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' OPPOSITION TO PETITIONERS' MOTION TO GOVERN AND FOR REMAND AND CROSS-MOTION FOR REINSTATEMENT OF JUDGMENT

Respondents Barack H. Obama *et al.* respectfully submit this opposition to petitioners' motion, which seeks immediate remand of this case to the district court for factfinding. Respondents also submit their own cross-motion for reinstatement of the Court's judgment, along with an amended opinion taking account of intervening developments that reinforce the panel's prior conclusion that petitioners are not entitled to a judicial order requiring that they be brought to the United States and released here.

Petitioners are members of the Uighur ethnic group who previously were held in military detention as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba. The United States agreed in 2008 that petitioners should no longer be held on that basis. Petitioners did not want to return to their native China,

because they reasonably feared mistreatment there. Consistent with established policy, the Executive determined not to return them to China, because of concerns that they likely would be tortured. The Executive continued to pursue efforts to resettle petitioners elsewhere. Petitioners sought an order from the habeas court requiring the Executive Branch to bring them to the United States and release them here because, in their view, resettlement efforts had failed. The district court issued that order. This Court reversed, explaining that, although petitioners are entitled to release from military detention, their habeas remedy does not extend to an order that would override the immigration laws and the judgment of the political Branches. 555 F.3d 1022 (D.C. Cir. 2009). Petitioners sought certiorari, contending that they were entitled to be brought to the United States because there was no other place for them to go. The Supreme Court granted certiorari. 130 S. Ct. 458 (2009).

After this Court issued its decision, the Executive continued its intensive diplomatic efforts to identify other countries that would accept petitioners for settlement. Those efforts followed from President Obama's issuance of Executive Order 13,492 on January 22, 2009, and the appointment of a Special Envoy to pursue the resettlement of detainees at Guantanamo Bay who are approved for transfer. And those efforts have been successful. As of February 2010, all of the original Uighur detainees either had been resettled in another country, had accepted an offer of resettlement, or had received but declined to accept offers of resettlement from two

different countries. These developments removed the premise of the question presented in the certiorari petition, which was that the Uighurs could not be resettled in another country. The Supreme Court therefore vacated this Court's judgment and remanded the case to determine "what further proceedings in [the court of appeals] or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." 130 S. Ct. 1235 (2010).

The government respectfully submits that this Court should reinstate its prior judgment reversing the district court's order that petitioners be brought to the United States for release here, and amend its prior opinion to take account of intervening developments. As the government argued in its merits brief to the Supreme Court, this Court correctly concluded that, although petitioners are entitled to release from military detention, they have no right to be brought to the United States outside the framework of the immigration laws. Since that time, Congress enacted specific statutory bars on petitioners' transfer to the United States for release here, and all of the petitioners have either been resettled or have received offers of resettlement. If an alien who has not been offered resettlement elsewhere has no right to be brought into the United States for release outside the framework of the immigration laws, as this Court held, then *a fortiori* an alien who has been offered resettlement opportunities but turned them down has no such right. The government's success in securing opportunities for petitioners' resettlement also shows that it never was the

case that a judicial order requiring that petitioners be brought to the United States and released here was the only possible way for petitioners to leave U.S. custody at Guantanamo Bay. These successful efforts on behalf of petitioners — as well as the successful efforts on behalf of every other detainee at Guantanamo Bay who has received a habeas order of release that is not subject to appeal — underscore the soundness of the Court's prior conclusion that these transfer issues are matters for the political Branches.

Contrary to petitioners' contention, there is no need for further proceedings in the district court. The basic developments regarding resettlement are known and undisputed, and simply serve to reinforce the correctness of the Court's prior conclusion that petitioners are not entitled to the extraordinary relief they seek. Nothing petitioners could show on remand would provide any legal ground to depart from the Court's prior judgment.

