IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED BELBACHA (ISN 290),	)	
Petitioner,	)	Misc. No. 08-442 (TFH)
v.	)	Civil Action No. 05-2349 (RMC)
BARACK H. OBAMA, *et al.*,	)	
Respondents.	)	

REPLY TO RESPONDENTS' OPPOSITION TO
EMERGENCY MOTION TO RECONSIDER AND VACATE

On March 22, 2010, the Supreme Court denied certiorari in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"). Accordingly, the pendency of the *Kiyemba II* certiorari petition is no longer a reason to grant Mr. Belbacha's emergency motion. His motion should be granted nevertheless, because the Court lacks jurisdiction to dissolve Judge Collyer's preliminary injunction of June 13, 2010 (Doc. 44) ("June 13 Order"). The Court should also grant his emergency motion in deference to the prerogatives of the D.C. Circuit.[1]

The government's appeal from the June 13 Order divested this Court of jurisdiction to dissolve the injunction. (In deciding Mr. Belbacha's alternative stay request, this Court must consider Mr. Belbacha's likelihood of success on appeal on the jurisdictional issue.) Later in this reply, we will further explain why reliance on *Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C.

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[1] We note that Judge Collyer assigned this case to Judge Hogan only for purposes of "coordination and management, while retaining [the] case for all other purposes." Order, July 7, 2008 (Doc. 45). Mr. Belbacha respectfully submits that this Court, in dissolving Judge Collyer's preliminary injunction, exceeded the terms of the transfer. For that reason alone, this Court should vacate its order of January 4, 2010 ("January 4 Order").

2004), and *System Federation No. 91, Railway Employment Department., AFL-CIO v. Wright*, 364 U.S. 642 (1961), is misplaced.

As the Supreme Court has stated:

> The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). This principle reflects the commonsense view that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Id.*

Federal Rule of Civil Procedure 62(c) allows a district court to "suspend, modify, restore, or grant an injunction" during the pendency of an appeal from the injunction.[2] Rule 62(c), however, does not allow a district court to *dissolve* an injunction. *See Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989) (explaining the text of Rule 62(c), and citing cases from other circuits). This Court in *Cobell v. Norton*, 310 F. Supp. 2d 77, 83 n.10 (D.D.C. 2004), recognized its Rule 62(c) authority to "suspend, modify, restore, or grant an injunction" during the pendency of an appeal. But the Court did not suggest that Rule 62(c), or any other source of authority, allows *dissolution*.[3]

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[2] Rule 62(c) provides:

> **Injunction Pending Appeal**. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[3] *System Federation No. 91, Railway Employment Department, AFL-CIO v. Wright*, 364 U.S. 642 (1961), is even farther afield. The Supreme Court in that case recognized a district court's power to modify a decree in light of changed circumstances. That power is not in dispute here. But the case did not involve any question of the district court's jurisdiction to modify a decree while an appeal from the decree was pending. The case simply has no bearing on that question.

On facts similar to those here, where a party sought dissolution of a preliminary injunction in the district court while its appeal from the injunction was pending, Judge Collyer ruled: "Because Defendants have appealed the preliminary injunction to the Court of Appeals, this Court is divested of jurisdiction to consider in parallel a motion for the same relief." *Decatur Liquors, Inc. v. District of Columbia*, C.A. No. 04-1971(RMC), 2005 WL 607881, *1 (D.D.C. Mar. 16, 2005). Judge Collyer explained: "The reasons for this transfer of jurisdiction are prudential and obvious: divestiture of district court jurisdiction avoids the "'confusion and waste of time that might flow from putting the same issues before two courts at the same time.'" *Id.* at *2 (citing *In the Matter of Thorp*, 655 F.2d 997, 998 (9th Cir.1981) (citation omitted)). Judge Kessler has likewise dismissed for lack of jurisdiction a motion to vacate an injunction pending appeal. *Chamber of Commerce of U.S. v. Reich*, C.A. No. 95-0503 (GK), 1995 WL 611645 (D.D.C. Sept. 18, 1995) (citing *Griggs*, 459 U.S. at 58-59 (1982)).

