

THE *KIYEMBA* PARADOX: CREATING A
JUDICIAL FRAMEWORK TO ERADICATE
INDEFINITE, UNLAWFUL EXECUTIVE
DETENTIONS

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I. INTRODUCTION

An undeniable trend has emerged in the Supreme Court of the United States supporting the proposition that the judicial branch is playing a greater role in national security and foreign relations debates.¹ In particular, the Court has demonstrated a willingness to apply its judicial review powers to detainees held under the auspices of America's military response to terrorist threats²—which is a relatively recent phenomenon, given that courts have typically deferred to the political branches on such matters.³ The Supreme Court has broadly interpreted the federal habeas statute⁴ and the Constitution as it pertains to the writ of habeas corpus⁵ to assume jurisdiction to review terrorist detentions. The Court's role in terrorist detentions is particularly relevant and timely following President Barack Obama's Executive Order, signed on January 22, 2009, declaring that the United States intends to shut down the detention facility in Guantanamo Bay.⁶ When the President signed the Order, 245 detainees were still being held at Guantanamo—detentions that would ultimately have to be reviewed.⁷ Yet, troubling judicial and political developments threaten to undermine the delicate foundations of authority in this area of law developed by the Court in its seminal case, *Boumediene v. Bush*.

After *Boumediene*, the detainees at Guantanamo were constitutionally guaranteed access to the writ of habeas corpus as an avenue for judicial review of their detentions.⁸ But, even as the

¹ See *Rasul v. Bush*, 542 U.S. 466, 478-79 (2004) (holding that the federal habeas statute, 28 U.S.C. § 2241, applies to detainees in Guantanamo Bay); *Boumediene v. Bush*, 553 U.S. 723, 723 (2008) (holding that Guantanamo detainees have a constitutional right to habeas corpus); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 578-79 (2006) (demonstrating the Court's willingness to construe statutory language in restricting the Executive's ability to act in traditional areas of judicial deference).

² See *supra* note 1.

³ See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CALIF. L. REV. 167, 182 (1996) (“[T]he Supreme Court has deferred to the conduct of international relations by the other branches, particularly the President.”); Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305 (1988) (“Whether on the merits or on justiciability grounds, the courts have held for the President in [foreign affairs] cases with astonishing regularity.”).

⁴ *Rasul*, 542 U.S. at 478-79.

⁵ *Boumediene*, 553 U.S. at 771.

⁶ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

⁷ *Id.*

⁸ *Boumediene*, 553 U.S. at 771.

Court handed down that decision, it began qualifying and thereby limiting its authority in such cases. *Munaf v. Geren*,⁹ decided on the same day as *Boumediene*, held that the judiciary's habeas authority over two American citizens being detained in Iraq under the authority of the United States government was limited by the extent to which it could order a remedy.¹⁰ The Supreme Court distinguished the traditional habeas remedy, a basic right to release, from what can be characterized as "release-plus"—or, in *Munaf*, release "plus" entry back into the United States.¹¹ Basic release would have placed the petitioners on Iraqi soil and exposed them to arrest and prosecution by the Iraqi government.¹² The "plus" they sought was essentially shelter from the possibility of criminal prosecution.¹³ Yet, the limitations of a habeas appeal are hardly troubling, or even surprising, given that the Iraqi government may have had legitimate reasons to detain the *Munaf* petitioners.¹⁴

Then came *Kiyemba v. Obama*.¹⁵ Prior to *Kiyemba*, *Boumediene*'s anticipated effect on the role of the judiciary was heralded as one of the most significant in recent Supreme Court history.¹⁶ While *Kiyemba* has not completely undermined that significance, it has raised serious questions regarding *Boumediene*'s future application by illustrating conditions that would create unlawful, indefinite executive detentions, even in a world with *Boumediene*. At its core, *Boumediene* symbolized a Court that was more willing to exercise an active role in national security cases—an area of law it had traditionally avoided.¹⁷ More specifically, *Boumediene* held that the constitutionally-defined role of the Court in terrorist detention cases is its ability to review and

⁹ *Munaf v. Geren*, 553 U.S. 674 (2008).

¹⁰ *Id.* at 693.

¹¹ *Id.* at 693-94.

¹² *Id.*

¹³ *Id.*

¹⁴ *Munaf*, 553 U.S. at 693-94.

¹⁵ *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, 70 U.S.L.W. 3370 (U.S. Dec. 8, 2010) (No. 10-775). *Kiyemba I* is the first of three cases associated with the petitioners from the same group of Uighur detainees. *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509 (D.C. Cir. 2009), is outside the scope of this Note. *Kiyemba III* refers to the D.C. Circuit Court decision which was reinstated on May 29, 2010, and the renewed petition for writ of certiorari filed on December 8, 2010, in the Supreme Court of the United States.

¹⁶ Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009).

¹⁷ *See supra* note 3.

determine the legality of those detentions.¹⁸ Additionally, and particularly relevant to this Note, is the concept of release as an integral element of habeas relief—the absence of which *Boumediene* calls a “constitutional infirmity.”¹⁹ Yet, one of the major criticisms of the opinion is that it fails to adequately provide guidelines for constitutionally-sufficient review and leaves open the extent to which the habeas right extends procedurally and substantively.²⁰ For all that it hopes to accomplish, *Boumediene* fails to address the more nuanced issues of how judicial review should be administered and the subsequent adequacy of remedies that should be and can be applied.

The facts that legitimized the Court’s holding in *Munaf* are substantially different from the facts in *Kiyemba*. In *Kiyemba*, the D.C. Circuit Court also held that it did not have the authority to order the petitioners’ release into the United States, but for different reasons from those espoused in *Munaf*.²¹ There, the circuit court determined that such release would violate the traditional distribution of immigration authority—a problem that did not exist with the American petitioners in *Munaf*.²² As in *Munaf*, the government concluded that the *Kiyemba* petitioners’ request amounted to a request for “release-plus.”²³ Unlike *Munaf*, however, a troubling paradox is raised under the *Kiyemba* facts—as it now stands, the Executive has determined that certain detainees being held unlawfully may, nonetheless, remain indefinitely detained.²⁴ There are three primary elements that contributed to the Uighur²⁵ plaintiffs’ dilemma. First, because of the high risk of torture, the Uighurs could not return to their home country of China.²⁶ Second, diplomatic solutions had failed and no third-party country had been willing to accept them.²⁷ Third, the

¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 790 (2008).

¹⁹ *Id.* at 822.

²⁰ *Id.* at 800-02 (Roberts, C.J., dissenting); *id.* at 828-29 (Scalia, J., dissenting).

²¹ *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009).

²² *Munaf v. Geren*, 553 U.S. 674, 680 (2008).

²³ Reply Brief for Appellants at 1, *Kiyemba I*, 555 F.3d 1022 (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429), 2008 WL 6058812 (“Petitioners and their amici curiae frame their arguments in terms of the simple right to ‘release’ in habeas, but they in fact claim an entitlement to something fundamentally different: release *plus* an order requiring the Government to bring them into the United States”). See Brief for the Respondents in Opposition at 19, *Kiyemba I*, 130 S. Ct. 1235 (No. 08-1234), 2009 WL 1526934.

