

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AL-HALMANDY, <i>et al.</i> ,)	
)	
Petitioners,)	
)	Civil Action No. 05-2385 (ESH)
)	(Jawad, ISN 900)
v.)	
)	
BARACK OBAMA, <i>et al.</i> ,)	
)	
Respondents.)	
)	

**PETITIONER’S RESPONSE TO RESPONDENTS’ NOTICE THAT
RESPONDENTS WILL NO LONGER TREAT PETITIONER AS DETAINABLE
UNDER THE AUMF AND REQUEST FOR APPROPRIATELY TAILORED
RELIEF**

Last Friday, July 24, 2009, the Government finally conceded, over 42 months after Petitioner’s original petition was filed, that it has no authority to detain Petitioner Mohammed Jawad and that Mr. Jawad’s nearly seven-year detention by the United States has been and remains illegal. *See* Notice that Respondents Will No Longer Treat Petitioner As Detainable Under the AUMF and Request for Appropriately Tailored Relief (“Notice”) (dkt. no. 311). *See also* Resp’ts’ Memo. Regarding the Gov’t’s Detention Authority Relative to Detainees Held at Guantanamo Bay (dkt. no. 217) (asserting the AUMF as the sole basis for detention). Having made a “decision not to contest the writ,” Notice at 2, and having determined that Petitioner will no longer be treated as detainable, the only issue now before this Court is the appropriate relief to be granted. In *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008), the Supreme Court held that the Suspension Clause has full effect at Guantánamo, *id.* at 2663, and that “when the judicial power to issue habeas corpus properly is invoked the judicial officer must have

adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release,” *id.* at 2271. Having concededly subjected Mr. Jawad to years of torture and abuse, and unlawfully deprived him of his liberty for approximately a third of his life, this Court should reject this brazen attempt by Respondents to further prolong his detention. Where “the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his *immediate release.*” *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) (emphasis added).¹

Respondents recommend that the Court take two “considerations” into account when fashioning its relief: first, that the Attorney General has initiated a criminal investigation against Mr. Jawad based on evidence that was “not previously available for inclusion in the record,” Notice at 2; and second, that logistical considerations and financial constraints will require a period of “several weeks” to resolve. Notice at 2-4.

These “considerations” are nonsensical and the Court should disregard them. The insinuation that the evidence furnishing the basis for criminal prosecution is some fresh revelation that was discovered too recently to be included in the record is preposterous.

¹ The D.C. Circuit’s decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *pet’n for certiorari filed*, 77 U.S.L.W. 3577 (Apr. 3, 2009) (08-1234), is not to the contrary. Even if correct—and Petitioner believes it is not—*Kiyemba* addressed a totally different situation: where there was no basis to detain as an “enemy combatant,” but where the traditional habeas remedy of release would have meant release into the United States because the prisoners could not be sent home and no other country had yet been identified that would accept them. *Id.* at 1024. The D.C. Circuit’s decision rested expressly on the power of the political branches to control entry into the United States and the separation of powers concerns that would arise if a habeas court were to order the release of a Guantánamo detainee into this country. *Id.* at 1025-29. This case, by contrast, does not implicate the political branches power to control entry into the United States and attendant separation of powers concerns that underlay *Kiyemba*. The Afghan government has explicitly demanded Mr. Jawad’s immediate return. Any assertion by the Executive that this Court somehow lacks the power to order his release and return to Afghanistan would raise serious separation of powers concerns, flout principles of comity, and ignore the Supreme Court’s mandate that there is “no higher duty than to maintain [the writ of habeas corpus] unimpaired.” *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

As the dates of the reports in Respondents' Attachment A indicate, the Government has had possession of this evidence for several months. Indeed, everything in Attachment A was provided in discovery to military commission defense counsel in May, long before the Government filed its amended Statement of Material Facts on June 1, 2009. Nor can the DoJ attorneys plausibly plead ignorance. In fact, this is not the first time DoJ has used the existence of these materials to try and stall these proceedings: on May 26, Respondents' counsel sought a 30-day extension of the Court's Order of April 27 to produce task force discovery and file an amended Statement of Material Facts, citing the need to "confer with its client agencies" about possible criminal investigation and the existence of evidence that had "only recently been identified." Resp'ts' Mot. for an Extension of Time to Comply with the Ct.'s Apr. 27, 2009 Order 4 (dkt. no. 256). Having foregone multiple opportunities over the course of several months to introduce this "evidence," Respondents should not be rewarded with yet more delay.

