IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID S. KHAN (ISN 10020), Petitioner, v. JOSEPH R. BIDEN, JR, President of the United States, et al., Respondents.	)	Civil Action No. 22-1650-RBW

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO HOLD IN ABEYANCE BRIEFING ON CERTAIN ISSUES

In their initial submission, Respondents asked that the Court hold in abeyance further briefing on the issues raised in the Petition for the Writ of Habeas Corpus in light of the Government's ongoing effort to transfer Petitioner and its authority to resolve his detention in a safe and orderly manner. *See* Resps.' Combined Response to Petition for Writ of Habeas Corpus and Petr's Mot. for Summary Order, and Resps.' Mot. to Hold in Abeyance Briefing on Certain Issues, ECF No. 19 ("Resps.' Mot."). In support, Respondents cited the well-established doctrine that the Court should not take up a constitutional issue ahead of the necessity of doing so, as well as the resources that might needlessly be expended should full briefing on the remaining issues raised in the Petition proceed even while Respondents work diligently to resolve Petitioner's detention. *See id.* at 33–36. Petitioner raises four objections in response, *see* Petr's Reply in Further Support of his Petition for Writ of Habeas Corpus and Mot. for Summary

Order Granting Writ of Habeas Corpus and Other Relief, and in Opp'n to Resps.' Cross-Mot. to Hold in Abeyance Briefing on Certain Issues, ECF No. 22 ("Petr's Opp'n"), but none of them have merit.

1. First, Petitioner argues generally that the habeas statute and the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), require prompt disposition of Guantanamo habeas cases. *See* Petr's Opp'n at 2, 12–13. But these general authorities, addressing the litigation of the merits of a habeas case, offer little guidance as to whether briefing should proceed in a Guantanamo habeas case in which the Government already is working to resolve the Petitioner's detention by transferring him to a third country as quickly as practicable. The D.C. Circuit's resolution of *Kiyemba v. Obama* suggests that it should not. *See Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009), *vacated and remanded* 559 U.S. 131 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

As discussed in Respondents' Motion, *Kiyemba* was a Guantanamo habeas case in which the Court of Appeals reversed the district court's order that the petitioners be brought to the United States. *See* Resps.' Mot. at 19. The Court of Appeals in that case reasoned: "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. Nor do we have the power to require anything more." 555 F.3d at 1029. The Court so held having looked to various facets of *Boumediene* throughout its opinion, and with the concurrence even having noted "[t]he excellence of habeas corpus consists in the easy, *prompt*, and efficient remedy afforded for all unlawful imprisonment." *Id.* at 1037 (Rogers, J. concurring) (quotations and alterations in original omitted) (emphasis added).

Of course, Respondents do not suggest that Petitioner's situation is identical to that of the Uighur detainees in *Kiyemba*; indeed, unlike Petitioner here, the petitioners in *Kiyemba* had a habeas writ from the District Court in hand. If, even in a case where petitioners whom the Government determined should no longer be detained as enemy combatants and who already possessed a writ of habeas corpus, the D.C. Circuit held that the Court lacked the power to require the Government to do anything more than work in good faith to try to resettle them, logic would dictate the same conclusion as to a petitioner whom Respondents are trying to resettle now that he has finished serving his criminal sentence.

Alongside their motion, Respondents submitted the declaration of Ian C. Moss, Deputy Coordinator for Counterterrorism in the Bureau of Counterterrorism at the U.S. Department of State, who discussed the intensive diplomatic effort underway to identify an appropriate resettlement country for Petitioner, including outreach to eleven different countries and subsequent follow up with certain governments at senior levels. *See* Moss Decl., ECF No. 17-4, ¶¶ 6–11. Petitioner acknowledges that these efforts have been "substantial" and does not dispute that the Government is currently treating with urgency the effort to transfer him. Petr's Opp'n at 1, 6. Given that the parties agree that the Government "is continuing diplomatic attempts to find an appropriate country willing to admit petitioner[]," *Kiyemba*, 555 F.3d at 1029, the D.C. Circuit's conclusion in *Kiyemba* that the Court there lacked "the power to require anything more," *id.*, suggests that, at a minimum, a stay of further briefing on the Petition is appropriate at this time, and that the Court should instead order ongoing monthly status reports as Respondents have proposed.

2. Petitioner also speculates as to Respondents' motives for seeking to hold further briefing in abeyance, concluding that Respondents "do not want the Court to rule on the legality of Petitioner's continued imprisonment because they fear such a ruling could imperil their law-of-war arguments in other areas, including where their ability to use force may depend on the continuation of an armed conflict with Al Qaeda." *Id.* at 13. Petitioner overlooks that all three courts to have addressed the issue within the past year have found that the armed conflict continues. *See* Resps.' Mot. at 35 n. 14 (collecting cases). The reasons for Respondents' position were stated in their initial brief: It is well established that a Court should not take up a constitutional issue unless it is necessary to do so. Nor should the Court's and the parties' resources be expended on novel issues of statutory interpretation and international law, when it is not disputed that Respondents currently are working towards the very result that Petitioner seeks, transfer from Guantanamo Bay to a third country.

