

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**

**BRIEF OF RETIRED FEDERAL JUDGES AS
AMICI CURIAE SUPPORTING PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are eight former federal judges.¹ *Amici* are interested in this case because of their years of dedicated service to the United States and their commitment to the Constitution and the rule of law. From their service on the bench, all of the *amici* are keenly aware of the critical role played by the judicial branch in our constitutional system, and all recognize the centrality of the Great Writ to the preservation of individual liberty and to the Framers’ “separation-of-powers scheme.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008). All of the *amici* herein also participated as *amici* in *Rasul v. Bush*, 542 U.S. 466 (2004), and/or *Boumediene*, the Court’s prior cases addressing the availability of the Great Writ to the detainees at Guantanamo.

BACKGROUND AND SUMMARY OF ARGUMENT

It has been almost six years since this Court held in *Rasul* that the men imprisoned at Guantanamo have a right to file petitions for habeas corpus to challenge the factual and legal basis for their imprisonment. In the intervening years, Congress has twice tried to restrict or eliminate the federal courts’ jurisdiction over the detainees’ habeas cases, and the Court has twice—in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and then in *Boumediene*—

¹ Please see the attached Appendix for a list of the *amici*, along with biographical information for each one. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

upheld the courts' jurisdiction. By the time this case is decided, almost two years will have elapsed since the Court emphasized in *Boumediene* that "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing" and that "the costs of delay can no longer be borne by those who are held in custody." 128 S. Ct. at 2275. Yet the petitioners in this case—who *won* their habeas cases in the district court and whose status as *non-enemy* combatants the government does not contest—remain imprisoned at Guantanamo.

In *Boumediene*, the Court "h[e]ld that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay," 128 S. Ct. at 2262, and that the detainees there "may invoke the fundamental procedural protections of habeas corpus," *id.* at 2277. The Court ordered the cases "remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion." *Ibid.*

Shortly thereafter, the government conceded that there was no basis to continue to detain the Uighur detainees (petitioners in this case) as enemy combatants. The district court granted petitioners' motion for release in the United States and scheduled a hearing to consider what conditions, if any, to impose on the release. The district court also ordered a representative of the Department of Homeland Security to attend, presumably so that the district court, in the exercise of its discretion, could consider the views of the Executive concerning appropriate conditions. See Pet. App. 4a. Before the district court could conduct the hearing, however, the court of appeals issued a stay and then reversed. Alluding to the "political question" doctrine, Pet.

App. 10a, the court of appeals held that the courts do not “have the power to require anything more” than representations by the Executive “that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners.” *Id.* at 15a. In so holding, the court of appeals eviscerated the Great Writ.

As this Court emphasized in *Boumediene*, “the Framers considered the writ a vital instrument for the protection of individual liberty” and “an essential mechanism in the separation-of-powers scheme.” 128 S. Ct. at 2246. All nine members of the *Boumediene* Court recognized that an Article III court sitting in habeas “must have the power to order the conditional release of an individual unlawfully detained.” *Id.* at 2266. Accord *id.* at 2283 (Roberts, C.J., dissenting) (“the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release”). The court of appeals’ holding that the district court had no discretion to order release flies in the face of *Boumediene* and its teaching that habeas “is, at its core, an equitable remedy,” *id.* at 2267 (internal quotation marks omitted), and that “in our tripartite system of government,” the Great Writ “must not be subject to manipulation by those whose power it is designed to restrain.” *Id.* at 2259.

ARGUMENT

I. As the Court Recognized in *Boumediene*, Habeas Corpus Is Essential to the Preservation of Individual Liberty and to the Framers’ Separation-of-Powers Scheme.

This Court has long recognized that “the great object of [habeas corpus] is the liberation of those

who may be imprisoned without sufficient cause.” *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). Accord *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (recognizing that the “grand purpose” of the writ is “the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty”). Indeed, “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” *Boumediene*, 128 S. Ct. at 2244. The importance of the writ is reflected in the Constitution’s text: “That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension.” *Id.* at 2246.

