

No. 08-1234

IN THE
Supreme Court of the United States

JAMAL KIYEMBA, ET AL.,
Petitioners,

v.

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

On Writ of Certiorari to the United States
Court of Appeals For the District of Columbia Circuit

**BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN
SUPPORT OF PETITIONERS**

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae are the immigration and constitutional law professors whose individual names appear in the Appendix to this Brief.¹ *Amici* have expertise in the constitutional law of the United States relating to immigration and due process, as well as the statutes and rules governing entry, admission, detention and parole of non-citizens in the United States. With the consent of the parties, we offer our views on the historical and contemporary meaning of several major decisions of this Court, including *Shaughnessy v. United States ex rel. Mezei* (“*Mezei*”), 345 U.S. 206 (1953), *Zadvydas v. Davis*, 533 U.S. 678 (2001) (“*Zadvydas*”) and *Clark v. Martinez* (“*Martinez*”), 543 U.S. 371 (2005). We write to share our expertise with the Court and to place *Mezei* in context so that its holding may be properly understood.

Although the government relies heavily on *Mezei*, *amici* believe for the reasons explained below that *Mezei*, properly understood, does not pose a significant barrier to the power of an Article III court to require the Government to produce these *habeas*

¹ Pursuant to Supreme Court Rule 37.6, *amici*, who are listed in the Appendix, state that no counsel for any party authored this brief in whole or in part. The brief was written by counsel for *amici*, with the assistance of Asher Alavi, Diana Chang, Philip Cheng, Daniel Ko, Nicole Moniz, Lisa Owens, and Jennifer Yeung, students at Boston College Law School. No one other than counsel for *amici curiae* has made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief.

corpus Petitioners before that same court and to provide a remedy for their prolonged unlawful detention “as law and justice require.” 28 U.S.C. § 2243 (2008). *Amici* believe that *Mezei* was an unfortunate product of its time and would welcome a decision overruling it. However, *amici* also believe that *Mezei* has been significantly narrowed by this Court’s more recent decisions and the Court need not overturn *Mezei* to decide this case. Petitioners’ claims do not involve the Executive’s power under the immigration laws, but the right to liberty protected by the Constitution, Constitutional restrictions on unlawful detention, and the scope of the Great Writ.

SUMMARY OF ARGUMENT

Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 219 (1953) (Jackson, J. and Frankfurter, J., dissenting)

This case is about the fundamental limits placed by law on Executive power to imprison people on government-controlled territory. Petitioners are not immigrants in any meaningful sense of the term. They have never sought to live in the United States. Indeed, their involvement with the United States has been completely involuntary.

The government relies heavily on *Mezei* to argue that “the decision whether to allow an alien abroad to enter the United States, and if so, under what terms, rests exclusively in the political Branches.” *Br. For The Resp’ts In Opp’n To Pet. For Writ Of Cert.* at 11, *Kiyemba v. Obama*, No. 08-1234 (S. Ct. filed May 2009) [hereinafter *Gov’t Opp*]. Echoing arguments made by the government more than a half century ago in *Mezei*, the government argues that “Petitioners have already obtained relief. They are no longer being detained as enemy combatants,

they are free to leave Guantánamo Bay to go to any country that is willing to accept them” *Id.* That argument is strained at best. As Justice Jackson wrote in dissent in *Mezei*: “Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?” *Mezei*, 345 U.S. at 226 (Jackson, J., dissenting). Just as “eject[ing] him bodily into the sea” would constitute a deprivation of life, *Mezei*’s time at Ellis Island, “occurring within the United States or its territorial waters,” constituted a deprivation of liberty which must be tested against constitutional requirements. *Id.* at 226–27.

Amici disagree strongly with the government’s position that the legal issues resolved by the Court in *Mezei* are “indistinguishable from the one Petitioners now make.” *Gov’t Opp. supra* page 3, at 11. The cases are fundamentally different. *Mezei* came to the United States voluntarily, as an immigrant. The *Mezei* majority analyzed that case as an immigration matter, involving the question whether an alien who presents himself as a new immigrant “stands on a different footing” from aliens “who have once passed through our gates,” *Mezei*, 345 U.S. at 212. Indeed, the Court went to great lengths *not* to view the case as primarily about detention, even referring to *Mezei*’s time in custody as his “harborage on Ellis Island.” *Id.* at 213.

The government claimed in *Mezei* that without the authority to deny entry, hostile nations could force their citizens upon us, and our country would

be powerless to protect itself. The Court said that to release Mezei, an alien barred from entry on national security grounds, would nullify the very purpose of exclusion. *Id.* at 216. These concerns are wholly absent here. Petitioners did not seek to immigrate here; our country brought them. The district court's order of release on habeas corpus would not encourage other aliens to come directly to the United States, nor would it create a precedent that would entitle others to gain access to this country. Nor would their release in the United States undermine our nation's security; indeed, the government does not claim that Petitioners present a security threat.

