

IN THE SUPREME COURT OF THE UNITED STATES

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NAZUL GUL AND ADEL HASSAN HAMAD, PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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DONALD B. VERRILLI, JR.  
Solicitor General  
Counsel of Record

TONY WEST  
Assistant Attorney General

ROBERT M. LOEB  
BENJAMIN S. KINGSLEY  
Attorneys

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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QUESTION PRESENTED

Whether habeas petitions filed by individuals who were previously detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, but who have since been released from United States custody, are moot.

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No. 11-7827

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-42) is reported at 652 F.3d 12. The opinion of the district court (Pet. App. 1-24) is reported at 700 F. Supp. 2d 119.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2011. A petition for rehearing was denied on September 12, 2011 (Pet. App. 43). The petition for a writ of certiorari was filed on December 9, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners are aliens who were detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. They petitioned for writs of habeas corpus, and while the cases were pending, petitioners were transferred from United States custody to their home countries. The district court subsequently dismissed the petitions as moot. The court of appeals affirmed. Pet. App. 25-42.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President \* \* \* to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with that conflict, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

2. Petitioners, aliens who were detained at Guantanamo Bay under the AUMF, filed petitions for writs of habeas corpus. The petitions were filed before this Court held in Boumediene v. Bush,

553 U.S. 723 (2008), that the district court has jurisdiction to consider habeas petitions filed by Guantanamo detainees challenging the lawfulness of their detention, and proceedings were stayed pending resolution of that jurisdictional issue. Pet. App. 3.

In March 2007, petitioner Gul was transferred from United States custody to his home country of Afghanistan. Pet. App. 27. The district court sua sponte dismissed his petition as moot. Id. at 3.

In December 2007, petitioner Hamad was transferred from United States custody to his home country of Sudan. Pet. App. 28. After this Court decided Boumediene, petitioner's case was consolidated with those of other Guantanamo Bay detainees who had been transferred, and the district court invited the parties to brief the issue of mootness. Id. at 4-5. The government argued that the petitions were moot, and it submitted declarations from various officials, including Ambassador Clint Williamson and then-Deputy Assistant Secretary of Defense for Detainee Affairs Sandra Hodgkinson. C.A. App. 1110-1113 (Hodgkinson Declaration); id. at 1123-1130 (Williamson Declaration). The declarations explain that a Guantanamo Bay detainee is transferred only after a dialogue with the receiving government, the purpose of which "is to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure that the detainee will not pose a continuing

threat to the United States and its allies." Id. at 1111-1112. But once the transfer takes place, whatever security restrictions the receiving country may apply to a former detainee are at the discretion of the receiving country, and the United States relinquishes all legal and physical custody of the detainee and he "is transferred entirely to the custody and control of the other government." Id. at 1112. Accordingly, both petitioners are now beyond the legal and physical custody of the United States.

3. The district court dismissed the petitions as moot. Pet. App. 1-24. The court held that "petitioners are no longer 'in custody' of the United States," id. at 10, and that, to the extent petitioners suffer collateral consequences as a result of their prior detention, "each of these consequences is not redressable by a federal court," id. at 13. In particular, the court held that any restrictions on the former detainees that may be imposed by the governments of their home countries are imposed by "foreign government[s] pursuant to [their] own laws and not on behalf of the United States." Id. at 15 (quoting Kiyemba v. Obama, 561 F.3d 509, 516 n.7 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010)) (brackets in original).

4. The court of appeals affirmed. Pet. App. 25-42. The court held that a former detainee may not maintain a challenge to his prior detention if he is unable to "make an actual showing [that] his prior detention or continued designation burdens him

with 'concrete injuries.'" Id. at 33 (quoting Spencer v. Kemna, 523 U.S. 1, 14 (1998)). Petitioners argued that the Afghan and Sudanese governments had restricted their ability to travel, but the court explained that any such restrictions "are traceable to the act of a foreign sovereign," and therefore "any decision to lift those restrictions will depend upon an 'exercise of broad and legitimate discretion [a] court[] cannot presume either to control or to predict.'" Id. at 35 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)) (brackets in original). Petitioners also asserted that they have been placed on the "No Fly List," but the court observed that "there is no evidence in the record suggesting either [of petitioners] actually wishes to enter the United States," so that "the likelihood of either actually incurring the injury alleged is therefore exceedingly remote." Id. at 36. In any event, the court noted that, by statute, "any individual who was a detainee held at \* \* \* Guantanamo Bay" must be included on the No Fly List, 49 U.S.C. 44903(j)(2)(C)(v) (Supp. III 2009), such that even a favorable judicial decision would not redress the alleged injury. Pet. App. 36.

