[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

GEORGE W. BUSH, ET AL.,

Respondents-Appellants,

v.

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*

The parties, intervenors, and *amici* appearing before the district court and this Court in this action are:

Petitioners-Appellees: Jamal Kiyemba,[1] as next friend, Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, Sabir Osman, Ibrahim Mamet, as next friend, Edham Mamet, Abdul Razakah, Ahmad Tourson, Arkin Mahmud, Bahtiyar Mahnut, Ali Mohammad, Thabid, Abdul Ghaffar, and Adel Noori;

Respondents-Appellants: George W. Bush, Donald Rumsfeld, Jay Hood, and Mike Bumgarner.

Amici: Respondent-Appellants have consented to the filing of amicus briefs by the following: (1) The Brennan Center, The Constitution Project, The Rutherford Institute, and the National Association of Criminal Defense Lawyers; (2) The National Immigrant Justice Center and The American Immigration Lawyers Association; (3) The Uighur American Association; (4) Law Professors Michael Churgin, Niels Frenzen, Bill Ong Hing, Kevin Johnson, Daniel Kanstroom, Steven H. Legomsky, Gerald Neuman, Margaret Taylor, Susan Akram, Chuck Weisselberg, Hiroshi Motomura, Sarah H. Cleveland, Michael J. Wishnie, and Leti Volpp; (5) Legal and historian *habeas* scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker, William M. Wiecek, Abraham R. Wagner, Cornell W. Clayton, David M.

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[1] Each Petitioner-Appellee also directly authorized counsel to act in these cases.

Cobin, Mark R. Shulman, Marcy Tanter, Samuel B. Hoff, Nancy C. Unger, and Karl Manheim.

(B) Rulings Under Review

The ruling at issue on appeal is the district court's final judgment granting Appellees' respective motions for judgment on their *habeas* petitions and ordering their release into the continental United States, entered in *In re Guantanamo Bay Detainee Litigation,* Misc. No. 08-0442 (TFH), *Kiyemba v. Bush*, No. 05-1509 (RMU), *Mamet v. Bush*, 05-1602 (RMU), *Kabir v. Bush*, No. 05-1704 (RMU), *Razakah v. Bush*, No. 05-2370 (RMU), *Thabid v. Bush*, No. 05-2398 (RMU), *Gaffar v. Bush*, No. 08-1310 (RMU), on October 8, 2008.

(C) Related Cases

The Executive's appeal on the issue of prior notice of transfer is currently pending before the Court in *Kiyemba v. Bush*, No. 05-5487, 05-5489, argued September 25, 2008. All Petitioners-Appellees other than Ali Mohammad filed DTA Petitions in this Court: *Parhat v. Gates*, No. 06-1397 (judgment for Petitioner: June 20, 2008); *Semet v. Gates*, No. 07-1509 (judgment for Petitioner: Sept. 12, 2008); *Jalaldin v. Gates*, No. 07-1510 (judgment for Petitioner: Sept. 12, 2008); *Ali v. Gates*, No. 07-1511 (judgment for Petitioner: Sept. 12, 2008); *Osman v. Gates*, No. 07-1512 (judgment for Petitioner: Sept. 12, 2008); *Mahnut v. Gates*, No. 07-1066; *Mahmud v. Gates*, No. 07-1110; *Abdurahman v. Gates*, No. 07-1303; *Nasser v. Gates*, No. 07-1340; *Thabid v. Gates*, No. 07-1341; *Amhud v. Gates*, No. 07-1342; *Razakah v. Gates*, No. 07-1350; *Sabour v. Gates*, No. 07-1508; *Memet v. Gates*, No. 07-1523; *Tourson v. Gates*, No. 08-1033; *Noori v. Gates*, No. 08-1060.

Susan Baker Manning (Bar No. 50125)

GLOSSARY

DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005)
INA	Immigration and Nationality Act
MCA	Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), 28 U.S.C.A. § 2241(e)

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MISCELLANEOUS

PRELIMINARY STATEMENT

In this appeal, the Executive resubmits the blank check.[1]

In 2005, it assured a district judge of its vigorous efforts to resettle these Uighur Appellees among civilian populations of the Nation's allies. Efforts had already been underway for more than a year. The State Department had traveled the globe, quietly but urgently recommending these men to friendly governments. The Uighur resettlement campaign continued for *another* three years, until October, 2008, when State Department officials confessed that the Justice Department's recent rhetorical excesses had sabotaged their efforts.

Thus this case is not about whether a court should intrude into fog-of-war decisions, nor whether to give the Executive a thirty-day breathing space to remedy a surprising judgment. Resettlement has failed. At issue now is whether the Court will consign noncombatants to a military prison for the rest of their lives.

Equally at issue here is the role of the judicial branch. The constitutional significance of *habeas* relief to the separation of powers was a crucial factor in the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Forging the *Boumediene* decision may have been controversial—a split decision issued from this Court,[2] and dissents in the Supreme Court were framed in passionate terms—but there is nothing controversial about the duty to implement its ruling. Judge Urbina was faithful to that duty. This appeal ignores it—and not just as to the Uighurs. Courts cannot order foreign sovereigns to receive Guantánamo prisoners. So if release *within* the continental United States is

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[1] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality).

[2] *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

forbidden, even in a case where the Executive pleads no contest, then no court may ever order a remedy—in any Guantánamo case.

It would be odd if the Guantánamo saga ended with such a whimper; odder still that a case as peculiar as this one should have ended it. Another case might at least have raised a contest over enemy-combatant status, or presented a jailer who "housed" civilian prisoners, rather than chaining them to the floor for counsel visits, or a showing that modest judicial patience was likely to lead to resettlement, or an Executive that offered a factual record to a district judge instead of to a court of appeals. But none of those factors is here.

Remedy is the central attribute of the judicial power; release the central attribute of *habeas*. Each is mandated by *Boumediene*. The hour is late. If ever a case asked whether judicial review under our Constitution is real, it is the case of the Uighur prisoners still stranded at the Guantánamo prison.

JURISDICTION

The district court's jurisdiction arises under the constitutional privilege of *habeas corpus* protected by the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and 28 U.S.C. § 2241. This Court has jurisdiction over the district court's final judgment in these *habeas* cases pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether this Court's final judgment in *Parhat v. Gates* effectively requires this Court to affirm (Argument § A).

2. Whether, in a case in which the law provides no affirmative basis for indefinite Executive detention of prisoners who enjoy the constitutional privilege of *habeas corpus*, the Executive nevertheless may avoid providing any *habeas*

corpus relief by asserting a discretionary immigration power conferred on it by statute (Argument §§ B, C).

2. Whether the judicial branch constitutionally may withhold a remedy to an alien non-enemy civilian who enjoys the constitutional privilege of *habeas corpus* and is within the district court's jurisdiction, but is held by the Executive in a military prison without affirmative basis in law (Argument § D).

3. Whether reversal can be supported on the basis of the record before the district judge (Argument § E).

RELEVANT PROVISIONS OF LAW

Relevant provisions of constitutional, statutory, and international law not contained in the addendum to the Executive's brief are set forth in the addendum hereto.

STATEMENT OF THE CASE

A. Factual Background

1. The Appellees

Appellees are Uighurs, a Muslim minority from the Xingjiang Uyghur Autonomous Region of far-western China long oppressed by the communist regime. JA 411-12, 446, 477, 513, 1601. Each fled China to escape that oppression. JA 1601. Thirteen of them eventually made their way to a Uighur village—termed a "camp" by the Executive—in Afghanistan. JA 1601. Four others settled among a small Uighur expatriate population in Kabul, Afghanistan. *See, e.g.*, JA 805, 913, 927.

No Appellee contemplated or participated in conflict with U.S. forces, or had any connection with the attacks of September 11, 2001. *See, e.g.*, JA 809,

846. Nor does the record show that any Appellee participated in what the Executive—in a newly minted but wholly fanciful theory—referred to as an organized attempt to attack a "sovereign Government" (*i.e.*, China). *See* Em'gcy Stay Mot., *Kiyemba v. Bush*, Nos. 08-5424-08-5429 (D.C. Cir., filed Oct. 7, 2008) ("Stay Mot."), at 13-14.

