No. 11-___

IN THE

Supreme Court of the United States

MAHMOUD ABDAH, *et al.*,
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a habeas corpus action, a Guantánamo detainee has a right to challenge his transfer to a foreign country on the ground that he is likely to be tortured there, and a court has the power to enjoin the transfer upon a proper showing by the detainee.

PARTIES TO THE PROCEEDING

Appellants/Respondents:

Barack Obama, President of the United States.
Rear Admiral David B. Woods, Commander, Joint Task Force-GTMO.
Donnie Thomas, Army Colonel, Joint Detention Operations Group, JTF-GTMO.
Leon E. Panetta, Secretary of Defense.

Appellees/Petitioners:

Detainees:

05-5224. Mahmoad Abdah; Majid Mahmoud Ahmed; Abdulmalik Abdulwahhab Al-Rahabi; Mahktar Yahia Naji Al-Warafi; Aref Abd Il Rheem; Yasein Khasem Mohammad Esmail; Adnan Farhan Abdul Latif; Othman Abdulraheem Mohammad; Adil El Haj Obaid; Abd Alsalam Mohammed Saeed; Salman Yahaldi Hsan Mohammed Saud.

05-5225. Hani Saleh Rashid Abdullah; Rami Bin Saad Al-Oteibi.

05-5227. Ahmed Abdullah Al-Wazan.

05-5229. Omer Saeed Salem Al Daini, aka Amer Said Salim Al Daini.

05-5230. Abulsalam Ali Abdulrahman Al-Hela, aka Abd Al-Salam Ali Al-Hela.

05-5235. Muhammed Al-Adahi; Muhammad Ali Abdullah Bawazir; Fahmi Salem Al-Assani; Suleiman Awadh Bin Aqil Al-Nahdi; Zahir Omar Khamis Bin Hamdoon.

05-5236. Jarallah Al-Marri; Ali Salah Kahlah Al-Marri.

05-5237. Saleh Abdulla Al-Oshan; Zaben Dhaher Al Shammari; Abdul Rahman Shalby; Abdullah Aali Al Otiabi; Muhammed Fahad Al Qahtani; Musa Al Madany.

05-5238. Suhail Abdu Anam; Fahmi Abdullah Ubad Al-Tawlaqi; Bisher Naser Ali Almarwalh, aka Bashir Naser Ali Almarwalh, aka Bashir Nasir Ali Al-Marwala; Masaab Omar Al-Madhwani, aka Musa'ab Omar Madhwani; Abdulkhaliq Al-Baidhani, aka Abdul Khaleq Ahmed Al-Baidandi; Ali Ahmed Mohammed Al Razehi; Saeed Ahmed Al-Sarim; Imad Abdullah Hassan; Jalal Salim Bin Amer; Ali Yahya Mahdi, aka Ali Yahaya Mahdi Al-Rimi; Atag Ali Abdoh, aka Atag Ali Abdoh Al Hag; Khalid Ahmed Kassim; Fahmi Abdullah Ahmed; Abdualaziz Abdoh Al Swidi, aka Abdualaziz Abdoh Alsswidi; Al Hussin Al-Tis.

05-5243. Djamel Ameziane.

05-5244. Muhammed Khan Tumani; Abd Al Nisr Khan Tumani.

05-5248. Mohammed Abdul Rahman.

05-5337. Omar Deghayes; James Abdullah Kiyemba; Shaker Abdurraheem Aamer.

05-5338. Mohamedou Ould Slahi.

05-5374. Arkan Mohammad Ghafil Al Karim.

05-5390. Hussein Salem Mohammad A. El-Marqodi.

05-5398. Saeed Mohammed Saleh Hatim; Mohammed Nasser Yahia Abdullah Khussrof.

05-5479. Abdulzaher.

05-5484. Hussain Salem Mohammed Almerfedi.

06-5041. Ismail Alkhemisi; Hasan Balgaid.

06-5065. Hayal Aziz Ahmed Al-Mithali.

Next Friends of Detainees:

05-5224. Mahmoad Abdah Ahmed, aka Mahmood Abdo Ahmed Bin Ahmed; Mahmoud Ahmed; Ahmed Abdulwahhab; Foade Yahia Naji Al-Wrafie; Aref Abd Al Rahim; Jamel Khasem Mohammad; Mohamed Farhan Abdul Latif; Araf Abdulraheem Mohammad; Nazem Saeed El Haj Obaid; Yahiva Hsane Mohammed Saud Al-Rbuaye.

05-5225. Yosra Saleh Rashid Abdullah.

05-5227. None.

05-5229. Mohammed Saeed Salem Al Daini.

05-5230. Abdulwahab Ali Abdulrahman Al-Hela.

05-5235. Miriam Ali Abdullah Al-Haj; Salih Ali Abdullah Bawazir; Salem Said Al-Assani; Muhammad Omar Khamis Bin Hamdoon.

05-5236. None.

05-5237. Mohammed Saad Mohammed Al-Oshan; Nasser Daher Al Shammari; Shaker Aamer.

05-5238. Mohamed Abdu Anam; Abdullah Admed Ubad Al-Tawlaqi; Huissen Naser Ali

Almarwalh; Ali Omar Madhwani; Khalid Al-Baidhani; Abdullah Ahmed Mohammed Al Razehi; Samir Ahmed Al-Sarim; Amro Abdullah Hassan; Faez Bin Amer; Mohamed Yahya Mahdi; Fadhle Ahmed Kassim; Kmal Abdullah Ahmed; Adnan Abdoh Alswidi; Hadi Hussin Al-Tis.

05-5243. None.

05-5244. None.

05-5248. None.

05-5337. Saeed Ahmed Siddique; Theresa Namuddu.

05-5338. None.

05-5374. None.

05-5390. None.

05-5398. Ali Mohammed Saleh Al-Salahi; Fatima Nasser Yahia Abdullah Khussrof.

05-5479. None.

05-5484. Salem Mohammed Salem Abdulla Almerfedi.

06-5041. None.

06-5065. Ali Aziz Ahmed Al-Mithali.

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DECISIONS BELOW

The order of the court of appeals, App. 1a, is unreported. The order of the court of appeals denying initial *en banc* hearing, App. 3a, is reported at 630 F.3d 1047 (D.C. Cir. 2011). The district court's memorandum opinion, App. 18a, is not reported but appears at 2005 WL 711814 (D.D.C. Mar. 29, 2005). The district court's order, App. 32a, is not reported.

JURISDICTION

The order of the court of appeals was entered on April 25, 2011. On July 15, 2011, the Chief Justice extended the date for filing this petition to September 22, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

Suspension Clause, U.S. Const., Art. I, § 9, cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Due Process Clause, U.S. Const., Amdt. V:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681-822 (8 U.S.C. 1231 note):

> [N]othing 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].

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(B), 119 Stat. 310-311 (codified as 8 U.S.C. § 1252(a)(4)):

> (4) Claims under the united nations convention.—
>
> Notwithstanding any other provision of law (statutory or nonstatutory), 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 * * *.

STATEMENT OF THE CASE

1. Overview.

Petitioners are Guantánamo detainees who have brought habeas corpus actions challenging the lawfulness of their detention. In this case, the court of appeals summarily vacated orders of the district court requiring the government to give a detainee's counsel and the court 30 days' advance notice of the detainee's transfer from Guantánamo. App. 1a. The court cited its earlier decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"), as compelling the result. App. 2a. In *Kiyemba II*, the court of appeals read *Munaf v. Geren*, 553 U.S. 674 (2008), to preclude the district court from enjoining a Guantánamo detainee's transfer to a particular country, based on the detainee's fear of torture, if the government has determined that the detainee is unlikely to face torture in that country. The advance notice requirement was invalid, the court reasoned, because the requirement itself had the effect of enjoining the detainee's transfer during the 30-day period. Obviously, however, a detainee can challenge his transfer only if he has advance notice of the transfer. By holding the notice requirement invalid, *Kiyemba II* effectively held that a detainee, in a habeas corpus action, has no right to challenge his transfer based on his fear of torture in the receiving country.