²⁴ See generally *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

²⁵ Uighurs are Chinese Muslims from the western province of Xinjiang. *Id.* at 1023.

²⁶ *Id.* at 1024.

²⁷ *Id.* But see Erik Eckholm, *Out of Guantanamo, Uighurs Bask in Bermuda*, N. Y. TIMES, Jun. 14, 2009, at A4, available at <http://www.nytimes.com/2009/06/15/world/>

D.C. Circuit Court determined that release into the United States would violate immigration laws and undermine the Executive's ability to administer those laws.²⁸ Lacking refuge and possibility of asylum, the Uighurs were forced to remain, indefinitely, as prisoners at Guantanamo Bay.

The *Kiyemba* petitioners' appeal to the Supreme Court²⁹ is certainly well known, given its importance in clarifying the courts' role in terrorist detention cases, yet it hardly stands alone. While the Supreme Court has dismissed the appeal given recent resettlements,³⁰ it must be emphasized that the paradox in *Kiyemba* is not an isolated occurrence. The petitioners there are in good company, with over fifty Guantanamo detainees that have been cleared for release but remain detained. As of January 2010, fifty-nine Guantanamo detainees have been cleared, several under the Bush Administration, and are still waiting for resettlement.³¹ Given that the district courts have issued thirty-one "*Kiyemba* orders,"³² it is clear that these unlawful executive detentions are not unique. Moreover, the orders point to the courts' unwillingness to remain passive in the attempts to resolve them. *Kiyemba's* relevance, therefore, goes beyond its specific petitioners and must be addressed despite the Supreme Court's recent decision.

Munaf and *Kiyemba* have delineated the contours of *Boumediene's* broad constitutionality argument. That is, generally, the constitutionally-guaranteed right to habeas corpus is limited by the courts' ability to order only basic release, and not

americas/15uighur.html; William Glaberson, *6 Detainees Are Freed as Questions Linger*, N. Y. TIMES, Jun. 11, 2009, at A6, available at <http://www.nytimes.com/2009/06/12/world/12gitmo.html>; Andy Worthington, *Swiss Take Two Guantanamo Uighurs: Save Obama From Having to Do the Right Thing*, ANDY WORTHINGTON, Apr. 2, 2010, <http://www.andyworthington.co.uk/2010/02/04/swiss-take-two-guantanamo-uighurs-save-obama-from-having-to-do-the-right-thing/>.

²⁸ *Kiyemba*, 555 F.3d. at 1024.

²⁹ *Kiyemba v. Obama*, 130 S.Ct. 458 (2009) (granting petition for writ of certiorari).

³⁰ *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam). The case was vacated and remanded to the D.C. Circuit Court where the original decision was reinstated. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

³¹ ANDY WORTHINGTON, *THE GUANTANAMO FILES: THE STORIES OF 774 DETAINEES IN AMERICA'S ILLEGAL PRISON* (2007). See Andy Worthington, *Guantanamo: The Definitive Prisoner List (Updated for 2010)*, ANDY WORTHINGTON, Apr. 1, 2010, <http://www.andyworthington.co.uk/2010/01/04/guantanamo-the-definitive-prisoner-list-updated-for-2010/>.

³² "Kiyemba orders" are cases of unlawful of detentions where a court has ordered the Executive to take diplomatic measures in resettling a detainee. Brief of Petitioners at 20, *Kiyemba*, 130 S. Ct. 1235 (No. 08-1234), 2009 WL 4709536.

“release-plus.”³³ How meaningful, then, is that habeas right if release cannot be effectively applied? In other words, what is “release” if the result is, effectively, continued indefinite detention? Are there circumstances where a detainee is legally entitled to release, but where release would nevertheless be inappropriate? While it would be unreasonable to assume that a constitutionally-granted right is unbridled in all circumstances, *Kiyemba* raises serious questions regarding *Boumediene*’s application of habeas review. The existence of the *Munaf* holding, other unlawful detentions, and the renewed petition for writ of certiorari by five of the *Kiyemba* petitioners in *Kiyemba III*,³⁴ raises the question of when, *precisely*, release-plus is an appropriate remedy.

More troubling, perhaps, are the remarks made by President Obama during a speech delivered at the National Archive Museum in Washington, D.C. on May 21, 2009 (Archives speech).³⁵ There, he explicitly stated that his administration intended on implementing detention policies that would create a framework for “prolonged detentions” for detainees who have not been prosecuted and *may* pose a national security threat.³⁶ President Obama followed through with that promise by signing an Executive Order to that effect on March 7, 2011.³⁷ The dangers of standardizing a system for indefinite detentions cannot be understated. Exactly one year after President Obama signed the January 22, 2009 Order, 240 detainees still remained at Guantanamo, only five detainees less than the prior year.³⁸ Of the 240 Guantanamo detainees, 126 were approved for transfer (63 of which were so approved under the Bush Administration);³⁹ only 44

³³ Reply Brief for Appellants, *supra* note 23, at 1; Brief for the Respondents in Opposition, *supra* note 23, at 19.

³⁴ Petition for Writ of Certiorari, *Kiyemba*, 130 S. Ct. 1235 (No. 10-775) (filed on Dec. 8, 2010).

³⁵ President Barack Obama, Address on National Security at the National Archives (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

³⁶ *Id.*

³⁷ *See* Press Release, The White House, Executive Order—Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

³⁸ GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 9-10 (2010), http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf.

³⁹ *Id.* at 10.

had actually been transferred as of January 22, 2010.⁴⁰

This Note examines the availability of habeas review in executive terrorist detentions. Specifically, the scope of habeas is examined in light of recent interpretations of the judicial branch's ability, or lack thereof, to order release as a remedy. Courts have a rightful place in the foreign relations debate and recent detainee cases point to habeas review as a means to exercise that role.⁴¹ For habeas review to be meaningful, the ability to order *functional* release, or release where the detainees are no longer being physically detained, must be available. The restraints *Munaf* has placed on functional release are not problematic so long as the detainees' liberty interests are adequately accounted for. This Note will argue that *Kiyemba* poses the archetypal situation where detainees have been unlawfully held for an unreasonable length of time, eroding that liberty interest. If release-plus is necessary to effectuate functional release under these conditions, courts must have the authority to grant it—even if those circumstances only occur in a limited class of cases. Indeed, both historical evidence of the judicial branch's role in such circumstances and the *Zadvydas v. Davis*⁴² line of cases has already answered the question of what balance must be struck between the liberty interests of a detainee held unlawfully and the executive immigration prerogative. Limits must be placed on how long a detainee may be held and the liberty interest, under circumstances where the detention has become unreasonably lengthy, must win out.⁴³ Functional release, therefore, must apply when unlawful detentions reach a point where they can be characterized as unreasonable.

Part II examines the historical evolution of habeas corpus and demonstrates that its significance as a judicial remedy depends on the courts' ability to order a detainee's functional release. Part III introduces the contemporary application and scope of habeas corpus in the context of executive terrorist detentions. Part IV examines the application of immigration paradigms to habeas jurisprudence. Part V argues, based on the *Kiyemba* paradox, that the courts' role in reviewing such detention cases is substantially diminished if they are unable to meaningfully offer release as a remedy for unlawful detentions. Ultimately, this Note concludes

⁴⁰ *Id.*

⁴¹ See generally *supra* note 1.