Moreover, “[t]he Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches,” and “[s]urviving accounts of the ratification debates” demonstrate that the Framers “deemed the writ to be an essential mechanism in the separation-of-powers scheme.” *Ibid.* Accord *id.* at 2247 (“Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government”) (citing THE FEDERALIST NO. 84). As the Court explained in *Boumediene*, “consistent with the essential design of the Constitution,” the Suspension Clause thus “ensures 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.” *Id.* at 2247 (quoting *Hamdi v. Rumsfeld*, 542

U.S. 507, 536 (2004) (plurality opinion)). “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” *Id.* at 2277.

II. *Boumediene* Makes Clear That the Discretion to Order Release Is Fundamental to the Exercise of Habeas Jurisdiction by Article III Courts.

Habeas has famously been described as “the great and efficacious writ, in all manner of illegal confinement.” *Boumediene*, 128 S. Ct. at 2267 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1768) (“BLACKSTONE, COMMENTARIES”)). The “great and efficacious writ” would hardly be worthy of such approbation, however, if a court sitting in habeas were powerless to order release of a petitioner whose imprisonment it determined to be unlawful. See also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 26 (12th ed. 1873) (“[t]he right of personal liberty is [an] absolute right of individuals,” and “effectual provision is made against the continuance of all unlawful restraint or imprisonment, by the security of the privilege of the writ of *habeas corpus*”).

All nine members of the *Boumediene* Court recognized that the power to order release is a fundamental element of the Article III courts’ habeas jurisdiction. “[T]hough release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted,” nevertheless “the habeas court must have the *power* to order the conditional release of an individual unlawfully detained.” 128 S. Ct. at 2266 (emphasis added).

Accord *id.* at 2271 (“when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority * * * to formulate and issue appropriate orders for relief, *including, if necessary, an order directing the prisoner’s release*”) (emphasis added); *id.* at 2283 (Roberts, C.J., dissenting) (“the writ requires most fundamentally an Article III court able to hear the prisoner’s claims and, when necessary, order release”).

Thus, *Boumediene* makes clear that the petitioners were entitled to petition for a writ of habeas corpus to challenge their imprisonment at Guantanamo. *Boumediene* makes plain as well that, at the very least, the Article III courts adjudicating such petitions must have, and do have, “the *power* to order the conditional release of an individual unlawfully detained.” *Boumediene*, 128 S. Ct. at 2266 (emphasis added).

III. The Court of Appeals’ Cramped View of Habeas Is at Odds With *Boumediene* and With the Great Writ’s History and Purpose.

Although the government admits that there is no basis for continued detention of the petitioners as enemy combatants, the court of appeals held that the district court did not have the discretion to order them released in the United States. In the view of the D.C. Circuit, the political branches have “exclusive province” to decide whether to admit aliens, and thus the district court did not “have the power to require anything more” than the Executive’s representations that it “is continuing diplomatic attempts to find an appropriate country willing to admit petitioners.” Pet. App. 7a, 15a. Under the D.C. Circuit’s reasoning, the petitioners could remain imprisoned at Guantanamo by the

Executive for the rest of their lives, because no “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.” *Id.* at 8a. The D.C. Circuit’s reliance on the Executive’s authority over immigration law is misplaced, for the reasons explained in the Brief for *Amici Curiae* Law Professors in Support of Petitioners.

Moreover, and remarkably, the court of appeals reached its conclusion without making any attempt to come to grips with—indeed, almost without mention of—*Boumediene*; one of the few references to *Boumediene* in the court of appeals’ decision is the dismissive assertion (Pet. App. 12a) that “[i]t cannot be that because the court had habeas jurisdiction, *see* [*Boumediene*], it could fashion the sort of remedy petitioners desired.” But the power to fashion an appropriate remedy—including release—is inherent in the exercise of habeas jurisdiction. Otherwise, the writ of habeas corpus is meaningless. The court of appeals’ cramped view of the issue presented by this case is at odds with *Boumediene* itself and with the history and purpose of the Great Writ.