By relying upon *Mezei*, the government also implicitly invokes the so-called “plenary power doctrine” of immigration law, pursuant to which the power of the political branches to exclude aliens has been said to be “a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control.” *Mezei*, 345 U.S. at 210. This doctrine rests on a decision, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“*The Chinese Exclusion Case*”), the continuing validity of which has been substantially questioned. The doctrine should not be extended to the Constitutional question of whether Petitioners can be subject to a long-term, indeterminate detention. While *amici* do not believe that the present case requires this Court to re-examine the plenary power doctrine entirely, a doctrine of such dubious parentage that is so deeply inconsistent with the better norms of our constitutional legal system should be invoked, if at all, with great care and in the most limited ways possible.

In important ways, this case is the inverse of *Mezei*. There, the government argued that the plenary power doctrine should be sustained *because* of a security threat presented by *Mezei*. Here, the government argues that *despite* having no reason to fear these men, they should be excluded simply to uphold the *principle* of plenary power. This is an inhumane and brutal argument that directly contradicts the most fundamental purpose of habeas corpus. And, unlike *Mezei*, where the alien's exclusion was authorized by a statute and the President's national security powers, Petitioners' detention is, at most, sustained by the President's "wind-up" authority -- an authority not conveyed by statute nor one that may be indefinitely exercised as a matter of national security.

Moreover, for more than a quarter century, *Mezei* has been progressively undermined.² This Court, for example, applied ordinary due process analysis in the admission/exclusion context in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test to a returning resident alien).³ In *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), the Court acknowledged that there was a "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the

² See generally, Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (2007).

³ In *INS v. Chadha*, 462 U.S. 919, 940–41 (1983), the Court invalidated the "legislative veto" of an immigration statute, affirming that Congress' authority over immigration must be implemented through "a constitutionally permissible means."

admission and exclusion of aliens....”, albeit limited. In *Nguyen v. INS*, 533 U.S. 53, 72-73 (2001), the Court applied “conventional equal protection scrutiny” to a citizenship statute, though it recognized that there might be “potential problems with fashioning a remedy” had it found the statute unconstitutional.

Most importantly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), this Court recognized that admission and detention are distinct issues. In *Zadvydas*, this Court interpreted 8 U.S.C. § 1231(a)(6) (2006), to authorize the government to detain aliens who had been ordered removed only as long as “reasonably necessary” to remove them from the country in light of the “serious constitutional threat” posed by indefinite detention. *Zadvydas*, 533 U.S. at 689, 699. *Martinez* then required the release from confinement of “inadmissible” non-citizens when they could not be removed to other countries in the reasonably foreseeable future. The Court in *Martinez* rejected the very same separation of powers and security concerns that the government raises here. *Martinez*, 543 U.S. at 385-86.

These decisions make plain that the judiciary may remedy unlawful detention without impinging upon the government’s power to admit or remove non-citizens. The district court’s order here similarly ordered Petitioners’ release in the United States *as a remedy* for their unlawful detention. It did not order that Petitioners be admitted under the immigration laws or that they be granted any particular status.

The seizure, isolation, rendition without process, and detention of non-combatant civilians by the executive branch of government, as is the case here, present basic and profound challenges to fundamental human rights. This Court recognized in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the writ of *habeas corpus* was designed to secure individual liberty as “an essential mechanism in the separation-of-powers scheme...,” *Id.* at 2246. by calling “the jailer to account.”⁴ Such judicial action neither deprecates governmental authority to protect national security nor violates appropriate principles of judicial deference. For “freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers” are among “freedom’s first principles.” *Id.* at 2277.

ARGUMENT

I. **MEZEI, AN IMMIGRATION CASE, WAS A PRODUCT OF ITS TIME AND DOES NOT PROVIDE BLANKET AUTHORITY FOR UNLIMITED EXECUTIVE DETENTION**

A. ***Mezei* was an Immigration Case and a Product of its Time**

National security immigration cases decided in the early 1950’s, at the height of both the Korean conflict and the McCarthy era, represent the modern zenith of judicial deference to executive decisions

⁴ *Id.* at 2247 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) and *In re Jackson*, 15 Mich. 417, 439-40 (1867) (Cooley, J., concurring)).

regarding entry and admission. Those cases were a product of their time and addressed specific immigration law and national security concerns not present here.

In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court affirmed the exclusion of the non-citizen wife of a U.S. soldier without a hearing based on secret evidence and national security grounds. The Attorney General invoked statutory provisions, which, during a time of war or national emergency, permitted excluding individuals from entry without a hearing if such entry would be “prejudicial to the interests of the United States.”⁵ The Court held that, regardless of the rules applicable to persons “who have gained entry into the United States,” the decision to exclude an alien presenting herself at the border was to be “final and conclusive.” *Id.* at 543.

While Ellen Knauff, the petitioner in that case, was held on Ellis Island for a significant period of time, she could have left and returned to Europe.

