No. 08-____

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court exercising its *habeas* jurisdiction, as confirmed by *Boumediene v. Bush*, 553 U.S. ---, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.

PARTIES TO THE PROCEEDING

The Petitioners are Jamal Kiyemba, as next friend,[1] Abdul Nasser, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Ibrahim Mamet, as next friend, Edham Mamet, Abdul Razakah, Ahmad Tourson, Arkin Mahmud, Bahtiyar Mahnut, Ali Mohammad, Thabid, Abdul Ghaffar, and Adel Noori, stateless refugees from the Xinjiang Uighur Autonomous Region of Western China, who are imprisoned at Guantánamo Bay, Cuba and have been in the custody of the United States military for over eight years.[2]

The Respondents are Barack H. Obama, President of the United States, Robert M. Gates, Secretary of the Department of Defense, Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force GTMO, Guantánamo Bay, Cuba, Colonel Bruce E. Vargo, Commander, Joint Detention Operations Group, Guantánamo Bay, Cuba.

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

[2] Abdul Sabour, Khalid Ali, and Sabir Osman were petitioners below, but discharged counsel following the court of appeals' decision and are not Petitioners here.

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PRELIMINARY STATEMENT

In the decision below ("*Kiyemba*"), a panel majority of the court of appeals held that Article III courts are powerless to remedy indefinite and illegal Executive detention of prisoners within their *habeas* jurisdiction. If allowed to stand, the decision would eviscerate this Court's landmark decision in *Boumediene v. Bush*, 553 U.S. ---, 128 S. Ct. 2229 (2008).[1]

In this case, the Executive presented for payment, and the *Kiyemba* majority honored, the "blank check" the Court forbade five years ago. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality). Notwithstanding *Hamdi*, *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene*, the panel majority inverted the Court's decree that the Executive cannot "switch the Constitution on or off at will." *Boumediene* 128 S. Ct. at 2259. Indeed, the Executive has construed *Kiyemba* in precisely this way, contending in recent filings that *habeas* proceedings brought by prisoners approved for

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[1] Twenty-nine Guantánamo *habeas* cases have reached a final disposition since this Court decided *Boumediene*. In twenty-four of them, district judges determined that there was no legal basis for detention. Yet twenty-one of the "winners" remain at Guantánamo. Lakhdar Boumediene—who took his case to this Court, vindicated his right to *habeas*, and then "won" his case before the district court in November, 2008—remains imprisoned at Guantánamo today. In 2008, this Court denied without prejudice an original *habeas* petition filed by one of the Petitioners here, Ali Mohammad. *In re Ali*, 128 S. Ct. 2954 (2008). Ali Mohammad followed the Court's suggestion that, in light of *Boumediene*, he "file a *habeas* petition in an appropriate district court with jurisdiction over the matter." *Id.* He did. Like the other Petitioners here, he "won," yet soon will begin his eighth year of executive imprisonment at Guantánamo.

transfer should be stayed because, after *Kiyemba*, *no court can relieve a Guantánamo detainee's imprisonment*.[2]

The Great Writ requires the jailer to identify in a return to the petition the law that justifies imprisonment. *Kiyemba* reverses this burden. Under *Kiyemba*, the jailer needs no legal authorization to deny freedom, and the prisoner needs the express authorization of Congress to claim it. And while these Petitioners are aliens, the question whether it is for the prisoner to justify release or the jailer to justify imprisonment arises from every detention. It would be hard to overstate the importance of the question presented in this case—to the rule of law and to the public. The question is fundamental, and there is every need for this Court's immediate intervention.

OPINIONS BELOW

The district court's decision (Pet. App. 38a) is reported at *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The opinion of the court

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[2] *See* Respondents' Memorandum in Support of a Stay of Proceedings Involving Petitioners Who Were Previously Approved for Transfer at 5, *Al Sanani v. Obama*, No. 05-02386-RBW, Dkt. No. 1058 (D.D.C. filed Mar. 9, 2009) (arguing that once the Executive has approved a detainee for transfer, "a detainee will have received the only relief the Court can provide with respect to the fact of the detainee's detention"; that *Kiyemba* precludes "relief as to the fact of detention available beyond already mandated diplomatic efforts to find an appropriate receiving country"; and that because a court cannot "question" diplomatic efforts, nor direct them, "the Executive's decision approving a detainee for transfer may render the detainee's request for *habeas* relief, *i.e.*, release, moot").

of appeals (Pet. App. 1a) is reported at *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

JURISDICTION

The court of appeals entered judgment on February 18, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The constitutional and statutory provisions relevant to this petition are set forth in Appendix D. Pet. App. 65a.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are Uighurs, members of a Muslim minority from the Xinjiang Uyghur Autonomous Region of far-western China, long oppressed by the communist regime. Pet. App. 40; JA 411-12, 446, 477, 513, 1601.[3] Each fled China to escape that oppression. Pet. App. 40; JA 1601. Ten Petitioners eventually made their way to a Uighur village in Afghanistan. Pet. App. 40; JA 1601.[4] Four others settled separately among a

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[3] References to "JA," "SA," and "Classified Supplement" are to the Joint Appendix, Supplemental Appendix, and Petitioners' Classified Supplement, filed below in accordance with the procedures governing Guantánamo cases.

[4] Five Uighurs formerly imprisoned at Guantánamo, who were sent to Albania in 2006 on the eve of a hearing before the D.C. Circuit (and who have lived peacefully abroad ever since) were also present in the village, *see Qassim v. Bush*, 466 F.3d 1073, 1074-75 (D.C. Cir. 2006), as were three men still incarcerated at Guantánamo who were petitioners below not here.

small Uighur expatriate community in Kabul, Afghanistan. *See, e.g.*, JA 805, 913, 927. No Petitioner contemplated or participated in any conflict with U.S. or coalition forces, or had any connection with the September 11, 2001 attacks. *See, e.g.*, JA 809, 846.

