[ORAL ARGUMENT NOT SCHEDULED]

No. 05-5224 and consolidated case nos. 05-5225, 05-5227,05-5229, 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.

---

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

---

MAHMOUD ABDAH et al.,
Petitioners-Appellees,

v.

BARACK OBAMA et al.,
Respondents-Appellants.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

# RESPONDENTS-APPELLANTS' RESPONSE TO PETITION FOR INITIAL HEARING *EN BANC*

---

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

ROBERT M. LOEB
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases:** **Page**



*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

**Statutes:**



**Legislative Materials:**



*Authorities upon which we chiefly rely are marked with asterisks.

**Other Materials:**



*Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY

CAT. . . . . Convention Against Torture

FARRA. . . . . Foreign Affairs Reform and Restructuring Act

## INTRODUCTION AND SUMMARY

Respondents-Appellants respectfully submit that the petition for initial hearing *en banc* should be denied. The issues raised in this petition have already been thoroughly considered by this Court, first in issuing its decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"), *cert. denied*, 130 S. Ct. 1880 (2010), and again in considering and rejecting the petition for rehearing and rehearing *en banc* in that case, and in considering and rejecting the petition for initial hearing *en banc* in *Ben Bacha v. Copeman*, which yet again asked this Court to overrule *Kiyemba II*, *see* D.C. Cir. No. 08-5350 (Order of June 3, 2010) [attached as Ex. A]. Moreover, this Court has recently reaffirmed *Kiyemba II* in four cases. *See Khadr v. Obama*, D.C. Cir. No. 08-5233 (Order of Sept. 3, 2010) (unpublished) (vacating a district court omnibus notice order pertaining to over 100 district court cases) [attached as Ex. B]; *Paracha v. Obama*, D.C. Cir. No. 05-5334 (Order of Sept. 3, 2010) (unpublished) [attached as Ex. C]; *Naji v. Obama*, D.C. Cir. No. 10-5191 (Order of July 16, 2010) [attached as Ex. D]; *Mohammed v. Obama*, D.C. Cir. No. 10-5218 (Order of July 8, 2010) (unpublished) [attached as Ex. E].

Nothing has happened since this Court last considered these issues and denied the *en banc* petitions in *Kiyemba II* and *Ben Bacha* that warrants reconsideration of this Court's decision in *Kiyemba II*. Indeed, the Supreme Court declined to review that decision *three times*, first denying a certiorari petition in *Kiyemba II* itself and then denying applications for stays pending the filing and disposition of certiorari petitions in *Mohammed* and *Naji*. *See Mohammed v. Obama*, No. 10A52, 2010 WL 2795602, at *1 (S. Ct. July 16, 2010); *Naji*

*v. Obama*, No. 10A70, 2010 WL 2801730, at *1 (S. Ct. July 16, 2010).

Thus, the extraordinary relief petitioners seek — initial *en banc* review of a Circuit precedent adopted only one year ago that this Court and the Supreme Court have repeatedly declined to further review — should be denied.

## STATEMENT

These appeals arise from habeas corpus actions brought by aliens detained by the Department of Defense at the Guantanamo Bay Detention Facility. Petitioners in these cases sought preliminary injunctive relief in the district court to prevent their transfer from Guantanamo to another country, speculating that they might be subject to torture or further detention in the receiving country. In each case, the district court entered an order prohibiting the Government from transferring petitioners without thirty days' notice or barring transfer without further court action. *See, e.g.*, *Abdah v. Bush*, D.D.C. No. 04-cv-1254, Doc. 147 (Order of Mar. 29, 2005) [attached as Ex. F].

The Government filed an appeal from each order, and this Court consolidated the appeals and held them in abeyance. Meanwhile, resolution of the underlying legal issues continued. This Court issued its decision in *Kiyemba II*, and the Government then filed a motion in this Court to vacate and remand. On July 23, 2010, this Court ordered petitioners to show cause why the district court's orders should not be vacated in light of *Kiyemba II*. On August 23, 2010, petitioners filed a response to the show-cause order and the petition for initial hearing *en banc* to which this filing responds. The Government filed a reply to petitioners' response to the show-cause order on September 9, 2010.

