**[UNSEALED VERSION]**

No. 08-5350

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AHMED BELBACHA,

Petitioner-Appellee.

v.

BARACK OBAMA *et al.,*

Respondents-Appellimts,

RESPONDENTS-APPELLANTS RESPONSE TO PETITION FOR INITIAL

HEARING *EN BANC* **(PUBLIC VERSION)**

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[NOT SCHEDULED FOR ORAL ARGUMENT]

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**INTRODUCTION AND SUMMARY**

Respondents-Appellants, Barack Obama *et al.,* respectfully submit that the

petition for initial hearing *en bane* should be denied. As an initial matter, the petition

for initial hearing *en bane* should be denied in this case because this appeal is moot.

Accordingly, the appeal should be dismissed.[**FN 1**-- The Government is filing a separate motion requesting that this Court dismiss this appeal as moot.] In any event, the issues raised in this petition have already been thoroughly considered by this Court, first in issuing the

decision in *Kiyemba* v. *Obama,* 561 F.3d 509 (D.C. Cir. 2009) (hereinafter *Kiyemba*

*II),* and again in considering and rejecting the petitions for rehearing and rehearing *en*

*bane* in that case. Nothing has happened since this Court last considered these issues·

and denied the *en bane* petition less than a year ago that warrants reconsideration of

this Court's decision. Indeed, the Supreme Court, likewise, considered the case and

denied a petition for certiorari challenging this Court's ruling .

Petitioner seeks the extraordinary relief of initial *en bane* review of a Circuit

precedent adopted only one year ago - based on the claims that he will be tortured if

returned to Algeria. Any suggestion that the United States is contemplating sending

petitioner to a country where he more likely than not would be tortured is refuted by

sworn declarations.

Moreover, initial *en bane* review is unwarranted because *Kiyemba II* is legally

sound. It does not conflict with any decision of this Court or the Supreme Court.

Indeed, to the contrary, the decision follows from the rationale of *Muna fv. Geren,*

128 S. Ct. 2207 (2008). Finally, it does not conflict with any decision of another court

of appeals.

**STATEMENT**

Petitioner is a native of Algeria currently detained in Guantanamo Bay, Cuba.

In 2008, the district court issued a preliminary injunction, enjoining the Government

from transferring him to Algeria. Exhibit ("Ex.") 1 (attached as an addendum to this

response). ·The Government filed the current appeal, challenging that order. This

Court held the appeal in abeyance on October 28, 2008.

Meanwhile, resolution of the underlying legal issues continued. This Court

issued its decision in *Kiyemba II,* and shortly thereafter the Government moved in.the

district court to dissolve the preliminary injunctions barring transfer of Belbacha.

**[deleted]** to Algeria. After this Court denied motions for rehearing and rehearing *en bane*

in *Kiyemba II,* the district court vacated the injunction **{deleted]** Petitioner filed a

motion for reconsideration or, in the alternative, a stay pending appeal. After the

Supreme Court denied the petition for a writ of certiorari in *Kiyemba II,* the district

court denied the motion to reconsider. Ex. 3.

Rather than appeal the district court's order vacating the injunction, petitioner

filed this motion in the 2008 appeal.

**THE PETITION SHOULD BE DENIED**

**I. THIS APPEAL IS MOOT**

As an initial matter, the petition for initial hearing *en bane* should be denied in

this case because this appeal is moot. This appeal was brought by the United States

challenging the district court's 2008 preliminary injunction. That injunction, by its

own terms was provisional and remained in force only "pending briefing and

resolution of the issues left unresolved in *Boumediene."* Ex. 1 **[deleted]**

Thus, the 2008 preliminary injunction, which is the order on appeal, no longer exists, and this appeal from that order is now moot.

Petitioner apparently believes that the district court lacked the power to vacate ~

the injunction while this appeal was pending: Ordinarily, when an appeal is filed,

jurisdiction transfers from the district court to the appellate court. *See Cobell* v.

*Norton,* 310 F. Supp. 2d 77, 83 n.10 (D.D.C. 2004) (citing *Griggs* v. *Provident*

*Consumer Discount Co.,* 459 U.S. 56, 58 (1982)). "But a district court is not deprived

of jurisdiction to modify a preliminary injunction while that injunction is on appeal."