As the Court explained in *Boumediene*, “[h]abeas corpus is a collateral process that exists, in Justice Holmes’ words, to ‘cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.’” 128 S. Ct. at 2270 (quoting *Frank v. Mangum*, 237 U.S. 390, 346 (1915) (Holmes, J., dissenting)). Thus, “common-law habeas corpus was, above all, an *adaptable* remedy. Its precise

application and scope changed depending upon the circumstances.” *Boumediene*, 128 S. Ct. at 2267 (emphasis added). That remains as true today as it was when Blackstone described habeas as “the great and efficacious writ, in all manner of illegal confinement.” *Ibid.* (quoting 3 BLACKSTONE, COMMENTARIES 131). As *Boumediene* itself makes clear, “[h]abeas is not ‘a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.” *Ibid.* (quoting *Jones*, 371 U.S. at 243); see also *Wilkinson v. Dotson*, 544 U.S. 74, 89-90 (2005) (Kennedy, J., dissenting) (“Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief”). As explained in the amicus Brief of the Right Honourable Lord Goldsmith QC, *et al.*, from its earliest days the essence of the writ has been that the disposition of the prisoner must conform to the law as rendered by an independent judge, not to the wishes of his jailer.

With the government having abandoned its contention that the petitioners may be detained as enemy combatants, the district court’s decision ordering the petitioners released, and setting a hearing to consider appropriate conditions, was clearly a proper exercise of its broad discretion. The district court’s decision was also in keeping with *Boumediene* itself and with the “grand purpose” of habeas. By contrast, the court of appeals’ decision that the petitioners must remain imprisoned by the Executive because the courts are powerless to order their release in the United States, and its termination of the district court’s exercise of its habeas powers in fashioning a remedy, reflect just the sort of “static, narrow, formalistic” approach to

habeas that this Court expressly rejected in *Boumediene*.

Indeed, the approach adopted by the court of appeals in its decision below was “static” in the literal sense—holding that the district court had no discretion to order release in the United States because petitioners are “aliens without property or presence in the sovereign territory of the United States.” Pet. App. 8a-9a. The D.C. Circuit thought that habeas relief depended on a showing by petitioners that they had a right to liberty based on some positive law, such as the Due Process Clause of the Fifth Amendment. See *ibid.* That view is squarely at odds with *Boumediene*, which made clear that at common law and under this Court’s jurisprudence, a court sitting in habeas has the authority to order the release of a prisoner whenever, as with the Guantanamo detainees, “the judicial power to issue habeas corpus properly is invoked.” 128 S. Ct. at 2271. Moreover, the court of appeals simply ignored *Boumediene*, which addressed at great length (128 S. Ct. at 2253-2262) the applicability of constitutional principles to the detainees at Guantanamo, and in holding that the Suspension Clause “has full effect at Guantanamo Bay” (*id.* at 2262), rejected “the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.” *Id.* at 2253; see also *id.* at 2253-2262.

In rejecting the government’s argument, the Court in *Boumediene* recognized that at Guantanamo, the United States “maintains *de facto* sovereignty,” *id.* at 2253, and that “[i]n every practical sense Guantanamo is not abroad; it is

within the constant jurisdiction of the United States.” *Id.* at 2261; accord *id.* at 2262 (“The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government”); *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (“From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it”). Confronted with the question of whether habeas jurisdiction applied at Guantanamo, the Court in *Boumediene* considered this reality and all of the pertinent circumstances and concluded that the Suspension Clause “has full effect at Guantanamo Bay” and that the detainees were entitled to the “privilege of habeas corpus.” 128 S. Ct. at 2262. But the “privilege of habeas corpus” is an empty shell unless the district court has the discretion to order release when there is no legal basis for continued detention.

Moreover, the government’s position—that petitioners “already have obtained” the “relief” of “release” because their status has been altered and they are being “housed” in “relatively unrestrictive conditions,” Br. in Opp. 5, 13—is, with all due respect, absurd. The government now admits that petitioners are not enemy combatants. But although petitioners’ *status* has changed, the fact of their wrongful imprisonment has not: they are still being held behind barbed wire, often shackled to the floor, and prevented from seeing their families. In a locution worthy of Lewis Carroll (Humpty Dumpty: “When I use a word it means just what I choose it to

mean”)², the government euphemistically describes this as “special communal housing” (Br. in Opp. 5), but that is nonsense: petitioners are imprisoned.

