 242, "Judicial Review of Orders of Removal," makes clear. Congress simply sought to channel review of immigration removal orders to the courts of appeals by petition for review, and to eliminate habeas review in those situations where petition-for-review jurisdiction was available.

Congress added § 242 to the INA in the REAL ID Act of 2005. Pub. L. 109-13, 119 Stat. 302, 310. The legislative history shows that Congress did not intend to eliminate habeas review in cases where petition for review jurisdiction is unavailable and habeas review is the only review mechanism.[16] Indeed, the Conference Report states that Congress was concerned, after *INS v. St. Cyr*, 533 U.S. 289 (2001), about creating Suspension Clause problems, and that it did not intend therefore to eliminate habeas review over challenges that were independent of removal orders and could not be challenged in a petition for review.[17]

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[16] As the Conference Report stated, the REAL ID Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Rep. No. 109-72, at 175 (2005); *id.* ("the bill would eliminate habeas review only over challenges to removal orders"); *see also Lindaastuty v. Attorney General*, 186 Fed. Appx. 294, 298 (3d Cir. 2006) ("The Report specifically states that [the REAL ID Act] would not preclude habeas review over challenges to detention that are independent of challenges to removal orders." (internal quotation marks omitted)).

[17] *See* 151 Cong. Rec. H 2813, H 2873 (2005) (citing *St. Cyr* and emphasizing the "constitutional concerns" with denying review in any forum, including habeas); *id.*

Construed to limit judicial review of CAT claims to review of removal orders, § 242(a)(4) violates the Suspension Clause and the Equal Protection Clause. Like the statutes at issue in *Boumediene* (the Detainee Treatment Act of 2005 and Military Commissions Act of 2006), § 242(a)(4), as construed, eliminates habeas review but does not provide "habeas-like substitutes," as was the case in *Swain* and *Hayman*. *Boumediene*, 128 S. Ct. at 2265. Like those statutes, § 242(a)(4), as construed, violates the Suspension Clause. Moreover, because § 242(a)(4), as construed, allows only individuals petitioning for judicial review of removal orders to assert CAT claims, the provision also violates the Equal Protection Clause by precluding other individuals, who may also be facing transfers to likely torture, from asserting such claims.

b. Kiyemba II misread Munaf to impose a rule at odds with Boumediene.

The *Kiyemba II* panel read *Munaf* to preclude a district court exercising habeas jurisdiction from enjoining the transfer of a Guantánamo detainee to another country, when there is evidence that the detainee is likely to be tortured there. Whether a court must treat the government's assessment of the likelihood of torture as conclusive is also a question of exceptional importance. The question is

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(noting *St. Cyr*'s admonition that Congress may only eliminate habeas if it provides an "adequate and effective" alternative to habeas corpus). The government

important not just to Guantánamo detainees but to all who fear torture if transferred to particular countries. And here, unlike in *Munaf*, the threat of torture comes not only from the transferee government, but also from terrorist organizations.

The *Kiyemba II* panel misread *Munaf*. First, whatever else *Munaf* may have done, it declined to reach the petitioners' CAT claims. *See* 128 S. Ct. at 2226. The Court noted that CAT claims under the FARR Act "may be limited" by § 242, but it did not decide that question. *Id.* at n.6. The *Kiyemba II* panel also did not address that issue, because it concluded that § 242 precluded the petitioners from raising CAT claims. Hearing en banc is warranted to decide not only whether § 242 precludes Mr. Belbacha from asserting a CAT claim, but, if he may assert such a claim, what effect, if any, a rule precluding courts from "second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign," *Kiyemba II*, 561 F.3d at 515, might have. CAT's protections would have no meaning if an individual could challenge his transfer to another country on the ground that he faces likely torture there, but the government could defeat his claim simply by representing that he is not likely to face torture. *Munaf* surely did not, by implication, reduce CAT claims to an empty gesture.

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has never suggested that a Guantánamo detainee could raise a CAT claim by petition for review.

In addition, *Munaf* involved highly idiosyncratic facts, which make it treacherous to extend its reasoning to cases such as this or *Kiyemba II*. In *Munaf*, the U.S. military held two Americans in Iraq, at the behest of the Iraqi government, pending prosecution in Iraqi courts, for crimes they allegedly committed in Iraq, during ongoing hostilities there. The Court stated the issue as "whether United States district courts may exercise their habeas jurisdiction to enjoin our armed forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution." *Munaf*, 128 S. Ct. at 2218. The Court's answer: "Under the circumstances presented here, . . . habeas corpus provides petitioners with no relief." *Id.* at 2213. "It would be more than odd," the Court said, "if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained." *Id.* at 2227. It was in this "present context," *id.* at 2225, that the Court stated that any concern that the petitioners might be tortured if transferred to Iraqi custody "is to be addressed by the political branches, not the judiciary." *Id.*

The panel's misreading of *Munaf* results in a curtailment of the right to habeas review that the Supreme Court held in *Boumediene* the Suspension Clause guarantees Guantánamo detainees. As Judge Griffith noted in his partial dissent, *Kiyemba II* deprived the petitioners of "any opportunity to challenge the accuracy of the government's sworn declarations," 561 F.3d at 524, a deprivation at odds

with *Boumediene*'s mandate that habeas review be "meaningful," *id.* (quoting *Boumediene*, 128 S. Ct. at 2268-69). "Calling the jailer to account must include some opportunity for the prisoner to challenge the jailer's account." *Id.* at 524-25; *see id.* at 525 (noting that a "naked declaration" such as those of the government "'cannot simply resolve the issue") (citation and internal quotation marks omitted). "The rudimentaries of an adversary proceeding demand no less." *Id.*

The panel should have avoided a reading of *Munaf* that pitted one Supreme Court decision against another. The Court should hear this case en banc to repair *Kiyemba II*'s mistake.

c. Kiyemba II ignored Due Process issues

The *Kiyemba II* petitioners asserted a due process right to notice of a proposed transfer and an opportunity to be challenge the transfer if appropriate, but the *Kiyemba II* panel ignored their claims. Notice is not an issue for Mr. Belbacha. He reasonably believes that the government will send him to Algeria, where he faces torture by the government and terrorist organizations. He has a substantive due process right not to transferred to a country where he is likely to be tortured – whether at the hands of the government or a terrorist organization – and a procedural due process right to be afforded a meaningful opportunity to challenge his transfer.

In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court described the broad contours of the Due Process Clause:

> The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Salerno, 481 U.S. at 746.[18]

In *Rochin*, the Supreme Court reversed the conviction of the petitioner for narcotics offenses, finding that the manner in which the state obtained the conviction shocked the conscience. The Court stated:

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened

[18] This Court held in *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) ("*Kiyemba I*"), that Guantánamo detainees possess no constitutional due process rights. On March 1, 2010, the Supreme Court vacated the decision and remanded to this Court to consider any effect of "new developments" on the legal issues presented." *Kiyemba v. Obama*, 130 S.Ct. 1235 (2010). The *Kiyemba I* panel heard argument on remand on April 22, 2010.

> sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Rochin, 342 U.S. at 172. The rack and the screw will be the least of Mr. Belbacha's worries if he is transferred to Algeria.

The government claims that it has a policy against transferring Guantánamo detainees to countries where they are likely to be tortured, and has "determined" that Mr. Belbacha is not likely to face torture if he is transferred to Algeria. This is of no moment. (The government has never explained how it could "determine" that Mr. Belbacha does not face a threat of torture by terrorist organizations that have him in their sights.) Belbacha's substantive due process right not to be transferred to a country where he is likely to face torture, *cf. Rochin*, and his procedural due process right to challenge his transfer even if he does not enjoy such a substantive right, means little if the government's representation that he is not likely to face torture if transferred to Algeria is conclusive. Mr. Belbacha must be afforded a meaningful opportunity to contest his transfer.[19]

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[19] In his concurring *Kiyemba II* opinion, Judge Kavanaugh stated, "In *Munaf*, in response to a similar due process claim, the Supreme Court unanimously held that the Judiciary may not 'second-guess' the Executive's assessment that transferred detainees are unlikely to be tortured by the receiving nation." *Kiyemba II*, 561 F.3d at 517 (citing *Munaf*, 128 S. Ct. at 2226). However, in the portion of *Munaf* that Judge Kavanaugh cited, the Court was speaking to something else, making the point that "[t]he Judiciary is not suited to second-guess . . . determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Munaf*,

d. Kiyemba II was an unsuitable vehicle for deciding whether Munaf precludes the relief Mr. Belbacha seeks.

The issue in *Kiyemba II* was abstract – whether Guantánamo detainees are entitled to advance notice of intended transfers – and, as the *Kiyemba II* petitioners stressed, scenarios justifying such notice were hypothetical.[20] The petitioners, Uighurs, did not face a risk of transfer to China, where they faced torture or worse. Nor did they claim that the government intended to transfer them to any other country where they might be tortured, or detained on behalf of the United States, or that they were at risk from terrorist organizations. All they wanted was advance notice, to allow their lawyers to assert objections to a transfer if need be. It was against this backdrop that the *Kiyemba II* panel decided, equally abstractly, that under *Munaf*, the government's general policy against transfer to torture is conclusive. By contrast, Mr. Belbacha reasonably fears that the government will send him to Algeria, and has compelling reason to expect that he will be persecuted and tortured if sent there. This case, not *Kiyemba II*, is the proper vehicle to decide the issue raised by Judge Collyer's injunction.