The court of appeals has twice applied *Kiyemba II* to preclude a detainee from challenging his transfer to a particular country based on his fear of torture. In one of those cases, the detainee applied to this Court for a stay of transfer pending his filing of a petition for certiorari. The Court denied the application. In a dissenting statement, 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*, 131 S. Ct. 32 (2010) (No. 10A52). This Court denied a similar stay application in *Naji v. Obama*, 131 S. Ct. 32 (2010) (No. 10A70). The government mooted both detainees' cases by transferring them before this Court could decide whether they were entitled to challenge their transfers.

The court of appeals acknowledged that Congress, in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), has allowed judicial review of torture claims under the Convention Against Torture ("CAT"), as part of judicial review of a final order of removal. But the court also read the REAL ID Act of 2005 to make such review "the sole and exclusive means for judicial review of any cause or claim under the [CAT]." Based on its reading of these provisions, the court of appeals held that, while individuals may assert CAT claims in appeals from final orders of revoval, a detainee, facing the same threat of torture if transferred to the same country, cannot assert CAT claims in a habeas corpus action.

As discussed below, review is warranted for at least three reasons: First, to clarify whether *Munaf* bars a detainee, in a habeas corpus action, from challenging his transfer to another country based on his fear of torture. Second, to resolve whether a detainee has a right under the Due Process Clause to challenge his transfer based on his fear of torture and, *a fortiori*, a right to advance notice of his transfer. Third, to consider whether Congress, through FARRA and the REAL ID Act, has limited CAT claims to judicial

review of final orders of removal, thereby precluding individuals from asserting CAT claims in habeas corpus actions, and whether, if Congress is understood to have so limited the assertion of CAT claims, the limitation violates the Suspension Clause and the equal protection guarantee of the Due Process Clause.

2. Proceedings below.

The first detainees arrived at Guantánamo in January 2002. The first detainee habeas corpus actions were filed soon thereafter. After this Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that the district court had jurisdiction under 28 U.S.C. § 2241 to hear the detainees' habeas corpus challenges to "the legality of their detention," more detainees filed habeas corpus petitions. This Court, in *Boumediene v. Bush*, 553 U.S. 723, 734-35 (2008), described what followed:

> After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases, Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

The detainees appealed Judge Leon's decision; the government appealed Judge Green's decision. All of the detainee habeas cases were stayed pending these appeals.

Soon after the cases were stayed, detainee counsel asked the district court to require the government to

provide them and the court with 30-days' advance notice of a detainee's transfer to allow counsel to challenge the transfer if, for example, the detainee fears that he would be tortured in the receiving country. In March 2005, the district court judges, granting this request, began issuing orders requiring the government "to provide Petitioners' counsel and the court with 30 days' notice prior to transporting or removing any of Petitioners from Guantánamo Bay Naval Base." App. 32a.

The Government appealed the notice orders. In a per curiam order, the court of appeals vacated the orders. App. 1a. In pertinent part, the court's order reads:

> FURTHER ORDERED that the district court's orders requiring advance notice of transfer are hereby vacated. *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

App. 2a. Because the court of appeals relied solely on *Kiyemba II*, the instant petition, in substance, presents that decision to this Court for review.[1]

3. *Kiyemba II*.

In *Kiyemba II* involved nine Uighurs detainees who had brought habeas corpus actions challenging their detention. Fearing that they might be transferred to a country where they would be tortured or further detained, they, like the petitioners here, requested

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[1] In *Khadr v. Obama*, No. 10-751, this Court denied a detainee's petition for certiorari to review a decision of the court of appeals, also resting on *Kiyemba II*, vacating notice orders issued by the district court in 2008 in the wake of *Boumediene*. *Khadr*, 131 S. Ct. 2900 (2011). Justice Breyer and Justice Sotomayor would have granted the petition. *See id.*

interim relief requiring the Government to give their counsel and the court 30 days' notice before transferring them from Guantánamo. The district court entered the requested orders. The Government appealed each order. Concluding that the district court had subject matter jurisdiction to hear the detainees' challenges to their transfers, 561 F.3d at 512-13, a divided court of appeals vacated the notice orders "[i]n light of the Supreme Court's recent decision in *Munaf v. Geren*, 128 S. Ct. 2207 (2008)." 561 F.3d at 511. The majority stated:

> The detainees here seek to prevent their transfer to any country where they are likely to be subjected to further detention or to torture. Our analysis of their claims is controlled by the Supreme Court's recent decision in *Munaf*. In that case, two American citizens held in the custody of the United States military in Iraq petitioned for writs of habeas corpus, seeking to enjoin the Government from transferring them to Iraqi custody for criminal prosecution in the Iraqi courts. [128 S. Ct.] at 2214-15. The Court held [that] the district court had jurisdiction over the petitions, but that it could not enjoin the Government from transferring the petitioners to Iraqi authorities. *Id.* at 2213. As we explain below, *Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer on the grounds asserted by the petitioners here; therefore the detainees cannot prevail on the merits of their present claim and the Government is entitled to reversal of the orders as a matter of law.

Id. at 513-14 (footnote omitted). The majority continued:

> Under *Munaf*, * * * the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee. 128 S. Ct. at 2226 ("The Judiciary is not suited to second-guess such determinations-determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area"). In light of the Government's policy, a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country.

Id. at 514.

The majority invalidated the notice orders on the ground that, contary to *Munaf*, the district court's advance notice orders effectively enjoined transfers for the duration of the 30-day notice period. Under *Munaf*, the court stated, a detainee who fears that he will be tortured if transferred to a particular country has no right to challenge the transfer, if the government has determined that the detainee is unlikely to be tortured in that country—or simply "declared its policy not to transfer a detainee to a country that likely will torture him." *Id.* at 516. In those circumstances, "the district court may not second-guess the Government's assessment of that likelihood." *Id.*

The majority rejected the petitioners' effort "to distinguish *Munaf* on the ground that the habeas petitioners in that case did not raise a claim under the Convention Against Torture, as implemented by the Foreign Affairs Reform and Restructuring (FARR) Act, 8 U.S.C. § 1231 note. *See Munaf*, 128 S. Ct. at 2226 n.6." 561 F.3d at 514. The court explained:

> That distinction is of no help to them * * * because the Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal. 8 U.S.C. § 1252(a)(4) * * *. Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act, and *Munaf* controls.

561 F.3d at 515 (parenthetical quoting statute omitted).

Judge Griffith dissented from the majority's conclusion that *Munaf* precluded the district court from ordering advance notice of transfers:

> The majority makes much of its language that courts may not "second-guess" the government's determinations, but it overlooks a significant difference between that case and ours: the *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful. There was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer. In considering the *Munaf* petitioners' request to enjoin their transfers, the district court had the benefit of competing arguments from the petitioners and the government for each specific transfer. *See* 128 S. Ct. at 2226 * * *. Although the Supreme Court rightly gave substantial weight to the government's determination that the proposed transfer was lawful, the petitioners were at least permitted to argue otherwise. The *Kiyemba* petitioners should be afforded the same opportunity.

561 F.3d at 515 (citations omitted). Judge Griffith added:

> Given the significant differences between the circumstances of *Munaf* and this case, we are not required to hold that courts are foreclosed from exercising their habeas powers to enjoin a transfer without some opportunity for a detainee to challenge the government's representation that his transfer will be lawful.

Id. Cf. Munaf, 553 U.S. at 706. (Souter, J. joined by Ginsburg and Breyer, JJ., concurring) (stating, in essence, that he joined the Court's opinion on the understanding that the case was limited to its facts).

4. Denial of initial *en banc* hearing.

Recognizing that *Kiyemba II* controls this case, petitioners moved for rehearing *en banc*, asking the full court to reexamine that case. The court of appeals denied their petition. App. 3a-4a. Judge Griffith, joined by Judge Judith W. Rogers and Judge David S. Tatel, dissented.

