

No. 12-5410

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

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HAMIDULLAH, Detainee; WAKEEL KHAN, as Next Friend to Hamidullah,

Petitioners -Appellants,

v.

BARACK HUSSEIN OBAMA, President of the United States; CHUCK HAGEL,  
Secretary of Defense; JACK L. BRIGGS II, Col., Commander;  
JOHN AND/OR JANE DOES 1-5, Custodians,

Respondents-Appellees.

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

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**SUPPLEMENTAL BRIEF FOR RESPONDENTS-APPELLEES**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and his next-friend invoked the habeas corpus jurisdiction of the district court to review the lawfulness of petitioner's detention by the U.S. military at the Bagram Airfield Military Base, Afghanistan. On November 16, 2013, the United States transferred Hamidullah to the custody of the government of Pakistan, relinquishing all legal and physical custody and control over him. In light of that transfer, Hamidullah's claim for habeas corpus relief is now moot. The United States does not impose any continuing burdens on petitioner that could satisfy the injury component of Article III's case-and-controversy requirement, nor are any injuries that petitioner might identify susceptible to redress by a U.S. court. Hamidullah's appeal should be dismissed.

## STATEMENT

Hamidullah is a citizen of Pakistan who alleges that he has been detained by the U.S. military at Bagram since 2008. *See* Joint Appendix (JA) 1286-1287, 1292. He seeks habeas corpus review of the lawfulness of his detention. The district court denied Hamidullah's petition for a writ of habeas corpus, and Hamidullah appealed. This Court heard oral argument on September 17, 2013.

On November 16, 2013, the United States transferred Hamidullah to the custody of the government of Pakistan. The transfer is described in greater detail

in the affidavit from Paul Lewis, Special Envoy for Detainee Transfers for the Department of Defense, which is attached as Exhibit 1. Mr. Lewis engages in diplomatic dialogue with foreign governments concerning the repatriation or resettlement of individuals who are detained at, *inter alia*, the detention facility at Parwan, Afghanistan.

As Mr. Lewis explains, the United States and Pakistan have agreed to transfer, in appropriate circumstances, Pakistan nationals detained by the United States to the exclusive custody and control of Pakistan. Exh. 1, at 1. The government of Pakistan has provided assurances that it would treat individuals transferred to its custody humanely and in accordance with its laws and international obligations. *Id.* at 1-2. The government of Pakistan has also agreed to take responsibility for ensuring, consistent with Pakistan law, that the transferred detainees will not pose a continuing threat to the United States and its allies. *Id.* at 2. The implementation and enforcement of any security measures, however, are within the sole discretion and control of the government of Pakistan, and are not the result of any specific terms or conditions required by the United States. *Id.* In other words, within the government of Pakistan's sole discretion, a transferred detainee may be released or subject to continued detention, investigation, and/or prosecution by Pakistan under its laws. *Id.*

On November 16, 2013, the United States transferred Hamidullah, who was a detainee at the detention facility in Parwan, to the government of Pakistan. Exh. 1, at 2. An additional five Pakistani national detainees were also transferred. *Id.* The United States relinquished all legal and physical custody and control over Hamidullah and the other transferred detainees. *Id.*

### ARGUMENT

The United States' transfer of Hamidullah to the government of Pakistan, and its relinquishment of all legal and physical custody and control over him, renders this case moot.

In *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), this Court held that habeas corpus petitions of individuals detained at the Guantanamo Bay Naval Base were moot following the transfer of those individuals to the custody of foreign sovereigns. *Id.* at 14. As is the case here, those individuals were transferred following diplomatic discussions between the United States and the foreign government to ascertain what measures the foreign government would take to ensure that the detainee would not pose a continuing threat to the United States or its allies. *See Gul v. Obama*, Nos. 10-5117, 10-5118 (consolidated), Brief for Respondents-Appellees \*4-\*5 (D.C. Cir. filed Dec. 22, 2010). Also as is the case here, once the individual was transferred, whatever security restrictions the receiving country might apply were at the discretion of the receiving country. *See*

*id.* In transferring a detainee from Guantanamo, the United States relinquished all legal custody and control of the detainee. *See id.*

This Court concluded that the habeas petitions of the detainees were mooted by their transfer by the United States to the custody of foreign governments. The Court held that it was the petitioners' burden to show that their petitions continued to present a live controversy. 652 F.3d at 21. The Court refused to presume that the petitioners suffered collateral consequences as a result of their prior detention. *Id.* at 16-17. The Court found it unnecessary to decide whether the doctrine of collateral consequences could even apply in this context to prevent a claim from becoming moot, because it held that petitioners had not made an actual showing that their prior detention burdened them with concrete injuries. *Id.* at 17. The Court held that petitioners did not establish a concrete injury in fact through allegations that their home governments had imposed travel restrictions on them; that they are prohibited from entering the United States; that they were stigmatized by being designated as enemy combatants; and that they could again be targeted in the future under the laws of war. *Id.* at 18-21.