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128 S. Ct. at 2226. In any event, Mr. Belbacha faces a threat of torture not only from the Algerian government but also from terrorist organizations in Algeria.

[20] *See* Supp'l Br. for Appellees/Cross-Appellants, Nos. 05-5487, 05-5488, 05-5489, 05-5490 (filed Aug. 21, 2008) ("There is no need at this time to address the merits of a hypothetical transfer.").

CONCLUSION

For the foregoing reasons, the Court should hear this case en banc.

Dated: April 27, 2010

Respectfully,

/s/

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FRAP 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,405 words. The petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 97-2003 in 14-point Times New Roman font.

/s/

David H. Remes
Counsel for Appellee/Petitioner

Dated: April 27, 2010

CIRCUIT RULE 28(a)(1)(A) CERTIFICATE AS TO PARTIES

Following are the parties in the district court:

Ahmed Belbacha, Petitioner
Salah Belbacha, Next Friend of Petitioner
George W. Bush, Respondent
Donald Rumsfeld, Respondent
Jay Hood, Respondent
Mike Bumgarner, Respondent
Barack H. Obama, Respondent
Department of Defense Privilege Team, Interested Party

Following are the parties in this court:

Ahmed Belbacha, Petitioner-Appellee
Salah Belbacha, Next Friend of Petitioner, Petitioner-Appellee
Robert M. Gates, Respondent-Appellant
Tom Copeman, Respondent-Appellant
Donnie Thomas, Respondent-Appellant
Barack H. Obama, Respondent-Appellant

/s/
_____
David H. Remes
Counsel for Appellee/Petitioner

Dated: April 27, 2010

EXHIBIT A

561 F.3d 509, 385 U.S.App.D.C. 198
(Cite as: 561 F.3d 509, 385 U.S.App.D.C. 198)

H

United States Court of Appeals,
District of Columbia Circuit.
Jamal KIYEMBA, Next Friend, et al., Appellees
v.
Barack OBAMA, President of the United States, et al., Appellants.
No. 05-5487, 05-5489.

Argued Sept. 25, 2008.
Decided April 7, 2009.
Rehearing Denied July 27, 2009.FN*

FN* Circuit Judge Griffith would grant the petition.

Rehearing En Banc Denied July 27, 2009.FN**

FN**Circuit Judges Rogers, Tatel, and Griffith would grant the petition for rehearing en banc.

Background: Nine detainees at United States naval base at Guantanamo Bay, Cuba, petitioned for writ of habeas corpus. Detainees requested interim relief requiring government to provide 30 days' notice to court and counsel before transferring them from naval base, asserting fears that they would be transferred to country where they might be tortured or further detained. The United States District Court for the District of Columbia entered requested orders. Government appealed, and appeals were consolidated.

Holdings: The Court of Appeals, Ginsburg, Circuit Judge, held that:
(1) district court could exercise jurisdiction over claims related to detainees' potential transfer;
(2) provision of Military Commissions Act (MCA) eliminating jurisdiction over non-habeas actions against United States or its agents relating to any aspect of detainee's transfer did not apply to preclude jurisdiction over detainees' claims for notice of transfer;
(3) writ of habeas corpus was not available to bar detainee's transfer based upon likelihood of detainee being tortured in recipient country; and
(4) district court could not issue writ of habeas corpus to bar transfer of detainee based upon expectation that recipient country would detain or prosecute detainee.

Vacated.

Kavanaugh, Circuit Judge, filed a separate concurring opinion.

Griffith, Circuit Judge, filed a separate opinion concurring in the judgment in part and dissenting in part.

West Headnotes

[1] Habeas Corpus 197 621.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(B) Jurisdiction and Venue
197III(B)1 In General
197k621 Exclusive, Concurrent, or Conflicting Jurisdiction
197k621.1 k. In general. Most Cited Cases

Habeas Corpus 197 912

197 Habeas Corpus
197V Suspension of Writ
197k912 k. Constitutional and statutory provisions. Most Cited Cases
Supreme Court's decision in *Boumediene v. Bush*, which ruled that provision of Military Commissions Act (MCA) precluding jurisdiction over application for writ of habeas corpus filed by or on behalf of detained alien either determined to be enemy combatant or awaiting determination effected unconstitutional suspension of the writ, invalidated such provision with respect to all habeas claims brought by covered detainees, and not just so-called "core" habeas claims, and therefore provision did not bar district court from exercising jurisdiction in ongoing habeas cases over claims related to potential transfer of detainees from United States naval base at Guantanamo Bay, Cuba. 28 U.S.C.A. § 2241(e)(1).

[2] Statutes 361 64(1)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In general. Most Cited Cases
Ordinarily, a court should invalidate as little of an unconstitutional statute as necessary to bring it into conformity with the United States Constitution.

[3] Habeas Corpus 197 529.5

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k529.5 k. Enemy combatants and similar detainees. Most Cited Cases
Potential transfer out of district court's jurisdiction of detainees at United States naval base at Guantanamo Bay, Cuba, was proper subject of statutory habeas relief, and therefore provision of Military Commissions Act (MCA) eliminating jurisdiction over non-habeas actions against United States or its agents relating to any aspect of transfer of detainee did not apply to preclude district court's jurisdiction over detainees' claims seeking order requiring government to provide notice of planned transfers. 28 U.S.C.A. § 2241(e)(2).

[4] Injunction 212 138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In general. Most Cited Cases
Court considering a request for preliminary injunctive relief must examine four factors: (1) the moving party's likelihood of success on the merits, (2) irreparable injury to the moving party if an injunction is denied, (3) substantial injury to the opposing party if an injunction is granted, and (4) the public interest.

[5] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Federal Courts 170B 815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary injunction; temporary restraining order. Most Cited Cases
Court of Appeals reviews for abuse of discretion district court's weighing of factors governing grant of preliminary injunctive relief, but de novo review applies insofar as district court's decision hinges on questions of law.

[6] Injunction 212 138.18

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.18 k. Likelihood of success on merits. Most Cited Cases
If the moving party can show no likelihood of success on the merits, preliminary injunctive relief is improper.

[7] Habeas Corpus 197 529.5

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k529.5 k. Enemy combatants and similar detainees. Most Cited Cases
Writ of habeas corpus was not available to bar government's transfer of detainees at United States naval base at Guantanamo Bay, Cuba, based upon likelihood of detainee being tortured in recipient country, given government policy not to transfer detainee to country where detainee was likely to be tortured. 28 U.S.C.A. § 2241.

[8] Aliens, Immigration, and Citizenship 24 607

24 Aliens, Immigration, and Citizenship
24VII Asylum, Refugees, and Withholding of Removal
24VII(G) Judicial Review or Intervention
24k607 k. Decisions reviewable. Most Cited Cases

Habeas Corpus 197 617.1

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(B) Jurisdiction and Venue
197III(B)1 In General
197k617 Federal Courts
197k617.1 k. In general. Most Cited Cases

Treaties 385 13

385 Treaties
385k13 k. Performance and enforcement of provisions. Most Cited Cases
Judicial review under Convention Against Torture (CAT), as implemented by Foreign Affairs Reform and Restructuring Act (FARR), was not available to detainees at United States naval base at Guantanamo Bay, Cuba, who, in seeking habeas relief in connection with anticipated transfers, were not making requisite challenge to final order of removal. Immigration and Nationality Act, § 242(a)(4), 8 U.S.C.A. § 1252(a)(4); 28 U.S.C.A. § 2241.

[9] Habeas Corpus 197 529.5

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k529.5 k. Enemy combatants and similar detainees. Most Cited Cases
District court could not issue writ of habeas corpus to bar transfer of detainee at United States naval base at Guantanamo Bay, Cuba, based upon expectation that recipient country would detain or prosecute detainee pursuant to its own laws. 28 U.S.C.A. § 2241.

[10] International Law 221 5

221 International Law
221k5 k. Territorial extent and jurisdiction. Most Cited Cases
Jurisdiction of a nation, within its own territory, is necessarily exclusive and absolute.

[11] Habeas Corpus 197 520

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k520 k. In general. Most Cited Cases
Court cannot issue writ of habeas corpus to shield United States detainee from prosecution and detention by another sovereign according to its laws.

[12] Evidence 157 83(1)

157 Evidence
157II Presumptions
157k83 Official Proceedings and Acts
157k83(1) k. In general. Most Cited Cases
In the absence of contrary evidence, courts presume that public officers have properly discharged their official duties.

West Codenotes
Recognized as Unconstitutional28 U.S.C.A. § 2241(e)(1)

510** Appeals from the United States District Court for the District of Columbia, (No. 05cv01509), (No. 05cv01602).Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Gregory G. Katsas, Assistant Attorney General, Jonathan F. Cohn, Deputy Assistant511** Attorney General, and Douglas N. Letter, Jonathan H. Levy, Catherine Y. Hancock, and Sameer Yerawadekar, Attorneys.