Judge Griffith first reviewed the historical record. App. 5a-12a . He stated: "Since at least the seventeenth century, the writ of habeas corpus has guaranteed prisoners the very right the *Kiyemba II* court failed to protect: the right to challenge transfers beyond the reach of the writ." App. 5a. Judge Griffith then reviewed the *Kiyemba II* court's reading and application of *Munaf*. App. 12a-17a. Judge Griffith stated:

> Whether the *Munaf* prisoners were entitled to notice was never at issue, because the prisoners already had notice of their proposed transfers and a meaningful opportunity to challenge them in an Article III court. By denying these fun-

> damental procedural rights, *Kiyemba II* went well beyond the holding of *Munaf*.

App. 13a.

Judge Griffith continued:

> In relying on *Munaf*'s treatment of the merits of a transfer claim, the *Kiyemba II* court was fundamentally confused. Notice is a necessary element of the right to challenge a transfer, and this right does not depend on whether the challenge is likely to succeed. By holding otherwise, the *Kiyemba II* court put the detainee in an impossible position: To receive notice of a transfer, he must first show that it is likely unlawful. But he cannot make that showing without knowing any details of his transfer except that he might be sent some day to some place for some reason. This Catch-22 eliminates any "meaningful opportunity" to challenge a transfer.

App. 16a (citing *Boumediene*, 553 U.S. at 779).

5. The panel's order.

Following the court of appeals' denial of initial *en banc* hearing, the court of appeals panel summarily vacated the notice orders on the authority of *Kiyemba II*. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

1. *Munaf*.

Review should be granted to clarify that *Munaf* does not bar a detainee, in a habeas corpus action, from challenging his transfer to another country based on his fear of torture, or a court from enjoining the transfer upon a proper showing by the detainee.

In reaching a contrary conclusion, the court of appeals failed to recognize that this Court had limited *Munaf* to its highly idiosyncratic facts, which the facts of *Kiyemba II* did not remotely resemble. The Court thus confined its holding to "circumstances such as those presented here," 514 U.S. at 680, confining to "the present context," *id.* at 700, its conclusion that a court should not "second-guess" the government's determination that the *Munaf* petitioners were unlikely to be tortured if transferred to Iraqi custody, *id.* at 702. *See also id.* at at 706 (Souter, J. joined by Ginsburg and Breyer, JJ., concurring) (stating, in essence, that he joined the Court's opinion on the understanding that the case was limited to its facts).

The "circumstances" and "context" of *Kiyemba II* (and this case) are entirely different from those of *Munaf*, and the considerations that the Court regarded as militating against judicial review of the petitioners' torture claims in *Munaf* do not pertain here. In "context," the Court treated the petitioners' request for adjudication of their claims of possible torture as a facet of their general request, as the Court saw it, for adjudication of the adequacy of Iraq's justice system, all in aid of the petitioners' quest to avoid transfer for prosecution in Iraq. *See* 514 U.S. at 702 ("The Judiciary is not suited to second-guessing such determinations [regarding the likelihood of torture]—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."). The "circumstances" that Justice Souter considered "essential to the Court's holding," *id.* at 706, all pivot on the petitioners' quest to avoid transfer for prosecution. The court of appeals mechanically applied the

"no inquiry" rule of *Munaf* to the circumstances of cases such as *Kiyemba II*, without pausing to examine whether the context of those cases and *Munaf* are the same. They are not. In short, *Munaf* did not settle the issues raised in cases such as this. This Court should resolve them.

Kiyemba II is also self-contradictory, as Judge Griffith recognized. *See* App. 16a. The decision identified potential grounds on which a detainee might be able to challenge his transfer. *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010), identified the same potential grounds.[2] In *Munaf* itself, this Court identified a potential ground of challenge—the "extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 553 U.S. at 702.[3] *Kiyemba II*

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[2] 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 of appeals similarly reserved decision on whether habeas is available in cases of transfers "to evade judicial review of Executive detention decisions."). *Kiyemba II*, however, 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.

[3] 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

does not explain how a detainee can challenge his transfer on these or any other grounds without advance notice.

2. Due Process.

Review is also warranted to decide whether Guantánamo detainees have a due process right to challenge their transfer to another country on the ground that they are likely to be tortured there. In *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008), the Third Circuit stated that it violates the due process rights of an excludable alien to fail to provide him with an opportunity to contest diplomatic assurances prior to his removal to a country where he fears torture. In *Khouzam*, (1) "the Government failed to make any factfinding based on a record that was disclosed to Khouzam"; (2) "Khouzam had no opportunity to make arguments on his own behalf"; and (3) "Khouzam was denied his right to an individualized determination." *Id.* at 257–58. The court of appeals's misreading of *Munaf* in *Kiyemba II*—that a detainee has no right to challenge his transfer on the ground that he faces torture in the transferee country—are in tension with *Khouzam*, and may have the effect of depriving the detainees of the due process rights articulated by the Third Circuit.

3. FARRA and the REAL ID Act.

Review is also warranted because, in *Kiyemba II*, the court of appeals decided an important issue of federal law that has not been, but should be, settled by this Court: Whether FARRA § 1252(a)(4) bars

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(D.C. Cir. 2004) (imputing to city government constructive knowledge that its agents would violate constitutional rights).

Guantánamo detainees from asserting CAT claims in habeas corpus actions.

FARRA § 2242(d) provides:

> [N]othing 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].

Section 1252(a)(4), added by the REAL ID Act, in turn provides:

> 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 * * *.

In *Kiyemba II*, the court of appeals held that § 1252(a)(4) limits a court's jurisdiction to "consider or review" CAT claims to review of a final order of removal. 561 F.3d at 514-15. Under the court's reading of § 1252(a), only individuals appealing such orders may raise CAT claims.

The court of appeals was mistaken. As an initial matter, the court simply assumed that § 1252(a)(4) applies extraterritorially to Guantánamo. That as-

sumption is at least questionable.[4] Moreover, even assuming that § 1252(a)(4) applies, the provision governs judicial review of immigration "removal orders," as the title of § 1252, "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 § 1252 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 is the only review mechanism.[5] Indeed, the 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

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[4] *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).

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

challenges that were independent of removal orders and could not be challenged in a petition for review.[6]

Construed to limit judicial review of CAT claims to review of removal orders, § 1252(a)(4) violates the equal protection guarantee of the Fifth Amendment. Like the statutes at issue in *Boumediene* (the Detainee Treatment Act of 2005 and Military Commissions Act of 2006), § 1252(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), § 1252(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, § 1252(a)(4) 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 likely torture if transferred to the very same country, from asserting such claims in a habeas corpus action.

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[6] *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).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 22, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: April 25, 2011]

No. 05-5224
September Term 2010

04cv01194, 04cv01254, 04cv02035,
04cv02215, 05cv00023, 05cv00280,
05cv00329, 05cv00359, 05cv00392,
05cv00520, 05cv00526, 05cv00634,
05cv00881, 05cv00998, 05cv01048,
05cv01236, 05cv01429, 05cv01645,
05cv01649, 05cv01983, 05cv02186

MAHMOAD ABDAH, DETAINEE, CAMP DELTA, *et al.,*
Appellees,

v.

BARACK OBAMA,
PRESIDENT OF THE UNITED STATES, *et al.,*
Appellants.

Consolidated with 05-5225, 05-5227,
05-5229, 05-5230, 05-5235, 05-5236, 05-5237,
05-5238, 05-5243, 05-5244, 05-5248,
05-5337, 05-5338, 05-5374, 05-5390,
05-5398, 05-5479, 05-5484, 06-5041, 06-5065

ORDER

BEFORE: Henderson, Tatel, and Kavanaugh, *Circuit Judges*

Upon consideration of the court's order to show cause filed July 23, 2010, appellees' response thereto, and the reply; and appellees' motion to hold the cases in abeyance pending disposition of the petition for initial hearing en banc and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot in light of the court's order denying the petition for initial hearing en banc. It is

FURTHER ORDERED that the district court's orders requiring advance notice of transfer are hereby vacated. *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

[Filed January 11, 2011]

MAHMOAD ABDAH, DETAINEE, CAMP DELTA, *et al.*,
Appellees,

v.

