[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
v.	)	05-5229, 05-5230, 05-5232, 05-5235, 05-5236, 05-5237, 05-5238, 05-5239, 05-5242, 05-5243, 05-5244, 05-5246, 05-5248, 05-5337, 05-5338, 05-5374, 05-5390, 05-5398, 05-5478, 05-5479, 05-5484, 05-5486, 06-5037, 06-5041, 06-5043, 06-5062, 06-5065, 06-5094
BARACK OBAMA, et al.,	)	
Appellants.	)	

PETITION FOR INITIAL EN BANC HEARING

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

At issue in these consolidated cases are orders issued by the district court directing the Government to provide counsel for Guantánamo detainees with advance notice of intended transfers. These orders ensure that counsel will be able to object to transfers if circumstances warrant. The Government appealed these orders. It contends that *Kiyemba v. Obama* ("*Kiyemba II*"),[1] decided after the

[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*, 130 S. Ct. 1880 (2010). Judge Griffith filed a separate opinion concurring in the judgment in part and dissenting in part from the panel decision, and would have granted panel rehearing. Judges Rogers, Tatel, and Griffith would have granted the petition for rehearing *en banc*.

orders were issued, controls these cases and compels that the orders be vacated.[2]

In *Kiyemba II*, the Court held that a district court exercising habeas jurisdiction cannot enjoin the Government from transferring a detainee to another country based on a showing by the detainee that he will likely be tortured, or prosecuted or detained under the laws of the recipient country. The Court struck down the district court's advance notice orders on the ground that they effectively enjoin detainee transfers. The Court rested its holding on *Munaf v. Geren*, 128 S. Ct. 2206 (2008), which it read to require a district court to accept the Government's representation that torture is unlikely, and to preclude a district court from barring a transfer on the ground that the recipient country may prosecute or detain the detainee under its own laws.

The Court also held that the petitioners could not prevail on their claims under the Convention Against Torture ("CAT") because, the Court believed, Congress, through amendments to the Immigration and Naturalization Act ("INA"), had "limited judicial review under the Convention to claims raised in a challenge to a final order of detention." *Id.* at 514 (citation omitted). The Court also rejected the petitioners' due process claims *sub silentio*.

[2] *See* Respondents' Opposition in Response to Petitioners' Motion to Govern Further Proceedings, No. 05-5224 (and consolidated cases), filed Sept. 17, 2009.

Kiyemba II was wrongly decided and should be overruled. First, the decision misconstrued the INA to bar a district court from enjoining a detainee's transfer on the basis of CAT claims. The statutory text does not compel such a construction, and Congress did not intend such a result. Moreover, so construed, the statute violates the Suspension Clause and the equal protection component of the Due Process Clause. Second, the decision misread *Munaf* to require a district court to accept the Government's assurance that a detainee transferred to a particular country is unlikely to face torture, and that the transfer relinquishes custody of the detainee to another country for proceedings under that country's law. *Munaf* itself forecloses such an absolutist reading, and the Court's misreading of the decision creates a conflict with *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Finally, the decision erroneously rejected, *sub silentio*, the petitioners' due process claims. Due process requires that detainees be afforded notice and an opportunity to challenge a transfer. In sum, *Kiyemba II* conflicts with decisions of the Supreme Court and presents "questions of exceptional importance." Fed. R. App. P. 35(b)(1).

Kiyemba II is also self-contradictory. In its decision, the Court identified potential grounds on which a detainee might be able to challenge his transfer. In *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010), the Court identified the same potential grounds of challenge. In *Munaf* itself, the Supreme Court identified

potential grounds of challenge. *Kiyemba II* does not explain how a detainee can challenge his transfer on these or any other grounds without advance notice.[3]

B. **Reasons for granting initial en banc hearing**

1. The Court erroneously held that habeas petitioners may not assert CAT as a bar to transfer.

Section 242(a)(4) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(a)(4) provides:

> (4) Claims under the United Nations Convention
>
> Notwithstanding any other provision of law (statutory or non-statutory), 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, except as provided in subsection (e) of this section.

In *Kiyemba II*, the Court held that § 242(a) limits judicial consideration of claims under the Convention Against Torture to appeals of final orders of

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[3] More particularly, *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 the habeas is available in cases of transfers "to evade judicial review of Executive detention decisions."). In *Kiyemba II*, however, the Court did not explain how, absent advance notice, a detainee's counsel would be able to object to "such manipulation by the Executive." *Al Maqaleh*, 605 F.3d at 99. Other issues left undecided by *Kiyemba II* and *Munaf* are discussed in note 8, below.

deportation. *Kiyemba II*, 561 F.3d at 514-15. Under the Court's reading of § 242(a), only individuals appealing such orders may raise CAT claims.[4]

The Court was mistaken. As an initial matter, the Court simply assumed that § 242(a)(4) applies extraterritorially to Guantánamo. That assumption is at least questionable.[5] Moreover, even assuming that § 242(a)(4) applies, the provision governs judicial review of immigration "removal orders," as the title of § 242, "Judicial Review of Orders of Removal," makes clear. Congress simply sought to channel review of removal orders to the courts of appeals by petition for review, and to eliminate habeas review in those situations where such review is 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 the only review mechanism.[6] Indeed, the

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[4] 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* referred to the petitioners' CAT claims as "FARR Act" claims. For present purposes, we refer to them simply as "CAT claims."