*Id* (citing Fed. R. Civ. P. 62(c)); *see Board of Educ. of St. Louisv. Missouri,* 936 F.2d

993, 995 (8th Cir. 1991). Under Rule 62(c), "when an appeal is taken from an

ipterlocutory or final judgment granting, dissolving, or denying an injunction, the

court in its discretion may suspend, modify, restore, or grant an injunction during the

pendency of the appeal." Fed. R. Civ. P. 62(c); *see also Barnstead Broadcasting*

*Corp.* v. *Offshore Broadcasting Corp.,* 869 F. Supp. 35, 38 (D.D.C. 1994) (stating

that district courts can modify injunctions on appeal when so doing would aid in the

appeal). And dissolving an injunction that has been appealed is particularly

appropriate when changed circumstances or changes in the law establish that the

injunction is no longer legally sustainable. *See, e.g., System Federation No.* 91, *Ry.*

*Emp. Dept., AFL-CIOv. Wright,* 364 U.S. 642, 647 (1961) (authorizing "modification

of the terms of an injunctive decree if the circumstances, whether of law or fact,

obtaining at the time of its issuance have changed, or new ones have since arisen");

*Decatur Liquors, Inc.* v. *District of Columbia,* 2005 WL 607881, at \*3 (D.D.C. 2005).

The district court acted within its authority, therefore, when it vacated the injunction

in response to this Court's decision in *Kiyemba II.*

Hence, this appeal is moot and should be dismissed and this petition denied.

Plainly, an initial *en banc* hearing of a moot appeal would not be appropriate

..

**II. *KIYEMBA II* WAS CORRECTLY DECIDED AND IS**

**CONSISTENT WITH SUPREME COURT PRECEDENT**

"The rule of law depends in large part on adherence to the doctrine of *stare*

*decisis." Welch* v. *Tex. Dep't of Highways* & *Pub. Transp.,* 483 U.S. 468, 478-79

(1987). Here, petitioner asks this Court to flout the doctrine of *stare decisis,* and to

reconsider a Circuit precedent that was decided in 2009, and for which this Court

already reviewed and rejected a petition seeking *en banc* consideration less than one

year ago. A petition was filed seeking Supreme Court review of *Kiyemba II,* and that

petition was denied iess than two months ago (on :March 22,2010). There is no iegai

or factual basis (see pp. 10-14) for this Court to reconsider the legal precedents

established in *Kiyemba II.*

A. *Kiyemba II* was correctly decided and followed from the Supreme Court's

reasoning in *Muna!·* As this Court explained, *Munaf"prec1udes* 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" where,

as here, "[t]he Government has declared its policy" not to transfer a detainee if torture

would more likely than not result. *Kiyemba II,* 561 F .3d at 516. In *Muna!,* United

States citizens detained by U.S. forces in Iraq sought to block their transfer to the

custody of the Iraqi Government, claiming that they would be tortured if transferred.

Despite noting that these allegations were "a matter of serious concern," the Court did

*not* assess their strength or validity. Instead, the Court made clear that such

determinations are properly addressed to the political branches. *Muna!,* 128 S.Ct. at

2225. The Executive is "well situated" to determine "whether there is a serious

prospect of torture" upon transfer "and what to do about it if there is." *Id.* at 2226.

By contrast, the Court noted that "[t]he Judiciary is not suited to second-guess such

determinations" and judicial interference in this area would "undermine the

Govemment'sability to speak with one voice" in the foreign policy arena. *Ibid*

The petitioners in *Munf,* like petitioners here and in *Kiyemba II,* were in

military detention. 128 S. Ct. 2214-2215. They, like the petitioner here, contended

that an injunction prohibiting transfer was necessary because of the prospect oftorture

upon transfer. *Id.* at 2225. In *Munaf,* as here, the Government had declared its

commitment not to transfer petitioners in circumstances where torture was likely to

result. *Id.* at 2226. As in *Munaf,* while torture "allegations are \* \* \* a matter of

serious concern, \* \* \* in the present context that concern is to be addressed by the

political branches, not the judiciary." *Id.* at 2225.

That judgment is appropriate, and judicial inquiry into the correctness of the

Government's determination as to the likelihood of torture - often made in light of

diplomatic exchanges with the receiving country - would interfere with the

Government's ability to accomplish its goal of closing Guantanamo Bay by

transferring detainees whose release is consistent with national security, foreign

policy, and our protection commitments, as well as with the government's ability to

comply with court-ordered release. As Ambassador Fried has explained, the

Department's "ability to seek and obtain assurances from a foreign government

. depends in part on the Department's ability to treat its dealings with the foreign

government with discretion." Fried Decl. ~ 9 (Nov. 25, 2009) [Ex. 7]. The task of

resettling detainees requires a "delicate diplomatic exchange" that "cannot occur

effectively except in a confidential setting." *Id.* ~ 10. Moreover, "[j]udicial review

of the diplomatic dialogue between the U.S. Government and other governments

concerning the terms of transfer, or of the ultimate decision to effect a transfer to a

given country, risks undermining the ability of the U.S. Government to speak with one

voice on Guantanamo transfer issues." *Id.* ~ 12. **[deleted]**

As this Court held in *Kiyemba II,* the legislation implementing Article 3 of the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess.