Petitioners were transferred to Guantánamo in 2002, and in May will begin their eighth year of imprisonment there. Pet. App. 41a; JA 414-15, 418, 1117-18. *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008) (facts surrounding capture and imprisonment of most Petitioners). The conditions of confinement have at times been severe. JA 1182-97. Yet as early as 2003 for most, and continuing through 2008 for the rest, the U.S. military determined that each Petitioner was eligible for release. Pet. App. 41a; JA 1568. Respondents conceded in 2008 that no Petitioner is an enemy combatant. Pet. App. 42a; JA 1542, 1568.

Although afforded many opportunities by the district court, Respondents never offered evidence that any Petitioner ever participated in terrorist activity, committed any other crime, is hostile toward the United States, or is otherwise a danger to the public.[5]

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[5] A U.S. military official stated that Petitioner Ali Mohammed "ha[s] not developed any animosity towards the U.S. or Americans in general, and ha[s] great admiration for such a wonderfully democratic society, where human rights are protected and people are allowed to live their lives peacefully, with no threat of mistreatment." Pet'n for Original Writ of *Habeas Corpus* (Declassified), *In re Petitioner Ali*, S. Ct. No. 06-1194 (filed February 12, 2007) at 21 n.19 (citing *Thabid v. Bush*, D.D.C. No. 05-2398, Dkt. 27 at 81) (classified factual return). "I have nothing against the Americans," Petitioner Ahmad Tourson told his Combatant Status Review Tribunal. JA 916. "We are just disappointed in the U.S.

As to Petitioner Huzaifa Parhat, the D.C. Circuit noted, "It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies." *Parhat*, 532 F.3d at 835-36.

The parties agree that Petitioners cannot be repatriated to China or any country that would render them to China—despite Chinese demands—because they would likely be tortured or worse. JA 1124, 1126-27, 1174; *see also Parhat*, 532 F.3d at 838-39. The record is clear, however, that there is nowhere else to go but the United States. Respondents had publicly maintained throughout that Petitioners were "enemy combatants," and the record evidences extensive diplomatic resistance from China to resettlement abroad and failed efforts over five years to obtain asylum from more than 100 countries. Pet. App. 48a-49a & n.2, 59a-60a; *see also* Classified Supplement.

B. Procedural History

1. The *habeas* petitions and the DTA litigation

Each Petitioner sought *habeas* relief in 2005.[6] JA 409, 444, 475, 510, 550, 582. The petitions alleged that

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government, but we are still hoping that the U.S. government will help because the U.S. government respects other people's rights." JA 925. Petitioner Abdur Razakah testified, "There have been no problems between the Americans and the Uighurs[.] [We] support America." JA 955.

[6] *See* JA 409, 444, 475, 510, 550, 582 (*Kiyemba* (05-1509), *Mamet* (05-1602), *Kabir* (05-1704), *Razakah* (05-2370), *Thabid* (05-2398), and *Mohammon* (05-2386)). *Mohammon*'s thirty petitioners included Petitioners Abdul Ghaffar and Adel Noori. A new docket

Petitioners were not "enemy combatants," and that there was no basis in law to support executive detention.[7] At Respondents' request, each case was stayed for over three years. JA 13, 68, 164, 348.

While the *habeas* cases were stayed, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005) ("DTA"), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635 ("MCA"). In 2006, with *habeas* jurisdiction stripped, seven petitioners below sought review under the DTA. Respondents held DTA review hostage to years of litigation over the record on review. Theoretically, petitioners (including some Petitioners here) prevailed, *see Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2008), but the Executive never provided even its own version of the record until October 29, 2007. Petitioner Huzaifa Parhat immediately moved for DTA judgment on that limited record, and in June, 2008, the D.C. Circuit granted judgment, ordering Respondents to "release Parhat, to transfer him, or to expeditiously convene a new CSRT."[8] *Parhat*, 532 F.3d at 851. This disposition was without prejudice to Parhat's right to seek release immediately through *habeas corpus*. *Id.* at 854. "[I]n that [*habeas*] proceeding there is no question but that the court will have the power to order him released." *Id.* at 851.

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number was assigned, *Ghaffar v. Bush* (08-1310), and the case was consolidated with *Kiyemba*. JA 390.

[7] *See* JA 410 (*Kiyemba* petitioners), 445 (Mamet), 476 (Mahnut and Mahmud), 511 (Razakah and Tourson), 551 (Thabid and Ali), 603 (Ghaffar and Noori).

[8] "CSRT" means Combatant Status Review Tribunal.

2. Proceedings following *Boumediene* and *Parhat*

Following *Boumediene*, the stays in the Uighur *habeas* cases were dissolved and the cases were consolidated before District Judge Ricardo Urbina. JA 1602. Parhat moved for release ("Release Motion"), based upon the constitutional privilege of *habeas corpus* protected by the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, and 28 U.S.C. § 2241. JA 1106. All Petitioners later joined the motion. JA 1466. On August 18, 2008, in parallel DTA proceedings, Respondents conceded that four more of the petitioners below (the next four in the DTA queue) were not "enemy combatants," and moved for entry of the *Parhat* judgment in their DTA cases. SA 1802.[9] In the *habeas* cases, Judge Urbina gave Respondents additional time to state their position, and scheduled a hearing on the Release Motion for October 7. JA 1317. On the eve of the hearing, Respondents conceded that none of the Uighur petitioners is an enemy combatant. JA 1464-65.

Except for the conceded fact that each Petitioner is an alien imprisoned by the U.S. at Guantánamo, Respondents offered no factual record to the district court. As to seven Petitioners, Respondents never filed a *habeas* return at all.[10] They did file returns—in each case only the CSRT hearing record—in seven other

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[9] Among these were Petitioners Jalal Jalaldin and Abdul Semet, as well as Khalid Ali and Sabir Osman, who were petitioners below but not here.

