No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

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

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QUESTION PRESENTED

Whether a federal court exercising its *habeas* jurisdiction, as confirmed by *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years in the Guantánamo prison, where the Executive detention is indefinite and without authorization in law, and release in the continental United States is the only possible effective remedy.

PARTIES TO THE PROCEEDING

Seventeen petitioners brought this appeal, seeking reinstatement of the release order issued by the district court in October, 2008. While *certiorari* was pending, Huzaifa Parhat, Abdul Nasser, Jalal Jalaldin, and Abdul Semet were transferred to Bermuda. After *certiorari* was granted, Ahmad Tourson, Adel Noori, Abdul Ghappar, Edham Mamet, Dawut Abdurehim, and Ali Mohammad were relocated to Palau. Petitioners Khalid Ali, Sabir Osman, Abdul Sabour, Abdul Razakah, Bahtiyar Mahnut, Arkin Mahmud and Hammad Mehmet remain in the Guantánamo prison.[1]

The Respondents are Barack H. Obama, President of the United States, Robert M. Gates, Secretary of Defense, Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force GTMO, Guantánamo Bay, Cuba, Colonel Bruce E. Vargo, Commander, Joint Detention Operations Group, Guantánamo Bay, Cuba.

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[1] Jamal Kiyemba was the next friend in the original *Kiyemba habeas* petition. He has since been released.

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PRELIMINARY STATEMENT

Two terms ago, in a *habeas corpus* petition brought by aliens held in the Guantánamo prison, this Court held 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." *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229, 2271 (2008). Four months later, a judicial officer tried to apply this ruling in the Uighur cases. The government conceded that there was no legal basis to detain the Uighurs, and that years of diligent effort to resettle them elsewhere had failed. Seven years into their imprisonment at Guantánamo, there was no available path abroad to the release *Boumediene* described. At that point the judicial officer directed that the Petitioners be brought to his court room to impose conditions of release. The court of appeals reversed in the decision below, *Kiyemba v. Obama*. Pet.App.1a.

Seven of these men are still stranded in the Guantánamo prison more than a year later. Hobbled by the decision below, *habeas* judges in other cases have issued encouragements to diplomacy. Largely these have failed, and in some cases the government has antagonized the home country with the freight of release conditions. The result is stasis, and the failure of *habeas corpus* as an "indispensable mechanism for monitoring the separation of powers." *Boumediene*, 128 S. Ct. at 2259.

At Guantánamo, where winners and losers remain, *habeas corpus* is an academic abstraction. Imprison-

ments drag deep into the eighth year, doubling the detentions of real enemies in past conflicts. The calendar rebukes the ancient boast of the Judicial Branch that *habeas* is a "swift and imperative" remedy. *See, e.g.*, *Price v. Johnston*, 334 U.S. 266, 283 (1948), *abrogated on other grounds*, *McCleskey v. Zant*, 499 U.S. 467, 483 (1991). Life in that iconic prison is unperturbed by this Court's decrees. Each night, while armed military police patrol the fences, alleged enemy combatants bunk down not far from men who, the Executive concedes, never were our enemies at all.

OPINIONS BELOW

The district court's decision (Pet.App.38a) is reported at *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The decision of the court of appeals (Pet.App.1a) is reported at *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

JURISDICTION

The court of appeals entered judgment on February 18, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The relevant constitutional and statutory provisions are set forth in Appendix D of Petitioners' Appendix. Pet.App.75a. Additional statutes discussed herein are contained in the Addendum hereto.

STATEMENT OF THE CASE

A. Factual And Procedural Background

Seized in error in the fog of the Afghanistan war, the Uighurs are non-enemy civilians. They belong to a Muslim minority from the "other Tibet,"[1] the Xinjiang Uyghur Autonomous Region of far-western China, long oppressed by the communist regime. Pet.App.40a; Joint Appendix ("JA") 25a, 70a, 113a. Six of the remaining prisoners, fleeing that oppression, made their way to a Uighur village in Afghanistan. Pet.App.40a. The other, Arkin Mahmud, left home to find his brother (then living in the village), and got as far as Kabul. *See* Decl. of Joseph S. Imburgia at Encl. (3), *Amahmud v. Bush*, No. 05-1704 (D.D.C. Sept. 21, 2005) [dkt. no. 9-4]. No Petitioner contemplated or participated in any conflict with U.S. or coalition forces, or had any connection with the September 11, 2001 attacks. *See* Pet.App.2a-3a; *see also Parhat v. Gates*, 532 F.3d 834, 835-36 (D.C. Cir. 2008) ("It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies.").

This case presents an unusual consensus: the jailer agrees that the prisoners ought to be free. The Executive was ambiguous about this for years, publicly litigating while privately encouraging allies to resettle the men. *See* Pet.App.49a; Classified Declarations ("Class.Decls."), Tab A ¶ 6, Tab B ¶¶ 7, 9-10, Tab C

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[1] *See* Matthew Teague, *The Other Tibet*, NAT'L GEOGRAPHIC, Dec. 2009, at 30.

¶¶ 3-4. In 2009 it dropped all pretense, urging release on small allies such as Bermuda and Palau.

The parties agree that Petitioners cannot be repatriated to China or any country that would render them to China, because their avowed separatism would likely result in torture or worse. JA 176a (citing State Department reports), 180a-181a (citing Department of Defense News Transcripts and related news reports); *see also Parhat*, 532 F.3d at 838. The record evidences extensive diplomatic resistance from China to resettlement abroad and failed efforts over six years to obtain asylum from more than 100 countries. Pet.App.48a-49a & n.2, 59a-60a; Class.Decls., Tab A ¶¶ 6, 8, Tab B ¶¶ 9-10, Tab C ¶ 3. No one disputes that in 2008, the United States was the only place in which the district court could order release.

2001

According to the State Department, China has long oppressed its Uighur minority. JA 567a (citing State Department reports). Following the murderous 9/11 attacks, China initiated a propaganda campaign against "East Turkistan terrorist forces," urging that an organization it called the "East Turkistan Islamic Movement" ("ETIM") was a terrorist organization, and that Uighur political dissidents were members of ETIM. JA 580a (citing Human Rights Watch report). The United States did not believe, however, that the group was a terrorist group, *see* JA 581a (citing statement of Francis X. Taylor, U.S. State Department Coordinator for Counter-terrorism), and the State Department omitted ETIM from its list of terrorist or-

ganizations, *id.* (citing State Department report on Foreign Terrorists).

Petitioners had been living in Afghanistan, and fled the U.S. bombing campaign. Pet.App.2a. Late in 2001, most Petitioners were seized in Pakistan and transferred to the Kandahar Air Base. Pet.App.41a; JA 28a-29a, 33a-34a, 164a-166a; *see also Parhat*, 532 F.3d at 837 (facts surrounding seizure and imprisonment of most Petitioners).

2002

The U.S. moved Petitioners, against their will, to the Guantánamo prison in approximately May, 2002. Pet.App.41a; JA 164a. They soon became pawns in negotiations concerning China's U.N. Security Council veto power and U.S. policy toward Iraq. In August, Deputy Secretary of State Richard Armitage met with Chinese officials, *see* JA 584a-585a, to "discuss[], with our Chinese friends, the fact that we will consult with them [about Iraq plans] as we move forward," JA 584a. A press conference included this exchange about Armitage's discussions with the Chinese:

> QUESTION: You mentioned the ETIM, and discussed putting it on the terrorist list. Does this mean that the U.S. considers the ETIM to be a terrorist organization, and would support putting it on a list of terrorist organizations?
>
> ARMITAGE: We did.

JA 585a. ETIM was then added to a State Department list. U.S. DEP'T OF STATE COUNTRY REPORTS ON TERRORISM 2006, ch. 6 (Apr. 30, 2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/82738.htm. De-

spite this accommodation, no court has ever found that Petitioners were members of ETIM. *See Parhat*, 532 F.3d at 844 (quoting military's determination that "no source document evidence was introduced to indicate . . . that the Detainee had actually joined ETIM").

A few weeks later, the U.S. admitted Chinese interrogators to interrogate Petitioners at Guantánamo. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN AND IRAQ at 183-84 & n.134 (2008), *available at* http://www.justice.gov/oig/special/s0805/final.pdf. In October, President Bush met with President Jiang to firm up China's acquiescence to U.S. Iraq policy. JA 586a (citing White House news release).

2003

U.S. efforts to curry the support of China and others came to naught when the U.N. rejected an Iraq incursion. Soon after, the U.S. military determined that each Petitioner was eligible for release. Pet.App.41a; JA 488a. Efforts were made to resettle the men abroad (although in proceedings below these efforts were not well defined). Pet.App.49a & n.2.

2004

Following the decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the twenty-two Uighurs at Guantánamo were put through Combatant Status Review Tribunals ("CSRTs").[2] CSRT panels initially found two of the

[2] The process was pretextual. Before the CSRTs even began, the U.S. was trying to resettle the men. *See* Interview by Roundtable

Kiyemba Petitioners to be non-combatants. JA 663a-667a (Anvar Hassan); Unclassified Pages From the Combatant Status Review Tribunal Administrative R. Vol. G (ISN 328) at 000002 n.1, *Parhat v. Gates*, No. 06-1387 (May 8, 2007) (Hammad Mehmet). At the Pentagon's insistence, these decisions were sent back for a second CSRT proceeding. *Id.* at 000001; JA 665a; *see also* Resp. to Omnibus Mot. to Stay Orders to File Certified Index of R. at Ex. A ¶¶ v-bb, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Oct. 4, 2007) (statement of anonymous CSRT hearing officer describing government efforts to reverse non-combatant determinations for Uighur detainees). Ultimately, all seventeen *Kiyemba* Petitioners were labeled "enemy combatants." Five of their Uighur companions, whose histories were identical for all relevant purposes, were designated non-combatants.[3]

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of Japanese Journalists with Colin Powell, Former Sec'y of State, U.S. Dep't of State, in Washington, D.C. (Aug. 12, 2004), *available at* http://usinfo.org/wf-archive/2004/040813/epf502.htm ("[T]he Uighurs are a difficult problem. . . . The Uighurs are not going back to China, but finding places for them is not a simple matter, but we are trying to find places for them."); *see also* Transcript of Daily Press Briefing Press Relations Office, Bureau of Public Affairs, U.S. State Dep't (May 13, 2004), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2004/32455.htm (disclaiming U.S. interest in detaining the Uighurs); Tim Golden, *For Guantánamo Review Board, Limits Abound*, N.Y. TIMES, Dec. 31, 2006, at A1 ("'We were shocked that they even sent those guys before the C.S.R.T.'s,' said one former national security official who worked on the matter. 'They had already been identified for release.'").