⁴² *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁴³ *Zadvydas*, 533 U.S. at 699-701; *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

that under particular circumstances, the courts must have the authority to order release into the United States because the availability of release as a remedy is an essential element of habeas corpus. Furthermore, if the availability of habeas review is constitutionally-guaranteed, then as a general rule, the availability of release as a remedy must also be guaranteed. This Note will show that these propositions do not, contrary to what the government argued in *Kiyemba*, run counter to current understandings of the executive immigration authority.

II. HISTORY OF THE GREAT WRIT

The development of the writ of habeas corpus and its progression from an incidental writ to the “Great Writ” has historically been characterized by ongoing tensions between conflicting government branches. The early forms of the writ existed as a relic of the British judicial system, and its association with freedom from arbitrary detention only developed as courts began vying for power amongst themselves and against the King.⁴⁴ In the United States, the development paralleled the British tradition with respect to conflicts between federal and state authorities as well as conflicts among the various branches of the federal government.⁴⁵

A. *The British Tradition*

While the codification of freedom from arbitrary detention dates as far back as the eleventh century in the English legal charter, the Magna Carta,⁴⁶ the actual term “habeas corpus” had not always been associated with the concept. The earliest manifestation of that terminology emerged in thirteenth-century English courts where the most basic form of the writ merely served as an order to county sheriffs to bring an accused before the court.⁴⁷ Indeed, there were many manifestations of the writs of

⁴⁴ WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 27-58 (1980). See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 27 (2010).

⁴⁵ See generally DUKER, *supra* note 44, at 127-273.

⁴⁶ Magna Carta ch. 39 (1215) (“No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgment of his peers or the law of the land.”).

⁴⁷ DUKER, *supra* note 44, at 17. The writ was a reflection of the court’s belief that justice could not be accurately rendered if the accused was not physically present before the court. *Id.*

habeas corpus, each with its own pendant meaning.⁴⁸ By the middle of the fourteenth century, the writ had developed two important forms: the writ of *habeas corpus cum causa* (“have the body with reasons”)⁴⁹ and its modern form, the writ of *habeas corpus ad subjiciendum* (“to have the body for submitting”).⁵⁰ These new manifestations reflected the courts’ willingness to review the validity or justness of an imprisonment.⁵¹ Prisoners, rather than the courts, initiated these proceedings by petitioning for a writ of certiorari.⁵² This process marked another crucial moment in the writ’s evolution by indicating its importance to the individual and not merely as a tool for the courts.⁵³ Where cause for imprisonment was found to be insufficient, the court issued a “mainprise”⁵⁴—which is comparable to a release on bond.⁵⁵

The writ was also used to resolve conflicts between the various adjudicatory bodies of the British government—in each circumstance, ordering release was the primary means of asserting power.⁵⁶ The earliest example of such a conflict was between the British superior courts and the local courts, whereby the former used habeas corpus as a method of correcting unlawful detentions ordered by local courts.⁵⁷ Within the superior courts themselves, common law courts employed the writ against the equity courts as a response to the latter’s growing clout.⁵⁸ The common law courts also used the writ to protect cases thought to be within their

⁴⁸ *Id.*

⁴⁹ DUKER, *supra* note 44, at 25.

⁵⁰ EDWARD INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS 1 (1849); A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 18 (1902).

⁵¹ DUKER, *supra* note 44, at 25 (“Although the writ of habeas corpus demanding the presence of a prisoner had issued to sheriffs as early as the thirteenth century, whether the defendant was incarcerated had been irrelevant before the origin of the *cum causa* form of habeas corpus.”); INGERSOLL, *supra* note 50, at 2.

⁵² DUKER, *supra* note 44, at 24. The actual writ of *habeas corpus cum causa* was not petitioned for by the prisoner. Rather, it was done by way of a prisoner’s petition for a writ of certiorari to have his imprisonment challenged before the court, after which a writ of *habeas corpus cum causa* would be issued by the court to the sheriff to bring the prisoner before the judicial authorities. *Id.*

⁵³ *Id.* at 25.

⁵⁴ *Id.*

⁵⁵ Mainprise Definition, DICTIONARY.COM, <http://dictionary.reference.com/browse/mainprise> (last visited Jan. 10, 2010).

⁵⁶ DUKER, *supra* note 44, at 27.

⁵⁷ *Id.*

⁵⁸ *Id.* at 33-35. The equity courts’ ability to issue injunctions included the power to suspend common law court decisions. A conflict arose when the common law court issued a final order that the equity court reversed in a subsequent hearing that resulted in imprisonment. To counter reversals by the equity court, the common law court employed the writ of habeas corpus to release the prisoner on bail. *Id.*

exclusive jurisdiction against intrusion from the ecclesiastical courts.⁵⁹ Alleged jurisdictional intrusions by the Court of Admiralty and Court of Requests were also met with issuances of the writ by the courts of common law.⁶⁰ In each of these conflict scenarios, the issuing court would attempt to deprive the target court of its ability to administer what was considered the “ultimate sanction:” imprisonment.⁶¹ The use of the writ of habeas corpus in the context of these inter-judicial disagreements is associated with the ability of the court to order the release of a prisoner. Without such an ability to call for release, the offensive use of the writ as a check on other judicial bodies would have been incapacitated.

In a similar fashion, the common law courts also issued the writ against the Privy Council, an administrative arm of the King.⁶² While habeas action against the Privy Council was a means for the courts to assert their jurisdictional claims, it also evolved into the writ’s modern purpose as a mechanism for reviewing the validity of executive detentions.⁶³ The first major codification of the right to employ the writ of habeas corpus against arbitrary detention by the King was the Petition of Right (Petition).⁶⁴ Section III of the Petition created a duty for the King to show cause when imprisoning its citizens, providing in relevant part:

And whereas also by the statute called, “The Great Charter of the Liberties of England,” is it declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or to be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.⁶⁵

Section V of the Petition granted those unlawfully detained access to the writ of habeas corpus. It stated:

[A]gainst the tenor of the said statutes, and other the good laws and statutes of your realm, [] divers of your subjects have of late been imprisoned, without any cause showed; and when for

⁵⁹ *Id.* at 36. When the British ecclesiastical court, the High Commission, was created, its jurisdiction had not been determined by any previous precedent. Therefore, any augmentation of its jurisdiction usually meant it was intruding on an area of law in which common law courts had already been exercising jurisdiction. To prevent the High Commission from expanding, the common law courts issued writs of habeas corpus for prisoners convicted by the High Commission and usually ordered their bail. *Id.*

⁶⁰ *DUKER*, *supra* note 44, at 39-40.

⁶¹ *Id.* at 27.

⁶² *Id.* at 40.

⁶³ *Id.* at 46-47.

⁶⁴ *See id.* at 45.

