[ORAL ARGUMENT ON REMAND HELD APRIL 22, 2010]

Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

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

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JAMAL KIYEMBA, Next Friend, *et al.,*
Petitioners-Appellees,
v.
GEORGE W. BUSH, President of the United States, *et al.,*
Respondents-Appellants.

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

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APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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The petition for rehearing en banc is predicated on the sweeping assertion that successful habeas petitioners have an absolute right under the Suspension Clause to be brought into the United States for release, without regard to whether they can be repatriated or resettled in an appropriate third country; and that a federal court must order such relief over the wishes of the political branches and in contravention of federal legislation. The panel properly rejected these extreme and unprecedented arguments, and held that the five Uighur detainees who remain at Guantanamo — each of whom has been offered resettlement in other appropriate countries but has declined to accept — are not entitled to an order of release in the United States. That ruling is correct, and does not merit review by the full Court.

Petitioners claim that this case merits en banc review because, unless a habeas court has the power to order that a Guantanamo detainee be brought into the United States for release, the writ of habeas corpus will be ineffective. The assertion is demonstrably incorrect. As Judge Rogers noted in her concurring opinion, the petitioners in this case, who are the only Guantanamo detainees with final orders granting habeas relief who still remain in U.S. custody, "hold the keys to their release." Concurring op., at 4. The writ of habeas corpus is effective at Guantanamo, and the question posed by the petition for rehearing en banc — whether a federal court could ever order release of a detainee in the United States— simply is not presented at this stage of proceedings.

Furthermore, the panel correctly ruled that the right to habeas corpus review of the lawfulness of confinement does not confer on Guantanamo detainees a right to be brought to the United States and released. The panel previously recognized the political branches' exclusive authority to control entry into the United States. In addition, and as the panel recognized in its ruling on remand, Congress has now enacted legislation restricting the use of federal funds to bring Guantanamo detainees into the United States for release. Ordering petitioners released into ths country would conflict with the judgment of the political branches, and would be particularly inappropriate where the detainees have offers of resettlement in other countries.

Petitioners argue that further factfinding is necessary, but they do not dispute that they were offered resettlement in a country that the United States Government determined to be appropriate consistent with the government's policy not to transfer an alien to a country where he is more likely than not to be tortured. Petitioners may not, through declining resettlement elsewhere, force a federal court to order their release in the United States.

This Court has twice rejected petitioners' requests for en banc review in this case — first from the order granting a stay pending appeal, and again when petitioners sought initial hearing en banc. *See Kiyemba v. Bush*, No. 08-5424, Order (D.C. Cir. Oct. 24, 2008); *Kiyemba v. Bush*, No. 08-5424, Order (D.C. Cir. Nov. 14, 2008). Petitioners are now back for a third time, but they identify no reason why en

banc review at this stage of proceedings is any more warranted now than it was previously. The panel's decision was correct, and does not conflict with any decision of this Court or of the Supreme Court. The government respectfully requests that the Court deny the petition for rehearing en banc.

STATEMENT

1. Petitioners are the last five members of a group of 17 Uighurs who were held at Guantanamo as of September 2008, when the district court granted them habeas corpus relief. Since that time, the government has not sought to detain the men as enemy combatants. The government has actively pursued their resettlement and has agreed not to return them to their home country, China, consistent with its longstanding policy not to return an alien to a country where he is more likely than not to be tortured.

The district court ordered the Executive Branch to bring the petitioners into the United States and release them here, reasoning that, because the men could not go to China and no other country for resettlement had yet been identified, release in this country was the only means of effectuating their release from custody. 581 F. Supp. 2d 33 (D.D.C. 2008).

2. This Court reversed. 555 F.3d 1022 (D.C. Cir. 2009) (*Kiyemba I*). The Court recognized petitioners' right to habeas corpus review, including a judicial order

of release from unlawful detention. But the Court distinguished "simple release" from an order compelling the government to bring detainees into this country for release, "outside the framework of the immigration laws." *Id.* at 1028. The Court held that the authority to exclude aliens rests exclusively with the political branches, and it "is not within the province of any court, unless expressly authorized by law, to review [that] determination." *Id.* at 1026 (quotation marks and citation omitted).[1]