Moreover, petitioners have not presented any other legal argument in this litigation that could justify their being brought to the United States. Throughout the litigation, petitioners have contended that they must be released in the United States because they had nowhere else to go. They have never argued that they would be entitled to release into the United States on some other theory, even if they did have other offers of resettlement.

STATEMENT

1. Petitioners are members of the Uighur ethnic minority group in China who were previously held in military detention at the Guantanamo Bay Naval Base. After petitioners filed for writs of habeas corpus — and after this Court found the record insufficient to hold one of the Uighur detainees in enemy combatant status in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) — the government concluded that it would no longer seek to hold any of the petitioners as enemy combatants. When a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship. But the Uighurs reasonably fear torture in China, and consistent with longstanding policy, the United States agreed not to return them there. The United States instead continued to pursue resettlement opportunities elsewhere.

Petitioners sought an order from the habeas court requiring the Executive Branch to bring them to the United States and release them here. The premise of their claim was that they could not otherwise be released from U.S. custody at Guantanamo Bay. C.A. App. 1123-1124. In particular, petitioners argued that, under *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), and this Court's decision in *Parhat*, they are entitled to release, and because they cannot return to China and cannot be resettled elsewhere,

" 'release' * * * can only mean release into the United States." C.A. App. 1123-1124. The district court issued such an order. 581 F. Supp. 2d 33 (D.D.C. 2008).

2. This Court reversed. 555 F.3d 1022 (D.C. Cir. 2009). The Court held that petitioners have a right to habeas corpus review under *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008), including an order of release from unlawful detention. But the Court distinguished between an order of "simple release" and "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 reasoned that "never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population." *Id.* at 1029. The Court concluded that the authority to exclude aliens rests exclusively with the political Branches, *id.* at 1025-1026, and it "'is not within the province of any court, unless expressly authorized by law, to review [that] determination.'" *Id.* at 1026 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)).[1]

[1] Judge Rogers concurred in the judgment. 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 that the court 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.

3. Petitioners filed a petition for a writ of certiorari. The Supreme Court granted certiorari on October 20, 2009, to address the following question: "Whether 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).

4. Since well before the district court order in petitioners' habeas cases, the United States has expended significant diplomatic efforts to resettle the Uighurs who were at Guantanamo Bay. Prior to January 20, 2009, Executive Branch officials approached a substantial number of countries concerning the Uighurs' resettlement, recognizing that those efforts were laying the groundwork for a potentially lengthy dialogue with other nations. In Executive Order No. 13,492, issued on January 22, 2009, 74 Fed. Reg. 4897 (E.O. 13,492), the President directed Executive Branch officials to undertake "a prompt and thorough review" of each detainee who remained at Guantanamo Bay in order to determine whether transfer, release, prosecution, or other disposition of the individual was consistent with the national security and foreign policy interests of the United States and the interests of justice. *Id.* preamble, §§ 1(c), 2(d), 3. And for those individuals whom the review determined should be returned home or resettled, the President instructed the Secretary of State to

"expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5.

To implement the latter directive, the Secretary of State appointed a Special Envoy, Ambassador Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer. Since accepting his appointment, Ambassador Fried has regularly traveled abroad to meet with representatives of other nations and discuss transfers of Guantanamo Bay detainees. He has focused his efforts on resettling detainees whom the United States could not send to their home countries because of concerns about possible torture. These efforts have borne fruit. Since January 20, 2009, 52 individuals have been transferred from Guantanamo Bay to third countries. Detainees have been accepted by Albania, Belgium, Bermuda, France, Hungary, Ireland, Palau, Portugal, Slovakia, Spain, and Switzerland, in addition to their home countries. Gov't S. Ct. Br. 4, *Kiyemba* v. *Obama*, No. 08-1234.[2]

Ambassador Fried made resettlement of the Uighurs a top diplomatic priority. In multiple instances, both before and after the United States approached a nation about accepting some of the Uighurs, China pressured that nation not to do so. Nonetheless, the United States' diplomatic efforts have been successful. Much of that