Christopher P. Moore argued the cause for appellees. With him on the briefs were Jonathan I. Blackman, Rahul Mukhi, Aaron Marr Page, Susan Baker Manning, P. Sabin Willett, Rheba Rutkowski, Neil McGaraghan, Jason S. Pinney, and Gitanjali Gutierrez.

Before: GINSBURG, GRIFFITH, and

KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Concurring opinion filed by Circuit Judge KAVANAUGH.

Opinion concurring in the judgment in part and dissenting in part filed by Circuit Judge GRIFFITH.

GINSBURG, Circuit Judge:

****200** Nine Uighurs held at Guantanamo Bay, in order to challenge their detention, petitioned the district court for a writ of habeas corpus. Asserting that they feared being transferred to a country where they might be tortured or further detained, they also sought interim relief requiring the Government to provide 30 days' notice to the district court and to counsel before transferring them from Guantanamo. The district court entered the requested orders. *Kiyemba v. Bush*, No. 1:05cv1509 (Sept. 13, 2005); *Mamet v. Bush*, No. 1:05cv1602 (Sept. 30, 2005). The Government appealed each of the orders and we consolidated its appeals. In light of the Supreme Court's recent decision in *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008), we now reverse.

I. Background

In granting the request for 30 days' notice of any planned transfer, the district court in *Mamet* noted the detainee's fear of being tortured. In *Kiyemba* the district court did not advert to the detainees' fear of harm but entered an order requiring pre-transfer notice lest removal from Guantanamo divest the court of jurisdiction over the detainees' habeas petitions.

While this appeal was pending, the Congress passed the Military Commissions Act (MCA), § 7 of which provided:

> No court ... shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Pub.L. No. 109-366, 120 Stat. 2600, 2635-36 (2006) (codified at 28 U.S.C. § 2241(e)(1)). Accordingly, we dismissed the cases for lack of subject matter jurisdiction. *Kiyemba v. Bush*, 219 Fed.Appx. 7 (D.C.Cir.2007). In *Boumediene v. Bush*, however, the Supreme Court held § 2241(e)(1) "effects an unconstitutional suspension of the writ" of habeas corpus. 553 U.S. 723, 128 S.Ct. 2229, 2274, 171 L.Ed.2d 41 (2008). In light of that decision, we vacated our judgment of dismissal and reinstated the Government's appeal. *Kiyemba*, No. 05-5487 (July 31, 2008).[FN***]

> FN*** After oral argument in the court of appeals, the Government acknowledged in the district court that it no longer views any of the present petitioners as enemy combatants, whereupon the district court ordered them released into the United States. *See In re Guantanamo Bay Detainee Litig.*, 581 F.Supp.2d 33 (D.D.C.2008). The Government appealed that order, which this court reversed on the ground that the political branches have "the exclusive power ... to decide which aliens may, and which aliens may not, enter the United States, and on what terms." *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (2009).

****201 *512** II. Subject Matter Jurisdiction

[1][2] We begin with the Government's argument that the MCA bars the district court from exercising jurisdiction in their ongoing habeas cases over claims related to the detainees' potential transfer. The Government contends the Supreme Court in *Boumediene* held the first provision of § 7 of the MCA, 28 U.S.C. § 2241(e)(1), unconstitutional only insofar as it purported to deprive the district court of jurisdiction to hear a claim falling within the "core" of the constitutional right to habeas corpus, such as a challenge to the petitioner's detention or the duration thereof. According to the Government's theory, because the right to challenge a transfer is "ancillary" to and not at the "core" of habeas corpus relief, § 2241(e)(1) still bars the district court from exercising jurisdiction over the instant claims. In support of its argument, the Government invokes the rule that ordinarily a court should invalidate as little of an unconstitutional stat-

ute as necessary to bring it into conformity with the Constitution. *See* *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary.... Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course." (internal quotation marks omitted)).

In response, the detainees maintain it was no accident that the Court in *Boumediene* avoided making just the sort of fine distinction the Government proposes. They point specifically to the Court's caution in *Ayotte* that "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake." *Id.* at 330, 126 S.Ct. 961 (internal quotation marks omitted).

We think the detainees have the better of the argument. The Court in *Boumediene* did not draw (or even suggest the existence of) a line between "core" and "ancillary" habeas issues, neither of which terms appears in the opinion (apart from the innocuous observation that "Habeas is, at its core, an equitable remedy"). Rather, the Court stated simply that § 2241(e)(1) "effects an unconstitutional suspension of the writ." 128 S.Ct. at 2274. [FN1] Accordingly, we read *Boumediene* to invalidate § 2241(e)(1) with respect to all habeas claims brought by Guantanamo detainees, not simply with respect to so-called "core" habeas claims.[FN2]

FN1. The Court actually referred to § 7 without specifying a particular subsection of § 2241(e) but its discussion of the Suspension Clause clearly indicates it was referring only to that part of § 7 codified at § 2241(e)(1).

FN2. Thus, the Court necessarily restored the status quo ante, in which detainees at Guantanamo had the right to petition for habeas under § 2241. *See* *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004); *see also* *Boumediene*, 128 S.Ct. at 2266 (identifying § 2241 as "the habeas statute that would govern in MCA § 7's absence"). There is, therefore, no need to decide today whether the present petitions come within "the contours and content of constitutional habeas," Dis. Op. at 523. *See* *INS v. St. Cyr*, 533 U.S. 289, 301 n. 13, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (noting that "what the Suspension Clause protects" is a "difficult question").

[3] The Government next argues the second provision of MCA § 7 stripped the district court of jurisdiction. That provision eliminates court jurisdiction over "any other action against the United States or its agents relating to any aspect of the ... transfer" of a detainee. 28 U.S.C. § 2241(e)(2). This case does not come within the reach of § 2241(e)(2), however. ****202 *513** That provision applies by its terms to " any other action"-meaning other than a petition for a writ of habeas corpus, which is the subject of § 2241(e)(1). The detainees' claims are not in the nature of an action barred by § 2241(e)(2) because, based upon longstanding precedents, it is clear they allege a proper claim for habeas relief, specifically an order barring their transfer to or from a place of incarceration. *See* *Benson v. McMahon*, 127 U.S. 457, 462, 8 S.Ct. 1240, 32 L.Ed. 234 (1888) (reviewing, on petition for writ of habeas corpus, claim of unlawful extradition); *Ward v. Rutherford*, 921 F.2d 286, 288 (D.C.Cir.1990) ("[A]ctions taken by magistrates in international extradition matters are subject to habeas corpus review by an Article III district judge"); *INS v. St. Cyr*, 533 U.S. 289, 305-08, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (detailing long history of reviewing deportations per petition for habeas); *In re Bonner*, 151 U.S. 242, 255-56, 14 S.Ct. 323, 38 L.Ed. 149 (1894); *Miller v. Overholser*, 206 F.2d 415, 419-20 (D.C.Cir.1953) ("We think it has been settled since ... *Bonner* that the writ is available to test the validity not only of the fact of confinement but also of the place of confinement").

Because a potential transfer out of the jurisdiction of the court is a proper subject of statutory habeas relief, § 2241(e)(2) does not apply to and therefore does not deprive the court of jurisdiction over the claims now before us. Even "where a habeas court has the power to issue the writ," however, the question remains " 'whether this be a case in which [that power] ought to be exercised.' " *Munaf*, 128 S.Ct. at 2221 (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201, 7 L.Ed. 650 (1830)). We turn, accordingly, to the merits of the petitioners' claims.

III. Proper Grounds for Habeas Relief

[4][5][6] A court considering a request for preliminary relief must examine four factors: (1) the moving party's likelihood of success on the merits; (2) irreparable injury to the moving party if an injunction is denied; (3) substantial injury to the opposing party if an injunction is granted; and (4) the public interest. *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C.Cir.2008). We review for abuse of discretion the district court's weighing of these factors; insofar as "the district court's decision hinges on questions of law," however, our review is *de novo*. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C.Cir.1998) (internal quotation marks omitted). If the moving party can show no likelihood of success on the merits, then preliminary relief is obviously improper and the appellant is entitled to reversal of the order as a matter of law. *See Munaf*, 128 S.Ct. at 2220. [FN3]

FN3. The detainees argue the district court in *Kiyemba* correctly issued the injunction-regardless of their ability to make a showing on the four factors for granting preliminary relief-in order to protect the court's jurisdiction over their underlying claims of unlawful detention. In defense of the district court's rationale, the detainees rely upon the All Writs Act, 28 U.S.C. § 1651 (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"), and upon our opinion in *Belbacha*, but they overstate the holding in that case. In *Belbacha*, we held that "when the Supreme Court grants certiorari to review this court's determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act ... and during the pendency of the Supreme Court's review, act to preserve the status quo," but only, we added, "if a party satisfies the [four] criteria for issuing a preliminary injunction." 520 F.3d at 457. *Belbacha* therefore provides no basis for relieving the detainees of the need to satisfy the standard for a preliminary injunction, which, as discussed below, they have failed to do.