[3] The government's differing enemy combatant determinations were made despite its belief that all twenty-two Guantánamo Uighurs—including the non-combatants—were "identical," JA

2005

In March, 2005, the first Uighur *habeas* petitions were filed. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 199 (D.D.C. 2005). CSRTs had determined that the two *Qassim* petitioners were non-combatants. *Id.* When these determinations came to light in August, 2005, the government asserted that continued imprisonment was authorized by a so-called "wind-up" power, and assured the district court that it was engaged in "sensitive, ongoing diplomatic efforts" to resettle the petitioners abroad. *Qassim v. Bush*, 382 F. Supp. 2d 126, 128 (D.D.C. 2005).

The current Petitioners' CSRT panels classified them as enemy combatants. Each sought *habeas* relief in 2005, alleging that he was not an "enemy combatant," and that there was no other basis in law to support Executive detention.[4] Each case was stayed.[5] Of the seven prisoners who still remain, the government

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665a (citing statement of Deputy Assistant Sec'y of Defense for Detainee Affairs Matthew Waxman); *see also* JA 666a (government official states that the Uighurs "are all considered the same"), and despite its plans to transfer all the Uighurs to a third country "as soon as the plan is worked out," JA 666a-667a (quoting government official). Most of the men had been living together in the same Uighur village in Afghanistan before the 9/11 attacks. Pet.App.2a.

[4] *See* JA 22a-23a (Hammad Mehmet, Sabir Osman, Khalid Ali and Abdulsabour); JA 68a (Bahtiyar Mahnut and Arkin Mahmud); JA 110a (Abdul Razakah).

[5] *See* Order, *Kabir v. Bush*, No. 05-1704 (D.D.C. Feb. 22, 2007) [dkt. no. 62]; Minute Order, *Razakah v. Bush*, No. 05-2370 (D.D.C. Mar. 17, 2006) [not docketed]; Memo. Order, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Sept. 13, 2005) [dkt. no. 8].

filed *habeas* returns only for Abdul Razakah[6] and the brothers Arkin Mahmud and Bahtiyar Mahnut.[7]

Meanwhile, in December, the district court dismissed *Qassim*, ruling that the imprisonment of non-combatants was unlawful but that it could give no remedy. 407 F. Supp. 2d at 200-01, 203. A few days later, the President signed the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005) ("DTA"), creating the DTA remedy, and leaving open the question (which later would be resolved in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)), whether the DTA stripped *habeas* rights for current detainees.

2006

With their *habeas* cases stayed, the *Kiyemba* Petitioners began their fifth year of imprisonment. On the eve of the *Qassim* appellate argument, five Uighurs whom CSRTs had designated as non-combatants were hurried to Albania. *See Qassim v. Bush*, 466 F.3d 1073, 1074-75 (D.C. Cir. 2006).[8]

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[6] *See Kabir v. Bush*, No. 05-1704 (D.D.C. Sept. 21, 2005) [dkt. no. 9] (Arkin Amahmud and Bahtiyar Mahnut); *Razakah v. Bush*, No. 05-2370 (D.D.C. Mar. 30, 2007) [dkt. no. 55]. The government did not file *habeas* returns for Petitioners Hammad Memet, Sabir Osman, Khalid Ali or Abdul Sabour.

[7] Military transliteration rendered the brothers' surnames differently.

[8] The five have lived peacefully in Europe ever since. *See Frontline World, Albania: Getting Out of GITMO* (PBS television broadcast Jan. 27, 2009), *available at* http://www.pbs.org/frontlineworld/stories/albania801.

In October, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635 ("MCA"), stripping *habeas* jurisdiction. Petitioners sought review under the DTA.[9] At about this time, the Uighurs were transferred to Camp VI. *See* Jan. 20, 2007 Decl. of Sabin Willett, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. July 31, 2008) [dkt. no. 140-4] ("Willett Decl.").

2007

Petitioners' darkest days in Guantánamo came in year six, which they passed in the grinding isolation of Camp VI. *See* Willett Decl. ¶¶ 14-26. Confined in almost complete isolation, with almost no social interaction or exposure to sunlight, the men suffered deep despair. *Id.* Although many had filed for DTA relief, no actual review occurred. The government for almost a year refused to produce any records while it litigated what constitutes the "record on review" in a DTA case. *See Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007). Late in 2007, the government first produced its narrow version of the record. Parhat immediately moved for judgment, and other movants, including current prisoners Khalid Ali and Sabir Osman, soon followed.

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[9] *Mehmet v. Gates*, No. 07-1523 (D.C. Cir. Dec. 18, 2007); *Osman v. Gates*, No. 07-1512 (D.C. Cir. Dec. 14, 2007); *Abdul Sabour v. Gates*, No. 07-1508 (D.C. Cir. Dec. 14, 2007); *Ali v. Gates*, No. 07-1511 (D.C. Cir. Dec. 14, 2007); *Abdur Razakah v. Gates*, No. 07-1350 (D.C. Cir. Aug. 30, 2007); *Amhud v. Gates*, No. 07-1342 (D.C. Cir. Aug. 24, 2007); *Mahnut v. Gates*, No. 07-1066 (D.C. Cir. Mar. 15, 2007).

2008

Petitioners began their seventh year at Guantánamo. In June, this Court issued its decision in *Boumediene*. A few days later, the D.C. Circuit gave judgment for Parhat, finding that "he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States." *Parhat*, 532 F.3d at 835-36. It ordered the government to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.* at 851. It authorized Parhat to seek immediate release through *habeas corpus*. *Id.* at 854. "[I]n [a *habeas*] proceeding there is no question but that the court will have the power to order him released." *Id.* at 851.

At long last the *Kiyemba habeas* cases resumed. Pet.App.42a. Parhat moved for release, *see* JA 155a-156a, and the other petitioners joined, *see* Mot. of Abdul Sabour *et al*. For Immediate Release, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Oct. 1, 2008) [dkt. no. 172]. Judge Urbina gave the government additional time to file returns and brief its position. *See* Order, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Aug. 12, 2008) [dkt. no. 152]. Petitioners requested an evidentiary hearing to address any immigration or other theories that might arise. JA 390a-391a. The government strenuously objected. JA 401a-411a.

During the late summer and early fall, most Petitioners were at last released from Camp VI to less restrictive camps, including Camp Iguana, which permits social interaction and access to sunlight. JA 426a-427a, JA 439a n.3. It is nevertheless a prison, surrounded by fences, guard towers, and military police. *See* Dep't of

Defense Home Page, Camp Iguana Slides, http://www.defenselink.mil/pubs/pdfs/App12_Pt6.pdf (showing pictures of Camp Iguana surrounded by chain link fence and barbed wire). No telephone privileges[10] or visitors were permitted, all written communications were screened by military censors, and prisoners could meet privately with attorneys only if chained to the floor. JA 521a-523a.

The *habeas corpus* hearing of October 7, 2008, and the district court's release order are described below.

2009

On February 18, 2009, the D.C. Circuit reversed the district court's release order, in a decision summarized below. Pet.App.1a. As their eighth year in the prison began, Petitioners sought *certiorari* review.

B. Post-*Certiorari* Legislation

With the petition for *certiorari* pending, the Executive planned to resettle some of the Uighurs in Virginia. *See* Julian E. Barnes, *U.S. plans to accept several Chinese Muslims from Guantanamo*, L.A. TIMES, Apr. 24, 2009, *available at* http://articles.latimes.com/2009/apr/24/nation/na-gitmo-release24. As Defense Secretary Gates explained to Congress, "it's difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won't take any of them ourselves." *See Proposed Budget Estimates for the Fiscal 2009 War*

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[10] In 2009, Petitioners were for the first time granted permission to make telephone calls to family members.

Supplemental: Hearing before the S. Appropriations Comm., 111th Cong. (2009) (statement of Robert M. Gates). But political opposition to this plan was swift and highly charged, and the President shelved it.[11]

Instead, a rider was stapled to a must-pass defense funding bill, the Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859 (the "June Bill"). Enacted on June 24, 2009, it barred use of the defense funding to release into the U.S. anyone detained at Guantánamo on the date of the bill's enactment. *See* Addendum ("Add.") 1a. The June Bill expired on October 31, 2009, but became a model for the October legislation that followed.

On October 28, 2009, Congress separately enacted the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142 (the "DHS Bill"), and the National Defense Authorization Act for the Fiscal Year, 2010, Pub. L. No. 111-84, 123 Stat. 2190 (the "NDAA Bill"), each of which purports to bar the agencies in question from spending funds to

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[11] *See* Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig*, TIME, Nov. 19, 2009, *available at http://www.time.com/time/politics/article/0,8599,1940537,00.htm*; Michael Isikoff & Mark Hosenball, *Next Stop Nowhere*, NEWSWEEK, May 23, 2009, *available at* http://www.newsweek.com/id/199158; Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees; Administration Gives Up on Bringing Cleared Inmates to U.S., Officials Say*, WASH. POST, June 12, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061101210.html.

aid release of detainees or aliens who were present in Guantánamo on a specified day. *See* Add.2a-4a.[12]

C. The 2009 Transfers

Bermuda. On June 11, 2009, four petitioners (among them, Huzaifa Parhat) were resettled a few hours from Washington—in Bermuda.[13] The Bermuda four live peacefully near Hamilton, [14] working as groundskeepers at the Port Royal Golf Club (a favorite of American tourists where the Professional Golf Association recently held a tournament).[15] Two joined a community soccer club; all were guests of the U.S. Consul at a Fourth-of-July beach party; and all have met with Premier and Mrs. Ewart Brown.[16]

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[12] On October 30, Congress enacted the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904 (the "DOI Bill"). Add.4a-5a.

[13] Press Release, Dep't of Justice, U.S. Resettles Four Uighur Detainees from Guantanamo Bay to the Government of Bermuda (June 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/June/09-ag-574.html.

[14] Erik Eckholm, *Out of Guantánamo, Uighurs Bask in Bermuda*, N.Y. TIMES, June 14, 2009, *available at* http://www.nytimes.com/2009/06/15/world/americas/15uighur.html?_r=2&pagewanted=1&hpw.