(1988), 1465 v.N.T.S. 85 [hereinafter CAT] does not provide a basis for judicial

review of Executive Branch CAT determinations outside of the immigration context.

561 F.3d at 514-15. In giving its advice and consent to ratification, the Senate

declared that Articles 1 through 16 of the Convention would not be self-executing.

*See.* 136 Congo Rec. SI7486-01, S17492 (Oct. 27, 1990). Congress then enacted

implementing legislatiqn conferring jurisdiction on federal courts to hear CAT Article

3 claims only in the immigration context. *See* Foreign Affairs Reform and

Restructuring Act of1998 ("FARRA"), Pub. L. No. 105-277, § 2242,112 Stat. 2681

(codified at 8 *V.S.C.* § 1231 note); *id.* § 2242(d) ("[N]othing in this section shall be

construed as providing any court jurisdiction to consider orreview claims raised under

the Convention or this section \* \* \* except as part of the review of a final order of .

removal"). Accordingly, the Convention by itself creates no private right of action,

and the FARRA creates no jurisdiction to enforce the Convention outside of the

immigration context. [**FN 2** -- Petitioner alleges that he risks serious mistreatment or death at the hands ofprivate parties. Such claims are examined thoroughly; and the Government would not transfer petitioner if it concluded that such harm were likely to result. The

CAT, however, provides no protection against mistreatment by private parties.

That treaty defines torture as requiring the involvement or acquiescence of a public

official or person acting in an official capacity. Art. 1 (1).]

B. Petitioner suggests that the Fifth Amendment and the CAT Impose

substantive limits on the Government's ability to release or transfer him. These are

not new arguments and they were raised and properly rejected in *Kiyeinba II.*

As set out in more detail in Part III, below, the Government has repeatedly

emphasized its firm commitment not to send any detainee to a country where torture

is more likely than not to result. Every decision to transfer or repatriate a particular

detainee is based on the Government's. determination that the detainee will not more

likely than not face torture in the receiving country, and these determinations are

based on a variety offactors, including at times diplomatic dialogue with the receiving

country.

As in *Kiyemba II,* petitioner's due process claim is without merit. As this Court

has recognized, consistent with the Supreme Court's rationale in *Muna/,* where the

Government has firmly declared its commitment not to transfer detainees to face

torture and determined that a particular transfer is consistent with that commitment,

courts are ill-suited to second-guess that determination. *Kiyemba II,* 561 F.3d at 514

(discussing *Munaf,* 128 S. Ct. at 2225-2226).

Thus, this Court's prior ruling is correct, consistent with Supreme Court

precedent, and does not warrant initial *en bane* consideration.

**III. PETITIONER'S CLAIMS THAT HE WILL BE SENT TO** A

**COUNTRY WHERE HE WILL BE TORTURED OR HELD ON**

**BEHALF OF THE UNITED STATES ARE UNFOUNDED AND**

**DO NOT SUPPORT RECONSIDERATION OF CIRCUIT**

**PRECEDENT**

Petitioner seeks the extraordinary relief - of initial *en bane* review of a Circuit

precedent adopted only one year ago - based on th~ claims that he will be tortured if

returned to Algeria. This argument is not a basis for reconsidering *Kiyemba II,* in

which petitioners made similar claims. In any event, the suggestion that the United States plans to send petitioner to a country where he more likely than not would be tortured is wholly unfounded and refuted by sworn declarations.

President Obama by recent executive order has directed that transfers "comply

with the domestic laws, international obligations, and policies ofthe United States and '\

do not result in the transfer of individuals to other nations to face torture." Executive

Order No. 13,491, 74 Fed. Reg. at 4893 § 5(e)(ii). In these Guantanamo cases, the

United States has submitted a number of sworn declarations from Executive Branch

officials describing the transfer process. Each of the declarants has stated, in no

uncertain terms, that it is the "longstanding policy of the United States not to transfer

a person to a country if it determines that it is more likely than not that the person will

be tortured." Williamson Decl. ~ 4 [Ex. 6]; *see* Hodgkinson Decl. ~ 6 [Ex. 5]; Ex. 7

~~ 4, 6. As Ambassador Fried explains, a key concern in any proposed transfer from

the Guantanamo Bay detention facility is whether the receiving government will treat

the detainee humanely and in a manner consistent with its international obligations.