⁵ Proclamation No. 2523, 3 C.F.R. 270-72 (1938-1943), *reprinted in* 55 Stat. 1696, 1698 (1942), *amended by* Proclamation No. 2850, 3 C.F.R. 27-28 (1949-1953), *reprinted in* 63 Stat. 1289, 1289-90 (1950); *see also* 8 C.F.R. § 175.57(b) (Supp. 1945) (regulations issued by Attorney General permitting exclusion without a hearing on the basis of confidential information if disclosure would be similarly prejudicial). Congress had previously authorized the President to promulgate restrictions on immigration during time of war or national emergency. *See* Act of June 21, 1941, ch. 210, 55 Stat. 252 (1942). The President had earlier declared a national emergency. *See* Proclamation No. 2487, 3 C.F.R. 234 (1938-1943), *reprinted in* 55 Stat. 1647 (1942).

Ignatz Mezei, however, had nowhere to go. Mezei was born in Gibraltar of “uncertain parentage”. He came to the United States in 1923 and lived in New York until 1948. That year, he left the United States voluntarily to visit his mother in Romania. He spent 19 months in Hungary, and then obtained a quota immigrant visa and made his way by ship to the United States. Mezei arrived at Ellis Island in February 1950, presenting himself as a new immigrant. He was excluded under the same provisions applied to Ellen Knauff. At that point, Mezei attempted to leave the United States. He twice tried to return to Europe, but France and Great Britain both refused him permission to land. The State Department could not negotiate his admission to Hungary so he remained on Ellis Island. *See Mezei*, 345 U.S. at 208–11. Mezei brought a petition for writ of *habeas corpus*. When the government refused to disclose its confidential information *in camera* to the court, the Court ordered Mezei released on bond. *See id.* at 209. The court of appeals affirmed. *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

The government then sought Supreme Court review, presenting the case, against the backdrop of the Cold War, as one that threatened our nation’s ability to control its borders when non-citizens arrive voluntarily, seeking admission. The government wrote in its petition:

Under [the court of appeals’] holding, therefore, any excludable alien who manages to get to our shores may nevertheless obtain most of the benefits of

the entry, if, for some reason, the country from which he comes refuses to take him back and no other country is willing to take him.

Pet. for a Writ of Cert. to the United States Ct. of Appeals for the Second Cir. at 6–7, Mezei, 345 U.S. 206 (1953) (No 139).

The government went on to argue that allowing Mezei entry presented national security concerns: “the decision below provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back.” *Id.* at 7.

In its merits brief, the government described Mezei’s act of coming ashore as being “granted a haven on Ellis Island rather than being forced to remain aboard the vessel on which he arrived” while his claim to enter the country was adjudicated. *Br. for the Pet’r’s [United States]* at 16–17, *Mezei, 345 U.S. 206 (1953) (No. 139), 1952 WL 82476*. And “[i]f this situation be considered a hardship, it is a result of the current international situation and does not itself call for extraordinary relief.” *Id.* at 31. Thus, as the government presented the case, two features stand out: first, Mezei came to the border *on his own volition* and was allowed to disembark on Ellis Island *for his own benefit*. The U.S. government was not responsible for his unfortunate situation. Second, according to the government, releasing Mezei into the United States would have undermined national security. The main concern was to protect our country from hostile nations

trying to ship their citizens to us and compelling their entry.

This Court accepted that characterization of the case, over strenuous dissents from Justices Black, Frankfurter, Jackson, and Douglas. The Court held that Mezei was properly excluded and held without a hearing under the same wartime provisions that had applied to Ellen Knauff. The majority viewed Mezei's time on Ellis Island as an unfortunate consequence of the decision to exclude him. His "temporary harborage" on Ellis Island was seen as "an act of . . . grace" that bestowed no additional rights. *Mezei*, 345 U.S. at 215. Further, the Court held that "to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding." *Id.* at 216.

In reaching those conclusions, the Court treated the matter as primarily a question of immigration law:

[A]rmed with a quota immigration visa issued by the American Consul in Budapest, [Mezei] proceeded to France and boarded the *Ile de France* in Le Havre bound for New York. Upon arrival on February 9, 1950, he was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act as amended and regulations thereunder.

Mezei, 345 U.S. at 208.

The majority specifically distinguished *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), decided

the same Term, underscoring that *Mezei* was based upon the concern that our nation might be forced to admit uninspected immigrants. In *Kwong Hai Chew*, a resident merchant seaman sought entry to the United States after a temporary absence at sea. Though he was placed in exclusion proceedings, the Court had no difficulty in deciding to “assimilate” his status to that of an already-admitted resident alien. *See id.* at 596. This, the Court said, “does not leave an unprotected spot in the Nation’s armor. Before petitioner’s admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status.” *Id.* at 602. *Mezei*, by contrast, could be seen as “no more ours than theirs” and perhaps “other countries ought not shift the onus to us.” *Mezei*, 345 U.S. at 216.

Justice Jackson, in dissent, stressed the distinction between exclusion and detention that this Court subsequently recognized in *Zadvydas* and *Martinez*. *See infra* Part I.B. He argued:

It is evident that confinement of respondent no longer can be justified as a step in the process of turning him back to the country whence he came. Confinement is no longer ancillary to exclusion; it can now be justified only as the alternative to normal exclusion. *It is an end in itself.*

Mezei, 345 U.S. at 227 (Jackson, J., dissenting) (emphasis added).