[10] Respondents never filed *habeas* returns for Petitioners Abdul Nasser, Abdul Semet, Memet, Parhat, Jalaldin, Ghaffar, or Noori.

Uighur cases.[11] Significantly, as to no petitioner below did Respondents ever file a return asserting any legal basis for executive imprisonment other than the "enemy combatant" status Respondents later abandoned. Respondents never asserted, for example, that any provision of the immigration laws supported a right to imprison. *See* JA 1464-65. As the return is the only means by which the jailer certifies "the true cause of the detention," 28 U.S.C. § 2243 (cl. 3), the *pleadings* below established a conclusive right to release.

Even apart from the pleadings, no evidence was *ever* offered to the district court demonstrating dangerousness, involvement in terrorism, criminal activity, or any other putative basis for detention. To the contrary, the record contains powerful evidence that Petitioners' release would create *no* risk to the public. JA 1546-49; Classified Supplement.

At the hearing, the district court offered Respondents a further chance, soliciting a factual proffer of "the security risk to the United States should these people be permitted to live here." JA 1547. The Executive responded, "I don't have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street." JA 1549.

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[11] Petitioners Mahnut, Mahmud, Mamet, Razakah, Tourson, Ali Mohammad, and Thabid. Respondents barred counsel from seeing the classified portion of the *habeas* return for Petitioners Mahnut and Mahmud. These records were filed with the district court under seal *more than three years ago*. JA 113. Respondents asserted that it would be "burdensome" to release these materials to counsel.

Respondents had "seven years to study this issue," JA 1547, three years' notice of these *habeas* cases, ten weeks' notice of the Release Motion, and six weeks' notice of the hearing date. The Executive "presented no reliable evidence that Petitioners would pose a threat to U.S. interests." Pet. App. 23a; JA 1611.

Efforts to resettle the Uighurs abroad had already been underway since 2003. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005) (reciting failed resettlement efforts). When the case came before the district court in 2008, three more years of such efforts had failed. "Throughout this period," the district court found, "the Government has been engaged in 'extensive diplomatic efforts' to resettle the petitioners" abroad. Pet. App. 49a. "These efforts have failed for the last four years and have no foreseeable date by which they may succeed." *Id.* at 60a. *See also* Classified Supplement. These findings were not challenged on appeal.

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

C. The Decisions Below

1. The district court's decision

Respondents argued below that continued detention of Petitioners after their concession that Petition-

ers are not enemy combatants was justified by "inherent Executive authority to 'wind up' detentions in an orderly fashion," Pet. App. 44a, and that *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), controls. Relying on *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), the district court correctly concluded that any "wind up" authority had long since ceased, and further detention had become unlawful. Pet. App. 50a.

The district court acknowledged "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," Pet. App. 53a (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (alterations omitted)), but concluded that this "does not mean that the third branch is frozen in place." *Id.* at 59a n.5. Judicial authority to issue the writ in this case derives from "the guiding principle that personal liberty is secured by adherence to separation of powers." *Id.* at 58a-59a (quoting *Boumediene*, 128 S. Ct. at 2277) (internal quotation marks and alterations omitted). *Boumediene*, the district court reasoned, held that the writ is "an indispensable mechanism for monitoring the separation of powers," and commanded that "the writ must be effective." *Id.* at 57a-59a (citing and quoting *Boumediene* at 2277, 2259, 2269). "[T]he court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release." *Id.* at 59a (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

Citing *Hamdi* for the proposition that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake," the district court ruled that "the carte blanche authority the political branches purportedly wield over [Petitioners] is not in keeping with our system of governance." Pet. App. 60a. "The political branches may not simply dispense with these protections, thereby limiting the scope of *habeas* review by asserting that they are using their 'best efforts' to resettle the petitioners in another country." *Id.* at 59a (citing *Boumediene*, 128 S. Ct. at 2259). "[O]ur system of checks and balances is designed to preserve the fundamental right of liberty." *Id.* at 60a.

Finding that the Executive's "extensive diplomatic efforts" to resettle Petitioners abroad had failed, and that there was "no foreseeable date by which they may succeed," Pet. App. 48a-49a & n.2, 59a-60a, the district court concluded that "[Petitioners'] detention has already crossed the constitutional threshold into infinitum," *id.* at 60a. The court granted the Release Motion, *id.*, and ordered that Petitioners and the resettlement providers appear on October 10 and 16, 2008, to address appropriate release conditions ("Release Order), *see id.* at 62a-63a (order); JA 1578-1584,1592.

Respondents immediately moved for a stay pending appeal, which the district court denied and the court of appeals subsequently granted. JA 1585-86; Pet. App. 65a.

2. The D.C. Circuit's decision

No Petitioner had ever sought refugee status or any other immigration remedy, and no executive discretion (such as the statutory discretion to parole, grant immigration status, exclude, or initiate removal) had ever been foreclosed. Nevertheless, the panel majority reconfigured Petitioners' *habeas* petitions into requests for judicially imposed immigration status and reversed.

The majority began with an exegesis of immigration-law decisions concerning "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," Pet. App. 6a, and concluded that 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,'" *id.* at 8a (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). The majority rested on *Mezei* and *Knauff*, neither of which involved a prisoner captured by the Executive and brought to our threshold by force of arms.

The majority held that the district court erred because it "cited no statute or treaty authorizing its order" and "spoke only generally" of the Constitution. Pet. App. 8a. The Fifth Amendment Due Process Clause, the majority held, "cannot support the court's order of release" because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Id.* at 8a-9a. The majority cited a series of its own pre-*Boumediene* decisions, as well as this Court's decisions in *Zadvydas*, 533 U.S. at 693; *United States v. Verdugo-Urquidez*, 494

U.S. 259, 269 (1990); and *Johnson v. Eisentrager*, 339 U.S. 763, 783-84 (1950).