BARACK OBAMA,
PRESIDENT OF THE UNITED STATES, *et al.*,
Appellants.

Nos. 05-5224,
September Term 2010
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,
05-5479, 05-5484, 05-5486, 06-5037, 06-5041,
06-5043, 06-5062, 06-5065, 06-5094.

BEFORE: SENTELLE, *Chief Judge*, and GINBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*.[**]

ORDER

Appellees' petition for initial en banc hearing and the response thereto were circulated to the full court,

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[*] Circuit Judges Rogers, Tatel, and Griffith would grant the petition.

[*] A statement by Circuit Judge Griffith, with whom Circuit Judges Rogers and Tatel join, dissenting from the denial of initial en banc hearing, is attached.

and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

GRIFFITH, Circuit Judge, with whom *Circuit Judges* ROGERS and TATEL join, dissenting: I dissent from the denial of en banc hearing because I believe the Suspension Clause, as construed by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), entitles detainees at Guantanamo Bay to notice of transfers that will take them beyond the reach of the writ of habeas corpus. The petitioners ask us to reexamine our ruling to the contrary in *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C.Cir.2009). We should oblige.

As I expressed in my dissent in *Kiyemba II*, faithful application of *Boumediene* compels us to provide Guantanamo detainees the fundamental procedural protections that characterized the Great Writ in 1789. *Id.* at 522-23 (Griffith, J., dissenting); *see also INS v. St. Cyr*, 533 U.S. 289, 301, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("[A]t an absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'. . . ." (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996))). Among those procedural safeguards was the long-

established right of a prisoner to question his jailer's authority to transfer him to a place where it would be difficult or impossible to execute the writ. *Boumediene*, 553 U.S. at 845-46, 128 S.Ct. 2229 (Scalia, J., dissenting); *Kiyemba II*, 561 F.3d at 523 (Griffith, J., dissenting). *Kiyemba II* eviscerated that right by denying the detainees notice of transfers beyond the reach of the writ.

The court's reasoning was fundamentally flawed in at least two respects. First, the court failed to account for the right of a prisoner to challenge his transfer. Second, the court denied detainees the notice necessary to exercise this right based on the judgment that any transfer away from Guantanamo was likely to be lawful. In reaching that conclusion, the court misread then misapplied the Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008).

If *Kiyemba II* is allowed to stand, the government will be able to transfer detainees away from Guantanamo without affording them "a meaningful opportunity" to argue that the transfers would be unlawful. *Boumediene*, 553 U.S. at 779, 128 S.Ct. 2229. Such a practice would violate the habeas protections *Boumediene* conferred.

I

Since at least the seventeenth century, the writ of habeas corpus has guaranteed prisoners the very right the *Kiyemba II* court failed to protect: the right to challenge transfers beyond the reach of the writ. This element of habeas corpus developed as a means of preventing the King's officers from sending prisoners away to evade habeas jurisdiction. Justice Scalia described this component of the writ in his dissent in

Boumediene: "The possibility of evading judicial review through such spiriting-away was eliminated, not by expanding the writ abroad, but by forbidding . . . the shipment of prisoners to places where the writ did not run or where its execution would be difficult." 553 U.S. at 845-46, 128 S.Ct. 2229 (Scalia, J., dissenting).

In 1679, Parliament codified the habeas rights that had been developed at common law in what has come to be known as the Habeas Corpus Act of 1679, a legislative achievement that Blackstone described as the "stable bulwark of our liberties." 1 WILLIAM BLACKSTONE, COMMENTARIES *137. The full title of the Act acknowledged that protection from transfer beyond the writ's reach was an integral component of habeas corpus: "An Act for the better securing of the Liberty of the Subject and for the Prevention of Imprisonment beyond the Seas." 31 Car. 2, c. 2 (Eng.). With three limited exceptions,[1] prisoners entitled to invoke the writ could not be transferred "beyond the seas" or to any other place where it would be difficult to execute the writ. *Id.* § 12 ("[N]o subject . . . may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into any parts, garrisons, islands, or places beyond the seas which are or at any time hereafter shall be within or without the dominions of his Majesty . . . and . . . every such imprisonment is hereby . . . illegal. . . ."). A jailer

[1] The Act allowed transfers to places beyond the reach of the writ only if a prisoner had contracted to work abroad as an indentured servant, *id.* § 13, a court permitted a felon to choose transportation to a penal colony in lieu of execution, *id.* § 14, or the Crown transferred a prisoner to another of the King's dominions to be tried for a crime he was alleged to have committed there, *id.* § 16.

who violated this ban on unlawful transfers could be imprisoned, fined upwards of five hundred pounds payable to the prisoner, and "disabled from thenceforth [bearing] any office of trust or profit" in England or any of the King's other dominions. *Id.* The 1679 Act allowed prisoner transfers within England, but only in specifically enumerated circumstances.[2] A jailer who transferred a prisoner under other circumstances was subject to punishment. *Id.* § 9.[3]

Concern over unlawful transfers had been voiced in Parliament some years before the Act. For example, in 1667 Lord Chancellor Edward Hyde was impeached in part because he had "advised and procured divers of his Majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 330 (Thomas B. Howell ed., London, R. Bagshaw 1816); *see also* ROBERT SEARLES WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF

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[2] The relevant portion of the Act provided: "[I]f any person . . . shall be committed to any prison or in custody of any officer . . . whatsoever for any criminal . . . matter . . . the said person shall not be removed from the said prison and custody into the custody of any other officer . . . unless it be by habeas corpus or some other legal writ or where the prisoner is delivered to the constable . . . to carry such prisoner to some common jail or where any person is sent by order of any Judge of Assize or Justice of the Peace to any common . . . house of correction or where the prisoner is removed from one prison . . . to another within the same county in order to his or her trial or discharge in due course of law or in case of sudden fire or infection or other necessity. . . ." *Id.* § 9.

[3] A jailer who repeatedly defied the Act and transferred prisoners outside these enumerated scenarios was subject to a two hundred pound fine and "made incapable to hold or execute his . . . office" any further. *Id.* § 5.

HABEAS CORPUS AS THE WRIT OF LIBERTY 82 & n. 151 (photo. reprint 2006) (1960) (describing the "practice of removing prisoners altogether out of the jurisdiction of the royal courts" as "absolutely fatal" to habeas corpus and "one of the principal charges" against Hyde). In 1669, Sir Anthony Cope took to the floor of the House of Commons to declare that he "[w]ould have no man out of the reach of Westminster-hall," the location from which the King's courts issued writs of habeas corpus. 1 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS 237 (London 1769). In turn, Sir Thomas Lee worried that "[h]e that is sent to Jersey or Guernsey," islands in the English Channel, "may be sent to Tangier," a more distant dominion, "and so never know what his crimes are, and no Habeas Corpus can reach him." *Id.; see also* Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 534 (1960) (observing that proponents of what became the Habeas Corpus Act of 1679 "charged that men were being sent to the plantations and to Tangier so that writs from Westminster could not reach them").

By 1679, experience had taught that some limit on transfers was needed to prevent the King's officers from "avoiding the writ by moving the prisoners." WALKER, *supra*, at 84. In the notorious case of Robert Overton, the prominent parliamentarian was arrested for his part in a plot against the restored monarchy of Charles II and, in 1664, sent to the island of Jersey, *see* 42 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 174 (H.C.G. Matthews & Brian Harrison eds., 2004), a place where the authority of the writ was still very much in doubt, *see* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 227-28 (2010) (describing a Jersey prisoner's

unsuccessful attempt to invoke the writ in the 1650s). King's Bench, the common law court that issued the writ most often, sent multiple writs to Overton's Jersey jailers, but for seven years they refused to give any return. *Id.* at 267-68, 437 n. 33. The 1679 Act was designed to protect prisoners like Overton by expressly prohibiting the King's officers from sending prisoners to Jersey or any other place where it was difficult to execute the writ. *See* 31 Car. 2, c. 2, § 12.