[15] *Former Gitmo detainees work on Bermuda golf course*, U.S.A. TODAY, Aug. 5, 2005, *available at* http://www.usatoday.com/news/world/2009-08-05-gitmo-detainees-bermuda_N.htm.

[16] James Whittaker, *Uighurs swap Gitmo fatigues for Bermuda Shorts*, AFP, Oct. 20, 2009, *available at* http://www.google.com/hostednews/afp/article/ALeqM5ggzvviY7LycZeXRMH0eTsGz0DXXQ; Sam Strangeways, *A month after arriving, Uighurs wish is to become productive island citizens*, THE

Palau. The Republic of Palau is a tiny island nation lying some 500 miles east of the Philippines. Until recently it contained no Uighurs. The island has no Muslim heritage, although a small population of immigrants is Muslim. In June, 2009, Palau extended an offer to relocate temporarily up to twelve of the thirteen remaining prisoners while the U.S. continued to seek a permanent resettlement. Six offerees accepted. Four *more* months of prison followed this announcement, but at last the six left Guantánamo on October 31 and were graciously welcomed to the island by Palau's president on November 1.[17]

The United States continues to imprison seven Petitioners. Among them is Petitioner Arkin Mahmud, to whom Palau made no offer of temporary relocation.[18]

ROYAL GAZETTE, July 15, 2009, *available at* http://www.royalgazette.com/siftology.royalgazette/Article/article.jsp?sectionId=60&articleId=7d977b330030005.

[17] Their status remains uncertain. The Palauans have provided housing, an interpreter, English-language classes and job training, but no citizenship was conferred. Both the Palau and U.S. governments agreed that relocation there is *only temporary*. Jonathan Kaminsky, *Ex-Guantanamo detainees begin new lives in Palau*, ASSOC. PRESS, Nov. 3, 2009, *available at* http://abcnews.go.com/International/wireStory?id=8981107.

[18] Bahtiyar Mahnut (Arkin Mahmud's brother) advised that he would have taken the offer, but could not in good conscience abandon his brother in Guantánamo. Del Quentin Wilber, *2 Brothers' Grim Tale Of Loyalty And Limbo*, WASH. POST, Sept. 28, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/09/27/AR2009092703076.html.

D. The Decisions Below

1. The district court's decision

The government argued below that continued detention was justified by "inherent Executive authority to 'wind up' detentions in an orderly fashion," Pet.App.44a, and that *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), controls. Relying on *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), the district court concluded that any putative "wind up" authority had long since ceased, and that further detention had become unlawful. Pet.App.48a-50a.

A week before the October 7, 2008 *habeas* hearing, the government conceded that none of the Petitioners was an enemy combatant, and declined to submit returns. JA 426a-427a. It also presented evidence to the district court that it had diligently pursued resettlement abroad for years, and that no such resettlement was in prospect. *See* Pet.App.48a-49a & n.2, 59a-60a; Class.Decls., Tab A ¶ 6, Tab B ¶¶ 6-10, 13, Tab C ¶¶ 3, 6.

The government offered no other record to the district court. For no Petitioner did it file a return certifying grounds for imprisonment arising under the immigration laws, or any other laws. JA 426a-427a. No evidence was offered of dangerousness, involvement in terrorism, or criminal activity. The district court solicited a factual proffer of "the security risk to the United States should these people be permitted to live here." JA 468a. The government's counsel stated that he did not "have available to me today any particular specific

analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street." JA 470a. The government "presented no reliable evidence that [Petitioners] would pose a threat to U.S. interests." Pet.App.54a; *see also* Pet.App.23a.

The court received unrebutted evidence concerning arrangements for resettlement in the U.S. JA 445a-450a, 499a-505a. Local Uighur-American families offered a short-term bridge to more permanent arrangements coordinated by a Lutheran refugee group and leaders from the Tallahassee, Florida religious community. *Id.* A donor committed substantial financial support. JA 450a, 504a.

The court acknowledged the sovereign power of the political branches over immigration matters, Pet.App.53a, but concluded that *Boumediene* held that the writ is "an indispensable mechanism for monitoring the separation of powers," and commanded that "the writ must be effective," Pet.App.57a-58a (quoting *Boumediene*, 128 S. Ct. at 2259, 2269) (internal quotation marks omitted). "The political branches may not simply dispense with these protections, thereby limiting the scope of habeas review by asserting that they are using their 'best efforts' to resettle the petitioners in another country." Pet.App.59a (citing *Boumediene*, 128 S. Ct. at 2259). "[O]ur system of checks and balances is designed to preserve the fundamental right of liberty." Pet.App.60a.

The government offered undisputed evidence that its "extensive diplomatic efforts" to resettle Petitioners abroad had failed, and that there was "no foreseeable

date by which they may succeed." Pet.App.48a-49a & n.2, 59a-60a; *see also* Class.Decls., Tab B ¶ 13, Tab C ¶ 6. The court concluded that "[Petitioners'] detention has already crossed the constitutional threshold into infinitum." Pet.App.60a. The court ordered that Petitioners and the U.S. resettlement providers appear on October 10, 2008, to begin the process of fashioning appropriate release conditions ("Release Order"). Pet.App. 62a-63a; JA 499a-505a, 512a-513a. That hearing never took place, because the court of appeals entered an immediate stay. Pet.App.65a; JA 505a-507a.

2. The D.C. Circuit's decision

No Petitioner had ever sought an immigration remedy, and no Executive discretion (such as discretion to initiate removal) had ever been foreclosed. Nevertheless, the panel majority reconfigured Petitioners' *habeas* petitions into requests for judicially imposed refugee status and reversed. The majority rested chiefly on *Mezei* and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), and held that the district court erred because it "cited no statute or treaty authorizing its order" and "spoke only generally" of the Constitution. Pet.App.8a.

The Fifth Amendment's Due Process Clause, the majority held, "cannot support the court's order of release" because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." Pet.App.8a-9a. The majority cited its own pre-*Boumediene* decisions and this Court's decisions in *Zadvydas*, 533 U.S. at 693; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269

(1990); and *Johnson v. Eisentrager*, 339 U.S. 763, 783-84 (1950).

"Not every violation of a right yields a remedy, even when the right is constitutional," the majority said, citing sovereign immunity and political question decisions. Pet.App.10a. The majority concluded that the Judiciary had no "power to require anything more" than the jailer's representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Pet.App.15a.

Circuit Judge Rogers disagreed. This analysis, she wrote, was "not faithful to *Boumediene*." Pet.App.22a. It "compromises both the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause, art. 1, § 9, cl. 2, and the balance of powers regarding exclusion and admission and release of aliens into the country recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court." Pet.App.28a. The majority, she wrote, "recast the traditional inquiry of a habeas court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the habeas court is 'expressly authorized' to order aliens brought into the United States," and "conflate[d] the power of the Executive to classify an alien as 'admitted' within the meaning of the immigration statutes, and the power of the habeas court to allow an alien physically into the country." Pet.App.32a-33a.

Judge Rogers would have remanded to permit Respondents a further opportunity to show that the "im-

migration laws . . . form an alternate basis for detention." Pet.App.22a.

3. Subsequent "*Kiyemba* orders"

In thirty-nine cases decided since *Boumediene*, courts determined that thirty-one Guantánamo prisoners were not enemy combatants, and issued what came to be referred to as "*Kiyemba* orders," directing the government to engage in diplomacy to try to arrange the prisoner's transfer abroad. Those orders accomplished little. Saber Lahmar celebrated the *anniversary* of his *habeas* win in Guantánamo.[19] When *certiorari* was granted in this case, 19 habeas "winners" were still imprisoned.[20]

The Executive has complete license to withhold freedom after losing cases. Khaled Al Mutairi, a Kuwaiti who wished to return home, prevailed in *habeas*. *See* Order, *Al Mutairi v. United States*, No. 02-00828 (D.D.C. July 29, 2009) [dkt. no. 606]. More than two months later, he remained in the prison. Kuwaiti officials reported that the sticking point was U.S. insistence on detention restrictions *in Kuwait after his transfer*. *See* Decl. of David J. Cynamon, ¶¶ 8-9 [dkt. no. 661-2], *Al Rabiah v. United States*, No. 02-00828 (D.D.C. Oct. 13, 2009). The district court now

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[19] Richard Bernstein, *A Detainee Freed, but Not Released*, N.Y. TIMES, Sept. 23, 2009, *available at* http://www.nytimes.com/2009/09/24/us/24iht-letter.html.

[20] *Excerpts from rulings in Guantanamo Bay cases*, ASSOC. PRESS, Nov. 15, 2009, *available at* http://www.google.com/hostednews/ap/article/ALeqM5jocytVzilj Xjih05WNGayZWpcWMQD9C02K880 (summarizing post-writ history of other Guantánamo *habeas* cases).

reviews ancillary litigation regarding the *bona fides* of the government's diplomacy. *See* Order, *Al Rabiah v. United States*, No. 02-00828 (D.D.C. Dec. 1, 2009) [dkt. no. 675]. Al Rabiah remains in the prison. His *Kiyemba* order has accomplished nothing.

Following the decision below, the Executive assumed effective control of the judicial function in other ways. When a hearing was imminent or a government filing due, the Executive "cleared the prisoner for release," and then obtained a stay. Umar Abdulayev had prosecuted his *habeas* claim, *see* Br. of Appellant at 12-13, *Abdulayev v. Obama*, No. 09-5274 (D.C. Cir. Nov. 10, 2009), and with a decision looming, the Executive cleared him for release and obtained a stay, *id.* at 13, promising to pursue a diplomatic transfer. *See also* App. to *Abdulayev* Br. of Appellant at A.76-A.77. Judicial review was avoided, *Abdulayev* Br. of Appellant at 14, and six months later, Abdulayev is in Guantánamo.[21]

SUMMARY OF THE ARGUMENT

A. The decision below conflicts intolerably with *Boumediene*, the constitutional function of the Judiciary, and the constitutional role of the *habeas* remedy.

1. *Boumediene* recognized the critical place of the Judiciary in our system of checks and balances and the "indispensable" constitutional role of *habeas corpus* as the mechanism for maintaining "the delicate balance of

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[21]Counsel are informed and believe that this pattern has recurred repeatedly in 2009. The government generally designates the details as "protected information," which cannot be included in a public filing.

governance that is itself the surest safeguard of liberty." 128 S. Ct. at 2247.