In pre-war Afghanistan, where automatic weapons were ubiquitous, some Appellees obtained firearms training, *see, e.g.*, JA 916 ("I never had training on how to shoot a gun, but I looked at a gun and then I learned how to split the parts and bring it back . . . [The training lasted] about 1 hours and 40 minutes.") (Ahmad Tourson), and some had target practice, *see, e.g.*, JA 847 ("I shot the rifle only once and only at targets.") (Ali Mohammad).[3] *See generally* Classified Supplement of Petitioners-Appellees, submitted herewith ("Classified Supplement"). Millions of American civilians, and hundreds of thousands of servicemen and women have done the same.[4] Five Uighurs released in 2006 had

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[3] Three *habeas* returns contain no allegation that the Appellee was ever in a so-called "camp." JA 787 (Arkin Mahmud) (also omitting any allegation of "firearms training"), 810 (Edham Mamet), 927 (Ahmad Tourson). Appellee Abdul Razakah delivered groceries. JA 951 ("I remember once or twice bringing food to Uighur people to a place outside Jalalabad. I never stayed there long and never saw any military training. . . . I never trained there.").

[4] *See, e.g.*, John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Dep't of State, U.S. Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* http://www.state.gov/t/us/rm/janjuly/4038.htm ("The United States believes that the responsible use of firearms is a legitimate aspect of national life. . . . We . . . do not begin with the presumption that all small arms and light weapons are the same or that they are all problematic."); National Rifle Ass'n, Basic Firearm Training Program, *available at* http://www.nrahq.org/education/training/find.asp?State=VA&Type=(eighty-six gun ranges and weapons training offered at 24 locations in Virginia alone); Colin Harrison, *High: Vegas on $1,000 a Day*, N.Y. TIMES, Mar. 19, 2006 (Uzis, AK-

the same firearms training: we understand that the Executive advertised them to Albania as suitable for release into the civilian population of its capital. They have lived peaceably ever since. *See Parhat*, 532 F. 3d at 847 n.8.

There is no record evidence that any Appellee is hostile toward the United States or is otherwise a danger to the public.[5] As to Appellee Huzaifa Parhat, this Court has already concluded, "It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies." *Parhat v. Gates*, 532 F.3d 834, 835-36 (D.C. Cir. 2008).

Most Appellees were transferred to Guantánamo in May, 2002. JA 414-15, 418, 1117-18; *Parhat*, 532 F.3d at 837 (facts surrounding capture and

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47s, and Mac-10s available at Las Vegas center); Cumberland Tactics, *available at* http://www.guntactics.com/page6.php (offering "urban carbine" training). The Executive expedites immigration benefits (including citizenship) for aliens who obtain firearms training by joining the military. *See, e.g.*, 8 U.S.C. § 1440 (expedited naturalization for military service during hostilities); Exec. Order No. 13269, 67 Fed. Reg. 130 (July 8, 2002) (non-citizen active-duty soldiers immediately available for naturalization); P.L. 108-136, § 1701(a), 117 Stat. 1392 (2003) (reducing time of service required for naturalization).

[5] A U.S. military official stated that Appellee Ali Mohammed "ha[s] not developed any animosity towards the U.S. or Americans in general, and ha[s] great admiration for such a wonderfully democratic society, where human rights are protected and people are allowed to live their lives peacefully, with no threat of mistreatment." Pet'n for Original Writ of *Habeas Corpus* (Declassified), *In re Petitioner Ali*, S. Ct. No. 06-1194 (filed February 12, 2007) at 21 n.19 (citing *Thabid*, D.D.C. No. 05-2398, Dkt. 27 at 81) (classified factual return). "I have nothing against the Americans," Appellee Ahmad Tourson told his CSRT. JA 916. "We are just disappointed in the U.S. government, but we are still hoping that the U.S. government will help because the U.S. government respects other people's rights." JA 925. Appellee Abdur Razakah testified, "There have been no problems between the Americans and the Uighurs[.] [We] support America." JA 955.

imprisonment of most Appellees).[6] As early as 2003 for ten, and continuing through 2008 for the others, the U.S. military concluded that Appellees should be released. JA 1568. These determinations were predicated on findings that each Appellee does not pose a continuing "threat to the United States or its allies in the ongoing conflict against al Qaida." *See* Supplemental Appendix of Petitioners-Appellees ("SA") 1811 (Paul Wolfowitz, Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba at ¶ 2(A) (May 11, 2004)). The Executive has conceded that no Appellee is an enemy combatant. JA 1542, 1568.

2. The Executive's political concession to China

The United States has condemned China's human rights abuses of the Uighurs. SA 1824-87 (Department of State, Country Reports on Human Rights Practices—2006, § 1(c) (Mar. 6, 2007) ("State Department Report"), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm). *See also* Amnesty International, China Report 2005, *available at* http://web.amnesty.org/report2005/chn-summary-eng (China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations.").

According to the State Department:

> The [Chinese] government's war on terror continued to be used as a pretext for cracking down harshly on Uighurs expressing peaceful

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[6] Parhat and twelve other Appellees together fled the coalition bombing campaign in Afghanistan and made their way to Pakistan, where bounty-hunters sold them to U.S. forces. JA 1602. Another fled from Kabul to Pakistan where he too was sold to the U.S. for a bounty. The remaining three were arrested in Afghanistan by the Northern Alliance. JA 784, 809-10, 916-17.

> political dissent and on independent Muslim religious leaders. . . . Uighurs were sentenced to long prison terms and many were executed on charges of separatism. . . . In 2003 Uighur Shaheer Ali was executed after being convicted of terrorism.

SA 1853 (State Department Report § 5 (subsection on National/Racial/Ethnic Minorities)).

In September, 2002, after Appellees were sold to U.S. forces, the Executive designated the so-called "Eastern Turkestan Islamic Movement" ("ETIM") as a "terrorist organization" for certain immigration purposes. *See* 69 Fed. Reg. 23,555-01 (2004). The ETIM designation was based on an article posted on the Internet by a Chinese state news agency. JA 824, 1115-16; *see Parhat*, 532 F.3d at 844. Congress never authorized military force against this group and it appears that the designation was a political concession to induce Chinese cooperation with Iraq invasion plans. SA 1656-59 (*Parhat v. Gates* DTA Petition, D.C. Cir. No. 06-1397 (Dec. 4, 2006) at ¶¶ 73-80).

As this Court has previously noted, China appears to be the source of many doubtful incriminating assertions. *Id.* at 848 ("Parhat contends that the ultimate source of key assertions in the four intelligence documents is the government of the People's Republic of China, and he offers substantial support for that contention. Parhat further maintains that Chinese reporting on the subject of the Uighurs cannot be regarded as objective, and offers substantial support for that proposition as well.") (footnotes omitted). Congress never authorized military force against this group.

3. Appellees are imprisoned, not "housed" at Guantánamo.

Until very recently, conditions of Appellees' imprisonment at Guantánamo were astonishingly harsh. In late 2006, the Uighurs were sent to Camp 6, where

each Appellee was severely isolated. JA 1182-97 (January 20, 2007 Declaration in *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 22, 2007)); *see also* Amnesty International, *Cruel and Inhuman: Conditions of isolation for detainees at Guantánamo Bay* (April 2007) (inmates "completely cut-off from human contact" under conditions "[c]ontrary to international standards"); *Locked Up Alone—Detention Conditions and Mental Health at Guantánamo*, Human Rights Watch, June 2008, at 11, *available at* http://www.hrw.org/reports/2008/us0608/us0608web.pdf. After (but *only* after) motion practice following this Court's decision in *Parhat*, Appellees were transferred to Camp Iguana, but the Executive retains, and has asserted, the unilateral right to send them back to isolation. JA 1224, 1246.

The Executive's new refrain is that Appellees are "housed." *See* Br. 2, 3, 9, 17, 36, 43. Camp Iguana is not "housing": it is a high-security prison controlled by same Joint Task Force Guantánamo that operates all areas of the Guantánamo prison. *See* SA 1809-10 (October 15, 2008 Declaration of J. Wells Dixon, ¶ 6). The men may not leave the camp, even under supervision. *Id.* ¶ 4. It is surrounded by fences and razor wire. *Id.* ¶ 6. Heavily armed military police guard the prison, patrol its perimeter, and monitor the men by camera twenty-four-hours a day. *Id.* ¶ 6. Huts take up much of the physical space at Camp Iguana, leaving a small area as the only outdoor space. *Id.* ¶ 7. On three sides, the fences are covered in opaque mesh. *Id.* ¶ 6. Guards refer to the men only by number. *Id.* ¶ 8. Just last week, the Executive refused counsel's request to meet face-to-face unless the Appellee was chained to the floor. JA 1617; SA 1625-34.

In Camp Iguana, Appellees are utterly isolated from the outside world. They see their anonymous jailers, and have an occasional visit from a lawyer and

once every three months from the Red Cross, but have no access to family, friends, news or information. *Id.* ¶¶ 4, 5. There is no telephone or other direct access to the outside world. *Id.*

4. Transfer of Appellees is impossible, because they cannot be returned to China and the Executive's libel has dissuaded any other country from providing asylum.

