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

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees,

v.

BARACK H. OBAMA, ET AL.,

Respondents-Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' REPLY ON MOTION TO GOVERN AND FOR REMAND AND OPPOSITION TO RESPONDENTS' CROSS-MOTION FOR REINSTATEMENT OF JUDGMENT

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INTRODUCTION

The Supreme Court vacated *Kiyemba v. Obama,* 555 F.3d 1022 (D.C. Cir. 2009), noting that new facts may affect the outcome of this case. The parties would give effect to this order in different ways, expressing profoundly different conceptions of the judicial power. In the Executive's view, all remedy is political. Because there is no relief a court can give, no remand to a judicial officer to find facts is warranted. Petitioners believe that because they prevailed in an Article III proceeding, there *must* be relief of a judicial character. Where necessary, that means a judicial order that directs release, as *Boumediene v. Bush,* 553 U.S. 723, 128 S. Ct. 2229 (2008), said in plain words. *Id*. at 2271. Here that relief was appropriate in 2008, and remains so today. Petitioners show in Part I that remand is appropriate to find the facts and fashion that relief.

In Part II, Petitioners address the Executive's cross-motion to reinstate *Kiyemba*. The motion should be denied. *Kiyemba* stripped Article III courts of Article III power, turned the constitutional remedy of *habeas corpus* on its head, and led to more than a year of judicial impotence in the district court, leaving that court as beholden to the Executive jailer as it had been before *Boumediene*. For five Uighurs who never were our enemy, never asked to come to our threshold, and now commence their ninth year at Guantánamo, that abdication of the judicial power would be as intolerable today as ever. For all the record shows, it might leave them in the prison forever.

Under the Constitution, the rule of law is enforced most fundamentally by the judicial power. In *habeas*, this is a power to inconvenience the political branches by ordering the release of those imprisoned without legal basis. The Supreme Court has reminded us repeatedly that the judicial power checks the Executive, s*ee Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Boumediene,* 128 S. Ct. at 2247, and that its check, while inconvenient to the other branches, is a

touchstone of the separation of powers. The Executive sought in those cases—and through its motion for a quick reinstatement, now seeks again—to eliminate that check.

ARGUMENT

I. The Court Should Remand the Case to the District Court.

Kiyemba is singularly important. While it was the law, the panel decision was this Court's only pronouncement on remedy following *Boumediene*. Two judges of this Court established a rule governing every district judge with jurisdiction of a Guantánamo *habeas* case. The Supreme Court has now vacated the decision, eschewing the Executive's request that it remain intact. It would hardly be a judicious response to *vacatur* for the panel simply to reinstate its prior opinion, without ordering that the material facts be judicially determined.

The Supreme Court noted that changed circumstances in this case may affect the legal issues presented, referring in its order to the "underlying facts." *See Kiyemba v. Obama*, 559 U.S. ___ (2010) (*per curiam*) ("Supreme Ct. Order") ("This change in the underlying facts may affect the legal issues presented."). By ordering that the case be disposed of "in light of the new developments," *id.*, the Supreme Court made remand a practical necessity. The Court's observation that—like this Court—it is "a court of review, not of first view," Supreme Ct. Order (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 178 n.7 (2005)), its remand order, and the gravity of the consequences to Petitioners all suggest that the facts—as yet unfound—will bear on the correct legal result.

The Executive disagrees. It suggests that because Petitioners had no judicial remedy before Executive diplomacy, nothing diplomacy accomplished or failed to accomplish can help them now. *See*, *e.g.*, Opp'n Br. at 16, 23, 26. But if facts did not matter, it is hard to understand why the Supreme Court granted *certiorari* in the

first place, and harder still to understand why a suggestion that facts have changed led to *vacatur*, instead of the mere dismissal of *certiorari* the Executive initially requested.