2. In exercising its power and duty in *habeas*, the Judiciary calls the Executive jailer to account. The Executive must point to positive authority in law to justify detention, and where it cannot do so and there are no other means to procure freedom, the Judiciary must order that the prisoner be released.

3. This case is on all fours with *Boumediene*. When the government showed that the unlawful Executive detention could not otherwise be relieved, the *habeas* court appropriately exercised its core power to order produced in the court room prisoners over whom it had jurisdiction, to determine appropriate release conditions.

B. The theories offered by the government fail.

1. This case is not an immigration case. Neither a plenary power, nor the statutory power to exclude volunteers who come to the border, as articulated in *Mezei* and *Knauff,* authorizes the Executive's detention of the Petitioners, and if either purported to do so it would violate the Suspension Clause. The decisions in *Zadvydas* and *Martinez* preclude any assertion of an ancillary immigration indefinite detention power.

2. The Executive's continued detention of the Petitioners cannot be justified by a purported "wind-up power" or by the Court's decision in *Munaf v. Geren*, 553 U.S. __, 128 S. Ct. 2207 (2008). The government's suggestion that Petitioners have already been released is meritless.

3. Congress's 2009 legislation does not bar a remedy to Petitioners.

C. The Release Order should have been upheld on the independent ground that it was warranted by 28 U.S.C. § 2241(c), as a remedy for violation of Petitioners' rights under (1) the Due Process Clause of the Fifth Amendment to the Constitution, and (2) the Fourth Geneva Convention.

ARGUMENT

A. *Kiyemba* Must Be Reversed Because It Conflicts With *Boumediene* And Hobbles The Function Of The Judiciary In The Constitutional Design.

1. The separation of powers invests the Judiciary with the power and the duty to direct effective relief from unlawful Executive detention.

Balancing the power of the political branches with the liberty of the individual was crucial to the Framers, and animated the constitutional scheme. *Boumediene*, 128 S. Ct. at 2246. Judicial *habeas* power was critical to this balance; it designated the apolitical branch to check the historic proclivity of political branches for depriving liberty. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

Article III and the Suspension Clause preserved this critical checking power, "ensur[ing] that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest

safeguard of liberty." *Boumediene*, 128 S. Ct. at 2247 (internal quotation marks omitted). The check "serves not only to make Government accountable but also to secure individual liberty." *Id.* at 2246 (citing cases). The structural check performed by the Judiciary gave the writ a "centrality" that informs interpretation of the clause. *Id.* at 2244.

By removing remedy, the decision below removed this structural check and thus upset the separation of powers at the heart of our Constitution. This shows most acutely in the panel majority's parting observation that the only judicial power was the power to receive representations from the Executive jailer that it would try to end its unlawful imprisonment on its own terms, by appealing to the grace of foreign countries. Pet.App.15a. That conclusion left the Judiciary unable to discharge its constitutional checking function in a case in which it had jurisdiction. Far from protecting the legitimate sphere of the political branches, the decision below intolerably retrenched the constitutional authority of the Judiciary. *Boumediene*, 128 S. Ct. at 2247.

Events in 2009 showed how powerful this retrenchment was. At the time *certiorari* was granted, nineteen of thirty-one successful *habeas* petitioners remained imprisoned after (in some cases more than a year after) courts adjudicated their cases and granted them "relief." Ten of the prisoners who left Guantánamo in 2009 were petitioners in this case, transferred or relocated to avoid review. *See* Letter from Elena Kagan, Solicitor General, to Hon. William K. Suter, Clerk of Supreme Court of the U.S. (Sept. 23, 2009).

2. The constitutional design requires judicially ordered release where there is *habeas* jurisdiction and unjustified Executive detention.

a. *Habeas* requires the jailer to justify detention, not the prisoner to justify relief.

The panel majority held not that the Release Order was unwarranted on the record, but that the *habeas* court had no power at all. In this view, the Executive calls the Judiciary to account: "The critical question is: what law 'expressly authorized' the district court to set aside the decision of the Executive branch and to order these aliens brought to the United States and released in Washington, D.C.?" Pet.App.8a.

As Circuit Judge Rogers noted, this approach cannot be reconciled with *Boumediene's* observation that "[t]he [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." Pet.App. 22a (citing 128 S. Ct. at 2247). The burden of the common-law writ has always fallen on the jailer. He must point to positive law authorizing imprisonment; where he cannot, the prisoner prevails. Thus had the writ been understood before the Founding, *see, e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598-600 (2008) ("Halliday & White"), and thus has it been understood in this Court's decisions, *see, e.g.*, *Boumediene*, 128 S. Ct. at 2244 (common-law *habeas*, as protected by the Suspension Clause, did not depend on "constitutional rights" which did not exist); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of *habeas corpus* is

an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("[T]he great object of [*habeas corpus*] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment."). The "right" guaranteed by the Great Writ and the Suspension Clause, as authorities from Blackstone to *Boumediene* have said, is the "right" to a judicial remedy where the Executive cannot demonstrate "special permission" in positive law to imprison. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *133 (liberty is a "natural inherent right" which ought not "be abridged in any case without the special permission of law"). The *Habeas Corpus* Act of 1679, 31 Car. 2, c.2 (1679) "confirmed and strengthened the freedom of the individual against arbitrary arrest by the executive Government," so that "wherever the English language is spoken in any part of the world, wherever the authority of the British Imperial Crown or the United States prevails, all law-abiding men breathe freely." 2 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 290-91 (Cassell & Co. 2d ed. 1957).

The writ protected by the Suspension Clause thus presumes that every person is entitled to be free. It demands that the Executive explain the individual's imprisonment, and not, as the *Kiyemba* majority would have it, that the prisoner prove a personal right. "The question," wrote Chief Justice Marshall, "is what authority has the jailor to detain him?" *Ex parte Burford*,

7 U.S. (3 Cranch) 448, 452 (1806). In the early years of the Republic, federal *habeas* decisions invariably were framed this way. *See* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1187-88 (2007) (showing that in scores of early *habeas* decisions, courts discussed only the federal detention power, not whether the prisoner had an affirmative right to release); *Boumediene*, 128 S. Ct. at 2247.

b. Release is the remedy in *habeas*.

In *Boumediene*, the Court split over whether the petitioners had access, through the DTA, to an adequate substitute to the *habeas* remedy. But nine justices agreed about what *habeas is*: a remedial mechanism by which the Judiciary compels release.

The Court acknowledged the importance of the writ as a "vital instrument for the protection of individual liberty." *Id.* at 2246 (collecting cases). Because release is what the "instrument" achieves, the absence of an express release remedy in the DTA troubled the Court, *id.* at 2271, which saw in that absence one of the "constitutional infirmities" of the DTA regime, *id.* at 2272.

The Chief Justice differed sharply with the majority—*but not on the question of whether* habeas *requires release*. His opinion (joined by all of the dissenting justices) argued that the MCA's jurisdictional strip did not violate the Suspension Clause, in part, because the DTA *did* afford a release remedy. 128 S. Ct. at 2291-92. The majority concluded that a "*habeas* court must have the power to order the conditional[22] release of an

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[22] "Unconditional release" is unconditional "discharge from custody." *Ex parte Frederich*, 149 U.S. 70, 77 (1893). "Conditional release" requires the jailer either to discharge the

individual unlawfully detained," *Boumediene*, 128 S. Ct. at 2266, while the Chief Justice wrote similarly that "the writ requires *most fundamentally* an Article III court be able to hear the prisoner's claims and, *when necessary, order release*," *id.* at 2283 (emphasis added).

Thus four dissenting justices, like five in the majority, agreed that release is fundamental to *habeas* and that the power to order it is of the essence of judicial power. This conclusion had been well established before. *See, e.g., In re Medley*, 134 U.S. 160, 173 (1890) ("under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from wrongful confinement"); *Ex Parte Watkins*, 28 U.S. (3 Pet.) at 202 (Marshall, C.J.); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (a *habeas* court that finds imprisonment unlawful "can only direct [the prisoner] to be discharged"); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (*habeas* is "a remedy for [the] fatal evil" of "arbitrary imprisonments").[23]

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prisoner or retry (or re-sentence) him in a constitutional manner within a reasonable period of time. *See, e.g., Richmond v. Lewis*, 506 U.S. 40, 52 (1992); *Whiteley v. Warden*, 401 U.S. 560, 569 (1971). If no retrial follows a conditional release order, the *habeas* court must order the immediate discharge of the prisoner. *See Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) ("Conditional writs enable *habeas* courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release.") (Scalia, J., concurring).

[23] *Accord Wilkinson*, 544 U.S. at 79 (release "lie[s] . . . 'within the core of *habeas corpus*'") (quoting *Preiser*, 411 U.S. at 487); *St. Cyr*, 533 U.S. at 301 ("[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial")

The government has never explained how it could be otherwise. A *habeas* writ that did not conclusively end unlawful Executive imprisonment would protect neither the separation of powers, because it would not judicially check the Executive; nor the prisoner, who would obtain nothing from judicial review; nor the Judiciary, whose function would be (and, since *Boumediene*, largely has been) reduced to cheerleading, if not outright irrelevance. The writ and the constitutional plan require more of the Judiciary than to accept assurances from Executive jailers. *See Harris v. Nelson*, 394 U.S. 286, 292 (1969) (no higher duty of a court than "the careful processing and adjudication of petitions for writs of *habeas corpus*"; writ must "be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected"); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) (*habeas corpus* the "precious safeguard of personal liberty"; "no higher duty than to maintain it unimpaired").

(internal quotation marks and citation omitted); *Carbo v. United States*, 364 U.S. 611, 618 (1961) (the writ is "designed to relieve an individual from oppressive confinement"); *Price v. Johnston*, 334 U.S. at 283 (the writ "afford[s] a swift and imperative remedy in all cases of illegal restraint upon personal liberty").

3. The district court's order that Petitioners be produced in court for the fashioning of release conditions was necessary.

a. The core judicial power in *habeas* is to order production of the prisoners in the court room and provide a judicial remedy for unlawful Executive imprisonment.

