U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 19, 2010

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Jamal Kiyemba v. Barack H. Obama
S. Ct. No. 08-1234

Dear Mr. Suter:

I am writing in response to the February 12, 2010, order of this Court in the above-captioned case, which is scheduled for oral argument on March 23, 2010. In that order, the Court directed the parties to file letter briefs addressing the following question: "What should be the effect, if any, of the developments discussed in the letters submitted by the parties on February 3 and 5 on the Court's grant of certiorari in this case?"

Petitioners are members of the Uighur ethnic minority group in China who were previously held in military detention in an enemy status at the Guantanamo Bay Naval Base. The United States agreed in 2008 that petitioners should not be held on that basis and continued to pursue efforts to resettle them. 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, so consistent with longstanding policy, the United States has agreed to resettle them 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 such an order, but the court of appeals reversed. This Court granted certiorari 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 (citation omitted).

In letters dated February 3, 2010, and February 5, 2010, counsel for the parties informed the Court that the government of Switzerland has agreed to accept for resettlement two of the petitioners in this case, Arkin Mahmud and Bahtiyar Mahnut. One of those men (Arkin Mahmud) had not previously received an offer of resettlement from any country. The parties also informed the Court that the two men had accepted Switzerland's offer, and are

expected to be resettled shortly. Once the two men leave Guantanamo Bay for Switzerland, only five of the 22 Uighurs originally detained at Guantanamo Bay (and two of the 14 original petitioners in this Court) will remain there. All of the remaining five Uighurs at Guantanamo Bay have received two offers of resettlement, one from Palau and one from another nation.

In our letter dated February 5, 2010, and in our brief on the merits (at 51-52), the government noted that these recent developments have eliminated the premise of the question presented. All of the petitioners remaining at Guantanamo Bay have received offers of resettlement from other countries. Yet petitioners' claim to be brought to and released in the United States has always depended on their having no other nations willing to accept them. Because these developments eliminate the factual premise of the question on which the Court granted review, the Court should dismiss the writ of certiorari.

1. Petitioners are Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority in the far-western region of China. Pet. App. 1a-2a. After September 11, 2001, they were captured by Pakistan or coalition forces, transferred to U.S. military custody, and brought to the Guantanamo Bay Naval Base for detention under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. 1541 note). Pet. App. 2a. In all, 22 Uighurs were brought to Guantanamo Bay. J.A. 25a.

All 22 Uighurs were given hearings before Combatant Status Review Tribunals (CSRTs) to determine whether they should be retained in military detention. Pet. App. 2a. The CSRTs determined that five of them should no longer be considered enemy combatants. Those five men were resettled in Albania in 2006. For the other 17 Uighurs, a CSRT issued a final determination that the record supported continued detention. See *id.* at 2a-3a; U.S. Br. 5.

Habeas petitions were filed in federal court to challenge the legality of the detention of those 17 men (14 of whom are petitioners in this Court). In September 2008, the United States determined that these 17 men should no longer be held in military detention in an enemy status. The government moved the Uighurs to new, less restrictive housing at Guantanamo Bay and focused its efforts on resettling them. See U.S. Br. 6, 21-22.

2. Petitioners moved for judgment on their habeas petitions and sought an order requiring the Executive to bring them into the United States and release them here. The premise of their claim to such an order was that there is no other means by which they can be released from U.S. custody at Guantanamo Bay. J.A. 175a-176a. In particular, petitioners argued that, under *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), and the court of appeals' decision in *Parhat* v. *Gates*, 532 F.3d 834 (D.C. Cir. 2008), they are entitled to release, and because they cannot return to China, "'release' * * * can only mean release into the United States." J.A. 175a-176a. Petitioners "emphasize[d] that this is an unusual case" because "[i]n most cases, * * * release of the prisoner to his home country would be the natural remedy."

J.A. 189a n.13. But here, they claimed, they are "entitled to release into the United States because no other remedy is available." *Ibid.*; see also J.A. 160a ("He is entitled to relief, and there is no relief—except an order that he be released into the continental United States."). That theme pervaded petitioners' presentation in the district court. J.A. 205a (stating that petitioners "are stranded because no foreign government has agreed to accept them"); J.A. 208a ("Parhat is detained for the practical reason that no safe country has been found to take him"; "[A]ll efforts to persuade allies to accept him as a refuge have failed."); J.A. 260a ("We are at the *end* of a five-year failed effort by the government to repatriate Parhat and the other Uighurs."); J.A. 462a ("[T]here's only two places to go from Guantanamo. You can come here or you can go somewhere else in the world, but somewhere else in the world requires the cooperation of a foreign sovereign.").