The detainees here seek to prevent their transfer to any country where they are likely to be subjected to further detention ****203 *514** or to torture. Our analysis of their claims is controlled by the Supreme Court's recent decision in *Munaf*. In that case, two American citizens held in the custody of the United States military in Iraq petitioned for writs of habeas corpus, seeking to enjoin the Government from transferring them to Iraqi custody for criminal prosecution in the Iraqi courts. *Id.* at 2214-15. The Court held the district court had jurisdiction over the petitions, but that it could not enjoin the Government from transferring the petitioners to Iraqi authorities. *Id.* at 2213. As we explain below, *Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer on the grounds asserted by the petitioners here; therefore the detainees cannot prevail on the merits of their present claim and the Government is entitled to reversal of the orders as a matter of law.[FN4]

FN4. For present purposes, we assume arguendo these alien detainees have the same constitutional rights with respect to their proposed transfer as did the U.S. citizens facing transfer in *Munaf*. They are not, in any event, entitled to greater rights.

A. Fear of Torture

[7] Like the detainees here, the petitioners in *Munaf* asked the district court to enjoin their transfer because they feared they would be tortured in the recipient country. The Court recognized the petitioners' fear of torture was "of course a matter of serious concern," but held "in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The context to which the Court referred was one in which-as here-the record documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured. *Id.* at 2226. Indeed, as the present record shows, the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee. Decl. of Pierre-Richard Prosper, United States Ambassador-at-Large for War Crimes Issues ¶¶ 4, 7-8, Mar. 8, 2005.

The upshot is that the detainees are not liable to be cast abroad willy-nilly without regard to their likely treatment in any country that will take them. Under *Munaf*, however, the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee. 128 S.Ct. at 2226 ("The Judiciary is not suited to second-

guess such determinations-determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area"). In light of the Government's policy, a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country. FN5

> FN5. As in *Munaf*, we need not address what rights a detainee might possess in the "more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 128 S.Ct. at 2226.

[8] The detainees seek to distinguish *Munaf* on the ground that the habeas petitioners in that case did not raise a claim under the Convention Against Torture, as implemented by the Foreign Affairs Reform and Restructuring (FARR) Act, 8 U.S.C. § 1231 note. *See Munaf*, 128 S.Ct. at 2226 n. 6. That distinction is of no help to them, however, because the Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal. 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law ... including section 2241 of Title 28, or any other habeas corpus provision, ... a petition for review [of an ****204 *515** order of removal] shall be the sole and exclusive means for judicial review of any cause or claim" arising under the Convention). Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act, and *Munaf* controls. FN6

> FN6. *Munaf* concerned a specific transfer, but the transferee sovereign's likely treatment of the petitioners was not material to its holding. Contrary to the statement in the dissent, the Court gave not merely "substantial weight to the [G]overnment's determination that the proposed transfer was lawful," Dis. Op. at 526; it held the judiciary cannot look behind the determination made by the political branches that the transfer would not result in mistreatment of the detainee at the hands of the foreign government. 128 S.Ct. at 2225, 2226.

B. Prosecution or Continued Detention

[9][10][11] To the extent the detainees seek to enjoin their transfer based upon the expectation that a recipient country will detain or prosecute them, *Munaf* again bars relief. After their release from the custody of the United States, any prosecution or detention the petitioners might face would be effected "by the foreign government pursuant to its own laws and not on behalf of the United States." Decl. of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs ¶ 5, June 2, 2005. It is a longstanding principle of our jurisprudence that "[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and absolute." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812). As the Supreme Court explained in *Munaf*, the "same principles of comity and respect for foreign sovereigns that preclude judicial scrutiny of foreign convictions necessarily render invalid attempts to shield citizens from foreign prosecution." 128 S.Ct. at 2224 (quoting Brown, J., dissenting in part in *Omar v. Harvey*, 479 F.3d 1, 17 (D.C.Cir.2007)). *Munaf* therefore bars a court from issuing a writ of habeas corpus to shield a detainee from prosecution and detention by another sovereign according to its laws.

[12] Judicial inquiry into a recipient country's basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also the same separation of powers principles that preclude the courts from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign. *See id.* at 2225 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"). Furthermore, the requirement that the Government provide pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees. Prosper Decl. ¶ 10 ("Later review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture ... and to reach acceptable accommodations with other governments to address those important concerns"). FN7

FN7. Our dissenting colleague agrees the detainees cannot prevail on a claim based upon their likely treatment by a foreign sovereign acting pursuant to its own laws. *See* Dis. Op. at 525 ("[T]he [G]overnment has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority. If the [G]overnment's representations are accurate, each transfer will be lawful."). Nor can they prevail on the ground that the foreign sovereign is an agent of the United States merely because, with respect to detainees who are-unlike the present petitioners-regarded as enemy combatants, the Government engages in a dialogue "to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies," Waxman Decl. ¶ 5. The dissent takes note of the Government's statement that "under appropriate circumstances," it transfers detainees "to the control of other governments for continued detention," *see* Dis. Op. at 525, but, as the Government explains, "[i]n all such cases ... the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States," Waxman Decl. ¶ 5. Whether, acting pursuant to its own laws, a "foreign nation will continue detention of the petitioners," Dis. Op. at 525, is precisely the inquiry *Munaf* forbids this court from undertaking.

This case involves the Government's proposed release from U.S. custody of detainees whom the Government no longer regards as enemy combatants. It does not involve-and therefore, unlike our dissenting colleague, we express no opinion concerning-the transfer of detainees resulting in their "continued detention on behalf of the United States in places where the writ does not extend," Dis. Op. at 524. The Government represents that it is trying to find a country that will accept the petitioners and, in the absence of contrary evidence, we presume public officers "have properly discharged their official duties." *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 15, 47 S.Ct. 1, 71 L.Ed. 131 (1926). In view of the Government's sworn declarations, and of the detainees' failure to present anything that contradicts them, we have no reason to think the transfer process may be a ruse-and a fraud on the court-designed to maintain control over the detainees beyond the reach of the writ.

***516 **205** In short, "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Munaf*, 128 S.Ct. at 2223. Therefore, the district court may not issue a writ of habeas corpus to shield a detainee from prosecution or detention at the hands of another sovereign on its soil and under its authority. As a result, the petitioners cannot make the required showing of a likelihood of success on the merits necessary to obtain the preliminary relief they here seek.

IV. Conclusion

The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws. In sum, the detainees' claims do not state grounds for which habeas relief is available. The orders of the district court barring their transfer without notice during the pendency of their habeas cases therefore must be and are

Vacated.

KAVANAUGH, Circuit Judge, concurring:

I agree with and join the persuasive opinion of the Court. Under current law, the U.S. Government may transfer Guantanamo detainees to the custody of foreign nations without judicial intervention-at least so long as the Executive Branch declares, as it has for

the Guantanamo detainees,****206 *517** that the United States will not transfer "an individual in circumstances where torture is likely to result." *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 2226, 171 L.Ed.2d 1 (2008).

I write separately to emphasize three points.

First, our disposition does not preclude Congress from further regulating the Executive's transfer of wartime detainees to the custody of other nations. Congress possesses express constitutional authority to make rules concerning wartime detainees. *See, e.g.*, U.S. CONST. art. I, § 8 ("Congress shall have Power ... To ... make Rules concerning Captures on Land and Water"). The constitutional text, Justice Jackson's *Youngstown* opinion, and recent Supreme Court precedents indicate that the President does not possess exclusive, preclusive authority over the transfer of detainees. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Except perhaps in a genuine, short-term emergency, the President must comply with legislation regulating or restricting the transfer of detainees. In other words, under the relevant precedents, the President does not have power to trump legislation regarding wartime transfers in a *Youngstown* category-three situation. To be sure, there are weighty policy reasons why Congress may not seek to restrict the Executive's transfer authority or to involve the Judiciary in reviewing war-related transfers. That presumably explains why Congress has not done so. But to the extent Congress wants to place judicially enforceable restrictions on Executive transfers of Guantanamo or other wartime detainees, it has that power.

Second, in the absence of a meritorious statutory claim,[FN1] the detainees argue that they have a constitutional due process right against "transfer to torture"-and, therefore, to judicial reassessment of the Executive's conclusion that transfer to a foreign nation's custody is unlikely to result in torture. But both *Munaf* and the deeply rooted "rule of non-inquiry" in extradition cases require that we defer to the Executive's considered judgment that transfer is unlikely to result in torture. Those precedents compel us to reject the detainees' argument that the court second-guess the Executive's conclusion in this case.

> FN1. The detainees advance a claim under the Foreign Affairs Reform and Restructuring Act, but that argument is unavailing. *See* Maj. Op. at 514-15.

In *Munaf*, in response to a similar due process claim, the Supreme Court unanimously held that the Judiciary may not "second-guess" the Executive's assessment that transferred detainees are unlikely to be tortured by the receiving nation (in that case, by Iraq, where the detainees were to be prosecuted in Iraqi courts). 128 S.Ct. at 2226.[FN2] The *Munaf* decision applies here a fortiori: That case involved transfer of ***518 **207** *American citizens*, whereas this case involves transfer of alien detainees with no constitutional or statutory right to enter the United States.