⁶⁵ Petition of Right, 1628, 3 Car., c. 1, § 3 (Eng.).

their deliverance they were brought before your justices, by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer⁶⁶

Limitations imposed on the courts' ability to order release were considered inimical to the purpose of the writ and were usually met with statutory provisions eradicating such obstacles.⁶⁷ The most pertinent example was the British legislature's implementation of the Habeas Corpus Act of 1640,⁶⁸ the purpose of which was to abolish the Court of Star Chamber.⁶⁹ The Court of Star Chamber was a court controlled by the Executive that had the authority to overturn judicial orders for release.⁷⁰

The King's Bench⁷¹ did not hesitate to cast its habeas authority broadly to reign in potentially unlawful imprisonment, regardless of the circumstances surrounding the imprisonment.⁷² Particularly relevant are the assertion of authority over challenges to wartime imprisonments⁷³ and the application of the writ to prisons located in areas traditionally outside the jurisdiction of the courts.⁷⁴ In the Habeas Corpus Act of 1679,⁷⁵ the legislature renounced the executive practice of exiling prisoners to territories outside the reach of the writ.⁷⁶ The identity of the judiciary was clear; it "always had the last word, no matter when, how, or by

⁶⁶ *Id.* § 5.

⁶⁷ DUKER, *supra* note 44, at 47-58.

⁶⁸ Habeas Corpus Act, 1640, 16 Car., c. 10 (Eng.) ("[J]udges [of the Court of Star Chamber] have not kept themselves to the points limited by the said Statute but have undertaken to punish where no Law doth warrant and to make Decrees for things having no such authoritie and to inflict heavier punishments then by any Law is warranted And forasmuch as all matters examinable or determinable before the said Judges or in the Court commonly called the Star Chamber may have their proper remedy and redresse and their due punishment and correction by the Common Law of the Land and in the ordinary course of Justice elsewhere And forasmuch as the reasons and motives inducing the erection and continuance of that Court doe now cease and the Proceedings Censures and Decrees of that Court have by experience beene found to be an intollerable burthen to the subjects and the meanes to introduce an Arbitrary Power and Government."). The Habeas Corpus Act of 1640 is referred to by Duker as the Habeas Corpus Act of 1641. DUKER, *supra* note 44, at 47.

⁶⁹ DUKER, *supra* note 44, at 47.

⁷⁰ *Id.* at 46.

⁷¹ The King's Bench is the highest superior court sitting in common law.

⁷² See HALLIDAY, *supra* note 44, at 124-32 (domestic imprisonment); *id.* at 174-76 (enslavement); *id.* at 165-74 (imprisonments related to the military).

⁷³ *Id.* at 165-74.

⁷⁴ *Id.* at 259-61.

⁷⁵ Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

⁷⁶ DUKER, *supra* note 44, at 51-54.

whom one had been imprisoned.”⁷⁷ Great Britain applied the writ to its American colonies, whereby the United States developed its own habeas tradition.⁷⁸

B. *The American Tradition*

By way of the common law, the right to the writ was extended to the British colonies in North America, albeit in a piecemeal manner.⁷⁹ Statutory protection of the writ was officially extended to the colonies in 1710.⁸⁰ It was subsequently included in the constitutional text as the Suspension Clause⁸¹ and codified in Section 14 of the Judiciary Act of 1789.⁸² While the Suspension Clause does not expressly create a right to habeas, the Supreme Court has since interpreted it to do so.⁸³

⁷⁷ HALLIDAY, *supra* note 44, at 139.

⁷⁸ DUKER, *supra* note 44, at 95. See Carpenter, *supra* note 50, at 18.

⁷⁹ *Id.*

⁸⁰ Carpenter, *supra* note 50, at 24.

⁸¹ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it.”). It is generally accepted that the Suspension Clause was originally intended to guarantee a means for state courts to challenge federal detentions. DUKER, *supra* note 44, at 181. It was not until after the Civil War that Congress officially provided federal courts with the ability to challenge state detentions where state judicial remedies have been exhausted. *Id.* at 208. These two distinct operations of the writ—to challenge both executive and state detentions—represent its modern-day usage in the United States. *Id.* The latter form of habeas reflects the development of the writ in fourteenth-century England as part of an attempt by the central courts to expand their jurisdiction to the detriment of the local courts. *Id.* at 27 (“[The writ of *habeas corpus cum causa*] was often employed by the central courts to deprive the local courts of their ultimate sanction in the course of the judicial process—imprisonment.”). While this expansion was seen as an increase in the sovereign’s judicial powers, the writ actually applied to the Court of Chancery. *Id.* As for its modern significance in the United States, we have seen that the courts are now more willing to place limits on the availability of habeas in the context of the federal courts’ ability to review state court decisions, based primarily on questions of federalism. CARY FEDERMAN, *THE BODY AND THE STATE* 165 (2006). It is essential to distinguish the particular form of habeas being employed in any particular circumstance, since the remedy employed varies based on that determination. Because of the aforementioned federalism concerns, the traditional remedy in habeas review of state court decisions is remand, rather than release. *Id.* If we accept the theory that the federal government is one of limited application and the state government serves as a distinct and separate legitimate authority, then remand to state courts to make the final determination of whether a state detention is legal seems more appropriate than having the federal court order release outright.

⁸² Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (“[C]ourts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”).

⁸³ See *Boumediene v. Bush*, 553 U.S. 723, 739 (stating that the Suspension Clause created a “privilege of habeas corpus”).

It is oft quoted that in the United States the writ of habeas corpus is “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”⁸⁴ Indeed, the Supreme Court has held that “[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”⁸⁵ The lofty language that is often employed in describing the writ reflects the esteem associated with the writ’s ability to free an individual from injustice. Among the watershed habeas cases that contributed to the writ’s development in the United States, *Ex parte Bollman*⁸⁶ is considered among the first. There, the Supreme Court held that it had the inherent authority to order the release of prisoners if it was found that there was no legal basis for their detention.⁸⁷ The writ “[a]t its historical core . . . has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”⁸⁸ As such, the writ’s operation as a check on the Executive’s detention authority would be crippled without the availability of release. Indeed:

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, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.⁸⁹

Release is the long-established remedy in cases of unlawful executive detention. Judges today would agree that release is the most, if not the *only*, appropriate remedy in such cases. The courts are bound by their constitutional duty to correct unlawful detentions.⁹⁰ The principle that release is the core element of the writ of habeas corpus is found in its historical context and was expounded in *Boumediene*.⁹¹

⁸⁴ *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

⁸⁵ *Id.* at 290.

⁸⁶ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

⁸⁷ *Id.* at 93.

⁸⁸ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

⁸⁹ *Harris*, 349 U.S. at 292.

⁹⁰ *Id.* See *Bowen v. Johnson*, 306 U.S. 19, 26 (1939).

⁹¹ See *Boumediene v. Bush*, 553 U.S. 723, 823 (2008) (“We have long held, and no party here disputes, that this includes the power to order release.”); *id.* at 729 (“[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained.”).

III. THE CURRENT SCOPE OF HABEAS CORPUS

A. *Habeas After Boumediene and Munaf*

Rasul v. Bush presented habeas challenges from sixteen non-citizens, captured incident to the United States' war in Afghanistan, who were detained at Guantanamo Bay.⁹² The government argued, and the D.C. Circuit Court agreed,⁹³ that given the Court's holding in *Johnson v. Eisentrager*,⁹⁴ United States' courts lacked jurisdiction to petition for a writ of habeas corpus.⁹⁵ The Supreme Court disagreed and held that Guantanamo detainees were, indeed, statutorily entitled to habeas corpus.⁹⁶ Congress responded by passing the Detainee Treatment Act (DTA),⁹⁷ which established the Combatant Status Review Tribunals (CSRT).⁹⁸ As part of the DTA's procedural design, it precluded the courts from exercising habeas jurisdiction over Guantanamo detainees.⁹⁹ The Supreme Court responded in turn

⁹² *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (Statutory basis for habeas corpus comes from 28 U.S.C. § 2241 ("Power to grant writ")).

