

[CASES REMOVED FROM ORAL ARGUMENT CALENDAR]

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

ABDUSEMET,)	
Petitioner,)	
v.)	No. 07-1509
ROBERT M. GATES, Secretary of Defense,)	
Respondent.)	
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JALAL JALALDIN,)	
Petitioner,)	
v.)	No. 07-1510
ROBERT M. GATES, Secretary of Defense,)	
Respondent.)	
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**OPPOSITION TO PETITIONERS' MOTION FOR
CONDITIONAL ORDER OF CONTEMPT**

Petitioners, in the context of their petitions for review under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, move for a conditional order of contempt against respondent Robert M. Gates, Secretary of Defense. Petitioners contend that a conditional order of contempt is warranted because of respondent's "continued refusal to comply" with this Court's final order in this case, which directs respondent "to release or transfer the petitioners, or expeditiously to hold a new Combatant Status Review Tribunal[.]" *Abdusemet v. Gates, et al.*, Nos. 07-1509 through 07-1512 (D.C. Cir. Sept. 12, 2008) (judgment). Petitioners' motion is baseless and should be rejected.

1. Pursuant to this Court's order, the United States is no longer housing petitioners as enemy detainees and is vigorously pursuing diplomatic efforts to identify a country to which petitioners may be transferred. Indeed, this Court in *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), explicitly recognized that fact. *See id. at 1024* ("Diplomatic efforts to locate an appropriate third country in which to resettle [petitioners] are continuing."); *id. at 1029* ("The 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.").

Those efforts remain ongoing. *See Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, Exec. Order 13492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009) (requiring executive review participants to "work to effect promptly the release or transfer of all individuals for whom release or transfer is possible," which includes "expeditiously pursu[ing] and direct[ing] such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order"). Given the President's directive that the executive review participants "shall determine, on a rolling basis and as promptly as possible, * * * whether and how the Secretary of Defense may effect" the transfer or release of individuals for whom such disposition is appropriate, *id.*, it is expected that petitioners here, who have been ordered by this Court to be transferred or released, will be among the first cases subject to that

review. In the meantime, as this Court has further recognized, petitioners are being “held under the least restrictive conditions possible in the Guantanamo military base.” *Kiyemba*, 555 F.3d at 1024.

Given the United States’ ongoing diplomatic efforts and the Executive Branch’s active consideration of how to effect petitioners’ release, it is clear that respondent is not “ignor[ing]” this Court’s order, as petitioners contend (Mot. at 1). Petitioners remain at Guantanamo because they fear that they would be subject to mistreatment by the Chinese Government, and the United States, in an effort to protect petitioners, has committed not to return them to their home country. While petitioners understandably do not wish to be released to their home country, the fact that the United States has yet to identify an appropriate alternate country to take them does not mean that the government is in violation of the Court’s order.

2. The only issue presented by petitioners’ motion, therefore, is whether this Court’s judgment, directing petitioners’ release, must be construed to require petitioners’ release *into the United States*, such that the United States may be held in contempt of that order. Petitioners’ argument that the judgment in these cases must be read to mandate release into the United States cannot be squared with this Court’s ruling in *Kiyemba*.

This Court in *Kiyemba*, in the context of a habeas action, expressly rejected the argument that a release order directed at the Uighurs held at Guantanamo mandates

release into the United States. *See* 555 F.3d at 1026. Indeed, this Court held that federal courts lack authority to order a Guantanamo detainee's release into the United States. *Ibid.* If the federal courts lack authority to order release into the United States in a habeas action, then this Court plainly lacks authority to order release into the United States in the context of these DTA actions. As the Supreme Court and this Court have held, the authority of this Court under the DTA is less than the authority possessed by a habeas court. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) ("if congressional intent is to be respected," the rights and procedures in the DTA cannot be read to be "as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding"); *id.* at 2271 ("The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released * * *. This is troubling."); *id.* at 2274 ("To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation."). *See also Bismullah v. Gates*, 551 F.3d 1068, 1070, 1074 (D.C. Cir. 2009) (DTA is more narrow than habeas; "Congress's overriding goal throughout was to limit the judicial review available to detainees").