## ARGUMENT

"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, petitioners ask this Court to flout the doctrine of *stare decisis*, and to reconsider a Circuit precedent decided just one year ago that has been repeatedly reaffirmed during this past year by this Court in *Khadr*, *Paracha*, *Naji*, and *Mohammed*. Exs. B, C, D, E; *see also Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010). This Court already rejected a petition seeking rehearing *en banc* in *Kiyemba II*. And in *Ben Bacha*, this Court likewise denied a petition for initial *en banc* hearing that sought to overrule *Kiyemba II*. *See* Ex. A. The Supreme Court, in turn, has declined to review *Kiyemba II* on three separate occasions, in *Kiyemba II* itself and in *Mohammed* and *Naji*. *See Kiyemba*, 130 S. Ct. 1880; *Mohammed*, 2010 WL 2795602; *Naji*, 2010 WL 2801730.[1] There is no basis for this Court to reconsider the legal precedents established in *Kiyemba II*.

### A. *Kiyemba II* Properly Applied the Reasoning in *Munaf.*

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

[1] In *Mohammed*, three Justices dissented from the denial of the stay, stating that they 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*, [128 S. Ct. 2207 (2008)]," 2010 WL 2795602, at *1. Petitioners incorrectly assert that, by issuing this statement, these Justices "spoke to the pitfalls of relying on *Munaf* to bar courts from enjoining transfers of Guantanamo detainees." Pet. 9. Instead, this statement reflects only the view — of three Justices — that a decision on the case should have been made on a non-expedited basis. Significantly, no Justices dissented from the denial of certiorari in *Kiyemba II* or from the denial of the stay of the transfer in *Naji*.

reasoning in *Munaf v. Geren*, 128 S. Ct. 2207 (2008). As this Court explained in *Kiyemba II*, *Munaf* "precludes 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. 561 F.3d at 516. In *Munaf*, U.S. 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 Supreme Court did not assess their strength or validity. Instead, the Court made clear that such determinations are properly addressed to the political branches. *Munaf*, 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 Government's ability to speak with one voice" in the foreign policy arena. *Id.*

The petitioners in *Munaf*, like petitioners here and in *Kiyemba II*, were in military detention. *Id.* at 2214-15. They, like petitioners here and in *Kiyemba II*, contended that an injunction prohibiting transfer was necessary because of the prospect of torture upon transfer. *Id.* at 2225. In *Munaf*, as here and in *Kiyemba II*, the Government had declared its commitment not to transfer petitioners in circumstances where torture was more likely than not 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 comply with court-ordered release and to accomplish its goal of closing Guantanamo by transferring detainees whose release is consistent with foreign policy and national security interests. As the declarations submitted in these cases explain, the State 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." Prosper Decl. ¶ 9 (filed in D.D.C. No. 04-cv-1254, Doc. 116-2) [attached as Ex. G]. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting." *Id.* ¶ 10. Moreover, "[a]ny judicial decision to review a transfer decision by the United States Government or the diplomatic dialogue with a foreign government concerning the terms of transfer could seriously undermine our foreign relations." *Id.* ¶ 12.[2]

[2] Updated versions of the Prosper declaration, cited above, and the Waxman declaration, cited *infra* on pages 7-8, were submitted to Judge Hogan in his role as coordinating judge in the Guantanamo habeas cases. *See* Williamson Decl. (filed in D.D.C. No. 08-mc-442, Doc. 40, Ex. 2) (updated version of Prosper Decl.) [attached as Ex. H]; Hodgkinson Decl. (filed in D.D.C. No. 08-mc-442, Doc. 40, Ex. 1) (updated version of Waxman Decl.) [attached as Ex. I]. The policies described in the updated declarations are the same as the policies in the declarations that were before the district court when it issued the orders on appeal here. *See, e.g.*, Ex. H. ¶¶ 4, 6-8 (explaining that