> FN2. There is no meaningful distinction between (i) the Executive's declaration in this case that no Guantanamo detainees will be transferred to the custody of a foreign country where the Executive believes they would likely be tortured, and (ii) a similar Executive declaration with respect to a specific transfer (as in *Munaf*). The former encompasses the latter. In other words, for our purposes, the Government has represented that no detainee in this case will be transferred to a country where the Government believes it likely the detainee would be tortured. It bears emphasis that neither *Munaf* nor this case is the "more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 128 S.Ct. at 2226.

Similarly, the longstanding rule of non-inquiry in extradition cases undermines the detainees' argument. When the Executive seeks extradition pursuant to a request from a foreign nation, the Judiciary does not inquire into the treatment or procedures the extradited citizen or alien will receive in that country. "It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir.1990); *see also Neely v. Henkel*, 180 U.S. 109, 122-23, 21 S.Ct. 302, 45 L.Ed. 448 (1901); *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir.2006); *United States v. Kin-Hong*, 110 F.3d 103, 110-11 &

nn. 11-12 (1st Cir.1997); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9th Cir.1997); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L.REV. 1198 (1991).[FN3]

> FN3. The rule of non-inquiry traditionally has not required an express executive declaration regarding the prospect of abuse by the foreign nation. After *Munaf*, courts in extradition cases presumably may require-but must defer to-an express executive declaration that the transfer is not likely to result in torture.

Therefore, with respect to international transfers of individuals in U.S. custody, *Munaf* and the extradition cases have already struck the due process balance between the competing interests of the individual and the Government. That balance controls here.[FN4] The detainees' interest in avoiding torture or mistreatment by a foreign nation is the same "matter of serious concern" at issue in *Munaf* and the extradition cases. *Munaf*, 128 S.Ct. at 2225. And on the other side of the ledger, the Government's interest in transferring these detainees to foreign nations without judicial second-guessing is at least as compelling as in those cases. *Cf.* ****208*519***id.* at 2224- 25 (noting significant governmental interest in detainee transfers connected to "the Executive's ability to conduct military operations abroad").

> FN4. In *Boumediene v. Bush*, the Supreme Court held that the Guantanamo detainees possess constitutional habeas corpus rights. 553 U.S. 723, 128 S.Ct. 2229, 2262, 171 L.Ed.2d 41 (2008). This Court has since stated that the detainees possess no constitutional due process rights. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C.Cir.2009). The detainees argue that they must possess due process rights if they have habeas rights. *See Hamdi*, 542 U.S. at 525-26, 124 S.Ct. 2633 (plurality opinion) (discussing interaction of habeas and procedural due process); *id.* at 555-58 (Scalia, J., dissenting) (explaining linked origins of habeas and due process). And they further contend that the due process balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), applies here-rather than a test based solely on history and tradition. *See Hamdi*, 542 U.S. at 529, 124 S.Ct. 2633 (plurality opinion) (applying *Mathews* test); *see also Boumediene*, 128 S.Ct. at 2283-92 (Roberts, C.J., dissenting) (applying *Mathews* test as articulated in *Hamdi*); *but see Hamdi*, 542 U.S. at 575-77, 124 S.Ct. 2633 (Scalia, J., dissenting) (criticizing application of *Mathews* test); *Medina v. California*, 505 U.S. 437, 446-48, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (applying history-based test). That *Mathews*/ *Hamdi* test requires "weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529, 124 S.Ct. 2633 (plurality opinion) (citation and internal quotation marks omitted).
>
> But as explained in the opinion of the Court and in this concurring opinion, the detainees do not prevail in this case even if they are right about the governing legal framework: Even assuming that the Guantanamo detainees, like the U.S. citizens in *Munaf*, possess constitutionally based due process rights with respect to transfers and that the *Mathews*/ *Hamdi* balancing test applies, *Munaf* and other precedents preclude judicial second-guessing of the Executive's considered judgment that a transfer is unlikely to result in torture.

The detainees counter that the Government's transfer interest in this case involves non-enemy combatants and is therefore less important than in *Munaf* and the extradition cases; they further hint that transfer without their consent would be without legal authority. Those arguments are incorrect for two separate reasons.

To begin with, even if this were just a standard immigration case involving inadmissible aliens at the U.S. border, the governmental interest in transfer would be compelling. Like Guantanamo detainees, inadmissible aliens at the border or a U.S. port of entry have no constitutional right to enter the United States. *See Shaughnessy v. United States ex rel.*

Mezei, 345 U.S. 206, 210-13, 73 S.Ct. 625, 97 L.Ed. 956 (1953); *see also id.* at 222-23 (Jackson, J., dissenting) (agreeing with majority that there is no constitutional right for an alien to enter the United States); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C.Cir.2009). In those cases, the United States has a very strong interest in returning the aliens to their home countries or safe third countries so that they will not be detained indefinitely in facilities run by the United States-a scenario that can trigger a host of security, foreign policy, and domestic complications. *Cf.* 8 C.F.R. §§ 241.13, 241.14. That governmental interest applies at least as strongly in the case of these Guantanamo detainees.

In addition, and more fundamentally, this is a case involving transfer of wartime alien detainees. Transfers are a traditional and lawful aspect of U.S. war efforts. When waging war, the United States captures and detains enemy combatants. The United States may hold enemy combatants for the duration of hostilities, and it of course may prosecute unlawful enemy combatants. *See Hamdi*, 542 U.S. at 518-19, 124 S.Ct. 2633 (plurality opinion). At the conclusion of hostilities, the United States ordinarily transfers or releases lawful combatant detainees to their home countries. Most relevant in this case, when the United States determines during an ongoing war that an alien no longer needs to be detained or has been mistakenly detained-for example, if he is a non-combatant and not otherwise subject to confinement-the United States attempts to promptly transfer or release that detainee to his home country or a safe third country. *Cf.* Army Regulation 190-8 § 1-6(10)(c) (person who is captured and determined to be "innocent civilian should be immediately returned to his home or released"); *id.* §§ 3-11 to 3-14 (transfer and repatriation of prisoners of war); *id.* § 6-15 (transfer of civilian internees).[FN5]

> FN5. The factual complication in this case arises because the United States will not send these Uighur detainees back to their home country of China, apparently because the Executive has concluded there is a likelihood of torture by China. *See* John B. Bellinger, III, U.S. State Dep't Legal Advisor, Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007). The detainees do not want to return to China for that same reason and thus support the Executive's decision. Yet these alien detainees also have no constitutional or statutory right to enter the United States. Assuming the Executive has the authority to bring them into the United States, the Executive has thus far declined to do so. And the Executive apparently has not yet found a safe third country willing to accept them.

Throughout the 20th Century, the United States transferred or released hundreds of thousands of wartime alien detainees-some of whom had been held in America-back to their home countries or, in some ****209 *520** cases, to other nations.[FN6] Those transfer and exchange decisions rested then-as they do now-on confidential information, promises, and negotiations. They involved predictive, expert judgments about conditions in a foreign country and related matters. Given those sensitivities, as well as the delays and burdens associated with obtaining judicial preapproval of transfers and transfer agreements, it comes as no surprise that war-related transfers traditionally have occurred without judicial oversight. *See Boumediene*, 128 S.Ct. at 2248-49 (negotiated exchange of prisoners was "a wartime practice well known to the Framers," and "[j]udicial intervention might have complicated" those negotiations). As both history and modern practice demonstrate, the capture, detention, possible trial, and eventual transfer or release of combatants-as well as the transfer or release of those mistakenly detained during wartime-are all necessary and traditional incidents of war implicating compelling governmental interests. *See Hamdi*, 542 U.S. at 518-19, 124 S.Ct. 2633 (plurality opinion); *cf.* Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001).

> FN6. *See generally* George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, DEP'T OF THE ARMY PAMPHLET NO. 20-213, at 46, 177, 201-204, 240-43, 247, 258-60 (1955), http:// cgsc. cdmhost. com; Raymond Stone, *The American-German Conference on Prisoners of War*, 13 AM. J. INT'L L. 406 (1919); Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L.REV. 51 (1946); Mark Elliott, *The United States and Forced Repatriation of Soviet Citizens, 1944-47*, 88 POLITICAL SCIENCE QUARTERLY 253 (1973); Howard S.

> Levie, *How It All Started-And How It Ended: A Legal Study of the Korean War*, 35 AKRON L.REV. 205 (2002); U.S. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 661-73, 703-08 (1992), http:// www. ndu. edu.

In short, *Munaf* and the extradition cases have already weighed the relevant due process considerations regarding transfers. They have established that "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 128 S.Ct. at 2226. And the "Judiciary is not suited to second-guess such determinations." *Id.* In light of those precedents, it would be quite anomalous for courts, absent congressional direction, to second-guess such Executive assessments in these war-related transfer cases, where the governmental interest is at least as compelling and the individual interest in avoiding mistreatment is the same. *See* *Al-Anazi v. Bush*, 370 F.Supp.2d 188, 194-95 (D.D.C.2005) (Bates, J.); *see generally* *The Supreme Court, 2008 Term-Leading Cases*, 122 HARV. L.REV.. 415 (2008) (analyzing *Munaf* and collecting authorities).

Third, I respectfully offer a few comments about the dissent.