"Not every violation of a right yields a remedy, even when the right is constitutional," the majority said, drafting the sovereign immunity and political question doctrines as support. Pet. App. 10a. The maxim "*Ubi jus, ibi remedium* . . . cannot overcome established law that an alien who seeks admission to this country may not do so under any claim of right." *Id.* (internal quotation marks and citations omitted).

Most telling was the majority's conclusion as to the role of the *habeas* court. The judiciary, it held, had no "power to require anything more" than the jailer's assurances that he was continuing efforts to find a foreign country willing to admit Petitioners. Pet. App. 15a.

Concurring in the judgment, Judge Rogers found the majority's analysis to be "not faithful to *Boumediene*." Pet. App. 22a. It "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." *Id.* at 28a.

To reach its conclusion, Judge Rogers explained, the majority "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," and "conflate[d] 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." Pet. App. 32a-33a.[12]

REASONS FOR GRANTING THE PETITION

A. The Decision Below Must Be Reversed Because, In Conflict With This Court's Precedents, It Subordinates Judicial Authority To Relieve Unlawful Imprisonment To The Discretion Of The Political Branches.

1. *Kiyemba* conflicts with *Boumediene* and is unfaithful to the constitutional commands it enforces.

The Court held in *Boumediene* that Guantánamo prisoners are "entitled to the privilege of *habeas corpus* to challenge the legality of their detention," 128 S. Ct. at 2262, and that a "*habeas* court must have the power to order the conditional release of an individual unlaw-

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[12]Judge Rogers would have remanded to permit Respondents a further opportunity to show (as they had not alleged in any return or shown at the *habeas* hearing) that the "immigration laws . . . form an alternate basis for detention." Pet. App. 22a. This theory was foreclosed by the pleadings, as discussed above, and because nothing in Judge Urbina's order would have precluded the Department of Homeland Security ("DHS"), once Petitioners were present in the United States, from pursuing any available statutory rights incidental to a lawful deportation process. *Id.* at 63a. Judge Urbina had scheduled a further, post-release hearing to afford DHS an opportunity to be heard on conditions for release. *Id.* at 63a. The court of appeals stopped that process with a stay order. Pet. App. 65a.

fully detained," *id.* at 2266. The district court was faithful to that mandate. The *Kiyemba* panel was not. It ruled that the district court is powerless to relieve unlawful imprisonment, even where the Executive brought the prisoners to our threshold, imprisons them there without legal justification, and—as seven years have so poignantly proved—there is nowhere else to go. Its ruling profoundly conflicts with *Boumediene*, which unequivocally forecloses *Kiyemba*'s analysis and result. This warrants certiorari review.

a. *Kiyemba* inverts *Boumediene*'s analysis of the Suspension Clause as crucial to the separation of powers.

Boumediene held that the Suspension Clause has full effect at Guantánamo, 128 S. Ct. at 2263, and that "when the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release," *id.* at 2271.

The decision is grounded in the separation of powers. Noting that the "Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches," the Court explained that "[t]his design serves not only to make Government accountable but also to secure individual liberty." 128 S. Ct. at 2246 (citing cases). "[P]rotection for the privilege of *habeas corpus* was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights," the Court explained. *Id.* at 2244. "In the system conceived by the Framers the

writ had a centrality that must inform proper interpretation of the Suspension Clause." *Id.*

Thus the Great Writ invests in the judiciary a real check against Executive power. The Suspension Clause "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty," and "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." 128 S. Ct. at 2247 (internal quotation marks and citations omitted).

Kiyemba's remarkable inversion of the Great Writ guaranteed by the Suspension Clause shows most acutely in the majority's last sentence, stating that the Article III judge's constitutional function is satisfied when she receives representations from the Executive—from the jailer—that it is attempting to relieve its own unlawful imprisonment. "Nor do we have the power to require anything more," the majority shrugged. Pet. App. 15a.

A *habeas* court certainly can do more: under the Constitution, it is duty-bound to do more. *See Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of *habeas corpus* . . . ."); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."). By accepting the jailer's mere assurances, the *Kiyemba* majority abdicated that

duty, and left pitifully theoretical the question whether the Executive had a lawful basis for imprisonment in the first place. That is no judicial remedy.

The *Kiyemba* majority's taxidermy would hang *Boumediene* as a trophy in the law library, impressive but lifeless. For *Kiyemba*'s practical result is that while every Guantánamo prisoner enjoys the privilege of *habeas corpus*, none can obtain a judicial remedy. No sovereign except our own is subject to the orders of our judiciary, and if our own sovereign is immune, there is no judicial remedy in any case. To be sure, a foreign sovereign generally and safely may accept its own citizens, and in some cases other diplomatic arrangements may be reached. But without the fallback of judicial power to order release, even imprisonments that the Executive concedes have no legal justification will continue at the discretion of the Executive, while the *habeas* court will be reduced to powerless irrelevance, required to grant plenary control over relief to the party that failed to meet its burden and lost the case.

Kiyemba was a profound error that directly conflicts with *Boumediene*'s command that the *habeas* court has the power—to be used carefully and judiciously, but power nevertheless—to order release, where as in this case, there is no other remedy 128. S. Ct. at 2266.

b. *Kiyemba*'s holding rests on an erroneous understanding of the Great Writ guaranteed by the Suspension Clause.

