IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, Next Friend, *et al.*, Appellees, v. GEORGE W. BUSH, President of the United States, *et al.*, Appellants.	)	Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL AND FOR EXPEDITED APPEAL

GREGORY G. KATSAS
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

THOMAS M. BONDY
(202) 514-4825
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

In its motion, the Government explained why this Court should stay the district court's order to bring to the United States 17 aliens who were taken into military custody and are now housed at Guantanamo pending efforts to locate an appropriate country for resettlement. Most of those aliens were detained after attending, or traveling to, terrorist training camps, and virtually all of them admitted freely that they sought weapons training for the purpose of fighting the Chinese Government. Congress has made a legislative judgment that aliens who have engaged in this type of activity are inadmissible, and the Executive wholly agrees that petitioners should not be allowed into this country. Furthermore, the Supreme Court has held that the Constitution permits the continued detention of an alien who has been excluded from the United States but cannot find another country willing to take him. The district court's order is at odds with this governing precedent, and threatens to impose irreparable harm on the United States.

Petitioners oppose a stay pending appeal, but their arguments are without merit. Their primary contention is that this Court should ignore the facts in the case — an argument that is inconsistent with the current posture of the litigation, their own prior filings, and the record in this and related cases. Petitioners also seek to recharacterize the issue on appeal as whether their "alien status bars a habeas remedy as a matter of immigration law." Opposition 11. But that gets it exactly backwards: the relevant merits question is not whether federal law *bars* their release into the United States,

but whether petitioners have any *right* under a federal statute or the Constitution to be brought to the United States and released here, notwithstanding the political branches' inherent plenary authority over immigration. As our motion showed, and as elaborated below, they do not — and, at a minimum, the Government has made a substantial showing in this regard. Given the irreparable injury that would result from the district court's erroneous order, a stay pending appeal is plainly warranted.

1. Petitioners do not seriously contest that the Government's legal arguments pose a substantial question — a conclusion that is inescapable from the district court's opinion, which recognizes that the question of its authority to order petitioners brought to this country for release "rais[es] serious separation of power concerns," was not resolved by *Parhat v. Gates*, 532 F.3d 834 (2008), and was decided adversely by the only other court to address it. Opinion 12-13, 14-15. Moreover, petitioners do not and cannot dispute that the "authority to admit aliens" is "a historically political inquiry," and that the power to exclude an alien is "'inherent in the executive power to control the foreign affairs of the nation.'" *Id.* at 11 (quoting *United States ex rel. Knauff v. Schaugnessy*, 338 U.S. 537, 542 (1950)); *see also id.* ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'" (citation omitted)).

In light of the political branches' inherent plenary powers over immigration, petitioners cannot prevail on the merits of this case unless they demonstrate that a

federal statute or the Constitution entitles them to be brought to and released into the United States. They cannot do so.

The Immigration and Nationality Act (INA) does not provide petitioners any right to be brought to the United States. Under the INA, individuals at Guantanamo Bay, Cuba, are not in the United States, *see* 8 U.S.C. 1101(a)(38), and petitioners have neither invoked nor been found eligible under the statutory criteria and procedures for seeking entry into the United States from abroad. As for detention, *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001) — both of which construed the INA as it applied to aliens who were physically present in the United States — lend petitioners no support. *See also* Opposition 11 n.14 (citing other cases construing the scope of detention authority under the INA).[1]

Likewise, the Constitution bestows no right on petitioners to be brought to the United States and released into this country. As the Government explained in its stay motion, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which involves an alien who had reached the U.S. border and was physically present on Ellis Island, *a fortiori* permits the continued exclusion of petitioners (who are outside the

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[1] Furthermore, petitioners' assertion that *Clark* and *Zadvydas* establish a "rule * * * that *no* statute can be read to permit indefinite imprisonment" (Opposition 12) is inconsistent with both cases' explicit recognition that "special circumstances," such as "suspected terrorists," would pose a different question and might warrant preventive detention. *Zadvydas*, 533 U.S. at 691; *Clark*, 543 U.S. at 379 n.4.

United States) and their detention at Guantanamo as an incident of their exclusion. Petitioners suggest (Opposition 14-15) that *Mezei* was overruled by *Boumediene,* but the holdings are fully consistent: *Boumediene* confers on Guantanamo detainees a right to habeas corpus review, including the right, where applicable, to an order of release. It does not, however, entitle those detainees to the extraordinary remedy of being brought into the United States — and nothing in the decision suggests otherwise. Such an outcome would be irreconcilable with *Mezei* (which the district court was bound to follow, *see Agostini v. Felton*, 521 U.S. 203, 258 (1997)), and would fundamentally encroach on the political branches' plenary powers to control entry into this country. Aliens who are taken into custody by military forces in wartime do not gain a constitutional right to be brought into this country and released here, notwithstanding their statutory inadmissibility and the distinctive risk they present to our Nation. At most, habeas provides a right of release from custody on the *basis of their status as asserted enemy combatants*. It does not confer on petitioners the further and fundamentally different right to be brought to and released in the United States without regard to the ordinary operation of the immigration laws, and free of any conditions except those agreed to by the aliens themselves or imposed by the district court in its unfettered discretion.