The court of appeals also rejected petitioners' argument that, as previously "designated enemy combatants," they are subject to attack or recapture under the laws of war. Pet. App. 39. The court explained that that argument was "speculative" because petitioners "apparently have no basis whatsoever for believing the

Government might pursue them because of their continuing designation (or for that matter, any other reason)." Ibid. The court similarly rejected petitioners' allegation of reputational harm, noting that an injury to reputation cannot save a case from mootness in the absence of some "tangible concrete effect" that is "susceptible to judicial correction." Ibid. (quoting McBryde v. Committee to Review Circuit Council Conduct, 264 F.3d 52, 57 (D.C. Cir. 2001), cert. denied, 537 U.S. 821 (2002)).

#### ARGUMENT

Petitioners renew their claim (Pet. 7-26) that, notwithstanding their release from United States custody, their habeas petitions are not moot. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals assumed, without deciding, that the mootness analysis in this case is governed by the standards applicable to ordinary habeas petitions. Pet. App. 30-31; see pp. 17-18, infra. Applying those standards, the court correctly held that, because petitioners have been released from United States custody, they must affirmatively demonstrate that they suffer continuing collateral consequences of their prior detention in order to show that their petitions are not moot. Pet. App. 31-33; see Spencer v. Kemna, 523 U.S. 1, 7-8 (1998). "In the context of

criminal conviction," this Court has observed that a "presumption of significant collateral consequences" is appropriate because it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," Id. at 12 (quoting Sibron v. New York, 392 U.S. 40, 55 (1968)). In other contexts, however, the Court has declined to presume collateral consequences from completed detention. See id. at 12-13; Lane v. Williams, 455 U.S. 624, 632-633 (1982). Instead, the Court has applied the principle that "it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." Spencer, 523 U.S. at 11 (internal quotation marks omitted).

Petitioners' prior detention was not based on a criminal conviction, but was under the AUMF. As a plurality of this Court explained in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." Id. at 518. It is "neither a punishment nor an act of vengeance," but "merely a temporary detention which is devoid of all penal character." Ibid. (quoting William Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920)). The court of appeals therefore correctly held that, even under mootness principles applicable in ordinary habeas cases, petitioners may maintain a challenge to their prior

detention only if they “make an actual showing [that their] prior detention or continued designation burdens [them] with ‘concrete injuries.’” Pet. App. 33 (quoting Spencer, 523 U.S. at 14).

Petitioners argue (Pet. 9-16) that the court of appeals erred in requiring them to demonstrate ongoing collateral consequences of their prior detention. According to petitioners, not only does the collateral-consequences doctrine apply in the circumstances of this case, but also, under that doctrine, the court should have placed the burden on the government to demonstrate that petitioners are not facing such consequences. For the reasons explained by the court of appeals, that argument lacks merit. Pet. App. 31-33. In any event, this case is an inappropriate vehicle for considering the appropriate allocation of the burden of showing collateral consequences (or a lack thereof). Under any standard, petitioners are no longer suffering any injury that could be redressed by a decision in their favor, and this case is therefore moot.

2. The court of appeals correctly held that, to the extent there are any collateral consequences of petitioners’ prior detention, those consequences could not be redressed in a habeas proceeding. Pet. App. 10-17. Petitioners’ challenges to that conclusion lack merit.

a. Petitioners emphasize (Pet. 17-18) that the government has described their transfer to their home countries as a “transfer” rather than a release. But petitioners do not allege that they are

being detained in Sudan or Afghanistan under the control of the United States. Indeed, they do not allege that they are being detained at all. Instead, Hamad asserts (Pet. 21-23) that the government of Sudan agreed to subject him to various conditions, such as limitations on travel. Even assuming that the government of Sudan has, in fact, imposed such conditions on Hamad, those conditions are not redressable in a habeas suit in a United States court.

As the government explained in declarations submitted to the district court, a Guantanamo Bay detainee is transferred from United States custody to another country only after a dialogue with the receiving government, the purpose of which "is to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies." C.A. App. 1111-1112. But once the detainee is transferred to the custody of the other government, he is no longer in the custody of the United States. Id. at 1112. Therefore, whatever the content of transfer discussions between the United States and Sudan before Hamad's transfer, any restrictions now imposed on him are imposed solely by Sudan pursuant to its independent sovereign judgments. Ibid. It follows that, if Sudan imposes any restrictions on Hamad under its

own laws, a federal court could not order the Sudanese government to lift those restrictions.

