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February 19, 2010

Via Hand Delivery

Hon. William K. Suter, Clerk
Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

Re: *Kiyemba v. Obama*, No. 08-1234

Dear General Suter:

We respond to the Court's February 12, 2010 order directing the parties to address the effect, if any, of the developments discussed in the parties' letters of February 3 and 5 on the Court's grant of *certiorari*.

Eight years into its unlawful detention, five years after the prisoner sought *habeas* review, and two days before the second extension on its merits brief ran, the Executive offered to resettle Petitioner Arkin Mahmud. It then announced that *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), was moot—almost. Not *actually* moot, so as to require *vacatur*, *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), but moot *enough* to justify dismissal—leaving *Kiyemba* cemented in place, and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), of little practical relevance.

Kiyemba has stripped the judicial power to order a remedy in cases within a court's jurisdiction. If successful here, the Executive's familiar tactic of imprisoning and delaying for years, then seeking dismissal at the last moment to evade review, would make *Kiyemba*'s consequences permanent. The Court should not accept the invitation, based on circumstances uniquely within its control, to discretionary dismissal, for post-*certiorari* developments provide no basis for dismissal under any theory. The Court should reverse *Kiyemba* and remand to the district court with directions to "enter appropriate orders for relief, including, if necessary"—as Petitioners concede, only if still *necessary* in light of a record to be developed by the district judge—"an order directing the prisoner's release." *Boumediene*, 128 S. Ct. at 2271.

The Separation Of Powers Problem Created By Kiyemba

Until *Kiyemba*, the power to give remedies in cases and controversies in which courts have jurisdiction had always been an essential attribute of judicial power under Article III, and one with which the political branches could not interfere. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Gordon v. United States*,

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117 U.S. 697 (1864, reported 1885); *United States v. Klein*, 122 U.S. (13 Wall.) 128 (1872); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). Discretionary dismissal would leave in place the court of appeals' cession to the Executive of complete power over whether remedy may be granted at all. Review of that constitutionally intolerable decision remains as necessary today as when *certiorari* was granted.

Petitioners Arkin Mahmud and Bahtiyar Mahnut

When Arkin Mahmud sought *habeas corpus* three years after he was seized by the Executive, no country had offered to resettle him. Joint Appendix ("JA") D ¶ 44. The Executive's aggressive litigation over whether he could bring his petition, *see, e.g.*, *Kabir v. Bush*, No. 05-1704, (D.D.C. filed Aug. 25, 2005) [dkt. nos. 4, 25, 53], cost Arkin three more years in the Guantánamo prison, including a period, in 2007-08, of solitary confinement in Camp Six. Arkin spent 22 hours of each day alone in a tiny cell. He had a Koran, but no other book; no activities, no companion, and scarcely any human contact at all. Weeks would pass in which he never glimpsed the sun. The consequences of solitary confinement are psychologically brutal, as this Court observed in *In re Medley*, 134 U.S. 160 (1890).

At last, in the summer of 2008, Arkin's case came before a *habeas* judge. The Executive conceded it had no basis to detain him, JA 426a-427a, and that, after four years of resettlement efforts, no other country had offered to accept him, Pet. App. 48a-49a & n.2, 59a-60a. When the district court directed that Arkin be brought to the courtroom for a hearing on terms of release, the Executive, advising that it had no evidence that any Uighur petitioner was dangerous, immediately procured an appellate stay. JA 505-07a. The case was in the court of appeals, and Arkin in the prison, when he finished his seventh year of executive detention. No country offered him refuge. Arkin sought *certiorari* in April 2009. The Executive obtained an extension before filing its opposition on May 29, 2009. Soon after, Palau announced that it would offer a temporary relocation to his companions—but not to Arkin.

Arkin passed the rest of 2009 stranded in the Guantánamo prison. On October 20, the Court granted his Petition. He filed his merits brief in December. The Executive asked for another extension. January 2010 came and went. The Executive requested yet another extension, this time until February 5, 2010. On February 3, Switzerland offered refuge to Arkin and his brother, Petitioner Bahtiyar Mahnut. They instantly accepted.