Mezei and *Knauff* were heavily criticized in their day.⁶ Professor Henry Hart called the proposition that due process for aliens denied entry was whatever Congress had provided “patently preposterous.” See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953). The decision, he wrote, “trivialize[d] the great guarantees of due process” to reach “brutal conclusions”. *Id.* at 1395 (footnote omitted). Such scholarly critique has continued to the present.⁷

⁶ See John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212, 231–32 (1954); see also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 985 n. 267 (1995) (collecting sources).

⁷ See T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L. J. 365, 374 (2002) (“The rule affirmed in *Mezei* . . . is wildly out of step with modern constitutional law.”); T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237 (1983); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 27–34 (1985); Stephen H. Legomsky, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, 200-01 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173, 176 (1983) (The Court “misread[] the cases it invoked and ignor[ed] many others” yielding a doctrine that was “scandalous . . . deserving to be distinguished, limited, or ignored.”); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1642 (1992) (The Court’s developing due process jurisprudence for excludable aliens “turned colder” with the *Knauff* and *Mezei* decisions “at the height of McCarthyism and the nation’s

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Mezei also provoked considerable public outcry. Editorials condemned the decision.⁸ Two private bills were introduced in Congress on *Mezei*'s behalf. Attorney General Brownell eventually agreed to grant *Mezei* an exclusion hearing before a Board of Special Inquiry. The Board found that *Mezei* was excludable because in 1935, he had received several bags of stolen flour and pleaded guilty to petty larceny, which was a crime of moral turpitude. But

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preoccupation with the perceived Communist threat.”); Gerald L. Neuman, STRANGERS TO THE CONSTITUTION: IMMIGRATION, BORDERS, AND FUNDAMENTAL LAW, 253 n.2 (1996)[hereinafter NEUMAN, STRANGERS TO THE CONSTITUTION]; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1052 (1998) (“The legal fiction that exclusion merely withholds a benefit was . . . stretched beyond decency in *Mezei*.”); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 20 (1984) (“[T]hese decisions [*Knauff* and *Mezei*] are easy to denounce and their reasoning is not difficult to demolish.”); Peter H. Schuck, *Developments in the Law – Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322–24 (1983) (“In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development”). See also Ronald D. Rotunda & John E. Nowak, 2 TREATISE ON CONSTITUTIONAL LAW § 17.4 n.62 (2d ed. 1986) (“The ability to detain unadmitted aliens for an indefinite period of time, and without procedural safeguards . . . seems difficult to rationalize in terms of modern conceptions of the fundamental fairness principle that lies at the heart of due process.”)

⁸ Weisselberg, *supra* note 6 at 970 n.201 (collecting newspaper reports). See also *Opening the Door*, N.Y. TIMES, Apr. 24, 1953, at 22 (describing the decision as “cruel, intolerant and downright un-American”); *Deprived of Liberty*, WASH. POST, Mar. 18, 1953, at 12 (“the indefensible consequences of the decision demand further attention”).

the real reason why the government wanted to exclude him was that Mezei had been affiliated with a lodge of the International Workers Order, which had been listed as a communist organization. Yet after the Board heard the evidence about Mezei's activities, it found that he played no more than a minor role in the Communist Party, such as attending meetings and demonstrations and distributing literature. On the basis of the Board's off-the-record recommendation, the Attorney General paroled Mezei into the United States, where he lived for many years.⁹

B. *Zadvydas* and *Martinez* Support the Judicial Power to Order Petitioners' Release

This Court's most significant rulings that support Petitioners are *Zadvydas* and *Martinez*. Taken together, these decisions make plain that the fundamental judicial power to remedy unlawful detention does not undermine the government's power to admit or remove non-citizens.

In *Zadvydas*, this Court interpreted 8 U.S.C. § 1231(a)(6)¹⁰ to authorize the Attorney General (now

⁹ See Weisselberg, *supra* note 6, at 970–85 (describing *Mezei's* history); see also Richard A. Serrano, *Detained, Without Details*, L.A. TIMES (Nov. 1, 2003) at A1 (describing case and interviewing family members).

¹⁰ That section provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a

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the United States Secretary of Homeland Security) to detain certain aliens who had been ordered removed only as long as “reasonably necessary” to remove them from the country. *Zadvydas*, 533 U.S. at 689, 699. The statute’s use of “may,” the Court said, “suggests discretion,” but “not necessarily . . . unlimited discretion. In that respect the word ‘may’ is ambiguous.” *Id.* at 697. In light of that ambiguity and the “serious constitutional threat” posed by indefinite detention of aliens who had been admitted to the country, this Court interpreted the statute to permit only detention that is related to the statute’s “basic purpose [of] effectuating an alien’s removal.” *Id.* at 696–99. “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized.” *Id.* at 699. The Court further held that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is “no significant likelihood of removal in the reasonably foreseeable future.” *Id.* at 701.