The Executive acknowledges that Appellees cannot be repatriated to China or any of its satellites—despite Chinese demands—because they would likely be tortured or worse. JA 1124; 1126-27 (quoting, among others, Navy Secretary Gordon England as identifying "concerns and issues" about returning the Uighurs to China); 1174 (quoting former Secretary of State Colin Powell as stating "[t]he Uighurs are not going back to China"); *see also Parhat*, 532 F.3d at 838-39. Transfer to China would violate the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment as well as the Convention Relating to the Status of Refugees. *See* Third and Fourth Geneva Conventions; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dated December 10, 1984, 1465 U.N.T.S. 85; the 1954 Convention Relating to the Status of Refugees; *see also* JA 1255 (Declaration of Pierre-Richard Prosper in Support of Respondents' Supplemental Memorandum Pursuant to the Court's Invitation at the August 1, 2005 Hearing ¶ 3 (Aug. 8, 2005) (unclassified version)). By falsely labeling them as "enemy combatants," however, the Executive has effectively dissuaded other countries from accepting the Uighurs. After more than four years of failed resettlement efforts, there is no question that Appellees' detention is indefinite. *See* Classified Supplement.

B. Procedural History

1. The CSRTs

Prior to their Combatant Status Review Tribunals ("CSRTs") in 2004, the military had designated many Appellees as eligible for release. JA 1099-1100, 1114-15. A colonel wrote, "it appears unlikely that Parhat will be determined to be an individual subject to the President's military order of 13 Nov. 2001." *Parhat*, 532 F.3d at 837; *see also* Classified Supplement. Thirteen Appellees were companions of five Uighurs whom CSRT panels determined *not* to be enemy combatants. *Qassim v. Bush*, 407 F. Supp. 2d 198, 199 (D.D.C. 2005). In all respects the facts were the same. Four others were materially indistinguishable from these thirteen insofar as the core allegation of affiliation with ETIM. SA 1744. Nevertheless, Appellees were all—eventually[7]—classified as enemy combatants. For example, Parhat's CSRT panel found no evidence that Parhat had committed any hostile acts against the U.S or its coalition partners, or that he had joined any hostile group, but deemed him an "enemy combatant" anyway.

2. The *habeas* petitions and the DTA litigation

Each of the *habeas* cases—*Kiyemba* (05-1509), *Mamet* (05-1602), *Kabir* (05-1704), *Razakah* (05-2370), *Thabid* (05-2398), and *Mohammon* (05-2386)—

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[7] When first CSRTs cleared prisoners, vigorous efforts by the Pentagon to change the non-combatant findings through second panels ensued. One such example involved Appellee Ali Mohammed, whose second CSRT overturned a 2004 non-combatant determination, under intense pressure from the Pentagon. *See* Petition for Original Writ of Habeas Corpus, *In re Ali*, No. 06-1194 (U.S. Feb. 12, 2007). Noting that "[the Uighurs] are all considered the same," a Pentagon official wrote in 2005 that, "[b]y properly classifying them as EC, then there is an opportunity to . . . further exploit them here in GTMO. . . . The consensus is that all Uighurs will be transferred to a third country as soon as the plan is worked out." *Id.* at 8.

was filed in 2005.[8] JA 409, 444, 475, 510, 550, 582. All were stayed. JA 13, 68, 164, 348.

In 2006, seven Appellees filed a DTA petition. A year of litigation ensued over the record. Appellees prevailed, *see Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2008), but the Executive never provided the record defined in *Bismullah*, and provided no record at all until October 29, 2007. Relying on the Executive's version of the record, Parhat moved for judgment. On June 20, 2008, this Court granted judgment in *Parhat*.

Noting the CSRT panel's conclusion that there was no source evidence that Parhat had ever joined ETIM, the Court declined to reach the question of his affiliation with ETIM. *See also* Classified Supplement. It did find that affiliation with ETIM could not support enemy status, noting that the Executive's "evidence" was derived entirely from reports describing ETIM's "activities and relationships as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, and as things that are 'suspected of' having taken place," *id.* at 846-47,[9] without identifying sources,[10] and in a manner that suggested Chinese propaganda was at

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[8] *Mohammon*'s thirty petitioners included Appellees Abdul Ghaffar and Adel Noori. A new docket number was assigned, *Ghaffar v. Bush* (08-1310), and the case was consolidated with *Kiyemba*. JA 390.

[9] At oral argument, the Executive suggested that the assertions were reliable because they were repeated in multiple reports. Invoking Lewis Carroll, the Court observed that "the fact that the government has 'said it thrice' does not make an allegation true." 532 F.3d at 848 (quoting LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876)).

[10] Indeed, the Court noted that Parhat had provided "substantial support" for the notions that (i) the source was the communist Chinese government, and (ii) "Chinese reporting on the subject of the Uighurs cannot be regarded as objective." 532 F. 3d at 848.

play, *id.* at 848. The Court held that "bare assertions cannot sustain the determination that Parhat is an enemy combatant." *Id.* at 846. It ordered the Executive to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.* at 851. The Court noted that its disposition was without prejudice to Parhat's right to seek release immediately through *habeas corpus*. *Id.* at 854. "*[I]n that proceeding there is no question but that the court will have the power to order him released.*" *Id.* at 851 (emphasis supplied).[11]

3. Proceedings following *Boumediene* and *Parhat*

The Uighur *habeas* cases were consolidated before Judge Urbina. JA 1602. Parhat moved for final judgment, seeking immediate release into the United States, and an alternative motion for interim parole ("Release Motion"). JA 1106. On August 4, 2008, the Government advised this Court that it would not re-CSRT Parhat. *See* Respondent's Petition for Rehearing, at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008). On August 18, it conceded that four other Appellees are not "enemy combatants." SA 1802. At an August 21 status conference, JA 47, Judge Urbina gave the Executive until September 30 to state its position as to the status of the remaining Appelleees, and scheduled a hearing on the Release Motion for October 7, JA 1317.

The record before the district judge established as a matter of law not simply that the men are not enemy combatants, but that there is no basis for detention and they are entitled to release. Appellees filed *habeas* petitions alleging that there is no lawful basis for detention. JA 410 (*Kiyemba* petitioners), 445 (Mamet), 476 (Mahnut and Mahmud), 511 (Razakah and Tourson), 551

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[11] The Executive's petition for rehearing was denied. Order Denying Rehearing, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008). *Parhat* has become final.

(Thabid and Ali), 603 (Ghaffar and Noori). The Executive never filed a *habeas* return as to ten Appellees (Nasser (Internment Serial No. ("ISN") 278), Semet (ISN 295), Memet (ISN 328), Parhat (ISN 320), Jalaldin (ISN 285), Ali (ISN 280), Osman (ISN 282), Ghaffar (ISN 281), Sabour (ISN 275), and Noori (ISN 584)). The Executive produced part of the "record on review" in some DTA cases, but the Executive never formally advanced these documents as a *habeas* return justifying detention. The Executive filed a *habeas* return—in each case only the CSRT hearing record—for Appellees Mahnut (ISN 277), Mahmud (ISN 103), Mamet (ISN 102), Razakah (ISN 219), Tourson (ISN 201), Mohammad (ISN 250), and Thabid (ISN 289).[12] But as to all Appellees, the Executive pleaded no contest on September 30 by conceding that it would not contest that each was a noncombatant, and failing to file a return asserting any other basis for imprisonment—as, for example, a right arising under the immigration laws or the so-called "wind-up power." *See* JA 1464-65. The return is the means by which the jailer must certify "the true cause of the detention." 28 U.S.C. § 2243 (cl. 3). Thus, the *pleadings* below established conclusively that there is no lawful basis for detention.

Lest the Executive resume at the eleventh hour the rhetorical campaign it had waged against them before, Appellees moved on September 11 for leave to be present at the hearing (in person and/or by videoconference), to respond to any facts the Executive might assert to justify their imprisonment or oppose their

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[12] The Executive barred counsel from seeing the classified portion of the *habeas* return for Appellees Mahnut and Mahmud. These records were filed with the district court under seal *more than three years ago*. JA 113. The Executive asserts that it would be "burdensome" to release these materials to counsel, evidently preferring to litigate by rhetorical charge.

release. JA 1323-28. The Executive objected, arguing that Appellees' presence "is utterly unnecessary for the Court to address the legal question" to be heard. JA 1337.[13]

By these two maneuvers—pleading no contest to status (which precluded a traverse) and resisting presence—the Executive blocked any opportunity by Appellees to respond to any factual allegation. *But see* 28 U.S.C. § 2243 (cl. 3, 5) (absolute right of presence to contest facts).[14] All Appellees joined in the Release Motion. JA 1466. Appellees were not present at the October 7 hearing. *No fact was ever offered to Judge Urbina demonstrating dangerousness.* To the contrary, the record contains powerful evidence that Appellees' release would create no risk to the public.[15] JA 1546-49.