The brothers remain imprisoned, with no actual release date scheduled. Actual freedom is uncertain, for the political actors involved—domestic and foreign—must remain steadfast. That concern is not hypothetical. So radioactive is the very word "Guantánamo" that another preannounced Uighur transfer failed a year

ago, when the Executive made a firm commitment to release two former *Kiyemba* petitioners in Virginia, only to shrink from it after news leaked and inflamed a political opposition. Jane Mayer, *The Trial*, THE NEW YORKER, at 60 (Feb. 15 & 22, 2010); *see also* Pet. Br. 12-13 & n.11; Resp. Br. 33-34. Arkin and Bahtiyar hope for relief. They have not obtained it.

The Other Petitioners

Five other Petitioners have today no open option to leave Guantánamo, *see* Resp. Br. 52—as was true in 2005 when they sought *habeas corpus*, and in 2008 when Judge Urbina ruled. After they sought *certiorari*, the Executive procured an offer from Palau, a small island group isolated in the Pacific, with no previous Uighur connection. (Press reports disclosed the offer in June, but no Uighur was transferred until after the Court granted *certiorari*.) Those who accepted would be relocated temporarily, with the hope of finding a permanent home in a year or two, but with citizenship unavailable. An overture was received from another country, which the Executive does not identify. Resp. Br. 52. Except for the fact that the offer was withdrawn, the record is silent about its terms or source, or why it did not lead to resettlement.

Habeas courts are not travel agencies. But *habeas* has never required a successful petitioner to choose between imprisonment and involuntary and indeterminate exile. The affect, if any, of now-withdrawn resettlement offers on the appropriate relief for unlawful executive detention can only be assessed based on a complete record, which today does not exist. The facts should be fully developed by the district court on remand.

The Executive's Repeated Efforts To Avoid Review In Detention Cases

The Executive has evaded review of the question presented here for five years, while each petitioner remained its prisoner. The issue arose in the first Uighur case. *See Qassim v. Bush*, 382 F. Supp. 2d 126 (D.D.C. 2005). Just before argument on appeal, the Executive rushed the first Uighur petitioners to Albania and moved to moot the case. *Qassim v. Bush*, 466 F.3d 1073, 1074-75 (D.C. Cir. 2006).

The delay-then-moot strategy is not confined to Uighurs. In *Rasul v. Bush*, 542 U.S. 466 (2004), four petitioners sought judicial review beginning in 2002. The Executive asserted that they were dangerous, yet labored to moot the case after *certiorari* was granted, transferring two petitioners home. *Id.* at 471 n.1. This secured two years of unreviewable detention.

Padilla also illustrates. Arrested in 2002 and accused of planning to set off "dirty bombs," Jose Padilla sought review, eventually here, asserting that his executive detention was unlawful. With a response to Padilla's petition for *certiorari* due—

over three years after Padilla was imprisoned—the Executive indicted Padilla on entirely unrelated criminal charges and moved to dismiss the petition as moot. The court of appeals expressed such distaste for this manipulation of the review process that it denied a motion to transfer custody. *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005). This Court permitted the transfer to go forward, but the Executive was pointedly warned that the "office and purposes of the writ of *habeas corpus*" will be compromised, not served, if the Executive knows that it may detain for years without charge and then repeatedly avoid review when its asserted detention power is called into question before the Court. *See Padilla v. Hanft*, 547 U.S. 1062 (2006) (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring in denial of *certiorari*).

In the subsequent case of al-Marri, who was detained by the Executive for almost six years without charge or trial, the Executive disregarded that warning. After the Court granted *certiorari*, and before its merits brief was due, the Executive transferred al-Marri to civilian custody and brought criminal charges against him to avoid review of its claimed detention power. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (vacating and remanding with instructions to dismiss en banc decision below as moot).