[5] *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).

[6] As the Conference Report stated, the REAL ID Act "would not preclude habeas review over challenges to detention that are independent of challenges to

Conference Report states that Congress was concerned, after *INS v. St. Cyr*, 533 U.S. 289 (2001), about creating Suspension Clause problems, and 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.[7]

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), so construed, bars habeas review, not absolutely, to be sure, but as to particular claims. However, unlike the statutes at issue in *Swain v. Pressley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952), § 242(a)(4) does not provide "habeas-like substitutes" for review of such claims, *see Boumediene*, 128 S. Ct. at 2265, and therefore violates the Suspension Clause. Moreover, as construed, § 242(a)(4)

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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)).

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

violates equal protection by allowing only individuals petitioning for judicial review of removal orders to assert CAT claims, and precluding other individuals, who may also be facing transfers to likely torture, from asserting such claims.

2. The Court erroneously held that *Munaf* precludes a requirement of advance notice.

The Court erroneously read *Munaf* to preclude a district court exercising habeas jurisdiction from enjoining the transfer of a Guantánamo detainee to another country, where there is evidence that the detainee is likely to be tortured if transferred there. *Munaf* could not have precluded such a notice requirement, because, as noted, *Munaf* itself contemplated circumstances in which a detainee might legitimately object to a transfer, specifically, where "the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," 128 S. Ct. at 2226.[8] Without notice, the detainee's counsel would be

[8] It is unlikely that the Government would ever acknowledge deliberately transferring a detainee to likely torture, but the evidence of likely torture may be so overwhelming as to impute to the Government constructive knowledge that torture is likely. *See Munaf*, 128 S. Ct. at 2228 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring) (suggesting that habeas relief may be available to a citizen in "a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it."). *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). *Munaf* also did not decide whether a district court may enjoin a detainee's transfer if the detainee shows that he faces torture at the hands of local terrorists. Absent advance notice, a detainee's counsel would be unable to object on any of these grounds.

unable to object. Moreover, whatever else the Court in *Munaf* may have done, it did not 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(a), but it did not decide that question. *See id.* at n.6.

In addition, *Munaf* involved highly idiosyncratic facts, which makes it treacherous to extend the decision's 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 Court'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* deprives the petitioners of "any opportunity to challenge the accuracy of the government's sworn declarations," 561 F.3d at 524, 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" of the government "cannot simply resolve the issue") (citation and internal quotation marks omitted). "The rudimentaries of an adversary proceeding demand no less." *Id.*

Three Justices recently spoke to the pitfalls of relying on *Munaf* to bar courts from enjoining transfers of Guantánamo detainees. In *Mohammed v. Obama* (D.C. Cir. No. 10-5218), Farhi Mohammed, an Algerian, sought to enjoin his transfer to Algeria because he feared torture or death at the hands of the Algerian government or terrorists groups. The district court enjoined the transfer. In an order dated July 8, 2010, this Court summarily reversed, stating:

> Under *Kiyemba v. Obama* (*Kiyemba II*), * * * the district court may not prevent the transfer of a Guantánamo detainee when the Government has determined that it is more likely than not that the detainee will not be tortured in the recipient country. 561 F.3d 509, 516 (D.C. Cir. 2009); *see Munaf v. Geren*, 128 S. Ct. 2207, 2216 (2008).

Mr. Mohammed thereupon applied to the Supreme Court for a stay of transfer pending the Supreme Court's consideration of a petition for certiorari seeking review of this Court's denial of relief. The Supreme Court denied the application. *Mohammed v. Obama*, 2010 WL 2795602 (U.S. July 16, 2010) (No. 10A52). In a dissent joined by Justice Breyer and Justice Sotomayor, Justice Ginsburg stated, "I would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*, 553 U. S. 674 (2008)." *Mohammed v. Obama*, 2010 WL 2795602 (U.S. July 16, 2010) (No. 10A52). The Court should hear this case *en banc* to repair its mistakes and consider those unresolved issues.

3. The Court erroneously rejected the petitioners' claim that due process compels advance notice.

The *Kiyemba II* petitioners asserted a due process right to notice of an intended transfer and an opportunity to challenge the transfer if warranted. The Court ignored their claims, tacitly rejecting them. Due process, however, requires notice of a transfer. Three Justices have suggested that detainees may have a substantive due process right not to be transferred to a country where they are likely to be tortured. *See Munaf*, 126 S. Ct. at 2228 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring) (stating that "it would be in order to ask whether substantive due process bars the Government from consigning its own people to

torture"). Detainees also have a procedural due process right to be afforded a meaningful opportunity to challenge their transfers.

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.

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

Rochin, 342 U.S. at 172.

A detainee'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, mean little if the government's representation that a detainee is not likely to face torture is conclusive. Detainees must be afforded a meaningful opportunity to contest their transfer.

CONCLUSION

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

Respectfully submitted,

/s/

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August 23, 2010

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

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

The petition is filed on behalf of Guantánamo detainees, and their next friends, in thirty consolidated cases. Counsel will file the Rule 28(1)(A) certificate as a separate document, or otherwise proceed as the staff of the Office of the Clerk may direct.

/s/
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David H. Remes

August 23, 2010