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

JAMAL KIYEMBA, et al., Appellees, v. GEORGE W. BUSH, et al., Appellants.	Appeal Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428 and 08-5429

APPELLEES' OPPOSITION TO GOVERNMENT'S MOTION FOR STAY PENDING APPEAL AND RESPONSE TO MOTION FOR EXPEDITED APPEAL

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PRELIMINARY STATEMENT

Given the rhetoric in the Government's stay motion ("Motion"), the Court may be surprised by the actual *record* in these cases. It shows an experienced district judge closely investigating public safety, and the Government presenting not a single fact suggesting any risk to that safety, let alone a risk justifying more imprisonment. Intervention through an extraordinary stay would invite the Government to prosecute Guantánamo *habeas* cases in the Court of Appeals, rather than the district court. This case is uniquely inappropriate for such a precedent. Its record provides no basis to avoid the mandate of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), for prompt determination, and a compelling one for the essence of *habeas corpus*: release. The public will be well protected by the district judge's imposition of monitoring conditions during expedited review of the merits here. Monitoring was to be addressed at the October 10 (and October 16) hearing that Judge Urbina previously ordered, and would ensure that Appellees be accountable to any orders that might follow a reversal on appeal.

Habeas is unique: stays exacerbate the substantive wrong. Their burden on noncombatants who stood within hours of freedom is obvious and poignant. Given the record here, a further stay would also impose an intolerable burden on a district court carrying out the duties imposed on it by *Boumediene* four months ago.

Appellees too are unique: they are not accused of taking up arms or even of antipathy toward the United States; the Government has conceded that they are not enemy combatants; they cannot be returned to their home country; and no other country will take them despite over four years of resettlement efforts. This case will open no "floodgates"—most non-combatants can be sent home.

FACTUAL AND PROCEDURAL HISTORY

Last June, Judge Urbina regained custody of Appellees' *habeas* cases. The oldest, *Kiyemba v. Bush*, No. 05-1509, dated from July 2005. As to ten Appellees, the Government never filed a *habeas* return.[1] One of the ten, Huzaifa Parhat, had obtained judgment in his proceeding under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA"). *Parhat v. Gates*, 532 F. 3d 834 (D.C. Cir. 2008).[2] On July 23, Parhat filed a motion for judgment in his *habeas*

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[1] As to those ten it still has not. No *habeas* return was filed for Appellees Nasser (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 Government produced part of the "record on review" in some DTA cases, but these documents were not made part of the *habeas* record. *See* Ex. A at 1 (conceding that Appellees may use in *habeas* cases classified CSRT hearing records filed in their DTA cases, an action Appellees never needed to take because the Government never made a return or otherwise presented or contested facts). The Government 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). As to those, the Government avoided any traverse by its September 30 concession that it would not contest that each was a noncombatant.

[2] Following the mandate of *Boumediene*, the Court held that Parhat was entitled to seek *habeas* relief immediately and that "*in that proceeding there is no question*

case, seeking immediate release into the United States, and an alternative motion for interim parole ("Release Motion"). Exhibit B. On August 4, 2008, the Government advised this Court that it would not convene a new CSRT for Parhat.

On August 21, Judge Urbina held a status conference. The Government conceded that four more Appellees would be treated as Parhat, and asked for time to consider its options as to the others. *See* Exhibit C (Aug. 21 Hrg. Tr. 9-11). The response was generous—the court gave the Government until September 30 (five weeks), and scheduled a hearing on the Release Motion for October 7. *Id.* at 51.