⁹³ *Rasul v. Bush*, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *rev'd* 542 U.S. 466 (2004).

⁹⁴ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁹⁵ *Rasul*, 542 U.S. at 472-73.

⁹⁶ *Id.* at 478. Statutory basis for habeas corpus comes from 28 U.S.C. § 2241 ("Power to grant writ").

⁹⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742 (codified as amended at 28 U.S.C. § 2241(e)) [hereinafter DTA].

⁹⁸ News Release, U.S. Dep't of Def., Combatant Status Review Tribunal Order Issued (July 7, 2004), available at <http://www.defense.gov/releases/release.aspx?releaseid=7530> ("This tribunal will serve as a forum for detainees to contest their status as enemy combatants. Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court."). The Obama Administration has since chosen to forgo the "enemy combatant" distinction in determining the legality of terrorist detentions in favor of using a "substantiality" test. See News Release, U.S. Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>; see also *Gherebi v. Obama*, 609 F.Supp. 2d 43 (D.C. 2009) (holding that an individual may be lawfully detained by the Executive where he has "substantially supported" terrorist forces); Andy Worthington, *Guantanamo: The Nobodies Formerly Known as Enemy Combatants*, ANDY WORTHINGTON, Mar. 16, 2009, <http://www.andyworthington.co.uk/2009/03/16/guantanamo-the-nobodies-formerly-known-as-enemy-combatants/>.

⁹⁹ DTA § 1005(e) ("(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the

in *Hamdan v. Rumsfeld*,¹⁰⁰ where it interpreted the habeas-stripping provision of the DTA to apply only to future habeas petitions.¹⁰¹ Since all of the Guantanamo detainees had pending habeas petitions, the DTA effectively would not apply to any of them.¹⁰² Congress again responded by clarifying, in section 7 of the Military Commissions Act of 2006 (MCA), that the habeas-stripping provision of the DTA applied to *all* unlawful alien enemy combatants.¹⁰³ This statutory preclusion from right to habeas created in *Rasul* meant that the writ was no longer an avenue by which the detainees would be able to challenge their imprisonment. The detainees' response was to challenge the constitutionality of the MCA with the hopes of constitutionalizing their right to habeas review.¹⁰⁴

1. Boumediene v. Bush

Lakdhar Boumediene's habeas petition was consolidated with sixteen additional habeas petitions; each claimed that the MCA had violated the Constitution by functionally suspending the writ of habeas corpus.¹⁰⁵ Prior to *Boumediene*, the prevailing view was

United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”).

¹⁰⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁰¹ *See id.* at 572.

¹⁰² *Id.* at 669 (Scalia, J., dissenting) (“The Solicitor General represents that ‘[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees,’ including one that ‘seek[s] relief on behalf of every Guantanamo detainee who has not already filed an action.’ The Court’s interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.”). (citation omitted).

¹⁰³ Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part at 28 USC § 2241(e) (Supp. 2007)). Specifically, section 7 amends the effective date of the DTA § 1005(e)(1) to include all pending cases. An “enemy combatant” is:

[A]n individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Memorandum from Paul Wolfowitz, Deputy Sec’y, U.S. Dep’t of Def., to President George W. Bush (Jul 7, 2004), <http://www.defense.gov/news/jul2004/d20040707review.pdf>.

¹⁰⁴ *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.C. 2005); *see also* *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.C. 2005).

¹⁰⁵ *See id.*

that constitutional rights did not extend to Guantanamo Bay.¹⁰⁶ Indeed, the very purpose of holding detainees at Guantanamo was to create an extraterritorial detention center where such legal restrictions would not extend.¹⁰⁷ The Court in *Rasul*, however, refused to apply this conclusion to territory over which the United States had effective control.¹⁰⁸ Although *Rasul* determined that Guantanamo detainees had a statutory right to habeas corpus, the Court in *Boumediene* held, for the first time, that the protections afforded by the Suspension Clause were also available to detainees held in a foreign detention center as well.¹⁰⁹ The habeas-stripping provision of the DTA and section 7 of the MCA were, therefore, unconstitutional suspensions of habeas corpus.¹¹⁰

Despite the controversial 5-4 decision, all nine Justices agreed that the availability of release is essential to the writ's integrity.¹¹¹ Yet, commentators have criticized *Boumediene* for its failure to properly define the constitutional boundaries that habeas requires.¹¹² While the Court held that detainees are

¹⁰⁶ See Memorandum from Alberto R. Gonzales, Attorney Gen., U.S. Dep't of Justice, to President George W. Bush (Jan. 25, 2002), http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020125_Gonz_Bush.pdf; Johan Steyn, *Guantanamo Bay: The Legal Blackhole*, 53 INT'L & COMP. L.Q. 1, 1 (2004), <http://www.statewatch.org/news/2003/nov/guantanamo.pdf> ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals.").

¹⁰⁷ See *supra* note 106.

¹⁰⁸ *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring).

¹⁰⁹ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). It is also the first time that the Supreme Court has held that the Suspension Clause is an affirmative constitutional grant of access to the writ of habeas corpus. See David J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1 (2008).

¹¹⁰ *Boumediene*, 553 U.S. at 771.

¹¹¹ See *id.* at 787 ("We do hold 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 808 (Roberts, C.J., dissenting) ("Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release.").

¹¹² Saxby Chambliss, *The Future of Detainees in the Global War on Terror: A U.S. Policy Perspective*, 43 U. RICH. L. REV. 821, 842-43 (2009) ("It is crucial to our national security that the political branches of the federal government act swiftly to answer the questions *Boumediene* left open and define the legal boundaries for future habeas petitions in U.S. courts. . . . Unfortunately, and in sharp contrast to the balance of power ordained by our founders, the intentions of the political branches have been disregarded by the Judiciary."). See Brian D. Fahy, *Given an Inch, the Detainee Effort to Take a Mile: The Detainee Legislation and the Dangers of the "Litigation Weapon in Unrestrained Enemy Hands"*, 36 PEPP. L. REV. 129, 209-10 (2008) ("Chief Justice Roberts and Justice Scalia are rightfully concerned about the lack of procedural guidelines and substantive

constitutionally guaranteed access to the writ, it failed to address the underlying issue of what a detainee was entitled to upon exercising that right. In particular, the Court did not clarify whether the constitutional right it was upholding was merely a procedural one or a substantive one. More importantly, the Court did not address what “release” means and to what extent release must be effectuated before it can be considered constitutionally sufficient. Critics argue that this lack of a bright-line rule is particularly dangerous with regard to “detainees in the global war on terror.”¹¹³ *Munaf* addressed these shortcomings by beginning the process of defining what the Constitution does *not* require the writ to provide to detainees.¹¹⁴

2. *Munaf v. Geren*

Even as the Court asserted its habeas jurisdiction over Guantanamo detainees, it recognized that that authority was not absolute. In fact, on the very same day it decided *Boumediene*, it began laying the framework upon which dramatic limitations would be founded. At issue in *Munaf* was the extent to which habeas applies to detainees held abroad and the extent to which habeas relief is available for those detainees.¹¹⁵ The plaintiffs were two American citizens in Iraq, who were both arrested by the Multinational Force-Iraq¹¹⁶ (MNF-I)¹¹⁷ for various terror-related crimes committed within the sovereign territory of Iraq.¹¹⁸ The Supreme Court determined that American citizens held abroad by

standards provided by the *Boumediene* majority to guide the district court judges tasked to implement the Court’s decision There is little reason to be optimistic that the procedures and rulings emerging from those trials will be consistent with similar trials occurring in other federal district courts What does seem abundantly clear is that the Court’s most recent foray into foreign affairs has produced far more chaos when certainty is needed.”).