[2] A copy of the government's merits brief in the Supreme Court detailing these efforts and results is attached for the Court's convenience.

success has occurred since this Court's original decision in this case. As explained in the government's brief in the Supreme Court (at 8-10), all of the 22 Uighurs originally at Guantanamo Bay have now either been resettled or received offers of resettlement from other countries. The United States transferred five Uighurs to Albania in May 2006, after their Combatant Status Review Tribunals determined they should no longer be detained. In June 2009, after the certiorari petition was filed, the United States resettled four additional Uighur detainees in Bermuda. In September 2009, Palau offered to accept 12 of the 13 remaining Uighurs, conditional on their consent. Palau did not make an offer of resettlement to petitioner Arkin Mahmud, whose counsel stated to the press that he had developed mental health problems apparently too serious to be treated in the sparsely populated country.[3] Six of the 12 who received offers from Palau accepted them, and were resettled in Palau in October 2009.

Seven Uighurs thus remain at Guantanamo Bay. On February 3, 2010, the government of Switzerland announced that it would accept two — Arkin Mahmud and his brother, Bahtiyar Mahnut — for resettlement. The United States government expects that those two men will be resettled in Switzerland in the very near future.

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[3] See Del Quentin Wilber, *2 Brothers' Grim Tale of Loyalty and Limbo*, Wash. Post (Sept. 28, 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/27/AR2009092703076.html> (cited at Pet. S. Ct. Br. 15 n.18, *Kiyemba* v. *Obama*, No. 08-1234).

The remaining five Uighurs received the offer of resettlement in Palau referred to above, but did not accept it. All five also received an offer of resettlement from another country, but they did not accept that offer either, and it was withdrawn after several months. The United States continues its efforts to identify an appropriate country in which to resettle these five Uighurs, and is prepared to pursue the matter further with Palau upon their request.

The government's success in providing resettlement opportunities for the Uighur detainees has been replicated with respect to other detainees at Guantanamo Bay who have been ordered released by the district court. Since *Boumediene*, 24 detainees at Guantanamo Bay, in addition to the Uighurs, have had their habeas corpus petitions adjudicated by the courts. Fifteen of those petitions were granted, and nine were denied.[4] In the 15 cases in which the petition was granted, the courts entered essentially the same remedial order, "direct[ing]" the Executive Branch "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release." See Gov't S. Ct. Br. 14 & n.13 (citing the decisions), *Kiyemba* v. *Obama*, No. 08-1234. Following those court orders, the government has responded with substantial diplomatic efforts to repatriate or resettle the successful

[4] See Benjamin Wittes et al., The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking 86-87 (Brookings Inst. Jan. 22, 2010) <http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx>.

habeas petitioners. These sustained efforts have paid off. The habeas order is final and not subject to appeal in 11 of the 15 cases (not involving the Uighurs) in which a court found the detention to be unauthorized, and all 11 of those individuals have been transferred. See Gov't S. Ct. Br. 14-15, *Kiyemba v. Obama*, No. 08-1234.

5. In addition to these successful resettlement efforts, relevant legal developments have occurred since this Court's prior decision. In particular, Congress has enacted a series of specific restrictions on the transfer to the United States of Guantanamo detainees. On June 24, 2009, Congress enacted the Supplemental Appropriations Act, 2009 (SAA), Pub. L. No. 111-32, 123 Stat. 1859, which prohibited the use of any funds made available by that Act or any prior Act to release or transfer into the United States any individual detained as of that date at the Guantanamo Bay Naval Station, with a limited exception for transfers for the purpose of prosecution or detention during legal proceedings. *Id.* § 14103, 123 Stat. 1920; *see also* Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B, §§ 106(3), 115, 123 Stat. 2046 (extending the SAA's transfer restrictions through Oct. 31, 2009).