September came. Concerned lest the Government resume at the eleventh hour the rhetorical campaign it had waged against them, Appellees moved for leave to be present at the hearing (in person and/or by videoconference), to respond to any facts the Government might assert to justify their imprisonment or oppose their release. Ex. D. The Government objected, arguing that Appellees' presence "is utterly unnecessary for the Court to address the legal question" to be heard. Ex. E at 6. On September 30, as to every Appellee, the Government pleaded no contest to the sole basis for detention ever asserted previously: "enemy combatant" status. Ex. G. It filed no new returns, nor amended previous returns.[3]

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but that the court will have the power to order him released." *Id.* at 851 (emphasis supplied). In the plainest words, the Court directed the Government to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.*

[3] The Government argues that the October 7 hearing involved only legal issues. Mot. 19 n.7. But Judge Urbina stated at the August 21 conference that the hearing

The Government thus abandoned the right to assert against Appellees any factual basis other than the one that was conceded, *viz.*, that they are aliens imprisoned at Guantánamo since 2002. The concession that the men are not enemy combatants (and the insistence that the Release Motion involved only legal issues), also eliminated any question whether Appellees were entitled to be present for the hearing, 28 U.S.C. § 2243 (cl. 3), to controvert any factual assertion the district court might nevertheless permit to be made against them, *id.* (cl. 5).[4]

The Release Motion was heard on October 7, nearly four months after *Boumediene* issued. Based on the Government's objections, *see* Ex. E, Appellees were not present. The court offered the Government a last chance—soliciting a factual proffer of "the security risk to the United States should these people be permitted to live here." Ex. H (Hrg. Tr. ("Tr.")) 15. The Government responded, "I don't have available to me today any particular specific analysis as to what the

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was on the Release Motion. Ex. C at 50-51. The Government precluded Appellees' participation by advising the court that only legal issues were involved, Ex. E at 6; a concession that, in turn, informed Judge Urbina's minute order, Ex. F. The Government never presented to the court any fact to which Appellees could respond concerning alleged "dangerousness."

[4] Each Appellee has the privilege of statutory as well as constitutional *habeas*. The "*habeas* strip" of 28 U.S.C. § 2241(e) never applied in the first place to persons not properly determined to have been "properly detained as an enemy combatant" or "awaiting such determination." That means that each Appellee was entitled to be present to contradict and refute evidence offered to justify imprisonment. 28 U.S.C. § 2243 (cl. 5). Each man asserted that right, and the Government objected, asserting that there were no factual issues in the case. Ex. E at 5-6.

threats of—from a particular individual might be if a particular individual were let loose on the street." Tr. 17. The Government offered no evidence.

The Government had "seven years to study this issue," Tr. 15, three years' notice of these *habeas* cases, ten weeks' notice of the Release Motion, and six weeks' notice of the hearing date on the motion. The district court never barred or denied any offer of the Government of a return, or indeed any evidence at all. (The court did require detailed proffers concerning the practical arrangements in place for release and resettlement, and as to who would host the men and where. Witnesses were present and ready to testify. The Government accepted the evidence by proffer and declined to challenge or cross-examine. Tr. 43-52.[5])

The record contained powerful evidence that Appellees' release would not threaten civilians. "Throughout this period," the court properly found, "the Government has been engaged in 'extensive diplomatic efforts' to resettle the petitioners." Op. 9. The Government described these efforts in 2005. *Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005). Classified declarations updated this information, and the Government publicly claimed its renewed effort to

[5] The suggestion that he was about to free the men carelessly, Mot. 19 n.7, does a gross disservice to Judge Urbina, omitting pages of context concerning the Government's provocative assertion that the men would be jailed upon arrival by a DHS that needed an additional week to consider its options. Tr. 46-52. Judge Urbina expressly retained the authority to set appropriate conditions when the Appellees arrived at his courtroom on October 10. Ex. I (October 8 release order stating that Judge Urbina intended to address release conditions on October 10).

resettle Appellees among civilians abroad.[6] It can hardly suggest that it was seeking to settle dangerous persons among civilian populations of U.S. allies.[7]

That was the record. In addition are matters of which the district court properly could take judicial notice. First was this Court's *Parhat* decision, which rejected the Government's best case[8] as to the propriety of Appellee Parhat's enemy-combatant status. Op. 2, 5, 9. The Government was ordered "to release Parhat, to transfer him, or to expeditiously convene a new [CSRT] to consider evidence submitted in a manner consistent with this opinion." 532 F.3d at 836. The district court also took judicial notice of the Government's concession to entry of identical judgments in four other Appellees' cases in September. Op. 3.[9]

The district court (i) properly concluded that there is no legal basis for the continued indefinite imprisonment of Appellees, Op. 8-9; and (ii) made a finding

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[6] Five companions of Appellees were sent to Albania in 2006; one reached Sweden in 2007. *See Qassim v. Bush*, No. 05-5477 (D.C. Cir. 2007). The Government does not and could not contend that their presence there has ever resulted in the slightest threat to the people of Tirana or Stockholm.