This Court has held that when justiciability “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” it is “the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). “[U]nadorned speculation” about a relationship between the challenged government action and the alleged third-party conduct “will not suffice to invoke the federal judicial power.” Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976). In this case, Hamad has not alleged that a United States court would have the authority to modify the behavior of the government of Sudan. Instead, he is asking the district court to issue an advisory opinion declaring his prior confinement invalid, in the hopes that the government of Sudan would take account of that ruling in determining how to treat him. But a ruling that the government had not sufficiently shown that a former detainee was lawfully held under the AUMF would not establish that the individual poses no threat, nor would it mean that he could not be prosecuted under the domestic laws of his own

country. It is entirely speculative how the government of Sudan would react to such a ruling.

Petitioners' own description of the relief they seek underscores these points. They suggest (Pet. 20) that the district court could "issue an order to the government to take all necessary and appropriate diplomatic and other steps to ameliorate the conditions of transfer and the enemy combatant designation." As the court of appeals explained, however, "[r]eframing the remedy that way \* \* \* does not alter the nature of the injury claimed and therefore does not cure [the] lack of jurisdiction." Pet. App. 35-36. Indeed, that formulation of the remedy merely highlights that petitioners seek judicial involvement not only in the sovereign affairs of a foreign nation, but see Munaf v. Geren, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to \* \* \* pass judgment on foreign justice systems."), but also in the foreign relations realm of the Executive Branch by mandating particular diplomatic steps it must take with a foreign government. By interfering with the ability of the United States to communicate in candor with a foreign government, the requested remedy would offend the separation of powers. See Kiyemba v. Obama, 561 F.3d 509, 515 (D.C. Cir. 2009) (noting that "[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and absolute," and that "[j]udicial inquiry into a recipient country's basis or procedures for prosecuting or detaining a transferee from

Guantanamo would implicate not only norms of international comity but also \* \* \* separation of powers principles") (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)) (first and second brackets in original), cert. denied, 130 S. Ct. 1880 (2010). Any conditions that may be imposed on petitioners by foreign governments therefore provide no basis for the continuing exercise of jurisdiction over their habeas petitions.

b. The court of appeals also correctly held that the alleged stigma resulting from prior detention does not mean that the habeas petitions are not moot. Pet. App. 39-40. As this Court explained in Spencer, only the "adverse collateral legal consequences" of prior detention are sufficient to avoid mootness, 523 U.S. at 12 (quoting Sibron, 392 U.S. at 55) (emphasis added), and even the stigma resulting from "a finding that an individual has committed a serious felony" is therefore insufficient, id. at 16 n.8 (quoting id. at 23, 24 (Stevens, J., dissenting)).

Petitioners err in arguing (Pet. 12-13) that the decision below conflicts with three cases in which courts held that stigma was sufficient to prevent mootness. In two of the cited cases, the petitioners faced actual legal consequences. In re Ballay, 482 F.2d 648, 651-652 (D.C. Cir. 1973) (explaining that petitioner's mental-health designation would prevent him from voting and create other legal disabilities); Justin v. Jacobs, 449 F.2d 1017, 1019 (D.C. Cir. 1971) (same). In the third case, Demjanjuk v.

Petrovsky, 10 F.3d 338 (6th Cir. 1993), cert. denied, 513 U.S. 914 (1994), the court of appeals invoked its "inherent power to protect the integrity of the judicial process" to allow the reopening of a prior habeas proceeding in order "to determine whether that proceeding had been tainted by fraud on the court or prosecutorial misconduct," id. at 356. The Sixth Circuit did not hold that stigma resulting from a criminal conviction, by itself, can prevent the mootness of a habeas proceeding challenging the legality of detention pursuant to that conviction. Even if it had so held, it could reconsider its position in light of this Court's subsequent decision in Spencer, making review of any conflict unnecessary at this time.

