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

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

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees,

v.

BARACK OBAMA, ET AL.,

Respondents-Appellants.

PETITION FOR REHEARING EN BANC

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Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Petitioners-Appellees request *en banc* review of the Court's May 28, 2010, decision, 605 F.3d 1046 (D.C. Cir. 2010) ("*Kiyemba III*"), reinstating *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*").

Petitioners submit that two errors are embedded in this reinstated rationale, whose broad implications — for this and other Guantanamo cases — should be reviewed by the Court *en banc*: first, that release can never be procured by judicial order; and second, that the prisoner's failure to elect a deportation site that he had well-founded reasons to decline forfeits his *habeas* remedy.

The first proposition conflicts with the holding in *Boumediene v. Bush* that "the judicial officer must have adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." 553 U.S. 723, 128 S. Ct. 2229, 2271 (2008).[1] Under *Kiyemba I* and *III*, the courts are powerless to direct release of any Guantanamo prisoner. Even where, as here, the Executive concedes that the Petitioners are entitled to release from eight years of detention, *Kiyemba I* and *III* relegate the judiciary to a spectator role, issuing unenforceable encouragements to diplomacy. The result is the elimination of

[1] The Supreme Court recognized that a judicial order is not necessary in most cases because the prisoner wishes to go home and can do so by agreement. The "necessity" of a judicial order arises where there is no agreement, and the prisoner's conduct, on full factual review, cannot fairly be seen as volunteering to live at Guantanamo.

judicial relief at Guantanamo, an exception to *Boumediene* that swallows its rule, and an improper delegation to the Executive of the Article III judicial power.

The second proposition, which arises from the rejection of an offer to resettle in Palau, is also incorrect. The panel erred by not developing a factual record adequate to support a finding as to whether the Petitioners have now elected voluntarily to live at Guantanamo. After the Executive reported that the last remaining Petitioner received a resettlement offer, the Supreme Court vacated *Kiyemba I* and remanded here to "determine, in the first instance, what further proceedings in [the Circuit] or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba v. Obama*, 559 U.S. ___, 130 S. Ct. 1235, 1235 (2010). Petitioners sought remand to the district court to develop a record that would have shown that Petitioners are still detained and are not "volunteers" at Guantanamo merely because they did not volunteer to resettle in another remote island. The panel should have accepted the Supreme Court's invitation to develop a record.

This appeal presents a question of exceptional importance: whether the judicial power exists to provide relief to an alien held offshore by the Executive, in a *habeas* case over which the Court has jurisdiction. The panel's holding goes well beyond these Petitioners, because it bars a district judge from *ever* exercising the judicial power to direct release for a successful Guantanamo petitioner. The

problem is systemic — Petitioners believe that Guantanamo prisoners have prevailed in 38 of 52 *habeas* reviews conducted to date. More than two years after *Boumediene*, their remedy from years of wrongful imprisonment still depends not on courts, but entirely on Executive discretion.

The discretion of the political branches is by definition changeable, and now appears to be changing again. The Executive has announced the indefinite suspension of its plan to close Guantanamo, *see* Charlie Savage, *Closing Guantánamo Fades as a Priority*, N.Y. TIMES, June 26, 2010, at A13, has stopped or delayed releasing Yemenis who win in *habeas*, and in this Court and others has cited post-hoc legislation as a bar to actual judicial relief in *habeas*.

The issues presented by the panel's decision warrant consideration by the full Court. Petitioners respectfully request the Court rehear the case *en banc*.

I. The Panel's Decision Strips *Habeas* Of Any Judicial Remedy.

A. *Kiyemba I* conflicts with *Boumediene v. Bush*.

Boumediene held that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." 128 S. Ct. at 2266. The dissent agreed: "the writ requires most fundamentally an Article III court be able to . . . when necessary, order release." *Id.* at 2283 (Roberts, C.J., dissenting). This has been the law for centuries. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 128 S. Ct. 2207, 2223 (2008) (release is "the quintessential habeas remedy"); *In re Medley*,

134 U.S. 160, 173 (1890) ("[U]nder the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement"); *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) ("Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release.") (Scalia, J., concurring).

But the panel departed dramatically, holding that so long as the Executive promises to use "diplomatic attempts to find an appropriate country willing to admit" a Guantanamo detainee, the courts "do [not] have the power to require anything more." *Kiyemba I*, 555 F.3d at 1029. After *Kiyemba III*, release in the United States is barred. Because a U.S. court lacks power to order a foreign sovereign to accept a detainee, even its own citizen, the only remedy in a Guantanamo case is an Executive one: "diplomatic attempts." If the district courts are limited to encouraging diplomacy,[2] they have lost the power to fashion the "quintessential habeas remedy." *See Munaf*, 128 S. Ct. at 2223.

But the courts have not merely *lost* the judicial power. *Kiyemba I* and *III* cede it to the Executive Branch. This is inimical to an independent judiciary, which, under our tripartite system, may not constitutionally cede remedy in a case

[2] The district court orders in successful Guantanamo *habeas* cases post-*Kiyemba I* reflect the determination of judges that they are prohibited from providing a sure judicial remedy. *See* Letter from Susan Baker Manning, Counsel for Petitioners, to Mark Langer, Clerk of Court (filed in *Kiyemba v. Obama, No. 08-5424, et al.*, Apr. 4, 2010), and accompanying Appendix (filed under seal).

or controversy to the political branches. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that "revision and control" of remedy by other branches is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *see Gordon v. United States*, 117 U.S. 697, 702 (1864, reported 1885) (statute that cedes remedy to the Executive constitutionally infirm; remedy is "an essential part of every judgment passed by a court exercising judicial power. . . . Without [it] the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion. . . . Such is not the judicial power confided to this Court."); *see also Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (striking down statute that required federal courts to reopen final judgments). Granting the Executive sole discretion over remedy is especially intolerable in *habeas*, whose purpose is to check (not accept assurances from) the Executive. *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[T]he writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

Under *Kiyemba I* and *III*, the courts abdicate the Judicial remedy power, ceding control of the "quintessential *habeas* remedy" to the Executive. *See Munaf*, 128 S. Ct. at 2223; *see also Boumediene*, 128 S. Ct. at 2262 (holding that failing to hear Guantanamo *habeas* cases would amount to a suspension of the writ).

B. In *habeas*, release is from the courthouse as a matter of law.

Petitioners seek the same remedy that the *habeas* judge always provided: discharge from the courthouse. *See, e.g.*, *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795); *Sommersett's Case*, (1772) 98 Eng. Rep. 499, 511 (K.B.) ("The only question before us is, whether the cause on the return is sufficient? If it is, the [petitioner] must be remanded; if it is not, he must be discharged."); *see also Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) ("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.'") (footnote omitted). The release mechanics are the same for aliens as for citizens. *Sommersett's Case*, 98 Eng. Rep. at 511; *see also Boumediene*, 128 S. Ct. at 2248.

Those mechanics are atypical today, but not because courts have lost the power to use them. In almost every domestic case, the petitioner does not need to come to the courthouse for judicial relief, and the court does not need the petitioner present to grant relief. As a matter of convenience, presence is dispensed with. *See, e.g.*, *In re Medley*, 134 U.S. 160, 162 (1890) (noting agreement between parties that waived petitioner's presence). But here, because the Executive chose

Guantanamo, Petitioners' presence was necessary, and *habeas* jurisdiction gave the district court the power to require it.

Thus 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. Once it does, so must the remedy. The Executive's decision to bring Petitioners to Guantanamo to avoid judicial review is no cause for denying Petitioners relief under the writ as it has existed for centuries.

C. Release from the courthouse does not raise immigration issues.

The panel concluded that release in the United States is tantamount to granting immigration admission to the United States, a matter that is committed to the political branches. *Kiyemba I*, 555 F.3d at 1027. Relying on *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the panel held that the district court therefore lacked power to order relief. *Kiyemba I*, 555 F.3d at 1027. But release here would not grant asylum, or "admission." *Mezei* is not on point and in the present context does not survive the Supreme Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005).

Although it involved an alien who had made an immigration "entry," *Zadvydas* undermines the premise of *Kiyemba I* and *III*. Zadvydas was convicted of violent crimes, ordered removed, and detained pending location of a country that would accept him. Invoking its "plenary" immigration power, the government

contended that because Zadvydas had no right to "live at large in this country" it could hold him indefinitely. *Zadvydas*, 533 U.S. at 695-96. The government argued, as it did here, that the Judiciary "must defer to [the] Executive and Legislative Branch" in all immigration matters. *Id.* at 695. The Supreme Court disagreed. It held that the liberty interests of removable aliens trump statutory detention power pending exclusion once that detention becomes indefinite, despite the political branches' legitimate interest in deportation.[3] *Id.* at 699.

In *Martinez*, the petitioner had not made an entry in the U.S. Although physically present, he was treated as though stopped at the border, *see Martinez*, 543 U.S. at 373-75 & n.2, and thus, in law, situated exactly as these Petitioners. (Unlike these Petitioners, though, Martinez was a violent criminal and had been adjudged an excludable alien for that reason). Nonetheless, the Supreme Court did precisely what the panel here asserts has never been done through centuries of the common law, *Kiyemba I*, 555 F.3d at 1028: over the objection of the Executive, it ordered Martinez to be released into the community, which, since he had not made an entry, amounts to being brought across the border for release. *Martinez*, 543 U.S. at 386. Release was not an "entry" for immigration purposes, and it did not confer any immigration status on Martinez. *Id.* at 387-88 (O'Connor, J.,

[3] Release did not bestow any immigration status on Zadvydas. He remained excludable and subject to deportation. *Zadvydas*, 533 U.S. at 696.

concurring). It simply ended his unlawful detention.

After *Martinez*, being stopped at the border — as these Petitioners are — is not dispositive. *Zadvydas*[4] and *Martinez* reject the notion that courts must defer to the Executive in the face of unlawful detention of aliens who lack asylum rights.