[7] On October 8, the Government itself destroyed whatever hope remained by its senseless libel—quite false, but now available to every foreign nation—that Appellees are terrorists. Oct. 8 Em'gcy Mot. for Stay 19. That they never were makes no difference to diplomacy. The United States has said it and cannot unsay it. The Government's position would consign Appellees to Guantánamo forever.

[8] Neither Parhat nor any other Appellee has ever been provided with the exculpatory materials required by this Court's decisions in *Bismullah v. Gates, in which Parhat and seven other Appellees were petitioners*.

[9] The Government was forced to make the concession or brief and argue the cases. No other DTA cases had reached the point of jeopardy.

of fact—unassailable on the record before it—that the Government "has presented no reliable evidence that Appellees would pose a threat to U.S. interests," Op. 9. Judge Urbina ordered that Appellees be brought to his courtroom at 10 a.m. on October 10, 2008 and that the local Uighur families who will care for them appear then as well, at which time he would address release conditions. Ex. I. He also set a further hearing for October 16, 2008 to address the Government's concerns about release conditions. *Id.* Judgment entered. That closed the record.

Now the cases are here on appeal. There is no mechanism for making a new record here.[10] As to most Appellees,[11] there is literally no *habeas* record at all. As to all, the Government rests in part on a purely legal theory that Appellees'

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[10] *See Ouimette v. Moran*, 942 F.2d 1, 12 (1st Cir. 1991) (government could not raise factual question for first time on appeal in a *habeas* case where it did not raise it in its return or at evidentiary hearing). This Court stated in *United States v. Booze*, 293 F.3d 516, 519 (D.C. Cir. 2002), that it "follows the general rule that issues and legal theories not asserted at the district court level ordinarily will not be heard on appeal," but "acknowledges that the rule should not be applied where the obvious result would be a plain miscarriage of justice." There, the Government asked the Court to order an evidentiary hearing in a case under 28 U.S.C. § 2255, and the Court considered it "lest a plain miscarriage of justice be the result." *Id.* The facts giving rise to a miscarriage of justice there are not present here. The Motion makes no such argument; nor could it, as its concession below blocked Appellees from offering evidence to show, *inter alia*, they are not "dangerous."

[11] Parhat is among the ten Appellees with no *habeas* return. His DTA case contains an incomplete record, as it was based on the Government's best case, which he never had any opportunity to controvert. No other Appellee has ever been afforded the opportunity to controvert that *habeas* would have secured to him, had the Government ever offered a record below supporting its new argument that Appellees are subject to further detention. 28 U.S.C. § 2243 (cl. 4).

conceded alien status bars relief. In every other particular, the Government's position as to a stay rests on "factual" allegations *that either are not in the habeas record at all*, or that the Government is precluded from resting on now, having abandoned its "enemy combatant" theory and barred Appellees from responding.

ARGUMENT

A. The Government's Insuperable Burden

Two procedural obstacles bar relief: the standard of review, which receives little attention in the Motion, and the absence of a factual record upon which this Court might base an extraordinary stay.

1. Standard of review

The operative rule directs that "[w]hile a decision ordering the release of a [*habeas*] petitioner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." Fed. R. App. P. 23(c). The rule "creates a presumption of release from custody" pending appellate review. *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987). Fed R. App. P. 24(d) also "creates a presumption of correctness" as to a district court's release order, which can be overcome only upon "special reasons shown." *Id.* In *Hilton*, the Supreme Court considered a stay in a *habeas* case, holding that courts should "be guided not only by the language of [Rule 23(c)] itself but also by the factors traditionally considered in deciding whether to

stay a judgment in a civil case"—(i) likelihood of success on the merits; (ii) irreparable injury to movant absent a stay; (iii) substantial injury to other parties by issuance of stay; and (iv) the public interest. 481 U.S. at 777.