Congress subsequently prohibited the use of any federal funds to release in the United States or, with the same limited exception, to transfer here any person detained at Guantanamo Bay as of June 24, 2009. Department of Homeland Security Appropriations Act (DHS Act), Pub. L. No. 111-83, § 552, 123 Stat. 2177;

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (DOI Act), Pub. L. No. 111-88, § 428, 123 Stat. 2962; Consolidated Appropriations Act, 2010 (CAA), Pub. L. No. 111-117, § 532 (2009); Department of Defense Appropriations Act, 2010 (NDAA), Pub. L. No. 111-84, § 1041, 123 Stat. 2454 (prohibiting use of Department of Defense funds "to release into the United States, its territories, or possessions," any non-citizen at Guantanamo Bay who is "in the custody or under the effective control of the Department of Defense" or "otherwise under detention").[5]

6. In its merits brief in the Supreme Court, the government argued that this Court's initial judgment was correct because petitioners here have no right to release into the United States in contravention of the federal immigration laws and specific statutory bars on their entry. See Gov't S. Ct. Br. 18-51, *Kiyemba* v. *Obama*, No. 08-1234. The government's merits brief also noted that the recent success in obtaining resettlement offers for all the Uighurs had eliminated the premise of the question presented in the certiorari petition, because their claim to be brought to and released

[5] Some of the enactments also bar the use of any funds made available under the relevant act "to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba." DHS Act § 552(f); CAA § 532(f).

in the United States has always depended on their having no other nation willing to accept them. The government therefore suggested that the Court might wish to dismiss the writ of certiorari as improvidently granted. See *id.* at 51-53.

At the direction of the Supreme Court, the parties subsequently filed supplemental briefs addressing the following question: "What should be the effect, if any, of the developments [regarding resettlement] * * * on the Court's grant of certiorari in this case?" The government filed a supplemental letter brief, in which it argued that the success of the government's resettlement efforts undermined the premise upon which certiorari was granted and that the Court therefore should dismiss the petition as improvidently granted. In the alternative, the government suggested that the Court might wish to vacate this Court's judgment and remand the case to this Court to consider whether petitioners had some other legal argument to support the judicial order they sought, and whether petitioners had preserved any such argument. See Letter from Solicitor General to Clerk of Court 5-7 (Feb. 19, 2010), *Kiyemba* v. *Obama*, No. 08-1234 (Letter Brief).[6]

7. On March 1, 2010, the Supreme Court issued a per curiam order vacating this Court's judgment and remanding the case to this Court. The Court stated that certiorari had been granted "on the question whether a federal court exercising habeas

[6]A copy of the government's letter brief is enclosed for the convenience of the Court.

jurisdiction has the power to order the release of prisoners held at Guantanamo Bay 'where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.' " Order, *Kiyemba* v. *Obama*, No. 08-1234 (quoting Pet. for Cert. i) (Order), 130 S. Ct. 1235, 1235 (2010). "By now, however, each of the detainees at issue in this case has received at least one offer of resettlement in another country," with most of the detainees accepting resettlement, while five detainees "have rejected two such offers and are still being held at Guantanamo Bay." *Ibid*. Noting that "[n]o court has yet ruled in this case in light of the new facts" and that it would "decline to be the first to do so," the Supreme Court remanded the case to this Court to "determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Ibid.*

8. On March 5, 2010, petitioners moved in this Court for remand of the case to the district court. Petitioners assert that a remand is necessary in order to determine "whether there is any current alternative form of release available to five petitioners," as well as to conduct factfinding regarding the details of the prior resettlement offers made by Palau and another country. Motion 3. Petitioners contend that this factfinding is needed to ascertain whether their release in the United States is necessary and appropriate. *See ibid.* Petitioners also argue that this Court

should not reinstate its prior judgment, arguing that the prior decision was erroneous and that the developments in the case may affect the issues presented to the Court. *See id.* at 4-5.