In the "record" of *Kiyemba's* post-*certiorari* developments there is not a word of testimony, nor a single document. On page 24 of its brief, for example, the Executive urges that there is "no occasion for factual development regarding whether resettlement in Palau would be only 'temporary.'" Two sentences later it asserts that resettlement in Palau is *not* temporary (a factual assertion), and that the Uighurs are welcome to stay indefinitely (another), relying not on testimony or admissible documents, but on a *newspaper article from Thailand*. The suggestions before this Court are in some cases inaccurate (Petitioners do not believe they received an *offer* to travel to the "second country," *see* Opp'n Br. at 10, 24), and in others, incomplete. As to incompleteness, there is no record concerning:

a. Whether foreign release is currently available at all;

b. The terms of any "offer" received from any source;

c. the identity and circumstances of the "other country" to which the Executive refers, the nature of the discussions with that country, and what its relations with China are;

d. Concerns about the risk of refoulement to China or one of its satellites implicit in the various discussions and arrangements;

e. The facts surrounding the inability of any Uighur to obtain Palaun citizenship or other legally permanent immigration status; or

f. Petitioners' reasons for acting as they have done.

The Executive argues that the Court should refrain from "judicial factfinding" because doing so "would disrupt diplomatic negotiations." Opp'n Br. at 25. Confidentiality concerns can be addressed by filing sensitive facts under

seal, as has been done in this very case in the past. And more fundamentally, the argument illustrates the depth of *Kiyemba's* flaw; for its essence is that judicial relief in an Article III proceeding, far from checking the Executive, must not be permitted to inconvenience him.

Remand leaves open the possibility that the case may become moot or may be decided in the district court on narrower grounds than those presented by the original *Kiyemba* appeal. Either outcome would avoid the resolution of difficult constitutional questions, and for that reason remand is to be favored. *See Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality. . . .'") (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

The Executive has not credibly overcome the basic premise that a court should decide every case or controversy on the basis of its particular circumstances, nor explained why the suggestion implicit in a *per curiam* remand order of the Supreme Court should be disregarded.

II. The Cross-Motion Should Be Denied.

The Executive urges reinstatement of the panel majority's *Kiyemba* decision. It asserts that Petitioners sought release in the United States "because they had nowhere else to go," Opp'n Br. at 4, 15, and that, because they now have *some*where else to go,[1] the previous decision is correct *a fortiori*. Certainly for long years there *was* nowhere else to go, and that made the case poignant, but the Executive is mistaken in its premise. Petitioners sought release in the United

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1 As discussed above, there is no admissible record evidence that there is, *today*, somewhere else to go.

States because, first, as petitioners in an Article III proceeding, they were and are entitled to a judicial remedy, and second, because *release from the court house is the judicial remedy to which they are entitled*.

A. The *Kiyemba* Decision Offended the Judicial Power.

The Executive's refrain is that the Judiciary must defer remedy to the Executive. *See*, *e.g*., Opp'n Br. at 15 ("Appropriate deference to the political Branches continues to bar the extraordinary relief petitioners seek [] in light of [the] United States' success in obtaining offers for petitioners to resettle in other countries."); *id*. at 24 ("[T]he Judiciary should defer to the political Branches with respect to [resettlement] and [] petitioners have no right to the extraordinary judicial order they seek.").

The Executive misses the essential point. Article III of our Constitution does not permit a federal court having jurisdiction of a *habeas corpus* action to cede remedy to the political branches. The Judicial Power is a power conferred by the Constitution exclusively on the Judicial branch of the government. U.S. CONST. art. III, § 1. The Judiciary may not share its exercise with the political branches. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (rejecting as unconstitutional a statute that empowered courts to determine pension rights but left payment subject to stay by the Executive and appropriation by Congress). "[R]evision and control" of remedy by other branches of government is "radically inconsistent with the independence of that judicial power which is vested in the courts." *See id*. at 410 (statement of Wilson, J., Blair, J., and Peters, D.C.J.). But beholden is what the panel majority in *Kiyemba* made the federal courts—expressly. *See* 555 F.3d at 1029 (court can only accept Executive "representations").

