[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]

Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

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

JAMAL KIYEMBA, Next Friend, *et al.,*
Petitioners-Appellees,
v.
GEORGE W. BUSH, President of the United States, *et al.,*
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

Immigration and Nationality Act	INA
National Immigration Justice Center	NIJC

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and their amici curiae frame their arguments in terms of the simple right to "release" in habeas, but they in fact claim an entitlement to something fundamentally different: release *plus* an order requiring the Government to bring them into the United States. The Constitution's separation of powers and existing Supreme Court precedent preclude the entry of such extraordinary relief. And nothing in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), or the law of habeas corpus, sanctions any different result.

The district court erred in claiming the power to order the Government to bring petitioners into the country and to release them here. The power to allow aliens into the United States from abroad rests exclusively in the political branches in their exercise of plenary authority over foreign relations and national security. The Government has been pursuing — and, despite petitioners' suggestion to the contrary, continues to pursue vigorously — diplomatic efforts to identify a third country for petitioners' resettlement.[1] However, the political branches have made a judgment that petitioners should remain housed in relatively unrestricted conditions at Guantanamo, pending the successful conclusion of those diplomatic efforts. Because petitioners have no statutory or constitutional right to be brought into the United States, that considered judgment should be the end of the matter.

A. The Supreme Court's decision in *Shaughnessy v. United States ex. rel Mezei*, 345 U.S. 206 (1953), compels this conclusion. There, the Supreme Court upheld the potentially indefinite detention of an alien excludable from the United

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[1] Relying on a newspaper article, petitioners contend that "resettlement efforts were abandoned" because of language in the Government's stay motion. Petitioners' Brief (Pet. Br.) 1, 16-17, n.19. In fact, as the attached letter makes clear, "the Department of State confirms that it is actively continuing its efforts to resettle the 17 Uighurs currently held at Guantanamo, and that negotiations are ongoing regarding the possibility of their resettlement in third countries." Letter from John B. Bellinger, III, The Legal Adviser, Department of State, to Gregory G. Katsas, Assistant Attorney General, Civil Division, Department of Justice (October 21, 2008) (attached as an Addendum to this brief).

States but housed at Ellis Island because he could not find another country willing to take him. *A fortiori*, that holding — which involved an alien who had been granted a visa by the U.S. Government, who was a previous long-term resident with a citizen wife and children and other substantial ties to this country, and who was physically present in the United States — applies to petitioners, who are aliens wholly outside the United States with no voluntary connections to this country. Petitioners question *Mezei*'s ongoing validity and also assert that it is factually distinguishable, but neither argument undermines its binding force on this Court.

Petitioners repeatedly argue that the Suspension Clause entitles them to a remedy of "release." But petitioners seek release *plus* an order requiring the Government to bring them into the United States. And they remain overseas at Guantanamo precisely because they do not wish to return to their home country. The Government has agreed for their own protection not to return them against their will, and is housing them at Guantanamo under relatively unrestricted conditions pending efforts to locate another country for their resettlement. The salient point is that petitioners do not seek simple release, but instead an unprecedented order requiring the Government to bring them into the United States, and to permit them to remain here without regard for the operation of the immigration laws. A judicial order requiring the Executive to bring an alien located abroad into the United States

violates our separation of powers. And nothing in the office or tradition of the writ of habeas corpus would permit a court to grant such extraordinary relief.

Petitioners concededly have not established eligibility under the immigration laws to come from a foreign country into the United States. But beyond that, the district court lacked authority to issue the order under review because it is contrary to the political branches' undisputed and inherent sovereign power to prevent aliens outside the United States from reaching or crossing our Nation's borders. At a bare minimum, a court would need a positive grant of authority to order that aliens held overseas be brought into this country, and there is no such grant of authority governing the situation here.