The district court's decision granting petitioners' requested relief was likewise premised on the assumption that resettlement efforts had failed and that petitioners therefore had no country willing to accept them for resettlement. The court "assume[d] * * * that the petitioners were lawfully detained and that the Executive d[id] have some inherent authority to 'wind up' wartime detentions." Pet. App. 44a. But the court decided to order petitioner's release in the United States because it concluded that petitioners' detention had "become effectively indefinite." *Id.* at 49a. The court noted that the government had approached a significant number of countries about accepting petitioners, *id.* at 49a n.2, but concluded that the government's "efforts have failed" and that there was "no foreseeable date by which they may succeed," *id.* at 60a; see J.A. 489a. Thus, although the district court acknowledged that ordering the Executive to bring petitioners to the United States and release them "strikes at the heart of our constitutional structure, raising serious separation-of-powers concerns," Pet. App. 55a, it concluded that the order was necessary because the government could no longer detain petitioners as enemy combatants and there was no other country willing to accept them, *id.* at 46a-50a, 59a-61a.

On appeal, petitioners again argued that they are entitled to release in the United States because there is no other way for them to leave U.S. custody at Guantanamo Bay. Petitioners acknowledged that the Executive had made consistent efforts to resettle them, but declared that "[r]esettlement has failed" and "[t]ransfer of [petitioners] is impossible." Pet. C.A. Br. 1, 9 (emphasis omitted); see *id.* at 9 ("After more than four years of failed resettlement efforts, there is no question that [petitioners'] detention is indefinite."). Petitioners recognized that "[i]n most cases repatriation or transfer will [be]—and indeed has been—feasible," but they argued that they must be released into the United States because resettlement "requires the consent of a foreign sovereign" and no other foreign sovereign had agreed to accept them. *Id.* at 40. The court of appeals recognized this fundamental premise of petitioners' argument, Pet. App. 3a, 14a-15a, but held that they were not entitled to the relief they sought, explaining 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 15a.

Again before this Court, petitioners have premised their claim on the assertion that they are entitled to release into the United States only because there are no other nations willing to accept them. The question presented in their petition for a writ of certiorari presumed that "release into the continental United States is the only possible remedy" for their continued custody at Guantanamo Bay. Pet. i. Throughout the petition, petitioners argued that "there is nowhere else [for them] to go" but the United States. Pet. 5, 15; see, *e.g.*, *id.* at 17 ("there is no other remedy" available but release in the United States); *id.* at 22 ("The law of habeas guarantees and requires release in these circumstances, where no other remedy is available.") (emphasis omitted); *id.* at 24 (release into the United States is "the least intrusive remedy that could be fashioned to end the imprisonment").

Petitioners' opening brief on the merits rested on the same set of factual assertions. Petitioners argued that "th[e] years of diligent effort to resettle them elsewhere had failed" and that "there was no available path abroad to the release *Boumediene* described." Pet. Br. 1. Petitioners described themselves as "stranded" at Guantanamo Bay, without any options to leave United States custody. *Ibid.* Echoing the argument in their initial district court pleadings, petitioners contended that release was required under *Boumediene*; that "a transfer home [to China] would be unlawful"; that "[a]ll efforts [at resettling petitioners] had failed"; and therefore that release into the United States "was the least intrusive remedy available to end [petitioners'] imprisonment" at Guantanamo Bay. *Id.* at 33-34; see *id.* at 36 ("If U.S. release is the only way to achieve that release, Petitioners are not responsible for the dilemma."). Indeed, petitioners disclaimed any notion that they were seeking release into the United States because they preferred it to other options: they said that "[t]ransfer to a safe haven abroad" would be "welcome," and that they "prefer U.S. release only to U.S. prison." *Id.* at 36. And petitioners suggested that they should be able to "remain at large in the U.S." only "[u]ntil another country accepts them." *Ibid.*

3. Since well before the district court issued its order that petitioners be brought to and released in the United States, the United States has undertaken extensive diplomatic efforts to resettle the Uighurs at Guantanamo Bay. Before 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. Later, consistent with the President's directives in Executive Order No. 13,492, 74 Fed. Reg. 4897 (2009), the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer from Guantanamo Bay. 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, and has made resettlement of the Uighurs a top diplomatic priority. See U.S. Br. 3-4, 8-10.