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risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

By its terms, this provision applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk.

In *Martinez* this Court confronted the situation of aliens who had never been granted admission to the United States. An alien arriving in the United States who is not found to be “clearly and beyond a doubt entitled to be admitted,” must generally undergo removal proceedings to determine admissibility. 8 U.S.C. § 1225(b)(2)(A) (2006). Such an unadmitted alien may be detained, subject to the Secretary’s discretionary authority to parole him into the country. *See id.* § 1182(d)(5); 8 C.F.R. § 212.5 (2004). If, at the conclusion of removal proceedings, the alien is determined to be inadmissible and ordered removed, the law provides that the Secretary of Homeland Security “shall remove the alien from the United States within a period of 90 days...” 8 U.S.C. § 1231(a)(1)(A). *Martinez* concerned the Secretary’s authority to continue to detain an inadmissible alien subject to a removal order *after* the 90-day removal period has elapsed. The question was whether the construction of 8 U.S.C. §1231(a)(6) that this Court applied to the *Zadvydas* category of aliens also applies to aliens “ordered removed who [are] inadmissible under [§] 1182.” This Court held that, “the answer must be yes.” *Martinez*, 543 U.S. at 378.

Although technically a case of statutory interpretation, this Court’s holding in *Martinez* indicates that release is a judicially-enforceable remedy for the unlawful executive detention even of aliens who have no right to enter the United States. The aliens in *Martinez* were detained, deemed by legal fiction to be outside the country and had no right to be admitted to the United States. *See id.* at 374–75. Like Petitioners in this case, they could not

be removed to their home country and no other country would take them. This Court nevertheless held that their continued detention was without sufficient statutory authorization and that the petitions should have been granted. *See id.* at 386-87.

The government strenuously argued in *Martinez*, as it has in this case, that judicially-compelled release of unadmitted aliens would violate the constitutional separation of powers. Indeed, the government specifically asserted that granting habeas relief to aliens who had never been admitted would confer a judicially-ordered entry into our country over the objection of the political branches. The government attempted to distinguish this Court's earlier decision in *Zadvydas* on the ground that it addressed only aliens who previously had been lawfully admitted and then lost their right to remain. *See Br. for the Pet'r's. [United States]* at 20, *Martinez*, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1080689.

The government also insisted that a judicial order of release would pose grave separation-of-powers and national security concerns:

That constitutional distinction [between aliens admitted by our government and those stopped at the border] rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, *but also on practical separation-of-powers considerations in this sensitive area where foreign policy and*

national security intersect.... [W]hen the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would cause an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply ‘is not within the province of the judiciary to order that foreigners who have never . . . even been admitted into the country’ should ‘be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches.

Id. at 20 (citing cases) (emphasis added).¹¹

¹¹ See also *Br. for the Pet’r’s [United States]* at 16–17, *Martinez*, 543 U.S. 371 (2005) (No. 03878), 2004 WL 1080689 (citations omitted):

The singular authority of the political Branches over immigration derives from the “inherent and inalienable right of every sovereign and independent nation” to determine which aliens it will admit or expel. Indeed, the power “to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe,” is not only “inherent in sovereignty,” but also “essential to self-preservation.” That power is vital “for maintaining normal international relations and

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This Court implicitly rejected much of the government’s reasoning when it held in *Martinez* that inadmissible aliens stopped at our border and denied entry must be released (subject to permissible conditions of supervision) if their detention becomes unlawful. *See Martinez*, 543 U.S. at 378, 386–87. That decision compels the rejection of the government’s argument below that prior immigration jurisprudence prohibits granting meaningful judicial relief in this case. Moreover, it is worth noting that the orders of release in both *Zadvydas* and *Martinez* did not work any change to the aliens’ immigration status. It merely freed them from indefinite detention. That is what Petitioners are seeking here, and that is what the district court ordered as a remedy for their unlawful detention. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 43 (D.D.C 2008), *rev’d sub nom. Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). It did not direct that Petitioners be admitted under the immigration laws, be granted any particular status, or be immune from having their immigration status

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defending the country against foreign encroachments and dangers.” The power to exclude is a legislative and an “inherent executive” power. Accordingly, “[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.

* * *

The political Branches’ comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States[.]

determined by the government as it would for other non-citizens.

Such a remedy is not as unusual as it might at first seem. The immigration statute's mechanism of "parole" allows non-citizens to be brought to the United States without conferring any of the statutory rights that would accompany "admission" or a legal "entry." See 8 U.S.C. § 1182(d)(5)(A). This Court long ago recognized that parole out of detention does not confer legal status on the alien:

For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted); see also *Kaplan v. Tod*, 267 U.S. 228, 230–31 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute). A paroled alien has long been deemed to remain in the same status as one "on the threshold of initial entry." *Mezei*, 345 U.S. at 212.