The judicial power includes, most centrally, the power to give remedies in cases of which courts have jurisdiction. As Justice Johnson explained, "the term

'judicial power' conveys the idea, both of exercising the faculty of judging *and of applying physical force to give effect to a decision*." *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (Johnson, J., on circuit) (emphasis added). In *Gordon v. United States*, 117 U.S. 697 (1864, reported 1885), the Court struck as unconstitutional a statute that left remedy beholden to the Executive. The statute created a new Court of Claims, but made payment of judgments dependent on appropriations by the Treasury. Because remedy depended on the Executive, the statute was constitutionally intolerable, for the capacity to direct a remedy is "an essential part of every judgment passed by a court exercising judicial power." *Id*. at 702. Again, when former Confederate partisans began to collect handsome reclamation claims after the Civil War, an inflamed Congress enacted a set of evidentiary and procedural rules designed to ensure that a class of claimant cases would fail. The Supreme Court struck the statute as another intolerable intrusion on Article III power. *United States v. Klein*, 122 U.S. (13 Wall.) 128 (1872). And in our own day, in a case involving aliens in the same prison, the Supreme Court did not hold that a docile judicial officer should suggest a remedy, or accept the Executive's assertion that it was trying. It held that he had power to make it happen unilaterally. He "must have adequate authority to … issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." 128 S. Ct. at 2271; *see also United States v. Nixon*, 418 U.S. 683, 704 (1974); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (holding that judicial remedies are historically "necessary to provide an important safeguard against abuses of legislative and executive power . . . as well as to ensure an independent Judiciary").

The good faith of a political branch cannot substitute for the Judicial power. In *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), Congress sought to save alleged victims of securities fraud whose cases had been finally adjudicated against them

under a perplexing tangle of statutes of limitation. Justice Scalia held for the majority that this aspect of its legislation was void, for a final judgment is an exercise of judicial power that cannot be overcome by the political branches. *Id*. at 240. Assertions of benign intent were irrelevant. The Supreme Court explored in detail how abrogation of judgments by the political branches was common at the state level, and thought intolerable by the Framers, who therefore sought to eliminate it in the Constitution. *See id*. at 219-24. *Plaut* shows that judicial remedy is a matter solely for the judicial branch.

In short, these cases demonstrate that the judicial power *is* remedy, and that the power to give remedy is inalienable under the separation of powers. The panel majority in *Kiyemba* abandoned this principle, and without citing a single relevant authority. Its "rights without remedy" discussion rested on cases involving nonjusticiable controversies (like political questions, *see Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting)[2]), or cases in which discrete acts of Congress did not afford the particular remedy prayed for. *See Wilkie v. Robbins*, 551 U.S. 537 (2007) (denying damages where plaintiff failed to allege predicate offense under RICO); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (denying claim against state of Maine for violation of overtime provisions of federal Fair Labor Standards Act where Maine had not consented to suit); *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992) (plaintiffs failed to

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2 "[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies [the] political question doctrine . . . the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists To Stop The War*, 418 U.S. 208, 215 (1974). Below, Judge Urbina not only had jurisdiction, he was bound to exercise it expeditiously. *Boumediene*, 128 S. Ct. at 2275 ("[T]he costs of delay can no longer be borne by those who are held in custody.").

establish that FERC abused its discretion in finding that plaintiffs were not entitled to restitution of overcharges resulting from alleged violation of FERC regulations).[3]

The panel also rested on immigration cases, which involved no constitutional *habeas* claim at all, but the mere use of *habeas corpus* as the procedural vehicle by which a statutory immigration right was tested. In those cases, the petitioner was not entitled to a remedy for the simple reason that he did not prevail on the merits. *See Kiyemba*, 555 F.3d at 1025-26 (citing, *inter alia*, *Demore v. Kim*, 538 U.S. 510 (2003) (unsuccessful challenge to no-bail provision of Immigration and Nationality Act by alien detained pending removal for committing aggravated felony); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (unsuccessful challenge to Geary Act by aliens detained pending deportation for failure to carry or obtain alien resident permits); *Ekiu v. United States*, 142 U.S. 651 (1892) (statutory authority of immigration official to detain inadmissible alien who came voluntarily to the border)).