3. The United States has engaged in extensive efforts to resettle the Uighurs detained at Guantanamo, which have only intensified since the President issued Executive Order No. 13,492, directing "a prompt and thorough review" of each detainee at Guantanamo and instructing the State Department to negotiate with foreign governments over repatriation or resettlement of detainees cleared for transfer. 74 Fed. Reg. 4897 (2009). Diplomatic negotiations, led by the State Department, have led to the transfer of 64 individuals from Guantanamo since January 2009, including 12 of the 17 Uighur detainees held as of September 2008. The United States transferred four Uighurs to Bermuda in June 2009, and six to Palau in October 2009. Two Uighurs accepted resettlement in Switzerland in February

[1] Judge Rogers concurred. 555 F.3d at 1032-1039. Judge Rogers believed that the district court would have power to order petitioners' release into the United States if detention were no longer justified, but should not have done so without first determining whether petitioners were excludable and could be detained under the immigration laws. *See id.* at 1036-1039.

2010, and were transferred there in March 2010. The five Uighurs who remain at Guantanamo have been offered resettlement both in Palau, which they rejected, and also in another country deemed appropriate for resettlement, which withdrew the offer after several months when it was not accepted.[2] The United States continues its efforts to identify an appropriate country for their resettlement, and is prepared to pursue the matter further with Palau should the men indicate a willingness to resettle there.

Resettlement efforts on behalf of other Guantanamo detainees have also been highly successful. Of the 36 detainees other than the Uighurs with habeas petitions that have been adjudicated since *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), 12 have obtained an order granting habeas that is final and not subject to appeal. In each case, the district court ordered essentially the same remedy, *i.e.*, that the Executive Branch "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release." All 12 petitioners have been released from Guantanamo.

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[2] In addition, in December 2008, another country offered resettlement to all of the Uighurs then held at Guantanamo. As the government informed the Court at that time, the government viewed that particular country as an appropriate destination for resettlement only if the detainees wished to go there. No Uighur detainee accepted that offer. As to the other two countries, the United States deemed them appropriate countries for resettlement without regard to petitioners' consent. Palau, and one other country at issue, however, conditioned their offers of resettlement on the detainees' consent. Thus, their consent was still necessary to effect the transfer.

4. The Supreme Court granted certiorari in this case in October 2009 to review "[w]hether a federal court exercising its habeas jurisdiction, as confirmed by *Boumediene* v. *Bush*, has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy." Pet. i, *Kiyemba* v. *Obama*, No. 08-1234 (citation omitted). Prior to argument, however, the government notified the Court that all of the Uighurs remaining at Guantanamo Bay had received offers of resettlement, which eliminated the factual premise of the question on which the Court granted review. After supplemental briefing, the Court vacated the judgment of the court of appeals and remanded the case. *See Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010).

5. After additional briefing and oral argument on remand, this Court reinstated its prior judgment and opinion "as modified here to take account of new developments." *Kiyemba v. Obama*, No. 08-5424, Slip op., at 2 (D.C. Cir. May 28, 2010).

The panel majority explained that the "posture of the case now is not materially different" than when the case was previously before the Court, noting that the Court had been "confident" at that time "that the government was 'continuing diplomatic attempts to find an appropriate country willing to admit petitioners.'" Slip op., at 2-3 (quoting *Kiyemba*, 555 F.3d at 1029).

The panel majority also noted that there are no legally relevant facts in dispute that would require remand to the district court. Slip op., at 3. Although petitioners sought an evidentiary hearing about the specific terms of the resettlement offers, the panel held that "even if petitioners had good reason to reject the offers they would have no right to be released into the United States." Slip op., at 3. And the Court noted that its decision in *Kiyemba v. Obama*, 561 F.3d 509, 514-516 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) (*Kiyemba II*), "precludes the sort of judicial inquiry petitioners seek," *i.e.*, district court litigation over the correctness of the Executive Branch's determination that Palau and the second country that offered resettlement in 2009 were appropriate locations for petitioners' resettlement. Slip op., at 3-4.

Finally, the panel majority noted that, since its prior ruling that the political branches have exclusive authority over the exclusion of aliens, Congress has enacted legislation restricting the use of federal funds to bring Guantanamo detainees to the United States. Slip op., at 4.

Judge Rogers concurred, reasoning that petitioners have no constitutional or other right to be released in the United States in preference to other safe locations for petitioners' resettlement that, for reasons of "cultural affinity" or similar factors, they consider less desirable. Concurring op., at 2-7 & n.3. Noting that petitioners "hold the keys to their release from Guantanamo," Judge Rogers deemed it unnecessary to

decide whether a habeas court could ever order release of a Guantanamo detainee in the United States. *Id.* at 7-8.