In addition to considering the *habeas* record, Judge Urbina took judicial notice of this Court's *Parhat* decision, which rejected the Executive's best case[16] as to the propriety of Appellee Parhat's enemy-combatant status, JA 1601, 1604, 1608, and of the Executive's concession to entry of the *Parhat* judgment in four other Appellees' cases in September, JA 1602.

"Throughout this period," the district court found, "the Government has been engaged in 'extensive diplomatic efforts' to resettle the petitioners" *abroad among the civilian populations of the nation's allies.* JA 1608. In 2005, the

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[13] Judge Urbina advised on August 21 that the October 7 hearing would be on the Release Motion. JA 1316-17.

[14] As discussed below, all Appellees have statutory *habeas* rights.

[15] *See generally* Classified Supplement.

[16] No Appellee has ever received the exculpatory materials required by this Court's decisions in *Bismullah v. Gates, in which Parhat and seven other Appellees were petitioners.*

Executive described its campaign, which then had already been underway for some time. *Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005).[17] The court found that "the Government has been engaged in quote[], extensive diplomatic efforts, close quote, to resettle the Petitioners," JA 1568, but that "[t]hese efforts have failed for the last four years and have no foreseeable date by which they may succeed," JA 1574. *Cf.* Classified Supplement. None of these findings is challenged on appeal.

At the hearing, the court offered the Executive a last chance—soliciting a factual proffer of "the security risk to the United States should these people be permitted to live here." JA 1547. The Executive offered no evidence. Counsel responded, "I don't have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street." JA 1549. The Executive had "seven years to study this issue," JA 1547, three years' notice of these *habeas* cases, ten weeks' notice of the Release Motion, and six weeks' notice of the hearing date. The district court never precluded any effort by the Executive to offer evidence. Judge Urbina found that the Executive "has presented no reliable evidence that Appellees would pose a threat to U.S. interests." JA 1611. He stated that he "recognizes that the petitioners acquired weaponry skills at 'training camps' in Afghanistan after fleeing China, but will not draw adverse inferences based on other unsubstantiated allegations." JA 1602.

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[17] Five men originally found to be non-enemy combatants were sent to Albania in 2006; one reached Sweden in 2007. *See Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2007). They were accused of the same affiliations in their unclassified CSRT transcripts. The Executive represented to the Albanian government that they were not dangerous. They have lived there peacefully ever since.

The court *did* require detailed evidence concerning the arrangements in place for release and resettlement. JA 1469-1532, 1578-84. Local Uighur-American families offered relief, JA 1532, as a bridge to more permanent resettlement arrangements offered by a Lutheran refugee group and religious leaders from the Tallahassee religious community, JA 1469-70, 1474-1532, 1580-83. A substantial donor committed financial support. JA 1583-84.

4. The decision below

On October 7, 2008, Judge Urbina granted judgment in these *habeas* cases and ordered that Appellees and the resettlement providers appear on October 10, 2008. JA 57. Conditions were to be addressed then, and, in response to the Executive's representation that the Department of Homeland Security ("DHS") needed a week to consider its position on these matters, again on October 16. JA 1592.[18]

As Judge Urbina recognized, the inability to find a safe transferee country is a problem of the Executive's own making. JA 1611, 1615 (branding Uighurs "enemy combatants"—after Parhat and others were cleared for release—"subvert[ed] diplomatic efforts to secure alternative channels for release"). The Executive states that it has made "extensive diplomatic efforts on petitioners' behalf," and that it is "informed by the State Department that those efforts are still ongoing." Br. 8. Whatever slim hope of resettlement remained was gravely

[18] The suggestion that the district court acted carelessly, Br. 10, does a gross disservice to Judge Urbina. The Executive asserted that the men would be jailed upon arrival by a DHS that needed an additional week to consider its options, JA 1578-1584. The court retained the authority to set appropriate conditions when the Appellees arrived at his courtroom on October 10. *See* SA 1623.

damaged by the allegation on October 8—false, but available to every foreign nation—that Appellees are "terrorists." Stay Mot. 3, 19.[19]

In sum, Judge Urbina noted that the Executive *had approached almost 100 countries, over four years,* and failed:

> [T]he government cleared 10 of the petitioners for release by the end of 2003.[20] The government cleared an additional 5 for release in 2005, 1 for transfer in 2006, and 1 for transfer in May of this year. Throughout this period, the government has been engaged in "extensive diplomatic efforts" to resettle the petitioners. These efforts over the years have remained largely unchanged, and the government has not indicated that its strategy or efforts have been or will be altered now that petitioners are no longer treated as enemy combatants. Furthermore, the government cannot provide a date by which it anticipates releasing or transferring the petitioners. Accordingly, their detention has become effectively indefinite.

JA 1607-08 (citations and footnote omitted).

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *United States v. Smith*, 374 F.3d 1240, 1246 (D.C. Cir. 2004). Findings of fact are binding on this Court unless clearly erroneous. *United States v. Holder*, 990 F.2d 1327, 1328 (D.C. Cir. 1993).

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[19] Citing State Department sources, *The New York Times* reported that resettlement efforts were abandoned after this filing. *See* SA 1888 (William Glaberson, *Release of 17 Guantanamo Detainees Sputters as Officials Debate the Risk*, N.Y. TIMES, Oct. 16, 2008 at A20).

[20] JA 1250 (Aug. 18, 2008 Joint Status Report, Ex. 1).

SUMMARY OF ARGUMENT

In Section A, we show that the judgment and subsequent history of *Parhat v. Gates* mandate affirmance here, for reversal would effectively overrule a final, unstayed judgment of a prior panel of the Court.

In Section B, we show that the Executive has no detention authority as to these Appellees, who are civilians, outside the war power. It presented no other basis to justify imprisonment. There is no "wind-up power," and even if there were, it was used up years ago.

In Section C, we show that nothing in immigration law bars the relief granted below. The argument is foreclosed by the Suspension Clause. No immigration remedy was granted. The immigration jurisprudence holds that the Executive's power to exclude cannot overcome *habeas corpus* and confer a right of indefinite imprisonment.

Section D demonstrates that *Boumediene* and the separation of powers compel the remedy of release here. Reversal would flout *Boumediene* and constitute an intolerable burden on the separation of powers.

Section E explains that the Executive has not shown any procedural or evidentiary error below that could merit reversal of the district court's measured and considered judgment. Invited over a period of months to offer facts justifying imprisonment, the Executive offered none. The preemptive appeal foreclosed the district court from considering and, as appropriate, imposing conditions of release.

ARGUMENT

A. This Court May Not Rule Inconsistently With *Parhat v. Gates* And Therefore Must Affirm.

Parhat v. Gates, 532 F. 3d 834 (D.C. Cir. 2008), is a final judgment of this Court. No appeal has been filed. No *en banc* review was sought. No stay has entered. On June 20, 2008, this Court ordered that Parhat be released, transferred, or that the Executive expeditiously convene a new CSRT. 532 F. 3d at 851. The Executive waived the option to re-CSRT. *See* Respondent's Petition for Rehearing, at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008).

In September, similar judgments entered at the government's request for Appellees Ali, Semet, Jalaladin, and Osman. *See* Judgment, D.C. Cir. Nos. 07-1509, 07-1510, 07-1511, 07-1512 (Sept. 12, 2008). The mandates have issued. Although the second panel disclaimed any ruling on the meaning of "release," it is clear that as to those Appellees as well, its order–release or transfer–has not been complied with.

The Secretary of Defense has not complied with final judgments of this Court. While the parties contest what *Parhat* meant by "release," there is no dispute that Parhat and the other DTA petitioners have not been transferred, and that they have not, under any definition of the word, been "released." Parhat moved for contempt, and on October 24, 2008, the *Parhat* panel denied the motion, noting the pendency of this appeal. *See* Order Denying Motion for Contempt, D.C. Cir. No. 06-1397 (Oct. 24, 2008). Thus there is no separate proceeding by which the order in *Parhat* may be vindicated.

The Secretary is bound by the *Parhat* judgment—but, as the Chief Judge has observed, so too is *this Court itself.* "The law of this Circuit, whether in error

or not, is binding absent correction by a higher court." *National Treasury Employees Union v. United States,* 990 F.2d 1271, 1286 n. 7 (D.C.Cir.1993) (Sentelle, J., dissenting), *aff'd in part and rev'd in part*, 513 U.S. 454 (1995); *see, e.g., BellSouth Corp. v. FCC*, 162 F.3d 678, 696 (D.C. Cir. 1998) ("The prior opinions of other panels of this court bind us."); *Melcher v. Federal Open Market Comm.*, 836 F.2d 561, 565 n.4 (D.C. Cir.1987). Here, reversal would insulate the Secretary's noncompliance with a judgment of this Court. Were the Court in *this* appeal to reverse, then as to Appellee Parhat and the other Appellees who have obtained judgments, it effectively would overrule another final, unstayed judgment of *this* Court. That it may not do.