The consequence of *Kiyemba*, was that the Judiciary had no power to effect a judicial remedy. Finding that the Executive jailer had broken the law by holding a prisoner, a court applying *Kiyemba* finished its judicial work by receiving a representation that the jailer would address the matter itself, using a practice—foreign diplomacy—discretionary to itself, unaffected by the lawfulness of detention, and opaque to the judiciary, the public, and the prisoner. *See, e.g.*, *Basardh v. Obama*, 612 F. Supp. 2d 30, 35-36 (D.D.C. 2009); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at *16 (D.D.C. Aug. 21, 2009); *Mohammed v. Obama*, No. 05-1347, 2009 WL 4884194, at *30 (D.D.C. Dec. 16, 2009).

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3 None of those cases involved what is present here: litigants entitled to a judicial remedy, yet consigned entirely to the Executive for any remedy at all.

While *Kiyemba* prevailed, the Executive often moved to stay cases in which the prisoner was cleared for release or transfer by the President's Inter-Agency Review Team ("IART"). The Executive argued that once it exercised its own discretion, there was no further relief that a court could provide. Courts had no practical choice but to concur. Whatever its merit, *Kiyemba* left them impotent to exercise judicial power, and so they granted stays in such cases. *See* Appendix (filed under seal) (attaching *habeas* cases in which judges, in reliance on *Kiyemba*, have entered stays).[4] Yet the Executive that procured those stays was mercurial, as one prisoner's case illustrates. Cleared for transfer under the last administration, he filed for *habeas* review. He was cleared anew by the IART. Over his objection, the Executive procured a stay based on the IART clearance, successfully arguing that, after *Kiyemba,* there was no relief a court could give. The prisoner received no hearing. Now the Executive has changed its mind. Today the prisoner is "no longer cleared for transfer." *See* A01-04.

The prisoner remains at Guantánamo. If this is *habeas*, one wonders what suspension would look like.

All remedy under *Kiyemba* was by the grace of the Executive. A prisoner of high political worth—say, a Uighur whose resettlement would moot noisome Supreme Court scrutiny—might be offered Switzerland two days before the Executive's merits brief was (at last) due in the Supreme Court. Meanwhile a "cleared" prisoner (who had no case in the Supreme Court, and was of no political consequence at all) was denied a hearing, and later, his clearance revoked on the say-so of the Executive. Such was the "judicial power" after *Kiyemba*.

The Executive has set out its efforts to release *habeas* winners. Gov't S. Ct.

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4 As the Executive has deemed IART clearances protected, Petitioners can provide the details only in a separate filing under seal.

Br. at 14-16 (attached to Opp'n Br.). Even prisoners who might safely go home are held for many months while the Executive makes secret arrangements with the home government. *Id*. at 15-16 & n.16. And where men are at last released, the remedy is political, not judicial. The terms are dictated in secret by the Executive. The Court has nothing to do with it.

The Executive has suggested Uighur resettlement to many nations. Perhaps their diffidence reflects China's pressure; perhaps bemusement at America's conviction that other nations, but not our own must accept exonerated Guantánamo prisoners. The diplomatic effort may have been strenuous and more recently in good faith, but by definition is subject to diplomatic trade-offs and shifts in the political climate. Because *Kiyemba* forbade what *Boumediene* had ordered, a meaningful judicial remedy became as remote while *Kiyemba* was the law as it had been before the *Boumediene* ruling.[5]

B. *Kiyemba* Profoundly Misread the *Habeas* Remedy.

Two mistakes permeate the Executive's discussion of the *habeas* remedy: the premise that release from the court house depends on there being "nowhere else to go," and the idea that failure to volunteer for exile bars a remedy.