Petitioners also suggest (Opposition 14) that *Mezei* is distinguishable because the Government had not explained in that case why it was excluding the alien, and the

alien had come voluntarily to the United States. As the Government has already explained (Motion 12), neither difference matters. Petitioners do not even try to counter that analysis.

Finally, petitioners' suggestion that the Executive "create[d] the dilemma" (Opposition 14) is not well-taken. The district court properly assumed that "the petitioners were lawfully detained" (Opinion 5), pending a reasonable opportunity to determine whether they were in fact enemy combatants. As the Government has explained (Motion 12), the decision to move petitioners away from the battlefield was in accord with established wartime practice. Petitioners have no response to either point.

2. Forcing the Government to bring petitioners to the United States would also pose at least four different irreparable harms.

First, the district court's order intrudes upon the political branches' exclusive constitutional authority over the Nation's borders and over the administration of the immigration laws implementing that authority. The district court exacerbated the affront by holding that the Department of Homeland Security cannot impose conditions on petitioners or otherwise enforce the immigration laws against them. Contrary to petitioners' suggestion (Opposition 15-16), impinging on the constitutional separation of powers can and does constitute irreparable injury warranting equitable relief. *See, e.g., Ex parte Peru*, 318 U.S. 578, 586-588 (1943)

(recognizing that common law writs, "like equitable remedies, * * * are usually denied where other adequate remedy is available," and holding that judicial interference with Executive's conduct of foreign relations warrants mandamus relief).

Second, the district court's order threatens to cloud petitioners' legal status as inadmissible aliens, by conferring on them new rights under the INA. Far from disputing this harm, petitioners confirm it and even suggest that the Government understates it. Specifically, petitioners argue that bringing them into the United States would necessarily result in their obtaining rights under the INA. Upon crossing the border, petitioners claim, "their status will be as clear as that of the many aliens released since *Clark*." Opposition 16.

Third, bringing petitioners to the United States pending appeal poses a risk distinct to this Nation. Petitioners are aliens who (with one exception, who was admittedly en route to a training camp) freely admitted that they sought weapons training in Afghanistan for the express purpose of fighting the Chinese Government. Those aliens ask to be brought to the country that has detained them for six years. Congress has specifically determined that aliens who engage in activities of the type admitted to by petitioners should be excluded from the United States. *See* 8 U.S.C. § 1182(a)(3)(B). Furthermore, the risk posed by the order was exacerbated by the district court's holding barring DHS from imposing conditions on petitioners or

taking them into custody pending immigration proceedings.[2]

Fourth, the district court's order could also make it more difficult for the Government to negotiate with third countries over resettlement. If all 17 Uighurs were brought from GTMO and resettled into the United States, our friends and allies might be less likely to participate in resettlement efforts for petitioners (or, indeed, for any other detainees). Those potential harms weigh strongly in favor of staying the district court's release order pending appeal.

Petitioners ask this Court to ignore their backgrounds, asserting that the Government has failed to adequately develop a record or has otherwise waived the opportunity to challenge their suitability to be brought into the United States. But the

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[2] Petitioners' suggestion that the district court would have minimized any danger by imposing conditions on their release is not only speculative but is also inconsistent with the district court's oral ruling at the October 7, 2008 hearing. In a written order issued on October 8 — *after* the Government had sought a temporary stay from this Court — the district court stated that it would "impose such short-term conditions of release as it then finds reasonable and appropriate" at the October 10 hearing at which the Government had been ordered to produce petitioners for release into the United States. Order, at 2. The district court had previously ruled orally that no government supervision would be permitted between October 10 and October 16. *See* Transcript 62-65. Given that prior oral ruling, it is not clear whether the district court's reference to "conditions of release" in the October 8 written order was intended to encompass some form of government supervision, or instead merely to refer to conditions such as identifying private persons who would provide petitioners with housing and interim support. *See also* Opposition 5 (noting that district court required "detailed proffers concerning the practical arrangements in place for release and resettlement, and as to who would host the men and where"). And, as noted, the district court's order did not permit DHS to impose conditions on petitioners' release.

fact that the only question before the district court was the purely legal one of the court's power to order petitioners to be brought to this country does not bar the Government from asserting that equitable factors support a stay of the district court's release order pending appeal and, if necessary, adducing facts in support of that argument. *See, e.g.,* Fed. R. App. P. 8(a)(2)(B)(i), (ii). There is nothing improper about relying for this purpose on petitioners' own testimony and statements relating to their background — the veracity of which petitioners do not dispute.