Bound to enforce *Boumediene's* command that the "writ must be effective," 128 S. Ct. at 2269, and considering Petitioners' unlawful imprisonment for nearly seven years, Judge Urbina ordered Petitioners released from the one place where he certainly had jurisdiction — his own courtroom. In so doing, he did not grant "entry" or "admission" as an immigration matter. *See Martinez*, 543 U.S. at 387-88 (O'Connor, J., concurring). As aliens present in the United States but with no right to admission, Petitioners would be subject to removal, and the Executive would have the full array of immigration remedies.[5]

II. The Release Remedy Is Not Barred By New Legislation.

The majority points to a series of appropriations bills (enacted after Judge

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[4] *Zadvydas* rested in part on due process considerations. 533 U.S. at 690. *Kiyemba I* held that due process rights do not extend to aliens at Guantanamo. *Boumediene*, however, rejected a strict geographic test in favor of a functional one, 128 S. Ct. at 2259-62, and acknowledged that due process protection is inherent in the very nature of *habeas*, *id.* at 2269 ("What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral"). But here the primary relevance of *Zadvydas* is not the constitutional issue involved, but that courts have the power to trump the Executive's legitimate immigration concerns.

[5] *See* 8 U.S.C. §§ 1229a and 1231; *see also Jama v. Immigration and Customs Enforcement*, 543 U.S. 334, 341 (2005); *see generally* 8 U.S.C. § 1001, *et seq.*

Urbina ruled) as support for its decision. *Kiyemba III*, 605 F.3d at 1048. These bills raise profound constitutional concerns, and under the canon of constitutional avoidance, should not be read to apply to noncombatants who have won their *habeas* cases. Otherwise, the bills would violate the Suspension Clause and the proscription against bills of attainder. The panel concluded that because it found no right of U.S. release, these protections do not apply. As discussed, the premise of the panel's decision is wrong. And if that is the case, at a minimum these questions warrant more thorough treatment than that supplied by the panel.

A. If applied to Petitioners, the appropriations bills would violate the Suspension Clause.

If the bills are read to apply to Petitioners, then they are void as unlawful suspensions 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). The bills define the burdened class only by alien status and either "location" or "detention" at Guantanamo on a certain day, without regard to conduct or prior adjudication. None addresses conduct or creates a general, proscriptive rule. And none of the bills provides a remedy to a successful *habeas* petitioner. *Cf. Boumediene*, 128 S. Ct. at 2275 (voiding Detainee Treatment Act as inadequate substitute for *habeas corpus*). As the Executive concedes, the bills' sponsors said they were responding to reports that the President was about to release some of the Uighur petitioners into the United States. "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)). This is just the kind of legislative retaliation that the Suspension Clause is designed to check.

B. If applied to Petitioners, the appropriations bills would be unlawful bills of attainder.

If any of the appropriations bills were construed to bar Petitioners' release, it would 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). The clause is "a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature." *INS v. Chadha*, 462 U.S. 919, 962 (1983). Congress may not target specific individuals with legislative punishments, such as continued imprisonment. *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 purpose of the appropriations bills was to bar Petitioners from release. If the appropriations bills are read to apply to Petitioners, they must be struck down as bills of attainder.

III. At A Minimum, Reinstatement Of *Kiyemba I* Was Error Because It Deprives Petitioners Of The Opportunity Develop A Factual Record.

Kiyemba III was wrong on the merits and warrants *en banc* review on that basis. But at a minimum the panel should have remanded to develop a record of

whether (i) declining an offer to be sent to a remote island renders Petitioners "volunteers," and thus no longer detained (necessarily a fact intensive inquiry about the offers), and (ii) whether any release option at all exists today.

The Court decided *Kiyemba I* on February 18, 2009. 555 F.3d 1022. Petitioners' petition for a writ of *certiorari* was granted on October 20, 2009. *Kiyemba v. Obama*, 558 U.S. __ (2009). In February 2010, after two Petitioners received an offer of resettlement in Switzerland, the Executive asked the Supreme Court to dismiss the *certiorari* petition as improvidently granted because the other five remaining Petitioners had earlier received and declined offers of resettlement from the Republic of Palau.[6] Dismissing the *certiorari* petition would have left *Kiyemba I* intact. But the Supreme Court instead vacated the decision, noting a "change in the underlying facts [that] may affect the legal issues presented," and remanded here to determine what further proceedings were necessary. *Id.*

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[6] Similar assertions were made as to a "second country." As to the second country, Petitioners sought but were denied an opportunity to make a record. On remand, they would show that, being advised of the second country, some Petitioners were interested in resettlement, asked questions about the nature of the resettlement, and were later told the second country was not an option. A "third country" rejected prior to *Kiyemba I* was not, as the government concedes (*see Kiyemba v. Obama, Nos. 08-5424 et al.,* transcript of April 22, 2010, Oral Argument at 6) a suitable locus for resettlement unless resettlement was voluntary, thus illustrating that the mere existence of a resettlement offer does not of necessity forfeit the *habeas* remedy. The government does not assert that facts regarding any *other* country are pertinent to the issues in this appeal.

Thus the case returned from the Supreme Court to explore the changed circumstances. Yet the reinstated rationale made those changed circumstances immaterial, because the prisoner has no judicial remedy whether he has rejected a resettlement option or not. *Kiyemba III*, 605 F.3d at 1047-48. This approach was erroneous. At issue here is not whether the Executive has power to transfer an alien abroad. Its power to do so is well defined by Congress, *see* 8 U.S.C. § 1001, *et seq*., and was recently upheld by this Court, *see Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert denied*, 559 U.S. ___ (Mar. 22, 2010) ("*Kiyemba II*"). The issue now is whether failure to agree to a particular destination ends "detention" because it renders the prisoner a volunteer; as Judge Rogers put it at oral argument: "[A]re the petitioners . . . presently being unlawfully detained?" *Kiyemba v. Obama*, *Nos. 08-5424, et al.*, Transcript of April 22, 2010 Oral Argument at 15.

Petitioners submit that that question cannot be answered without a factual record. A full record in another case might show that a detainee who had rejected options was not detained — that he, in effect, preferred to be at Guantanamo. But that record is not here, and Petitioners submit that a developed record in this case would show that: (a) they *are* detained; (b) there is currently no option[7] that even

[7] The government advised that there is presently no offer from Palau but that if Petitioners expressed an interest, the government would ask Palau to revive it.

the government regards as "appropriate;" (c) that the offer from the "second country" was withdrawn before all Petitioners had responded; and (d) the facts and circumstances of the Palau offer show that Petitioners had well-founded reasons for rejecting it so that they cannot reasonably be deemed volunteers.

In *Kiyemba III*, the Court relied on *Munaf* and this Court's decision in *Kiyemba II*. *See Kiyemba III*, 605 F.3d at 1048. But as Judge Rogers observed, this rationale read *Munaf* and *Kiyemba II* too broadly. *Kiyemba III*, 605 F.3d at 1051 n. 4. In *Munaf*, the petitioners were lawfully detained pending criminal prosecution in Iraqi courts. *Munaf*, 128 S. Ct. at 2214-15. They sought to enjoin their transfer to Iraqi authorities. *Id.* The Court held that a U.S. court has no power "to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy . . . ." *Munaf*, 128 S. Ct. at 2224. Because "petitioners state[d] no claim for relief," the petitions should have been dismissed on the merits. *Id.*

Kiyemba II addressed the petitioners' request for an injunction against *involuntary* transfer without notice. "Declin[ing] to consider the likelihood of torture and prosecutions under [a] foreign legal system," *Kiyemba III*, 605 F.3d at 1051 n. 4 (Rogers, J., concurring), the court reversed the district court's grant of an injunction, *Kiyemba II*, 561 F.3d at 511.

No petitioner here seeks to enjoin the exercise of Executive transfer power. This appeal presents the distinct question of whether executive detention has ended

(and the remedy of release — a quintessentially judicial power — is forfeited) because a detainee rejects a resettlement offer. The panel's rule would permit no judicial inquiry into any such rejection unless it involved a nation that the government itself conceded would engage in torture. But because here we address not the scope of the Executive's unilateral power to transfer aliens, but of the Judiciary's power to grant relief to aliens who have *not* been transferred, that approach is incorrect.[8] If the Executive were to offer resettlement in Antarctica, a court would have no trouble concluding that rejection of the offer does not demonstrate that Petitioners are volunteers who prefer Guantanamo to release. Palau is not Antarctica, but the question is one of degree, and necessarily of fact: whether the facts show that rejecting the offer rises to the level of volunteering to live at Guantanamo. That determination cannot be made without a factual record.

WHEREFORE, Petitioners-Appellees request that the Court grant rehearing *en banc* and such other and further relief as may be just and proper.

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[8] Since the Suspension Clause secured a right to be brought into court and there released, the presumption in any remand ought to be that rejection of a remote island does *not* indicate a wish to remain at Guantanamo.

July 12, 2010

Respectfully submitted,

/s/ Sabin Willett

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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 24, 2008 Decided February 18, 2009

No. 08-5424

JAMAL KIYEMBA, NEXT FRIEND, ET AL.,
APPELLEES

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Consolidated with 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

Appeals from the United States District Court
for the District of Columbia
(No. 1:08-mc-00442)

Gregory G. Garre, Deputy Solicitor, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Gregory G. Katsas*, Assistant Attorney General, *Jonathan F. Cohn*, Deputy Assistant Attorney General, and *Robert E. Kopp*, *Thomas M. Bondy*, *Anne Murphy*, and *Sharon Swingle*, Attorneys. *Scott R. McIntosh*, Attorney, entered an appearance.