Petitioners submit that, as scholars powerfully demonstrated in an *amicus* brief filed in the Supreme Court, the panel majority's assertion that "no habeas court since the time of Edward I ever ordered such an extraordinary remedy," *Kiyemba*, 555 F.3d at 1028, was incorrect. *See generally Brief of the Right Honorable Lord Goldsmith et al. as Amici Curiae in Support of Petitioners*,

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[5] "If the Constitution ever perishes," Justice Story warned long ago, "it will be, when the Judiciary shall have become feeble and inert, and either unwilling or unable to perform the solemn duties imposed upon it by the original structure of the Government." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION 185 (1865).

Kiyemba v. Obama, No. 08-1234 (U.S. Dec. 11, 2009) ("Parliamentarians' Brief") (attached as Ex. 1). The remedy the five Petitioners seek is the same remedy that the habeas judge always gave: discharge of the successful petitioner from the court house, regardless of citizenship. English cases during the period straddling 1789, and American cases following 1789, demonstrate categorically that the *habeas* remedy was immediate release, or "discharge" from the courthouse. In England, the Writ would issue from a London courtroom to a distant jail, Parliamentarians' Br. at 27-29, including jails over the sea, *id.* at 20, directing the jailer to return to the courtroom with the prisoner and the explanation for his detention, *id.* at 35-44.[6] With the prisoner there in the courtroom, the court would consider the grounds for detention. Finding them adequate, it would remand the prisoner to the jailer's custody. Finding them inadequate, it would order the prisoner discharged then and there. *See id.* at 28-32. Release was immediate, *see id.* 30-33, and practical (or political) difficulties were not permitted to delay release, *id*. at 33-35.

If there was one *habeas* case the Framers knew well, it was *Sommersett's Case*, (1772) 98 Eng. Rep. 499, 510 (K.B.). An African by birth, James Sommersett was enslaved in Virginia in 1749. Accompanying his master Charles Stewart to England in 1771, Sommersett applied for *habeas corpus*. Stewart tried to hurry him out of England on a ship bound for Jamaica. A writ issued from King's Bench, requiring the ship's captain to bring Sommersett into court. There Lord Mansfield said, "[t]he only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be

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6 The cross-border "transfer" that the Executive contends is beyond the power of the *habeas* judge occurs prior to review, and is essential to the operation of the "one writ" now protected by our Constitution. Parliamentarians' Br. at 25-27. Once the writ runs from the court having jurisdiction to the place of confinement, the prisoner is, in law, *already* in the court room.

discharged." Sommersett prevailed, and was discharged there in London. *See* PAUL D. HALLIDAY, HABEAS CORPUS, FROM ENGLAND TO EMPIRE at 174 (Harv. U. Press, 2010). As *Sommersett's Case* shows, the release mechanics are the same for aliens as for citizens. Parliamentarians' Br. 18-19, 20-22; *see also Boumediene*, 128 S. Ct. at 2248.

These same release mechanics obtained in the new Republic. Six years after the Constitution was ratified, a prisoner jailed in Pennsylvania sought the writ and was "now *brought into court* upon a Habeas Corpus." *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17 (1795) (emphasis added). The Supreme Court granted the petition and directed release of the prisoner. *Id*. at 18. Eleven years later, in *Ex Parte Burford*, 7 U.S. (3 Cranch) 448 (1806), Burford was "brought before the supreme court on a writ of habeas corpus." *See Ex Parte Watkins*, 28 U.S. 193, 208 (1830) (Marshall, C.J.) (describing *Burford* case). The Supreme Court granted the petition and discharged the prisoner. *Ex Parte Burford*, 7 U.S. at 453. The same mechanics applied in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). "With the prisoners present, the Supreme Court fully examined and attentively considered, on an item-by-item basis, the testimony on which they were committed, held it insufficient, and ordered their discharge." Eric M. Freedman, Habeas Corpus, Rethinking the Great Writ of Liberty 25 & nn.38-39 (New York University Press 2001) (internal quotations marks and footnotes omitted). It has always been true that "[a] basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term 'habeas corpus.'" *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