Petitioners' release would not run afoul of separation of powers requirements. Indeed, in both *Zadvydas* and *Martinez*, this Court rejected the government's assertion that for a court to order the

release in the community (under appropriate supervision) of aliens who had no right to enter or remain in the United States would exceed the judiciary's authority or violate the separation of powers. In both cases, this Court emphasized that such release did not transgress the courts' proper role. And, although the practical result of such an order might be the release of Petitioners in the community, that does not confer a legal right to "liv[e] at large" but merely a right to be "supervis[ed] under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696. As this Court made clear,

[t]he question before us is not one of "confer[ring] . . . the right to remain against the national will" Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment

Id. at 695 (citations omitted).

Thus, contrary to the government's *Mezei* argument, the Executive's right to exclude an alien does not also confer on it the right to detain him indefinitely when there is no reasonable prospect of repatriation. *Zadvydas* and *Martinez* clearly demonstrate that a court may grant a habeas corpus petition and release even an "inadmissible" alien in the United States, subject to the Executive's supervisory powers.

II. THE PLENARY POWER DOCTRINE DOES NOT LIMIT THE RELIEF SOUGHT BY PETITIONERS

A. The Plenary Power Doctrine Was First Developed in a Largely Discredited Case Involving the Exclusion of Non-citizens

In relying upon *Mezei*, the Government implicitly invokes the so-called “plenary power doctrine” of immigration law pursuant to which the power of the political branches to exclude aliens has been said to be “a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Mezei*, 345 U.S. at 210.¹²

¹² For descriptions of the plenary power doctrine and its limitations, see generally T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, *supra* note 7, 16 GEO. IMM. L. J. 365 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Margaret Taylor, *Detained Aliens: Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1128–39 (1995); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 864–69 (1989); Neuman, STRANGERS TO THE CONSTITUTION, *supra* note 7, at 253 n.2; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854–63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256–78; David A. Martin, *supra* note 7 at 166-80; ; Hiroshi Motomura, *Evolution of Immigration Law at 1632–50* (1992); Hiroshi Motomura, *Immigration Law*

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This doctrine rests upon *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“*The Chinese Exclusion Case*”) a widely discredited decision, from a very different time in our political and constitutional history. That case has been well-described as “a constitutional fossil, a remnant of pre-rights jurisprudence that we have proudly rejected in other respects.”¹³

The *Chinese Exclusion Case* involved a Chinese laborer, Chae Chan Ping, who, in 1887, had obtained a certificate permitting him to reenter the United States. In 1888, Congress amended the restriction acts of 1882 and 1884 and voided previously obtained certificates. Chae Chan Ping was denied reentry. The Court held that Congress’ ability to pass legislation to exclude non-citizens was an inherent attribute of sovereignty, extra-constitutional, essentially unchallengeable by anyone, and unreviewable by the judicial branch. *Id.* at 604, 609. The Court reasoned similarly in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), holding that the “final determination” of facts regarding a noncitizen’s

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After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 550–60 (1990) [hereinafter Motomura, *Immigration Law*]; Peter H. Schuck, *supra* note 7, 84 COLUM. L. REV. at 14–18.

¹³ Louis Henkin, *supra* note 12 at 862 (describing the case as “a constitutional fossil, a remnant of pre-rights jurisprudence that we have proudly rejected in other respects”). The doctrine may well have evolved inadvertently out of misplaced reliance on cases that meant merely to emphasize the power of the federal government to regulate immigration, as opposed to state governments. See generally, Legomsky, *supra* note 6, at 200–01.

admission may be entrusted to executive officers and that it was not “within the province of the judiciary” to order the entry of immigrants who were not residents of the United States. For such people, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Id.* at 660.

As its very name shows, however, *The Chinese Exclusion Case* involved a law with ugly racial aspects. More specifically, however, it concerned the government’s exclusion of a non-citizen who was seeking to live in the United States. In a rather inflammatory opinion by Justice Field, the Court reasoned that the exclusion of foreigners was an “incident of sovereignty:”

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Id. 130 U.S. at 606.

Since it was first articulated, the plenary power doctrine has proven controversial, generating strong dissents and significant limitations. *See e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893), (Justice Brewer, dissenting, asked, “Where are the limits to such powers to be found, and by whom are

they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists”); *see also Reid v. Covert*, 354 U.S. 1, 5–7 (1957) (stating that the United States is “entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. . .”) (footnotes omitted). Many commentators have noted that the plenary power doctrine has impeded the development of coherent principles of constitutional immigration law.¹⁴ As Justice Jackson asked in dissent in *Mezei*:

Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?

345 U.S. at 226 (Jackson, J., dissenting).¹⁵

The idea of “absolute and unqualified” government power is surely a challenging one. Indeed, the notion that Congress has plenary power

¹⁴ *See, e.g.*, Motomura, *Immigration Law supra* note 12, at 545 (suggesting that the plenary power doctrine has prevented the growth of a coherent constitutional framework for immigration law, within which its sub-constitutional levels: statutes, regulations, agency directives, etc, can develop and be administered fairly and predictably.)