What was the writ? "[L]iterally, a scrap of parchment, about one or two inches by eight or ten inches in size, directing the jailer to produce the body of the prisoner along with an explanation of the cause of the prisoner's detention." Halliday & White at 598. "*Habeas*" itself is the verb, "have, produce," conjugated in the second-person singular, expressed in the iussive subjunctive: "Thou shalt produce." The words literally require the jailer to produce the body in his court room. *See* BLACK'S LAW DICTIONARY 715 (7th ed. 1999). When the Constitution was framed, this remedy had frequently been used by aliens. "Hundreds of foreign seamen, caught up by press gangs in English, Caribbean, or even foreign ports, successfully used *habeas corpus* to gain release from naval service." Halliday & White at 605 n.72. In *DuCastro's Case*, 92 Eng. Rep. 816 (K.B. 1697), alien enemy status was raised as a bar to *habeas corpus*, and the court rejected it and ordered the prisoners released. Halliday & White at 606 n.76.

The district court had at least the power that existed at common law to provide a judicial remedy for unlawful Executive imprisonment. *Boumediene*, 128

S. Ct. at 2248; *St. Cyr*, 533 U.S. at 301.[24] The court exercised the irreducible minimum of judicial power—ordering that the bodies be produced in the place where jurisdiction lay for judicial investigation into appropriate conditions of release.[25] To condition the exercise of that power on the permission of the political branches would cripple the *habeas* judge's Article III function of making an independent determination of facts and law. *See United States v. Klein*, 122 U.S. (13 Wall.) 128, 146 (1872) (statute prescribing rules of decision to Judiciary in pending cases unconstitutional).

b. The undisputed facts made the Release Order necessary.

Judicial release power *surely* could not mean release in the United States, the court below thought: "[t]hat question was not presented in *Boumediene* and the Court never addressed it." Pet.App.15a. But *Boumediene* indeed addressed the question. The majority held, in a case involving aliens from the same prison, "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*." 128 S. Ct. at 2271 (emphasis added). The panel majority below did not discuss (or even

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[24] In *Boumediene*, the Court noted "the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." 128 S. Ct. at 2248; *see also* Jonathan L. Hafetz, Note: *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L. J. 2509, 2517 & n.56 (1998) (collecting cases).

[25] *See also* 28 U.S.C. § 2243 (cl.5) (contemplating production of body of prisoner).

mention) this holding,[26] but application of its plain words to the unusual record below shows that it controls.

The cases are on all fours. This case involves aliens without visas. So did *Boumediene*. Petitioners here were seized abroad by the Executive, as in *Boumediene*, transported, as there, and imprisoned in the same offshore prison where Boumediene himself was held. Like Boumediene himself, Petitioners cannot safely return home. Alike, too, were the situations of the *habeas* judges. Each found himself with jurisdiction of *habeas corpus* petitions in the summer of 2008. Each was bound to enforce this Court's ruling that the petitioners were "entitled to the privilege of *habeas corpus* to challenge the legality of their detention." *Boumediene*, 128 S. Ct. at 2262. In this case, the government conceded that there was no basis in law to imprison. At that point the judge had authority to issue "if necessary, an order directing the prisoner's release." *Id.* at 2271.

Whatever case one might imagine in which a release order were not necessary,[27] the record the government

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[26] Judge Rogers noted it in the first sentence of her opinion. Pet.App. 22a.

[27] For example, where the Guantánamo prisoner seeks *habeas* relief for the jailer's failure to accord minimum protections required by treaty obligations, *see, e.g.*, Pet'r Falesteny's Second Supplemental Br. in Supp. of Mot. to Enforce Geneva Conventions, *el Falesteny v. Bush*, No. 05-2386 (D.D.C. May 7, 2009) [dkt. no. 1193], or succeeds, through *habeas*, in obtaining relief from transfer that would violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85; *cf. Munaf v. Geren*, 128 S. Ct. 2207, 2226 & n.6 (2008) (noting that no specific showing had been made of an in-

offered to the district court showed that the Release Order was necessary here, for *Boumediene* held that "the writ must be effective," *id.* at 2269, and only a judicial release order could make the writ effective in this case.[28] The government acknowledged that a transfer home would be unlawful. Brief for the Resp'ts in Opp'n at 4, *Kiyemba v. Obama*, No. 08-1234 (U.S. May 29, 2009) ("Cert. Opp'n"). The *government*—not the prisoners—showed that transfer was not available anywhere abroad. *See* Pet.App.48a-49a & n.2, 59a-60a; Class.Decls. at Tab A, ¶ 6, Tab B ¶¶ 11, 13, Tab C ¶ 6. For years the government sought to transfer the Petitioners to safe countries; for years the Petitioners had prayed for success. All efforts had failed.

To return to the district judge sitting in the Prettyman Court House, bound to enforce *Boumediene* in a case involving non-enemy aliens in the same prison, having the power to order conditional release and the "*duty* . . . to call the jailer to account," 128 S. Ct. at 2247 (emphasis added), the question was: where else could he "direct[] the prisoner's release," *id.* at 2271, but in his own court room? Only on the point of this necessity did the district judge order the prisoners produced for determination of release conditions. That order was the least intrusive remedy available to end

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tention to transfer in violation of the CAT), a release order would not be necessary to give effective *habeas* relief.

[28] Plainly this Court did not contemplate that nugatory release "orders"—*i.e.*, orders to foreign sovereigns outside the court's jurisdiction—were "necessary." Because it involved aliens from the same prison and no other *judicial* order actually procures the prisoner's freedom, *Boumediene* must mean that an order of release in the United States was within the *habeas* judge's power.

the imprisonment. No one has identified another way that the *habeas* court might have kept faith with its obligation to remedy the Executive's wrong.[29]

c. "*Kiyemba* Orders" are inconsistent with the judicial function.

The decision below left lower courts attempting to intrude into the President's diplomatic competence. The result has been unenforceable orders and uninterrupted Executive discretion.

The question of how to frame an order was settled by *Boumediene*'s pellucid holding that Judge Urbina had to have release power. When a prisoner prevails on the merits, the court should order that, within a fixed time,[30] the President must release him.

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[29] Adherence to precedent reinforces the vitally apolitical nature of the third branch. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) ("[*Stare decisis*] contributes to the integrity of our constitutional system of government, both in appearance and in fact."); *see Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Assoc.*, 450 U.S. 147, 151 (1981) (Stevens, J., concurring) (expressing "concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction"). While faithful stewards of the Constitution will continue to differ on difficult questions, the genius of *stare decisis* is to mine certainty from just such differences.

[30] Domestic *habeas* grants customarily result in actual freedom in mere days. *See* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.3, n.6 (5th ed. 2005). The time for compliance in a Guantánamo case would depend on the facts. Where the prisoner might safely return home, a week might suffice. Whether in more complex cases a longer period were appropriate would be within the competence of the *habeas* judge. In all cases a short time should be fixed.

No more need be specified. The deadline imposed by that order will induce the President, in almost every case where transfer is safe, swiftly to arrange for the transfer of the prisoner home.[31] Where the exonerated prisoner is stateless, the President can attempt to secure a third country willing to resettle him. If diplomacy fails within the time ordered, the prisoner must be released here, although that release would not limit the President's power to remove him later under the immigration laws, as discussed below. The precise time of the order would be fashioned by the *habeas* judge within the facts and circumstances of the case.

As 2009's history of stranded "winners" and ancillary litigation has shown, the alternative cedes to the Executive "the power to switch the Constitution on or off at will," *see Boumediene*, 128 S. Ct. at 2259, by selecting an offshore prison in the first place, and then controlling the diplomacy that follows judicial review.

B. None Of The Government's Theories Is Adequate To Bar The Remedy Of Release To Petitioners.

1. The immigration laws do not bar relief.

Below, the government rested on immigration-law theories, characterizing Petitioners' request as one for immigration here. *See* Cert. Opp'n at 13. But this has never been an immigration case. Petitioners did not seek admission. They asked only for release from a

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[31] That is what happened to Yaser Hamdi after a *habeas* court, on remand from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), ordered him produced in the court room. JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER, 155-56 (Simon & Schuster 2006).

prison to which they were brought in chains. If U.S. release is the only way to achieve that release, Petitioners are not responsible for the dilemma. Transfer to a safe haven abroad would have been welcome, and still would be welcome if initiated from the continental United States. Petitioners prefer U.S. release only to U.S. prison.

The issue below was narrow. No judicial power was claimed to grant admission, or limit the exercise, once Petitioners were released, of Executive removal. At a practical level, the question was where non-criminal civilians whom the government brought to the threshold should be located while the government attempted to remove them. Until another country accepts them, removable aliens often remain at large in the U.S. *See, e.g., Martinez,* 543 U.S. at 386-87.[32] The irony is that Petitioners present no threat to anyone (demonstrated by the Executive's encouragement of resettlement abroad and its sometime plan to bring them here), while the usual alien in this situation has committed a crime of some kind. *See id.* at 374.

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[32] *See also United States v. Hernandez-Arenado*, 571 F.3d 662 (7th Cir. 2009) (release within 14 days for sex offender because deportation not imminent); *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (alien released despite security-risk argument); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (further detention of mentally ill aliens with history of violence not permitted); *see also Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (alien who engaged in terrorist activities under 8 U.S.C. § 1182 releasable in six months).

a. *Mezei* and *Knauff* provide no basis to deny release here.

The government relied on *Mezei*, the 5-4 McCarthy Era decision that stranded Ignatz Mezei at Ellis Island,[33] and *United States ex rel. Knauff v. Shaughnessy*. Neither case acknowledges a *detention* power *per se*; each involves Executive power to *exclude* those who come voluntarily to the border, but are barred by statute from accomplishing their objective of formal immigration admission.

Mezei did not arrive as the President's captive. He left the U.S. voluntarily, returned voluntarily, and sought the immigration remedy of admission. *Mezei*, 345 U.S. at 207. He was excluded by Executive officials, *id.* at 208, who invoked statutory authority. The war bride Ellen Knauff also came voluntarily, and her exclusion was similarly authorized by statute. *Knauff*, 338 U.S. 539-40. Though poignant, each case structurally was a collateral attack on an exclusion order issued against a volunteer, under the Executive's congressionally delegated immigration powers. Because Mezei voluntarily presented himself for admission at the border, and his exclusion was expressly authorized by

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[33] *Mezei* has been widely criticized. Chief Justice Warren thought it "intolerable," *see Trop v. Dulles*, 356 U.S. 86, 102 n.36 (1958), and it has been called the "nadir of the law with which the opinion dealt," *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981). The Principal Deputy General Counsel of the Department of Homeland Security once wrote (while a law professor) that its doctrine is "scandalous . . . deserving to be distinguished, limited, or ignored." David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983).

statute, the case implicates only the exclusion power as applied to volunteers. *Mezei*, 345 U.S. at 210-11 (quoting statutes).