English cases from this time and over the next century demonstrate that courts readily exercised their power to review the lawfulness of transfers beyond the reach of the writ. In 1677, the Crown twice imprisoned Robert Murray for defamation and other crimes, and both times the King's Bench ordered his release to prevent his deportation to Scotland, where the writ did not run. HALLIDAY, *supra*, at 236 (discussing *Murray's Case*). During the second half of the eighteenth century, habeas courts regularly ordered the release of wrongfully impressed seamen rather than permitting the King's navy to take them abroad. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L.REV. 575, 605 & n. 72 (2008). And in a celebrated case that foreshadowed the abolition of slavery in England, Lord Mansfield issued the writ to stop the transportation of an African bound to slavery in Jamaica, where the writ could not help him. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.); 20 How. St. Tr. 1, 79-82; *see also King v. Inhabitants of Thames Ditton*, (1785) 99 Eng. Rep. 891 (K.B.) 892; 4 Dougl. 300, 301 (Mansfield, J.) (observing in a habeas suit that even if slavery were legal in England, a slave owner could not "by force compel [a slave] to go out of the kingdom"); HALLIDAY, *supra*, at 274 (noting that while

white Jamaicans could invoke the writ by this time, "habeas corpus would never be available to their slaves"); Daniel J. Hulsebosch, *Nothing But Liberty:* Somerset's Case *and the British Empire*, 24 LAW & HIST. REV. 647, 657 (2006) (observing that the rule of *Somerset* did not apply to slaves in Jamaica).

The power of a court in habeas to pass on the lawfulness of transfers was part of the reception of English common law in the American colonies. *See* A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 26 (1902) (explaining how, even in the absence of statutory habeas, the common law extended the writ to the American colonies). Around the time of the Founding, many of the original thirteen states enacted habeas laws that either expressly adopted the 1679 Act or otherwise followed its prohibitions. *See, e.g.*, GA. CONST. art. LX (1777) ("The principles of the habeas-corpus act shall be a part of this constitution."); Act of Mar. 16, 1785, 1 MASS. GEN. LAWS ch. 72, § 10 (1823) (prohibiting "any person [from] transport[ing] . . . any subject of this Commonwealth . . . to any part or place without the limits of the same . . . except [if] such person be sent by due course of law, to answer for some criminal offense committed in some other of the United States of America"); Act of Mar. 11, 1795, § 11, DIGEST OF THE LAWS OF NEW JERSEY 378 (4th ed., Newark, Martin R. Dennis & Co. 1868) (providing that "no citizen of this state . . . may be sent prisoner to any place whatsoever out of this state" except where he is sent to another state to be tried for a crime he allegedly committed there); Act of Feb. 18, 1785, § 12, DIGEST OF THE LAWS OF PENNSYLVANIA 573 (7th ed., Philadelphia, Davis 1847) (imposing two hundred pound fine on anyone who transfers a prisoner without legal authority to do so); Act of 1779, 11 VA.

STAT. 410 (Richmond, Cochran 1823) (prohibiting transfers of prisoners out of the state except "where the prisoner shall be charged by affidavit with treason or felony, alleged to be done in any of the other United States of America, in which . . . case he shall be sent thither in custody" by order of a Virginia court); *see also* Act of Dec. 12, 1712, 2 S.C. STAT. 399-401 (Columbia, Johnston 1837) (adopting the Habeas Corpus Act of 1679). As evidenced by these laws, by the time Congress conferred habeas jurisdiction on the newly created lower federal courts in the Judiciary Act of 1789, § 14, 1 Stat. 73, 81, the right to challenge an unlawful transfer was an established and indispensable feature of the American law of habeas corpus.

American courts have always heard challenges to transfers that could deprive the prisoner of the benefits of habeas corpus. For example, in the nineteenth century, habeas courts in free states sometimes issued the writ to block a slave's forcible removal to a slave state. *See, e.g., Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836) (Shaw, C.J.); *Lemmon v. People*, 20 N.Y. 562 (1860); *see also* Dallin H. Oaks, *Habeas Corpus in the States-1776-1865*, 32 U. CHI. L.REV. 243, 279 & n. 194 (1965) (citing additional cases). The exercise of this authority was sufficiently well known that in 1855 a ship captain docking in Cincinnati moved his human cargo across the river to the commonwealth of Kentucky to avoid an Ohio judge's issuance of the writ. *An Attempt to Detain Sixteen Slaves on a Writ of Habeas Corpus*, N.Y. TIMES, Mar. 23, 1855, at 5. As Chief Justice Shaw explained in *Aves*, unless some law authorized a slave's removal from the state, transfer was illegal and could be enjoined by a habeas court. 35 Mass. (18 Pick.) at 217 (holding that a habeas court could inter-

vene to stop the transfer of slaves where "there [was] no law which [would] warrant . . . their forcible detention or forcible removal"); *see also State v. Hoppess*, 1 Ohio Dec. Reprint 105, 1845 WL 2675, at *11 (Ohio 1845) (observing that a habeas court may intervene to prevent a transfer where "there is no law authorizing the master to force [the slave] back to the state which recognizes and enforces the relation of master and slave"). The authority to enjoin unlawful transfers remains a feature of habeas jurisdiction in the modern era. *See Ex parte Endo*, 323 U.S. 283, 307, 65 S.Ct. 208, 89 L.Ed. 243 (1944) (observing that a habeas court may act to ensure that a prisoner's habeas rights are not "impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court").

The right to challenge transfers was inherent in *Boumediene* 's extension of the protections of habeas corpus to the Guantanamo detainees. Of course, this right is meaningless if the detainee is not told where the government plans to send him. Nevertheless, the court in *Kiyemba II* gave the Executive permission to spirit away a detainee without warning, thereby denying him the protections of an essential component of the Great Writ and making the right to habeas corpus "subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 766, 128 S.Ct. 2229.

II

The *Kiyemba II* court based its decision on *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1, which held that a habeas court should not block the transfer to Iraqi authorities of two American citizens held in U.S. custody in Iraq on behalf of Iraq. *See Kiyemba II*, 561 F.3d at 516. But the *Kiyemba II*

court overlooked a crucial distinction between *Munaf* and *Kiyemba II*. *Munaf* was about the lawfulness of a transfer, not about the procedures by which a transfer could be challenged. Whether the *Munaf* prisoners were entitled to notice was never at issue, because the prisoners already had notice of their proposed transfers and a meaningful opportunity to challenge them in an Article III court. By denying these fundamental procedural rights, *Kiyemba II* went well beyond the holding of *Munaf*.

The *Munaf* petitioners were American citizens who allegedly committed crimes in Iraq. Although the government of Iraq held "ultimate responsibility for [their] arrest and imprisonment," the petitioners were in the custody of the U.S. military because "many of Iraq's prison facilities ha[d] been destroyed." 553 U.S. at 680, 128 S.Ct. 2207. They sought an injunction to keep them in U.S. custody on the grounds that a transfer to Iraqi custody would not only subject them to unfair prosecution, but would also put them at risk of torture. *Id.* at 694, 128 S.Ct. 2207. A unanimous Supreme Court rejected the petitioners' challenge on the merits. The Court reasoned that blocking the transfers would be an affront to Iraqi sovereignty. *Id.* After all, the petitioners had been accused of committing crimes in Iraq and were being held in that country on behalf of the Iraqi government. Furthermore, the petitioners' claims called on the judiciary to "second-guess" a determination by the political branches that torture at the hands of Iraq was unlikely. *Id.* at 702, 128 S.Ct. 2207. Finally, the form of relief sought-continued detention to shelter the petitioners from foreign prosecution—was not traditionally available in habeas. *Id.* at 693, 128 S.Ct. 2207.