3. In addressing a similar contempt motion previously filed by Parhat, alleging that the United States had failed to comply with this Court's order requiring his release, *see* Petitioner's Motion for Conditional Order of Contempt at 11 (filed in *Parhat v. Gates*, D.C. Cir. No. 06-1397, on Oct. 16, 2008), this Court recognized that that contempt motion turned on whether that order must be read to require release into the United States. That is the same issue presented by petitioners' contempt motion here. The *Parhat* panel summarily rejected Parhat's motion, on the ground that the very question was pending before this Court on appeal in *Kiyemba*. *See* Order of Oct. 24, 2008, *Parhat v. Gates*, D.C. Cir. No. 06-1397. The fact that this Court has now issued a decision in *Kiyemba*, holding that federal courts lack authority to order the Uighurs' release into the United States, 555 F.3d at 1026, conclusively resolves that issue and prohibits any finding of contempt.

4. Moreover, this Court has already refused to accept petitioners' arguments that the Government is required to release them into the United States. *See* Judgment, *Abdusemet v. Gates*, No. 07-1509 (Sept. 12, 2008). When extending the *Parhat* judgment to these petitioners, the Court noted the Government's representation that it "will now treat these petitioners * * * as if they are no longer enemy combatants" and the Government will use "its best efforts to place them in a foreign country." *Ibid.* While petitioners had expressly asked the Court to construe *Parhat* as mandating their release into the United States, the Court held that, in the context of

the DTA actions, no issue “regarding the places to which these petitioners may be released is before this panel.” *Ibid.*

As discussed above, since the judgment was entered in petitioners’ cases, the Court has, in *Kiyemba*, addressed the issue and held that a release order directed at the Uighurs at Guantanamo does not compel their release into the United States. That ruling is dispositive as to the issue presented here and requires denial of petitioners’ motion.

5. Finally, because this Court has subsequently held that it lacks subject matter jurisdiction over DTA actions, *see Bismullah v. Gates*, 551 F.3d 1068, 1070, 1075 (D.C. Cir. 2009),¹ this Court would lack jurisdiction to enter an conditional order of contempt, even if such an order were otherwise appropriate.² *See Willy v. Coastal*

¹ In *Bismullah*, this Court explained that, “[t]he Congress’s careful crafting of a limited mechanism for judicial review indicates the basic objective of the DTA was not to supplement habeas corpus, but rather to restrict judicial review of the Executive’s detention of persons designated enemy combatants.” *Id.* at 1072. Given that objective, “had the Congress known its attempts to eliminate the habeas jurisdiction of the district courts would come to naught, it would not have turned around and created an additional and largely duplicative process by which a detainee could challenge his detention in the court of appeals.” *Id.* at 1075. As a result, this Court concluded that the provision conferring jurisdiction on it over DTA actions was not severable from the provision eliminating habeas jurisdiction, and therefore must be struck down in light of the Supreme Court’s invalidation of the latter provision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). *See Bismullah*, 551 F.3d at 1075.

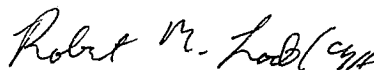
² Thus, regardless of whether the Court’s final order requiring petitioners’ release or transfer is *res judicata*, as petitioner argues (Mot. at 7-8), this Court may not issue a conditional order of civil contempt in these cases now that it is clear that the Court lacks subject matter jurisdiction. *See Willy*, 503 U.S. at 137-39.

Corp., 503 U.S. 131, 139 (1992) (because a civil contempt order “is designed to force the contemnor to comply with an order of the court * * * * it is logical that the order itself should fall with a showing that the court was without authority to enter the decree.”); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-79 (1988) (holding that civil contempt order may be challenged based on court’s lack of subject matter jurisdiction).

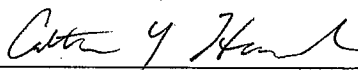
CONCLUSION

For the foregoing reasons, this Court should deny petitioners’ motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

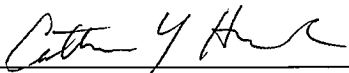
I hereby certify that on April 6, 2009, I filed and served the foregoing Opposition to Petitioners' Renewed Motion for Conditional Contempt by causing an original and four copies to be delivered to the Court via hand delivery, and by causing one paper copy to be delivered to lead counsel of record via Federal Express or hand delivery, as specified below:

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