B. Petitioners have not cited a single case in which a court has held that the Suspension Clause or any other constitutional provision empowers a district court to order an alien brought into this country and released. That is not surprising, because the Supreme Court's decision in *Mezei* holds that a court *lacks* that authority. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), is not to the contrary. Under *Boumediene*, Guantanamo detainees are entitled to habeas corpus review of their detention — a right also held by the alien in *Mezei* — and aliens who establish that they are unlawfully held at Guantanamo may be entitled to appropriate relief, but (even when a detention is shown to be unlawful) *Boumediene* establishes no right to be brought to this country and released. Indeed, in *Boumediene*, the Court recognized

that release itself is not "the appropriate [remedy] in every case in which the writ is granted." *Boumediene*, 128 S. Ct. at 2266.

C. The statutory rulings in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), are inapposite. As discussed in the opening brief, the Supreme Court in those cases simply construed a provision of the Immigration and Nationality Act (INA) that has no relevance here. The holdings do not apply to the Government's detention of aliens *outside of* the United States pursuant to its inherent, sovereign authority to bar aliens from the country. Moreover, *Zadvydas* itself recognizes the crucial difference, for constitutional purposes, between an alien outside the United States and one who has been admitted into this country.

D. Nor does *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), decide the question of petitioners' entitlement to be brought into the United States for release, as this Court has repeatedly recognized in rulings issued in this litigation and related cases. Under the narrow scope of jurisdiction conferred by the Detainee Treatment Act, this Court in *Parhat* reviewed only the determination of a Combatant Status Review Tribunal that Parhat was an enemy combatant.

E. Finally, even if the district court had the extraordinary power to order the relief sought, the court nonetheless should have permitted the Government a reasonable additional period to continue its active diplomatic negotiations, and also to present any relevant information to the court, before taking the extreme step of

ordering aliens formerly held as enemy combatants, at all times outside of this country, to be brought into the United States for release.

ARGUMENT

A. *Mezei* Compels Reversal Of The District Court Order.

Petitioners assert that the Constitution forbids their detention incident to exclusion, pending efforts to locate a third country in which they can resettle. That argument is squarely foreclosed by *Mezei*. Indeed, petitioners themselves acknowledge that — contrary to the district court's erroneous characterization of the decision — *Mezei* upheld the "potentially indefinite[]" detention of an alien who was excludable from the United States but held at Ellis Island because he could not find another country to take him. Petitioners' Brief (Pet. Br.) 32.

Mezei's constitutional holding applies with even greater force in the circumstances of this case. *Mezei* involved the detention of an alien who was physically present in this country, had previously been admitted and had resided for decades in the United States without incident, and had applied for and received a visa. This case involves seventeen aliens who have never set foot in the United States and never sought admission under our immigration laws. Moreover, petitioners were captured by foreign powers in foreign countries to which the aliens had voluntarily traveled, and subsequently transferred to the custody of the U.S. military in the course

of a multinational armed conflict against Al Qaeda and associated forces. The United States has since attempted to find — and continues actively to seek — an international solution to the global problem of where to send these aliens, who fear mistreatment in their home country. This difficult process is for the political branches to manage, pursuant to their responsibility for foreign relations and national security. It is not for a federal court to intercede and impose its own solution in this sensitive area.

Mezei's holding that a court should not intrude on the political branches' exclusive authority over the exclusion of aliens applies *a fortiori* to an alien who is outside the United States and who therefore has not even been placed in formal exclusion proceedings — and it is equally applicable whether the court purports to order an alien's admission into this country or instead orders the Executive to exercise its discretionary power to grant the alien parole. *Cf.* National Immigration Justice Center (NIJC) Br. 13 (arguing that petitioners are entitled to temporary parole). In either case, the separation-of-powers injury is the same. Even assuming that the Executive has the statutory authority to parole petitioners into this country, *cf.* 8 U.S.C. § 1182(d)(5)(A) (establishing statutory requirements for the discretionary grant of parole), the Secretary of Homeland Security[2] is not required to exercise his

[2] The statutory authority to grant parole under 8 U.S.C. § 1182(d)(5) has been (continued...)

discretionary authority to grant parole to any alien, nor may he be forced to do so by a reviewing court. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of discretionary decisions); *see also, e.g., Bolante v. Keisler*, 506 F.3d 618, 621 (7th Cir. 2007).