In *Kiyemba II*, the detainees sought the notice that would give them a meaningful opportunity to object to a transfer that might be unlawful. In response, the government cautioned that judicial involvement in the transfer of the detainees away from Guantanamo would undermine sensitive negotiations with foreign states and adversely affect American foreign policy. In any event, the government asserted, it would not undertake any unlawful transfer from Guantanamo. Deferring to the Executive's judgment, the court concluded that the detainees had no right to know of their transfers in advance because they were unlikely to prevail on a claim that their transfers would be unlawful. *See* 561 F.3d at 514; *see also id.* at 516-17 (Kavanaugh, J., concurring).

Although *Munaf* and a host of other authorities urge deference to the Executive's considered judgment about sensitive foreign-policy matters, no case, and especially not *Munaf*, directs us to short-circuit the procedures habeas requires. In its Guantanamo cases, the Supreme Court has made clear that deference to the Executive on the merits of habeas petitions does not divest the judiciary of its duty to hear them. *See Boumediene*, 553 U.S. at 797, 128 S.Ct. 2229; *see also Rasul v. Bush*, 542 U.S. 466, 487, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004) (Kennedy, J., concurring). And while there is no question that our approach to the War on Terror "must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head" to suggest that a prisoner with habeas rights "could not make his way to court with a challenge . . . simply because the Executive opposes making available such a challenge." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality

opinion); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) (stating that "[a] seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest of latitude of judicial interpretation" but would still be subject to judicial inquiry); *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C.Cir.1983) (holding that where a FOIA plaintiff seeks sensitive foreign-affairs information, the court should give "substantial weight" to a government affidavit that the information is exempt from FOIA but nevertheless consider contrary evidence presented by the plaintiff).

In *Munaf*, the fact that "the political branches are well suited to consider" sensitive foreign-policy matters was a reason to give substantial weight to their views on the merits, 553 U.S. at 702, 128 S.Ct. 2207, but it was not a reason to bar the courthouse door. The petitioners in *Munaf* lost their challenge to the lawfulness of their transfers, but only after having notice of the place the government wanted to send them and an opportunity to object. The petitioners in *Kiyemba II* sought the same notice and opportunity to object, and the court should have granted them.

In relying on *Munaf*'s treatment of the merits of a transfer claim, the *Kiyemba II* court was fundamentally confused. Notice is a necessary element of the right to challenge a transfer, and this right does not depend on whether the challenge is likely to succeed. By holding otherwise, the *Kiyemba II* court put the detainee in an impossible position: To receive notice of a transfer, he must first show that it is likely unlawful. But he cannot make that showing without

knowing any details of his transfer except that he might be sent some day to some place for some reason. This Catch-22 eliminates any "meaningful opportunity" to challenge a transfer. *Boumediene*, 553 U.S. at 779, 128 S.Ct. 2229. In the more familiar context of the Due Process Clause, a defendant who is unlikely to prevail is still entitled to know he has been sued. *See Wuchter v. Pizzutti*, 276 U.S. 13, 19, 48 S.Ct. 259, 72 L.Ed. 446 (1928) (requiring that defendant receive notice of lawsuit without regard to merits of suit). Similarly, Guantanamo detainees are entitled to notice of a transfer regardless of how likely they are to persuade a court the transfer would be unlawful.

It is no response to say that the right to challenge transfers away from Guantanamo is a mere formality. Indeed, the court in *Kiyemba II* allowed for the possibility that some transfers could be unlawful. *See Kiyemba II*, 561 F.3d at 514 n. 5, 516 n. 7; *id.* at 521 n. 7 (Kavanaugh, J., concurring); *see also Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C.Cir.2010) ("We do not ignore the arguments of the detainees that the United States chose the place of detention and might be able to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will." (internal quotation marks omitted)). A challenge to a transfer might succeed if, for example, we had "reason to think the transfer process may be a ruse . . . designed to maintain control over the detainees beyond the reach of the writ." *Kiyemba II*, 561 F.3d at 516 n. 7.

In the end, I do not disagree that the detainees face a high bar in demonstrating that their transfers

would be illegal. But that is beside the point. The question we face today is whether Guantanamo detainees are entitled to notice of a transfer beyond the reach of the writ. If it seems odd that detainees in the War on Terror should enjoy such a right, they do so only because *Boumediene* extended habeas corpus to Guantanamo. We are bound to accept the consequences of that decision. For that reason, I respectfully dissent from the denial of en banc hearing.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed March 29, 2005]

Civil Action 04-1254 (HHK)

MAHMOAD ABDAH, *et al*.,
Petitioners,

v.

GEORGE W. BUSH, *et al*.,
Respondents.

MEMORANDUM OPINION

Petitioners are aliens who are being held by the United States military at Guantánamo Bay Naval Base in Cuba and who have petitioned this court for a writ of habeas corpus. While the merits of their individual claims have not yet been adjudicated, this court (Green, J.) has determined that some of the causes of action set forth in their habeas petition survive Respondents' motion to dismiss. This ruling is currently on appeal. Presently before the court is Petitioners' motion for a preliminary injunction. Asserting that Respondents have contemplated or are contemplating transferring them to the custody of foreign nations to be further detained and possibly tortured, Petitioners seek an order from this court that would require Respondents to provide their counsel and this court with 30 days' advance notice of any Petitioner's removal from Guantánamo. Upon consideration of the briefing of the parties, the submissions that accompany the briefing, and the

arguments of counsel at a hearing, the court concludes that Petitioners' motion should be granted.

I. BACKGROUND

Petitioners are thirteen[1] Yemeni nationals who each allegedly traveled to Pakistan for reasons "unrelated to any activities of al Qaeda or the Taliban," Pet. 19,[2] such as pursuing religious studies, *id*. ¶ 26, 40, 43, 45, 47; obtaining medical care, *id*. ¶ 33; and seeking better employment, *id*. ¶ 36. All were "arrested by Pakistani police as part of a dragnet seizure of Yemeni citizens." *Id*. ¶ 19. Details of their capture and subsequent movements are hazy, but Petitioners allege that they were seized in 2001 or 2002, *id*. ¶ 20, "far from the battlefield." *Id*. ¶ 61. All were then transferred to United States military custody and transported to the United States Naval Base at Guantánamo Bay, Cuba ("Guantánamo"), where they have since been held, "virtually *incommunicado*," *id*. ¶ 63, as "enemy combatants." All Peti-

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[1] The court notes some inconsistency in the parties' briefing regarding the number of Petitioners included in this action. The petition for writ of habeas corpus lists *fourteen* individuals: (1) Mahmoad Abdah; (2) Majid Mahmoud Ahmed; (3) Abdulmalik Abdulwahab AlRahabi; (4) Makhtar Yahia Naji Al-Wrafie; (5) Aref Abd Il Rheem; (6) Yasein Khasem Mohammad Esmail; (7) Adnan Farhan Abdul Latif; (8) Jamal Mar'i; (9) Othman Abdulraheem Mohammad; (10) Adil Saeed El Haj Obaid; (11) Mohamed Mohamed Hassan Odaini; (12) Sadeq Mohammed Said; (13) Farouk Ali Ahmed Saif; and (14) Salman Yahaldi Hsan Mohammed Saud. Pet. ¶¶ 22-51 and caption.

Petitioners' motion for a preliminary injunction identifies thirteen Petitioners, Pet'rs' Mot. at 2, while Respondents mention *twelve* detainees, stating they have no records corresponding to Aref Abd Il Rheem. Resp'ts' Opp'n at 2, n. 1.

[2] "Pet." refers to Petitioners' petition for writ of habeas corpus filed July 27, 2004.

tioners deny that they are enemy combatants or that they have otherwise been "part of or supporting forces hostile to the United States." *Id*. ¶ 15.

On June 28, 2004, the Supreme Court determined that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of [the detainees at Guantánamo Bay] who claim to be wholly innocent of wrongdoing." *Rasul v. Bush*, __ U.S. __, 124 S. Ct. 2686, 2699 (2004). Shortly thereafter, the Department of Defense issued an order creating the Combatant Status Review Tribunal ("CSRT") to evaluate the status of each detainee at Guantánamo. *In re Gunatanamo Detainee Cases*, 355 F. Supp. 2d 443, 450 (D.D.C. 2005), *appeal docketed*, No. 05-8003 (D.C. Cir. Mar. 21, 2005). On July 27, 2004, Petitioners filed a petition for writ of habeas corpus, seeking to obtain "a judicial determination of whether there is a factual basis for Respondent's determination that they are 'enemy combatants,'" Pet. ¶ 14, and asserting that the government has "advanced no justification" for their "arrest, transportation and continued incarceration." *Id*. ¶ 16. Their petition was coordinated with ten other habeas cases filed by other Guantánamo detainees to allow Judge Joyce Hens Green, the designated judge, to resolve common issues of law and fact.