Sabin Willett argued the cause for appellees. With him on the brief were *Rheba Rutkowski, Neil McGaraghan, Jason S. Pinney, Susan Baker Manning, George Clark, Eric A. Tirschwell, Michael J. Sternhell, Darren LaVerne, Seema Saifee, Elizabeth P. Gilson, J. Wells Dixon,* and *Angela C. Vigil*.

Howard Schiffman was on the brief for *amicus curiae* Uyghur American Association in support of appellees.

Lucas Guttentag and *Theodore D. Frank* were on the brief of law professors as *amici curiae*, addressing *Shaughnessy v. United States ex rel. Mezei* and *Clark v. Martinez*, and supporting affirmance.

Alex Young K. Oh and *Aziz Huq* were on the brief for *amici curiae* Brennan Center for Justice at NYU School of Law, et al. in support of appellees.

David Overlock Stewart were on the brief for *amici curiae* Legal and Historical Scholars in support of appellees.

Thomas A. Gottschalk was on the brief for *amici curiae* National Immigration Justice Center, et al. in support of appellees.

Before: HENDERSON and ROGERS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

Opinion concurring in the judgment filed by *Circuit Judge* ROGERS.

RANDOLPH, *Senior Circuit Judge*: Seventeen Chinese citizens currently held at Guantanamo Bay Naval Base, Cuba, brought petitions for writs of habeas corpus. Each petitioner is an ethnic Uighur, a Turkic Muslim minority whose members reside in the Xinjiang province of far-west China. The question is whether, as the district court ruled, petitioners are entitled to an order requiring the government to bring them to the United States and release them here.

Sometime before September 11, 2001, petitioners left China and traveled to the Tora Bora mountains in Afghanistan, where they settled in a camp with other Uighurs. *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008). Petitioners fled to Pakistan when U.S. aerial strikes destroyed the Tora Bora camp. *Id.* Eventually they were turned over to the U.S. military, transferred to Guantanamo Bay and detained as "enemy combatants."[1]

Evidence produced at hearings before Combatant Status Review Tribunals in Guantanamo indicated that at least some petitioners intended to fight the Chinese government, and that they had received firearms training at the camp for this purpose. *See Parhat*, 532 F.3d at 838, 843. The Tribunals determined that the petitioners could be detained as enemy combatants because the camp was run by the Eastern Turkistan Islamic

[1] An "enemy combatant" is "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Parhat*, 532 F.3d at 838 (quoting Deputy Secretary, U.S. Dep't of Defense, Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004); Secretary, U.S. Navy, Implementation of Combatant Status Review Tribunal Procedures at E-1 § B (July 29, 2004)).

Movement, a Uighur independence group the military believes to be associated with al Qaida or the Taliban, *see id.* at 844, and which the State Department designated as a terrorist organization three years after the petitioners' capture, *see* 69 Fed. Reg. 23,555-01 (April 29, 2004).

In the *Parhat* case, the court ruled that the government had not presented sufficient evidence that the Eastern Turkistan Islamic Movement was associated with al Qaida or the Taliban, or had engaged in hostilities against the United States or its coalition partners. *Parhat*, 532 F.3d at 850. Parhat therefore could not be held as an enemy combatant. The government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the petitioners should be detained as enemy combatants.

Releasing petitioners to their country of origin poses a problem. Petitioners fear that if they are returned to China they will face arrest, torture or execution. United States policy is not to transfer individuals to countries where they will be subject to mistreatment. Petitioners have not sought to comply with the immigration laws governing an alien's entry into the United States. Diplomatic efforts to locate an appropriate third country in which to resettle them are continuing. In the meantime, petitioners are held under the least restrictive conditions possible in the Guantanamo military base.

As relief in their habeas cases, petitioners moved for an order compelling their release into the United States. Although the district court assumed that the government initially detained petitioners in compliance with the law, *In re Guantanamo Bay Detainee Litig.*, No. 05-1509, Memorandum Opinion at 5 (D.D.C. Oct. 9, 2008) ("Mem. Op."), the court thought the government no longer had any legal authority to hold them, *id.* at 9. As to the appropriate relief, the court acknowledged that

historically the authority to admit aliens into this country rested exclusively with the political branches. *Id.* at 11–12. Nevertheless, the court held that the "exceptional" circumstances of this case and the need to safeguard "an individual's liberty from unbridled executive fiat," justified granting petitioners' motion.[2] *Id.* at 12, 15.

Our analysis begins with several firmly established propositions set forth in *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999), from which we borrow. There is first the ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission.[3] This principle, dating from Roman times,[4] received recognition during the Constitutional Convention[5] and has continued to be

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[2] The district court granted the motion on October 8, 2008, and set a hearing date one week later to determine what conditions, if any, it would impose on petitioners. *In re Guantanamo Bay Detainee Litig.*, 05-1509, Order at 2 (D.D.C. Oct. 8, 2008) ("Order"). The same day, the government moved for, and this court granted, an emergency stay of judgment. This court later granted a full stay of judgment pending appeal and ordered expedited briefing of the government's appeal.

[3] *See, e.g.*, *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); Clement Lincoln Bouvé, *Exclusion and Expulsion of Aliens* 4 & n.3 (1912), and authorities there cited; II Emmerich de Vattel, *Le Droit Des Gens* §§ 94, 100 (1758).

[4] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 33, 44–48 (1915).

[5] *See* 3 *The Papers of James Madison* 1277 (J.C.A. Stagg et al. eds., 1996), in which Madison reports Gouverneur Morris' observation during the debates that "every Society from a great nation

an important postulate in the foreign relations of this country and other members of the international community.[6]

For more than a century, the Supreme Court has recognized the power to exclude aliens as "'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government'"[7] and not "granted away or restrained on behalf of any one." *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). Ever since the decision in the *Chinese Exclusion Case*, the Court has, without exception, sustained the

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down to a club ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. *See Karmuth v. United States*, 279 U.S. 231, 235–36 (1929). As to the Colonial understanding of the sovereign's power to control the admission of aliens, *see* Thomas Jefferson, *Notes on the State of Virginia* 83–85 (William Peden ed. 1955).

[6] *See Hines v. Davidowitz*, 312 U.S. 52, 62–65 (1941); *Convention Between the United States of America and other American Republics regarding the status of aliens* art. I, 46 Stat. 2753 (1928); Constitution of the Intergovernmental Committee for European Migration pmbl., 6 *United States Treaties and Other International Agreements* 603 (1953); III Green Haywood Hackworth, *Digest of International Law* 725–29 (1942); Borchard, *supra* note 4, at 44–48; William Edward Hall, *International Law* 211–12 (6th ed. 1909); IV John Bassett Moore, *A Digest of International Law* 151–74 (1906).

[7] *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quoting the Solicitor General's brief); *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms. *See, e.g.*, *Ekiu*, 142 U.S. at 659; *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902); *Tiaco v. Forbes*, 228 U.S. 549, 556–57 (1913); *Hines*, 312 U.S. at 62–64; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Kleindienst*, 408 U.S. at 765–66; *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Fiallo*, 430 U.S. at 792; *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Demore v. Kim*, 538 U.S. 510, 521–22 (2003).

With respect to the exclusive power of the political branches in this area, there is, as the Supreme Court stated in *Galvan*, "not merely 'a page of history,' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." 347 U.S. at 531 (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Justice Frankfurter summarized the law as it continues to this day: "Ever since national States have come into being, the right of the people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State" – a matter "wholly outside the concern and competence of the Judiciary." *Harisiades*, 342 U.S. at 596 (concurring opinion).

As a result, it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543. With respect to these seventeen petitioners, the Executive Branch has determined not to allow

them to enter the United States.[8] The critical question is: what law "expressly authorized" the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States and released in Washington, D.C.?

The district court cited no statute or treaty authorizing its order, and we are aware of none. As to the Constitution, the district court spoke only generally. The court said there were "constitutional limits," that there was some "constitutional imperative," that it needed to protect "the fundamental right of liberty." These statements suggest that the court may have had the Fifth Amendment's due process clause in mind. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). But the due process clause cannot support the court's order of release. Decisions of the Supreme Court and of this court – decisions the district court did not acknowledge – hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.[9] *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 274–75 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 783–84 (1950); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Harbury v. Deutch*, 233 F.3d 596, 603–04 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *People's*

[8] We express no opinion on whether the Executive Branch may ignore the immigration laws and release petitioners into the United States without the consent of Congress.

[9] The Guantanamo Naval Base is not part of the sovereign territory of the United States. Congress so determined in the Detainee Treatment Act of 2005 § 1005(g), 119 Stat. 2743. The Immigration and Nationality Act, *see* 8 U.S.C. § 1101(a)(38), also does not treat Guantanamo as part of the United States. *See also Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948).

Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam). The district court, no less than a panel of this court, must follow those decisions. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

The district court also sought to support its order by invoking the idea embodied in the maxim *ubi jus, ibi remedium* – where there is a right, there is a remedy. *See Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).[10] We do not believe the maxim reflects federal statutory or constitutional law. *See id.* Not every violation of a right yields a remedy, even when the right is constitutional. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2597–98 (2007). Application of the doctrine of sovereign immunity to defeat a remedy is one common example. *See Alden v. Maine*, 527 U.S. 706, 754 (1999). Another example, closer to this case,[11] is application of the political question doctrine. *See Webster v. Doe*, 486 U.S. 592, 612–13 (1988) (Scalia, J., dissenting). More than that, the right–remedy dichotomy is not so clear-cut. As Justice Holmes warned, "[s]uch words as 'right' are a constant solicitation to fallacy." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). *Ubi jus, ibi remedium* cannot tell us whether petitioners have a right to have a court order their release into the United States. Whatever the force of this maxim, it cannot overcome established law that an "alien

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[10] Some have argued that the maxim is part of the due process guaranteed by the Constitution. *See, e.g.*,Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004). If so, petitioners cannot take advantage of it, for reasons we have already given.