The *Kiyemba* majority held that a *habeas* court has no power to order release unless the prisoner demonstrates an affirmative personal right to that remedy. Pet. App. 8a. This ruling flatly contradicts this Court's decisions delineating the privilege of *habeas corpus* as guaranteed by the Suspension Clause. This was egregious error warranting this Court's intervention.

i. *Kiyemba* erroneously placed the burden on the prisoner to justify release, rather than on the jailer to justify imprisonment.

The Great Writ is "antecedent to statute, throwing its root deep into the genius of our common law." *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation marks and alteration omitted)). "[A]n integral part of our common-law heritage" at the time of the Founding, the writ received explicit recognition in the Suspension Clause. *Rasul*, 542 U.S. at 473-74 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (internal quotation marks omitted)). *See Boumediene*, 128 S. Ct. at 2248.[13] The core proposition of the Great Writ is

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[13] "[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." *St. Cyr*, 53 U.S. at 301 (internal quotation marks and citation omitted). The Court reaffirmed this point in *Boumediene*, emphasizing that "[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that

that the jailer has the burden to demonstrate positive law authorizing imprisonment; where he cannot do so, the court must order release, and the jailer must comply. Thus the writ guaranteed by the Suspension Clause burdens the Executive, not the prisoner. This explains why *habeas* cases were framed not in terms of the petitioner's rights but of the jailer's power. "The question is," wrote Chief Justice Marshall, "what authority has the jailor to detain him?" *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806).

Thus has the writ always been understood, in the centuries before the Founding, *see, e.g.*, Paul D. Halliday, G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598-600 (2008), and in this Court's decisions, *see, e.g.*, *Boumediene*, 128 S. Ct. at 2247 ("The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."); *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release"); *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 cus-

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define the present scope of the writ." 128 S. Ct. at 2248; *see Rasul*, 542 U.S. at 473; *see also* Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L. J. 2509, 2517 & n.56 (June 1998) ("HAFETZ") (noting that "although its view of *habeas* has evolved over time, the Supreme Court has never wavered from the proposition that the Suspension Clause incorporates the common law writ of *habeas corpus* as it existed in 1789") (collecting cases).

tody, and . . . the traditional function of the writ is to secure release from illegal custody.").

The *habeas* privilege guaranteed by the Suspension Clause thus "require[s] the jailer to establish with strict precision the legal authority for holding the petitioner." Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1186 & n.107 (2007) ("GOLDSTEIN"). In turn, the jailer's authority must be "based upon positive law, whether under the common law or statute, which clearly defines and limits the circumstances in which detention can be authorized and by whom." *Id.* at 1186 & n.108 (citing authorities). Courts had no need to inquire whether the petitioner's "rights" had been violated "because the only right at issue was the right not to be imprisoned without legal cause, an inquiry resolved by determining the scope of the jailer's authority." *Id.* at 1187-88; *see Boumediene*, 128 S. Ct. at 2247; HAFETZ at 2526 (explaining that the common-law writ required the Executive to justify detention; "that the writ's primary purpose had become the protection of the liberty of individuals; and that the writ played a structural role in limiting executive power").

The court of appeals had no need to research this history; it is set out at length in *Rasul*, 542 U.S. at 473-75, and *Boumediene*, 128 S. Ct. at 2244-47.

The *Kiyemba* majority assumed that a *habeas* petitioner must demonstrate a personal "constitutional right." Pet. App. 8a.[14] But common-law *habeas*, as it

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[14] To be sure, the Court has sometimes described the writ as protecting a "right." *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S.

was known in England and colonial America before the Founding, and is protected by the Suspension Clause, did not depend on "constitutional rights" which, of course, did not exist. *Boumediene*, 128 S. Ct. at 2244 (the Suspension Clause predates the Bill of Rights); GOLDSTEIN at 1182 (the concept of individual legal rights was "in its infancy"). The "right" guaranteed by the Great Writ and the Suspension Clause is, as authorities from Blackstone to *Boumediene* have said, the inviolable protection against Executive imprisonment not expressly authorized by law: in short, the "right" to call the Executive to account and obtain a judicial remedy where the Executive cannot demonstrate a legal basis for the imprisonment. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *133 (liberty is a "natural inherent right" which ought not "be abridged in any case without the special permission of law"); *Ex parte Yerger*, 75 U.S. (8 Wall) 85, 95 (1868) (describing the writ as "the best and only sufficient defence of personal freedom"); *Boumediene*, 128 S. Ct. at 2244-47; GOLDSTEIN at n.16 (citing Rollin C. Hurd, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 143 (1858)).

The district court enforced the *habeas* privilege guaranteed by the Suspension Clause, as affirmed in *Boumediene*. The *Kiyemba* majority's inversion of the

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443, 454 n.4 (1971) (*habeas* is among the rights "to be regarded as of the very essence of constitutional liberty") (internal citation omitted); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (*habeas* corpus is "shaped to guarantee the most fundamental of all rights").

burdens imposed by the Great Writ guaranteed by the Suspension Clause is error requiring certiorari review.

ii. The law of *habeas* guarantees and requires release in these circumstances, where no other remedy is available.

The writ secures release, not the jailer's blandishment. *See, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (release "lie[s] . . . 'within the core of *habeas corpus*'") (quoting *Preiser*, 411 U.S. at 487); *St. Cyr*, 533 U.S. at 301 ("[t]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial") (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953)); *Wingo*, 418 U.S. at 468 ("the 'great constitutional privilege' of *habeas corpus* has historically provided a prompt and efficacious remedy for whatever society deems to be intolerable restraints") (internal citation omitted)); *Carbo v. United States*, 364 U.S. 611, 618 (1961) (the writ is "designed to relieve an individual from oppressive confinement"); *Price v. Johnston*, 334 U.S. 266, 283 (1948) (The writ "afford[s] a swift and imperative remedy in all cases of illegal restraint upon personal liberty."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (a *habeas* court that finds imprisonment unlawful "can only direct [the prisoner] to be discharged"); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (describing *habeas* as "a remedy for [the] fatal evil" of "arbitrary imprisonment").