2. The record contains no fact demonstrating irreparable harm and the Government has waived any right to present facts now.

In *habeas*, a return serves as an answer. It must "certify[] the true cause of the detention." 28 U.S.C. § 2243 (cl. 3). It is the only vehicle by which the Government puts in play its factual basis for detention. Failure to make a return is, effectively, a waiver of any factual contest.[12] The Government conceded as much on September 30, and in insisting that the Release Motion involved only legal issues. Filing of a return affords the petitioner the right to "deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. § 2243 (cl. 6). Withholding the return denies that opportunity. This is what happened here.

The Government cannot be permitted to game the district court this way, or be allowed to rely upon untested extra-record assertions as a basis for reversal. The only facts on which it may rely here are the ones conceded; that Appellees are aliens, and have been imprisoned at Guantánamo since 2002. Thus, arguments for

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[12] *See National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987) (stating the rule that "issues and legal theories not asserted at the district court level will not be heard on appeal" and that "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact") (alteration omitted) (citing, *inter alia*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). There is no basis to depart from the rule in a case involving more than six years of executive detention.

a stay that themselves are grounded in assertions as to harms or threat to national security are barred. *Burford*, 835 F.2d at 318; *Ouimette*, 942 F.2d at 12. Such facts could have been asserted in a return, or even in response to Judge Urbina's invitation, and then controverted, and Judge Urbina could then have made a finding based on a full record. But no facts were offered.

B. The Government Has Not Met Its Burden To Justify A Stay.

With the difficulty of the Government's burden and the emptiness of the record in mind, the Court may consider the *Hilton* factors.

1. The Government cannot meet its burden to demonstrate a substantial likelihood of success on the merits.[13]

To meet its burden, the Government must demonstrate at least a "substantial case on the merits." *Hilton*, 481 U.S. at 778. The Government's theory throughout this litigation has been that the men are being properly held as enemy combatants. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). When this theory was abandoned on September 30, no other concept was advanced in its stead. The Government did not argue below, and cannot argue here, that it may simply deem a person "dangerous" (whatever that means) and imprison him indefinitely on that basis.

[13] A more complete discussion of the merits appears in the Release Motion (attached as Exhibit B) and reply (attached as Exhibit J).

The record contains no return advancing so remarkable an idea, and the law affords none.[14] The Government cannot prevail on the merits based on this new theory.

The Government's central preserved argument on the merits—that Appellees' alien status bars a *habeas* remedy as a matter of immigration law—cannot survive *Boumediene*'s Suspension Clause holding. Here, as in *Boumediene*, the Government proffers an Act of Congress as a bar to *habeas* relief. In *Boumediene*, it was the Military Commissions Act; here, a suite of immigration statutes. Mot. 13-14. It says that in these statutes, Congress forbade the only *habeas* relief available here. But Congress had no power to do so under *Boumediene*, and a long line of decisions such as *INS v. St. Cyr*, 533 U.S. 289 (2001), direct that statutes be construed to avoid interfering with the constitutional

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[14] *E.g.*, *Clark v. Martinez,* 543 U.S. 371 (2005) (convicted criminals with no entry right must be released into population); *Tran v. Mukasey*, 515 F.3d 478, 486 (5th Cir. 2008) ("While this Court is sympathetic to the Government's concern for public safety, we are without power to authorize [petitioner's] 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) ("If further detention of aliens with mental illness or threat of violence is required to protect public safety, rather than the supervised release which is currently authorized, Congress has not yet acted to provide such additional protection."); *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 "has been in custody for more than two and a half years" and "since he cannot at present be removed from the United States because of the Board's ruling on the Convention Against Torture, the six-month presumptive limitation on detaining an alien now begins to run").