[11] "Questions, in their nature political, . . . can never be made in this court." *Marbury v. Madison*, 1 Cranch 137, 170 (1803).

who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such a privilege is granted to an alien only upon such terms as the United States shall prescribe." *Knauff*, 338 U.S. at 542.

Much of what we have just written served as the foundation for the Supreme Court's opinion in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a case analogous to this one in several ways. The government held an alien at the border (Ellis Island, New York). He had been denied entry into the United States under the immigration laws. But no other country was willing to receive him. The Court ruled that the alien, who petitioned for a writ of habeas corpus, had not been deprived of any constitutional rights. *Id.* at 215. In so ruling the Court necessarily rejected the proposition that because no other country would take Mezei, the prospect of indefinite detention entitled him to a court order requiring the Attorney General to release him into the United States. As the Supreme Court saw it, the Judiciary could not question the Attorney General's judgment. *Id.* at 212.

Neither *Zadvydas*, 533 U.S. 678, nor *Clark v. Martinez*, 543 U.S. 371 (2005), are to the contrary. Petitioners are incorrect in viewing these cases as holding that the constitutional "liberty interests of concededly illegal aliens trumps [sic] statutory detention power pending exclusion once that detention becomes indefinite." Pet'rs' Br. 29. Both cases rested on the Supreme Court's interpretation, not of the Constitution, but of a provision in the immigration laws – a provision, the Court acknowledged, Congress had the prerogative of altering.[12] *See Clark*, 543 U.S.

[12] It would therefore be wrong to assert that, by ordering aliens paroled into the country in *Zadvydas* and *Clark*, the Court somehow undermined the plenary authority of the political branches over the

at 386. It is true that *Zadvydas* spoke of an alien's due process rights, but the Court was careful to restrict its statement to aliens who had already entered the United States. 533 U.S. at 693. It was on that ground that the Court distinguished *Mezei*. *Id.* The distinction is one that "runs throughout immigration law." *Id.* The Court stated: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 269; *Eisentrager*, 339 U.S. at 784).

And so we ask again: what law authorized the district court to order the government to bring petitioners to the United States and release them here? It cannot be that because the court had habeas jurisdiction, *see Boumediene v. Bush*, 128 S. Ct. 2229 (2008), it could fashion the sort of remedy petitioners desired. The courts in *Knauff* and in *Mezei* also had habeas jurisdiction, yet in both cases the Supreme Court held that the decision whether to allow an alien to enter the country was for the political departments, not the Judiciary. Petitioners and the amici supporting them invoke the tradition of the Great Writ as a protection of liberty. As part of that tradition, they say, a court with habeas jurisdiction has always had the power to order the prisoner's release if he was being held unlawfully. But as in *Munaf v. Geren*, 128 S. Ct. 2207, 2221 (2008), petitioners are not seeking "simple release." Far from it. They asked for, and received, a court order compelling the Executive to release them into the United States outside the framework of the immigration

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entry and admission of aliens. The point is that Congress has set up the framework under which aliens may enter the United States. The Judiciary only possesses the power Congress gives it – to review Executive action taken within that framework. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power.

laws. Whatever may be the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy.[13]

An undercurrent of petitioners' arguments is that they deserve to be released into this country after all they have endured at hands of the United States. But such sentiments, however high-minded, do not represent a legal basis for upsetting settled law and overriding the prerogatives of the political branches. We do not know whether all petitioners or any of them would qualify for entry or admission under the immigration laws.[14] We do know that there is insufficient

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[13] Petitioners observe 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." Pet'rs' Br. 38. But petitioners seek an extraordinary remedy. We therefore think it more significant that petitioners have cited no case in which a federal court ordered the Executive to bring an alien into the United States and to release him here, when the alien was held outside our sovereign territory and had not even applied for admission under the immigration laws.

[14] The government asserts that petitioners would not qualify for admission under the immigration laws. Gov't Br. 27–29. They would need visas, 8 U.S.C. § 1182(a)(7)(A), (B), which they do not have, and a court could not order the Executive Branch to grant them visas. *Saavedra Bruno*, 197 F.3d at 1160. The government also suggests that petitioners are ineligible for another reason – even though the United States was not their target, they allegedly engaged in "terrorist activity" within the meaning of 8 U.S.C. § 1182(a)(3)(B)(i)(I), which would mandate their removal under 8 U.S.C. § 1225(c)(1). Petitioners object that the evidence is insufficient to back up the government's claim. *See* Pet'rs' Br. 28. The dispute cannot be resolved at this stage. Petitioners have not applied for admission pursuant to the immigration laws; the

evidence to classify them as enemy combatants – enemies, that is, of the United States. But that hardly qualifies petitioners for admission. Nor does their detention at Guantanamo for many years entitle them to enter the United States. Whatever the scope of habeas corpus, the writ has never been compensatory in nature. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 493 (1973). The government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more.

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We have the following response to Judge Rogers's separate opinion.

1. **Judge Rogers: "The power to grant the writ means the power to order release."** Sep. Op. at 10.

No matter how often or in what form Judge Rogers repeats this undisputed proposition – and repeat it she does – it will not move us any closer to resolving this case. The question here is not whether petitioners should be released, but where. That question was not presented in *Boumediene* and the Court never addressed it. As we wrote earlier, *supra* at 11–12, never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population. As

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immigration authorities therefore have made no formal determination of their immigration status. *See id.* § 1225(a)(1). For the same reason, petitioners are not entitled to parole under 8 U.S.C. § 1182(d)(5)(A), a remedy that can be granted only to an applicant for admission and only in the exclusive discretion of the Secretary of Homeland Security.

we have also said, in the United States, who can come in and on what terms is the exclusive province of the political branches. In response, Judge Rogers has nothing to say.

2. **Judge Rogers: "[T]he district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention as the Executive alternatively suggested."** Sep. Op. at 4.

This statement, and others like it throughout the separate opinion, is confused and confusing. First of all, the government has never asserted, here or in the district court, that it is holding petitioners pursuant to the immigration laws. None of the petitioners has violated any of our immigration laws. How could they? To presume otherwise – as Judge Rogers does throughout her separate opinion, *e.g.*, *id.* at 1, 4, 5, 6, 13 – is strange enough.

Stranger still, Judge Rogers charges the district court with acting "prematurely" in ordering petitioners' release into the United States. Sep. Op. at 1, 13. How so? As she sees it, the district court should have first determined whether, under the immigration laws, petitioners were eligible to enter the country or were excludable. But no one – not the government, not petitioners, not the amici – no one suggested that the court should, or could, make any such determination.

What then is Judge Rogers talking about when she insists on evaluating petitioners' eligibility for admission under the immigration laws? None of the petitioners has even applied for admission. Perhaps she thinks a court should decide which, if any, of the petitioners would have been admitted if they had applied. But deciding that at this stage is impossible. A brief survey of immigration law shows why.

Eligibility turns in part on what status the alien is seeking. The immigration laws presume that those applying for entry seek permanent resident status. Such persons must first obtain an immigrant visa from a consular officer. 8 U.S.C. § 1101(a)(16). But the consular officer can only act after a petition is filed with the Secretary of Homeland Security, showing the immigrant status for which the alien qualifies. *Id.* §§ 1153(f), 1154. The consular officer then has the exclusive authority to make the final decision about the issuance of any such immigrant visa. *Id.* §§ 1104(a), 1201(a)(1)(A). That decision is not judicially reviewable. *Saavedra Bruno*, 197 F.3d at 1158.

Worldwide limits on immigration are set out in 8 U.S.C. § 1151. Additionally, there are limitations on the number of visas that can be issued to immigrants from any one particular country. *Id.* § 1152. Immigrants are divided into three categories: family-sponsored immigrants, *id.* § 1153(a); employment-based immigrants, *id.* § 1153(b); and diversity immigrants, *id.* § 1153(c). For employment-based immigrants, first preference is given to "priority workers," which include aliens with extraordinary ability in sciences, arts, education, business, or athletics, *id.* § 1153(b)(1)(A); "outstanding professors and researchers," *id.* § 1153(b)(1)(B); and "certain multinational executives and managers," *id.* § 1153(b)(1)(C). There are lower preference categories unnecessary to set forth.

Suppose the eligibility of any of the petitioners was determined on the basis that they were seeking only temporary admission. Here again, to be admitted as a nonimmigrant in any of the categories set forth in the margin,[15] the alien must

[15] Some general classes of nonimmigrants are: career diplomats, 8 U.S.C. § 1101(a)(15)(A); temporary visitors for business or pleasure, *id.* § 1101(a)(15)(B); aliens in transit, *id.*

apply for a visa. 8 U.S.C. § 1201(a)(1)(B). Different classes have different requirements for what the alien must do to obtain a visa, but all require that the alien submit some form.

Suppose the petitioners' eligibility for admission turned on whether they could be considered refugees or asylum seekers. An alien seeking refugee or asylum status (refugees apply from abroad; asylum applicants apply when already here) must qualify as a "refugee" as defined in 8 U.S.C. § 1101(a)(42). Whether they could be admitted under this heading depends on numerical limitations established by the President, and on the discretion of the Attorney General or the Secretary of Homeland Security. To qualify as a refugee, an alien must (1) not be firmly resettled in a foreign country, (2) be of "special humanitarian concern" to the United States, and (3) be admissible as an immigrant under the immigration laws. *Id.* § 1157(c)(1). Although the Attorney General and the Secretary are given discretion to waive many of the grounds of inadmissibility for a refugee applicant, the statute specifically prohibits waiver of the "terrorist activity" ground. *Id.* § 1157(c)(3); *see also supra* at 12 n.14.