Accordingly, *Boumediene* held that a "*habeas* court must have the power to order the conditional release of an individual unlawfully detained." 128 S. Ct. at 2266 (citing cases and authorities). In *habeas*, "uncondi-

tional release" refers to the prisoners' "unconditional discharge from custody." FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.1 (citing *Ex parte Frederich*, 149 U.S. 70, 77-78 (1893); *In re Medley*, 134 U.S. 160, 173 (1890) ("under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from wrongful confinement")). "Conditional release" requires the jailer either to release the prisoner from custody or to retry (or re-sentence) the prisoner in a constitutional manner within a reasonable period of time. *See, e.g.*, *Richmond v. Lewis*, 506 U.S. 40, 52 (1992) (remanding "with instructions . . . to enter an order granting the petition for a writ of *habeas corpus* unless the State . . . within a reasonable period of time either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law"); *Whiteley v. Warden*, 401 U.S. 560, 569 (1971) (remanding with "directions that the writ is to issue unless the State makes appropriate arrangements to retry the prisoner"). If there is no retrial following a conditional release order, the *habeas* court must order the immediate discharge of the prisoner. *See Wilkinson*, 544 U.S. at 87 ("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). In this case, there is no constitutional alternative to release.

Thus the question presented is not whether every wrong has a judicial remedy, as the *Kiyemba* majority argued. Pet. App. 10a. This Court has already held that imprisonment the Executive cannot show to be authorized by law is a particular wrong that *does* have

a remedy, and that remedy is release. The precise contours of release in any given case is a question for the judiciary, although the judicial branch will, of course, exercise its powers in a way that respects the political branches. The district court did just that here, ordering the least intrusive remedy that could be fashioned to end the imprisonment.[15] *Cf.* HAFETZ at 2529-30 (explaining that common-law *habeas* "involved broader judicial review where it presented the last resort for an individual facing a loss of liberty" or where a petitioner lacked any other remedy). *Boumediene* requires that such a remedy be implemented, 128 S. Ct. at 2271 (where imprisonment is unlawful, "the judicial officer must have adequate authority to . . . formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release"), and promptly, *id.* at 2275.

2. *Kiyemba*'s holding that immigration laws bar *habeas* relief would effect an unconstitutional suspension of the writ and conflicts with the Court's precedents.

To posit that the Release Order intruded on Executive power, the *Kiyemba* majority had to recast the case from one in which Petitioners ask for relief from unilateral Executive acts—capture, transportation, and long imprisonment—into a request for a judicial immigration order. Petitioners, the majority said, were "alien[s] who seek[] admission to this country." Pet.

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[15] The district court was unable to complete the process of assessing the appropriateness of any conditions because the court of appeals stayed the proceeding at Respondents' request. Pet. App. 65a.

App. 10a. This recharacterization permitted the majority to invoke the principle that the political branches have discretion over immigration matters, citing decisions in which courts defer to immigration policy choices made by Congress and the Executive's enforcement of those policies. *Id.* at 6a-8a. But it has no basis in the record in this case, and the analysis it spawned conflicts with this Court's precedents.

First, the immigration laws have not been triggered in this case. Petitioners never applied for immigration status. They did not bring themselves to the border. They bear no responsibility for their dilemma. Whether the immigration laws give the Executive discretion over the immigration status of Petitioners is beside the point—at issue here is imprisonment.

Respondents never pointed (in a *habeas* return, or otherwise) to an immigration law that justifies imprisonment, and there is none.[16] The district judge understood that his Release Order neither granted an immigration remedy nor limited the Executive's ability to impose one (such as, for example, deportation) once the men were released here.

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[16] The record below would not support detention under any immigration statute. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B) (barring the admission of aliens who, among other things, "*prepare or plan a terrorist activity*" or receive "military-type training" from a "*terrorist organization*"); 8 U.S.C. § 1226a(a)(6) (authorizing indefinite detentions of only those aliens who *pose a threat to national security*). And the Release Order did not foreclose the Executive from pursuing any immigration rights it might have once Petitioners were physically present in the United States.

Second, even if the immigration laws had been triggered, the Suspension Clause must trump the power of the political branches in the Guantánamo cases, or *Boumediene* was no more than a suggestion. By design, the Suspension Clause and the *habeas* privilege it protects check the political branches, barring unlawful Executive detention and suspension of *habeas* absent a formal suspension of the writ under the conditions prescribed in the text of the Suspension Clause. *Boumediene*, 128 S. Ct. at 2247. Accordingly, *Boumediene* held that the Suspension Clause trumped statutes—the DTA and the MCA—enacted by Congress to deprive Petitioners of the protections of the Great Writ. *Id.*

The Suspension Clause may not be eluded by thumbing to a different act of Congress. What was true for the DTA and the MCA is as true for any other statute. Interpreting the immigration laws or the immigration powers of the political branches to bar a remedy in *habeas* where no law authorizes executive detention would effect the same suspension of the writ that this Court found unconstitutional in *Boumediene*. *See also St. Cyr*, 533 U.S. at 300-05; *INS v. Chadha*, 462 U.S. 919, 943 (1983) ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . ."); HAFETZ at 2521 ("If, as the Court has maintained, constitutional *habeas* must be defined by referring to the writ at common law, Congress, however plenary its power over immigration, cannot gut the writ of its common law core without violating the Suspension Clause.").