These diplomatic efforts had met with considerable success even before the Court granted certiorari. In May 2006, the five Uighurs whose CSRTs determined that they should no longer be detained were resettled in Albania. In June 2009, four Uighurs were resettled in Bermuda. And in September 2009, Palau offered to accept 12 of the 13 Uighurs remaining at Guantanamo Bay. Six of those 12 accepted Palau's offer and were resettled there in October 2009 (after this Court's grant of certiorari). The remaining six (including the five who will be left at Guantanamo Bay after Mr. Mahmud and Mr. Mahnut go to Switzerland) did not accept that offer. U.S. Br. 5, 9-10.

Since the Court granted certiorari, the government of Switzerland agreed to accept the one Uighur detainee who had not previously received an offer, as well as his brother; they have accepted that offer and are expected to be resettled in Switzerland in the near future. U.S. Br. 10. And as noted in the government's brief (at 10), the five other Uighurs who remain at Guantanamo Bay also received an offer from a country other than Palau; they did not accept that offer, and it was withdrawn after several months. If petitioners were to express interest, the United States would again discuss the matter with the government of Palau. Earlier this month, the President of Palau 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* (Feb. 8, 2010) <http://news.yahoo.com/s/afp/20100209/wl_asia_afp/uschinaxinjiangguantanamopalaujustice>; see U.S. Br. 19 n.24. The United States also continues to work to find other options for resettlement. U.S. Br. 52.

The government's success in obtaining resettlement offers for all of the Uighurs at Guantanamo Bay is part of a broader pattern. Over the past year, 48 individuals have been transferred from Guantanamo Bay to nine different countries. U.S. Br. 4. And just several days ago, Spain agreed to accept five detainees. See Peter Finn, *Spain to Accept Five Guantanamo Detainees*, Wash. Post, Feb. 16, 2010 <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/15/AR2010021501746.html>. In particular, all 11 of the detainees in addition to the Uighurs who have obtained habeas orders of release that are final and not subject to appeal have been transferred. U.S. Br. 15.

4. These developments undermine not only the factual premise of the question on which this Court granted review, but the premise of petitioners' arguments throughout the entirety of the relevant proceedings in this case. As explained above, petitioners consistently have argued that, because no other nation would accept them, their remedy of release from Guantanamo Bay could only be effective if a federal court were to order the Executive to bring them into the United States and release them here. But to the extent this might have appeared to be the case once, it is not the case now. All of the Uighurs who were once in military detention in an enemy status at Guantanamo Bay have either been resettled elsewhere, accepted an offer of resettlement (with resettlement soon to follow), or received two offers of resettlement but chosen not to accept them. And the five in the last category

would likely still have the option of resettling in Palau if they expressed sufficient interest for the United States to again approach and engage in substantive discussions with the Palauan government. Or these five may benefit from the United States' ongoing diplomatic efforts to resettle them elsewhere. In sum, all of the petitioners have had an option for release from custody other than a judicial order of release into the United States. The question upon which the Court granted certiorari is therefore no longer presented as to any petitioner, because release into the United States has not been the "only possible effective remedy." Pet. i.

Under the circumstances, the government respectfully submits, as it did in its merits brief (at 51-52), that it would be appropriate to dismiss the writ of certiorari as improvidently granted. Such a dismissal is warranted where "[a]fter certiorari has been granted," it "become[s] apparent to the Court upon oral argument or upon further study that the basis on which review was permitted is in fact nonexistent." Eugene Gressman et al., *Supreme Court Practice* 358 (9th ed. 2007). As Justice Frankfurter once explained, a case "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." *Armstrong* v. *Armstrong*, 350 U.S. 568, 572 (1956).