3. Petitioner additionally argues that the Court should take up the remaining issues raised in the Petition based on the total length of his confinement, including prior to his sentence, and the conditions that he alleges he previously endured. *See* Petr's Opp'n at 13–14. The Court of Appeals rejected similar arguments that the petitioners in *Kiyemba* were entitled to relief "after all they ha[d] endured at hands of the United States," explaining that "[w]hatever the scope of habeas corpus, the writ has never been compensatory in nature." *See Kiyemba*, 555 F.3d at 1029. Furthermore, Respondents vigorously contest that Petitioner's current conditions of confinement are punitive.[1] And, in contrast to the period of detention found to have "become

[1] Respondents submitted information about the current conditions of Petitioner's confinement in the declaration of Colonel Matthew J. Jemmott, the Commander of the Joint

effectively indefinite" by the district court in *Kiyemba, see* 581 F. Supp. 2d 33, 38 (D.D.C. 2008) ("*Kiyemba*")—a case in which the Government had been working for over five years to resettle petitioners—here, just over five *months* have elapsed since the Convening Authority approved Petitioner's sentence.[2] Especially given that a portion of that time was needed to obtain important input from Petitioner's counsel and Petitioner himself to inform the resettlement process,[3] and that resettlements from Guantanamo to third-countries can be more diplomatically complex and require longer periods of negotiation than repatriations, *see* Moss Decl., ¶¶ 5, 6, the circumstances in this case support ordering the monthly status reports that the Government proposed, rather than fully litigating all the issues raised in the Petition at this time.

Detention Group and Deputy Commander of Joint Task Force Guantanamo (JTF-GTMO), ECF No. 17-3. As Respondents noted in their initial submission, the original version of this declaration is classified. *See* Resps.' Mot. at 1 n.1. The parties are continuing to confer regarding the entry of an appropriate protective order addressing the handling of classified and sensitive information in this case, and an unredacted version of this declaration and the Declaration of Ian Moss submitted alongside Respondents' Motion, *see supra* 3, will be submitted to the Court and opposing counsel upon entry of such an order.

[2] The district court in *Kiyemba*, like the district court in *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), *see* Resps.' Mot. at 26 n. 8 (discussing *Qassim*), built its analysis on reasoning subsequently criticized by the D.C. Circuit. *See* Resps.' Mot. at 26 n.8, 31–32. The Court of Appeals having removed the very foundation upon which the district court built its test, the district court's decision in *Kiyemba* can offer no guidance to the Court in this case.

[3] After the Convening Authority's decision fixed the length of Petitioner's sentence, Respondents requested input from Petitioner's counsel regarding resettlement preferences to aid the State Department's efforts, which Petitioner's counsel provided only several weeks later. Against that backdrop, Petitioner's insistence that the length of his sentence was never in doubt, *see* Petr's Opp'n at 6–7, is puzzling; by the terms of Petitioner's pretrial agreement, the length of his sentence was fixed only upon the Convening Authority's approval, *see* Resps.' Mot. at 6–7, 16, and, indeed, weeks elapsed after the Convening Authority's decision before counsel provided their input into the resettlement process.

4. Finally, Petitioner insists that the Court should proceed to full briefing of the issues raised in the Petition and grant the writ in this case because, in three other cases, detainees were transferred after their respective habeas petitions were granted. *See* Petr's Opp'n at 14–15 (citing the cases of Haroon Gul and those of the Uighur detainees). Respondents have explained that Mr. Gul's situation was not comparable to Petitioner's case, and, indeed, that the situation of each detainee subject to transfer is unique. *See* Resps.' Mot. at 22–23. Furthermore, contrary to Petitioner's implicit suggestion that issuance of the writ is necessary to end his detention, there has been no writ issued in the vast majority of cases in which detainees have been transferred from Guantanamo Bay. And, as noted, resettlements from Guantanamo to third-countries are more diplomatically complex and require longer periods of negotiation than repatriations.

In the instant case, the Government already is giving a high priority to effecting Petitioner's transfer because, *inter alia*, it is in the Government's national security interests to do so to encourage cooperation by individuals accused of acts of terrorism or other offenses under U.S. law. *See* Resps.' Mot. at 2, 23. As explained in Respondents' Motion, the primary obstacle to resolving Petitioner's detention in this case is the consent of a third country, and the Government is urgently working to secure that consent.

CONCLUSION

For all the reasons set forth herein and in Respondents' opening submission, the Court should hold in abeyance any further briefing on the issues raised in the Petition for Writ of Habeas Corpus, and instead permit Respondents to update the Court monthly regarding their efforts to find a suitable country in which to resettle Petitioner and thus conclude his detention.

Dated: August 22, 2022

Respectfully submitted,

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