On January 31, 2005, Judge Green issued a memorandum opinion and order granting in part and denying in part Respondents' motion to dismiss, finding that the detainees "have the fundamental right to due process of law under the Fifth Amendment," *In re Gunatanamo Detainee Cases*, 355 F. Supp. 2d at 463, and that the CSRT proceedings failed to protect those due process rights. *Id*. at 468.

Subsequently, Judge Green issued an order certifying her opinion for interlocutory appeal and staying the proceedings in the eleven cases pending resolution of Respondents' appeal. Petitioners now contend that "Respondents have contemplated or are contemplating removal of some or all Petitioners from Guantánamo to foreign territories for torture or indefinite imprisonment without due process of law." Pet'rs' Mot. for Prelim. Inj. ("Pet'rs' Mot.") at 1. Fearing that any such transfer would "also circumvent[] Petitioners' right to adjudicate the legality of their detention," *id*. at 6, Petitioners seek a preliminary injunction requiring Respondents to provide Petitioners' counsel with 30 days' advance notice of "any intended removal of Petitioners from Guantanamo Bay Naval Base," *id*. at 1, to enable counsel to contest the removal if they deem it advisable to do so.

II. ANALYSIS

A. Stay of February 3, 2005

Respondents first argue that the stay order Judge Green issued in the eleven coordinated cases prevents this court from considering the merits of the present motion. This argument is unavailing.

On February 3, 2005, Judge Green issued an order in the eleven habeas cases that "stayed [the cases] for all purposes pending resolution of all appeals in this matter." *In re Guantanamo Detainee Cases*, No. 04-1254 (D.D.C. Feb. 3, 2005) (order). Courts have consistently recognized that a stay may be necessary preserve the status quo among the parties pending appeal. *See, e.g., Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310 (1974); *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 205 (D.C. Cir. 1984); *NLRB v. Sav-on Drugs, Inc*., 704 F.2d 1147,

1149 (9th Cir. 1983); *Metzler v. United States*, 832 F. Supp. 204, 208 (E.D. Mich. 1993). Here, Petitioners are not asking the court to bypass the stay and resume adjudication of their underlying claims. Rather, they seek to prevent Respondents from unilaterally and silently taking actions that may render their claims moot; thus the injunctive relief Petitioners seek would ensure the very same result that the stay itself was entered to secure. *See Dist. 50*, *United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 169 (D.C. Cir. 1969). The stay order simply cannot be construed to prevent emergency relief consistent with maintenance of the status quo. *See Summit Med. Assocs., P.C. v. James*, 998 F. Supp. 1339, 1351 (M.D. Ala. 1998); *Universal Marine Ins., Ltd. v. Beacon Ins. Co.*, 577 F. Supp. 829, 832 (W.D.N.C. 1984). The court therefore proceeds to consider the merits of Petitioners' request.

B. Legal Standard

A preliminary injunction is an "extraordinary remedy" that should only issue "when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). A court considering a preliminary injunction request must examine four factors, namely whether: (1) Petitioners will be "irreparably harmed if an injunction is not granted"; (2) there is a "substantial likelihood" Petitioners will succeed on the merits; (3) an injunction will "substantially injure" Respondents; and (4) the public interest will be furthered by the injunction. *Serono Labs., Inc., v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). These four factors "interrelate on a sliding scale" and must be considered in relation to one

another, for "'if the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'" *Id*. at 1318 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

C. Merits of the Preliminary Injunction Motion

1. Irreparable Injury

The court gives special scrutiny to Petitioners' claims of injury, because "the basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin*., 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain preliminary injunctive relief, Petitioners must show that the injury threatening them is more than "remote and speculative." *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 897 (D.D.C. 1996). Petitioners unquestionably make such a showing.

Petitioners allege two irreparable injuries. With respect to the first, they claim that the Department of Defense is actively planning the transfer of detainees from Guantánamo to countries "for torture or indefinite imprisonment without due process of law," Pet'rs' Mot. at 1, and note that the United States has "repeatedly transferred detainees into the custody of foreign governments that employ inhumane interrogation techniques." *Id*. at 3. Respondents dispute these assertions, dismissing them as "sensationalistic allegations" based upon "hollow speculation" and "largely anonymous sources and innuendo" cited in newspaper and magazine articles, Resp'ts' Opp'n at 19, and statements from a single detainee. Respondents then describe the policy and procedures the United States employs regarding the transfer and repatriation of Guantánamo detainees, including the

transfer of detainees to the control of other governments for investigation and possible prosecution. Respondents state that "a key concern is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations," Resp'ts' Opp'n at 4, and that "it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured." *Id*. Respondents also provide declarations from high-level Department of State and Department of Defense officials outlining the consultations and deliberations the agencies undertake prior to transferring a detainee, and indicating that among 211 detainees the military has transferred out of Guantánamo to date, 65 were provided to foreign governments for ongoing detention. *Id*., Prosper Decl. ¶ 2, Waxman Decl. ¶ 4.

These declarations concerning general policy and practice, however, do not entirely refute Petitioners' claims or render them frivolous. The court has reviewed Petitioners' exhibits, and notes that in addition to citing anonymous sources, the submitted articles quote by name former Guantánamo detainees, former high-level officials from the United Kingdom and Pakistan, and current and former employees of the United States government who were themselves involved in transferring detainees. The court, however, need not determine whether Petitioners' fear of torture constitutes the requisite "irreparable injury" because their second claim of injury clearly satisfies the preliminary injunction standard.

Petitioners contend that if the United States military transfers Petitioners from Guantánamo to overseas custody, it would effectively extinguish

those detainees' habeas claims by fiat. Such transfers would eliminate any opportunity for Petitioners to ever obtain a fair adjudication of their "fundamental right to test the legitimacy of [their] executive detention." *Lee v. Reno*, 15 F. Supp. 2d 26, 32 (D.D.C. 1998). The parties agree that upon transfer, the court will no longer retain jurisdiction to provide any relief Petitioners seek. Hr'g Tr. at 19:7-10; Resp'ts' Opp'n at 6 ("once transferred, a detainee is no longer subject to the control of the United States"), Waxman Decl. ¶ 5. While Respondents contest Judge Green's determination that Petitioners have legally cognizable due process claims properly before the court, pending their appeal they may not act to deprive this court of its jurisdiction over the very "corpus" of this case; indeed, the "federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts for the protection of their rights in those tribunals." *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 54 (D.D.C. 2004) (quoting *Alabama Great S. R. Co. v. Thompson*, 200 U.S. 206, 218 (1906)).

2. Likelihood of Success

Petitioners argue that they have properly invoked this court's jurisdiction and have stated actionable claims under the Due Process Clause of the Fifth Amendment and the Geneva Convention, thereby demonstrating a likelihood of success. Respondents urge instead that Petitioners fail to make the required showing "that they are likely to succeed in establishing a judicially enforceable entitlement to veto the same repatriation that they previously told

the Court Respondents were required to conduct."[3] Resp'ts' Opp'n at 11 (emphasis omitted). Although the court would use somewhat different language to characterize the relevant standard, Respondents are correct that *if* there are no circumstances under which Petitioners could obtain a court order preventing a contemplated transfer, a preliminary injunction should not be granted. Respondents are wrong, however, in arguing that there are in fact no such circumstances present, and that consequently there is no legal basis for judicial involvement in transfer or repatriation decisions regarding Petitioners.