Only affirmance can avoid this problem, for while the Secretary might have complied with Parhat in one of two ways, he has not done so, and reversal would deny the very remedy—release—that was ordered in *Parhat* and is, as we show below, the only remedy remaining. Because a due fidelity to the final decisions of other panels within the Court mandates affirmance as to Parhat and the other Appellees who have obtained judgments, affirmance is a practical necessity for all Appellees.[21]

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[21] We recognize that some Appellees have obtained no DTA judgments. But the Executive has conceded that all should be treated identically. The district court stated, "I'd like to confirm that the 17 Uighurs before the Court in this matter today have similar factual backgrounds, that is to say that the parties acknowledge that there are no material differences between the individual Petitioners that the Court should be made aware of at this time. If the answer to that question is 'yes,' then the factual determination made by this circuit in Parhat will apply to all the Petitioners. Are we in agreement?" JA 1537. The Executive responded affirmatively. *Id.* It would be absurd if this Court affirmed as to some Appellees but not others. The record cannot support any meaningful distinction between them.

B. The Executive Has No Detention Power Over Appellees.

Previously, the Executive located detention authority solely in the President's war powers, asserting that Appellees were "enemy combatants." *See, e.g.*, JA 742. This assertion was always pretextual—even the Department of Defense found that five Uighur companions were not enemy combatants.[22] Appellee Ali Mohammad was branded as an enemy combatant only *after* the Pentagon ordered a mulligan to avoid embarrassment.[23] Some panels noted that their "enemy combatant" finding was academic *since resettlement efforts were already underway*.[24]

Three years later, after a thorough examination of his CSRT record, this Court held that Appellee Parhat's enemy-combatant designation was not consistent with law. *Parhat*, 532 F.3d at 836. In September, the Executive conceded the same judgment to the next DTA petitioners in the pipeline. JA 1464-65. At the deadline, it abandoned its enemy-combatant theory for all Appellees. JA 1464. In this appeal, the Executive scarcely mentions detention authority.[25] Only at pages 47-49 of its brief does it assert a "wind up detention" power. But there is no such power.

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[22] *See Qassim*, 407 F. Supp. 2d at 199.

[23] Appellee Mahnut's panel classified him as an "enemy combatant," yet recommended that he be released, but "not be forcibly returned to the People's Republic of China." JA 737.

[24] SA 1821 (*Chinese Muslims To Be Freed From Guantanamo*, WASH. POST, Oct. 29, 2004 at 14).

[25] Instead of asserting a positive detention authority, the Executive rests on the proposition that immigration law *bars* a remedy, whether or not the imprisonment is lawful. Br. sections A, B.

1. The courts have rejected the "wind-up power."

Although there is authority within this Circuit on the point, the Executive cites none for its claim of an indefinite "wind-up power" as a basis to justify imprisonment.[26] The few historical examples cited involve the repatriation of prisoners of war ("POWs") at war's end, not the right of civilians like Appellees to be free of the war power altogether. Considering this point, the absence of judicial authority, the terms of the Third and Fourth Geneva Conventions, the Uniform Code of Military Justice, Army Regulation 190-8, and the powerful domestic history of prompt release, Judge Robertson ruled that the Executive has no "wind-up power." *Qassim*, 407 F. Supp. 2d at 200-01. This ruling was consistent with *Ex parte Endo*, 323 U.S. 283, 295-97, 302 (1944), in which the Supreme Court held that the President could not, following World War II, continue to hold a civilian detainee for what amounted to a "wind-up" period. *See* Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1953 (2003).

2. History does not support the Executive's "wind-up" argument.

The Executive has "wind-up authority" precisely backwards as an historical matter in any event, and seems to hearken back to times better forgotten, when captured civilians had no rights at all.[27] Since at least the

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[26] The "wind-up power" exemplifies indefinite imprisonment. It lasts "as long as it takes," said the Executive's attorney in August 2005. SA 1822 (Josh White, *5 Guantanamo Detainees Moved But Not Freed*, WASH. POST, Aug. 25, 2005).

[27] *See* I *Samuel* 15:3 (civilian captives in wartime subject to slaughter); IV THE DIGEST OF JUSTINIAN, (L)(16)(239) at 956 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Pennsylvania Press) (slavery); III Hugo Grotius, DE JURE BELLI AC PACIS LIBRI TRES 646, chs. IV, VI (Francis W. Kelsey trans., Clarendon Press 1925) (1625) (right "to kill and injure all who [were] in the territory of the enemy").

eighteenth century, the captive's lot has improved. *See* Emmerich de Vattel, THE LAW OF NATIONS bk. III ch. XII, at 381 (G.G. and J. Robinson trans. London 1797). In 1863, President Lincoln commissioned the first comprehensive set of rules for the humane treatment of captured enemies. *See* The Lieber Code, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (Apr. 24, 1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp. A succession of international treaties (including the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929 and 1949) refined these ideas, and these Treaties became law in the United States. Many provisions were incorporated into the field manuals of the Armed Services. Most important to the analogy is Article 118 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, art. 118(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 972 ("III G.C.").

Following World War I, after the guns fell silent on November 11, 1918, diplomatic snags delayed an armistice, and POWs were held for as long as 30 months pending the treaty. In Europe, although not here, delays of similar length followed the conclusion of World War II. Dwarfed as they are by the length of Appellees' ordeal, those delays nevertheless were regarded as intolerable at the time, and were a focus of the Geneva Conventions of 1949. This led to promulgation of Article 118(1) of the Third Geneva Convention, providing that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." III G.C. art. 118(1). This provision addresses POWs, of course, not civilians like Appellees, but, ironically, its purpose was to *foreclose* assertions of "wind up" power. Release and repatriation *were not to abide the very thing the Executive now proffers—the inevitable delays of*

diplomacy. Significantly, the released prisoner was entitled to both "release," and "repatriation," reflecting a nascent recognition that there might be difficulties with repatriation. Release was something else again, and the detainee was entitled to it.

The rule for a *civilian* is found in Article 132 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973 ("IV G.C."). He must be released "as soon as the reasons which necessitated his internment no longer exist." IV G.C. art. 132. The only "reasons" for internment here—enemy-combatant status—never existed in the first place, *see Parhat*, 532 F.3d at 835, and in any event the Executive's four-year resettlement campaign demonstrates that no reasons for internment have existed since at least 2004. As with POWs, so with civilians: neither may be held indefinitely to abide the uncertain outcome of diplomacy. Moreover, commentary provides that in cases of this kind the detaining power should "tolerate" the civilian's presence while diplomacy evolves. *See* IV G.C., art. 135 cmt.

The Executive cites Christiane Shields Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights*, *in* WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER 75, 80 (Henry H. Han ed., 1979). Ms. Delessert's exemplar of post-war "wind-up" detention is that of the Soviet Union under Stalin. *Id.* at 80-81. Not cited in the Executive's brief is Delessert's more comprehensive monograph demonstrating that the post-war Soviet conduct toward German POWs was seen as a *major* abuse, and that Article 118(1) of the Third Geneva Convention was drafted to foreclose the assertion that wartime imprisonment may be extended so long as diplomatic efforts have not been completed. *See generally*

Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, 52, 70 (Schulthess Polygraphischer Verlag Zurich 1977) ("Delessert Monograph") (motive of Article 118(1) is to avoid delays of diplomacy in repatriation of POWs).

3. "Wind-up power" in the United States

The wartime experience of the United States also contradicts the Executive's theory. After the first Gulf War, "[e]xpeditious repatriation of EPWs [enemy prisoners of war] became a high Coalition priority when offensive operations were suspended." U.S. DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR at 605 (Apr. 1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf. A few months after the end of hostilities, the last EPW had been transferred out of United States custody. *Id.* at 672.

Following World War II, American POW camps emptied within two years. *See* Delessert Monograph at 63 n.77 (American post war POWs all repatriated by the end of 1946, less than 2 years after V-E day, May, 1945). Even when practical realities barred outright repatriation, continued military imprisonment was not an option. *See* Camilla Calamandrei, *Italian POWs Held in America During WW II: Historical Narrative and Scholarly Analysis* (2000), *available at* http://www.prisonersinparadise.com/history.html (Italian former enemy combatants who could not be repatriated to the still-war-torn Italian peninsula given increased freedom of movement *among the civilian population*: they held jobs, attended mass, concerts, bocci games, festive meals, and the like).