The parole remedy, 8 U.S.C. § 1182(d)(5)(A), not only is granted in the exclusive discretion of the Secretary of Homeland Security, but also is specifically limited to "any alien applying for admission." The section also provides that no alien who

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§ 1101(a)(15)(C); ship or airplane crew members, *id.* § 1101(a)(15)(D); students, *id.* § 1101(a)(15)(F); temporary workers, *id.* § 1101(a)(15)(H); aliens with extraordinary abilities, *id.* § 1101(a)(15)(O); entertainers and athletes, *id.* § 1101(a)(15)(P); religious workers, *id.* § 1101(a)(15); and individuals coming to provide information on a terrorist organization or for a criminal investigation, *id.* § 1101(a)(15)(S).

would more properly be considered a refugee should be paroled unless the Secretary specifically determines that "compelling reasons in the public interest" argue in favor of the parole remedy.

There are many more complications, but the bottom line is clear. Aliens are not eligible for admission into the United States unless they have applied for admission. Numerical limits may render them ineligible, as may many other considerations. The Secretary has wide discretion with respect to several categories of applicants and the decisions of consular officers on visa applications are not subject to judicial review. And so we find it impossible to understand what Judge Rogers is thinking when she insists, for instance, that "the district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention" of someone who (a) has never entered or attempted to enter the country, and (b) has never applied for admission under the immigration laws.

3. **Judge Rogers: "[T]he majority has recast the traditional inquiry of a habeas court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the habeas court is 'expressly authorized' to order aliens brought into the United States."** Sep. Op. at 9.

Judge Rogers fails to mention that the "expressly authorized" quotation in our opinion is taken from a Supreme Court opinion in a habeas case. We repeat with some additional emphasis: it "is **not within the province of any court, unless expressly authorized by law**, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543. When Judge Rogers finally confronts *Knauff*, how does she deal with the Supreme Court's opinion?

She calls it an "outlier," as if her label could erase the case from the United States Reports. We know and she knows that the lower federal courts may not disregard a Supreme Court precedent even if they think that later cases have weakened its force. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). With respect to *Knauff*, later cases have reinforced, not lessened, its precedential value. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32, 34 (1982); *Mezei*, 345 U.S. at 212.

4. **Judge Rogers: "[T]he majority has mischaracterized relevant precedent."** Sep. Op. at 11.

Judge Rogers is referring to our discussion of the Supreme Court decisions in *Clark* and *Zadvydas*. We made two points about the cases. The first was that both rested on statutory provisions that are not involved here. Judge Rogers acknowledges the correctness of our view. Our second point was that as far as a court's releasing an alien into the country temporarily pursuant to statutory authority, there was a clear distinction between aliens within the United States and those "outside our geographic borders." *Zadvydas*, 533 US. at 693. How does Judge Rogers deal with this distinction? She claims that *Boumediene* "rejected this territorial rationale as to Guantanamo." Sep. Op. at 11. But as the Court recognized, it had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically limited its holding to the Suspension Clause. 128 S. Ct. at 2262.

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The judgment of the district court is reversed and the cases are remanded for further proceedings consistent with this opinion.

So Ordered.

ROGERS, *Circuit Judge*, concurring in the judgment: In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held that detainees in the military prison at Guantanamo Bay ("Guantanamo") are "entitled to the privilege of habeas corpus to challenge the legality of their detentions," *id.* at 2262, and that a "habeas court must have the power to order the conditional release of an individual unlawfully detained," *id.* at 2266. Today the court nevertheless appears to conclude that a habeas court lacks authority to order that a non-"enemy combatant" alien be released into the country (as distinct from be admitted under the immigration laws) when the Executive can point to no legal justification for detention and to no foreseeable path of release. I cannot join the court's analysis because it is not faithful to *Boumediene* and would compromise both the Great Writ as a check on arbitrary detention and the balance of powers over exclusion and admission and release of aliens into the United States recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court. Furthermore, that conclusion is unnecessary because this court cannot yet know if detention is justified here. Due to the posture of this case, the district court has yet to hear from the Executive regarding the immigration laws, which the Executive had asserted may form an alternate basis for detention. The district court thus erred in granting release prematurely, and I therefore concur in the judgment.

I.

The Executive chose not to file returns to the petitions for writs of habeas corpus for a majority of the petitioners. After several hearings and briefing, the district court determined that the Executive neither claimed petitioners were "enemy combatants" or otherwise dangerous, nor charged them with a crime, nor pointed to other statutory grounds for detention, nor presented reliable evidence that they posed a threat to U.S. interests. *In re Guantanamo Bay Detainee Litig.*, Misc. No.

08-442, Mem. Op. at 4, 12 (D.D.C. Oct. 9, 2008) ("2008 Mem. Op."). The Executive also did not deny it detained the petitioners.[1] The district court understood the Executive to argue instead that it had extra-statutory "wind-up" authority to repatriate petitioners[2] and that the district court in any case

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[1] The majority opinion accepts the Executive's assertion on brief that "petitioners are held under the least restrictive conditions possible in the Guantanamo military base." Maj. Op. at 4, 13; Appellants' Br. at 9. This means, according to the uncontested allegations of petitioners, that they are still held in a high-security prison with no contact with family, friends, or news from the outside world, aside from sporadic visits from attorneys — during which detainees are at least sometimes chained to the floor — and the Red Cross. *See* Appellees' Br. at 8-9.

[2] The Executive argues this stems from the practice in past wars to detain prisoners of war ("POWs") beyond the end of a conflict in order to arrange repatriation, as occurred, for example, with respect to German POWs held within the continental United States during World War II. The majority does not discuss this "wind up authority," so I note only that both the Geneva Conventions and U.S. Army policy require repatriation of POWs "without delay." The Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 118, *ratified* July 14, 1955, 6 U.S.T. 3316, T.I.A.S. No. 3364; DEPT. OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10 at ¶ 71(d) (1957) (instituting verbatim Geneva Convention III Art. 118). In the first Gulf War, for example, all POWs – over 80,000 – were repatriated or granted refugee status within Saudi Arabia within six months of the cessation of hostilities. U.S. Dep't of Def., Final Report to Congress: Conduct of the Persian Gulf War at *662, *671-72 (Apr. 1992), available at http://www.ndu.edu/library/epubs/cpgw.pdf. By contrast, these seventeen petitioners, who have not been treated as POWs, have been imprisoned at Guantanamo for over seven years, and, as the district court determined, the Executive's unsuccessful efforts to locate a suitable country for release had been on-going for more than five years and "[petitioners'] detention has become

lacked the authority to order them released into the United States. *Id.* at 4. Rejecting both of these rationales — the first in view of the years in which the Executive had unsuccessfully sought to find a country that would receive the petitioners without risk of their being tortured,[3] *id.* at 8-9, the second in view of *Boumediene* and the need to afford an effective habeas remedy, *id.* at 15-16 — the district court granted the petitions, which sought release into the country. Ruling the Executive had shown no lawful basis for what had become indefinite detention, the district court concluded petitioners must be brought before the court and released. *Id.* at 9, 17.

However, in the district court the Executive had also pointed to a possible separate ground for detention that the district court did not resolve — namely that petitioners were excludable under the immigration statutes and could be detained pending removal proceedings. Mot. Status Hr'g Tr. at 15, 44-45 (citing 8 U.S.C. § 1182(a)(3)(B) (aliens engaging in terrorist activities inadmissible)), 52-53, 57-58 (discussing 8 U.S.C. §

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effectively indefinite." 2008 Mem. Op. at 8-9.

[3] The majority understates the extent to which there is no other viable country to which these petitioners can go. Maj. Op. at 4. It is not only petitioners who fear they would be tortured if returned to their homeland of China; former Navy Secretary Gordon England and former Secretary of State Colin Powell confirmed as much, and the Executive has never disputed that proposition, even in this litigation. And, while the majority states it is the "policy" of the United States not to render people into countries in which they will be subject to torture or other mistreatment, *id.*, that is also the legal obligation of the United States as a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *signed* Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. Nothing in the Executive's filings under seal on January 16 and 28, 2009 has changed the situation.

1182) (Oct. 7, 2008) ("Oct. 2008 Mot. Hr'g"). The Executive had also sought a stay so it could evaluate petitioners' status under the immigration laws and present the views of the Department of Homeland Security,[4] *id*. at 44-45. The district court declined to stay the proceedings, noting that petitioners had already been imprisoned for seven years and delay had been "the name of the game" in the Executive's litigation strategy. *Id.* at 47, 59. Instead the district court ordered the petitioners immediately released into the United States,[5] with a hearing to follow a week later at which time the position of Homeland Security could be presented, *id.* at 59-60. At that time, the district court intended to consider conditions for petitioners' continued release, *id.* The district court also purported to restrain the Executive from taking petitioners into custody pursuant to the immigration statutes during the week prior to the hearing, *id*. at 48, 60.

In so proceeding, the district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention as the Executive alternatively suggested. *See Boumediene*, 128 S. Ct.

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[4] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101, 441-478, 116 Stat. 2135, 2142, 2192-2212 (codified at 6 U.S.C. §§ 111, 251-298) (establishing Department of Homeland Security and vesting in it responsibility for border security and immigration).

[5] Petitioners were to be released in accordance with a detailed plan, developed with Lutheran Immigration and Refugee Services, the president of the World Uighur Congress, and others for their housing with Uighur families in the area, transportation, financial support, and care. *See* Oct. 2008 Mot. Hr'g Tr. at 49-52, 63. They acknowledged through counsel that conditions for bringing them into the country presented issues for the Department of Homeland Security. *Id*. at 52.

at 2266. The court seems to have relied on *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), for the proposition that petitioners could no longer be detained, *see* 2008 Mem. Op. at 8. But in those cases the Supreme Court first assessed the Executive's arguments that it had the right to detain under the immigration statutes before finding that power had expired and ordering release. *Clark*, 543 U.S. at 386-87; *Zadvydas*, 533 U.S. at 699. In so doing, the Court gave effect to both the province of the Great Writ as a check on unjustified detention and the power of the political branches over exclusion and admission of aliens into the country. *See Zadvydas*, 533 U.S. at 695 (noting that purported "plenary powers" of Congress to create immigration law are "subject to important constitutional limitations"); *see Clark*, 543 U.S. at 384. To instead order release before assessing asserted legal authority for detention is incompatible with the obligation of a habeas court. *See infra*, Part II. Even if the Executive's delay in raising the immigration statutes as a basis for detention appears troubling given its opportunity to file returns to the writs, as the petitioners asserted they did not seek an immigration remedy, Oct. 2008 Mot. Hr'g Tr. at 7, the Executive cannot have waived the argument when it raised the argument in response to the district court's rejection of its other rationales for detention.