privilege of *habeas corpus*. After *Boumediene*, no immigration statute can have deprived Appellees of their *habeas* remedy, and the appeal must fail.[15]

Even before *Boumediene*, Supreme Court precedents granted release to aliens who, like Appellees, had never made an entry, *see Clark*, 543 U.S. at 386, or whom the INS found either inadmissible or removable, and who could not find another country willing to accept them, *id.*; *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001). In both cases, the Supreme Court ordered the release of aliens into the United States, notwithstanding (as the Government argues is true of Appellees) that they had no legal entitlement to be here. *Id.* The rule of each case is that *no* statute can be read to permit indefinite imprisonment—even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment.

The Government argues that Appellees are inadmissible because they sought "to commit terrorist acts against a sovereign Government" and "receive[d] weapons training for the purpose of doing so." Mot. 13-14 (citing 8 U.S.C. § 1182(a)(3)(B)).[16] Assuming, *arguendo*, that 8 U.S.C. § 1182 renders Appellees

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[15] The Government argues that *Boumediene* "recognized that release . . . is not the appropriate [remedy] in every case in which the writ is granted." Mot. 15 (internal quotations and citation omitted). *Boumediene* cited three authorities: two holding that the prisoner must be released, and *Chessman v. Teets*, 354 U.S. 156 (1957), ordering remand for retrial, where the *habeas* petitioner had demonstrated *an error of law in the trial*. *Boumediene*, 128 S. Ct. at 2266-67. Plainly it was to that latter scenario that the phrase "not the appropriate one in every case" refers.

[16] In three years of litigation, the Government never before alleged terrorist activity or intent. No record supports the allegation here.

inadmissible and thus detainable pending removal, *Clark* and *Zadvydas* compel their release into the United States now. 8 U.S.C. § 1231(a)(6), does not authorize indefinite detention of aliens inadmissible under section 1182. *Clark*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 682. *Clark* permits only a six-month detention beyond the 90 days for aliens inadmissible under section 1182. 543 U.S. at 386; *see* 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention"). Once removal is not "reasonably foreseeable," as here, the Government must release the alien. *Clark*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

The Government also argues 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." Mot. 14 (citing 8 U.S.C. § 1226a(a)(1), (3)). But the Government bases its entire inadmissibility argument on the assertion that Appellees were enemies of *China*, and further detention based on sections 1226a(a)(1) and (3) is authorized only where release will threaten "the national security of the *United States*" or "the safety of the community or any person." The Government's arguments for further detention fail, particularly when the statute is construed in light of constitutional considerations.

The Government's reliance on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953), is unavailing. "[B]ecause the [Supreme] Court

accepted the Government's unsupported allegations as true, the *Mezei* Court's determination regarding continued detention is categorically different from the determination facing this court." Op. 8. In *Parhat*, this Court determined that *the Government's evidence provided no basis for Parhat's imprisonment*, 532 F.3d at 846-47, and the Government then waived litigation of this issue as to all Appellees.

Further, Mezei "came voluntarily to the United States, seeking admission," Op. 8, while Appellees were abducted by profit-seeking Pakistani bounty hunters, sold to the U.S. military, and brought by force to Guantánamo. One who comes to the threshold and is stranded is not like one brought by the Government against his will to a U.S. military base. *Zadvaydas*, 533 U.S. at 693 (Mezei "was 'treated,' for constitutional purposes, 'as if stopped at the border,'" "[a]nd that made all the difference") (citation omitted). The Executive cannot create the dilemma, and then complain that its own discretionary authority over immigration bars a solution.

At least in the narrow context presented by this case, where the Government has created its own dilemma, *Mezei* cannot override *Boumediene*'s core principle that the Constitution's design demands effective *habeas* review of unwarranted Executive intrusion into liberty. This principle—the central focus of section III.A of *Boumediene* and of the authorities there cited, *see* 128 S. Ct. at 2244-46—is lost without the remedy of release. "[T]he writ of *habeas corpus* is itself an indispensable mechanism for monitoring the separation of powers. The test for

determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 2259.

