

Belbacha was recalled for a second term of service. The Groupe Islamique Armée (GIA) – then at the height of its violent campaign for an Islamic Algeria – found out about the recall notice.² The GIA threatened to kill Mr. Belbacha if he rejoined the army, and ordered him to quit his job with Sonatrach. The GIA was notorious for killing soldiers and had also murdered a number of Sonatrach employees.³ Mr. Belbacha never reported for his recall, making him a deserter in the eyes of the Algerian government. He tried to hide from the GIA inside Algeria, but the group pursued him, going at least twice to his home and threatening him and his family. Deciding that he had to leave Algeria, Mr. Belbacha obtained a foreign visa and fled.

Mr. Belbacha’s well-founded fear of persecution has only intensified since the U.S. brought him to Guantánamo. In the eyes of extremist groups, Mr. Belbacha is still an ex-soldier and a Sonatrach employee. Should he be rendered to Algeria, the group will likely target him again. At the same time, Mr. Belbacha will also return to Algeria having been branded by the U.S. as an “enemy combatant” with asserted links to Al Qaeda. These assertions are baseless. Nonetheless, the Algerian government has already tried and convicted

² The GIA has carried out attacks in Algeria against civilians and regime officials and employees for years. See “Backgrounder: Armed Islamic Group (Algeria, Islamists),” <http://www.cfr.org/publication/9154/>. The GIA later spawned a splinter group now called “al-Qaeda in the Islamic Maghreb.” See *id.* This group continues to carry out violent attacks in Algeria. See Craig Whitlock, “Al Qaeda Branch Claims Algerian Blasts,” *Wash. Post*, Apr. 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/23/AR2007082301375.html>.

³ See Issue Paper: *Algeria: Political and Human Rights Update, Immigration and Refugee Board of Canada* (detailing threats and attacks against Sonatrach employees beginning in 1996), http://www2.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=115&cid=71.

Mr. Belbacha, *in absentia*, on spurious terrorism-related charges, and sentenced him to 20 years in prison.⁴

Caught between domestic terror groups and a government that has already decreed a harsh sanction for him, Mr. Belbacha cannot safely return to Algeria. His fear is such that he would prefer to endure imprisonment at Guantánamo until an asylum state can be found.

ARGUMENT

Respectfully, reconsideration is warranted because the Court committed “a clear error of law in the first order,” *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003) – particularly with respect to its exercise of jurisdiction over a matter pending on appeal in the D.C. Circuit – and because, in any event, reconsideration may be granted “under the standard, ‘as justice requires.’” *Williams v. Savage*, 569 F. Supp. 2d 99, 108 (D.D.C. 2008). That standard “amounts to determining ‘whether reconsideration is necessary under the relevant circumstances.’” *Id.* at 109. Under the circumstances here, justice requires that reconsideration be granted. As for the stay pending appeal that Mr. Belbacha alternatively seeks, the factors that supported the June 13 Order also support a stay. *See Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Mr. Belbacha’s present likelihood of success cannot be gauged because the legal issue presented here is pending in the Supreme Court in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (“*Kiyemba II*”), *pet. for cert. filed*, Nov. 10, 2009 (No. 09-581). As discussed below, the pendency of that issue in the Supreme Court is reason enough to grant preliminary injunctive relief. *See Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008). In fact, apparently because

⁴ Agence France Press, “Algiers court jails Guantanamo inmate who won't go home,” Nov. 29, 2009, http://www.google.com/hostednews/afp/article/ALeqM5hBRpCfZG_9FsNOKFUjF6-ymIdfXg.

the Supreme Court's disposition of *Kiyemba II* may resolve this case, the D.C. Circuit is holding in abeyance the government's appeal from Judge Collyer's June 13 Order. *See* Order of Oct. 28, 2008, *Belbacha v. Obama*, No. 08-5350 (D.C. Cir.), attached as Exhibit B. This Court should not pre-empt the D.C. Circuit.

In addition, the equities weigh overwhelmingly in Mr. Belbacha's favor. Should the United States repatriate Mr. Belbacha to Algeria, he faces certain persecution, including likely torture, and even death. Mr. Belbacha is filing under seal two of the exhibits he filed in the D.C. Circuit in support of his so-far-successful motion to continue holding the government's appeal in abeyance: (1) as Exhibit C, a declaration Mr. Belbacha dictated to counsel at Guantánamo on August 18, 2009 further supporting his claim that he faces torture if he is transferred to Algeria, and (2) as Exhibit D, a declaration of undersigned counsel David Remes further supporting the relief requested herein. *Cf. Belbacha*, 520 F.3d at 459 ("Here the probability of Belbacha's prevailing on the merits of his habeas petition is far from clear but, in light of the seriousness of the harm he claims to face, namely, torture at the hands of a state and of a terrorist organization, we cannot as the Government urged at oral argument say Belbacha's motion for a preliminary injunction fails as a matter of law").

Mr. Belbacha's fear of repatriation to Algeria is far from fanciful. The United States approved him for transfer over three years ago, and has made efforts to repatriate him to Algeria.⁵ And in a press briefing on December 15, 2009, a senior Obama Administration

⁵ Craig Whitlock, "82 Inmates Cleared but Still Held at Guantanamo," *Wash. Post*, Apr. 29, 2007 (reporting that the Pentagon notified counsel for Mr. Belbacha on Feb. 22, 2007 that he had been approved to leave Guantanamo), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/28/AR2007042801145.html>.

official stressed, “The bottom line is we’re trying to get to zero here on the detainees.”⁶ Mr. Belbacha reasonably fears the worst. *See* Exhibit E (under seal). On the other hand, having held Mr. Belbacha at Guantánamo for over eight years already, the United States cannot fairly claim that it will suffer substantial harm if it must continue to hold him while this case proceeds to the merits.