Petitioners seek to limit the *Munaf* ruling to its "idiosyncratic facts." Pet. 8. It would be wholly improper, however, to evade governing Supreme Court precedent by focusing on the granular facts of the particular case, while ignoring the core rationale of the Court's decision. As recognized in *Kiyemba II*, the rationale of *Munaf* is not so limited. Rather, the Supreme Court unambiguously "held the judiciary cannot look behind the determination made by the political branches that the transfer would not result in mistreatment of the detainee at the hands of the foreign government." 561 F.3d at 515.[3]

Petitioners contend that *Munaf* could not have precluded a notice requirement like

---

the Government will not transfer a detainee to a country if it determines he is more likely than not to face torture there). The Government also has recently filed a November 2009 declaration in several other cases to reaffirm these policies. *See* Fried Decl.¶¶ 3-4, 6-12 (filed in D.D.C. No. 05-cv-2386, Doc. 1682, Ex. 3). That declaration is attached for this Court's convenience as Exhibit J.

[3] Petitioners contend that *Munaf* did not decide whether a transfer may be enjoined based on a showing of likely torture by private parties rather than state actors. Pet. 7 n.8. The Government examines any concerns about torture that may arise, whether by governmental or private parties, and would not transfer petitioners if it concluded that torture were more likely than not to result. A court order barring transfer based upon potential harms from private parties would be inconsistent with *Munaf* because such an order would require examining sensitive diplomatic negotiations and second-guessing the Executive's transfer determination. *See Munaf*, 128 S. Ct. at 2225 ("[I]t is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."). Moreover, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("CAT"), on which petitioners' claims are predicated, does not provide protection against mistreatment by private parties because it defines torture as requiring the involvement or acquiescence of a public official or person acting in an official capacity. *See* Art. 1(1); *see also* 136 Cong. Rec. 36,198 § II(1)(d) (1990). As we explain *infra* on pages 9-14, however, petitioners' CAT claims are not enforceable in any event in these Guantanamo habeas proceedings.

the one here and in *Kiyemba II* because *Munaf* itself contemplated that a detainee might object to transfer in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," *Munaf*, 128 S. Ct. at 2226. Pet. 7. *Munaf* contemplates the possibility of an objection in such circumstances, but as the very next sentence in the opinion explains, such circumstances were not present in *Munaf* because "the Solicitor General states that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result." *Munaf*, 128 S. Ct. at 2226. Here and in *Kiyemba II*, as in *Munaf*, the Executive has submitted sworn declarations explaining that it will not transfer any detainee to any country if it is determined that he is more likely than not to face torture there. *See Kiyemba II*, 561 F.3d at 514 (describing declarations); *see, e.g.*, Waxman Decl. ¶ 6 (filed in D.D.C. No. 04-cv-1254, Doc. 116-3) [attached as Ex. K]; Ex. G ¶¶ 4, 6-8 (Prosper Decl.). *Kiyemba II* therefore correctly held that it was unnecessary to address what rights a detainee might possess in the "extreme case" described in *Munaf*. 561 F.3d at 514.[4]

Relatedly, petitioners argue that *Kiyemba II* is "self-contradictory" in that it reserved decision on whether courts "may enjoin detainee transfers to 'places where the writ does not run' for detention 'on behalf of the United States'" without explaining

[4] Petitioners also argue that evidence of likely torture could be "so overwhelming as to impute to the Government constructive knowledge that torture is likely," Pet. 7 n.8, but that argument is contrary to *Munaf*'s holding that the judiciary cannot second-guess a determination made by the Executive that a transfer is not more likely than not to result in torture. *See Munaf*, 128 S. Ct. at 2225-26.