¹⁵ *See also Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall J., dissenting) (“Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.”)

over the treatment of non-citizens was questioned by the Court in *Wong Wing v. United States*, 163 U.S. 228 (1896), when it struck down a law which authorized the imprisonment at hard labor of any Chinese citizen judged to be in the U.S. illegally. The statute provided no right to a judicial trial. The Court held that, even though detention or temporary confinement was permissible “as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens,” Congress may not, even by invoking plenary power, subject non-citizens to “infamous punishment at hard labor, or by confiscating their property,” without a judicial trial. *Id.* at 237.

Although the *Wong Wing* Court generally reaffirmed aspects of the plenary power doctrine, the Court also sought a consistent “theory of our government” which distinguished deportation from punishment. *See id.* at 238.¹⁶ And, it did not seek an overarching extra-constitutional principle based upon the status of alienage to avoid the apparent dilemma presented by the 1892 law. Rather, it held that the constitutional protections afforded persons against arbitrary governmental penal actions constrain what otherwise might be viewed as plenary power over deportation:

It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents. *Id.* at 237. The Court in *Wong Wing*

¹⁶ *See generally*, Kanstroom, *supra* note 12 at 1903.

thus made it very clear more than a century ago that generalizations about plenary power and deference cannot override all fundamental human rights. Concurring in *Wong Wing*, Justice Field, the author of the Court's opinion in the *Chinese Exclusion Case*, put the matter as follows:

The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . This has been decided so often that the point does not require argument.

Wong Wing, 163 U.S. at 242 (Field, J., concurring in part and dissenting in part).

B. The Government's "Plenary Power" To Regulate Immigration Is Subject to Constitutional Limits

There is a basic difference between Congress' authority as to substantive immigration policy choices, such as visa categories, and the means chosen to implement and enforce those choices. This dichotomy, though hardly unproblematic, gives Congress and the Executive broad powers over immigration policy, but may restrain the exercise of that power where certain fundamental constitutional rights are implicated. Under this approach, the Court may preserve the power of the political branches to control entry into and lawful status within the United States, as well as substantive naturalization authority. However, matters of basic rights such as liberty concern questions that have long been recognized as within the unique role of the

judiciary. The profound questions in this case do not implicate substantive immigration policy choices. Release from prolonged executive detention does not necessarily grant to the non-citizen any particular lawful status.

However, the constitutionality of detention without any time limit and without any individualized determination of danger or flight risk is a question that is well within the authority of judiciary. As Justice Jackson noted in *Mezei*, “Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is outside our gates.” 345 U.S. at 218 (Jackson, J. dissenting).

Although detention may be a procedural aspect of the immigration process, it raises basic constitutional issues whenever and against whomever it is used.¹⁷ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . .”) (citations and

¹⁷ See, e.g., *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) (holding that “in determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision[] . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future”); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (“Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly.”)

quotations omitted); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (“Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed”); *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“general rule” of substantive due process is that the government may not detain a person prior to a judgment of guilt in a criminal trial); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection”); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (an individual held as unfit to stand trial cannot be committed for more than a reasonable period necessary to determine whether he will become competent in the foreseeable future). As this Court recently noted, it has “upheld preventive detention based on dangerousness only when . . . subject to strong procedural protections,” including, “proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards.” See *Zadvydas*, 533 U.S. at 678 (citing *Salerno*).

Consequently, while detention may be a permissible means by which Congress and the President implement substantive immigration policy, see *Wong Wing, infra*, the decisions of this Court since *Mezei* have established that the legality of such detention is subject to constitutional scrutiny. The plenary power doctrine does not dictate otherwise; nor does it require this Court to abandon the balance it has crafted between immigration policy -- which is within the province of the political branches -- and the protection of fundamental constitutional rights vouchsafed by habeas corpus.

Indeed, a doctrine of such dubious parentage that is so deeply contradictory to the better norms of our constitutional legal system should be invoked, if at all, with great care and in the most limited ways possible. *Mezei* surely does not require a different result. Properly understood, *Mezei* only holds that aliens who voluntarily seek, and are denied, “admission” to the United States under our immigration laws may be denied entry if no other country is willing to accept them.

But the case does not stand for the proposition that aliens who are forced into the custody of the United States against their will, and whose detention has been found unlawful, cannot ever be granted release from detention in the United States, subject to appropriate safeguards. Nor does *Mezei*, which addressed very specific national security concerns, establish that prolonged detention is always a permissible adjunct to exclusion. The plenary power doctrine, in sum, has never been applied to the issue presented by this case: the constitutionality of executive detention of non-citizens on territory controlled by the United States apparently without time limit. A holding that the Executive has that power is difficult to reconcile with the deepest and best constitutional traditions of our nation. As James Madison once noted, “[even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them”¹⁸

¹⁸ JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, 4 DEBATES, RESOLUTIONS AND OTHER
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C. The Plenary Power Doctrine Has Been Eroded

Since deciding *Mezei*, this Court has held that the “plenary power” to control immigration is subject to significant constitutional constraints in a variety of contexts. In *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), this Court acknowledged that there was a “limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens.” This Court also applied ordinary due process analysis in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), applying the *Mathews v. Eldridge* balancing test to evaluate the procedures at a hearing to exclude a returning resident alien who had voluntarily left the United States to visit a foreign country. In *INS v. Chadha, supra*, this Court invalidated a legislative veto over an immigration statute, holding that Congress’ authority over immigration must be implemented through “a constitutionally permissible means.” 462 U.S. at 941-42. And in *Nguyen v. INS*, 533 U.S. 53, 72-73 (2001), the Court applied, *arguendo*, “conventional equal protection scrutiny” to a statute that granted U.S. citizenship to certain children born abroad.