The June 13 Order was the second preliminary injunction Judge Collyer entered in this case, the successor of a June 10, 2008 order (“June 10 Order”), attached as Exhibit F. In each instance, she acted to preserve the Court’s jurisdiction, pending further adjudication of threshold issues. That is what this Court should have done, rather than dissolve the order.

Judge Collyer grounded her June 10 Order on *Belbacha*. In *Belbacha*, Mr. Belbacha had moved to enjoin the Government from transferring him to Algeria. This Court denied the motion on the ground that, under the D.C. Circuit’s decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), it lacked jurisdiction to enjoin the transfer. On appeal, the D.C. Circuit reversed. It held that, though its *Boumediene* decision was the law of the circuit,

when the Supreme Court grants certiorari to review this court’s determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act, 28 U.S.C. § 1651, and during the pendency of the Supreme Court’s review, act to preserve the status quo in other cases raising the same jurisdictional issue if a party satisfies the criteria for issuing a preliminary injunction.

Belbacha, 520 F.3d at 457. *See also* *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947); *In re President & Dirs. of Georgetown College, Inc.*, 331 F.2d 1000, 1005 (D.C. Cir. 1964). In such a circumstance, the fact that *Kiyemba II* may be the law of the Circuit does not support dissolving Judge Collyer’s June 13 Order.

⁶ Josh Gerstein, “Obama’s tough Gitmo math: getting 50 to zero,” *Politico*, Jan. 22, 2010, http://www.politico.com/blogs/joshgerstein/0110/Obamas_tough_Gitmo_math_getting_50_to_zero.html.

Applying the teaching of *Belbacha*, Judge Collyer in her June 10 Order entered a preliminary injunction enjoining the government from transferring Mr. Belbacha to Algeria “pending the Supreme Court’s decision in *Boumediene*.” June 10 Order. The day after the Supreme Court issued its historic decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Judge Collyer entered her June 13 Order, enjoining Mr. Belbacha’s transfer to Algeria “pending briefing and resolution of the issues left unresolved in *Boumediene* which the Supreme Court left to be decided by the District Court in the first instance.” Judge Collyer tied her June 13 Order to the briefing and resolution of these *Boumediene* issues – not to the D.C. Circuit’s disposition of *Kiyemba II* or any other case.

Obviously, “the issues presented in the Supreme Court's decision in *Boumediene*” have not been resolved. Moreover, as noted, a petition for certiorari is pending in the Supreme Court to review the D.C. Circuit’s decision in *Kiyemba II*, which presents the legal question raised here. And because the government has appealed Judge Collyer’s June 13 Order, jurisdiction over the Order resides not in this Court, but in the D.C. Circuit. *See United States v. United Mine Workers*, 330 U.S. 258, 291 (1947); *In re President and Dirs. of Georgetown College, Inc.*, 331 F.2d 1000, 1005 (D.C. Cir. 1964). *See also Belbacha*, 520 F.3d at 456 (temporarily enjoining transfer to Algeria in aid of jurisdiction and remanding for preliminary injunction proceedings).⁷ This Court should not usurp the D.C. Circuit’s jurisdiction.

⁷ *Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004), and *System Federation No. 91, Railway Employment. Department., AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961), are inapposite. *Cobell* did not involve dissolution of injunctions, and *System Federation* involved neither dissolution of injunctions nor modification of injunctions on appeal.

As noted, the D.C. Circuit ordered the government's appeal of Judge Collyer's June 13 Order held in abeyance pending its disposition of *Kiyemba II*.⁸ Tellingly, despite having disposed of *Kiyemba II*, the D.C. Circuit has not lifted the abeyance order. Mr. Belbacha had asked the D.C. Circuit to continue to hold the appeal in abeyance pending disposition of a certiorari petition in *Kiyemba II*. Petitioner's Motion To Govern Further Proceedings, *Belbacha v. Obama*, No. 08-5350 (D.C. Cir. filed Sept. 8, 2009), attached as Exhibit G. It appears that the D.C. Circuit is doing exactly that.

If the Supreme Court grants review, the D.C. Circuit is likely to continue to hold the government's appeal in abeyance pending the Supreme Court's disposition of *Kiyemba II*. If review is denied, the D.C. Circuit will take other action, which we cannot anticipate. Either way, dissolving Judge Collyer's June 13 Order is not only beyond this Court's jurisdiction, but is inconsistent with the D.C. Circuit's apparent decision to hold the government's appeal in abeyance pending the Supreme Court's disposition of *Kiyemba II*.

CONCLUSION

The Court should reconsider and vacate its Feb. 4 Order dissolving Judge Collyer's June 13 Order and reinstate that order. Alternatively, the Court should stay its Feb. 4 order pending appeal. The Court should immediately enter an administrative stay of that Order pending a hearing on this Emergency Motion.

⁸ The Court's order, entered October 28, 2008, provided as follows:
ORDERED that the motion be granted and this case be held in abeyance pending further order of the court. The parties are directed to file motions to govern further proceedings within thirty days of this court's disposition of *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir.), argued September 25, 2008.

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Clive A. Stafford Smith
Cori A. Crider
Tara Murray
(all admitted *pro hac vice*)
REPRIEVE
PO Box 52742
London EC4P 4WS
United Kingdom
44 207 353 4640
cori@reprieve.org.uk
PO Box 52742

Respectfully,

/s/

David H. Remes
D.C. Bar. No. 370372
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 662-5212
remesdh@gmail.com

Counsel for Petitioner