Third, under this Court's precedents the right to release—even of concededly undocumented aliens—has trumped the powers of the political branches over immigration, even statutory detention powers related to a legitimate interest in deportation. *Zadvydas*, 533 U.S. at 689. In *Martinez*, 543 U.S. at 386, the Court extended this proposition to aliens who, like Petitioners, had never made an entry under the immigration laws (and who, unlike Petitioners, were adjudicated criminals). Thus *Martinez* permitted only a presumptive six-month detention beyond the 90 days for aliens inadmissible under section 1182. *See* 543 U.S. at 386; 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention"). Once removal is no longer "reasonably foreseeable," as happened years ago in these cases, the Executive must release the alien. *Martinez*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

Martinez rejected the same statutory, security, and separation-of-powers theories the Executive raised here and the *Kiyemba* majority adopted. 543 U.S. at 385-86. In both *Zadvydas* and *Martinez*, the Court ordered the release into the United States of aliens who had no legal entitlement to be here, based on constitutional concerns. The central constitutional principle is that no statute can be read to permit indefinite imprisonment—even if it deals with alien *criminal*s and on its face authorizes their indefinite imprisonment. This rule applies in cases—like *Martinez* itself—where there actually is a record of prior criminal activity or other risk factors.[17]

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[17] Courts applying *Martinez* have reached the same result. *See, e.g.*, *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (public-

Release into the United States of an alien without immigration status poses logistical difficulties, to be sure, but such difficulties are nothing new (as *Martinez* shows), and here they are entirely of the Executive's own making. The district court scheduled hearings to address precisely those logistics. The burden of such difficulties, whatever it may be, must be borne by the Executive, and no longer by Petitioners. *Boumediene*, 128 S. Ct. at 2275 ("the costs of delay can no longer be borne by those who are held in custody").

3. *Mezei* does not support *Kiyemba*.

The *Kiyemba* majority relied on *Mezei*, the 5-4 Cold War decision that stranded suspected communist Ignatz Mezei at Ellis Island. *Mezei* was an immigration case, and this case emphatically is not. Mezei left the U.S. voluntarily, returned voluntarily, and sought, at least initially, an immigration remedy: admission. 345 U.S. at 207.[18] He was temporarily excluded by an immigration inspector and then permanently excluded by the Attorney General. 345 U.S. at 208. His *habeas* pe-

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safety concerns do not justify continued detention); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (alien released from five-year detention despite security-risk argument); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (further detention of mentally ill aliens with history of violence not permitted); *see also Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (alien found to have engaged in terrorist activities under 8 U.S.C. § 1182 releasable in six months).

[18] Justice Clark's majority opinion strained to avoid characterizing Mezei's condition as "detention," and that is one way to harmonize the case with *Boumediene*. *See, e.g.*, *Mezei*, 345 U.S. at 207, 213 (describing Mezei's situation as "harborage," "temporary haven," and "exclusion").

tition was a collateral attack on an exclusion order—*i.e.*, an order issued under the Executive's delegated powers over immigration matters. This Court granted certiorari "[b]ecause of resultant serious problems in the enforcement of the immigration laws." *Id.* The government's concern was that foreign enemies might dump "volunteers" on our doorstep, and when the ships sailed past the horizon, the Executive would be forced to open its doors. *Id.* at 216. That concern does not arise where the Executive paid bounty hunters in Pakistan, shackled prisoners, and rendered them to Guantánamo, thus creating a population that is here *only because the Executive brought it here*. *Mezei* does not hold that the Executive is shielded from dilemmas of its own making.

Moreover, whereas Petitioners' detention has no basis in law, Mezei's exclusion was expressly authorized by statute. 345 U.S. at 210-11 (quoting statutes); *see also Knauff*, 338 U.S. at 540-42 (same); *id.* at 546 (no power to retry Attorney General's determination to exclude petitioner without a hearing "during the [present] national emergency"). And unlike the Attorney General in *Mezei*, DHS has not made any determination concerning Petitioners' immigration status because Petitioners have not sought that relief.

Whatever it may have stood for during the Cold War, *Mezei* has not survived *Boumediene*'s holding that a person captured by the Executive, brought to Guantánamo, and held in indefinite detention may

seek a remedy in *habeas*, and that the *habeas* court must have the power to order release.[19]

B. Petitioners' Statutory *Habeas* Rights Provide Separate Grounds For Reversal Of *Kiyemba*.

The *Kiyemba* majority held that a *habeas* court has no power to grant release unless the prisoner demonstrates an affirmative individual right to release under a statute, treaty, or the Constitution. Pet. App. 8a. As shown above, this conclusion conflicts with *Boumediene* and numerous other precedents of this Court illuminating Petitioners' right to release under the Great Writ guaranteed by the Suspension Clause. Reversal does not required the Court to reach other parts of the Constitution or treaties of the United States. Nevertheless, Petitioners' rights thereunder provide separate grounds for reversal, and the *Kiyemba* majority's contrary holding thus also warrants certiorari review.

1. Petitioners are protected by statutory *habeas*.

28 U.S.C. § 2241 gives "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" the "[p]ower to grant [the] writ," to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a),(c)(3), and title.

In *Rasul*, the Court held that statutory *habeas* extends to Guantánamo prisoners, 542 U.S. at 481, and stated that the prisoners' allegations that they are held

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[19] Reversal of *Kiyemba* requires not that *Mezei* be "overruled," but only that this Court follow subsequent decisions of the same Court that decided it.

in violation of the laws of the United States "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" *id.* at 483 n.15 (quoting section 2241). Section 7 of the MCA ("MCA § 7") eliminated statutory *habeas* for Guantánamo prisoners "who ha[ve] been determined by the United States to have been properly detained as an enemy combatant."[20]

Boumediene held that the DTA was not an adequate substitute for *habeas* and that MCA § 7 unconstitutionally effected a suspension of the writ. 128 S. Ct. at 2274. Accordingly, MCA § 7 is void. *Id.* at 2266 (stating that section 2241 "would govern in MCA § 7's absence"). Petitioners' statutory *habeas* rights survive and afford Petitioners an affirmative right of relief under a U.S. statute.

a. Petitioners' imprisonment violates the Fifth Amendment Due Process Clause.