how, absent advance notice, detainees could object to such a transfer. Pet. 4 n.3 (quoting *Kiyemba II*, 561 F.3d at 515 n.7). As in *Kiyemba II*, this is a non-issue. The Government's sworn declarations here and in *Kiyemba II* explain that once petitioners are transferred to another country, they are "no longer subject to the control of the United States." Ex. K ¶ 5 (Waxman Decl.); *Kiyemba II*, 561 F.3d at 515. And, as this Court explained in *Paracha*, any concern that petitioners may have about transfer to military bases abroad is not a valid ground for maintaining "broad notice order[s]" that require notice of *any* transfer. Ex. C at 1. In any event, the Government has no plans to send petitioners to any U.S. base abroad, including Bagram. *See* Julian E. Barnes, *Afghan Site Eyed for Detainees*, *Chi. Tribune*, June 9, 2010, 2010 WLNR 11731676 (Pentagon spokeswoman stated that "the U.S. was not considering transferring any detainees from Guantanamo to Bagram").

Petitioners' final contention is that by precluding challenges to the accuracy of the Government's declarations, *Kiyemba II* conflicts with the requirement in *Boumediene v. Bush* that habeas review be "meaningful," 128 S. Ct. 2229, 2269 (2008). Pet. 9. But *Munaf* itself was a habeas case and held that courts may not second-guess the Executive's assessment regarding humane treatment in the country of transfer when, as here and as in *Kiyemba II*, the record reflects that no detainee will be transferred to a country if the Government concludes that the detainee is more likely than not to face torture there. *Munaf*, 128 S. Ct. at 2225-26. Notably, *Munaf* was decided the same day as *Boumediene*, so there can be no doubt that *Munaf*'s holding fully comports with *Boumediene*. *Kiyemba II*'s preclusion of challenges to the Government's declarations is therefore consistent with *Boumediene*.

### B. The Convention Against Torture Is Not Judicially Enforceable in These Guantanamo Habeas Proceedings.

Petitioners are simply wrong in suggesting that they have a right to judicially challenge transfers under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("CAT"). As this Court held in *Kiyemba II*, the legislation implementing the 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.

**1.** In giving its advice and consent to ratification of the CAT, the Senate declared that "the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198 § III(1) (1990). Thus, the provisions are not, by themselves, privately enforceable in U.S. courts. *See Medellin v. Texas*, 552 U.S. 491, 505 & n.2 (2008); *Mironescu v. Costner*, 480 F.3d 664, 666, 677 n.15 (4th Cir. 2007); *Al-Bihani v. Obama,* No. 09-5051, 2010 WL 3398392, at *13 (D.C. Cir. Aug. 31, 2010) (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

Congress enacted implementing legislation conferring jurisdiction on federal courts to hear CAT claims only in the immigration context. *See* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note). That legislation provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a

final order of removal pursuant to [8 U.S.C. § 1252]." *Id.* § 2242(d). Congress reaffirmed this limitation in 2005, when it enacted a statute that provides that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, . . . a petition for review . . . shall be the sole and exclusive means for judicial review of any cause or claim" arising under the Convention, with one exception not relevant here. 8 U.S.C. § 1252(a)(4).

Accordingly, the Convention by itself creates no private right of action, and the FARRA and 8 U.S.C. § 1252(a)(4) create no jurisdiction to enforce the Convention outside of the context of immigration petitions for review. *See Munaf*, 128 S. Ct. at 2226 n.6 (observing that FARRA "may be limited to certain immigration proceedings"); *Khouzam v. Attorney General*, 549 F.3d 235, 245 (3d Cir. 2008) (holding that § 1252(a)(4) precludes the assertion of jurisdiction over a habeas petition raising CAT claims); *Mironescu*, 480 F.3d at 673-74 (holding that "although courts may consider or review CAT or FARR[A] claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims"); *United States v. Casaran-Rivas*, 311 Fed. App'x 269, 272 (11th Cir. 2009) (unpublished) (rejecting argument asserted in 28 U.S.C. § 2255 proceeding that an indictment violated the CAT because the CAT is "not self-executing" and the claim is not "subject to relevant legislation"). *But see Trinidad y Garcia v. Benov*, No. 09-56999, 2010 WL 3314496, at *3 (9th Cir. Aug. 24, 2010) (unpublished) (holding that prior circuit precedent dictated a holding that CAT claims are judicially reviewable in the extradition context but noting that "[i]f we were writing

on a clean a slate, we would hold that the Government has the better of the argument").