It makes perfect sense that "the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo and ought not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before [it] on appeal." *Coastal Corp.*, 869 F.2d at 820; *see id.* at 819 (citing cases from other circuits).[4] And

[4] *See also* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 11 Fed. Prac. & Proc. Civ. § 2904 (2d ed.) ("This subdivision of the rule, taken together with Rule 62(g), codifies the inherent power of courts to make whatever order is deemed *necessary to preserve the status quo* and to ensure the effectiveness of the eventual judgment.") (emphasis added). The authors add:

> It is of course generally the rule that when an appeal is perfected the district court loses jurisdiction to take further action in the cause, but subdivision (c) of Rule 62 is an exception to that general rule and a recognition of the long established right of the trial court, after an appeal, to make orders *appropriate to preserve the status quo* while the case is pending in the appellate court.

the status quo is "the status quo of the case as it sat before the court of appeals." *Id.* (quoting *State of New York v. NRC*, 550 F.2d 745, 758 (2nd Cir.1977)). In reversing the status quo between the parties as it had existed since June 13, 2008, this Court exceeded its authority under Rule 62(c) and its jurisdiction.

In *Decatur Liquors*, Judge Collyer allowed that the district court might reconsider and dissolve a preliminary injunction in light of "changed circumstances or a change in the law." 2005 WL 607881, *3. Judge Collyer did not explain what she meant, the case before her did not present the issue, and Rule 62(c) does not allow the district court to divest the D.C. Circuit of jurisdiction by mooting an appeal. Here, in any event, the effect of the relevant "change in the law" – the *Kiyemba II* decision – is the very issue the government has put before the D.C. Circuit in its appeal from Judge Collyer's injunction. Moreover, the D.C. Circuit has been holding the government's appeal in abeyance pending its disposition of *Kiyemba II*. *See* Emergency Motion at 4, 7, and Exhibit B. It is for the D.C. Circuit, not this Court, to decide the effect of *Kiyemba II* on the preliminary injunction. This Court's dissolution of the injunction would be inconsistent with the prerogatives of the D.C. Circuit.[5]

To the extent any factual circumstances have changed, they have changed for the worse. Mr. Belbacha's life is at stake. Torture – or worse – await him if the government returns him to

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Id. (emphasis added) (citing *Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922)). *See* 12 Moore's Federal Practice §§ 62.06[1]-[2] (Matthew Bender 3d ed.); 11 Federal Procedure Lawyers Edition: Enforcement of Judgments § 31:17 (West 2007).

[5] In its Order denying an administrative stay, the Court stated that "it is unclear if the public interest will be served by issuing a stay. For example, staying the Order would not further the public interest if it delayed the closing of the United States Naval Base in Guantanamo Bay, Cuba." Order of March 9, 2010, at 2-3 (Doc. 171). There is no possibility that staying the January 4 Order pending appeal will delay the closing of Guantánamo; if such a remote contingency were to materialize, the government could bring the matter to the attention of the D.C. Circuit. Moreover, this Court may take judicial notice that there is considerable disagreement about whether the public interest would be furthered by closing Guantánamo.

Algeria. At the very least, Mr. Belbacha faces severe persecution, including a 20-year prison sentence imposed by an Algerian court after convicting him *in absentia* on trumped-up terrorism charges. *See* Emergency Motion at 1-3, 4-5, and Exhibits C and D, and E (under seal). Even before Mr. Belbacha's conviction *in absentia*, Judge Collyer found the dangers he faces serious enough to warrant injunctive relief. *See also Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (noting "the seriousness of the harm he claims to face, namely, torture at the hands of a state and of a terrorist organization").

These dangers have not abated. If anything, they have already begun to materialize. Counsel will leave no stone unturned to protect Mr. Belbacha from such a fate.

CONCLUSION

The motion should be granted.

Dated: March 24, 2010

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

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

Counsel for Petitioner