Petitioners contend that *Mezei* was "[r]oundly criticized at the time and ever since." Pet. Br. 32; *see also id.* at 33 (describing *Mezei*'s holding as "eroded"); Law Professors Br. 4 (asserting that *Mezei* was "a product of [its] time"). But the lack of popularity of a Supreme Court decision provides no basis for ignoring it. The decision is governing precedent, which the Supreme Court itself has explicitly declined to reconsider. *See Zadvydas*, 533 U.S. at 694. Unless and until the Supreme Court does so, this Court is bound by *Mezei*'s holding. *See Agostini v. Felton*, 521 U.S. 203, 258 (1997) ("[L]ower courts lack authority to determine whether adherence to a judgment of [the Supreme] Court is inequitable."); *Munaf v. Geren*, 482 F.3d 582, 584-585 (D.C. Cir. 2007) ("[W]e are not free to disregard [a precedent of the Supreme Court] simply because we may find its logic less than compelling."), *vacated on other grounds*, 128 S. Ct. 2207 (2008). In any event, *Mezei* was correctly decided. The Supreme Court simply recognized the political branches' sovereign authority to protect the borders and prevent aliens from entering the country,

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[2](...continued)
transferred to the Secretary of Homeland Security. *See Clark*, 543 U.S. at 374 n.1.

including the power to detain an excludable alien who has not found another country in which to resettle.

Amici curiae Law Professors cite *Fiallo v. Bell*, 430 U.S. 787 (1977), *Landon v. Plasencia*, 459 U.S. 21 (1982), *INS v. Chadha*, 462 U.S. 919 (1983), and *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), for the general proposition that the political branches' authority to exclude aliens is subject to judicial review under the Constitution. But petitioners have not even sought to enter the United States under the immigration laws, and therefore cannot seek judicial review of any decision under those laws. Nor, indeed, do they challenge any provision of the immigration laws or explain how those laws' provisions for exclusion or admission of aliens are unconstitutional given Congress's plenary power over the subject. The fact that petitioners can challenge their custody through judicial review — which was also the case in *Mezei* — does not mean that their current custody is unlawful, much less that the reviewing court is empowered to order that the political branches must bring an alien into this country for release. None of those cases supports that extreme proposition, or purports to override the clear holding in *Mezei* that the Constitution permits the indefinite detention of an alien at our borders incident to his exclusion from the United States and inability to resettle elsewhere.

Petitioners and their amici also try to distinguish *Mezei* on factual grounds, but their efforts are unavailing. Indeed, their arguments are the same ones advanced by

the district court and refuted in our opening brief. For example, petitioners assert that, unlike Mezei, who came to the United States of his own volition, they were involuntarily taken into custody by U.S. military forces acting overseas (after petitioners voluntarily left their home country to travel to Afghanistan and Pakistan, areas of active international conflict). If anything, however, the fact that petitioners in this case have no voluntary connections to the United States serves to weaken, not strengthen, any claim that they might otherwise have to constitutional protections. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that the scope of constitutional protections afforded an alien depends on the extent to which the alien has voluntarily "come within the territory of the United States" and developed "substantial connections with this country").

Furthermore, petitioners' argument, if accepted, would penalize the Government for taking steps to minimize the danger to suspected enemy combatants and U.S. forces by moving those individuals to a safer location. Not only was the Government's conduct in this regard fully consistent with accepted wartime practice, but even the district court assumed that petitioners' initial detention was lawful. *See* Opinion 5, Joint Appendix 1604.[3]

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[3] Amici curiae National Immigration Justice Center and American Immigration Lawyers Association contend that immigration law distinguishes aliens who voluntarily seek admission from those brought to the United States against their will, (continued...)

