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

JAMAL KIYEMBA, *et al.,* Petitioners-Appellees,	)	
v.	)	Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429
BARACK H. OBAMA, *et al.,* Respondents-Appellants.	)	

RESPONDENTS' REPLY IN SUPPORT OF CROSS-MOTION FOR REINSTATEMENT OF JUDGMENT

Respondents Barack H. Obama *et al.* respectfully submit this reply in further support of their cross-motion for reinstatement of the Court's judgment. As the government explained in its prior brief, this Court previously correctly determined that petitioners have no right to be brought into the United States and released here, and developments since that time have only underscored the correctness of the Court's original conclusion. This Court should amend its prior decision to address those developments and then reinstate its prior judgment.

Petitioners make essentially two arguments against reinstatement of the judgment. First, they suggest that a remand to the district court is necessary for factual findings about petitioners' resettlement options. But that is wrong, because the only facts that are legally relevant to petitioners' claim are undisputed. Petitioners' claim throughout this litigation has been that they are entitled to release

into the United States because they have nowhere else to go. But the factual premise of that claim has been fatally undermined, because all of the Uighur detainees either have been transferred or have been offered transfer to at least two countries. Petitioners do not dispute that they have been offered resettlement. For that reason, their claim cannot succeed. Petitioners contend that remand is warranted for consideration of other facts, but they do not explain how any of those facts has legal relevance to the claim they have raised.

Second, petitioners raise a broad new legal argument for why the judgment should not be reinstated, going well beyond their prior claim that they were entitled to release in the U.S. because no other nation would accept them. Petitioners now contend that any prevailing habeas petitioner has a right to be brought to court in the United States and released. That claim does not depend on the availability of other resettlement options, and it therefore confirms that no remand to the district court is necessary. And petitioners' broad claim is one that can be readily rejected by this Court. As this Court has already recognized, an alien housed outside the United States pending resettlement elsewhere has no right of entry into the United States. Because petitioners attempt to reassert a claim that this Court already has rejected — and a claim that does not depend on facts about the availability of resettlement — the proper course is for this Court to reinstate its judgment.

1. There is no need for further factual development in this case. Petitioners' claim for release into the United States has been fatally undermined by the fact that other nations have offered them resettlement. Petitioners' claim throughout this litigation has been that they are entitled to habeas corpus release in the United States because no other nation is willing to accept them. See C.A. App. 1123-1124. Indeed, the question on which they sought Supreme Court review was whether the habeas corpus court may order release into the United States when it "is the only possible effective remedy." Pet. i, *Kiyemba* v. *Obama*, No. 08-1234. But as the government has explained (US Br. 8-10, 23-24), it is no longer the case that petitioners have no way to leave Guantanamo Bay.

Petitioners have been offered resettlement in Palau and previously in another country. Moreover, as the government explained (US Br. 23-24), if petitioners expressed interest at this time in resettlement in Palau, the United States would again immediately engage in diplomatic negotiations with the Government of Palau, which has publicly expressed its willingness to take them. And there is reason to believe those efforts would be successful. The government has resettled all of the successful habeas petitioners except the Uighur detainees, and it has resettled all but five of the 22 Uighurs at Guantanamo Bay — the five who did not accept prior resettlement offers. US Br. 10-11. Indeed, during the course of this briefing, the government has resettled two of the Uighurs in Switzerland — the two men whose resettlement has

proven the most challenging. *See* Letter from S. Swingle to M. Langer, *Kiyemba v. Obama*, Nos. 08-5424 *et al.* (D.C. Cir. filed Mar. 24, 2010). Petitioners themselves describe (Pet. Reply 10) the government's diplomatic efforts at locating additional countries to offer them resettlement as "strenuous" and carried out in "good faith."