Notably, the Court accepted the truth of petitioners' claims that they were subject to restrictions imposed by the governments of the foreign countries to which petitioners had been transferred. *Id.* at 18. The Court reasoned, however, that this asserted harm did not meet the case-or-controversy requirement "because

it is caused not by a party before the court but by a stranger to the case,” which is “beyond the power of the court to redress.” *Id.* Crediting the declarations of the United States that the detainees had been “transferred entirely to the custody and control of the [receiving] government,” the Court concluded that it lacked jurisdiction. *Id.*

Here, too, the United States has relinquished all legal and physical custody and control over Hamidullah and the other transferred detainees. Any restrictions that might be imposed are within the sole control of the government of Pakistan, which is not a party to this case and beyond the power of the Court to control. As in *Gul*, the habeas petition is therefore moot.

Furthermore, even if there were constitutional and statutory habeas jurisdiction over petitioner, principles of comity would weigh conclusively against the exercise of that jurisdiction. *See Munaf v. Geren*, 128 S. Ct. 2207, 2224 (2008); *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009). Once a detainee is released from the custody of the United States, any subsequent detention or criminal prosecution by the recipient government occurs at the sole discretion and under the laws of that foreign government. As this Court recognized in *Kiyemba*, the Supreme Court’s ruling in *Munaf* “bars a court from issuing a writ of habeas corpus to shield a detainee from prosecution and detention by another sovereign according to its laws.” 561 F.3d at 515.

## CONCLUSION

For the reasons set out in the foregoing supplemental brief, the petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

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NOVEMBER 2013

**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this supplemental brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

/s/ Sharon Swingle  
SHARON SWINGLE

**CERTIFICATE OF SERVICE**

I hereby certify that on November 27, 2013, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I served the following counsel, who are registered CM/ECF users, through the appellate CM/ECF system:

John Connolly  
*Counsel for petitioner in No. 12-5410*

The following counsel, who are not registered CM/ECF users, are being served by first-class mail, postage prepaid, on November 27, 2013:

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# EXHIBIT 1

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

**HAMIDULLAH, Detainee, et al.,**

**Appellants,**

**v.**

**BARACK H. OBAMA, et al.,**

**Appellees.**

**Civil Action No. 12-5410**

**DECLARATION OF PAUL LEWIS**

I, Paul M. Lewis, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Special Envoy for Detainee Transfers for the Department of Defense. I began my duties on November 4, 2013. In my capacity as Special Envoy, I will engage in diplomatic dialogue with foreign governments concerning the repatriation or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba and at the detention facility in Parwan, Afghanistan. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13492, which was signed by President Obama on January 22, 2009, and those third-country-nationals held by U.S. Forces in Afghanistan. Prior to accepting this appointment, I was the Minority General Counsel of the House Armed Services Committee. This declaration is based upon my personal knowledge and upon information made available to me in the performance of my official duties.

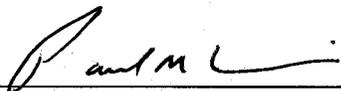
2. The United States and Pakistan have agreed to transfer, in appropriate circumstances, Pakistan nationals detained by the United States to the exclusive custody and control of Pakistan. The government of Pakistan has provided assurances that it would treat individuals transferred to

its custody humanely and in accordance with its laws and international obligations, and has also agreed to take responsibility for ensuring, consistent with Pakistan law, that the transferred detainees will not pose a continuing threat to the United States and its allies. The implementation and enforcement of any security measures, however, are within the sole discretion and control of the government of Pakistan and are not the result of any specific terms or conditions required by the United States. In other words, within the government of Pakistan's sole discretion, a transferred detainee may be released or subject to continued detention, investigation, and/or prosecution by Pakistan under its laws.

3. On November 16, 2013, pursuant to the agreement described in paragraph 2, the United States transferred Hamidullah, who was a detainee at the detention facility in Parwan and an appellant in the above-referenced case, to the Government of Pakistan along with five other Pakistani national detainees, relinquishing all legal and physical custody and control over Hamidullah and the other transferred detainees.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: November 26, 2013

  
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PAUL M. LEWIS