Petitioners also claim that *Mezei* is distinguishable because the Executive's concern in that case was that "foreign enemies might dump 'volunteers' on our doorstep." Pet. Br. 33; *see also* Law Professors Br. 7. But that concern is equally applicable here. The concern in *Mezei* was not that petitioner himself was dumped on our shores; he was a previous long-term resident of the United States with

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[3](...continued)
see NIJC Br. at 5, but none of the cited cases has any relevance here. Amici rely on three cases that did not address any constitutional issues and concerned only statutory procedures and privileges that have no bearing on any of the questions presented in this appeal. *See Matter of Badalamenti*, 19 I. & N. Dec. 623 (BIA 1988) (holding that, under the INA, an alien extradited and paroled must generally be given a fair and reasonable opportunity to depart voluntarily before being placed in exclusion proceedings); *United States v. Brown*, 148 F. Supp. 2d 191 (E.D.N.Y. 2001) (same); *Matter of Yam*, 16 I. & N. Dec. 535 (BIA 1978) (holding that, under the INA, an alien who crossed the border by floating unconscious down the Niagara River had to be placed in exclusion proceedings, not deporation proceedings). None of the cases concerned aliens abroad, let alone the question whether a court could order the Government to bring such aliens into the United States.

Amici also cite *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958), for the proposition that the Government's affirmative action to bring an alien into the United States can confer on the alien a constitutionally protected right to remain here. NIJC Br. 7-8. That case, however, in addition to being inconsistent with *Mezei*, was described by the court itself as "*sui generis*" and turned on the fact that the President had explicitly "invited" the alien through "the announced foreign policy of the United States" to seek parole in the United States and Congress had subsequently "endors[ed]" the President's actions. 260 F.2d at 613. Furthermore, the court did not order the Government to bring any aliens abroad into the United States (indeed, the alien was already here) or even to extend petitioner's parole. All the court ordered the Government to do was grant the alien a hearing before his parole was revoked. *Id.* at 614-615. The decision provides no support for the district court's order.

substantial ties to this country, to whom the Government had affirmatively granted a visa to re-enter. Instead, the concern was that if excludable aliens have a right to come into the United States, then foreign countries could dump volunteers on our doorstep and we would have to let them in. That same concern is relevant here. Moreover, as explained in our stay briefing, a decision requiring the Government to bring petitioners into the United States could make it more difficult for the Government to negotiate with third countries over resettlement. Reply Brief in Support of Motion for Stay Pending Appeal 7. If all seventeen petitioners were brought here, even our friends and allies might be less likely to participate in resettlement efforts for petitioners (or, indeed, for any other detainees).

Next, amici curiae Law Professors assert that *Mezei* "addressed specific national security concerns not present here." Law Professors Br. 4. But the Supreme Court's holding concerning *detention* — as distinguished from the use of classified information — did not turn on the specific basis for Mezei's exclusion. In addition, as previously discussed, bringing petitioners into the United States poses a distinct risk to this Nation. *See* Reply Brief in Support of Motion for Stay Pending Appeal 6. Any decision to allow aliens into this country or to resettle them elsewhere inevitably implicates foreign relations and national security concerns. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005); *INS v. Abudu*, 485 U.S. 94, 110 (1988). And there is no basis for ignoring those concerns here.

Finally, amici curiae Law Professors suggest that *Mezei* is distinguishable because the detention in this case is unlawful. Law Professors Br. 11-12. This argument, however, erroneously assumes that petitioners' detention is unlawful. In fact, it is *not*, because the Government retains the sovereign authority, independent of the authority to detain enemy combatants, to hold petitioners incident to barring them from the United States, and pending efforts to resettle them elsewhere. *See Mezei*, 345 U.S. at 216; *cf. Munaf v. Geren,* 128 S. Ct. 2207, 2221-2224 (2008) (recognizing that a habeas court should not issue a release order that would bar detention by independent sovereign government). It is fully lawful for the Government to hold petitioners on this second, independent legal basis.