Because the district court could not properly order release into this country when it could not yet know whether detention was justified, I concur in the judgment vacating the release order. Because the question of whether the immigration statutes provide that justification "cannot be resolved at this stage," Maj. Op. at 12 n.14, I would remand the case for that determination to be made.

II.

In reversing and remanding, the majority has written broadly, apparently concluding that a habeas court is without power to order the release into this country of Guantanamo detainees whom the Executive would prefer to detain indefinitely, where there is no legal basis for that detention, including no contention that these petitioners are "enemy combatants" or a showing that they are even dangerous. Maj. Op. at 8. Because this court does not know if detention could be authorized here, the majority need not reach that issue. More fundamentally, its analysis compromises both the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause, art. 1, § 9, cl. 2, and the balance of powers regarding exclusion and admission and release of aliens into the country recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court. Consequently, I cannot join it.

A.

The Executive urges this court to recognize an extra-statutory, perhaps constitutional, Executive power to detain in order to prevent an alien from entering the United States. *See* Appellants' Br. at 21. Supreme Court precedent indicates there is no such power, and the Executive's authority to exclude and remove aliens, and to detain them to effect that end, must come from an explicit congressional delegation, as the majority's citations confirm, Maj. Op. at 7. *See, e.g.*, *Zadvydas*, 533 U.S. at 696-99*; Galvan v. Press*, 347 U.S. 522, 531 (U.S. 1954) ("As to the extent of *the power of Congress* [in regulating the entry and deportation of aliens], there is not merely 'a page of history,' but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (citations

omitted, emphasis added); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659-60 (1892) (the power to detain, remove, and exclude aliens "may be exercised either through treaties made by the president and senate, or through statutes enacted by congress"); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889). It would be surprising under our constitutional system if the law were otherwise. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."). Even the single apparent outlier to this line of precedent, which stated that the power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation," *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), is no outlier at all. In *Knauff*, the Court upheld the challenged action because it was authorized by statute, albeit in "broad terms," *id.* at 543, thereby acknowledging that the political branches act on matters of exclusion and admittance through statutes and treaties.

Where the Executive claims need of a power not yet delegated in order to control entry into the country, the Supreme Court has instructed it to look to Congress for a remedy. *See Clark*, 543 U.S. at 386 ("The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it."); *see also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT ACT"), Pub. L. 107-56, § 412(a), 115 Stat.

272, 350 (codified at 8 U.S.C. § 1226a(a)(6)) (providing Attorney General authority to detain terrorist aliens pursuant to removal longer than six months under certain circumstances, after the Supreme Court in *Zadvydas* found no such statutory authority then existed, 533 U.S. at 691). Other statutory justification may also exist in some cases. *See Clark*, 543 U.S. at 387 (O'Connor, J., concurring) (pointing out that the Executive "has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks," including authority under the USA PATRIOT ACT). If these petitioners present "special circumstances," *Zadvydas*, 533 U.S. at 696, as the Executive appears to suggest, *see supra* n.3, Congress may, within constitutional limits, provide a remedy, *id.* at 695.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), relied on by the majority (and the Executive), Maj. Op. at 10, is not to the contrary. That case does not stand for the proposition that any detention by the Executive is authorized if it serves to effect exclusion of an alien whom the Executive chooses not to admit. To the contrary, the Supreme Court looked to a statute then in effect and since repealed, wherein Congress had "expressly authorized" the President to exclude aliens without a hearing when the Attorney General determined entry would be prejudicial to the interests of the United States. 345 U.S. at 210. The Attorney General so determined and ordered the petitioner excluded on the basis of confidential information. *Id.* at 208. Thus, in *Mezei* the Supreme Court recognized broad Executive power not because it was inherent to the Office of the President, but because in Mezei's case that power was specifically authorized by Congress. *Id.* at 216 ("[R]espondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."). *Mezei* is thus another case in

which the Supreme Court found detention justified because it was authorized by statute.

B.

The majority does not adopt outright the Executive's argument that detention here is justified under an extra-statutory Executive power, but instead seems to conclude that the habeas court lacks the power to order the release of non-"enemy combatant" Guantanamo detainees from indefinite detention, even where such detention is not justified by statute. The effect, however, is much the same. To reach this conclusion, the majority has recast the traditional inquiry of a habeas court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the habeas court is "expressly authorized" to order aliens brought into the United States. Maj. Op. at 8. Along the way, the majority's analysis, Maj. Op. at 11-12, tends to conflate the power of the Executive to classify an alien as "admitted" within the meaning of the immigration statutes, and the power of the habeas court to allow an alien physically into the country.[6] But

[6] *See Zadvydas*, 533 U.S. at 695 ("The question before us is not one of '"confer[ring] on those admitted the right to remain against the national will"' or '"sufferance of aliens"' who should be removed. Rather, the issue we address is whether aliens that the [Executive] finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." (citation omitted)); *Mezei*, 345 U.S. at 212 (an inadmissible alien, although physically present in the United States, is deemed to be "only on the threshold of initial entry"); *see also* 8 U.S.C. § 1182(d)(5)(A); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (Holmes, J.) ("The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate."). The district court here was presented with motions for "parole" and for release.

this analysis, like the majority's rights/remedy discussion, Maj. Op. at 9-10, ignores the very purpose of the Great Writ and its province as a check on arbitrary Executive power. The power to grant the writ means the power to order release.[7] *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."); *see* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *133 (Liberty is a "natural inherent right" which ought not "be abridged in any case without the special permission of law," and "[t]his induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner."); THE FEDERALIST NO. 84, at 629 (Alexander Hamilton) (John C. Hamilton Ed. 1869) (describing habeas corpus as "a remedy for [the] fatal evil" of "arbitrary imprisonment"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *32 (O.W. Holmes, Jr., ed., Little Brown, & Co. 12th ed. 1873) ("[The] excellence [of habeas corpus] consists in the easy,

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[7] As petitioners have not styled their pleadings as compensatory claims, the majority's citations to *Heck v. Humphrey*, 512 U.S. 477, 481 (1994), and *Preiser v. Rodriguez*, 411 U.S. 475, 493 (1973), which addressed monetary claims, are to that extent irrelevant. Maj. Op. at 13. So too are the citations in the majority's discussion of a right/remedy dichotomy, Maj. Op. at 9-10, *e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597-98 (2007), where the question was whether a new cause of action should be created to provide a remedy for a constitutional harm under *Bivens*. Likewise, the citation to *Munaf v. Geren*, 128 S. Ct. 2207 (2008) , Maj. Op. at 11, is inapposite; unlike the petitioners in *Munaf*, petitioners here are not seeking to circumvent the local law and in fact disavowed any intention to change their status under the immigration laws through habeas. Oct. 2008 Mot. Hr'g Tr. at 7.

prompt, and efficient remedy afforded for all unlawful imprisonment . . . .").

Furthermore, the majority has mischaracterized relevant precedent. The majority offers that the district court did not have the power to order that petitioners be released into the United States because such an order would impermissibly "set aside the decision of the Executive Branch" to deny petitioners release into the United States. Maj. Op. at 8. But the Supreme Court in *Clark* makes clear that a district court has exactly the power that the majority today finds lacking — the power to order an unadmitted alien released into the United States when detention would otherwise be indefinite. 543 U.S. 368, 386-87 (2005). The majority notes that *Clark*, like *Zadvydas*, 533 U.S. 678, rested on the proposition that detention was unauthorized by the immigration statutes. Maj. Op. at 10-11. But that only goes to whether detention is justified. Relevant here is that once the Supreme Court concluded the detention was unlawful, it ordered the aliens released into the United States. If the majority were correct that a habeas court, upon finding that the Executive detains indefinitely an unadmitted alien without authorization, is nonetheless powerless to order release, then the Executive in *Clark* could have continued the detention, even without legal justification. Instead, the Supreme Court held that "the petitions for habeas corpus should have been granted." 543 U.S. at 386-87.

The majority also offers that because petitioners are aliens outside the United States and have not applied for visas they are not entitled to the same due process as the aliens in *Zadvydas* and even *Clark*. Maj. Op. at 8-9, 11 (citing, *e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). However, in *Boumediene*, 128 S. Ct. at 2257, the Supreme Court rejected this territorial rationale as to Guantanamo, holding that detainees who were brought there involuntarily were entitled under the

Constitution to seek habeas relief because "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction [and "plenary control"] of the United States." 128 S. Ct. at 2261. It held further that whether a substitute process "satisf[ied] due process standards" was not "the end [of the Court's] inquiry," because "[h]abeas corpus is a collateral process that exists, in Justice Holmes' words, to 'cu[t] through all forms and g[o] to the very tissue of the structure.'" *Id.* at 2270 (quoting *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion)). Furthermore, the majority does not explain how a lack of procedural due process rights in petitioners, which it asserts and uses to distinguish *Clark*, Maj. Op. at 18, would go to the power of the court, which the majority finds lacking, Maj. Op. at 11-12.