This erosion reflects this Court’s recognition that the ostensibly absolute edifice of plenary power, as originally crafted by Justice Field in the *Chinese*

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PROCEEDINGS, IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot, 2d ed. 1836).

Exclusion Case, was too absolute a doctrine to withstand thoughtful scrutiny.

III. MEZEI DOES NOT MEAN THAT PETITIONERS HAVE NO CONSTITUTIONAL RIGHTS BECAUSE THEY ARE OUTSIDE U.S. TERRITORY

To the extent that the *Knauff* and *Mezei* decisions implicitly relied upon the theory that the protections of the Constitution are limited to U.S. territory, they should not be followed by this Court. Indeed, even by 1953, the formalistic approach to territoriality exemplified by *Ross v. McIntyre (In re Ross)*, 140 U.S. 453 (1891)¹⁹ and the 1901 *Insular Cases* had eroded. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 287, 298 (1901) (White, J., concurring). In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931), the Court recognized a Russian corporation located entirely abroad as an “alien friend[] embraced within the terms of the Fifth Amendment” for purposes of challenging a taking of property by the federal government. See also *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) (foreign corporation may sue under the Fourteenth Amendment to recover property stolen from abroad and brought to U.S.). Foreign corporations located entirely outside the United States are likewise entitled to due process protection,

¹⁹ In *Ross*, a merchant seaman was convicted by a U.S. consular tribunal in Japan of murder on board a U.S. vessel while docked at a Japanese port. This Court denied his habeas petition and stated that the Constitution is “ordained and established ‘for the United States of America’ and not for countries outside of their limits.”

even where their only significant connection to the U.S. is being sued in our courts. *See Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). Four years after *Mezei*, the Court in *Reid v. Covert*, 354 U.S. 1 (1957), recognized that U.S. citizens abroad have a right to jury trial, and it expressly overturned the theory that constitutional protections stopped at the water's edge. *See* Neuman, STRANGERS TO THE CONSTITUTION, *supra* note 7, at 93–94. Even the apparently contrary decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held only that the Fourth Amendment did not apply to the seizure of an alien's property occurring entirely in another country, and Justice Kennedy noted that the Constitution's reach abroad turned on whether such application in any given case was “impracticable and anomalous.” *See Id.* at 278 (Kennedy, J., concurring).

Most importantly, of course, this Court's decisions in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene* demonstrate that the constitution reaches Guantánamo Bay detainees such as Petitioners. As this Court noted in *Boumediene*, the writ of habeas corpus is intended to secure individual liberty as “an essential mechanism in the separation-of-powers scheme.”²⁰ The Suspension Clause and the Great Writ protect detainees' rights by affirming “the duty and authority of the Judiciary to call the jailer to account.”²¹ Freedom “from arbitrary and unlawful

²⁰ *See Boumediene*, 128 S. Ct. at 2246.

²¹ *Id.* at 2247 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484
Footnote continued on next page

restraint” is among “freedom’s first principles.” Therefore, such judicial action neither deprecates governmental authority to protect national security nor violates appropriate principles of judicial deference.²²

“It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely.” See *Fay v. Noia*, 372 U.S. 391, 401 (1963). To serve its crucial historical purpose, habeas review of executive detention cannot be formalistic or rigidly cabined. As the *Hamdan* and *Boumediene* decisions demonstrate, the interpretation of *habeas* review itself has evolved substantially in recent years, as the understanding of the fundamental human rights on which it is based changes. It is a “flexible remedy adaptable to changing circumstances.”²³ As this Court has long understood, “[*H*]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes.”²⁴ Reflecting this historic and central role of the Great Writ, the habeas corpus statute itself provides that the court

Footnote continued from previous page
(1973) and *In re Jackson*, 15 Mich. 417, 439-440 (1867) (Cooley, J., concurring)).

²² *Id.* at 2277.

²³ *Regina v. Sec’y of State for the Home Dep’t, ex parte Muboyayi*, (1992) Q.B. 244, 269 (C.A.)

²⁴ *Hensley v. Mun. Ct., San Jose Milpitas Judicial Dist., Santa Clara County, Cal.*, 411 U.S. 345, 349-50 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)) (internal quotations omitted).

shall “dispose of the matter as law *and justice* require.” 28 U.S.C. § 2243 (emphasis added).

CONCLUSION

This Court's decision in *Mezei*, when properly read in light of history and the Court's subsequent jurisprudence, poses no meaningful barrier to Petitioners' release from detention in the United States.

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