B. *Boumediene* Does Not Give Petitioners A Constitutional Right To Be Brought Into The United States And Released.

Boumediene v. Bush, 128 S. Ct. 2229 (2008), holds that aliens detained as enemy combatants at Guantanamo have the procedural right under the Constitution to habeas corpus review of the legality of their detention and, where warranted, to a writ requiring their release. But *Boumediene* explicitly recognizes that habeas is an "adaptable remedy," and that release "is not the appropriate" or "exclusive" remedy "in every case in which the writ is granted." *Id.* at 2266. And *Boumediene* certainly does not confer on aliens the fundamentally different — and *substantive* — right to be brought from an overseas detention facility, whether at Guantanamo, in Iraq, or

elsewhere, into the United States for release. The Suspension Clause does not abrogate the plenary authority of the political branches to bar aliens from reaching our shores and to exclude those who do. Because petitioners may be lawfully detained incident to that distinct power, and petitioners do not wish to be released in any country that is currently willing to admit them, there is no basis under *Boumediene* for imposing *any* habeas remedy, much less the extravagant remedy of release *plus* an order requiring petitioners to be brought into the United States.

In *Mezei* itself, the Supreme Court recognized that the alien had a right "by habeas corpus [to] test the validity of" his detention at Ellis Island. 345 U.S. at 213. Nevertheless, the Court held, the Government retained its power to exclude the alien. *Id.* Accordingly, the alien had no right to be released from indefinite detention at the border of the United States. *Id.* at 215-216.

Similarly, in *Munaf*, which was decided the same day as *Boumediene*, the Supreme Court held that United States citizens detained by a U.S.-led multinational security force in Iraq were entitled to habeas corpus review of their detention, but not to an order of release that would bar their criminal prosecution by the Iraqi Government or require them to be taken out of Iraq altogether. 128 S. Ct. at 2220; *see id.* at 2223 ("[T]he 'release' petitioners seek is nothing less than an order commanding our forces to smuggle them out of Iraq."). The Court emphasized that a habeas court's remedial discretion is limited by the separation of powers and other

concerns, and that a court sitting in habeas corpus should not interfere with a foreign government's "sovereign right to punish offenses against its laws committed within its borders," "even when application of that sovereign's laws would allegedly violate the Constitution." *Id.* at 2220, 2222; *see also id.* at 2225-2226 (rejecting argument that order of release should be granted because petitioners alleged that their transfer to Iraqi custody would likely result in torture, and emphasizing that a habeas court should not intrude on the political branches' conduct of foreign policy).

Petitioners seek to distinguish the Supreme Court's holding and analysis in *Munaf* — which they unpersuasively attempt to cabin as "[a] peculiar case, limited to its facts" — on the supposed basis that the Iraqi Government's sovereign interest in prosecuting crimes committed within its borders is fundamentally different from the United States Government's sovereign interest in excluding aliens. *See* Pet. Br. 39-40. The Court's analysis, however, relies not only on the nature of Iraq's sovereign interest, but also on the Court's refusal to "second-guess" the Executive's determinations regarding sensitive foreign policy issues. *Munaf*, 128 S. Ct. at 2226. In any event, the United States Government's undisputed sovereign power to exclude illegal aliens is entitled to at least the same deference and comity as is a foreign government's interest in enforcing its laws.

And although the Supreme Court held in the *Insular Cases* that citizens of certain overseas U.S. territories possessed fundamental rights under the United States

Constitution, *see Boumediene*, 128 S. Ct. at 2254-2255 (discussing cases), the recognition of those rights did not serve to strip the political branches of the plenary authority over the exclusion of aliens. *See Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (recognizing that the constitutional power to acquire territory by treaty encompasses the power "to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be"). Citizens of those territories who sought to enter the United States exercised whatever rights were granted by the political branches, either through legislative enactments conferring citizenship or other lesser immigration rights, or through similar covenants with the governments of those territories.[4]