In sum, the majority aims to safeguard the separation of powers by ensuring that the judiciary does not encroach upon the province of the political branches. But just as the courts are limited to enumerated powers, so too is the Executive, and the habeas court exercises a core function under Article III of the Constitution when it orders the release of those held without lawful justification. Indeed habeas is not an encroachment, but "a time-tested device" that "maintain[s] the 'delicate balance of governance' that is itself the surest safeguard of liberty," *Boumediene*, 128 S. Ct. at 2247 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)). The petitioners have the privilege of the writ including the right to invoke the court's power to order release, 128 S. Ct. at 2262, 2270, and the Supreme Court's decision in *Clark* shows that a habeas court has the power to order the release into the United States of unadmitted aliens whom the Executive would prefer to detain indefinitely but as to whom the Executive has exercised no lawful detention authority. The petitioners seeking release into the United States are seventeen Uighurs who come to the court as unadmitted aliens who are not "enemy combatants" or

otherwise shown by the Executive, when afforded the opportunity, to be dangerous or a threat to U.S. interests, and as to whom the Executive as yet has failed to show grounds for their detention, which appears indefinite. Because the district court prematurely determined the petitioners were entitled to be released into the country prior to ascertaining whether the Executive, as asserted, would have lawful grounds to detain them under the immigration statutes, I concur with the judgment and would remand the case so that the district court could so ascertain. Unlike the majority, however, I would conclude, consistent with the province of the Great Writ and the power of the political branches, that, were the district court to ascertain thereafter that petitioners' detention is not lawful and has become effectively indefinite, then under *Clark*, 543 U.S. at 386-87; *see supra* n.6, it would have the power to order them conditionally released into the country.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 22, 2010 Decided May 28, 2010

No. 08-5424

JAMAL KIYEMBA, NEXT FRIEND, ET AL.,
APPELLEES

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Consolidated with 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

On Remand from the U.S. Supreme Court

Sharon Swingle, Attorney, U.S. Department of Justice, argued the cause for appellants. With her on the motion for reinstatement and the opposition to appellees' motion to govern and for remand were *Thomas M. Bondy* and *Robert M. Loeb*, Attorneys.

Sabin Willett argued the cause for appellees. With him on the motion to govern and for remand and the opposition to the motion for reinstatement were *Rheba Rutkowski*, *Neil McGaraghan*, *Jason S. Pinney*, *Susan Baker Manning*, *George*

Clarke, J. Wells Dixon, Eric A. Tirschwell, Michael J. Sternhell, Darren LaVerne, Seema Saifee, Elizabeth P. Gilson, Angela C. Vigil and *Cori Crider*.

Before: HENDERSON and ROGERS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed PER CURIAM.

Opinion concurring in the judgment filed by *Circuit Judge* ROGERS.

PER CURIAM: On March 1, 2010, the Supreme Court vacated our judgment in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (*Kiyemba I*), and remanded the case to us to "determine . . . what further proceedings" in our court or in the district court "are necessary and appropriate for the full and prompt disposition of the case in light of the new developments," *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (per curiam). We assume familiarity with our *Kiyemba I* opinion. The "new developments" the Court identified were as follows. All seventeen petitioners "received at least one offer of resettlement in another country," and twelve accepted an offer. *Id.* The remaining five "rejected two such offers and are still being held at Guantanamo Bay." *Id.*

In compliance with the Supreme Court's mandate we held further proceedings, considered the parties' motions and heard oral argument. We now grant the government's motion to reinstate the judgment and we reinstate our original opinion, as modified here to take account of new developments.

The posture of the case now is not materially different than it was when the case was first before us. On February 19, 2010, the government informed the Supreme Court that one of the

original petitioners "had not previously received an offer of resettlement from any country" before he and his brother received offers from Switzerland in 2010. Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk of the Court, at 1 (Feb. 19, 2010). The government also told the Court that the five Uighurs who remain at Guantanamo Bay had received a total of two offers – one from Palau in September 2009, which they rejected, and then another from an unnamed country, which they also rejected. *See id.* at 2; Brief for Respondents at 10, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234). As the government admitted at oral argument, this information – on which the Court apparently relied in its *per curiam* opinion – was not completely accurate. In fact, shortly before we issued our opinion in February 2009, the government filed material under seal stating that each of the seventeen petitioners had recently received a resettlement offer from a foreign country. The five petitioners who remain in this case have thus received and rejected three offers, rather than two. Our original decision was made in the light of resettlement offers to all petitioners, which is why we were confident that the government was "continuing diplomatic attempts to find an appropriate country willing to admit petitioners." *Kiyemba I*, 555 F.3d at 1029.

We agree with the government that no legally relevant facts are now in dispute. None of petitioners' arguments turn on particular factual considerations. Petitioners want us to remand the case to the district court for an evidentiary hearing on whether any of the resettlement offers were "appropriate." But as our original opinion indicated, even if petitioners had good reason to reject the offers they would have no right to be released into the United States. In addition, an intervening opinion of this court precludes the sort of judicial inquiry petitioners seek; it is for the political branches, not the courts, to determine whether a foreign country is appropriate for

resettlement. *Kiyemba v. Obama*, 561 F.3d 509, 514-16 (D.C. Cir. 2009) (*Kiyemba II*) (discussing *Munaf v. Geren*, 128 S. Ct. 2207, 2225-26 (2008)); *see also id.* at 516-17 (Kavanaugh, J., concurring).

Our original opinion in 2009 held that it was within "the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms." *Kiyemba I*, 555 F.3d at 1025. At the time of our decision we had heard only from the Executive Branch. Since then, the Legislative Branch has spoken. In seven separate enactments – five of which remain in force today – Congress has prohibited the expenditure of any funds to bring any Guantanamo detainee to the United States. *See* Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920; Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B., § 115, 123 Stat. 2023, 2046; Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2142, 2177-78; National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55; Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, Div. A, § 428, 123 Stat. 2904, 2962; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3034, 3156; Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466-67. Petitioners say these statutes, which clearly apply to them, violate the Suspension Clause of the Constitution. U.S. CONST. art. I, § 9, cl. 2. But the statutes suspend nothing: petitioners never had a constitutional right to be brought to this country and released. Petitioners also argue that the new statutes are unlawful bills of attainder. The statutory restrictions, which apply to all Guantanamo detainees, are not legislative punishments; they deprive petitioners of no right they

already possessed. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475, 481 (1977).

We therefore reinstate the judgment and reinstate our opinion, as modified here to take into account these new developments.

So Ordered.

ROGERS, *Circuit Judge*, concurring in the judgment: As this case returns to the court on remand from the Supreme Court, petitioners' original habeas claim has been overtaken by events, and it is no longer necessary to opine as broadly as the majority does by reinstating its opinion of February 18, 2009. That opinion was overbroad to begin with, as pointed out in my separate concurrence, which must, as a result, also be reinstated, acknowledging certain new developments. *See Kiyemba v. Obama*, 555 F.3d 1022, 1032–39 (D.C. Cir. 2009) (Rogers, J., concurring in the judgment) ("*Kiyemba I*").

These five Uighur petitioners sought certiorari review of this court's reversal of the district court's grant of the writs of habeas corpus on the ground that their "Executive detention is indefinite and without authorization in law, and release into the continental United States is the *only* possible effective remedy." *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (quoting petition for certiorari) (emphasis added). The district court had granted the writs and ordered release into this country under these circumstances, when indefinite detention at Guantanamo was the only alternative. *In re Guantanamo Bay Litig.*, 581 F. Supp. 2d. 33, 42–43 (D.D.C. 2008). Since our decision in February 2009 reversing the district court, the United States has identified several countries willing to receive petitioners for resettlement.[1] One offer of resettlement was made shortly before our February 18, 2009 decision, although the United States "had not made and did not make an independent determination that [the country] was otherwise appropriate for resettlement." Tr. Apr. 22, 2010 at 6 (lines 17–19). After our

[1] Twelve of the original seventeen Uighur petitioners have accepted resettlement offers: four in Bermuda, six in Palau, and two in Switzerland. *See* Respondents' Opposition to Petitioners' Motion to Govern and for Remand and Cross-Motion for Reinstatement of Judgment ("Respts' Opposition") at 2–3; Respondents' Letter of Mar. 24, 2010 to Mark J. Langer, Clerk of the Court, at 2.

decision, however, the United States determined that two other countries represent "appropriate" places for petitioners' resettlement, including Palau where six other Uighur petitioners have since been resettled.[2] Tr. Apr. 22, 2010 at 6 (lines 24–25) – 7 (line 1); *see* Respts' Opposition at 10. Those countries conditioned resettlement on petitioners' "willingness to go there." Tr. Apr. 22, 2010 at 7 (lines 3–4).

Petitioners have rejected the offers of resettlement in countries the United States has independently determined are "appropriate" for their resettlement. *See* Respts' Opposition at 10. Oral argument on April 22, 2010 confirmed, however, as is implied in petitioners' post-remand filings in this court, that petitioners do not claim they feared torture or other oppression or harm, including return to China, were they to have accepted resettlement in either of the countries determined "appropriate" by the United States. *See* Tr. Apr. 22, 2010 at 18 (lines 14–17); *see also id.* at 34 (lines 16–17) (counsel for respondents); *id.* at 35 (line 25) – 36 (line 1) (same). Moreover, petitioners acknowledge the United States' efforts to identify a country for resettlement have been "strenuous" and "in good faith." Petitioners' Reply on Motion to Govern and for Remand and Opposition to Respondents' Cross-Motion for Reinstatement of Judgment ("Petrs' Reply") at 10.

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[2] The United States' determination that a country is "appropriate" for resettlement addresses at least whether there is a possibility that petitioners would "face harm in any proposed country of resettlement." Respondents' Reply in Support of Cross-Motion for Reinstatement of Judgment ("Respts' Reply") at 5. This includes assurance that they would not be returned to China and would be resettled in countries deemed to be "safe." *Id.*; Tr. Apr. 22, 2010 at 33 (line 9). As a matter of policy, the United States will obtain petitioners' consent prior to resettlement. *See id*. at 34 (lines 1–2).

