

[ORAL ARGUMENT NOT SCHEDULED]

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

SHARAF AL SANANI, <i>et al.</i>)	
UMAR HAMZAYEVICH ABDULAYEV,)	
a/k/a Abdullah Bo Omer Hamza Yoyej,)	
Petitioners-Appellees,)	No. 08-5149
v.)	
DONNIE THOMAS, <i>et al.</i> ,)	
Respondents-Appellants.)	

**PETITIONER-APPELLEE UMAR HAMZAYEVICH ABDULAYEV'S
RESPONSE TO COURT'S JULY 23, 2010 SHOW-CAUSE ORDER**

Petitioner-Appellee Umar Hamzayavich Abdulayev, by his undersigned counsel, respectfully submits this response to the Court's Order of July 23, 2010 directing him to show cause "why the district court's order requiring advance notice of transfer should not be vacated and the cause 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 Petitioner-Appellees in *Abdah v. Obama*, Case No. 05-5224, who share concerns similar to Mr. Abdulayev's here, have concurrently with this response petitioned for initial *en banc* hearing to overrule *Kiyemba II*. See Belbacha v. Bush, 520 F.3d 452 (D.C. Cir. 2008) (court may preserve the status quo while jurisdictional issue is under consideration in another case); *Kiyemba II*, 561 F.3d at 513 n.2 (discussing *Belbacha*).

If the Court denies initial *en banc* hearing in *Abdah*, the Court should not vacate the order here but should remand the case to the district court to consider any evidence that Petitioner-Appellee may present on issues left undecided by *Kiyemba II*.¹ 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 the habeas is available in cases of transfers “to evade judicial review of Executive detention decisions.”²

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 is unlikely that the Government would ever acknowledge deliberately transferring a

¹ The Court should not, however, disturb the preliminary injunction entered by the district court on October 20, 2008, prohibiting Petitioner-Appellee’s repatriation to Tajikistan. That order was not a thirty-day notice order and remains in effect. The Government has stated that it appealed from that order to this Court in Case Number 08-5516. That case remains pending in this Court.

² In *Kiyemba II*, 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.

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. *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).³

Accordingly, the Court should hold this case in abeyance pending its consideration of Appellees' petition in *Abdah* for initial *en banc* hearing to overrule *Kiyemba II*. If the Court instead vacates and remands, it should withhold the mandate while the *Abdah* 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).

³ Again, absent advance notice, a detainee's counsel would be unable to object to present such an argument.

Dated: August 23, 2010

Respectfully submitted,

**UMAR HAMZAYEVICH
ABDULAYEV,**
Petitioner-Appellee

By: /s/ Matthew J. O'Hara
One of His Attorneys

Matthew J. O'Hara
Kimberly A. Jansen
HINSHAW & CULBERTSON LLP
222 N. LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3000
mohara@hinshawlaw.com

J. Andrew Moss
REED SMITH LLP
10 S. Wacker Drive
Chicago, IL 60606
(312) 207-1000

Shayana Kadidal
CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6423

Counsel for Petitioner-Appellee

CERTIFICATE OF SERVICE

I, Matthew J. O'Hara, one of the attorneys for Petitioner-Appellee Umar Hamzayevich Abdulayev, hereby certify that on August 23, 2010, I caused a true and correct copy of the foregoing **Petitioner-Appellee Umar Hamzayevich Abdulayev's Response To Court's July 23, 2010 Show-Cause Order** to be served by electronic mail via this Court's CM/ECF system on counsel of record on the service list for No. 08-5149.

/s/ Matthew J. O'Hara
Matthew J. O'Hara