

[ORAL ARGUMENT NOT YET SCHEDULED]

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

MAHMOAD ABDAH, et al.,)	No. 05-5224
)	
Appellees,)	Consolidated with 05-5225, 05-5227
)	05-5229, 05-5230, 05-5232, 05-5235,
v.)	05-5236, 05-5237, 05-5238, 05-5239,
)	05-5242, 05-5243, 05-5244, 05-5246,
BARACK OBAMA, et al.,)	05-5248, 05-5337, 05-5338, 05-5374,
)	05-5390, 05-5398, 05-5478, 05-5479,
Appellants.)	05-5484, 05-5486, 06-5037, 06-5041,
)	06-5043, 06-5062, 06-5065, 06-5094

**APPELLEES’ RESPONSE TO COURT’S ORDER OF JULY 23, 2010,
AND MOTION TO HOLD THE CASES IN ABEYANCE PENDING
CONSIDERATION OF A PETITION FOR INITIAL *EN BANC* HEARING
TO OVERRULE *KIYEMBA II*, AND FOR OTHER RELIEF**

On July 23, 2010, this Court ordered “that the appellees in these consolidated cases show cause, within 30 days of the date of this order, why the district court’s orders requiring advance notice of transfer should not be vacated and the cases remanded. *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).” (The decision is known as “*Kiyemba II*.”)

The Court should not vacate the district court’s orders because Appellees have petitioned for initial *en banc* hearing to overrule *Kiyemba II*. A copy of the petition is attached for the Court’s convenience. The Court should hold the cases in abeyance pending consideration of the petition. If the Court denies initial *en*

banc hearing, the Court should not vacate the district court's orders but should remand the cases to the district court to consider any evidence that Appellees may present on issues not decided by *Kiyemba II*. The notice orders would have to continue in force while the district court considers these undecided issues.

For example, *Kiyemba II* reserved decision on whether a district court may enjoin detainee transfers to "places where the writ does not run" for detention "on behalf of the United States." 561 F.3d at 515 n.7 (citation omitted); *see also id.* at 524-26 (Griffith, J., dissenting). In *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010), the Court similarly reserved decision on whether habeas is available in cases of transfers "to evade judicial review of Executive detention decisions."

The Court also reserved consideration of a district court's power to enjoin a transfer "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.'" *Kiyemba II*, 561 F.3d at 514 n.5 (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008)). It may be unlikely that the Government would ever acknowledge deliberately transferring a detainee to likely torture. Nevertheless, the evidence of likely torture may be so overwhelming as to impute to the Government constructive knowledge that torture is likely. *Cf. Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004) (imputing to city government constructive knowledge that its agents would violate constitutional rights).

If the Court vacates and remands, it should withhold the mandate while Appellees seek review in the Supreme Court. Their petition for initial *en banc* hearing demonstrates “that [a] certiorari petition would present a substantial question and that there is good cause for the stay.” Fed. R. App. P. 41(d)(2).

Respectfully submitted,

/s/

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August 23, 2010

* Appellees in the other consolidated cases join this response and motion.