Judicial review of petitioners' CAT claims, which is what the injunctions here are designed to allow, would therefore improperly intrude not only on the authority of the Executive Branch, but also on that of the Legislative Branch. *Munaf*, 128 S. Ct. at 2226 (holding that "sensitive foreign policy issues" are left to the consideration of the "political branches," not the courts); *Kiyemba II*, 561 F.3d at 517 (Kavanaugh, J., concurring) (noting that in this context Congress has not sought "to restrict the Executive's transfer authority or to involve the Judiciary in reviewing war-related transfers"); *cf.* Pub. L. No. 111-32, § 14103(e), 123 Stat. 1859, 1921 (2009) (requiring the Executive to notify Congress before proceeding with any transfer from Guantanamo).

**2.** Notwithstanding the clear textual mandate in the FARRA and 8 U.S.C. § 1252(a)(4) providing for private enforcement of the CAT only in the immigration context, petitioners contend that judicial review of CAT claims is available here. They first argue that § 1252(a)(4) may not apply extraterritorially to Guantanamo. Pet. 5. Section 1252(a)(4), however, could not be written in broader terms. In any event, as explained *supra* on page 9, because the CAT is not self-executing, petitioners have no judicially enforceable rights in the absence of implementing legislation. Moreover, any construction of the FARRA and § 1252(a)(4) that would bar the judicial enforcement of CAT claims domestically but would permit extraterritorial claims would be nonsensical.

Petitioners next argue that §1252(a)(4) only applies in cases where CAT claims may be asserted as part of a petition for review of an order of removal, contending that

such a result follows from the title of 8 U.S.C. § 1252 — "Judicial Review of Orders of Removal" — and the provision's legislative history. Pet. 5-6. But "[w]here . . . the statutory text is clear, the title of a statute . . . cannot limit the plain meaning of the text." *Demore v. Kim*, 538 U.S. 510, 535 (2003) (internal quotation marks omitted) (second alteration in original). Here the statutory text is unambiguous, providing that "*[n]otwithstanding any other provision of law (statutory or nonstatutory)*, including section 2241 of Title 28, or any other habeas corpus provision, . . . the *sole* and *exclusive* means for judicial review of *any cause or claim* under the [CAT]" is the filing of a petition for review challenging a final order of removal. 8 U.S.C. § 1252(a)(4) (emphases added). In addition, the separate enactment in the FARRA also makes clear that judicial review is precluded here, providing that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal." *Id.* § 1231 note.

Petitioners' reading of § 1252(a)(4) would render that subsection entirely redundant with the subsection that follows it, 8 U.S.C. § 1252(a)(5), further underscoring the correctness of the Government's interpretation. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."). Section 1252(a)(5) — which was enacted at the same time as § 1252(a)(4), *see* Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231, 310-11 (2005) — provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, . . . 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 an order of removal entered or issued under any provision of this chapter." If, as petitioners believe, § 1252(a)(4) bars habeas review of CAT claims only when those claims could be asserted in a petition for review of a final order of removal, then § 1252(a)(4) is entirely unnecessary because § 1252(a)(5) already bars habeas review of *all* claims that could be asserted in a petition for review. Congress enacted these two provisions at the same time and meant for § 1252(a)(4) to mean what it says — to bar "any cause or claim under the [CAT]" not raised in a petition for review of a final removal order. 8 U.S.C. § 1252(a)(4).