ARGUMENT

A. Petitioners' principal argument is that, unless this Court grants en banc review and holds that a habeas court is empowered to order the government to bring a Guantanamo detainee into the United States and release him, the habeas remedy recognized in *Boumediene* will be eviscerated. Both the factual and legal premises of that argument are erroneous.

As a factual matter, it is simply not true that successful habeas petitioners at Guantanamo have been denied meaningful relief. Aside from the petitioners in this case, every Guantanamo detainee with a final, non-appealable order granting a habeas petition has been released from U.S. custody. In addition, the five remaining petitioners have each been offered resettlement to two appropriate countries, but have declined to accept. Petitioners are wrong to claim that meaningful habeas relief is not available absent this Court's en banc review. And at this stage of proceedings, where petitioners have received offers of resettlement and diplomatic efforts are ongoing, it is simply not necessary for this Court to reach the question of whether a district court could order an alien released in the United States in contravention of federal legislation. *See also* slip op., at 3 (noting that, in issuing prior decision, panel was

"confident" given the earlier resettlement offer that the government was continuing diplomatic efforts).

Furthermore, the panel was correct in holding that petitioners have no legal right to court-ordered release into the United States as a remedy in habeas. Appropriate deference to the political branches bars the extraordinary relief that petitioners seek, particularly in light of the government's success in obtaining offers for petitioners to resettle in other countries and the recently enacted statutory restrictions on their transfer to the United States for release.

Boumediene entitles Guantanamo detainees to habeas corpus review of the lawfulness of their detention and, where appropriate, a judicial "order directing the prisoner's release." 128 S. Ct. at 2266-2271. Petitioners have obtained this habeas review, and the government no longer seeks to detain them. But petitioners cannot be returned to China consistent with the government's policy on post-transfer treatment. As a result of the government's extensive diplomatic efforts, all of the other Uighur detainees have been released and each of the remaining five petitioners likewise has been offered release in countries deemed appropriate for resettlement by the Executive.

Far from supporting petitioners' claimed right of release in the United States, *Boumediene* recognizes that common law habeas corpus was "an adaptable remedy," and that even a simple order of release "need not be the exclusive remedy and is not

the appropriate one in every case in which the writ is granted." 128 S. Ct. at 2266-2267. Furthermore, *Munaf v. Geren*, 128 S. Ct. 2207 (2008), confirms that legal and prudential concerns shape the available habeas corpus remedy. The panel correctly held that those concerns foreclose an unprecedented judicial order requiring the government to bring these petitioners to the United States.

The Supreme Court's holdings in *Boumediene* and *Munaf* also foreclose petitioners' broader argument that every successful habeas petitioner has a right to be brought before the court adjudicating his petition and released there, regardless of the availability of other resettlement options and any limitations imposed by Congress. *See, e.g.,* Pet. 6 ("In *habeas,* release is from the courthouse as a matter of law."). Petitioners rely on early habeas cases in English and U.S. courts, but there were no relevant statutory restrictions on entry at the time of the early U.S. cases, *see Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972), and the English cases must similarly be read in light of common law recognizing the sovereign's then-absolute right to remove an alien from the territory. *See* William Blackstone, 1 *Commentaries* *259. Subsequent decisions make clear that a successful habeas petitioner is not necessarily entitled to immediate and outright release from custody, *see Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); *Coleman v. Tennessee*, 97 U.S. 509, 518-520 (1878), and a habeas petitioner has no absolute right under modern practice to be physically produced before the court. *See* 28 U.S.C. §§ 2243, 2255(c).

Petitioners also assert (Pet. 4-5) that the constitutional separation of powers requires that a habeas court must be able to order a Guantanamo detainee brought into the United States for release, but it is petitioners' theory that fails to adhere to our tripartite structure. As the panel recognized in its prior decision, it is an "ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission." *Kiyemba I*, 555 F.3d at 1025. In drafting our Constitution, the Framers vested the power to admit or exclude aliens in the political Branches, *see Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Kleindienst*, 408 U.S. at 765-766 & n.6, and Congress has exercised its plenary authority by enacting detailed restrictions on the entry of aliens into the United States, under which petitioners have no right to be admitted into and released in the United States.