The dissent does not address the fundamental issue raised in this appeal: whether the Constitution's Due Process Clause (or the Foreign Affairs Reform and Restructuring Act, *see* Maj. Op. at 514-15) requires judicial reassessment of the Executive's determination that a detainee is not likely to be tortured by a foreign nation-and whether, in order to ensure such a judicial inquiry, the Government must notify the district court before transfer. Rather, the dissent discusses a question that was not raised by the parties and fashions a new legal rule seemingly out of whole cloth. According to the dissent, a court must prevent a transfer of an alien detainee to a foreign nation's custody if it concludes that prosecution or detention by the foreign nation would also amount to continued detention "on behalf of the United States." Dis. Op. at 518. The detainees****210 *521** did not advance that position in their 104 pages of briefing in this Court (except perhaps an ambiguous reference at the tail end of one sentence in a supplemental brief). Nor did the detainees raise the point during two lengthy oral arguments in this Court. And because the detainees did not make the argument, the Government has not been able to address and respond to the dissent's novel approach.

In any event, I respectfully disagree with the dissent's theory. The Government represents that a foreign nation's prosecution or detention in the wake of a transfer to that nation's custody would take place "pursuant to its own laws." Waxman Decl. ¶ 5. Under the principles of *Munaf*, that declaration suffices to demonstrate that the proposed transfer of an alien to the custody of a foreign nation is not the same thing as the U.S. Government's maintaining the detainee in U.S. custody.[FN7]

> FN7. A quite different issue arises, of course, when the United States maintains physical custody of an alien detainee but moves him after he has filed his habeas petition from a place where habeas applies (such as Guantanamo) to a place where the writ does not extend for aliens (such as a U.S. military base in Germany). *Cf.* *Rumsfeld v. Padilla*, 542 U.S. 426, 440-41, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004); *Ex parte Endo*, 323 U.S. 283, 306, 65 S.Ct. 208, 89 L.Ed. 243 (1944).

The dissent cites no precedent-none-requiring or allowing a court to review a proposed transfer and assess whether custody of such an alien by a foreign nation would somehow also amount to custody "on behalf of the United States." The dearth of citations is noteworthy, particularly given that transfers of inadmissible or removed aliens to the custody of foreign nations have long occurred in the immigration context.

Furthermore, the dissent does not define or explain its proposed standard. What does "on behalf of the United States" mean in the context of a foreign nation's custody of an alien detainee? Does that concept apply to any negotiated transfer of an alien detainee? Does the dissent mean to prevent transfer from Guantanamo whenever the United States seeks or becomes aware of prosecution or detention of an alien by the receiving country pursuant to that country's laws? The dissent does not say.

The dissent in places seems to imply that an alien who is not an enemy combatant is perforce not dangerous, as that term is used in immigration practice, and that prosecution or detention by a foreign nation after transfer therefore would be improper, at least if the United States were aware of or encouraged it beforehand. But no authority is cited to support such a conclusion or the extraordinary judicial role it portends in connection with the Nation's foreign and immigration policies and international negotiations. *Cf.* *Munaf*, 128 S.Ct. at 2223 ("Habeas does not require the United States to keep an unsuspecting nation in the dark when it releases an alleged criminal insurgent within its borders."); *Demore v. Kim*, 538 U.S. 510, 522, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government") (internal quotation marks omitted); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) ("judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (internal quotation marks omitted).

***522 **211** Moreover, the dissent's theory necessarily would require some judicial review of a foreign nation's legal practices and procedures. But that would contravene the longstanding principle reiterated by the Supreme Court in *Munaf:* "Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S.Ct. at 2225.

Nor does the dissent explicate how its regime would work procedurally. For instance, would the Judiciary require questioning of the American and foreign officials who negotiated the transfer? Would it mandate disclosure of confidential nation-to-nation documents? Presumably so. But absent congressional direction otherwise, courts traditionally are wary of wading so deeply into this Nation's negotiations and agreements with foreign nations. *Cf.* *Dep't of Navy v. Egan*, 484 U.S. 518, 529-30, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

Courts have a responsibility to decide war-related cases with as much clarity and expedition as possible. Especially in this sensitive area, our holdings and opinions should strive to be readily understandable to the political branches that have to make critical wartime decisions. The dissent's uncertain "on behalf of" standard likely would create years of case-by-case litigation as the courts and the political branches grapple with what it means and how it applies to a given U.S. negotiation with a foreign nation about transfer of a wartime alien detainee.

In my respectful judgment, the dissent's theory does not advance a proper ground, absent congressional direction, for a judge to prevent the transfer of Guantanamo detainees to the custody of a foreign nation. And thus I fully agree with the opinion of the Court that the dissent's argument provides no basis in this case for the court to second-guess the Executive's proposed transfer of these alien detainees. *See* Maj. Op. at 515-16 n.*.

* * *

The opinion of the Court correctly concludes that, under current law, the U.S. Government may transfer Guantanamo detainees to the custody of foreign nations without judicial intervention-at least so long as the Executive Branch declares, as it has for the Guantanamo detainees, that the United States will not transfer "an individual in circumstances where torture is likely to result." *Munaf*, 128 S.Ct. at 2226.

GRIFFITH, Circuit Judge, concurring in the judgment in part and dissenting in part:

Nine detainees ask us to affirm district court orders requiring the government to provide thirty days' notice of their transfers from Guantanamo Bay. I share the majority's concern that requiring such notice limits the government's flexibility in a sensitive matter of foreign policy. Nevertheless, in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), the Supreme Court rejected this court's view of the reach of the writ of habeas corpus and extended its protections to those held at Guantanamo Bay. Since at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government. Because this protection applies to the petitioners, the

critical question before us is what process a court must employ to assess the lawfulness****212 *523** of their proposed transfers. Based on its reading of *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008), the majority finds sufficient the government's representations that no transfer will result in continued detention on behalf of the United States. I write separately because I do not believe *Munaf* compels absolute deference to the government on this matter, and I believe the premise of *Boumediene* requires that the detainees have notice of their transfers and some opportunity to challenge the government's assurances. Accordingly, I would affirm the district court orders.

I.

I agree with the majority that the district court has subject matter jurisdiction to hear the detainees' challenges to their transfers. I am less certain than the majority, however, that there remains a statutory basis to hear these claims after *Boumediene.* The majority opinion in *Boumediene* said nothing about whether statutory habeas for the Guantanamo detainees survived the Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600, and at least three Justices were of the view it did not. *See* *Boumediene*, 128 S.Ct. at 2278 (Souter, J., concurring, joined by Ginsburg & Breyer, JJ.) (noting that Congress "eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all"). Statutory habeas may in fact exist for these detainees and cover claims against unlawful transfer, but for now this remains an open question, and the Constitution provides a more sure footing for jurisdiction.

The bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' " *INS v. St. Cyr*, 533 U.S. 289, 301, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). Because the Habeas Corpus Act of 1679 "was the model upon which the habeas statutes of the 13 American Colonies were based," *Boumediene*, 128 S.Ct. at 2246; *see* Dallin H. Oaks, *Habeas Corpus in the States, 1776-1865*, 32 U. CHI. L.REV.. 243, 252 (1965) (explaining the "close conformity of most state legislation to the English Habeas Corpus Act of 1679"), the Supreme Court has looked to the 1679 Act to determine the contours and content of constitutional habeas, *see, e.g.*, *Boumediene*, 128 S.Ct. at 2245-47; *Hamdi v. Rumsfeld*, 542 U.S. 507, 557-58, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (Scalia, J., dissenting); *Peyton v. Rowe*, 391 U.S. 54, 58-59, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Section 12 of the 1679 Act included a prohibition against the transfer of prisoners to places where the writ did not run. *See* Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 12 (Eng.) ("[N]o subject ... may be sent ... into parts, garrisons, islands or places beyond the seas ... within or without the dominions of his Majesty ...."); *see also* *Boumediene*, 128 S.Ct. at 2304 (Scalia, J., dissenting) ("The possibility of evading judicial review through such spiriting-away was eliminated, not by expanding the writ abroad, but by forbidding (in Article XII of the Act) the shipment of prisoners to places where the writ did not run or where its execution would be difficult."); Oaks at 253 ("The act also prohibited sending persons to foreign prisons (§ 12)."). Because *Boumediene* extended constitutional habeas to the Guantanamo detainees, *see* 128 S.Ct. at 2240 (holding that petitioners "have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause"), we should acknowledge that jurisdiction****213 *524** to hear the petitioners' claims against unlawful transfer-a fundamental and historic habeas protection-is grounded in the Constitution.

II.

Transfer to continued detention on behalf of the United States in a place where the writ does not reach would be unlawful and may be enjoined. The question we must consider is what process courts must use to determine whether the government's proposed transfers run afoul of that bar. The majority holds that the district court must defer to the Executive's sworn representations that transfer to the physical custody of a foreign government will not involve continued detention on behalf of the United States. Majority Op. at 516. But this will leave the petitioners without any opportunity to challenge the accuracy of the government's sworn declarations. Although prudential concerns may justify some flexibility in fashioning habeas relief, *see* *Boumediene*, 128 S.Ct. at 2267 (noting that "common-law habeas corpus was, above all, an adaptable remedy"), such innovations must not strip the writ of its essential protections. *See* *id.* at

2276 ("Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.").