If those release mechanics are atypical today, it is not because courts have lost the power to use them. In almost every domestic case, the parties do not need them to obtain judicial relief, and the court does not need them to give it. As a

matter of convenience, presence is dispensed with in such cases. *See, e.g.*, *In re Medley*, 134 U.S. 160, 162 (1890) (noting that by "an arrangement between the parties and the counsel, it was agreed that the prisoner need not, in person, be brought to Washington"). But presence was necessary here, and *habeas* jurisdiction gave the District Court the power to require it.

Petitioners submit, with all respect, that the Executive is still fighting the last war. The question whether the prisoner can be brought across the border for release is simply the question whether the writ runs across the border. *Boumediene* holds that it does. And once it runs to a population of aliens beyond the border, *it runs to them.* They are entitled to its singular remedy, which is release from the court house. There is only one writ of *habeas corpus*,[7] and the Suspension Clause protects, at a minimum, that one writ as it was understood at the framing. *Boumediene*, 128 S. Ct. at 2248; *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *Boumediene*'s holding that the writ runs to Guantánamo means that judges hearing Guantánamo detention cases have, at minimum, the judicial power to apply the remedial mechanics of the writ. By stripping the District Court of that power, the panel majority in *Kiyemba* was not merely wrong—it effected an unconstitutional suspension of the writ.

The Executive's second key error is its thesis that, for the last five Uighurs, the right to the *habeas* remedy was forever lost through failure to volunteer to go to Palau, a place that they, like most Americans, had never heard of. This is a

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[7] *See* Transcript of Oral Argument at 59, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) ("Justice Souter: "The writ is the writ. . . . There are not two writs of habeas corpus for some cases and for other cases. The rights that—the rights that may be asserted, the rights that may be vindicated, will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus.").

remarkable argument. The remedy secured by the Great Writ is not transportation to a distant island.[8] It is not a second exile to Albania, or to some fastness so remote that the Executive declines to name it publicly. The remedy is discharge from the court house where there is jurisdiction. That is what is to be directed, where necessary. To be sure, it will rarely be necessary in the Guantánamo cases. Most prisoners want to go home; and most safely can. An order directing release need not be executed in such cases. But it was necessary here more than a year ago, and a remand is now appropriate to determine whether it is appropriate now.

No petitioner has restricted the Executive's exercise of unilateral removal power, and no relief is sought here that would do so. The five petitioners, having been consigned against their will to one island exile, have simply declined to *volunteer* for another. The Executive cites to no authority for the proposition that a failure of volunteerism of this kind forfeits the *habeas* remedy.[9] Unlike Albania, Palau evidently was available only to those who wished to resettle there. This case presents no question of the Executive's unilateral power to remove, and neither *Munaf v. Geren*, 553 U.S. __, 128 S. Ct. 2207 (2008), nor this Court's recent decision in *Kiyemba v. Obama*, 561 F. 3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. ___ (Mar. 22, 2010) (*Kiyemba II*), addresses an argument that a prisoner can be penalized in *habeas* for failing to volunteer for a foreign transfer. The Executive's theory, that it may capture civilians abroad, transport them to

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8 The Supreme Court has recognized the severity of deportation, even as to aliens. *See Padilla v. Commowealth*, no. 08-861, slip op. (U.S. Mar. 31, 2010).

9 Running through this case is the suggestion that petitioners seek asylum through the back door. On remand, a factual record would show that the remaining prisoners, like their resettled colleagues, have earnestly sought release in a number of foreign countries in which there are family or cultural ties, and would welcome such a resettlement today.