Justice Clark's majority opinion never refers to Mezei's plight as "detention," laboring to describe it as something else. *See, e.g.*, *Mezei*, 345 U.S. at 207, 213 ("harborage," "temporary haven," and "exclusion"). While perhaps elusive to historians, this distinction was essential to the holding, and thus to the case's precedential force. It affords a second way to harmonize the case with *Boumediene*, which is that the case did not address detention at all.

Unlike these Petitioners, Mezei really was "free to leave." He *left*—twice. *Mezei*, 345 U.S. at 208-09. Thus a much narrower separation-of-powers-problem was implicated in *Mezei* and *Knauff* than is here.[34] The government's concern—a legitimate Executive concern—was that if volunteers could claim admission by beaching themselves, enemies might secure that beachhead. *Id.* at 215. That concern does not arise when the prisoner is not an enemy, nor when the Executive forces him within the court's jurisdiction. Because stranded volunteers are the authors of their predicament, that predicament is distinguishable from the *unilateral* Executive detention that, as *Boumediene* holds, gives rise to judicial power to direct release.

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[34] Criticism of the case often focuses on the lamentable process that Mezei and Knauff received from the secret statutory review, and the fact that each had meaningful ties here. *See, e.g.*, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1052 (1998) (doctrine expands legal fiction "beyond decency").

A closer analogy is found in *United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947). Norwegian citizen and Quisling partisan Jacob Bradley fled Norway for Greenland, where he was seized by the Coast Guard, delivered to the Navy, and then brought to the port of Boston in October, 1941. With war still months away, there was no legal basis to detain him. Finding Bradley as awkward to categorize as the Uighurs have been, the government decided to treat him as an applicant for immigration. Under the fiction that he was an applicant who had made no entry, he spent years in immigration detention, landing at last on Ellis Island. 163 F.2d at 329.

Like Petitioners, Bradley was brought to and stranded at our threshold against his will. But no Executive authority over the border dissuaded the court from ordering Bradley's release. Judge Swan denounced the assertion of Executive authority in memorable terms. "The theory that an alien can be seized on foreign soil by armed forces of the United States Navy, brought as a prisoner to our shores, turned over to immigration authorities as being an 'applicant for admission to the United States,' held in custody by them for nearly six years, and then deported to [Norway][35] by virtue of the exclusion order savors of those very ideologies against which our nation has just fought the greatest war of history." 163 F.2d at 332.

Whatever its ideological savor, the President's escape from review in the court of appeals, on the basis of his own exclusion power, is an escape from *Boumediene*.

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[35] Evidently Bradley's Quisling affiliation made it unsafe for him to return to post-war Norway.

Mezei and *Knauff* do not overcome *Boumediene*'s holding that an alien without immigration status, captured by the Executive, brought to Guantánamo, and held in indefinite detention may seek relief, and that the *habeas* court must have the power to order his release.

b. Construing an immigration law to authorize detention in this circumstance would violate the Suspension Clause.

The government's theory is that it may capture civilians abroad, transport them to our threshold against their will, and then detain them indefinitely in order to "exclude" them from an entry they never sought in the first place. Interpreting exclusion power to immunize this kind of detention when the prisoners are, as here, within the jurisdiction of the *habeas* court, *see Boumediene*, 128 S. Ct. at 2241; *Rasul*, 542 U.S. at 484, would be barred under the Suspension Clause.

Boumediene voided a statute—section 7 of the MCA—that deprived petitioners of the *habeas* remedy. 128 S. Ct. at 2274-75. Interpreting an exclusion power in immigration law to bar release from Executive imprisonment where no statute positively authorizes detention would effect the same suspension of the writ that this Court found unconstitutional in *Boumediene*. *See also St. Cyr*, 533 U.S. at 300-05; *INS v. Chadha*, 462 U.S. 919, 943 (1983); Jonathan L. Hafetz, Note: *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L. J. 2509, 2520 (1998) ("If, as the Court has maintained, constitutional *habeas* must be defined by referring to the writ at common law, Congress, however plenary its power over

immigration, cannot gut the writ of its common law core without violating the Suspension Clause.").

c. No detention power grounded in positive immigration law was pleaded or proved, and remand was unwarranted.

Concluding that mere exclusion power was insufficient to justify these detentions, *see* Pet.App.31a, Circuit Judge Rogers nevertheless would have remanded for the *habeas* judge to consider whether the government's position could be saved by some positive grant of detention power in the immigration statutes, Pet.App.37a. The suggestion was that immigration issues came on late, and the government had no opportunity to address them. Pet.App.27a. This was unwarranted.

i. Pleading

Over more than three years, the government never made a return for any Petitioner grounding power to detain in an immigration law. This is not a technical quibble—Congress requires that the government "make a return certifying the true cause of the detention." 28 U.S.C. § 2243 (cl. 3). The government can hardly claim surprise by the immigration issue. It abandoned an "enemy combatant" theory months before the *habeas* hearing, when it conceded that it would not re-CSRT Parhat.[36] Two weeks later it made the same concession for four prisoners, including Sabir Os-

[36] Pet. For Reh'g at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008).

man and Khalid Ali.[37] On September 30, the government advised that all remaining Uighur prisoners would "be treated as if they are no longer enemy combatants." JA 427a.[38]

Immigration issues had been on the table since 2005 in any event. Two identically situated Uighurs litigated them in *Qassim*. 407 F. Supp. 2d at 201. And the government engaged with these Petitioners—months before the *habeas* hearing—on immigration issues. On July 22, 2008, Parhat explained why immigration law was not a bar to release. JA 185a-193a. On August 5, the government asserted immigration-law grounds to resist release, citing in particular 8 U.S.C. § 1182(a)(3)(B), and a plenary immigration power. JA 243a-244a. When Petitioners demanded an evidentiary hearing, *the government objected to the request*. JA 436a-437a. In short, for years the government had specific notice of the immigration issues. It did not simply fail to address them—it resisted all efforts of the Petitioners to address them. Remand—which neither party sought—was unwarranted.

ii. Plenary power

The core theory of the *Kiyemba* panel majority was that detention power could be located in plenary Ex-

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[37] *See* Government's Mot. to Enter J. from *Parhat v. Gates* in These Actions, With Modification, and to Remove from Oral Argument Calendar at 4, *Abdusemet v. Gates, et al.*, Nos. 07-1509, 07-1510, 07-1511, 07-1512 (D.C. Cir. Aug. 18, 2008).

[38] "The government's use of the Kafkaesque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants." *Qassim*, 407 F. Supp. 2d at 200.

ecutive control of the border—that is, in an immanent power separate from the Constitution or statute. Pet.App.4a-7a. The panel majority traced this power to *Chae Chan Ping v. United State*s (*"The Chinese Exclusion Case"*), 130 U.S. 581 (1889).[39] Pet.App.6a. The precarious foundations of that decision eroded more than a century ago, *see Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (invalidating law authorizing imprisonment of any Chinese citizen in the U.S. illegally), and today have collapsed where detention power is claimed. As the Court explained in *Martinez*, "the security of our borders" is for *Congress* to attend to, consistent with the requirements of *habeas* and the Due Process Clause. 543 U.S. at 386 (emphasis added); *see also Zadvydas*, 533 U.S. at 696 (no detention power incident to border prerogative without express congressional grant, which is subject to constitutional limits); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("[T]he executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."); Pet.App.29a (collecting cases). The "whole volume" of history, to which the government refers, Cert. Opp'n at 14, actually describes "the power of *Congress*" over regulating admission and deportation, *see Galvan v. Press*, 347 U.S. 522,

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[39] A "constitutional fossil," *see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 862 (1987), *The Chinese Exclusion Case*, although relied on by the *Kiyemba* panel majority, was not cited by the government in its opposition to *certiorari*.

531 (1954) (emphasis added). The border gives the Executive no plenary power to detain.

If an extra-constitutional Executive border power existed, one might have expected some treatment of it in *United States v. Libellants of Amistad*, 40 U.S. 518 (1841), the last of many cases argued before this Court by John Quincy Adams. Aboard a schooner that arrived off Montauk, Long Island in August, 1839 were Africans. Kidnapped by Spanish slavers, they had killed the crew and seized control of the ship. At Spain's request, President Van Buren prosecuted treaty-based salvage claims for the vessel and, on the theory that the latter were slaves of Spaniards, the Africans themselves. The Executive asserted significant Article II interests grounded in foreign relations with Spain. Yet neither diplomatic concerns (no less urgent to the Executive of the day than the control-of-the-border interest asserted here) nor a vague notion of security (the Africans had committed homicides) dissuaded Justice Story from ordering the Africans released into Connecticut, thence to travel where they liked. 40 U.S. at 592-97.[40] Nor did any notion of plenary power over immigration, which received no mention at all.

iii. Statutory power

The government's failure to file a return asserting a statutory detention power was not inadvertent—no statute afforded detention power here either. For example, 8 U.S.C. § 1182(a)(3)(B) bars admission of

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[40] Their desire was always for home, and in 1842 they returned to Sierra Leone. MICHAEL S. LIEF & H. MITCHELL CALDWELL, AND THE WALLS CAME TUMBLING DOWN 105-06 (Scribner 2004).

aliens who, among other things, "*prepare or plan a terrorist activity*" or receive "military-type training" from a "*terrorist organization*." No evidence was offered to Judge Urbina that any Petitioner fit this description, and following the *Parhat* decision in June, the government expressly abandoned the opportunity to pursue such a theory in a second CRST. JA 426a-427a. 8 U.S.C. § 1226a(a)(6) authorizes indefinite detentions of aliens who *pose a threat to national security*. The Government offered no evidence of such a threat (and, indeed, resisted Petitioners' request for an evidentiary hearing to confront any allegations of this character, *see* JA 437a) and evidently discerns no such threat to civilians in Bermuda or Palau.

iv. If it existed, any immigration detention power would be limited and in this case was exhausted years ago.