In *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2266 (2008), the Supreme Court held that "the habeas court must have the power to order the conditional release of an individual unlawfully detained — though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." Notably, the Court observed that "common-law habeas corpus was, above all, an adaptable remedy," and that "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Id*. at 2267, 2271. On the same day, in *Munaf v. Geren*, 553 U.S. 674, 128 S. Ct. 2207, 2213 (2008), the Court emphasized the distinction between the habeas court's power to issue the writ and order release and its judgment whether to do so "[u]nder [the] circumstances." *See also id.* at 2221 (quoting *Ex parte Watkins*, 3 Pet. 193, 201 (1830) (Marshall, C.J.)). So understood, the United States' position — that the writ of habeas corpus is effective, even without the habeas court issuing the requested "extraordinary judicial order" releasing petitioners into the continental United States while awaiting resettlement, because the seventeen original petitioners have either been transferred from Guantanamo to another country or been offered "appropriate" resettlement elsewhere, Respts' Opposition at 17; *see* Tr. Apr. 22, 2010 at 32 (lines 20–21) — has force, at least for now.

In view of the adaptability of the habeas writ, petitioners' claim of constitutional entitlement to release in the continental United States pending resettlement abroad, *see, e.g.*, Petrs' Reply at 14, cannot presently succeed. Pretermitting the question of whether a habeas court ordering petitioners' release from the courthouse could overcome statutory barriers, *see infra* note 6; *cf. Clark v. Martinez*, 543 U.S. 371, 386 & n.8 (2005); *id.* at

387–88 (O'Connor, J., concurring), the relief petitioners seek — release from indefinite and unlawful Executive detention at Guantanamo, *see Kiyemba*, 130 S. Ct. at 1235 — is theirs upon consent. Petitioners have received offers of resettlement abroad in countries determined by the United States to be "appropriate" for their resettlement. As a result, petitioners hold the keys to their release from Guantanamo: All they must do is register their consent. *See* Tr. Apr. 22, 2010 at 7 (lines 8–9). The habeas court thus is no longer confronted with the choice between either releasing petitioners into the continental United States or dooming them to indefinite detention at Guantanamo. The United States has acknowledged it will not deem a country "appropriate" for resettlement if petitioners would be subject to torture, *see id.* at 2, 5; *see also Kiyemba I*, 555 F.3d at 1033 n.3 (Rogers, J., concurring in the judgment) (citing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a signatory). Petitioners neither allege nor proffer evidence of this or other harm as would occasion the need for a remand[3] so the habeas court could devise a meaningful additional

[3] Petitioners' request for a remand to the district court focused predominantly on the fact that all of "the facts surrounding purported offers of resettlement abroad" developed after the petition for certiorari was filed are not a part of the record, other than through letters submitted to the Supreme Court by counsel. Motion to Govern and for Remand ("Petrs' Motion") at 2, 3. Of the matters petitioners identify, none affect their entitlement claim: Petitioners do not deny that they received two offers of resettlement in countries the United States determined "appropriate," and they do not challenge that determination in any way relevant to their claim of entitlement to release into the continental United States pending resettlement. During oral argument their counsel spoke instead of the desire for citizenship, ownership of property, cultural affinity, and employment, Tr. Apr. 22, 2010 at 20 (lines 24–25) – 22 (line 4), while acknowledging petitioners' "biggest issue is, are you going to be

remedy.[4] The United States has advised that, were petitioners to express an interest, it is prepared to pursue resettlement in Palau, an "appropriate" country that remains receptive to their consensual resettlement. *See* Respts' Opposition at 10, 24; Tr. Apr. 22, 2010 at 32 (lines 23–25).

Petitioners had not argued prior to this remand that they were entitled to release in the continental United States even if they had offers of resettlement elsewhere, only that they were entitled to be brought and released here because they had nowhere else to go. *See* Brief for Petitioners at 35–36, *Kiyemba*

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kicked back to China. That's the big risk," *id.* at 25 (lines 20–21).

[4] The majority overreads both *Munaf*, 128 S. Ct. at 2213, and this court's most recent opinion in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"). *See* Maj. Op. at 3–4. In *Munaf* the Supreme Court limited its holding, stating that "[u]nder circumstances such as those presented here," habeas corpus provided no relief. 128 S. Ct. at 2213. The Court did state, in discussing the State Department's evaluation of the risk of torture and prisoner mistreatment in a foreign country's legal system, that "[t]he Judiciary is not suited to second-guess *such* determinations," *id*. at 2226 (emphasis added), but went no further. Noting that the petitioners there "allege only the possibility of mistreatment in a prison facility," the Court left open the question whether, in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," the writ would provide relief. *Id.* So too in *Kiyemba II*, this court declined to consider the likelihood of torture and prosecutions under the foreign legal system on grounds of comity and separation of powers, 561 F.3d at 514–16 (citing *Munaf*, 128 S. Ct. at 2225–26). Neither case stands for the broader proposition that the habeas court has no role to play whenever a petitioner challenges an Executive Branch determination. *See Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

v. Obama, 130 S. Ct. 1235 (2010) (No. 08-1234).[5] The fact that an offer of resettlement in an "appropriate" country remains available, however, means petitioners' release from Guantanamo is available without the need for further action by the habeas court. That a habeas court may have the authority to order release is a separate question from whether that court is obligated to order release, *cf. Munaf*, 128 S. Ct. at 2220–21, much less release into the continental United States. Sustaining petitioners' objection to "exile" to "a distant island" (Palau), Petrs' Reply at 13–14, would imply that their claim of constitutional entitlement under the Suspension Clause to release in the continental United States applies no matter where "appropriate" resettlement is offered, until they give their consent to be resettled abroad. During oral argument petitioners disclaimed such a broad contention, *see* Tr. Apr. 22, 2010 at 24 (line 23) – 25 (line 4); *id*. at 25 (lines 20–21), presumably because *Boumediene* and *Munaf* reaffirmed that circumstances influence the nature of the meaningful remedy a habeas court should provide. *See Boumediene*, 128 S. Ct. at 2266–67; *Munaf*, 128 S. Ct. at 2213, 2220–21.

Petitioners' reliance on Fifth Amendment due process and the Geneva Conventions in support of their claim of entitlement

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[5] In their merits brief to the Supreme Court, petitioners stated:

> Petitioners did not seek admission [under the immigration laws]. They asked only for release from a prison to which they were brought in chains. If U.S. release is the *only* way to achieve that release, Petitioners are not responsible for the dilemma. Transfer to a safe haven abroad would have been welcome, and still would be welcome if initiated from the continental United States. Petitioners prefer U.S. release only to U.S. prison.

Id. (emphasis added).

to release in the continental United States pending resettlement fails for similar reasons. Petitioners seek writs of habeas corpus grounded in their claims of unlawful Executive detention at the Guantanamo Bay Naval Station. *See* Amended Petition for Writs of Habeas Corpus, filed Oct. 21, 2005, at 10, 31. Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States when an offer of resettlement abroad in an "appropriate" country is made in good faith and remains available. In *Boumediene*, 128 S. Ct. at 2266–67, the Supreme Court reaffirmed the adaptability of the habeas remedy, regardless of the reason the underlying detention is unlawful. The adaptable nature of the habeas remedy is intrinsic to the writ itself, and petitioners' current circumstances undermine their claim that the habeas remedy, even accounting for the Fifth Amendment Due Process Clause and the Geneva Conventions, requires their release into the continental United States pending resettlement abroad.

Contrary to petitioners' suggestion, the United States has not argued that their rejection of resettlement offers means they have permanently waived their right to seek habeas relief. *See* Petrs' Reply at 13, 14; Tr. Apr. 22, 2010 at 19 (lines 10–12), 25 (lines 13–16), 26 (lines 5–6). That a habeas court declines to provide a preferred remedy does not render a meaningful remedy forever unavailable, for circumstances can change, *see Boumediene*, 128 S. Ct. at 2267. But petitioners' circumstances differ from those of Guantanamo detainees who were designated enemy combatants, are now held at Guantanamo as enemies under the laws of war, and are seeking release by writ of habeas corpus. *See* Tr. Apr. 22, 2010 at 32 (lines 12–13); *see also* Brief for Respondents in Opposition to the Grant of Certiorari at 5, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234). Petitioners face no opposition by the United States to their

release from Guantanamo for resettlement in countries abroad. Indeed, the United States has taken the position that "[p]etitioners are indisputably entitled to release from military detention under the Authorization for Use of Military Force," 50 U.S.C. § 1541 note. Respts' Opposition at 17. Further, the United States has identified "appropriate" countries for petitioners' resettlement and resettlement in one such country remains available. Petitioners' claim of constitutional entitlement to release in the continental United States pending resettlement abroad has thus been overtaken by events: Petitioners hold the keys to their release from Guantanamo for resettlement in an "appropriate" country.[6]

[6] It is unnecessary, therefore, to decide whether Congress unconstitutionally suspended the writ or enacted a bill of attainder when it barred the use of appropriated funds to release or transfer detainees at Guantanamo into the continental United States for purposes other than trial and attendant detention. *See, e.g.*, Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3034, 3156 (2009) (providing that, except for prosecution and detention during legal proceedings, "[n]one of the funds made available in this or any other Act may be used to [transfer or] release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia . . . .").

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 28(a)(1)(A), undersigned counsel certifies that the parties 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, Arkina Amahmuc, Bahtiyar Mahnut, Ali Mohammad, Thabid, Abdul Ghaffar, and Adel Noori;

Respondents-Appellants Barack Obama, Robert M. Gates, David M. Thomas, Jr., and Bruce Vargo; and

Amici Curiae for Appellee (1) The Brennan Center, The Constitution Project, The Rutherford Institute, and the National Association of Criminal Defense Lawyers; (2) The National Immigrant Justice Center; (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, Leti Volpp; (5) Legal and historian *habeas corpus* scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul

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