4. Any wind-up power was exhausted long ago.

Judge Urbina found the entire question academic here. We are not at the *beginning,* but the *end* of a five-year failed effort by the Executive to resettle the Uighurs. JA 1607-08. Four years ago this week, "[s]pokesman Richard Boucher said the Bush administration is trying to relocate the Uighurs. The State Department has contacted a number of countries about the resettlement of the Uighurs." SA 1821. A year later, it reported that vigorous efforts to resettle the Uighurs, led by senior State Department officials, had been underway for a considerable time. JA 1253-58. In October, 2008, it reported that those resettlement efforts had continued for three more years.[28] There is no prospect of resettlement. Our Executive has been trying to resettle Appellees for longer than the entire period during which the Italians fought, were captured, held as POWs, and then repatriated.

The Executive has made the breathtaking argument that the "*Zadvydas* clock" started ticking only on September 30, 2008, when it made the formal concession that its actions have confessed since 2004. That is sophistry. The question is whether and when the imprisonment became indefinite. The record shows, the Executive does not dispute, and Judge Urbina correctly found that that happened years ago.

C. Immigration Law Does Not Bar Release.

The Executive's brief is devoted almost entirely to the erroneous proposition that immigration law bars release.

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[28] These declarations were filed under seal. Details are set out in the Classified Supplement.

1. The Executive's construction of the immigration laws violates the Suspension Clause.

The entire immigration argument is an exercise in woolgathering, for it must fail at the threshold under the Suspension Clause. U.S. CONST. art. I, § 9, cl. 2; *Boumediene,* 128 S. Ct. 2229. The argument is that Congress, by enacting laws delegating powers to the Executive, has barred Appellees' release under *habeas* altogether. The laws happen to be immigration laws, but it makes no difference: the proposition is that a statute may confer on the Executive unlimited discretion to bar the constitutional privilege of *habeas corpus*—even where the Executive has no affirmative detention power. That proposition was demolished by *Boumediene*. 128 S. Ct. 2229. Whatever the immigration laws might say, the principle of constitutional avoidance requires that they not be read to bar that remedy, lest they offend the Constitution. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).[29]

2. Immigration law does not bar release.

a. Judge Urbina did not interfere with the Executive's immigration powers.

The Executive's argument is incorrect in any event. Judge Urbina did not order an *immigration* remedy. He did not grant "entry" or "admission" as an immigration matter. Affirmance of his order would not limit the Executive's exclusion power. The Release Order affords Appellees a remedy no different

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[29] Even when the Executive acts with legislative sanction in the immigration field, it remains fully subject to Due Process Clause as well as the Suspension Clause. *Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001). The Executive exercises less authority when acting without legislative sanction—as here. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

from that afforded to the petitioners in *Zadvydas* and *Clark v. Martinez*, 543 U.S. 371 (2005).

In its Emergency Stay Motion, the Executive argued that Appellees are inadmissible because they sought "to commit terrorist acts against a sovereign Executive" and "receive[d] weapons training for the purpose of doing so." Stay Mot. 13-14 (citing 8 U.S.C. § 1182(a)(3)(B)). The Executive appears, sensibly, to have backed away from its incendiary libel but still argues that "it appears doubtful that petitioners would be so eligible [for admission]," and that "[i]n light of this statutory framework, petitioners presumably would not have been admitted into this country even if they had sought to rely on the INA." Br. 27-29. In three years of litigation, the Executive never before alleged terrorist activity or intent, and *there is no record that any Appellee committed, planned to commit, or thought about committing a terrorist act against anyone. See generally* Classified Supplement. The firearms training some Appellees candidly described to interrogators six year ago was no different from firearms training legally available in the United States today. *See, e.g., Parhat*, 532 F. 3d at 843; Classified Supplement. The Executive's failure to file returns, give notice of a factual contest, or permit Appellees to respond forecloses it from litigating by innuendo.

But the argument is academic anyway, because Appellees did not seek, and were not granted admission. Even if 8 U.S.C. § 1182 rendered Appellees inadmissible, 8 U.S.C. § 1231(a)(6) would not authorize their indefinite detention.[30] The Executive's statutory exclusion power cannot justify indefinite

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[30] The Executive's reading of immigration statutes as authorizing indefinite detention, Br. 27-30, contravenes the clear-statement rule, a canon of construction embodying separation-of-powers principles. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959). The statute contains no such clear statement, and it cannot be

imprisonment of Appellees, *regardless of the prisoner's immigration status. Martinez*, 543 U.S. at 386; *Zadvydas*, 533 U.S. at 689; *St. Cyr*, 533 U.S. at 301 (*habeas* review strongest in matters of indefinite executive detention). The liberty interests of concededly illegal aliens trumps statutory detention power pending exclusion once that detention becomes indefinite, even though it is related to a legitimate interest in deportation. *Zadvydas*, 533 U.S. at 689. In *Martinez*, 543 U.S. at 386, the Court extended this proposition to those who have no immigration status at all—aliens who, like Appellees, had never made an entry. Thus *Martinez* permits only a presumptive six-month detention beyond the 90 days for aliens inadmissible under section 1182, *see* 543 U.S. at 386; 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention"), a period that expired years ago. Once removal is no longer "reasonably foreseeable," as happened years ago, the Executive must release the alien. *Martinez*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

Martinez rejected the same statutory, security, and separation-of-powers theories the Executive raises here. 543 U.S. at 385-86. In both *Zadvydas* and *Martinez*, the Supreme Court ordered the release into the United States of aliens who had no legal entitlement to be here. Thus the rule for persons with constitutional rights is that *no* statute can be read to permit indefinite imprisonment—even if it deals with alien criminals and on its face to authorizes their indefinite imprisonment.[31] This rule applies in cases—like *Martinez* itself—

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assumed that Congress intended to delegate the extraordinary power of indefinite detention. *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)

[31] The Executive's cited immigration cases do not alter the analysis. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), held that the Executive could

where there actually *is* a record of prior criminal activity or other risk factors. *See, e.g.*, *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (public-safety concerns do not justify continued detention); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (alien released from five-year detention despite security-risk argument); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (further detention of mentally ill aliens with history of violence not permitted); *see also Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (alien found to have engaged in terrorist activities under 8 U.S.C. § 1182 releasable in six months).

The Executive also says that Congress authorized detention of aliens "for extended periods if there are reasonable grounds to believe that those aliens are inadmissible under 8 U.S.C. § 1182(a)(3)(B) or otherwise pose a danger to national security." Br. 51 (citing 8 U.S.C. §§ 1226a(a)(1), (3)). But its record provides no such grounds. Appellees' *habeas* petitions alleged there was *no* basis for detention (on this theory or any other), and the Executive conceded the point, by not filing returns in ten cases, and pleading no contest in all. The trial judge invited evidence of just such grounds, and the Executive offered none. The Executive's argument here appears in any event to rest on the assertion that Appellees were enemies of *China.* But under the statute, if it mattered, further

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exclude Haitians at Guantánamo because the relevant law did not apply extraterritorially. Appellees do not challenge their exclusion under an immigration statute, as in *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), or seek judicial review of an immigration officer's decision under the INA, as in *Saavedra Bruno v. Albright*, 197 F.3d 1153 (1999). *Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007), affirms that inherent judicial authority to grant bail is a natural incident of *habeas*. *Bolante* is not on point: Appellees neither seek asylum, nor appeal denial of discretionary relief.

detention based on sections 1226a(a)(1) and (3) would be authorized only where release will threaten "the national security of the *United States*" or the safety of the community or any person. As discussed, there was no evidence of this. *See also* Classified Supplement.

If release poses logistical difficulties, they are of the Executive's own making. The burden of such difficulties must be borne by the Executive, and no longer by Appellees. *Boumediene*, 128 S. Ct. at 2275 ("the costs of delay can no longer be borne by those who are held in custody").

b. Release is not barred by *Qassim v. Bush*.

The Executive relies on *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), in which Judge Robertson ruled unlawful the imprisonment of two Uighur companions, but concluded that he could not order release into the continental United States. An appeal was mooted at the eleventh hour by transfer of the men to Albania. *See also* Classified Supplement. The ruling was not tested here.

The parties in *Qassim* were constrained to argue by analogy. Guantánamo prisoners, petitioners there said, were *like Martinez*: each had failed to make an entry. The Executive countered that Guantánamo was geographically distinct. *Boumediene* mooted that dispute. 128 S. Ct. at 2240. Because Appellees have the same constitutional right as did the illegal alien in *Martinez*, they are entitled to the same remedy.

Qassim does not control in any event. Congress never purported to strip *habeas* rights from these Appellees, for MCA § 7 by its terms applies only to those aliens who are properly designated as enemy combatants. 28 U.S.C. § 2241(e).[32] Thus Appellees enjoyed an unqualified right of presence. 28 U.S.C. § 2243 (cl. 5).