These materials add little to nothing to the quantum of evidence previously produced by Respondents. Unsworn summaries of unsworn interviews are not admissible evidence in a U.S. federal court. Had Respondent actually produced one or more of these "eyewitnesses" at a habeas hearing on the merits, Petitioner's counsel were fully prepared to refute, rebut and impeach him or them. It is unclear why the Government is even mentioning "new" evidence and discussing potential criminal prosecution in the same document where they acknowledge they cannot prove even by a preponderance of the evidence that the Petitioner is detainable. Ultimately, the assertion that the Attorney General has at this late hour directed a criminal investigation is simply irrelevant to the Court's consideration. The Petitioner is, by the admission of the

Government, being held illegally, and must be released regardless of any pending investigation.

Respondents' second consideration—the logistical difficulties and financial constraints of transfer—is similarly contrived. Respondents note that the Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859 (2009), prohibits the use of appropriated funds to transfer a detainee from Guantánamo Bay until 15 days after the President has submitted a report to Congress including the detainee's name, a risk assessment, and the terms of repatriation. Notice at 2-4. In addition to this statutorily imposed 15-day delay, Respondents request “a period of several weeks to prepare Mr. Jawad's records so that they can be shared with the receiving government authorities and to engage with those authorities on logistical and other issues related to transfer arrangements.” *Id.* at 3-4. Respondents' claims on this front are without merit.

First, assuming *arguendo* that a statute obstructing the Executive from releasing an unlawfully detained individual for two weeks does not effect an unconstitutional suspension of the Great Writ,² the Appropriation Act's reporting requirements and 15-day clock are triggered only where the Executive uses appropriated funds. But Respondents can easily arrange for Mr. Jawad's repatriation in a manner that does not cost the U.S. Government a dime. All that is required of the United States is to allow a delegation from Afghanistan or from a neutral intermediary such as the International Committee of the Red Cross (ICRC) to fly to Guantanamo and pick him up, something that can easily

² Indeed, the Supplemental Appropriations Act cannot have altered this Court's authority to order the most central of habeas remedies: Petitioner's immediate release. It is well established that an act of Congress does not constrict the scope of habeas by implication. *See INS v. St. Cyr*, 533 U.S. 289, 312 (2001). *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (“The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an appropriations measure.”).

be arranged in 24 hours or less. By its plain text, such a transfer would not implicate the statutory requirements cited by Respondents. Second, the Government of Afghanistan has made it clear that it is prepared to receive Mr. Jawad immediately and unconditionally. *See* Decl. of Eric S. Montalvo, attached at Exhibit 1 (according to a high-ranking Afghan official, “if I have to pay for the plane out of my own pocket I will. That boy doesn’t need to stay at Guantanamo one day longer.”). Counsel for Petitioner have been engaged in ongoing discussions with high-level officials in the Government of Afghanistan and these officials have indicated there are no obstacles to an immediate repatriation. Finally, after seven years, Respondents have had ample time to prepare Petitioner’s records: they have known about the Afghan Attorney General’s official demand for his return since at least June 19. *See* Letter from Afghan Attorney General, Exhibit A to Pet’r’s Initial Traverse. The Government should have anticipated the current situation, since, in the Court’s words, “this case is riddled with holes. And . . . [t]he United States Government knows it.” July 16, 2009 Hrg. Tr. at 7:14-16.³ As the Court noted, “the U.S. Government has certainly known about the problems through the military commission. This was months ago.” *Id.* at 20:12-14.