Detention power incident to a proper grant of removal or other immigration power, if it existed at all, would be limited in any event. The right to release—even of concededly undocumented aliens—has trumped the assertion by the political branches even of indefinite detention powers related to a legitimate interest in removal and authorized by statute. *Zadvydas*, 533 U.S. at 689. In *Martinez*, the Court extended this proposition to aliens who, like Petitioners, had never made an entry under the immigration laws (and who, unlike Petitioners, were criminals). *See* 543 U.S. at 386-87. *Martinez* permitted only a presumptive six-month detention beyond the 90 days for aliens inadmissible under section 1182. *Id.*; *see* 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention"). Once removal is no longer "reasonably foreseeable," as happened

years ago in the Uighur cases, the Executive must release the alien. *Martinez*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

The government would limit *Martinez* to the construction of 8 U.S.C. § 1231(a)(6), but whenever a "'serious constitutional threat'" is raised by reading a statute to permit indefinite detention, the doctrine of constitutional avoidance applies. *Martinez*, 543 U.S. at 377, 380-81. Detention here initially was premised on one statute, the 2001 Authorization for the Use of Military Force, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), *see Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004), and now appears to be based on others, *see* Pet.App.17a (citing 8 U.S.C. § 1101(a)(16) (requiring visas)); *see also* Cert. Opp'n at 18 n.3 (citing 8 U.S.C. §§ 1182(f), 1185(a)(1)). Given the absence of an express detention power in the AUMF, the constitutional requirements imposed by the Suspension Clause suggest a maximum six-month limit after the government determines that the laws of war do not authorize detention. Constitutional avoidance also counsels strongly against construing a statute to impose a visa requirement on those whom the government forces here without one. *Cf. United States ex rel. Bradley v. Watkins*, 163 F.2d at 330-31.

Martinez did precisely what the *Kiyemba* panel majority contends no court had ever done. *See* Pet.App.15a. It directed the Executive to release into the population illegal aliens who had not entered and whom the Executive, on congressional authority, had imprisoned. The decision contradicts the argument that separation-of-powers concerns prohibit the Judiciary from intervening to force the release of inadmissi-

ble aliens against the will of the political branches. 543 U.S. at 386-87; *see also Boumediene*, 128 S. Ct. at 2271.

2. The government's other asserted theories are unavailing.

a. Wind-up authority

The government began asserting the so-called "wind-up authority" in 2005, and has continued to do so in 2009. In past conflicts the Executive needed time to accommodate the logistics of repatriation of prisoners of war. Pet.App.45a. This concept, as presented by the Executive, has only been applied to actual combatants—not civilians like Petitioners. *See* Pet.App.45a-50a. In any event whatever wind-up authority existed ended years ago, as Judge Urbina concluded, properly relying on *Zadvydas* and *Martinez*. Pet.App.45a-46a.

b. *Munaf*

The government also relies on *Munaf v. Geren*. Cert. Opp'n at 20-21. *Munaf* involved American citizens who traveled voluntarily to Iraq and stood accused by Iraq's sovereign government of committing crimes there. They were lawfully held by U.S. forces for the singular purpose of transferring custody to Iraq for prosecution. 128 S. Ct. at 2215-16. Far from seeking release, the *Munaf* petitioners sought an injunction prohibiting transfer to Iraqi custody. The case was an effort to use *habeas* as a special immunity of the American citizen abroad. Nothing like that is involved here. There is no cognizable comity interest of a foreign sovereign. Petitioners did not voluntarily transport themselves to their place of imprisonment, and they seek no protection from a recognized legal proceeding. *Cf. id.*

at 2228 (Souter, J., concurring). Properly understood, *Munaf* reinforces the district court's decision in this case, because it affirmed the principle that "[t]he typical remedy for [unlawful Executive] detention is, of course, release." *Munaf*, 128 S. Ct. at 2221 (citations omitted).

c. Petitioners have not been released.

The Executive's most audacious argument is that Petitioners *have been released after all*. Following proceedings before the *habeas* judge, the government began claiming that Petitioners were no longer "detained" but "housed," *see, e.g.*, Cert. Opp'n at 5, and are now "free to leave," *id.* at 13. These semantics blur a field that in sharper focus shows the Guantánamo prison surrounded by fences, razor wire, and armed guards.[41] The men are watched constantly, all communication with the outside world is strictly monitored and limited, visitors (apart from lawyers and the Red Cross) are forbidden, and even today every facet of their lives is controlled by the Defense Department. "Release" is not a difficult idea. As long as the prison gate is locked and the fence is patrolled, the prisoners are not released.

The *Kiyemba* panel majority mustered two further irrelevancies. It noted first that some rights have no remedy. Pet.App.10a. No *habeas* decision supports this observation. Freedom from unlawful Executive detention is a right *with* a remedy, the remedy is release, and it applies whenever the jailer cannot demon-

[41] A petitioner who attempted to "leave" Camp Iguana would almost certainly be shot. Imprisonment there also inhibits petitioners from effective resettlement discussions with third countries.

strate positive law justifying imprisonment.[42] *Boumediene*, 128 S. Ct. at 2266-67. The panel majority then fell back to its *ipse dixit* that the court's only judicial power was to accept the Executive jailer's assurances. Given this Court's holding the previous term, in a landmark case originating from the same prison, that the *habeas* judge must have release power, this was more than a little strange. For the proposition seemed to be that the only judicial power was to accept assurances that the Executive would continue to follow a path of proven failure. The real Executive "representation," as Judge Urbina recognized, was that no release was in prospect.

3. *Post-hoc* 2009 legislation does not provide a basis to withhold release.

While the *certiorari* petition in this case was pending, Congress enacted the June Bill. Add.1a. It has since expired. After *certiorari* was granted, Congress enacted three more bills—the DHS, NDAA and DOI Bills. Add.2a-5a. None of these acts may be construed to bar release in these cases.

As discussed above in the context of immigration statutes, a construction of the 2009 statutes that would raise serious constitutional problems must be rejected in favor of an alternative interpretation that is "fairly possible," and that avoids the constitutional problem. *St. Cyr*, 533 U.S. at 299-300 & n.12. Several canons reinforce this principle. A statute may be construed to apply only prospectively. *Hamdan*, 548 U.S. at 579; *St.*

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[42] As noted above, in both *Knauff* and *Mezei*, the Court concluded that the petitioner had no right to relief, and thus did not reach the remedy.

Cyr, 533 U.S. at 315-16; *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994). Courts will view constitutional deprivations through appropriations bills with particular skepticism. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (strong presumption that appropriations acts do not change existing law); *see also* LORRAINE C. MILLER, RULES OF THE H. OF REPRESENTATIVES, 111TH CONG. XXI(2) (2009) (prohibiting appropriations bills that change established law); S. COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE S., 111TH CONG. XV(4) (2009) (same). Most fundamentally, the Court will demand an unambiguous and express statement before concluding that Congress actually intended to suspend the privilege of *habeas corpus*. *St. Cyr*, 533 U.S. at 314.

Like the expired June Bill, section 552(a) of the DHS Bill bars the expenditure of funds to release into the United States an individual who is "detained" as of June 24, 2009 at Guantánamo. Add.2a. The bill includes no definition of "detained" or "detainee," but a reading that excludes persons who prevail in *habeas* review is consistent with the government's usage. At the time of enactment the government characterized the Uighurs at Guantánamo as "*previously detained*" and "*now* being *housed*" in a non-enemy combatant status. Cert. Opp'n at 1-2. This distinction is factually artificial, but it plainly informs the government's statutory semantics. To avoid constitutional infirmity, the DHS

Bill should be read to exclude from its scope any person who has prevailed in *habeas*.[43]

The NDAA Bill prohibits only the Secretary of Defense from spending appropriated funds to release noncitizens "located" at Guantánamo who are in the custody or control of the Defense Department or "otherwise under detention" at Guantánamo. Add.3a-4a. This bill would not affect those prisoners who had been surrendered to the custody of another agency in order to give effect to a judicial order.

The restrictions in the October legislation are expressly limited to the departments and agencies covered by those bills. *See* Add.2a (DHS Bill); 3a (NDAA Bill); 4a-5a (DOI Bill). The fact that Congress attached virtually identical riders to two separate agency-specific bills on the same day, with a third two days later, shows that Congress intended to limit the spending only of the agencies specified.

Most fundamentally, none of these Acts expresses an intention to deprive courts of the power to issue the release orders that *Boumediene* held they may give to a person who prevails in *habeas*. Congress confined itself to the many Guantánamo prisoners who have not prevailed in *habeas*. This construction makes particular sense in a political context in which the President had announced a broad intention to close the prison, and Congress's concern might be with the undifferentiated relocation of the prison population, including those properly held under the AUMF. To avoid the consti-

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[43] The funding limitation in the DOI Bill is substantially identical to the DHS Bill, although applicable to different, discrete agencies of the Executive Branch. *See* Add.4a.

tutional problem, it may be assumed that it was only to this general population, and only to extent of the identified agencies and budgets, that Congress referred.[44]

C. The District Court's Order Is Also Supported By 28 U.S.C. § 2241(c).

The *Kiyemba* majority ignored Petitioners' alternative argument that Judge Urbina had explicit power to grant release under 28 U.S.C. § 2241(c)(3), which gives "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" the "[p]ower to grant [the] writ," to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a),(c)(3). Four years ago, this Court held that there is jurisdiction over a claim brought by Guantánamo prisoners under this subsection. *Rasul*, 542 U.S. at 481. In "dictum well considered," *see Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring), the Court observed that the prisoners' allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'"

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[44] If construed to bar release of these Petitioners, the 2009 legislation would violate several constitutional provisions, including the Suspension Clause, *see Boumediene*, 128 S. Ct. at 2266, 2274 (voiding MCA § 7); the proscription against bills of attainder, *see* U.S. CONST. art. I, § 9 cl. 3; *United States v. Brown*, 381 U.S. 437, 462 (1965); *United States v. Lovett*, 328 U.S. 303, 317 (1946); and the Equal Protection Clause, *see Gray v. Sanders*, 372 U.S. 368, 380-81 (1963) (restriction of voting power based on group characteristics, such as location, unrelated to group interests, may violate the Equal Protection Clause).

Rasul, 542 U.S. at 483 n.15.[45] Here, both constitutional and treaty violations are presented.

1. Petitioners' imprisonment violates the Fifth Amendment Due Process Clause.

The *Kiyemba* majority held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," citing its pre-*Boumediene* decisions, and this Court's decisions in *Verdugo-Urquidez*, 494 U.S. at 269, and *Eisentrager*, 339 U.S. at 783-84. Pet.App.9a. This was error.