Not only does petitioners' waiver argument ignore the posture of this stay motion, it is also at odds with the record in the district court and this Court. The facts relating to petitioners' backgrounds were recognized by this Court as to petitioner Parhat,[3] and were affirmatively conceded in district court proceedings by the other petitioners.[4] Furthermore, unclassified records of proceedings before a Combatant Status Review Tribunal (CSRT) were submitted in Detainee Treatment Act cases for a number of petitioners. CSRT records were also submitted in habeas proceedings

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[3] *See also* Opposition 6 (stating that district court "properly could take judicial notice" of *Parhat* decision).

[4] *See, e.g.,* Motion for Consolidation of Petitioners for *Habeas Corpus* 2-3 (filed Jul. 7, 2008) (stating that, of 17 Uigher petitioners, 12 "are identically situated to Parhat in all material factual and legal respects: *in addition to their alleged affiliation with ETIM, they were living with Parhat in the same place, and thereafter were captured with Parhat,*" and that remaining 4 petitioners are also similarly situated to Parhat, by virtue of their "alleged affiliation with the Uighur separatist organization known as the East Turkistan Islamic Movement ('ETIM')").

for 7 of the 17 detainees, and petitioners urged the district court to act "for all * * * purposes" as if the CSRT records for all petitioners had been "produced as factual returns" in the consolidated habeas actions. Petitioners' Reply to Respondent's Response to Motion to Use CSRTs Provided in DTA Action in this Action 1 (filed Aug. 7, 2008); *see also* Respondents' Response to Uighur Petitioners' Motion 1 (filed Aug. 1, 2008) (agreeing that petitioners may use CSRT records from DTA cases in habeas proceedings). These facts were also repeatedly identified by the Government in arguing that the district court lacked authority to order petitioners released into the United States. *E.g.*, Respondents' Combined Opposition to Parhat's Motion for Immediate Release 9-10, 14, 17 (filed Aug. 5, 2008) (asserting that Parhat is inadmissible into United States and may not be ordered released into the country, and relying in support on Parhat's weapons training at ETIM-sponsored military camp); Respondents' Opposition to Petitioners' Joint Motion 2-4 (filed Sept. 24, 2008); Transcript 13-14, 15-17, 20-21.

Finally, petitioners assert that training with assault weapons in Taliban-controlled Afghanistan is equivalent to the experiences of "millions of American civilians, and hundreds of thousands of servicemen and women." Opposition 18. But the evaluation of potential risks — which surely would be affected by the fact that petitioners were detained for six years by the country to which the district court has now ordered them brought — is for the political branches alone. And if petitioners

wish to establish that they are admissible to the United States and seek to refute the evidence described above, they are required to invoke the procedures under the INA for doing so.

3. Petitioners argue that a stay of the district court's release order is unwarranted even if the Government has a substantial case on the merits and the balance of harms favors a stay, on the purported ground that a habeas court's release order is presumptively correct under Fed. R. App. P. 23 and *Hilton v. Braunskill*, 481 U.S. 770 (1987). The argument misreads *Hilton*, which holds that Rule 23 and the traditional stay factors are consistent and that the presumption of correctness under Rule 23(d) "may be overcome if the traditional stay factors so indicate." *Id.* at 777. Furthermore, even if a district court's decision to order release were reviewed under a heightened standard, neither *Hilton* nor Rule 23(d) sets a higher standard for staying an order requiring release *into the United States* of 17 aliens outside the country, in contravention of the determination of the political branches and immune from the Nation's immigration laws.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Government's motion, the Government respectfully requests that the Court grant a stay pending appeal, and expedite the appeal.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

THOMAS M. BONDY
(202) 514-4825

SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2008, I filed and served the foregoing Reply In Support Of Motion for Stay Pending Appeal And For Expedited Appeal by causing an original and four copies to be delivered to the Court via hand delivery, and by causing copies to be delivered to the following counsel of record by electronic service simultaneously with the filing of the motion and by overnight delivery, postage prepaid:

Eric A. Tirschwell
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100
Fax: (212) 715-8000
Email: etirschwell@kramerlevin.com

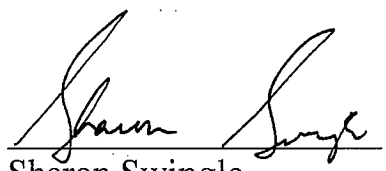
Sabin Willett
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110-1726
Email: sabin.willett@bingham.com

Susan Baker Manning
Bingham McCutchen LLP
2020 K Street, N.W.
Washington DC 20006-1806
(202) 373-6172
Email: susan.manning@bingham.com

George Clarke
Miller & Chevalier Ctd.
655 15th Street NW
Suite 900
Washington, DC 20005
Email: gclarke@milchev.com

Elizabeth P. Gilson
Attorney At Law
383 Orange Street
New Haven, CT 06511
(203) 777-4050
Email: egilson@snet.net

J. Wells Dixon
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Email: wdixon@ccr-ny.org



Sharon Swingle