Petitioners' legislative history argument fails for the related reason that it pertains not to 8 U.S.C. § 1252(a)(4) but to § 1252(a)(5) and other related provisions enacted at the same time as § 1252(a)(4). By contrast, the Conference Report's only discussion of the provision codified at § 1252(a)(4) notes that the provision would "allow aliens in section 240 removal proceedings to seek review of any cause or claim under the [CAT] in the courts of appeal." H.R. Rep. No. 109-72, at 176 (2005) (internal quotation marks omitted). The legislative history therefore provides no basis for departing from the clear statutory text barring judicial review of CAT claims outside of the immigration setting.

**3.** Petitioners contend, in the alternative, that 8 U.S.C. § 1252(a)(4) would amount to an unconstitutional suspension of the writ of habeas corpus if it does not permit them to assert CAT claims here. Pet. 6-7. But the FARRA and § 1252(a)(4) did not "suspend" some pre-existing authority to adjudicate CAT claims in habeas corpus actions. Because

the CAT is not self-executing, *see supra* p. 9, the question is whether these statutes conferred on courts the authority to adjudicate CAT claims beyond the immigration context in habeas corpus actions, and *Kiyemba II* properly held that they did not.

Moreover, the FARRA and § 1252(a)(4) do not bar habeas jurisdiction altogether; they bar jurisdiction only over claims arising under the CAT, which itself creates no judicially enforceable rights. The Suspension Clause does not require Congress to provide detainees with the right to enforce all treaty-based rights on habeas. *See Noriega v. Pastrana*, 564 F.3d 1290, 1294 (11th Cir. 2009) (holding that § 5 of the Military Commissions Act, which prohibits petitioners from invoking the Geneva Conventions as a source of rights, does not violate the Suspension Clause because it "at most changes one substantive provision of law upon which a party might rely in seeking habeas relief"), *cert. denied*, 130 S. Ct. 1002 (2010); *Al-Bihani v. Obama,* 2010 WL 3398392, at *20 (Kavanaugh, J., concurring in the denial of rehearing *en banc*) (same); *see also Al-Adahi v. Obama*, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010).

### C. Petitioners Do Not Have a Due Process Right to Advance Notice.

Petitioners suggests that they have a substantive and procedural due process right to notice to permit them to challenge a transfer to another country. Pet. 10-12. These arguments were raised and properly rejected in *Kiyemba II*, and there is no need or basis to revisit that ruling here.

*Munaf* involved U.S. citizen detainees with full due process rights, and, as explained above, the Supreme Court held that separation-of-powers principles preclude

courts from second-guessing a determination by the Executive that a detainee is not more likely than not to be tortured in the proposed country of transfer. 128 S. Ct. at 2225-26 ("The Judiciary is not suited to second-guess such determinations).[5] "*A fortiori*," the alien petitioners here have no right to challenge a determination by the Executive that a detainee is not more likely than not to be tortured in the proposed country of transfer. *Kiyemba II*, 561 F.3d at 517-18 (Kavanaugh, J., concurring); *see also Kiyemba v. Obama*, 555 F.3d 1022, 1026-28 (D.C. Cir.) (rejecting due process claims by Guantanamo detainees), *vacated*, 130 S. Ct. 1235 (2009), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010). Moreover, petitioners cannot claim a right to advance notice of transfer where the notice could not provide them any relief. *See Estes v. Texas*, 381 U.S. 532, 542 (1965). *See generally Kiyemba II*, 561 F.3d at 517-20 (Kavanaugh, J., concurring).

Thus, this Court's prior ruling is correct, consistent with Supreme Court precedent, has properly been applied by this Court in numerous cases, and does not warrant initial *en banc* consideration.

## CONCLUSION

For the foregoing reasons, the petition for initial hearing *en banc* should be denied.

---

[5] The *Munaf* Court explained that "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S. Ct. at 2225; *see also Holmes v. Laird*, 459 F.2d 1211, 1225 (D.C. Cir. 1972) (where U.S. citizen service members sued to prevent transfer to another country, the transfer presented "a matter beyond the purview of this court").

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

ROBERT M. LOEB

s/ Sydney Foster
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

September 27, 2010