The Court typically has dismissed the writ as improvidently granted based on circumstances that were present, although unrecognized, at the time certiorari was granted. That may have been the case here, because at the time the Court granted certiorari, it may not have recognized the full scope—and the developing success—of the government's intensified diplomatic efforts with respect to the Uighurs and other detainees at Guantanamo Bay.

In any case, the Court also has dismissed a writ as improvidently granted when "a change in circumstances since the writ was granted may have lessened the importance of the case." *Supreme Court Practice* 358. For example, in *Medellin* v. *Dretke*, 544 U.S. 660 (2005), the Court dismissed the writ as improvidently granted, in large part based on an intervening Presidential action that provided the petitioner with a potential avenue of relief. *Id.* at 662 ("After we granted certiorari, Medellín filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals, relying in part upon a memorandum from President George W. Bush that was issued after we granted certiorari. This state-court proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding."); see also, *e.g.*, *Quinn* v. *Muscare*, 425 U.S. 560, 562-563 (1976) (dismissing writ where the principal legal question at issue had been decided by the Court in another case and the petitioner had changed the rule that was the subject of the constitutional challenge); *Sanks* v. *Georgia*, 401 U.S. 144, 145, 147-153 (1971) (dismissing appeal where, due to events subsequent to the Court's notation of probable jurisdiction, the focus of the lawsuit had become "completely blurred, if not altogether obliterated," and the Court's resolution of the constitutional questions involved was "potentially immaterial").

Developments since this Court granted certiorari make dismissal appropriate here. That is so first and foremost because the question presented in the petition no longer covers petitioners' case. It is also so because the United States' intensified diplomatic efforts over the past year have met with increasing success in resettling other detainees in third countries. Those developments weigh in favor of the Court's allowing the United States' diplomatic efforts to proceed. If circumstances should change, such that the United States proves incapable of providing resettlement opportunities for detainees who have been ordered released, the Court could decide to take up the legal issue at that point.

Dismissal is also warranted as a prudential matter, given the circumstance that although this case technically still appears to present a justiciable controversy, it shares characteristics of a moot case. Habeas corpus is "governed by equitable principles." *Munaf* v. *Geren*, 128 S. Ct. 2207, 2220 (2008) (citation omitted). Prudential concerns therefore may lead a federal court to "forgo the exercise of its habeas corpus power." *Ibid.* (quoting *Francis* v. *Henderson*, 425 U.S. 536, 539 (1976)). Here, counsel for petitioners stated in his February 3, 2010 letter that the case remains "alive" as to the five Uighur detainees who remain at Guantanamo Bay and have not accepted an offer of resettlement. We agree in the end that the whole case is not moot for Article III purposes. Those five individuals remain at Guantanamo Bay, without pending offers of resettlement (although for the reasons previously stated, the United States believes that they likely would receive renewed offers from the Palauan government if they expressed interest in resettling to that country). Thus, it is possible (although, again, it does not seem likely) that no other country would accept them after all, despite continued diplomatic efforts by the United States, and then petitioners presumably would claim that their habeas remedy is ineffective. Yet for the reasons previously stated in this letter, the essential premise of petitioners' claim—even if not their Article III case—has indeed disappeared. In these circumstances, prudential concerns suggest that the Court should not now rule on the legality of petitioners' continued custody at Guantanamo Bay.

5. Alternatively, if this Court believes a dismissal is not appropriate, an order to vacate and remand may be so. If petitioners have a claim to be brought to the United States in the current circumstances, it is different from the one they presented to the court below and to this Court—*i.e.*, that transfer to and release in the United States is the only possible means by which they could leave U.S. custody at Guantanamo Bay. As discussed above, petitioners have never presented any such alternative theory in support of a claim to release into the United States. To the extent that petitioners may now assert that they are entitled to an order of release in the United States even though they have received offers of resettlement in third countries, the government likely would argue that they have not preserved that argument. But if the Court believes that petitioners may have preserved such a claim, it may wish to vacate the decision below and remand the case to the court of appeals to determine in the first instance whether petitioners have preserved any claim of a right to be released into the United States when other nations were willing to accept them and, if

such a claim has been preserved, to address the merits of that claim. See, *e.g.*, *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 175 (2004). No court has addressed such questions, and this Court should not address them in the first instance. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one of "review, not of first view"); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

Sincerely,

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cc: See Attached Service List