To carry its burden to justify a stay, the Executive must persuade the Court that it will ultimately succeed in showing that it is entitled to treat the Constitution's commands as a suggestion. But its position on the merits that even after a *habeas* court has reached a final judgment, the Executive nonetheless may exercise unilateral discretion as to what to do with the petitioner refutes itself.[17]

2. The Government has not demonstrated irreparable harm.

The Motion asserts three "harms:" (i) that the Government is correct on the merits; (ii) that the Release Order will give Appellees a United States presence to which they are not entitled; and (iii) that Appellees are dangerous. None of these theories can establish irreparable harm to the Government.

The Merits. The Government's claims that the release order "impinges on the political branches' exclusive constitutional and statutory authority over the admission of aliens into the United States, and over the winding up of the detention of former enemy combatants," Mot. 18, merely restates its legal position. It does

[17] *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995); *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).*Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948); *Hayburn's Case*, 2 U.S. 408, 410 (1792).

not demonstrate irreparable harm. If an adverse legal ruling, without more, constitutes irreparable harm, any legal ruling would justify a stay.[18]

Presence. The Government contends that releasing Appellees into the United States would "cloud" their present status. This is inaccurate. Their status will be as clear as that of the many aliens released since *Clark v. Martinez*. And that "cloud," even if it existed on an interim basis, would hardly be harm so irreparable as to overcome the harm of imprisonment without lawful basis. People without right to be here cross our borders daily in great numbers, almost always without the support in place that has been arranged for Appellees; never with precise Government knowledge of who and where they are; and never with the full support and urging of the Chairman and Ranking Member of the relevant congressional oversight committee.[19] And the record shows that release will cause no financial burden—indeed, Appellees will relieve the Government from expense.

Dangerousness. The Government's real claim is that "compliance with the district court's order would pose a serious security risk." Mot. 19. As to ten

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[18] The Government contends that any decision that "interfere[s] with Executive authority constitutes irreparable harm." Mot. 18. The cited cases state that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition," *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 382 (2004); *see Ex parte Peru*, 318 U.S. 578, 588 (1943), not that irreparable harm is shown by an argument that a court's decision interferes with executive authority.

[19] *See* Ex. K (letter from the Chairman and Ranking Member of the House Subcommittee on International Organizations, Human Rights, and Oversight requesting that Appellees "promptly be paroled into the United States").

Appellees, no record exists that could possibly support this, because there was no return. As to the others, there *is* a record that overwhelmingly disproves such a risk, and provides no basis upon which this Court might reverse the finding below.

For four years (and even this month), the Government offered evidence that it has considered these men suitable for resettlement in civilian populations of the Nation's allies. It advised the court, "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." Tr. 15. The court found, based on the record, that the Government "has presented no reliable evidence that [Appellees] would pose a threat to U.S. interests." Op. 12. Nothing in the record could possibly support reversal of this finding, and it precludes a stay.

There is no record evidence that any Appellee was involved in what the Government, in support of its newly minted theory seeking a stay from this Court, calls an "organized" attempt to attack a "sovereign Government" (*i.e.*, China). Mot. 1, 13. *Compare Parhat*, 532 F.3d at 838 (Government's own record showing no more than an aspiration to one day join a resistance against China).[20]

[20] *Parhat* made no finding as to a link between Parhat and "ETIM," and none was proved (or sought to be proved) below. Appellees were captured long before ETIM was deemed a "terrorist organization" for certain immigration purposes. As early as 2003, for ten of the men, and continuing through May 2008 for the rest, the military concluded that Appellees should be released. Op. 3.

There is evidence that some Appellees[21] obtained "firearms training" (*i.e.*, some were shown how to break down a rifle, and some shot one or two bullets at a target). So have millions of American civilians, and hundreds of thousands of servicemen and women.[22] Firearms training in 2001 by Chinese dissidents in pre-war Afghanistan, where automatic weapons were ubiquitous, is not evidence of dangerousness in 2008.[23] There is no record evidence that Appellees now harbor hostility against the United States that renders them a danger to the public, and the district court so found.[24] Op. 12. As to Parhat (who is materially indistinguishable

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[21] As to the nine Appellees who have no return other than Parhat, nothing in this record could support a finding of firearms training.