To the contrary, transfer of Petitioners without notice and leave of court is forbidden by FED. R. APP. P. 23(a), which requires that "pending review of a decision in a habeas corpus proceeding[4] commenced before a court . . . the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule." The Rule "was designed to prevent prison officials from impeding a prisoner's attempt to obtain habeas corpus relief by physically removing the prisoner from the territorial jurisdiction of the court in which a habeas petition is pending." *Hammer v. Meachum*,

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[3] This last contention is perplexing, because it seems beyond question that advocating for release into freedom is not equivalent to advocating for transfer from ongoing detention in one locale to ongoing detention in another.

[4] Jurisdiction over a petition for a writ of habeas corpus is determined when the petition is filed. *Barden v. Keohane*, 921 F.2d 476, 477 n.1 (3d Cir. 1990) (citing accordance with *Ross v. Mebane*, 536 F.2d 1199 (7th Cir. 1976) (per curiam); *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970)).

691 F.2d 958, 961 (10th Cir. 1982) (citing *Jago v. United States Dist. Court*, 570 F.2d 618, 626 (6th Cir. 1978), and *Goodman v. Keohane*, 663 F.2d 1044, 1047 (11th Cir. 1981)). Respondents' contention that Rule 23(a) is not typically applied in situations involving the transfer of prisoners to the custody of foreign nations, Resp'ts' Br. in Resp. to Pet'rs' Notice of Supp. Auth. at 3, while correct, is of no moment. Its application here is consistent with both the text of the rule and its underlying purpose. Indeed, Rule 23(a) acquires an even greater importance in the context of Petitioners' case. When a prisoner with a pending habeas action is simply transferred from one state to another in violation of Rule 23(a), the transfer "does not divest [the court of its] jurisdiction over the action." *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 409 (7th Cir. 1985). Here, though, Petitioners' transfer to another nation would assuredly deprive the court of its jurisdiction. Petitioners thus demonstrate that they have a clear likelihood of success in blocking a transfer made absent notice to, and approval from, the court.

Respondents further argue against the application of Rule 23 (a) by referring to a footnote in *Rasul*, which remarked that after the Supreme Court granted certiorari, two petitioners in that case, Shafiq Rasul and Asif Iqbal, were "released from custody." *Rasul*, 124 S. Ct. 2686, 2691 n.1. Respondents argue that this reference demonstrates that the Supreme Court "did not give any hint of perceiving any violation" of the Supreme Court's equivalent to Rule 23(a). Resp'ts' Br. in Resp. to Pet'rs' Notice of Supp. Auth. at 4; *see also* Hr'g Tr. at 7:20-21. The court declines Respondents' invitation to make such an inference, both because there is no indication in *Rasul* whether the two named petitioners were trans-

ferred into foreign custody or released outright, and because neither party presented the issue to the Supreme Court.

3. Harm to Respondents

Respondents assert that granting Petitioners' motion would "illegitimately encroach on the foreign relations and national security prerogatives of the Executive Branch." Resp'ts' Opp'n at 1. They also argue that granting Petitioners' injunction request would harm the government in "myriad" other ways, by "undermining the United States Government's ability to investigative and resolve allegations of mistreatment or torture"; "undermin[ing]the United States' ability to reduce the numbers of individuals under U.S. control"; impairing the United States' coordination with other governments' efforts in the war on terrorism; and "encumber[ing] . . . an already elaborate process leading up to transfers or repatriations." Resp'ts' Opp'n at 22. At the preliminary injunction hearing held on March 22, 2005, Respondents' counsel amplified these contentions, noting that the advance notice requirement would "undermine[] the executive's ability to speak with one voice." Hr'g Tr. at 8:10-11. Beyond these vague premonitions, however, the court does not have any indication that notifying Petitioners' counsel 30 days ahead of planned transfers of their clients will intrude upon executive authority. The preliminary injunction Petitioners seek will not require, or even enable, the court to take the two *specific* actions which Respondents' declarants warn against: forcing State Department officials to "unilaterally . . . disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture con-

cerns," Resp'ts' Opp'n, Prosper Decl. ¶ 10, and publicly disclosing the facts gathered and analyses prepared by various State Department offices, or bringing these findings "to the attention of officials and others in foreign States . . ." *Id.* ¶ 11.

In evaluating the alleged injury Respondents would suffer if the preliminary injunction is granted, the court balances the respective hardships imposed upon the parties. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *George Washington Univ. v. District of Columbia*, 148 F. Supp. 2d 15, 18-19 (D.D.C. 2001). While the injunction Petitioners seek might restrict or delay Respondents with respect to one aspect of managing Petitioners' detention, such a consequence does not outweigh the imminent threat facing Petitioners with respect to the entirety of their claims before the court.[5]

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[5] Respondents' assertion that they are merely "relinquishing" custody of detainees whom the government is simply "no longer interested in detaining," Hr'g Tr. at 9:20-21, is disingenuous. According to Petitioners' allegations, unanswered by the United States, they have been held at Guantánamo for periods of several years, *see*, *e.g.*, Pet'rs' Mot., Exs. K, M, O, S. The government's invocation of sudden exigency requiring their transfer now cannot trump Petitioners' established due process rights to pursue their habeas action in federal court. *See Rasul*, 124 S. Ct. at 2698-99; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464 ("Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected 'enemy combatants' at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test . . . constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies.").

4. Public Interest

Finally, the court looks to whether granting the preliminary injunction request implicates the public interest, and if so, whether it confers benefit or produces harm. Respondents simply conflate the public interest with their own position, noting that "the public interest and harm-to-non-movant factors converge." Resp'ts' Opp'n at 21. It is indisputable that the public interest favors vigorously pursuing terrorists and holding them to account for their actions. It is misleading, however, to frame the relevant interest here as the government's ability "to detain enemy combatants to prevent them from returning to the fight and continuing to wage war against the United States." Resp'ts' Opp'n at 21-22. Petitioners' current designation as enemy combatants is not a foregone conclusion; challenges to the accuracy and legitimacy of the government's determination that Petitioners have engaged in hostilities against the United States, or aided those who have, are the very core of Petitioners' underlying habeas claims. Respondents' assertion to the contrary, that "Petitioners' enemy combatant status was recently confirmed in Combatant Status Review Tribunals," Resp'ts' Opp'n at 2, ignores Judge Green's ruling that the CSRTs as so far implemented are constitutionally deficient. Instead, this factor tilts in Petitioners' favor, because the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process; "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

D. All Writs Act

Petitioners also ask the court to exercise its authority under the All Writs Act, which provides in relevant part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act "empowers a district court to issue injunctions to protect its jurisdiction . . . ," *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996), and a court may grant a writ under the Act whenever it determines such action necessary "to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 273 (1942). Were the court to find adequate "alternative remedies" unavailable, *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999), or "the traditional requirements of an injunction" inapplicable, *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004), it could employ the Act to order the relief Petitioners seek. Because Petitioners have made a clear showing that a preliminary injunction is warranted under the familiar four-part test, though, the court need not take recourse to the All Writs Act.

III. CONCLUSION

For the foregoing reasons, the court finds that Petitioners satisfy the requirements for a preliminary injunction, and therefore grants their present motion. An appropriate order accompanies this memorandum opinion.

Henry H. Kennedy, Jr.
United States District Judge

Dated: March 29, 2005

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed March 29, 2005]

Civil Action 04-1254 (HHK)

MAHMOAD ABDAH, *et al.,*
Petitioners,

v.

GEORGE W. BUSH, *et al*.,
Respondents.

ORDER

For the reasons stated in the court's memorandum docketed this same day, it is this 29th day of March, 2005, hereby

ORDERED, that Petitioners' motion for a preliminary injunction is GRANTED; and it is further

ORDERED, that Respondents shall provide Petitioners' counsel and the court with 30 days' notice prior to transporting or removing any of Petitioners from Guantánamo Bay Naval Base; and it is further

ORDERED, that this order shall remain in effect until the final resolution of Petitioners' habeas claims unless otherwise modified or dissolved.

Henry H. Kennedy, Jr.
United States District Judge