¹¹³ See generally *supra* note 112.

¹¹⁴ *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

¹¹⁵ *Id.* at 681-87.

¹¹⁶ *Id.* at 685-86.

¹¹⁷ The Court describes the MNF-I as:

[A]n international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of the United States military officers, at the request of the Iraqi Government, and in accordance with the United Nations (U.N.) Security Council Resolutions. Pursuant to the U.N. mandate, MNF-I forces detain individuals alleged to have committed hostile or war-like acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.

Id. at 679.

¹¹⁸ *Id.* at 681-87.

American forces were entitled to habeas review.¹¹⁹ However, rather than seek release in the traditional sense, the petitioners sought release into the United States to circumvent Iraqi criminal prosecution.¹²⁰ The government has come to characterize this form of release as “release-plus.”¹²¹ The Court held that, while the detainees were entitled to habeas review, the availability of a remedy was limited by the fact that the Iraqi government had a legitimate criminal proceeding pending against the petitioners.¹²² Even if release from the MNF-I was appropriate, it did not extend to a right to be protected from arrest and criminal prosecution by the Iraqi government.¹²³

B. Judicial and Political Challenges to Habeas Posed by Kiyemba

The *Kiyemba* petitioners were seventeen Uighurs from China’s Xinjiang Province who had traveled to Afghanistan and then to Pakistan prior to September 11, 2001.¹²⁴ They were subsequently captured by United States military in Pakistan during its military campaign in Afghanistan.¹²⁵ All seventeen had been held in Guantanamo Bay since 2002 on CSRT determinations made in 2004 that they were enemy combatants.¹²⁶ After *Parhat*

¹¹⁹ *Munaf v. Geren*, 553 U.S. 674, 684-86 (2008).

¹²⁰ *Id.* at 689. Omar and Munaf based their habeas petitions on two arguments: (1) that transfer to Iraqi custody would violate their due process rights as American citizens as well as the Foreign Affairs Reform and Restructuring Act of 1998; and (2) that their detention was unlawful under the Due Process Clause. *Id.* at 692. It is important to remember that in *Munaf*, the Supreme Court held that where there are alternative, legitimate reasons for the detention, even basic release may not be an appropriate remedy. *Id.* at 680 (“Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief The Government of Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq’s prison facilities have been destroyed, the MNF-I agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings.”).

¹²¹ Reply Brief for Appellants, *supra* note 23, at 1; Brief for the Respondents in Opposition, *supra* note 23, at 19.

¹²² *Munaf*, 553 U.S. at 689.

¹²³ *Id.*

¹²⁴ *Kiyemba v. Obama*, 555 F.3d 1022, 1023-24 (D.C. Cir. 2009).

¹²⁵ *Id.* at 1024.

¹²⁶ This was based primarily on the determination that the petitioners were members of the East Turkestan Islamic Movement (ETIM). *Id.* The ETIM is a Uighur independence movement that the State Department designated as a terrorist group in 2004. It is questionable whether it has legitimate ties with al Qaeda or the Taliban. *Id.* See generally Dana Carver Boehm, *China’s Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERK. J. MIDDLE E. & ISLAMIC L. 61 (2009). There is some evidence that the State Department only added the ETIM to its list of terrorist organizations as a diplomatic maneuver in order to gain China’s support in the war in Iraq. Corrected Brief of Petitioners-Appellees at 21, *Kiyemba I*, 555 F.3d 1022 (Nos. 08-5424,

v. Gates,¹²⁷ the government retracted that determination.¹²⁸ There, the D.C. Circuit Court determined that there was insufficient evidence linking the petitioner, Huzaifa Parhat, to the ETIM.¹²⁹ In fact, the court acknowledged that even if it had determined that Parhat was affiliated with the ETIM, that determination would be insufficient to sustain an enemy combatant status in light of the unreliability of the evidence linking the group to al Qaeda or the Taliban.¹³⁰ This finding was subsequently applied to all the *Kiyemba* petitioners.¹³¹

Following *Parhat*, the government conceded that the Uighurs' detention was unlawful.¹³² In *Kiyemba*, the government admitted that it no longer had a legal basis to hold the Uighurs.¹³³ Indeed, the D.C. Circuit Court agreed that the Uighurs may be entitled to release based on their habeas petition.¹³⁴ However, it also held that it did not have the authority to release the detainees into the

08-5425, 08-5426, 08-5427, 08-5428, 08-5429), 2008 WL 4809210. See Brief of Petitioners, *supra* note 32, at 6-7.

¹²⁷ *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008). See *Kiyemba I*, 555 F.3d at 1024.

¹²⁸ *Kiyemba I*, 555 F.3d at 1024; Corrected Brief of Petitioners-Appellees, *supra* note 126, at 21.

¹²⁹ *Parhat*, 532 F.3d. at 836.

¹³⁰ *Id.* The court stated:

The Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is "affiliated" with a Uighur independence group, and the further finding that the group was "associated" with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability. Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements.

Id.

¹³¹ *Kiyemba I*, 555 F.3d at 1024. See Corrected Brief of Petitioners-Appellees, *supra* note 126, at 20 n.21 ("[T]he parties acknowledge that there are no material differences between the individual Petitioners that the Court should be made aware of at this time . . . [T]he factual determination made by this circuit in *Parhat* will apply to all the Petitioners"); Letter from Elena Kagan, Solicitor Gen., U.S. Dep't of Justice, to Hon. William K. Suter, Clerk, Supreme Court of the United States (Feb. 19, 2010).

¹³² *Kiyemba I*, 555 F.3d at 1024.

¹³³ *Id.* Under the Convention Against Torture (which is codified in United States law as the Foreign Affairs Reform and Restructuring Act of 1998, section 2242), the United States may not transfer a prisoner "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, 2681-822 (1998) (codified 8 U.S.C. § 1231 (2006)). See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

¹³⁴ *Kiyemba I*, 555 F.3d at 1029.

United States nor could it overturn the government's transfer determinations.¹³⁵ This conclusion was based on the understanding that the court had no authority to intrude on the Executive's immigration authority,¹³⁶ which effectively precluded the court's ability to provide a meaningful remedy for release. The Uighurs sought release into the United States because the United States government could not legally return them to their home country of China on the basis of a high likelihood of torture upon their return.¹³⁷ Additionally, despite the Executive's attempts to find an alternative asylum destination, no other third-party countries were willing to receive them.¹³⁸ Political pressure from the Chinese government¹³⁹ and the Executive's prior determination that the Uighurs were enemy combatants¹⁴⁰ may have contributed to the government's inability to resettle them.