In any event, even if stigma were a sufficiently cognizable injury, it would not be redressable in this action. Petitioners assert (Pet. 13-15, 17-19) that they were transferred without having had their prior Combatant Status Review Tribunal (CSRT) "enemy combatant" status designation reviewed by a federal court, and they allude to the possibility that the district court could issue an order requiring the Executive to rescind that designation. But the constitutional habeas right recognized in Boumediene v. Bush, 553 U.S. 723 (2008), is the right of Guantanamo detainees to challenge the current lawfulness of their detentions. It is not a right to review of the detainee's prior designation by a CSRT. See id. at 783-784 (holding CSRT review an inadequate substitute for

habeas and making clear that the record to be considered in the habeas proceedings is not to be limited to the CSRT record). When a petitioner is released from United States custody, the core habeas issue of the lawfulness of his detention is moot. See Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody.”).

c. Petitioners also argue (Pet. 23-24) that their inclusion on the No Fly List is a collateral consequence of detention. That argument lacks merit. As the court of appeals observed, “there is no evidence in the record suggesting either [petitioner] actually wishes to enter the United States,” or that they would be admissible if they did. Therefore, the likelihood that either petitioner will be affected in any concrete way by his inclusion on the No Fly List “is exceedingly remote.” Pet. App. 36. Petitioners assert (Pet. 23 n.13) that the court’s “conclusion is unwarranted,” but their petition conspicuously omits any allegation that they do in fact intend to (or could lawfully) come to the United States, and that case-specific question would not warrant this Court’s review in any event.

Moreover, under 49 U.S.C. 44903(j)(2)(C)(v) (Supp. III 2009), the No Fly List must include “any individual who was a detainee held at the Naval Station, Guantanamo Bay, Cuba, unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies.” As

the court of appeals correctly held, an individual's inclusion under that provision does not turn on whether he prevailed in his habeas case or was previously designated an "enemy combatant," but rather on whether he was ever detained at Guantanamo Bay. Pet. App. 36-37. Because petitioners were in fact detained at Guantanamo Bay, they would be covered by the plain language of the statute regardless of any judicial determination of the lawfulness of their detention.

3. Even if petitioners could demonstrate that their habeas petitions were not technically moot, relief would still be inappropriate under the "equitable principles" that guide the exercise of habeas jurisdiction. Munaf, 553 U.S. at 693 (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)). In Munaf, this Court held that even where a United States citizen has constitutional and statutory habeas rights, "prudential concerns, such as comity and the orderly administration of criminal justice, may require a federal court to forgo the exercise of its habeas corpus power." Ibid. (internal quotation marks and citations omitted). A court possessing jurisdiction "is 'not bound in every case' to issue the writ" when equitable principles counsel against doing so. Ibid. (quoting Ex parte Royall, 117 U.S. 241, 251 (1886)).

In concluding that equitable principles barred the district court from issuing the writ, the Court in Munaf emphasized that the petitioners did not seek the core habeas remedy of release from

custody, but instead sought "a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." 553 U.S. at 693-694. The Court also observed that concerns about "interfering with a [foreign] sovereign's recognized prerogative to apply its criminal law," as well as "concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad," counseled against the continuation of the petitioners' habeas claim. Id. at 700.

Similar considerations are present here. As in Munaf, petitioners are not requesting the core remedy of habeas -- release from custody -- because they have already received that remedy. And as in Munaf, substantial equitable principles counsel against judicial interference with the actions of sovereign states and the Executive's communications with those states. In that context, allowing hundreds of former detainees to litigate the legality of their past detention would impose an unwarranted burden on the courts, on the military, and on intelligence agencies. While that burden is constitutionally required in the context of ongoing, long-term detention at Guantanamo Bay, once a detainee is transferred from United States custody, the constitutional imperatives animating habeas review no longer exist.

4. The court of appeals held the habeas petitions in this case are moot because petitioners cannot show that any redressable collateral consequences result from their former detention. Pet. App. 10-16. As explained, that holding is correct and does not warrant this Court's review. But review is also inappropriate for the additional reason that, unlike ordinary habeas petitions, the petitions in this case are based, not on 28 U.S.C. 2241, but directly on the Constitution. See Boumediene, 553 U.S. at 799 (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). In holding that Guantanamo Bay detainees have a constitutional entitlement to habeas to review the lawfulness of their detention in United States custody, this Court in Boumediene explained the basic historical contours of the habeas right, emphasizing that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." Id. at 779. The Court repeatedly stated that the constitutional habeas right of Guantanamo Bay detainees is, at its core, a right to challenge the legality of detention. Id. at 771 ("Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention."); see id. at 745 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody.") (quoting Preiser, 411 U.S. at 484) (brackets in

original). Nowhere did the Court suggest that the constitutional habeas right it recognized -- a right to challenge the lawfulness of detention -- would extend to individuals already released from United States custody, or that the district court would have authority to grant relief to such individuals. Because petitioners are no longer in United States custody, the constitutional habeas right recognized in Boumediene does not extend to them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General

TONY WEST  
Assistant Attorney General

ROBERT M. LOEB  
BENJAMIN S. KINGSLEY  
Attorneys

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