The *Kiyemba* majority held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," citing its pre-*Boumediene* decisions, and this Court's pre-*Boumediene* decisions in *Verdugo-Urquidez*, 494 U.S. at 269, and *Eisentrager*, 339 U.S. at 783-84,

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[20] The quoted text shows that MCA § 7 would not have applied to Petitioners. MCA § 7 purported to eliminate jurisdiction to consider the *habeas* petition of an alien "*properly detained as an enemy* combatant." Respondents have expressly conceded that Petitioners are not enemy combatants, a determination ratified by the district court, and the court of appeals also has formally vacated the enemy-combatant classification as to five Uighur petitioners. JA 1464-65.

upon which its own decisions had relied. This was error.

In *Verdugo-Urquidez*, the majority cited *Eisentrager*'s "emphatic rejection" of the extraterritorial application of the Fifth Amendment in holding that the Fourth Amendment's text and history, "and our cases discussing the application of the Constitution to aliens and extraterritoriality require" the conclusion that the Fourth Amendment does not apply to a citizen and resident of Mexico "with no voluntary attachment to the United States and the place searched was Mexico." 494 U.S. at 274-75. Justice Kennedy concurred in the judgment, but his analysis of the extraterritoriality issue was quite different. Relying on *In re Ross*, 140 U.S. 453 (1891), the *Insular Cases*, and Justice Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1, 74 (1957), he concluded:

> The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous. Just as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories because of their wholly dissimilar traditions and institutions, the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien.

Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J. concurring) (internal quotation marks and citation omitted).

The Court rejected *Eisentrager*'s geographic formalism, and that of the *Verdugo-Urquidez* majority, in *Rasul* and again in *Boumediene*. Citing with approval Justice Kennedy's concurrence in *Rasul* (which, in turn, cited Justice Kennedy's concurrence in *Verdugo-Urquidez*), the Court in *Boumediene* applied a functional test in determining that the Suspension Clause restrains the Executive's conduct as to Guantánamo detainees. 128 S. Ct. at 2261-62. Thus, the Court has already rejected the D.C. Circuit's bright-line test and held that neither their citizenship nor their incarceration at Guantánamo deprives these prisoners of constitutional rights. *Id.* at 2262.

Although *Boumediene*'s holding addresses only the Suspension Clause, application of its functional test leads inevitably to recognition of a due process liberty right for Guantánamo detainees, at least to the extent of the right to be relieved of unlawful imprisonment. Nothing about Guantánamo makes enforcement of a due process liberty right any more "impracticable and anomalous" than enforcement of *habeas*. 128 S. Ct. at 2255. The Court has repeatedly emphasized that the core purpose of the Due Process Clause is to protect against unlawful detention, whatever the context. *See, e.g., Zadvydas*, 533 U.S. at 690; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987). Accordingly, the Due Process Clause of the Fifth Amendment is sufficient to accord to noncombatants like Petitioners a positive right of release.

b. Petitioners' indefinite imprisonment violates the Geneva Conventions.

Petitioners contended below and continue to assert that their continued imprisonment after the Executive conceded that they are not enemy combatants violates rights personal to them under treaties of the United States—the Third Geneva Convention arts. 3, 118, 6 U.S.T. 3316, and Fourth Geneva Convention arts. 3, 132-35, 6 U.S.T. 3516—rights whose private vindication Congress provided for in 28 U.S.C. § 2241(c). Respondents' violation of these custodial treaty provisions thus constitutes a sufficient and independent basis for the Release Order. *See Mali v. Keeper of the Common Jail of Hudson County, New Jersey*, 120 U.S. 1, 12 & 17 (1887) (holding that because a "treaty is part of the supreme law of the United States," the power to issue writs of *habeas corpus* extends to prisoners held in violation of existing treaties).

C. Judicial Economy And The Surpassing Importance Of The Question Presented Require The Court's Immediate Intervention.

President Obama has ordered the closure of the Guantánamo prison. Perhaps it will close. Recent press accounts have suggested that the Executive may be considering consensual release of some of the Uighurs to the United States. Neither possibility constitutes grounds for withholding a judicial remedy or a basis to delay certiorari review.

In a constitutional sense, the President's discretionary release of a prisoner is no different from his discretionary imprisonment: each proceeds from his un-

checked power. The question presented here is whether the Third Branch may check the Second at all. If *habeas* review may be shelved because one President may some day undo what his predecessor did, then the law is whatever the sitting President says it is, and the judiciary is the handmaiden of the political branches. *Habeas* and the separation of powers cannot wait for politics. Without the Court's intervention now, in this case, six years of excruciating appellate litigation will end with the evisceration of the Great Writ, and the separation of powers will be reduced to quaint history. All relief would hereafter be diplomatic, and located entirely and completely within the discretion of the jailer himself.

The Executive has argued in recent filings that *habeas* proceedings brought by prisoners approved for transfer should be stayed because, after *Kiyemba*, no court can relieve a Guantánamo detainee's imprisonment.[21] Thus this case profoundly affects not only Petitioners, but the hundreds of other Guantánamo prisoners whose *habeas* cases are now pending. *See Massachusetts Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964) (granting certiorari, in part, "[b]ecause a considerable number of suits are pending in the lower courts which will turn on resolution of these issues"). Indeed, this case affects all prisoners in off-shore Executive prisons now and in future.

At stake is whether *Boumediene* is a landmark or a curiosity that, after long years, established the *habeas* prisoner's right to a learned essay. Petitioners believe

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[21] *See* note 2, *supra*.

Boumediene did affirm *habeas corpus* as the Third Branch's effective check of the Second. It will not be so unless certiorari is granted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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Dated: April 3, 2009