[22] It is especially paradoxical for the Government to suggest that merely being trained to fight against another country disqualifies a person for U.S. admission. The Government expedites immigration benefits (including citizenship) for aliens with firearms training—*i.e.*, by joining the military. *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).

[23] Judge Urbina 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." Op. 3.

[24] A U.S. military official stated that Appellee Hassan (ISN 250)—even after years in U.S. captivity—"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*, Sup. Ct. Dkt. No. 06-1194 (filed February 12, 2007) at 21 n.19 (citing Thabid, 05-2398, Dkt. 27 at 81 (classified factual return)). The Government's allegations do not prove a threat to the United States, or even make an alien inadmissible. *Cheema v. Ashcroft*, 383

from the other Appellees), this Court has already concluded, "It is undisputed that he is not a member of al Qaida or the Taliban, and he has never participated in any hostile action against the United States or its allies." *Parhat*, 532 F.3d at 835-836.

On this record, Judge Urbina's finding, in ordering a hearing to set release conditions (which we expect would include an outright ban on possession of a firearm, among other restrictions), that "[t]he government has not charged [Appellees] with a crime *and has presented no reliable evidence that they would pose a threat to U.S. interests*," Op. 12 (emphasis supplied), cannot be reversed.

3. A stay would cause substantial harm to Appellees.

The ongoing harm to Appellees is profound and obvious.[25] They remain in prison, monitored by soldiers and cameras, unable to communicate except by permission of the Department of Defense, and subject at the whim of the base commander to be sent back to solitary confinement. The Supreme Court has already balanced the harms of delay, ruling that Appellees were "entitled to a prompt *habeas corpus* hearing" and that "*the costs of delay can no longer be borne by those who are held in custody.*" *Boumediene*, 128 S. Ct. at 2275 (emphasis supplied). Imprisonment—particularly unlawful imprisonment—is a harm that overwhelms the theoretical and unsupported claims of harm advanced by the

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F.3d 848, 858 (9th Cir. 2004) ("We cannot conclude automatically that those individuals who are activists for an independent Tibet are necessarily threats to the United States because they have been labeled by China as insurgents.").

[25] *See* Opposition to Emergency Motion for Stay 5-6, 18-19.

Government. *Hilton*, 481 U.S. at 777 (characterizing as "always substantial" the "interest of the *habeas* petitioner in release pending appeal"); *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988); *Hernandez-Carrera v. Carlson*, No. 05-3051-RDR, 2008 WL 956742, at *1 (D. Kan. Apr. 7, 2008).

4. The public interest weighs in favor of denying a stay.

A six-and-one-half year imprisonment to which the Executive pleads no contest reflects badly on the Nation. The sunshine of judicial scrutiny in cases like *Parhat* and *Kiyemba* has just begun. The public will be ill served if the "judicial imperative" of a *habeas* remedy, *see Murray v. Carrier*, 477 U.S. 478, 505 (1986), is hamstrung by more stays. And the district court is poorly served by rewarding with stays litigants who withhold from it facts they argue on appeal are necessary to decide *habeas* cases. The public interest weighs strongly against further delay.

CONCLUSION

The Motion should be denied.[26]

Respectfully submitted,

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[26] Appellees do not object to the request to expedite the appeal. The request to prolong the administrative stay should be denied for the reasons stated.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2008, copies of the foregoing **Appellees' Opposition To Government's Motion For Stay Pending Appeal And Response To Motion For Expedited Appeal** were served via electronic mail and hand delivery upon:

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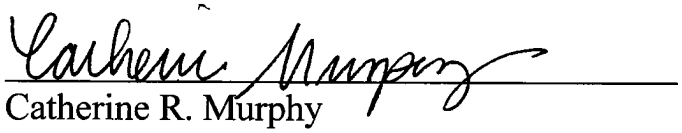

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