Fundamental to a prisoner's habeas rights is the government's duty to appear in court to justify his detention. At its most basic level, habeas "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 2247; *see Peyton*, 391 U.S. at 58, 88 S.Ct. 1549 ("The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law."). To vindicate the detainees' habeas rights, *Boumediene* requires the court to "conduct a meaningful review" of the government's reasons for the detention, which includes, at the very least, the rudimentaries of an adversary proceeding. 128 S.Ct. at 2268-69 (for the "writ [to] be effective ... [t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," typically through "a fair, adversary proceeding"); *see also id.* at 2269 (identifying as a critical deficiency in the CSRT process the "constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant"). Calling the jailer to account must include some opportunity for the prisoner to challenge the jailer's account.

Here the nine detainees claim their transfers may result in continued detention on behalf of the United States in places where the writ does not extend, effectively denying them the habeas protections *Boumediene* declared are theirs. *See, e.g.*, Appellees' Supp. Br. at 4-5 (arguing that habeas "extends to ensuring that any proposed 'release' " would not result in "continued unlawful detention in a location beyond the jurisdiction of the district court ... in coordination with[ ] or at the behest of the United States"); Appellees' Supp. Resp. Br. at 5-6; Application for Prelim. Inj. at 7, 9-10, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Sept. 9, 2005). The stakes of unlawful custody, which led the Court in *Boumediene* to extend habeas protections to the detainees in the first place, are no higher than the stakes of unlawful transfer. Indeed, because an unlawful transfer will deny the detainees any prospect of judicial relief, protecting their habeas rights in this context is vital.

***525 **214** It is significant that the government has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority. If the government's representations are accurate, each transfer will be lawful, for in habeas the only relevant judicial inquiry about a transfer is whether it will result in continued detention on behalf of the United States in a place where the writ does not run. But as we recently noted in another case involving the scope of habeas protections for detainees at Guantanamo Bay, a "naked declaration cannot simply resolve the issue." *Al-Odah v. United States*, 559 F.3d 539, slip op. at 10 (D.C.Cir.2009) (per curiam) (rejecting "the government's suggestion that its mere certification-that the [classified] information redacted from the version of the [document] provided to a detainee's counsel do[es] not support a determination that the detainee is *not* an enemy combatant-is sufficient to establish that the information is not material" (internal quotation marks omitted)); *see id.* at 545, slip op. at 11 ("[I]t is the [habeas] court's responsibility to make the materiality determination itself."). Critical to ensuring the accuracy of the government's representations is an opportunity for the detainees to challenge their veracity. The rudimentaries of an adversary proceeding demand no less. *See Boumediene*, 128 S.Ct. at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."). When an individual entitled to habeas protections faces the prospect of continued detention-be it by the United States at Guantanamo Bay or on its behalf after transfer to a foreign nation-he must be afforded some opportunity to challenge the government's case.

Relying solely on the government's sworn declaration and despite the petitioners' claims to the contrary, the majority insists that this case is not about possible continued detention by a foreign nation on behalf of the United States. Majority Op. at 515-16. But the majority makes too much of what the government has actually said. The government has stated only that transfer to a foreign nation will result in release of the detainees from the physical custody of the United States. *See* Declaration of Matthew C. Waxman, Deputy Assistant Sec'y of Def. for Detainee Affairs 2-3 (June 2, 2005). The declaration expressly left

open the possibility that a foreign nation will continue detention of the petitioners. *See id.* at 2 ("[T]he United States also transfers GTMO detainees, under appropriate circumstances, to the control of other governments for continued detention...."). The possibility of continued detention by a foreign nation on behalf of the United States after a transfer is the very issue we must address. Although the status of these detainees has been put to an adversarial process, whether their transfers will be lawful has not. I do not see how the court can safeguard the habeas rights *Boumediene* extended to these detainees without allowing them to challenge the government's account.[FN1]

> FN1. Because this case should be governed by *Boumediene*'s extension to the detainees of habeas protections that include the bar against unlawful transfer, I view the issues of interest to Judge Kavanaugh in his concurring opinion as inapposite. For example, whether the Due Process Clause of the Fifth Amendment reaches these detainees is simply not part of the inquiry required in this case. The critical issue is whether the petitioners' habeas rights permit them to offer evidence that their proposed transfers will result in continued detention by a foreign nation on behalf of the United States.

Munaf is not to the contrary. The majority makes much of its language that courts may not "second-guess" the government's****215 *526** determinations, but it overlooks a significant difference between that case and ours: the *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful. There was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer. In considering the *Munaf* petitioners' request to enjoin their transfers, the district court had the benefit of competing arguments from the petitioners and the government for each specific transfer. *See* 128 S.Ct. at 2226 (emphasizing that the government had considered and determined that the petitioners, Shawqi Ahmad Omar and Mohammad Munaf, would be treated adequately by Iraq's Justice Ministry and the prison where they would be held); *see also Omar v. Harvey*, 416 F.Supp.2d 19, 28 (D.D.C.2006) (stating petitioner's reasons for seeking an injunction barring transfer); Petition for Writ of Habeas Corpus at 7, *Munaf v. Harvey*, No. 06-1455 (D.D.C. Aug. 18, 2006) (same). Although the Supreme Court rightly gave substantial weight to the government's determination that the proposed transfer was lawful, the petitioners were at least permitted to argue otherwise. The *Kiyemba* petitioners should be afforded the same opportunity.

Other factual and legal differences limit *Munaf*'s applicability to our case. Critical to *Munaf*'s holding was the need to protect Iraq's right as a foreign sovereign to prosecute the petitioners. *See* 128 S.Ct. at 2221 ("[O]ur cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil."). No such interest is implicated here. The Court also emphasized Iraq's status as an ally and the fact that the petitioners had voluntarily traveled to Iraq to commit crimes during ongoing hostilities. *See id.* at 2224-25. Again, nothing similar is involved in this case. Perhaps most important, the *Munaf* petitioners sought a unique type of relief, as the Court stressed:

> [T]he nature of the relief sought by the habeas petitioners suggests that habeas is not appropriate in these cases. Habeas is at its core a remedy for unlawful executive detention.... At the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders.

Id. at 2221. Given the significant differences between the circumstances of Munaf and this case, we are not required to hold that courts are foreclosed from exercising their habeas powers to enjoin a transfer without some opportunity for a detainee to challenge the government's representation that his transfer will be lawful.

III.

In the end, I would add only one element to the process the majority concludes is sufficient for considering the petitioners' transfer claims. But it is, I believe, a fundamental element called for by the Great Writ. The constitutional habeas protections extended to these petitioners by *Boumediene* will be greatly diminished, if not eliminated, without an opportunity to

challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States. Accordingly, I respectfully dissent.

C.A.D.C.,2009.
Kiyemba v. Obama
561 F.3d 509, 385 U.S.App.D.C. 198

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EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED BEN BACHA (BELBACHA),	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 05-2349 (RMC)**
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents.	)	
	)	

ORDER

In light of the Supreme Court's decision in *Boumediene v. Bush*, No. 06-1195 (June 12, 2008), it is hereby

ORDERED that Respondents are enjoined from transferring Petitioner Ahmed Belbacha from Guantanamo Bay to Algeria pending briefing and resolution of the issues left unresolved in *Boumediene* which the Supreme Court left to be decided by the District Court in the first instance.

SO ORDERED.

Date: June 13, 2008

/s/
ROSEMARY M. COLLYER
United States District Judge

EXHIBIT F

--- F.Supp.2d ----, 2010 WL 1539845 (D.D.C.)
(Cite as: 2010 WL 1539845 (D.D.C.))

United States District Court,
District of Columbia.
In re GUANTANAMO BAY DETAINEE LITIGATION.
Misc. No. 08-0442 (TFH).
Civil Action No. 05-2349 (RMC).

April 19, 2010.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

***1** Pending before the Court is Petitioner Ahmed **Belbacha's** (ISN 290) Emergency Motion to Reconsider and Vacate Order Dissolving Preliminary Injunction Protecting Petitioner from Forced Repatriation to Algeria to Face Persecution, Torture, and Death, and for Other Relief. Petitioner requests that the Court reconsider its Order of February 4, 2010 ("February 4 Order") that dissolved the preliminary injunction barring Respondents ("Government") from transferring him to Algeria.[FN1] Upon consideration of the motion, Respondents' opposition, Petitioner's reply, and the entire record herein, the Court will deny the motion.

> FN1. Petitioner also had requested that the Court stay the February 4 Order pending appeal. On March 9, 2010, the Court issued an order denying that request. *See* Order, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (D.D.C. Mar. 9, 2010) [Dkt. No.1921].