Guantánamo against their will, and then detain them at its pleasure through invoking an exclusion power, neatly disposes of judicial check and the Suspension Clause, and would again empty the judicial power of meaning, as it did between October 2008 and March 2010.

C. Recent Legislation Restricting the Transfer of Guantánamo Detainees is Unconstitutional.

The Executive points to a series of 2009 appropriations bills as further support for its position that no relief is due Petitioners. These bills raise profound constitutional concerns. The new bills may be read, under the canon of constitutional avoidance, as not applicable to noncombatants who have won their *habeas* cases. *See* Br. of Pet'rs at 49-52, *Kiyemba v. Obama*, No. 08-1234 (U.S. Dec. 4, 2009) (attached as Ex. 2).

If any of the 2009 bills must be read to apply to these Petitioners, it would be void as an unlawful suspension of the writ. U.S. CONST. art. I, § 9; *Boumediene*, 128 S. Ct. at 2266, 2274 (voiding Section 7 of the Military Commissions Act of 2006). Each bill defines the burdened class only by alien status and either "location" or "detention" at Guantánamo on a certain day, without regard to conduct or previous adjudication. None provides any remedy at all. *Compare Boumediene*, 128 S. Ct. at 2275 (voiding Detainee Treatment Act as inadequate substitute). The bills' sponsors said they were responding to reports that the President was about to release the Uighur prisoners from Guantánamo in the United States,[10] demonstrating (as the Executive concedes) an express motive to deprive *these Petitioners* of the remedy they had already obtained from the Judicial branch. *See* Opp'n Br. at 19.

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10 155 Cong. Rec. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell); *id*. at S5606 (daily ed. May 19, 2009) (statement of Sen. Hatch); *id*. at S5654 (daily ed. May 20, 2009) (statement of Sen. Thune); *id*. at S5791 (daily ed. May 21, 2009) (statement of Sen. Sessions).

A plainer suspension could scarcely be imagined. "The Legislature's . . . responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *St. Cyr*, 533 U.S. at 314 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). Here, for political reasons the Uighurs were transformed on the Senate floor to "hardened killers bent on the destruction of the United States,"[11] and as so transformed, sentenced by that legislature to be imprisoned indefinitely. This is precisely the kind of political hysteria that the Suspension Clause is designed to check. *Id*.

If any of the 2009 appropriations bills were construed to bar Petitioners' release, that bill would also constitute an unlawful bill of attainder. U.S. CONST. art. I, § 9, cl. 3; *see United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968); *United States v. Brown*, 381 U.S. 437, 462 (1965); *United States v. Lovett*, 328 U.S. 303, 317 (1946). The clause is an important structural limitation on congressional power. *INS v. Chadha*, 462 U.S. 919, 962 (1983) (noting that the clause is "'an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.' This Clause, and the separation-of-powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."). Congress may not target specific individuals with punishments, *Ex parte Garland*, 71 U.S. 333, 377 (1867), and there is no doubt that *imprisonment* is punishment. *See Nixon*, 433 U.S. at 474 (imprisonment a

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11 55 Cong. Rec. S5653-4 (daily ed. May 20, 2009) (statement of Sen. Thune) (discussing the Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103). The absurdity of these statements—with released Uighurs now raking sand traps for American golfers in Bermuda, a few hours from Washington—reflects the danger to liberty of ceding judicial remedy to the political branches.

common form of proscribed punishment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867) ("[D]eprivation of any rights, civil or political, previously enjoyed, may be punishment . . . ."). The impact of the appropriations bills was to curry political favor by imprisoning indefinitely a specific list of persons, present at Guantánamo on a certain day, even where, like Petitioners, they had prevailed in *habeas*.

CONCLUSION

The Court should remand the case to the District Court with directions to find the facts and enter judgment. It should deny the cross-motion to reinstate *Kiyemba v. Obama*.

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Respectfully submitted,

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