Ex. 7 ~~ 3-4.

These declarants confirm that the Executive Branch has procedures in place to

effectuate the policy that the Government will not transfer a detainee to a country

where he more likely than no~ would be tortured. Tbe declaration of Clint Williamson

. recounts the process utilized by the Government to obtain assurances of humane

treatment. Ex. 6 ~~ 3-9. The declaration of Ambassador Daniel Fried explains that

if transfer of a particular detainee is found to be appropriate, a process is undertaken,

typically led by the Department of State, in which appropriate assurances concerning

security and other matters are sought from the country to which the transfer of the

detainee is proposed. Ex. 7 ~ 6. In every transfer case in which detention or other

security measures by the transferee government are foreseen, such assurances include

assurances of humane treatment and treatment in accordance with the international

obligations of the foreign government accepting transfer. *Ibid.* Among other things,

the Department of State considers whether the nation in question is a party to relevant

treaties such as the CAT, and it ensures that assurances are tailored accordingly if the

nation concerned is not a party or if other circumstances warrant. Ex. 7 par. 6. [**FN 3** -- An applicant for relief on the merits under the CAT bears the burden of

establishing "that it is more likely than not that he or she would be tortured if

removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). The

United States Senate specified this standard inthe several "understandings" that it

imposed on the United States' ratification of the CAT. *See Sevoian* v. *Ashcroft,*

290 F.3d 166,174-75 (3d Cir. 2002); 136 Congo Rec. S17486-01, S17486 (1990);

*In re J-E-,* 23 1. & N. Dec. 291,296,2002 WL 481156 (BIA Mar. 22, 2002) *(en*

*bane)*]*.*

Recommendations by the Department of State concerning proposed transfers

"are decided at senior levels through a process involving Department officials most

familiar with international legal standards and obligations and the conditions inthe

countries concerned." Ex. 7 ~ 7. Thus, indetermining whether it is more likely than

not that an individual will be tortured inthe proposed transfer country, the Department

consults internally with its Bureau of Democracy, Human Rights, and Labor (which

drafts the Department of State's annual Country Reports on Human Rights Practices)

and the relevant Department of State regional bureau, country desk, and/or U.S.

Embassy. *Ibid.* It also considers expressed commitments of officials of the foreign

government. Inevaluating assurances, Department of State officials consider the

identity, position, or other information concerning the official relaying the assurances;

political and legal developments inthe relevant foreign country that provide context

for the assurances; and the foreign government's incentives and capacity to fulfill its

assurances to the United States. *Id.* ~ 8. In an appropriate case, the Department of .

State may consider various monitoring mechanisms for verifying that assurances are

honored after transfer. *Ibid.*

If a case arises in which the assurances obtained from the receiving government

are not sufficient to address treatment concerns, the United States will not transfer a

detainee to the control of that government unless the concerns are satisfactorily

resolved. Ex. 7 ~ 8. Indeed, circumstances have arisen in the past in which the United

States decided not to transfer detainees to their country of origin or to another country

because of mistreatment concerns. *Ibid.; see id.* at ~ 3.

**[deleted]**

The declaration of Sandra L. Hodgkinson, Deputy Secretary of Defense for

*I*

Detainee Affairs, addresses the particular context of transfer to the custody of another

sovereign. Ex. 5 ~~ 5-8. This declaration makes clear that, once transferred, an

individual "is no longer in the custody and control of the United States." *Id.* ~ 5.

Individuals may be the subject of law enforcement interests in the receiving country.

However, any detention, investigation, or prosecution would be undertaken under the

laws of the receiving state. *Id.* ~ 3. Under no circumstances is a transferred

individual held on behalf of the United States. *Id.* ~ 5.

As these declarations make clear, petitioner would not be transferred if he were

more likely than not to face torture in Algeria. Nor would he face continued detention

there on behalf of the United States.

For the foregoing reasons, the petition for initial hearing *en bane* should be

denied.

. Respectfully submitted,

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I hereby certify that on this 19th day of May, 2010, I served the foregoing

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**[UNSEALED VERSION]**