After the D.C. Circuit Court issued its opinion and while the petition for certiorari was pending, the Executive expressly recognized the troubling scenario that the continued detention of the *Kiyemba* petitioners posed. Defense Secretary Robert M. Gates concluded that it was "difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won't take any of them ourselves."¹⁴¹ Indeed, the Executive was poised to send as many as seven of the petitioners to the

¹³⁵ *Id.* at 1022.

¹³⁶ *Id.* at 1024.

¹³⁷ *Id.* The transfer back to China may constitute violations of American policy and international laws such as the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment and the Convention Relating to the Status of Refugees. Corrected Brief of Petitioners-Appellees, *supra* note 126, at 9.

¹³⁸ *Kiyemba I*, 555 F.3d at 1024; Corrected Brief of Petitioners-Appellees, *supra* note 126, at 9.

¹³⁹ Letter from Attorney Sabin Willett, Attorney, Ctr. for Constitutional Rights, to Robert M. Gates, Sec'y of Def., and Eric H. Holder, Attorney Gen. (Jan. 23, 2009), available at <http://ccrjustice.org/newsroom/press-releases/letter-about-uighurs-attorney-sabin-willett-secretary-defense-gates-and-atto> ("The Chinese government has actively undermined the State Department's efforts. It has successfully pressured nations both strong and weak not to take the Uighurs."). See Corrected Brief of Petitioners-Appellees, *supra* note 126, at 7.

¹⁴⁰ Corrected Brief of Petitioners-Appellees, *supra* note 126, at 9 ("By falsely labeling them as 'enemy combatants,' however, the Executive has effectively dissuaded other countries from accepting the Uighurs."). The government does not argue that the determination that the Uighurs were enemy combatants was erroneous. Reply Brief for Appellants, *supra* note 23, at 6.

¹⁴¹ *Proposed Budget Estimates for the Fiscal 2009 War Supplemental: Hearing before the S. Appropriations Comm.*, 111th Cong. (2009) (statement of Robert M. Gates, U.S. Sec'y of Def.).

United States in 2009.¹⁴² However, in response to the threat of such action, Congress attached a rider to the Supplemental Appropriations Act which prevented the use of defense funds to release any Guantanamo detainees into the United States.¹⁴³ Congress also passed two additional pieces of legislation restricting the ability of Guantanamo detainees to enter the United States.¹⁴⁴ The National Defense Authorization Act¹⁴⁵ granted Congress a substantial degree of control over such releases and a spending provision banned the Department of Homeland Security from effectuating such release.¹⁴⁶ The detainees' hope for release, therefore, turned again on the pending petition for certiorari.

By the time the Supreme Court granted certiorari in *Kiyemba* on October 2009, ten of the seventeen petitioners had been granted refuge and transferred; four to Bermuda and six to Palau.¹⁴⁷ The offer extended by Palau was qualified as being an offer for *temporary* relocation pending permanent resettlement without the hope of obtaining citizenship.¹⁴⁸ Six of the remaining seven petitioners were also given the opportunity to transfer to Palau, but declined.¹⁴⁹ Only one petitioner, Arkin Mahmud, had not received an offer of refuge from any country, prompting his brother and the five other petitioners to reject the offer from Palau.¹⁵⁰ A favorable decision by the Supreme Court seemed to be Arkin Mahmud's only hope of escaping his unlawful detention, until the Swiss government announced it would provide refuge for both Mahmud and his brother.¹⁵¹ The Supreme Court, deciding that the underlying facts of the case had changed because all of the petitioners had now received at least one offer of resettlement, vacated the D.C. Circuit Court decision and remanded the case to

¹⁴² See Julian E. Barnes, *U.S. Plans to Accept Several Chinese Muslims from Guantanamo*, L.A. TIMES, Apr. 24, 2009, available at <http://articles.latimes.com/2009/apr/24/nation/na-gitmo-release24>.

¹⁴³ Supplemental Appropriations Act, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920 (2009).

¹⁴⁴ National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, § 1041, 123 Stat. 2190, 2454 (2009); Department of Homeland Security Appropriations Act of 2010, Pub. L. 111-83, § 552, 123 Stat. 2142, 2177 (2009).

¹⁴⁵ Pub. L. 111-84, 123 Stat. 2190 (2009).

¹⁴⁶ Pub. L. 111-83, 123 Stat. 2142 (2009).

¹⁴⁷ Brief of Petitioners. *supra* note 32, at 20.

¹⁴⁸ Petitioner for Writ of Certiorari, *supra* note 34, at 6; Letter from P. Sabin Willet, Counsel for Petitioners, Bingham McCutchen LLP, to Hon. William K. Suter, Clerk, Supreme Court of the United States (Feb. 19, 2010).

¹⁴⁹ *Id.*

¹⁵⁰ Worthington, *supra* note 27.

¹⁵¹ *Id.*

allow the lower courts to make a determination in the first instance.¹⁵² The D.C. Circuit Court promptly reinstated its original decision, holding that regardless of *any* settlement offers (of lack thereof), the petitioners had “no right to be released into the United States.”¹⁵³ The remaining five petitioners, still detained at Guantanamo, have since filed a second petition for writ of certiorari.¹⁵⁴

The facts in *Munaf* and *Kiyemba* are vastly different. Yet, both sets of petitioners sought release-plus, and in both circumstances, the “plus” they sought was release into the United States. The courts’ reasoning for refusing such a remedy, however, is entirely distinguishable in each respective case. In *Munaf*, the immigration issue faced by the *Kiyemba* petitioners was absent since both *Munaf* petitioners had been American citizens.¹⁵⁵ In that case, denial of the “plus” factor turned on the fact that the petitioners were attempting to ride roughshod over an international obligation the United States had to hand over individuals who had committed crimes on Iraqi soil to Iraqi officials,¹⁵⁶ an analogous element that did not exist in *Kiyemba*.

Ultimately, the outcomes in *Munaf* and *Kiyemba* point to the overarching principle that courts may have the legal authority to hear a habeas petition, but are limited as to the allocation of relief. A desirable remedy may not be appropriate, particularly when the remedy sought is release-plus. However, it is unlikely that *Munaf* intended to preclude release-plus in *all* circumstances because doing so could potentially create unconstitutional suspension. With this in mind, the next issue that must be confronted is determining when restrictions on the effectiveness of release are appropriate and when they are not. *Munaf* serves as an example of the former, where limits on release are appropriate. *Kiyemba*, arguably, serves as an example of when such limits are inappropriate.

IV. IMMIGRATION IN HABEAS JURISPRUDENCE

It is well-established that the availability of habeas in the context of executive detentions is its most significant role.¹⁵⁷ “At

¹⁵² *Kiyemba v. Obama*, 130 S.Ct. 1235, 1235 (2010).

¹⁵³ *Kiyemba v. Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (per curiam).

¹⁵⁴ Petition for Writ of Certiorari, *supra* note 34.

¹⁵⁵ *Munaf v. Geren*, 553 U.S. 674, 679 (2008).