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[32] Alternatively, *Boumediene* vacated MCA § 7.

Had the Executive prosecuted before Judge Urbina the disputed allegations it has urged here, it would have been required to produce Appellees for hearing, as they requested. If present, Appellees could have expanded on earlier testimony that the Uighurs "have never been against the United States and we do not want to be against the United States," *Parhat*, 532 F. 3d at 842, and the military's admission that Appellee Ali Mohammad "ha[s] not developed any animosity towards the U.S. or Americans in general, and ha[s] great admiration for such a wonderfully democratic society, where human rights are protected and people are allowed to live their lives peacefully, with no threat of mistreatment," SA 1757.[33] Having prevailed, Appellees would have been entitled to release from the court house. By enforcing section 2243, the district court would not have been "bringing" Appellees anywhere—it would simply be enforcing Congress's mandate, made applicable by the Executive's unilateral actions.

3. *Mezei* does not bar the remedy of release.

The Executive places great weight on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Roundly criticized at the time and ever since,[34] the 5-

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[33] The materials in the classified Joint Appendix contain a substantial volume of such material. Because the Executive pleaded no contest, there was no occasion to cite this material to Judge Urbina. *See generally* Classified Supplement.

[34] *See, e.g.*, Brief of Law Professors as *Amici Curiae*, Addressing *Shaughnessy v. United States ex rel. Mezei* and *Clark v. Martinez*, and Supporting Affirmance; Charles 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); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1052 (1998); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173-180 (1983); *Trop v. Dulles*, 356 U.S. 86, 102 n.36 (1958) (Warren, C.J.) (plurality); *Jean v. Nelson*, 472 U.S. 846, 868-69

4 decision stranded Ignatz Mezei at Ellis Island, potentially indefinitely.[35] It arose during a period not unlike our own, when the Executive sometimes offered a single word (then "communist," now "terrorist") as a substitute for reasoned argument. Justice Jackson—who had opened for the prosecution at Nuremberg by discussing what indefinite detention did to Germany[36]—wrote, "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial." 345 U.S. at 218 (Jackson, J., dissenting). Several points bear noting.

First, Mezei left the U.S. voluntarily, returned voluntarily, and sought, at least initially, an immigration-type remedy: admission. Whether fanciful or not, the Executive's concern was that foreign enemies might dump "volunteers" on our doorstep, and when the ships sailed past the horizon, the Executive would be forced to open its doors. That concern does not arise where the Executive paid bounty hunters in Pakistan, shackled prisoners, and rendered them to Guantánamo. That population is here *only because the Executive brought it here*. And its

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(1985) (Marshall, J., dissenting); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1388 (10th Cir. 1981).

[35] Mezei and the petitioner in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), both were eventually released into the United States. Weisselberg, 143 U. PA. L. REV. at 954, 963-64. "Once the Executive was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States." *Id.* at 964. Subsequent to a hearing, Mezei was paroled into the United States by the Attorney General, although he was never admitted as a citizen or permanent resident. *Id.* at 984.

[36] 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used "protective custody" to make the regime "secure from attack and to instill fear in the hearts of the . . . people." *Id.* at 34-35.

argument that *Mezei* shields it from dilemmas of its own making cannot be teased even from *Mezei*'s eroded holding.

Moreover, at least as to these Appellees, this reading of *Mezei* cannot survive *Zadvydas, Martinez*, and *Boumediene*. The Supreme Court has never interpreted *Mezei* to sanction the indefinite military imprisonment of a civilian. Its jurisprudence concerning constitutional restraints on Executive detention has greatly developed for both alien and citizen detainees. *Boumediene's* core principle, that the separation of powers demands a judicial branch that will effectively block overreaching by the Executive in cases of unwarranted intrusion into liberty, cannot be squared with imposing *Mezei* here, as discussed below. *Boumediene* controls, at least as to stateless civilian prisoners brought by force to Guantánamo. Properly understood, *Mezei* at best demonstrates that the political branches possess broad powers in regulating immigration; not that civilians may be seized and held in military prisons.[37]

D. The Constitution's Separation Of Powers Compels Release.

The Constitution creates "three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982). This Court should assess the conflicting separation-of-powers assertions with the respective powers of each branch in mind.

1. The powers of the political branches

The Congress. The Constitution confers immigration power on Congress. *See* U.S. CONST. art. I, § 8, cl. 4 (Rule of Naturalization); *Fiallo v. Bell*, 430 U.S.

[37] Affirmance does not require that *Mezei* be "overruled," but only that this Court follow subsequent decisions of the same Court that decided it.

787, 792 (1977) (Congress has power over admission of aliens). Congress also has sole constitutional power to declare war and substantial controls over the regulation of the armed forces, including power to "make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8 cl. 11-15.

Congress enacted several statutes relevant here. In 2001, it defined the enemy in the Afghanistan conflict so as to exclude the Uighurs. *See* Authorization for Use of Military Force, P.L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), § 2(a); *see also Parhat*, 532 F.3d at 838. In 2006, it evinced a specific intent to *preserve habeas* rights for these Appellees, by purporting to strip such rights only for an alien "determined by the United States to have been properly detained as an enemy combatant." *See* MCA § 7.

The Executive. Of the three branches, the Executive has the fewest powers pertinent to this case. Article II of the Constitution says nothing of immigration. Nor does it permit the President to define the enemy. Once the Executive conceded that Appellees are noncombatants, it lost any authorization to use military force (in the form of detention, or otherwise) against them.

2. The powers of the judicial branch

Article III invests in the federal courts the "judicial Power of the United States." U.S. Const. art. III, § 1. That power extends to cases and controversies, *id.* § 2, and these *habeas* cases are within that power. *Boumediene*, 128 S. Ct. at 2240.

Three attributes of the judicial power are pertinent here. The first is remedy. "Judicial power . . . is the power of a court to decide and pronounce a judgment *and carry it into effect* between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911)

(internal citation omitted) (emphasis supplied). Remedy is the hallmark of the judicial decree. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) ("a monstrous absurdity" that there should be no remedy where a right exists); *Boumediene*, 128 S. Ct. at 2271. The second is the unique power conferred on the third branch to discern the rights of the coordinate branches and enforce their separation. *Boumediene*, 128 S. Ct. at 2259.

These first two attributes of the judicial power make remedy most urgent where one of the coordinate branches encroaches the powers of another. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("concern of encroachment and aggrandizement . . . has animated . . . separation-of-powers jurisprudence"); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (judicial remedies "historically . . . necessary to provide an important safeguard against abuses of legislative and executive power, . . . as well as to ensure an independent Judiciary"); *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604-05 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal Government has *the constitutional duty* of requiring the executive branch to remain within the limits stated by the legislative branch.") (emphasis supplied); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971) (same).

A third key attribute of the judicial power is the urgent duty to protect the Great Writ. Where imprisonment is unlawful, "the judicial officer must have adequate authority to . . . formulate and issue appropriate orders for relief, *including, if necessary, an order directing the prisoner's release*." *Boumediene*, 128 S. Ct. at 2271 (emphasis supplied). The writ "afford[s] a swift and imperative remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948). Release "lie[s] . . . 'within the core of *habeas corpus*.'"

Wilkinson v. Dotson, 544 U.S. 74, 79 (2005) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973)); *see Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("[T]he great constitutional privilege of *habeas corpus* . . . historically provided a prompt and efficacious remedy for whatever society deems to be intolerable restraints. . . . [I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.") (internal quotation omitted); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (*habeas* court that finds imprisonment unjustified "can only direct [the prisoner] to be discharged").

This imperative for a judicial *habeas* remedy is most urgent where courts review indefinite imprisonment by the Executive. *Hamdi*, 542 U.S. at 525; *Martinez*, 543 U.S. at 385; *Rasul*, 542 U.S. at 474; *Zadvydas*, 533 U.S. at 699-700; *St. Cyr*, 533 U.S. at 301. *See also Murray v. Carrier*, 477 U.S. 478, 505 (1986); *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *Harris v. Nelson*, 394 U.S. 286, 292 (1969); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). This is especially so in a case of "actual innocence." *Schlup v. Delo*, 513 U.S. 298, 320-22 (1995).

The writ is not simply an urgent judicial remedy, it is "itself an indispensable mechanism for monitoring the separation of powers." *Boumediene,* 128 S. Ct. at 2259. "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Id.* at 2277. The idea that the Executive might resist a *habeas* remedy by invoking "wind-up" or immigration theories would allow the "political branches [to] have

the power to switch the Constitution on or off at will . . . ." *Id.* at 2259. A situation "in which Congress and the President, not this Court, say 'what the law is,'" offends the separation of powers, *id.* (citing *Marbury*, 5 U.S. (1 Cranch) at 177), and revisits *Hayburn's Case*, which ruled that the political branches cannot revise judgments of the judiciary, *see* 2 U.S. (2 Dall.) 408, 410 n.* (1792).