Here again, efforts have been timed for the eleventh hour, in order to avoid this Court's review of an important principle governing all of the detention cases. If successful, this ploy would work an effective reversal of *Boumediene*'s holding that *habeas* is a real check on the Executive. Stasis now dominates the district court's review of Guantánamo cases. It is not simply that a post-*Kiyemba habeas* court can only ask the Executive jailer to take "necessary and appropriate diplomatic steps," allowing the Executive to nullify a judicial ruling—predicated on *Boumediene*—that there is no basis for the detention. *See, e.g., Mohammed v. Obama*, No. 05-1347, 2009 WL 4884194, at *30 (D.D.C. Nov. 19, 2009); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at *16 (D.D.C. Aug. 21, 2009) (same); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (same); *see also* Pet. Br. 20-21. Today some prisoners are denied hearings altogether, as courts conclude that they have no judicial remedy power beyond Executive discretion. (We provide citations to sealed orders in a separate letter filed under seal.)

Dismissal Of The Petition As Improvidently Granted Is Unwarranted.

There was nothing "improvident" about the Court's grant of *certiorari*. There has been no belated discovery of a problem that existed at the time *certiorari* was granted. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). Applicable law is not so clear that this Court's review is unnecessary, as in *Burrell v. McCray*, 426 U.S. 471, 472-73 (1976) (*per curiam*) (Stevens, J., concurring). Nor has the issue presented been rendered academic by an event

preceding the grant of *certiorari*. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 73 (1955).[1]

As a practical matter, dismissal may mean indefinite, or even life imprisonment for some Petitioners, yet the only "record" of post-*certiorari* developments consists of statements by the parties' counsel in briefs and letters to this Court. Nor do these developments affect the heart of the question presented for review—the separation of powers problem created by *Kiyemba*. *Armstrong v. Armstrong*, 350 U.S. 648, 572 (1956) (Frankfurter, J.) ("After a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari.").

The apparent reason for the Executive's attempt to drive the round peg of this case into the square hole of a discretionary dismissal is that, as a practical matter, such a dismissal would amount to affirmance on the merits. *Kiyemba* would stand, and the district court would continue to operate, in scores of *habeas* cases properly within its jurisdiction, stripped of any power beyond the power to exhort the Executive to diplomacy. The Court should reject this strategic maneuver.

The Case Is Not Moot.

The Executive does not argue that there is no longer an Article III case or controversy. Nor could it, for the Petitioners remain in executive custody, most with no prospect of release. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Even in the unlikely event that the case were to become arguably moot in the future, this would not bar review.

Although the mootness doctrine has been described as an Article III requirement, the Court has acknowledged that practical and prudential concerns nonetheless may warrant deciding a case that might otherwise be considered moot. As the Court explained in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 406 n.11 (1980), "the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations." Thus, "the flexible character of the Article III mootness doctrine." *Id.* at 400; *see also Poe v. Ullman*, 367 U.S. 497, 508 (1961) (noting that Article III justiciability

[1] Petitioners will show in their reply brief that the 2009 legislation presents serious questions for review under the Suspension Clause and other constitutional provisions.

is "not a legal concept with a fixed content or susceptible of scientific verification").

The question presented by this case remains of great practical concern in other cases, a factor the Court has frequently viewed as warranting merits review in the face of claims of mootness. *See Geraghty*, 445 U.S. at 398-401 (declining to dismiss because of likelihood of recurrence as to others in class); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (declining to dismiss constitutional claim based on certainty of recurrence as to others); *Doe v. Bolton*, 410 U.S. 179, 187 (1973) (declining to dismiss abortion case despite termination of pregnancy before appeal); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (declining to dismiss challenge to durational residency requirement for voting, despite plaintiff's current ability to vote, because of likelihood of recurrence as to other voters); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (same).

This Court has shown antipathy to "strategic" mooting by interested parties. When a litigant has the effective power "to manipulate the Court's jurisdiction to insulate a favorable decision from review," the courts have resisted its exercise. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (declining to dismiss case on mootness grounds); *see also Khouzam v. Ashcroft*, 361 F.3d 161, 167-68 (2d Cir. 2004) (case not moot where government sought to avoid ruling on issue of public importance); *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) (dismissal denied to foil "an attempt to make the stock of precedent look more favorable than it really is"). This concern is of special importance here, as the Executive has complete latitude to manipulate the circumstances of those it imprisons, so as to ensure that the question presented at *certiorari* is no longer presented at judgment.

