

[ORAL ARGUMENT SET FOR SEPTEMBER 25, 2008]



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September 22, 2008

Mr. Mark Langer
Clerk, U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: Kiyemba v. Bush, Nos. 05-5487, 05-5489

Dear Mr. Langer:

Pursuant to Rule 28(j), Fed. R. App. P., appellants/cross-appellees hereby submit copies of Judge Hogan's order in *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-mc-0442, barring the transfer of a detainee. The order was issued under seal and then released publicly with redactions (including the date of issuance). The redacted-public version is attached.

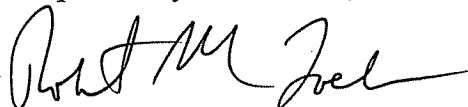
The district court in *In re Guantanamo Bay Detainee Litigation* follows the faulty rationale advocated by petitioners here. It asserts jurisdiction, where Congress has removed it. It also prevents release of a detainee from U.S. custody, and transfer, to another country, without addressing the four-factor standard for injunctive relief. It does so notwithstanding the Supreme Court's holding in *Munaf v. Geren*, 128 S.Ct. 2207 (2008). In *Munaf*, the Court held that failure to address the likelihood of

success was itself error. It further held, contrary to the district court's ruling, that preserving the status quo is not, by itself, a sufficient reason to grant an injunction. Finally, the Supreme Court held that a court may not bar the transfer of a detainee to another country as part of its habeas powers, even when the detainees allege (notwithstanding U.S. Government assurances to the contrary) that the transfer will be "likely to result in torture." *Id.* at 2222, 2225.

As we have explained in our briefs in the present appeals, court orders that restrict the Executive ability to transfer detainees impermissibly interfere with the exercise of foreign affairs powers. The *In re Guantanamo Bay Detainee Litigation* order provides a very tangible example of how, under such orders, all bilateral arrangements regarding the transfer of detainees are made contingent upon court approval.

In light of the district court's rationale, it appears the district courts are now poised to bar any transfer of a Guantanamo detainee. This reality counsels in favor of this Court's expeditious resolution of the current appeals. We believe that in this context, if possible, this Court should resolve the key issues as soon as possible after oral argument and, if necessary, issue an order disposing of the issues prior to a full opinion.

Respectfully submitted,



Robert M. Loeb

Enclosure

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY DETAINEE
LITIGATION

██████████
Misc. No. 08-mc-0442 (TFH)

Civil Action No. █-cv-█(█)

ORDER

Pending before the Court are Petitioner's (1) ██████████ Motion For A Temporary Restraining Order Enjoining Transfer Of Petitioner To ██████████ ("Injunction Motion") and (2) Motion ██████████

██████████. For the reasons given during the telephonic hearing held on ██████████, the Court

ORDERS that Petitioner's Injunction Motion is **GRANTED**. Specifically, finding it necessary to protect its jurisdiction over Petitioner's petition for a writ of habeas corpus, pursuant to its remedial authority under the All Writs Act, 28 U.S.C. § 1651, *see Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008) (holding that, notwithstanding Section § 7(a)(2) of the Military Commissions Act of 2006, district court has authority under 28 U.S.C. § 1651 to enjoin transfer to protect its jurisdiction to determine the constitutionality of § 7(a)), the Court temporarily enjoins the government from transferring Petitioner from the United States Naval Base at Guantanamo Bay, Cuba, to ██████████ pending the United States Court of Appeals for the D.C. Circuit's decision in *Kiyemba v. Bush*, No. 05-5487 (consolidated with Nos. 05-5488, 05-5489, 05-5490, and 05-5492), which is set for oral argument on September 25, 2008. The Court further

ORDERS that Petitioner's Motion [REDACTED] is **GRANTED** in part and **DENIED** in part. Specifically, [REDACTED]

[REDACTED]
[REDACTED] the government is not prohibited from sharing information contained in such pleadings with representatives of [REDACTED].

SO ORDERED.

[REDACTED]

/s/

Thomas F. Hogan
United States District Judge