ARGUMENT

THIS COURT SHOULD DENY THE MOTION FOR REMAND AND REINSTATE ITS JUDGMENT REVERSING THE DISTRICT COURT'S ORDER

Throughout this litigation, petitioners have contended that they are entitled to be brought into the United States and released here because they have had nowhere else to go. As the Supreme Court recognized in its Order, even if that once may have seemed to be the case, it is not so now. All of the Uighur detainees either have been resettled, have accepted offers of resettlement, or have been offered resettlement in two countries.

This Court was correct when it held in its initial decision that petitioners have no right to court-ordered release into the United States outside the framework of the immigration laws. Appropriate deference to the political Branches continues to bar the extraordinary relief petitioners seek, particularly in light of United States' success in obtaining offers for petitioners to resettle in other countries and the recently enacted statutory bars on their transfer to the United States for release. The government therefore respectfully requests that this Court reinstate its judgment

reversing the district court's order but amend its prior opinion to account for the intervening developments regarding resettlement and the new statutory bars on petitioners' entry into the United States. The Court may properly do so by concluding that these developments furnish further support for its conclusion that the district court erred in failing to respect the judgment of the political Branches and requiring that petitioners be brought to and released in the United States.

No further factual development in this proceeding is necessary or appropriate, and this Court should reject petitioners' request to remand the case to the district court. Such a remand would needlessly delay a final disposition of this case.

A. This Court's Prior Judgment Reversing The District Court's Order Was Correct And Should Be Reinstated.

This Court's prior judgment reversing the district court's order was correct. Petitioners, whom the government no longer seeks to hold in military detention and who are currently in custody at Guantanamo Bay pending their resettlement elsewhere, do not have a right to court-ordered release in the United States, in contravention of applicable laws and the judgment of the political Branches that they should not be admitted.

Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008), held that foreign nationals in military detention at Guantanamo Bay are entitled under the Suspension Clause of the Constitution to the writ of habeas corpus to challenge the lawfulness of their

detention. *Boumediene* identified the essential attributes of habeas corpus review guaranteed by the Constitution: a meaningful opportunity for the detainee to demonstrate that he is being held unlawfully; authority on the part of the habeas court to assess the sufficiency of the Government's evidence and any exculpatory evidence not considered during prior proceedings; and judicial authority to issue appropriate orders for relief, including, "if necessary, an order directing the prisoner's release." *Id.* at 2266-2271.

Petitioners have obtained the habeas corpus review that *Boumediene* requires. Petitioners are indisputably entitled to release from military detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. § 1541 note). But petitioners cannot be returned to their home country because they likely would be tortured. Despite this significant impediment to petitioners' transfer, and as a result of the government's extensive diplomatic efforts, each petitioner (along with each of the 11 other detainees at Guantanamo Bay who have prevailed in habeas proceedings in cases no longer subject to appeal) has either been transferred from Guantanamo Bay to another country or been offered resettlement elsewhere. The writ of habeas corpus therefore is effective at Guantanamo Bay, without any occasion for the further, extraordinary judicial order petitioners have sought.

Far from supporting a requirement that petitioners be released in the United States, *Boumediene* recognized that "common-law habeas corpus was, above all, an

adaptable remedy," and that even an order of immediate 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. Furthermore, *Munaf v. Geren*, 128 S. Ct. 2207 (2008), confirms that legal and prudential concerns shape the available habeas corpus remedy. Here, as this Court correctly concluded in its prior decision, those concerns foreclose an unprecedented judicial order requiring the government to bring petitioners to the United States.

As this Court previously recognized, it is an "ancient principle that a nation-state has an inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission." 555 F.3d at 1025. That power of exclusion is "inherent in sovereignty," *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), and is recognized widely in the international community. *See, e.g.*, *Case of Abdolkhani* v. *Turkey*, No. 30471/08, § 72 (2009) (Eur. Ct. H.R.) (recognizing the right of states "as a matter of international law and subject to their treaty obligations" to control the entry of aliens). In drafting our Constitution, the Framers vested the power to admit or exclude aliens in the political Branches, *see Nishimura Ekiu*, 142 U.S. at 659; *Kleindienst v. Mandel*, 408 U.S. 753, 765-766 & n.6 (1972), and Congress has exercised its plenary authority to make rules for the admission of aliens by enacting detailed restrictions on entry into the United States. Petitioners do not contest that, under the normal statutory standards and procedures

under the immigration laws, as implemented by the Executive, they have no right to be admitted into and released in the United States.