Accepting petitioners' argument would undermine fundamental interests served by the political branches' exclusive control over the national borders. In regulating the entry of aliens, Congress makes judgments regarding what restrictions are appropriate to ensure public safety, national security, and other national interests — judgments entitled to deference by this Court. In addition, a holding that habeas courts can order Guantanamo detainees brought into the United States and released here would interfere with our government's efforts to persuade other nations

to resettle detainees, and could lessen detainees' incentives to cooperate in resettlement efforts.

Furthermore, and as the panel noted in its decision on remand, Congress has now enacted legislation restricting the expenditure of any federal funds to bring a Guantanamo detainee to the United States. *See* Slip op., at 4 (collecting citations). Even when an alien was held indefinitely at the borders of the United States, pending identification of another country willing to accept him, the Supreme Court refused to order his release in the United States in contravention of the law and judgment of the political Branches. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *A fortiori* that proposition applies to aliens who remain at Guantanamo Bay after declining to accept two prior offers of resettlement, whose transfer to this country and release here would clearly violate federal law. Petitioners question the continuing validity of *Mezei* after *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), but "[b]oth cases rested on the Supreme Court's interpretation * * * of a provision in the immigration laws," *Kiyemba I*, 555 F.3d at 1028, which the Supreme Court construed not to authorize the indefinite detention of aliens in the United States. The Supreme Court did not address in *Zadvydas* or *Clark* whether a court could order release of aliens in the United States in contravention of restrictions established by Congress.

Petitioners also contend (Pet. 10-11) that the statutory restrictions on the use of federal funds to bring them to the United States for release violate the Constitution. But even before Congress enacted these statutes, petitioners had no right to be brought to this country and released. The new legislation simply confirms the judgment of the political branches that petitioners should not be brought here and that the proper way to effectuate the habeas court's order of release is through resettlement in a third country. In any event, the statutes do not constitute an unconstitutional suspension of the writ, because the right to habeas corpus review does not encompass the very different right to be brought into the United States for release in this country. Nor is the legislation an unlawful bill of attainder — *i.e.*, a law that both "applies with specificity" and "imposes punishment." *Bellsouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998). The statutory restrictions on release into the United States are not limited to petitioners, but apply generally to all Guantanamo detainees. Nor are the restrictions a legislative punishment; they serve the nonpunitive and legitimate purpose of barring the release of Guantanamo detainees in the United States in accordance with the political Branches' control over the borders. *See, e.g., Nixon v. Administrator of General Servs.*, 433 U.S. 425, 473-484 (1977). In addition, the restrictions should not be characterized as punitive because they do not deprive petitioners of any pre-existing right, given that petitioners previously had no right to be released in the United States. *See id.* at 474-475.

B. Petitioners also argue that, at a minimum, the panel should have remanded the case to the district court for factfinding on whether any resettlement offer is presently available to them and whether they had well-founded reasons for declining to accept a prior offer. But the panel correctly ruled that the only relevant facts were undisputed, given that petitioners do not contest that they were offered resettlement to a country determined by the United States Government to be an appropriate country for resettlement consistent with the government's policy on post-transfer treatment.[3] That ruling was fully consistent with the Supreme Court's remand order, which left it for the panel to decide in the first instance "what further proceedings in that court or in the District Court are necessary and appropriate." 130 S. Ct. 1235. At bottom, the petitioners' request for factfinding depends on a theory that a Guantanamo detainee who does not want to be resettled in a third country because, for example, it lacks cultural affinity or would not permit him to own real property, *see* Concurring op., at 4 n.3, can compel a court order requiring the United States Government to bring him into this country for release simply by declining to

[3] Before the panel, petitioners suggested that the district court should engage in factfinding to determine whether they risked mistreatment or possible return to China in the countries that offered resettlement. As the panel properly recognized, such factfinding would run afoul of *Kiyemba II*, 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 review the Executive's determination that a detainee can be transferred to another country consistent with the government's policy on post-transfer treatment. *See also Munaf*, 128 S. Ct. at 2225-2226.

accept the resettlement offer. The panel properly rejected that argument, which does not merit review by the en banc Court.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the petition for rehearing en banc be denied.

Respectfully submitted,

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AUGUST 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I filed and served the foregoing Appellants' Response To Petition for Rehearing En Banc by electronic service through the CM/ECF system to the following counsel, who are registered CM/ECF users,

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