Background

Petitioner is an Algerian national detained at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). His habeas petition is currently pending before Judge Rosemary M. Collyer. On July 26, 2007, Petitioner filed an emergency motion to temporarily enjoin the Government from transferring him to Algeria because, he contended, "it is more likely than not that Algerian authorities will ... torture him." *See* Pet'r's Emergency Mot. for Order Enjoining Transfer of Pet'r to Likely Abuse and Torture in Alegeria at 6 ("Pet'r's Emergency Mot. to Enjoin"). Ultimately, Judge Collyer enjoined Respondents from transferring Petitioner to Algeria pending a decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). *See* Order, ***Belbacha*** *v. Obama*, No. 05-2349 (D.D.C. June 10, 2008). When the Supreme Court decided *Boumediene* two days later, Judge Collyer issued a new order, enjoining Petitioner's transfer "pending briefing and resolution of the issues left unresolved in *Boumediene.*" *See* Order, ***Belbacha*** *v. Obama*, No. 05-2349 (D.D.C. June 13, 2008) ("June 13 Order"). Respondents appealed the order.

One of the "issues left unresolved in *Boumediene* " was the very question raised by Petitioner's injunction motion: whether a district court could bar the Government from transferring a Guantanamo detainee who feared the recipient foreign country would torture him. On April 7, 2009, the United States Court of Appeals for the District of Columbia Circuit resolved that issue in *Kiyemba v. Obama*, 561 F.3d 509 (D.C.Cir.2009), *cert. denied*, 2010 WL 1005960 (U.S. Mar. 22, 2010). Similar to Petitioner, the detainees in *Kiyemba* had sought "to prevent their transfer to any country where they are likely to be subjected ... to torture ." *Id.* at 513-14. Citing *Munaf v. Geren*, 128 S.Ct. 2207, 2225-26 (2008), the D.C. Circuit held that a district court is precluded "from barring transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country." *Kiyemba*, 561 F.3d at 516. Accordingly, on July 10, 2009, Respondents moved to dissolve the injunction. Judge Collyer transferred the motion to Judge Hogan since he was "handling an identical motion filed by the Government in certain other cases." Minute Order, ***Belbacha*** *v. Obama*, No. 05-2349 (D.D.C. July 16, 2009). Because the duration of the injunction was limited to the resolution of issues left unresolved in *Boumediene*, and *Kiyemba* resolved the precise issue that prompted Petitioner's motion for an injunction, this Court granted the motion and dissolved the injunction on February 4, 2010. *See* February 4 Order at 2-4.

***2** On March 7, 2010, Petitioner filed the instant

emergency motion for reconsideration of the February 4 Order. He requests that the Court reinstate the injunction. Respondents filed an opposition on March 15, 2010, which was followed by Petitioner's reply.

Legal Standard

Federal Rule of Civil Procedure 54(b) governs reconsideration of orders that do not constitute final judgments. *See* *Singh v. George Washington Univ.*, 383 F.Supp.2d 99, 101 (D.D.C.2005). Rule 54(b) provides that "any order ... that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." FED.R.CIV.P. 54(b). Although a federal district court has the discretion to reconsider interlocutory orders, the Supreme Court has admonished that "courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). In particular, a court should grant a motion for reconsideration of an interlocutory order "only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *In re Vitamins Antitrust Litig.*, 2000 WL 34230081, at *1 (D.D.C. July 28, 2000) (internal citation and quotation omitted).

Analysis

Petitioner avers that reconsideration is warranted because the Court lacked both jurisdiction and authority to dissolve the injunction. The Court disagrees.

I. *Jurisdiction to Dissolve the Injunction*

Petitioner argues that the Court lacked jurisdiction to dissolve the injunction since the injunction was pending on appeal. *See* Pet'r's Reply at 1-3. Under Rule 62(c), while an appeal is pending from an interlocutory order that grants an injunction, such as here, a federal court may "suspend, modify, restore or grant an injunction on terms ... that secure the opposing party's rights." FED.R.CIV.P. 62(c). Absent from the rule is any mention of dissolution. Since the February 4 Order dissolved the injunction rather than modifying it, Petitioner claims the Court committed a clear error of law and should reconsider the Order.

As mentioned in the February 4 Order, however, the Court need not rely on Rule 62(c) to dissolve the injunction because it was set to dissolve by its own terms. Petitioner ignores the overt limiting language of the injunction. The pendency of "issues left unresolved in *Boumediene* " was a condition subsequent to the injunction. June 13 Order at 1. The pertinent issue left unresolved was whether a federal court could enjoin the Government from transferring a Guantanamo detainee who claimed he was likely to be tortured in the recipient country. Such fear of torture was the precise reason Petitioner filed the emergency motion to enjoin his transfer to Algeria, as evidenced by the title of his injunction motion: "Emergency Motion for Order Enjoining Transfer of Petitioner to *Likely Abuse and Torture* in Algeria." Pet'r's Emergency Mot. to Enjoin at 1 (emphasis added). *Kiyemba* conclusively resolved that issue in the Government's favor. Therefore, once *Kiyemba* was decided, the issue was resolved, and so the injunction dissolved. Since the February 4 Order merely memorialized the terms of the injunction, the dissolution does not implicate Rule 62(c), which concerns alterations to an injunction.

***3** Though unnecessary in order to deny Petitioner's motion, the Court further observes that Rule 62(c) does not preclude the Court from dissolving the injunction. Although the D.C. Circuit has not opined on the issue, in *Decatur Liquors v. District of Columbia* the United States District Court for the District of Columbia indicated that a preliminary injunction under appeal could be dissolved if there were "changed circumstances or a change in the law." 2005 WL 607881, at *3 (D.D.C. Mar. 16, 2005). The Eleventh Circuit appears to be in agreement with the D.C. District Court, suggesting that a court may vacate an injunction pursuant to Rule 62(c). *See* *Pac. Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1096 n. 7 (11th Cir.1994) (stating that vacating an injunction "arguably was proper under Rule 62(c)"). Only the Fifth Circuit has directly held to the contrary. *See* *Coastal Corp. v. Texas E. Corp.*, 869 F .2d 817, 819-21 (5th Cir.1989) (holding that the authority granted by Rule 62(c) does not extend to the dissolution of an injunction). Yet even the Fifth Circuit seemingly permits

dissolution in the instant circumstances because the principle driving the circuit's prohibition on dissolution is that "the district court may not alter [an] injunction once an appeal has been filed except to maintain the status quo of the parties pending the appeal." *Id.* at 819; *see also Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2nd Cir.1962) ("unless the judge is satisfied that his order was erroneous he shall use his power under Rule 62(c) only to preserve the status of the case as it sits before the court of appeals"). Here, the February 4 Order maintains the status quo since the injunction, by its own terms, expired once the issue of a district court's authority to enjoin the transfer of a detainee based on his fear of torture was resolved. After *Kiyemba* resolved the issue, the Court merely followed the instructions of the injunction. *Cf. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 578-79 (5th Cir.1996) (stating that with respect to an injunction that "*by its own terms* create the possibility for a change in its operations ... [t]he court did not exceed its authority in stepping in to supervise this change through an amendment of its original order" (emphasis in original)). Accordingly, the Court concludes that Petitioner has failed to demonstrate that the Court erred in dissolving the injunction.[FN2]

FN2. Though not discussed by the parties, it bears noting that Petitioner is attempting to preserve an appeal filed by Respondents.

II. *Authority to Dissolve the Injunction*

Petitioner submits that in dissolving the preliminary injunction, the Court exceeded its authority under Judge Collyer's transfer order. *See* Pet'r's Reply at 1 n. 1. According to Petitioner, the relevant transfer order was issued on July 2, 2008, which assigned the case to Judge Hogan solely for purposes of "coordination and management." Order, ***Belbacha** v. Obama*, No. 05-2349 (D.D.C. July 2, 2008). For that reason alone, he maintains, "this Court should vacate its order of January [sic] 4, 2010." *Id.* Presumably, Petitioner is alleging that the Court's decision to dissolve the injunction under the terms of the Order of July 2, 2008, constitutes a "clear error of law" under Rule 54(b). The only error the Court can identify, however, is on the part of Petitioner.

***4** The Court's authority to dissolve Judge Collyer's preliminary injunction is not governed by the Order of July 2, 2008. As mentioned above, on July 16, 2009, Judge Collyer explicitly transferred Respondents' motion to dissolve the preliminary injunction to the undersigned. *See* Minute Order, ***Belbacha** v. Obama*, No. 05-2349. Petitioner fails to acknowledge the Order of July 16, 2009, or explain how the Court exceeded its authority under that order. Petitioner's claim thus is both incomplete and unavailing.

Conclusion

Therefore, the Court finds that Petitioner has failed to demonstrate that reconsideration is warranted. Having ruled on Respondents' motion to dissolve the preliminary injunction, any future motions regarding the transfer of Petitioner should be directed to Judge Collyer.

An order accompanies this memorandum opinion.

ORDER

Pending before the Court is Petitioner Ahmed **Belbacha's** (ISN 290) Emergency Motion to Reconsider and Vacate Order Dissolving Preliminary Injunction Protecting Petitioner from Forced Repatriation to Algeria to Face Persecution, Torture, and Death, and for Other Relief. For the reasons given in the Memorandum Opinion filed herewith, the Court

ORDERS that the motion for reconsideration is **DENIED.**

SO ORDERED.

D.D.C.,2010.
In re Guantanamo Bay Detainee Litigation
--- F.Supp.2d ----, 2010 WL 1539845 (D.D.C.)

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