Furthermore, the Government should already have compiled all available records in response to the Executive Order of the President of January 20, 2009, which directed the Inter-Agency Review Team (IART) to compile all available information about each detainee. Presumably, the Government has already done so, as it has informed the Court

³ In an excess of caution, the proposed relief requested below includes an order directing the Executive Branch to comply within 24 hours with any reporting requirements mandated as a condition of the use of appropriated funds. Immediate compliance with such requirements should be ordered even if the Court believes, as Petitioner’s counsel do, that such requirements are constitutionally impermissible, in order to put a maximum limit on the time that Petitioner might have to remain a captive of the United States.

that the IART has reviewed Petitioner's file and made a recommendation. The Government should be given no more than twenty-four hours to compile those records. "[T]he costs of delay can no longer be borne by those who are held in custody," *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), especially those whom the Government has conceded cannot lawfully be detained.

Contrary to Respondents' entreaties, the consideration that should guide this Court's relief is not the mythical logistical difficulties concocted by Respondents, but the urgency of returning this young man home to his family after nearly seven years of now admittedly illegal detention. Enough is enough.

Therefore, the Petitioner requests that this Court:

Grant the Writ of *Habeas Corpus* and order Respondents to release Petitioner from his current unlawful detention immediately;

1. Declare that Petitioner has been unlawfully detained and mistreated by the United States since December 17, 2002, and that his continued detention is unlawful;
2. Declare that based on the evidentiary record before this Court, including the materials belatedly⁴ provided in Attachment A of Respondents' July 24, 2009 Notice, Respondents have failed to meet their burden of establishing that Petitioner committed any acts which would authorize the United States to lawfully detain him, including the alleged acts of

⁴ And in contravention of the Court's direction that any attempt to supplement the record with new evidence be accompanied by an affidavit from counsel stating when they personally became aware of such evidence. *See* Order of July 17, 2009 at 2 (dkt. no. 303).

throwing a hand grenade and providing substantial support to terrorist groups;

3. Order that Petitioner be released to the custody of any authorized representative of the Government of Afghanistan or a neutral intermediary such as a representative of the International Committee of the Red Cross (ICRC) for transport and repatriation to Afghanistan;
4. Order that the United States—to include the Department of Justice, Department of State, and Department of Defense—take all necessary measures to facilitate the immediate transfer of Petitioner to the custody of the Government of Afghanistan or neutral intermediary such as the ICRC, including, but not limited to, providing clearances to personnel and aircraft overflight and landing permissions over and on U.S. or U.S.-controlled territory, including the Guantanamo Bay Naval Station, Cuba;
5. Order that Petitioner not be subject to shackling or hooding during his transfer and transportation back to Afghanistan;
6. Order that one or more of Petitioner's military or civilian counsel be permitted to be present during the transfer of Petitioner from U.S. to Afghan or neutral third party custody;
7. Order Respondents to cease all interrogations of Petitioner, direct or indirect and treat him humanely at all times;
8. Order Respondents, for whatever brief period Petitioner remains in U.S. custody, to offer a full range of social, educational, recreational and

- mental health services to Petitioner to assist in preparing him for reintegration into society;
9. Order Respondents to preserve all evidence relating to Petitioner's initial and on-going detention and treatment in U.S. custody;
 10. Grant such other and further relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the common law, the Constitution of the United States, federal statutory law, international law, the treaties to which the United States is a party and the law of war;
 11. Order that the Government report back to the Court concerning diplomatic and logistical efforts to transfer Petitioner within 24 hours after the entry of the Court's Order, and every 24 hours thereafter, until such time as Petitioner is repatriated to Afghanistan;
 12. Order that the Executive Branch comply within 24 hours with any reporting requirements mandated by law that condition the use of appropriated funds for transfer;
 13. Order that anyone who fails to comply with this order or fails to act with appropriate alacrity shall be held in contempt of court.

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