Furthermore, and as described above (at pp. 11-12, *supra*), following this Court's prior judgment, Congress enacted specific restrictions on the transfer of detainees from Guantanamo Bay to the United States. Those provisions bar petitioners' release in the United States — a conclusion that is confirmed by the legislative history, which demonstrates that the legislation was animated in part by the prospect of the transfer of Uighur detainees at Guantanamo Bay to the United States. *See, e.g.,* 155 Cong. Rec. H5618 (daily ed. May 14, 2009) (Rep. Tiahrt); *id.* at H5621 (Rep. Wolf); *id.* at S5589 (daily ed. May 19, 2009) (Sen. McConnell); *id.* at S5605-5606 (Sen. Hatch); *id.* at S5653 (daily ed. May 20, 2009) (Sen. Thune).

This Court previously recognized that "no habeas court since the time of Edward I" has ever ordered the "extraordinary remedy" petitioners seek. 555 F.3d at 1028. Even when an alien has been held indefinitely at the borders of the United States, pending identification of another country willing to accept him, the Supreme Court has 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.

Accepting the proposition advanced by petitioners — that the district court was empowered to order their release into the United States — would undermine fundamental interests that are served by the political Branches' exclusive control over the national borders. The immigration laws (and the more recent Acts of Congress specifically barring the transfer of detainees at Guantanamo Bay for release in the United States) reflect Congress's judgment, entitled to deference from the Judiciary, as to what restrictions are appropriate to ensure public safety, national security, and other important national interests. An order of release into the United States could also interfere with the United States Government's efforts to persuade other nations to provide resettlement opportunities for military detainees at Guantanamo Bay, as well as undermine the incentives of detainees to cooperate in resettlement efforts. See *Zadvydas v. Davis*, 533 U.S. 678, 711, 713 (2001) (Kennedy, J., dissenting). Those efforts to date have been highly successful, both generally and with respect to petitioners. Indeed, that diplomatic success underscores the soundness of this Court's original ruling, which recognizes that decisions concerning admission or exclusion of aliens — and related questions of alternative destinations for aliens if they are not allowed to enter the United States — reside with the political Branches, rather than the Judiciary. A court should not interfere with those efforts by ordering petitioners' release into the United States, particularly when they have already been afforded other opportunities for resettlement. Construing the Suspension Clause to entitle

petitioners to release in the United States under these circumstances also would impose heavy burdens on the Nation's commitment to uphold humanitarian principles against repatriation of aliens to countries where they are likely to be tortured. *Cf.* Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 391-392, 414 (1953) (raising concerns that states might forcibly repatriate prisoners of war "if the obligation not to repatriate were to involve a further obligation to provide a permanent home for displaced prisoners").

Moreover, petitioners' arguments based on the Due Process Clause and the Geneva Conventions do not furnish any basis for a judicial order requiring petitioners' release in the United States. There is no occasion in this case for the Court to address broad questions concerning the application of the Due Process Clause to detainees at Guantanamo Bay. For whatever due process rights petitioners might otherwise claim while they are at Guantanamo Bay, aliens outside the United States have no substantive due process right to enter the United States in contravention of the immigration laws and other Acts of Congress. See *Mezei*, 345 U.S. at 215; *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-591 (1952). Nor do the Geneva Conventions confer any right of release in the United States: none of the Geneva Convention provisions previously relied on by petitioners confers any right on a detainee to be brought into the territory of the detaining state for release.

In addition, Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, bars reliance on the Geneva Conventions as a source of enforceable rights in a habeas corpus proceeding against the federal government. *See Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010).