As Justice Story explained, “*every* restraint upon a man’s liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected.”³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833) (emphasis added); see also *Jones*, 371 U.S. at 243 (explaining that while the petitioner’s parole had released him from physical imprisonment, it imposed conditions that significantly confined and restrained his freedom, keeping him in “custody” within the meaning of habeas). Whatever rationalizations the government might offer for its continued detention of the petitioners, they indisputably remain “deprived of liberty.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting). “It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound.” *Ibid.*

* * *

In *Boumediene*, this Court once again affirmed the principle that our nation is stronger when the judiciary upholds the rule of law:

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.

² LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 198 (Chartwell Books 2008).

The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

128 S. Ct. at 2277.

The constitutional guarantee of habeas is a reservation of judicial authority, forged in the common law, that allows courts to fashion the relief that is necessary to liberate a person from wrongful detention. The D.C. Circuit erred because it abdicated the ultimate responsibility of a habeas court: to ensure that a person who is *entitled* to freedom actually is *returned* to freedom. If allowed to stand, its decision “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’” *Boumediene*, 128 S. Ct. at 2259 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Justice Story wrote long ago that “[i]f the Constitution ever perishes, it will be, when the Judiciary shall have become feeble and inert, and either unwilling or unable to perform the solemn duties imposed upon it by the original structure of the Government.” JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION 185 (1865). The writ of habeas “must be effective,” *Boumediene*, 128 S. Ct. at 2269, and its effectiveness is possible only if the judicial branch plays its full role in our constitutional design—including having the discretion to order release in appropriate circumstances.

Accordingly, *amici* retired federal judges respectfully submit that this Court must reverse the decision below with instructions to remand to the district court for a hearing to consider what conditions, if any, to impose in connection with

release of the petitioners in the United States. Only by doing so will this Court give effect to *Boumediene* and allow the district court to fashion a remedy that is faithful to the Framers' separation-of-powers scheme and fulfills the fundamental promise of habeas: release from unlawful Executive detention.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

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APPENDIX

The *amici curiae* are as follows:

Judge John J. Gibbons served as Chief Judge from 1987 to 1990 and Judge from 1969 to 1980 for the United States Court of Appeals for the Third Circuit. He is the Director and Founder of the John J. Gibbons Fellowship in Public Interest and Constitutional Law and is currently the Director of Business and Commercial Litigation at the Gibbons PC law firm.

Judge Shirley M. Hufstedler served on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979. Judge Hufstedler also served as Associate Justice of the California Court of Appeal from 1966 to 1968, and as a judge on the Los Angeles County Superior Court from 1961 to 1966. She also served as United States Secretary of Education from 1979 to 1981.

Judge Nathaniel R. Jones served on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002 and as Assistant United States Attorney for the Northern District of Ohio. He is currently Of Counsel and Chief Diversity & Inclusion Officer at Blank Rome LLP in Cincinnati, Ohio

Judge Abner J. Mikva served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1995, and served as Chief Judge from 1991 to 1994. He served as White House Counsel from 1994 to 1995. He served Illinois as a member of the United States House of Representatives from 1969 to 1973 and from 1975 to 1979. He was an Illinois State Representative from 1956 to 1966. He was a visiting professor at the University of Chicago from 1996 until 2008.

Judge Stephen M. Orlofsky served on the United States District Court for the District of New Jersey from 1996 to 2003 and was Magistrate Judge for the District of New Jersey from 1976 to 1980. He is currently a partner in Blank Rome LLP in Princeton.

Judge Stanley J. Roszkowski was appointed to the United States District Court for the Northern District of Illinois by President Carter and served from 1977 to 1998.

Judge H. Lee Sarokin served on the United States Court of Appeals for the Third Circuit from 1994 to 1996 and served on the United States District Court for the District of New Jersey from 1979 to 1994.

Judge Alfred Wolin served on the United States District Court for the District of New Jersey from 1987 to 2004. He was Presiding Judge of the Superior Court of New Jersey Criminal Division from 1983 to 1987, and a judge on the Superior Court of New Jersey, Civil Division, from 1982 to 1983.