"It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). The Court has also stated that the "public interest in having the legality of the [challenged] practices settled [] militates against a mootness conclusion." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also Wilkinson v. Abrams*, 627 F.2d 650, 657 (3d Cir. 1980) (holding that the "mootness doctrine may properly incorporate considerations of policy").

Chief Justice Rehnquist suggested that post-*certiorari* events should not be treated as a basis to avoid the merits. *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., concurring). *See also Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1117 (2009) (prudential concerns counsel against dismissal after investment of "substantial amount of time, effort, and resources in briefing and arguing the merits of [a] case.").

Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944), illustrates how the Court has used supervisory power to address a similar problem. There, plaintiff prevailed at trial against a corporation. The court of appeals reversed. After the Court granted *certiorari*, the corporation dissolved and respondent argued that the case was moot. Having none of that gamesmanship, the Court vacated the appellate ruling, and remanded to the district court with instructions to enter judgment; in effect, unmaking the appellate precedent and restoring the lower court's decision. The Court explained, "where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." 321 U.S. at 676-77.

The Court Should Reverse And Remand.

Courts must dispose of *habeas* cases as "as law and justice require," 28 U.S.C. § 2243, not cede disposition to the Executive. *Boumediene*, 128 S. Ct. at 2259 (determination of scope of provision "must not be subject to manipulation by those whose power [they are] designed to restrain."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (executive entitlement to unilateral decision-making would "serve[] only to condense power into a single branch of government").

This Court should reverse *Kiyemba* for the reasons we have shown in the opening brief and will show in the reply. It should then remand to the district court to carry out *Boumediene*'s directive, 128 S. Ct. at 2271, with instructions that the district court give appropriate relief, including, if and only to the extent necessary, an order directing release—from the courthouse.

The practical utility of clarifying that this power indeed rests with the *habeas* judge is illustrated by *Hamdi*. After this Court ruled, no one doubted that District Judge Doumar had judicial power to make relief real. The judge never had to exercise that power. He set a date at which Hamdi should be produced in the courtroom for hearing, and the Executive transferred Hamdi to Saudi Arabia, where he is free today. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER, 155-56 (Simon & Schuster 2006). As long as *Kiyemba* stands, judges no longer have that power.

On remand, the district court would consider the facts surrounding resettlement abroad.[2] Finding an appropriate and immediate resettlement option, the court

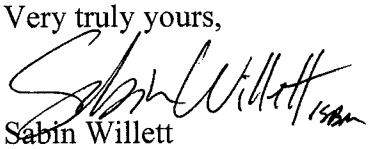
[2] As to the circumstances of the Petitioners themselves, the district court would establish those on remand by considering the factual record offered by the *parties*—the Executive

(Footnote Continued on Next Page.)

would not need to order U.S. release. Finding that an appropriate opportunity was lost through inequitable conduct of one or both parties, it might enter such order "as law and justice require." 28 U.S.C. § 2243. Under both *Boumediene* and the 2009 legislation to be discussed in Petitioners' reply brief, U.S. release would be available only if necessary under then-existing facts to give relief to a prevailing *habeas* petitioner. But it is vital that the district court clearly have that release power. As was true in *Hamdi*, it may be that it need not be exercised.

Habeas—where executive detention is to be remedied, and delay itself has worked substantive injury—demands it. *Boumediene*, 128 S. Ct. at 2269 (writ must be effective"); *Price v. Johnston*, 334 U.S. 266, 283 (1948) (writ affords "swift and imperative remedy in all cases of illegal restraint upon personal liberty.").

Very truly yours,



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and the Petitioners themselves (who have access to the classified record), and not some new, untested "record" of allegations lobbed into the fray by nonparties.