In sum, petitioners' continued presence at Guantanamo Bay pending resettlement elsewhere does not confer on them a right to be brought into the United States for release, in contravention of statutory restrictions on their entry and the judgment of the political Branches. This Court's prior judgment, reversing the district court's order mandating release in the United States, was correct. The Court should reinstate that judgment and amend its opinion to state that the resettlement and legal developments that have unfolded since the case was previously before this Court further support the Court's determination that the district court erred in failing to respect the judgment of the political Branches and granting petitioners' extraordinary request for release in the United States.

B. No Further Proceedings In District Court Are Necessary Or Appropriate.

1. Petitioners assert that this case should be remanded to the district court for development of an "appropriate evidentiary record" on the resettlement offers made to the seven petitioners who remain at Guantanamo Bay, including the offer of resettlement to Switzerland made to and accepted by two petitioners. Motion at 1-2.

Petitioners contend that there is no record regarding the terms of prior resettlement offers or whether they remain open. Motion 2-3. Petitioners also assert that remand is necessary for a determination of what "options, if any, [are] currently available to the Petitioners for release." Motion 2. But nothing petitioners could show on remand would provide any legal basis for altering this Court's prior conclusion that petitioners are not entitled to the extraordinary relief they seek.

Petitioners do not contest that each of the remaining seven detainees has previously been offered resettlement elsewhere, that two of the detainees have accepted offers of resettlement to Switzerland, and that the remaining five detainees have received but declined to accept offers of resettlement from Palau and another country. Petitioners themselves notified the Supreme Court on February 3, 2010, that two of the Uighur detainees had accepted an offer of resettlement to Switzerland and that it was "likely that this will result in a transfer of two petitioners to Switzerland within sixty days." Letter from Sabin Willett to Clerk of Court 1 (Feb. 3, 2010), *Kiyemba v. Obama*, No. 08-1234. Petitioners also previously acknowledged that the remaining five Uighur detainees at Guantanamo Bay were previously offered resettlement both to Palau and to another country. *See* Letter from Sabin Willett to Clerk of Court 3 (Feb. 19, 2010), *Kiyemba v. Obama*, No. 08-1234.

Although petitioners suggest that factfinding would be appropriate to elucidate the "terms of the Palau offer" or the offer of resettlement in the other country, they

do not identify the possible legal relevance of any such details. The successful resettlement of six other Uighur detainees in Palau last fall itself demonstrates the viability of the offer that the remaining five petitioners had available. Ambassador Fried has worked closely with petitioners' counsel regarding settlement options and terms. Although certain details (including the identity of the second country) have not been shared publicly because they involve sensitive diplomatic negotiations, they are not unknown to petitioners. Contrary to petitioners' contention (Motion 2), there is likewise no occasion for factual development regarding whether resettlement in Palau would be only "temporary." As the government explained to the Supreme Court, if petitioners were to express interest, the United States would again discuss resettlement with the government of Palau. And the President of Palau recently and publicly announced that Palau remains receptive to resettling the Uighurs who remain at Guantanamo Bay, and has reiterated that the Uighur transferees are welcome to stay indefinitely. See *Palau Willing to Take Remaining Guantanamo Uighurs*, Bangkok Post (Feb. 9, 2010) <http://bangkokpost.com/news/asia/167910/palau-willing-to-take-remaining-guantanamo-uighurs>. These developments concerning resettlement opportunities do nothing but support the Court's correct determination that the Judiciary should defer to the political Branches with respect to such matters and that petitioners have no right to the extraordinary judicial order they seek.