Petitioners argue that, unless a federal court sitting in habeas corpus can order them brought into the United States over the objection of the political branches, it will be impossible to grant effective relief to Guantanamo detainees found not to be enemy combatants, because foreign governments will refuse to accept detainees and accordingly the remedy of release will be "eliminate[d] * * * in every Guantanamo case." Pet. Br. 40. That argument is entirely unfounded, and invites this Court to

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[4] *E.g.,* Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) ("citizens of Porto Rico * * * are hereby declared, and shall be deemed and held to be, citizens of the United States"); Pub. L. No. 69-640, 44 Stat. 1234 (1927) (conferring U.S. citizenship on residents of the Virgin Islands); Pub. L. No. 72-198, 47 Stat. 336 (1932) ("a native of the Virgin Islands of the United States who is now residing in any foreign country shall for purposes of the Immigration Act * * * be considered as a nonquota immigrant").

second-guess the judgment of the political branches in a sensitive area of foreign relations. *Mezei* establishes that decisions relating to resettlement are for the political branches, not for courts — and of course the typical presumption is one of regularity. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). *Mezei* also establishes that, even if the detention is indefinite, it is still lawful.

Furthermore, petitioners are simply wrong to assert that large numbers of detainees at Guantanamo will be unable to be repatriated or transferred to third countries. As petitioners themselves recognize, "[i]n most cases," aliens detained at Guantanamo have been repatriated or transferred without incident. Pet. Br. 40; *see also* http://projects.nytimes.com/guantanamo (providing detailed information about the 779 aliens detained at Guantanamo, of whom at least 520 have been transferred to other countries). And, as a matter of international law, every national of a country has a right of return, and countries have an obligation to accept back their own nationals. *See* United Nations General Assembly, Universal Declaration of Human Rights, Art. 13(2) ("Everyone has the right to leave any country, including his own, and to return to his country.").[5]

[5] Although the Universal Declaration of Human Rights does not itself impose any legal obligations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004), the United States considers Article 13(2) to be reflective of customary international law.

Moreover, as explained, petitioners remain at Guantanamo only because they do not wish to return to their home country, and another country has not been identified that is willing to take them. Contrary to petitioners' suggestion (Br. 17 n.19), the Government remains engaged in active and vigorous diplomatic efforts to find a country that is willing to resettle petitioners consistent with our policies on humane treatment. *See* Letter from John B. Bellinger, III, The Legal Advisor, Department of State, to Gregory G. Katsas, Assistant Attorney General, Civil Division, Department of Justice (October 21, 2008) (attached as an Addendum to this brief). And there is no merit to petitioners' argument that the Government has failed to take meaningful steps to find an international solution to this problem. In any event, especially while such diplomatic efforts are underway, petitioners have no right to be brought from outside this country into the United States and released here.[6]

Finally, not only does the constitutional right to habeas corpus review not carry with it the very different right to be brought from outside the United States into this country from release, it also does not confer any automatic right on an alien to be

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[6] To the extent that habeas corpus compels petitioners' release, it is release only to a country to which petitioners have a right to enter — and currently, the only country that qualifies is petitioners' home country. While petitioners understandably do not wish to be released there (and the United States is vigorously seeking to identify a different country that will accept petitioners), the lack of an alternate country to take them does not confer on them a right to be brought into the United States.

brought to the United States for a hearing. Even assuming that this case is governed by 28 U.S.C. § 2243 cl. 5, as petitioners claim (*see* Pet. Br. 31), that provision by its terms states that a petitioner has no right to be present when his application for a writ of habeas corpus and the return "present only issues of law." *See also Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1973) (recognizing that habeas petitions "can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim"). Here, the district court explicitly found that "the petitioners fail to describe any outstanding factual issues related to the legality of their detention." Minute Order, Sept. 29, 2008. Petitioners have not challenged that ruling, which in any event was correct. And the general rule that a prisoner's physical presence before the court is not required in every case applies with particular force here, where that presence could confer on petitioners additional rights under the immigration laws, would present unique practical and security considerations, and would contravene the political branches' judgment that petitioners should be excluded from this country.[7]

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[7] In asserting that the constitutional right of habeas corpus entitles petitioners to be brought into the United States for release, amici curiae Legal and Historical Scholars cite a series of early British cases. *See* Br. 5-7. Not one of those cases involved a claim that a habeas petitioner outside of England had a right to be brought there in the exercise of the court's habeas jurisdiction. To the contrary, the petitioners in the cited cases were in England at the time the writ was sought. The salient historical point is that neither petitioners nor their multiple amici have managed to

(continued...)