Petitioners do not dispute that they have been offered resettlement elsewhere. As the Supreme Court recognized in its order, see 130 S. Ct. at 1235, that is the only fact that is relevant to the legal claim they have presented throughout this case, which is that they have a right to release into the United States because no other nation is willing to accept them. Moreover, although petitioners suggest that some facts about resettlement (such as the identity of the second country) are unknown, Pet. Reply 3, that is not true: the government has worked closely with petitioners' counsel and apprised them of all relevant facts, even when for diplomatic reasons it could not make those facts publicly known. Resp. Br. 23-24. Petitioners do not dispute this.

Petitioners suggest (Pet. Reply 3) that further factual development is necessary regarding "the nature of the discussions" between the United States and the other country to have offered resettlement and "the risk of refoulement to China" from countries that have offered resettlement. But petitioners do not explain how such factfinding can be squared with this Court's decision in *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009), *cert. denied,* 2010 WL 1005960 (Mar. 22, 2010), which held that a habeas corpus court may not require 30 days' notice prior to the

resettlement of a Guantanamo Bay detainee in order to scrutinize the Executive's transfer negotiations or to review the Executive's determination that a detainee is not likely to be tortured in the proposed transfer country. *See also Munaf v. Geren*, 128 S. Ct. 2207, 2225-2226 (2008). And in any event, there is no basis for believing that petitioners face harm in any proposed country of resettlement. The United States has long committed not to return them to China or to any country that would return them to China, and it has undertaken significant and successful diplomatic efforts to secure offers of resettlement for them in safe third countries. Because petitioners have not shown how their proposed factfinding could have legal significance in light of the claim they have raised, no remand is necessary.[1]

2. Petitioners now raise a much broader argument than the one they presented to the Supreme Court, contending that a successful habeas petitioner has an unqualified right to be released immediately in the United States, in contravention

[1] Petitioners also suggest (Pet. Reply 14) that, even if the Executive has the power to remove them involuntarily to another country as an alternative to release in the United States, they are entitled to release in the United States if resettlement elsewhere is conditioned on their consent. This is not a claim that petitioners have preserved in this litigation, and thus it should not be considered. Moreover, this is not a claim that would require any further factual development through a remand. Finally, petitioners are mistaken: the constitutional right of habeas corpus is an equitable remedy, and it does not entitle petitioners to decline release in countries where they face no risk of mistreatment and, through their refusal, to compel the government to release them in the United States.

of the judgment of the political Branches and without regard to whether they could be successfully resettled elsewhere. Pet. Reply 4-5, 12-14.

Significantly, that new and sweeping claim does not depend on any of the facts about resettlement options that petitioners say should be developed. In petitioners' view (Pet. Reply 13), *any* successful habeas petitioner is entitled to "release from the court house." Petitioners' resort to this claim therefore underscores that no remand is necessary here.

Moreover, this Court already has rejected petitioners' broad argument that they are entitled to release in the United Sates simply because they prevailed in habeas (irrespective of the presence of alternative resettlement options). As the Court explained, while the traditional habeas remedy has been "to order the prisoner's release if he was being held unlawfully," "petitioners are not seeking 'simple release'" but "a court order compelling the Executive to release them into the United States outside the framework of the immigration laws." 555 F.3d at 1028. The Court correctly held that the habeas corpus court cannot issue such an order, because the authority to exclude aliens rests exclusively in the political Branches, and it "is not within the province of any court, unless expressly authorized by law, to review [that] determination." *Id.* at 1025-1028 (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950)).

As the government has explained, and this Court has recognized, petitioners' position that the right to habeas corpus review necessarily includes a right of immediate release in the jurisdiction of the habeas court is inconsistent with *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008), where the Supreme Court recognized that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted," and with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), where the Supreme Court held that an alien held indefinitely at the borders of the United States, pending identification of another country willing to accept him, had no constitutional right to be released in this country in contravention of the law and judgment of the political Branches.