Indeed, judicial factfinding along the lines that petitioners propose would disrupt diplomatic negotiations regarding resettlement of Guantanamo detainees. In light of *Munaf*, 128 S. Ct. 2207, and the government's declared policy not to transfer petitioners to a country that likely will torture them or that will detain them on behalf of the United States, this Court held in *Kiyemba* v. *Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009), cert. denied, 2010 WL 1005960 (Mar. 22, 2010), that a "district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee," or evaluate whether the detainee will be subject to detention or criminal prosecution in the receiving country, because adjudication of these issues would undermine the Government's ability to speak with one voice in its foreign relations and could interfere with "the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 514-515. In the present context, permitting the district court to engage in factfinding as to the precise terms of prior resettlement offers or current diplomatic efforts similarly could interfere with sensitive diplomatic negotiations over resettlement, and could cause friction in our relations with other countries.

2. Petitioners also argue in their motion that this Court should not reinstate its prior judgment, but should instead remand the case to district court, because the Supreme Court chose to remand to this Court rather than dismiss the writ of certiorari as improvidently granted. Petitioners ignore the terms of the Supreme Court's order.

It remanded for this Court to determine in the first instance "what further proceedings in that Court or the District Court are necessary and appropriate." 130 S. Ct. 1235. The order thus expressly contemplated that this Court would decide whether further proceedings in the district court are necessary and appropriate. As we explain in this filing, no proceedings in the district court are warranted, and this Court should respond by finally disposing of this case as set forth herein.

In its letter brief to the Supreme Court, the government suggested that although the premise of petitioners' claim has been fatally undermined, this Court might wish to consider whether petitioners have any other legal claim that would warrant their release into the United States. See Letter Brief 7-8. In their remand motion, petitioners do not raise any such claim, but instead repeat the claim they have always made. Throughout the district court proceedings, petitioners premised their claim of constitutional entitlement to be brought to and released in the United States on their assertion that resettlement efforts have failed and that their continued presence at Guantanamo Bay is effectively indefinite. See, *e.g.*, C.A. App. 1114, 1132 n.13, 1155-1156. Petitioners reiterated that argument before this Court. *See* Pet. C.A. Br. 1, 9, 40. This Court recognized this fundamental premise of petitioners' argument, 555 F.3d at 1024, 1028-1029, but held that they were not entitled to the relief they sought. The Court explained that "[t]he government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit

petitioners, and we have no reason to doubt that it is doing so," *id.* at 1029 — a confidence borne out by subsequent events. And petitioners' certiorari petition likewise was premised on their assertion that "executive detention is indefinite" and "release into the continental United States is the only possible effective remedy." Pet. i, *Kiyemba v. Obama*, No. 08-1234. Thus, the only claim that petitioners have presented is that they are entitled to release into the United States because they have no other means to leave Guantanamo Bay.

As we have explained, this Court's initial judgment was correct, and the intervening developments regarding resettlement opportunities as well as the new statutory bars to transfer to the United States confirm the appropriateness of the Court's rejection of petitioners' claim that they are constitutionally entitled to be released in the United States. For purposes of further proceedings, the appropriate order to be entered in the district court is the same order that has been entered in other cases in which successful Guantanamo habeas corpus petitioners sought relief — *i.e.,* an order directing the Executive Branch "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release." *See, e.g., Boumediene v. Bush*, 579 F. Supp.2d 191, 199 (D.D.C. 2008). Such undertakings by the Executive, rather than factfinding in the district court or an unprecedented order of transfer to and release in the United States, is the relief properly available to petitioners. Indeed, even in the absence of such a directive in petitioners' habeas

orders, the United States has already engaged in intensive diplomatic efforts to arrange petitioners' resettlement — efforts that, to date, have resulted in offers of resettlement to all 17 of the petitioners previously before this Court, with 12 of the 17 either having already left government custody or soon to be transferred. And the Executive stands ready to reengage with Palau, if petitioners so request, and continues its other diplomatic efforts to resettle them. In sum, the United States has demonstrated that the writ of habeas corpus is effective at Guantanamo Bay, and further judicial involvement is neither necessary nor appropriate.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny petitioners' motion for a remand to the district court and instead reinstate its judgment reversing the district court's release order, and amend its opinion as described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, I filed and served the foregoing Respondents' Opposition to Petitioners' Motion to Govern and for Remand and 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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