C. *Zadvydas* And *Clark* Do Not Give Petitioners A Right To Be Brought Into The United States And Released.

Petitioners continue to improperly rely on *Zadvydas* and *Clark*. Pet. Br. 29. As the Government explained in its opening brief, *Zadvydas* and *Clark* were not constitutional rulings, but statutory ones, construing the scope of the Government's detention authority under 8 U.S.C. § 1231(a)(6). *See* Brief for Appellants 31-33. That provision is not applicable here, both because Guantanamo is outside the United States (geographically and also as defined by the pertinent immigration statute, *see* 8 U.S.C. § 1101(a)(38)) and because petitioners' detention is not pursuant to § 1231(a)(6). In addition, *Zadvydas* explicitly noted that the detention of excludable aliens like *Mezei* — and *a fortiori* petitioners here, who have not even reached our borders — poses a very different constitutional question from the detention of aliens who made an entry. *See Zadvydas*, 533 U.S. at 693-694. And *Clark*, which involved excludable aliens, simply held that, as a matter of statutory construction, *Zadvydas*'s interpretation of § 1231(a)(6) applied to all classes of aliens detained under the provision after entry of a removal order. The only Supreme Court decision to

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[7](...continued)
identify any prior case in which a court granted to an alien held outside the country the extraordinary relief at issue here. Indeed, English law recognized that the right to exclude aliens was a "sovereign power * * * vested in the person of the king," and that, although foreigners who entered the country were shown "[g]reat tenderness" under English law, they were "liable to be sent home whenever the king sees occasion." William Blackstone, 1 Commentaries *257, *259-*260.

address the *constitutionality* of detaining excludable aliens is *Mezei*. As discussed, that decision upholds the indefinite detention of an alien incident to his exclusion from the United States and pending efforts to locate another country for resettlement — and accordingly forecloses petitioners' claim to release.

D. *Parhat v. Gates* Does Not Entitle Petitioners To Be Brought Into The United States And Released.

Petitioners contend that this Court need not decide whether the district court erred in ordering the Government to bring them into the United States for release, because, according to petitioners, the Court has already resolved the question in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). That is incorrect. The Court's jurisdiction in *Parhat*, if any, was limited to "determin[ing] the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," *id.* at 835 (internal quotation marks omitted); the Court had no occasion to consider or decide the very different question whether a court exercising its habeas jurisdiction could order that a detainee be brought into the United States.[8]

Furthermore, this Court has repeatedly made clear that *Parhat* did not decide whether an alien who is not held as an enemy combatant but does not wish to be

[8] This Court is now considering whether it has any jurisdiction under the Detainee Treatment Act in light of *Boumediene*. *See Bismullah v. Gates*, No. 06-1197, Order (D.C. Cir. Nov. 5, 2008) (scheduling oral argument for Nov. 20, 2008, limited to that issue). The Government has argued in that case that the Court does not have jurisdiction.

repatriated to his home country is entitled to be brought into the United States and released. The Court held in *Abdusemet v. Gates*, No. 07-1509, Judgment 3 (D.C. Cir. Sept. 12, 2008), that the *Parhat* judgment did not resolve the question of "the places to which these petitioners may be released." In addition, when the petitioner in *Parhat* moved for a conditional order of contempt, specifically arguing that the *Parhat* judgment entitled him to be released into the United States, *Parhat v. Gates*, No. 06-1397, Petitioner's Motion for Conditional Order of Contempt 11 (D.C. Cir. filed Oct. 16, 2008), the *Parhat* panel summarily rejected that motion, on the ground that the very question posed by the motion is pending before this Court in this appeal. *See Parhat v. Gates*, No. 06-1397, Order (D.C. Cir. Oct. 24, 2008).