In *Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to a search, conducted in Mexico, of a Mexican resident who had no ties here. 494 U.S. at 274-75. The majority reached this unsurprising result through a rote application of *Eisentrager*. Concurring in the judgment, Justice Kennedy approached extraterritoriality differently. The case, he reasoned, fell in a line of cases stretching from *In re Ross*, 140 U.S. 453 (1891), through the *Insular Cases*, to Justice Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1, 74 (1957). These cases developed a functional approach to extraterritorial application of the

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[45] Section 7 of the MCA eliminated statutory *habeas* for Guantánamo prisoners "who ha[ve] been determined by the United States to have been properly detained as an enemy combatant." None of these prisoners is so held, and so the MCA would not apply in these cases, were it still the law. But *Boumediene* held that MCA § 7 unconstitutionally effected a suspension of the writ, 128 S. Ct. at 2274, and is void, *id.* at 2266. Section 2241 "govern(s) in MCA § 7's absence," *id.*, and affords Petitioners an affirmative statutory right of relief under both the Constitution and a treaty of the United States.

Constitution. The *Insular Cases* required the implementation of some, but not all constitutional guarantees in territories abroad. The test was whether the "conditions and considerations" of the application were consistent with the nature of the territory and the case. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 277-278 (citing *Reid*, 354 U.S. at 74 (Harlan, J. concurring)). In *Verdugo-Urquidez*, the Fourth Amendment's warrant requirement did not apply because it was obviously an impracticable and anomalous intrusion into Mexican affairs. 494 U.S. at 278 (Kennedy, J., concurring in the judgment).

This approach took hold in *Rasul* and again in *Boumediene*, where this Court rejected *Eisentrager*'s geographic formalism and applied a functional test to determine that the Suspension Clause is effective in Guantánamo and restrains the Executive's confinement of prisoners. 128 S. Ct. at 2261-62. Neither their citizenship nor their location places Petitioners entirely beyond the reach of the Constitution. *Id.* at 2262. Thus this Court has twice rejected, in *Rasul* and in *Boumediene*, decisions of the D.C. Circuit that the bright-line geography test governs, holding instead that a functional test applies. Rather than explaining why the functional test would not result in a release remedy in this case, the D.C. Circuit panel majority reapplied the geography test for a third time in *Kiyemba*.

Boumediene's holding addresses only the Suspension Clause. But application of its functional test leads inevitably to recognition of a due process liberty right for Guantánamo detainees that gives effective relief from indefinite Executive imprisonment, where the govern-

ment transports the prisoner to Guantánamo, unlawfully confines him there, and then pleads his want of a visa. Nothing about Guantánamo makes enforcement of this narrow due process liberty right "impracticable and anomalous." *Boumediene*, 128 S. Ct. at 2255. No other sovereign asserts a conflicting authority, and the reach of the remedy will never exceed the unilateral grasp of the Executive. The right claimed lies at the core of the Due Process Clause—the right be free from unlawful government detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 690; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Accordingly, the Due Process Clause of the Fifth Amendment is sufficient to accord to civilians like Petitioners a positive right of release, and section 2241(c)(3) gives them a private remedy for its infringement.[46]

2. Petitioners' indefinite imprisonment violates the Geneva Conventions.

Petitioners' continued imprisonment after the Executive conceded that they are not enemy combatants violates rights under a treaty of the United States—the Fourth Geneva Convention arts. 3, 132-35, 6 U.S.T. 3516. The government's violation of these custodial treaty provisions gives rise to a personal right under *habeas corpus* to the remedy of release. 28 U.S.C. § 2241(c)(3); *see Mali v. Keeper of the Common Jail of Hudson Cty., New Jersey*, 120 U.S. 1 (1887). In *Mali*, alien prisoners' *habeas* claims failed on the Court's review of the merits of the ship-board affray for which

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[46] Even were such a remedy not granted by statute, the Court would imply one pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396-97 (1971).

they had been arrested. But the Court first and specifically held that they had a private right to seek *habeas* relief. Because a "treaty is part of the supreme law of the United States," the power to issue writs of *habeas corpus* extends to prisoners held in violation of existing treaties, the Court held. *Id.* at 12, 17.

Articles 132-135 of the Fourth Geneva Convention provide for prompt release of civilians, and article 135 addresses the problem of the stateless refugee. As the commentary explains:

> It would be contrary to the spirit of the Convention if [the prisoner] could be forcibly repatriated when he feared persecution in his country of origin for his political opinions or his religious beliefs. In such a case, he would become a refugee, obliged to seek a new domicile in a country different from the one in which he is living. While awaiting the result of his efforts to find such a new domicile, the Detaining Power is bound by its humanitarian duty to tolerate his presence in the country on a temporary basis.

Commentary: Convention (IV) Relative to the Treatment of Protection of Civilian Persons in Time of War 519 (Jean S. Pictet ed. 1958).[47]

Continued detention also violates Common Article 3 (Article 3 of the Fourth Convention), which bars

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[47] Red Cross Commentary is "widely recognized as a respected authority on interpretation of the Geneva Conventions." *ACLU v. DOD*, 543 F.3d 59, 90 (2d Cir. 2008) (applying the ICRC Commentary to inform its application of the Fourth Geneva Convention to the treatment of tortured Iraqi detainees).

cruel or inhuman treatment of detainees. *See Hamdan*, 548 U.S. at 630. Treating civilians "humanely" requires compliance with Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977, which is "indisputably part of the customary international law." *Id.* at 634 (Stevens, J., plurality opinion). Protocol I provides:

> Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons *shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.*

Protocol I to the Geneva Conventions of 1949 art. 75 (emphasis added). Although Protocol I has not been separately ratified, its status as customary international law renders it an appropriate tool for the interpretation of Common Article 3. *See Hamdan*, 548 U.S. at 633 (Stevens, J., plurality opinion).

These release obligations are enforceable under 28 U.S.C § 2241(c)(3). The statute is not limited to citizens, being applicable to all "prisoners" in Executive custody. It affords a precise remedy that can be enjoyed only by a private litigant—*habeas* relief. It carves out a narrow class of persons—those in custody of the Executive in violation of a *treaty*. This narrowly describes persons like the aliens in *Mali,* 120 U.S. at 17, and the Petitioners here. Thus there is a private right of action—extended by Congress in this statute only to

habeas relief—against imprisonment that violates treaty provisions.

Section 5 of the MCA is no bar to this right of action. It provides, in relevant part, that:

> [n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a), 120 Stat. at 2631. There are hundreds of obligations in the Geneva Conventions—affording the prisoner of war rights to garden tools and musical instruments, for example. *See* Third Geneva Convention art. 72, 6 U.S.T. 3316. Section 5(a) appears to restrict private *habeas* claims based on breaches of such provisions.[48] But Congress did not extend this concept to release of civilians. In enacting MCA § 5(a), it might simply have amended section 2241(c)(3) to exclude the Geneva Conventions from the treaties at issue. But it left the language intact.

Nor, in contrast to the specific effective date provision in section 7(b), which Congress expressly applied *only* to the now-void "amendment to subsection 7(a),"

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[48] *See* Joint Statement by Senators McCain, Warner, and Graham on Individual Rights Under the Geneva Conventions *reprinted in* 152 Cong. Rec. S10402 (daily ed. Sept. 28, 2006) (the legislation was not intended to restrict individuals "from raising claims that the Geneva Conventions have been violated as a collateral matter once they have an independent cause of action").

did Congress apply section 5 retroactively to pending *habeas* cases, such as those of these Petitioners. Thus Congress did not abolish treaty-based claims for release, in *habeas* cases of existing petitioners. *See, e.g.*, *Landgraf*, 511 U.S. at 264. At a minimum, section 2241(c)(1) and (3) must each be read to be consistent with the Geneva Conventions. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). The district court would have been well warranted in giving effect to this treaty-based *habeas* release right in fashioning its remedy.

CONCLUSION

In the ballpark's roar, we may not notice that the crescendo of our national anthem makes no boast of freedom. It only puts a question. Each generation is called to answer. In our own time, the question is presented by seven years in the Guantánamo prison.

Judge Urbina's answer has always been the answer given by our law. Petitioners submit that the Court should reverse and vacate the decision of the court of appeals and remand with instructions that the order of the district court immediately be reinstated.

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Dated: December 4, 2009

ADDENDUM

ADDITIONAL STATUTORY PROVISIONS

Supplemental Appropriations Act, 2009

The Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859, June 24, 2009, provides, in pertinent part:

> Making supplemental appropriations for the fiscal year ending September 30, 2009, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2009, and for other purposes, namely:
>
> * * * *
>
> SEC. 14103. (a) None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia.

Department of Homeland Security Appropriations Act, 2010

The Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, October 28, 2009, provides, in pertinent part:

> Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2010, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Homeland Security for the fiscal year ending September 30, 2010, and for other purposes, namely:
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> * * * *
>
> SEC. 552. (a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

National Defense Authorization Act for the Fiscal Year, 2010

The National Defense Authorization Act for the Fiscal Year, 2010, Pub. L. No. 111-84, 123 Stat. 2190, October 28, 2009, provides, in relevant part:

> To authorize appropriations for fiscal year 2010 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.
>
> * * *
>
> SEC. 1041. LIMITATION ON USE OF FUNDS FOR THE TRANSFER OR RELEASE OF INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA
>
> (a) RELEASE PROHIBITION.—During the period beginning on October 1, 2009, and ending on December 31, 2010, the Secretary of Defense may not use any of the amounts authorized to be appropriated in this Act or otherwise available to the Department of Defense to release into the United States, its territories, or possessions, any individual described in subsection (e).
>
> * * * *
>
> (e) DETAINEES DESCRIBED.—An individual described in this subsection is any individual who is located at United States

> Naval Station, Guantanamo Bay, Cuba, as of October 1, 2009, who—
>
> (1) is not a citizen of the United States; and
>
> (2) is—
>
> (A) in the custody or under the effective control of the Department of Defense; or
>
> (B) otherwise under detention at the United States Naval Station, Guantanamo Bay, Cuba.

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010

The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904, October 30, 2009, provides, in pertinent part:

> Making appropriations for the Department of the Interior, Environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes.
>
> * * * *
>
> The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes, namely:
>
> * * * *

> SEC. 428. (a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

Authorization for Use of Military Force, 2001

The Authorization for the Use of Military Force, 115 Stat. 224 (Sept. 18, 2001), provides, in pertinent part:

> SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
>
> (a) IN GENERAL.—That the President is authorized 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.