Petitioners rely on early habeas cases in English and U.S. courts directing the jailer to produce a habeas petitioner before the court and, if his petition was granted, to discharge the prisoner. Pet. Reply 10-13. These decisions fail to support petitioners' claim of absolute entitlement to be brought into the United States for release. At the time of the early U.S. cases, there were no relevant statutory restrictions on entry, *see Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972), and thus the question of a habeas court's authority to override the decisions of the political branches simply was not posed. The English cases, similarly, must be read against the backdrop of common law recognizing the sovereign's absolute right to remove an alien from the territory at any time. *See, e.g.*, William Blackstone, 1

Commentaries *259. In any event, the Supreme Court has made clear since that time that a successful habeas petitioner is not necessarily entitled to immediate and outright release from government custody. See, *e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (when habeas petitioner successfully challenges a state criminal conviction, the federal habeas court "may delay [his] release * * * in order to provide the State an opportunity to correct the constitutional violation"); *Coleman v. Tennessee*, 97 U.S. 509, 518-520 (1878) (successful habeas petitioner in state custody who is also subject to imprisonment on a federal conviction may be transferred to federal custody rather than released outright). And petitioners are wrong to claim that a habeas petitioner has an absolute right to be produced before the court adjudicating his petition. The traditional practice of ordering the jailer to produce the body, which serves the purpose of allowing the court to obtain the prisoner's testimony, is not required where no questions of fact are presented, *see* 28 U.S.C. §§ 2243, 2255(c), and when the petitioner's testimony is required, technological advances allow it to be provided while still respecting the Executive's sovereign prerogatives.

Petitioners are wrong to suggest that the habeas remedy is ineffective. The government has transferred all finally successful petitioners who were willing to return to their home countries and whose home countries were willing to accept them. For detainees who cannot return to their home countries, the Executive has engaged and will continue to engage in extensive diplomatic efforts to locate countries in

which detainees can be resettled, in compliance with court orders appropriately directing the Executive to "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release." The Executive's many successes in resettling Guantanamo Bay detainees — including the Uighurs — demonstrate that the writ of habeas corpus is effective at Guantanamo Bay. See US Br. 10-11.

Petitioners contend (Pet. Reply 15-17) that the statutory restrictions on their transfer to and release in the United States pose constitutional concerns. But even before Congress enacted these statutes, petitioners had no right to be brought to the United States and released. The new legislation simply confirms that it is the judgment of the political Branches that petitioners not be brought here. In any event, petitioners are wrong to claim that the statutory restrictions are an unconstitutional suspension of the writ, because as we have explained — and this Court has already correctly held — the constitutional right to habeas corpus does not encompass the very different right to be brought into the United States for release in this country. And petitioners are mistaken in claiming that the new legislation violates the Article III principle in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), because that principle "does not take hold when Congress 'amend[s] applicable law.'" *Miller v. French*, 530 U.S. 327, 349 (2000). Nor is the legislation an unlawful bill of attainder. The statutory restrictions on release are not limited to petitioners, but apply to all Guantanamo detainees. *Cf. Bellsouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir.

1998) (requiring that law must apply with specificity before Court will find an unconstitutional bill of attainder). The restrictions are not a legislative punishment; they serve the nonpunitive and legitimate purpose of barring the release of Guantanamo detainees in the United States in furtherance of national security and in accordance with Congress' control over the borders. *See, e.g., Nixon v. Administrator of General Servs.*, 433 U.S. 425, 473-484 (1977). And because petitioners previously had no right to be released in the United States, Congress' codification of that bar could not constitute an unlawful bill of attainder. *See id.* at 474-475.

In sum, petitioners have not identified any reason why this case should be remanded to the district court, nor any factual dispute that is relevant to the legal issues presented. Factual and legal developments since this Court's prior decision simply underscore the correctness of the Court's judgment reversing the district court.

CONCLUSION

For the foregoing reasons and the reasons set out in Respondents' Opposition to Petitioners' Motion to Govern and for Remand and Cross-Motion for Reinstatement of Judgment, the government respectfully requests that the Court reinstate its judgment reversing the district court's release order.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2010, I filed and served the foregoing Respondents' Reply In Support Of Cross-Motion for Reinstatement of Judgment by electronic service through the CM/ECF system to the following counsel, who are registered CM/ECF users,

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