Similarly, limitations on *habeas* raise "troubling separation-of-powers concerns." *Boumediene*, 128 S. Ct. at 2258. "The test for determining the scope of th[ese] provision[s] must not be subject to manipulation by those whose power [they are] designed to restrain." *Id.* at 2259. An entitlement to unilateral decision-making would "serve[] only to *condense* power into a single branch of government," *Hamdi*, 542 U.S. at 536, in contravention of *Boumediene*'s most pressing concern—the need for a judicial remedy against executive overreaching during "pendular cycles" when the Executive has exceeded its war powers. *Boumediene*, 128 S. Ct. at 2259.

It is hardly surprising then, that the Executive has cited no decision in which a federal court has withheld a remedy from a civilian held in a military prison indefinitely, and without charge, when that civilian is within its jurisdiction and enjoys the constitutional privilege of *habeas corpus*. This Court must resist the invitation to be the first.

3. *Munaf* does not bar release.

Munaf v. Geren, 128 S. Ct. 2207 (2008), cuts against the Executive's position. There, the Supreme Court considered the availability of *habeas* relief to U.S. citizens detained by an international coalition force operating in Iraq ("MNF–I"). At issue was a preliminary injunction, and the Court remanded for determination whether a permanent injunction was still warranted based on the

threat of torture. *See* 128 S. Ct. at 2226 n.6. Petitioners voluntarily traveled to Iraq, were detained by MNF-I within the sovereign territory of Iraq as threats to Iraqi security, and were charged with committing serious crimes by Iraq's sovereign government. *Id.* at 2214.[38] Each conceded that, if not in MNF–I custody, Iraq might arrest and prosecute him under Iraqi law. *Id.* at 2221. The Supreme Court concluded that *habeas* jurisdiction extends to U.S. citizens held overseas by U.S. forces operating as part of a multinational coalition, *id.* at 2218, and held that (i) the lower courts in *Munaf* had erred in dismissing the case for lack of jurisdiction, and (ii) the lower courts in *Omar* had erred in enjoining Omar's transfer to Iraqi custody for criminal proceedings under Iraqi law, *id.* at 2219.

The Court addressed the merits of petitioners' requests for an injunction prohibiting the U.S. from transferring them to Iraqi custody for prosecution under Iraqi law, and for "release"—but only to the extent that "release" would not result in "unlawful" transfer to Iraqi custody. *Munaf*, 128 S. Ct. at 2220. The Court held that a U.S. court may not exercise *habeas* jurisdiction to enjoin U.S. forces from transferring individuals detained within a foreign sovereign's territory to that sovereign's Executive for criminal prosecution because doing so "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders,'" *id.* at 2220, affirming the principles that *habeas* is "at its core a remedy for unlawful executive detention," and that "[t]he typical remedy for such detention is, of course, release," *id.* at 2221 (citations omitted). The petitioners in

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[38] Among other duties, MNF–I forces maintain custody of individuals who pose a threat to Iraq's security, even though Iraq is responsible for the arrest and imprisonment of those who violate its laws, because Iraq's prison facilities have been destroyed. *Munaf*, 128 S. Ct. at 2213.

Munaf were held by U.S. forces for the singular purpose of transfer into a foreign sovereign's criminal justice system. Munaf had been convicted in Iraqi criminal proceedings and Omar would have been the subject of ongoing criminal proceedings but for the injunction entered by the district court. *Id.* at 2214-15.

None of that is here. No crimes have been charged. There is no issue of comity in favor of a foreign sovereign. Appellees did not voluntarily transport themselves to their place of imprisonment. And they seek no such remedy. They are held far from any war zone in a place to which, per *Boumediene*, *habeas* runs, and they are held by *this* sovereign, who brought them here, and who, per *Boumediene*, is answerable to the courts in *habeas*. Most important, they seek the very remedy *Munaf* said is fundamental: release. A peculiar case, limited to its facts, *Munaf* does not bar relief here.

4. Reversal would eliminate the *habeas* remedy in every Guantánamo case and would gravely distort the balance of powers embodied in the Constitution.

Unlawful Guantánamo detentions may be relieved only by repatriation, transfer to a third country, or release here. Release here would open no floodgates. In most cases repatriation or transfer will—and indeed has been—feasible (most of the Guantánamo population has been released through those methods). And a *habeas* judge has broad discretion in fashioning an equitable remedy. *See* 28 U.S.C. § 2243 cl. 8. Although the period was exhausted here, in many detainee cases (*e.g.*, where there was a serious contest over status) a judge might grant the Executive a reasonable period to negotiate a transfer with a home country or safe refuge before imposing a release remedy.

Still, repatriation requires the consent of a foreign sovereign. So does transfer. Neither can be ordered. Thus, if the Executive cannot or will not arrange

those remedies, the district court must reserve a power to give an effective remedy. Even then, a court might inquire, as Judge Urbina did, whether there is some set of circumstances that distinguishes the case. It might, as he did, reserve the right to consider and impose sensible conditions of release. But because only release *here* is wholly within the judicial power, that remedy must be available where, as in this unusual case, it is necessary to give effective relief. *See, e.g.*, *Martinez*, 543 U.S. 371; *Zadvydas*, 533 U.S. 678. The effect of the Executive's argument in this case is that the only unilateral relief a court can give cannot be ordered in any case. Given the undisputed record of resettlement efforts, there is no way to limit the breadth of the remedy sought here, and no way to harmonize it with *Boumediene*. If the Executive were correct, it would indeed have negotiated the blank check that *Hamdi* forbade, for it might prolong any and all Guantánamo imprisonments at its pleasure.

E. The Court Should Permit The District Court To Complete The Process Of Considering And Determining Appropriate Release Conditions.

An appellate court should not reward the procedural gamesmanship that took place before the district judge here. The Executive first procured a three-year stay, and avoided responding at all to the claims of ten Appellees that they are not enemy combatants. JA 13. The district court then granted the Executive, which had carried out "multiple levels of review,"[39] more than two months' notice that release into the United States was sought, and more than six weeks' notice of the hearing. JA 1317. The Executive delayed until after hours on the last possible day its plea of no contest to the Appellees' assertions in their *habeas* petitions that

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[39] *See* SA 1776 (Petitioner Huzaifa Parhat's Brief in Support of Motion for Judgment as a Matter of Law, D.C. Cir. No. 06-1397 (Jan. 4, 2008), at 7).

there is no lawful basis to imprison them. JA 1464. When Appellees sought to be present for the hearing—even electronically—in order to refute any factual basis that might be asserted to justify their detention, the Executive objected.

Judge Urbina carefully considered the public safety, inviting the Executive to present any evidence of risk. The Executive's counsel advised, "I don't have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street." JA 1549. Thus nothing in the record shows that any Appellee (i) has ever been an "enemy combatant," or (ii) presents a risk to the public if released. To the contrary, for four years (and as recently as this month), the Executive has considered these men suitable for resettlement in civilian populations of the Nation's allies. The Executive "has presented no reliable evidence that [Appellees] would pose a threat to U.S. interests." JA 1611. Nothing in the record supports reversal of this finding.

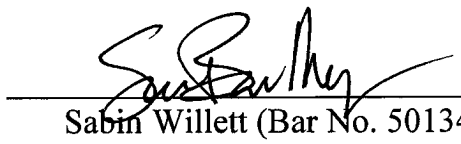
Judge Urbina ordered a hearing to set release conditions, and another hearing to consider any concerns the DHS may have. These proceedings were interrupted by the stay. Affirmance will allow that process to proceed.

CONCLUSION

Petitioners-Appellees respectfully request that the Court (i) affirm the Release Order in all respects; and (ii) grant such other, further relief as the Court deems just and proper. We appreciate that time and care will be necessary in the drafting of an opinion. The Court may, however, and immediately should vacate the stay.

Dated: November 3, 2008

Respectfully submitted,



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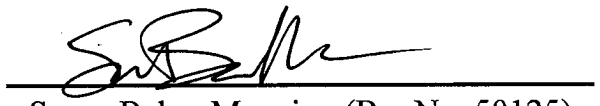

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Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

In the
United States Court of Appeals
for the
District of Columbia Circuit

GEORGE W. BUSH, ET AL.,

Respondents- Appellants,

v.

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees.

CERTIFICATE OF SERVICE

I certify that, on this 3rd day of November, 2008, I served the foregoing Corrected Brief of Petitioners-Appellees on counsel of record for Petitioners-Appellants by causing copies to be sent by Federal Express to Sharon Swingle, Attorney, Appellate Staff, Civil Division, Room 7250, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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