E. At All Events, The Government Retains Authority To Wind Up Petitioners' Detention.

Finally, even if the district court had authority under the Suspension Clause to order that petitioners be brought into the United States and released here, the court should have given the Government a reasonable additional period to continue to seek another country for resettlement, and also an opportunity to present any information relevant to petitioners' release or conditions on release, before ordering them to be brought into the United States for release. Through diplomacy, the Government is actively seeking another country to accept petitioners. Under the Government's authority to wind up detention of enemy combatants — which, contrary to petitioners'

insinuation (*see* Pet. Br. 21), the Government clearly invoked in the district court, *see In re: Guantanamo Bay Detainee Litig.*, Civ. Action No. 05-1509 (RMU), Respondents' Combined Opposition to Parhat's Motion for Immediate Release into the United States 10-14 (D.D.C. filed Aug. 5, 2008) — petitioners may be detained for a reasonable period of time incident to resettlement following a determination that they will not be treated as enemy combatants.

Petitioners' accusation that the Government has engaged in "procedural gamesmanship" (Pet. Br. 41) in seeking to litigate the questions of Guantanamo detainees' entitlement to habeas corpus review, and the status of Uighur petitioners as enemy combatants, is simply false. The Government is entitled to attempt to demonstrate that an alien detained in the course of foreign military operations, after the alien sought weapons training for the purpose of fighting a sovereign government, is subject to detention as an enemy combatant. There is no basis for concluding that the Government did not act in good faith in attempting to make that showing as to petitioners.

As the Government explained in its opening brief, the period for which petitioners have been detained since the Government's determination that it will not detain them as enemy combatants is in line with past examples of repatriation efforts following international conflicts. *See* Brief for Appellants 48-49. Petitioners argue that this history should not be considered because international treaties such as the

Third Geneva Convention (which petitioners concede is not directly applicable, Pet. Br. 23, and which does not give rise to judicially enforceable individual rights, *see Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C. Cir. 2005), *rev'd on different grounds*, 548 U.S. 557 (2006)), were intended to end the past practice of holding prisoners following the end of hostilities. Specifically, petitioners argue that Article 118(1), which provides for prisoners of war to be "released and repatriated without delay after the cessation of active hostilities," entitles prisoners of war to be released into the territory of the detaining power if they cannot be repatriated. Pet. Br. 23. As used in Article 118(1), however, "release" was not understood "to be a separate and altogether different operation from repatriation." Christine Delessert Shields, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* 175-176 (1978). Furthermore, release into the detaining power's territory did not comply with the requirement of Article 118(1) to release "and repatriate[]" the prisoner, and repatriation to the prisoner's home country was required even if the prisoner objected to his return. *Id.* at 176, 192-193. Clearly, Article 118(1) does not support petitioners' claimed right to be brought to the United States for release.

Petitioners also cite *Ex parte Endo*, 323 U.S. 283 (1944), for the proposition that, once the Government determined not to detain them as enemy combatants, it lost any authority to wind up their detention and was required immediately to release them. That case, however, did not involve detention of aliens held abroad as

suspected enemy combatants, but the detention of a U.S. citizen in the United States. *See id.* at 297-298 (distinguishing the two situations). Not only is the Government in the exercise of its war power entitled to a "wide scope for the exercise of judgment and discretion," *id.* at 298-299, but the potential interference with the exercise of that power by a habeas court is much greater than in the context of a U.S. citizen held within this country. As *Munaf* makes clear, a court should be cautious in the exercise of its habeas jurisdiction in a manner that would interfere with the political branches' conduct of foreign relations and national security. The district court failed to exercise the requisite caution, and its extraordinary order should be reversed.

CONCLUSION

For the foregoing reasons and the reasons set out in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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