¹⁵⁶ *Id.* at 689

¹⁵⁷ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The scope of this Note is limited to

its historical core, the 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.”¹⁵⁸ A remedy is typically granted where the detention is unlawful; for executive detentions, that remedy has historically meant release.¹⁵⁹ *Munaf*'s relevance after *Boumediene* concerned the Supreme Court's interpretation of “release.” While *Munaf* is factually different from *Kiyemba*, it provided a window into the government's interpretation of what constitutes release. *Munaf* is also instructive in determining, ultimately, how release *should* be viewed as a constitutional matter.

The historical development of habeas corpus and the holding in *Boumediene* demonstrated first, that release is imperative to maintain the integrity of the writ¹⁶⁰ and second, that habeas corpus is a constitutionally-guaranteed right for certain individuals.¹⁶¹ These two principles support the argument that efforts to limit the availability of release as a habeas remedy should, in the very least, require a high degree of scrutiny. Indeed, in *Boumediene*, Justice Kennedy noted that there are instances of unlawful detention where release may not be appropriate.¹⁶² Therefore, in a limited set of circumstances the grant of release may not be constitutionally required. *Munaf* suggested that requests for release-plus go beyond what the Constitution requires. In *Kiyemba*, the government successfully argued that the detainees should be denied release into the United States based on *Munaf*'s release-plus analysis.¹⁶³ However, preclusion of functional release is arguably inappropriate there. In fact, this understanding of release-plus in *Kiyemba* may have been an unconstitutional

examining the availability of habeas corpus in Executive detentions, and not in its other form as a remedy for arbitrary detention by state government. The latter was, arguably, more “important” before the influx of terrorist-based detentions after September 11, 2001. FEDERMAN, *supra* note 81, at 165.

¹⁵⁸ *St. Cyr*, 533 U.S. at 301.

¹⁵⁹ See *supra* Part II; *Boumediene v. Bush*, 553 U.S. 723, 788 (2008).

¹⁶⁰ *Boumediene*, 553 U.S. at 788.

¹⁶¹ *Id.* at 732.

¹⁶² *Id.* at 779 (“[T]hough release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.” (citing *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 75 (1807) (where imprisonment is unlawful “the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed . . .”))). Like in habeas review of state detentions, remand may be a more appropriate remedy than release, where the executive detention may be unlawful under the basis of one charge but lawful under the basis of another.

¹⁶³ See *generally Kiyemba v. Obama*, 555 F.3d 1022, 1022 (D.C. Cir. 2009).

reading of the immigration laws that the court had relied on.

The government's argument in *Kiyemba* was based on *Shaughnessy v. Mezei*¹⁶⁴ and broad interpretations of *Boumediene* and *Munaf*.¹⁶⁵ The government's argument was twofold. First, the government relied on *Mezei* to ground the legal authority for excluding the *Kiyemba* petitioners from entering the United States.¹⁶⁶ Second, *Munaf* was used to reconcile the petitioners' right to release with their continued detention.¹⁶⁷

A. *Mezei and the Government's Immigration-Based Framework*

In *Mezei*, the Supreme Court held that the indefinite detention of a non-citizen on Ellis Island was not a "[deprivation] of any statutory or constitutional right."¹⁶⁸ The petitioner, Ignatz Mezei, was born in Gibraltar and lived in the United States for over twenty-five years.¹⁶⁹ He left to visit his dying mother in Romania but was denied entry to the country and attempted to return to the United States, only to discover that a change in immigration laws while he was abroad meant that he could no longer legally re-enter.¹⁷⁰ He was stuck on Ellis Island and attempts at resettling him failed miserably.¹⁷¹ The government argued that rather than viewing Mezei's confinement as detention, it should be construed as exclusion¹⁷²—the authority of which was, the government argued, based on well-founded legal foundations in United States immigration law.¹⁷³ The Court agreed.¹⁷⁴ Employing habeas corpus to order the release of Mezei into the United States, it argued, was an improper exercise of judicial discretion.¹⁷⁵ In *Kiyemba*, much like in *Mezei*, the government

¹⁶⁴ *Shaughnessy v. Mezei*, 345 U.S. 206, 215-16 (1953).

¹⁶⁵ Reply Brief for Appellants, *supra* note 23, at 6-19.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Mezei*, 345 U.S. at 215. See Reply Brief for Appellants, *supra* note 23, at 6.

¹⁶⁹ *Mezei*, 345 U.S. at 208.

¹⁷⁰ *Id.* ("That determination rested on a finding that respondent's entry would be prejudicial to the public interest for security reasons.").

¹⁷¹ *Id.* at 208-09.

¹⁷² Brief for the Petitioner at 12, *Shaughnessy v. United States ex rel. Mezei*, 195 F.2d 964 (2d Cir. 1952) (No. 139).

¹⁷³ *Id.* at 21.

¹⁷⁴ *Mezei*, 345 U.S. at 210 (citing *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)).

¹⁷⁵ *Id.* at 212 (holding that "the action of the executive officer under such authority is final and conclusive" and 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

argued that releasing the petitioners into the United States would amount to an unlawful intrusion into the authority of the political branches to exclude non-citizens from entering United States territory.¹⁷⁶

However, there are serious flaws with the government's *Mezei*-based argument. The government was correct in asserting that it was "unprecedented" to grant the courts authority to order the Executive to release detainees into the United States.¹⁷⁷ It is also true, however, that a *Kiyemba*-type situation is unprecedented. One of the glaring differences between the immigration analysis adopted in *Mezei* and the facts in *Kiyemba* is the nature of the detentions. First, in immigration cases, detainees voluntarily come under the jurisdiction of the United States government upon choosing to enter the country—this is simply the nature of *immigration*-based detentions. The Uighurs, in contrast, were captured in Pakistan and forcibly brought under the jurisdictional umbrella of the United States.¹⁷⁸ This is relevant to determine the source of the detainees' predicament, or how the detainees came under United States authority. This suggests that indefinite executive detention is less disconcerting when the situation is created by the detainee himself. The government recognized, despite its reliance on immigration-based analysis, that judicial review based on immigration laws is inappropriate.¹⁷⁹ Second, the government in *Mezei* determined that the plaintiff posed a threat to national security.¹⁸⁰ The same cannot be said for the petitioners in *Kiyemba*. While the petitioners were initially characterized as enemy combatants—and, therefore, national security threats—the government has since withdrawn support for that determination.¹⁸¹ Additionally, the government had not made any further allegations or arguments to that effect. This indicates the government conceded there was no legal basis for the indefinite detention of the Uighurs. By applying *Mezei* in the *Kiyemba* proceedings, the government ignored the significant elements that distinguish immigration-based detentions founded on the concept of exclusion from terrorist detentions. In light of the pronounced factual differences, that application is troubling.

Government.") (quoting *Knauff*, 338 U.S. at 543).

¹⁷⁶ Reply Brief for Appellants, *supra* note 23, at 7.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

¹⁷⁹ Reply Brief for Appellants, *supra* note 23, at 9.

¹⁸⁰ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953).

¹⁸¹ *Kiyemba*, 555 F.3d at 1024.

B. Munaf and the Government's Understanding of "Release"

In addition to its immigration-based analysis, the government interpreted *Boumediene* narrowly and *Munaf* broadly to support the argument that the *Kiyemba* petitioners had been *legally* released, despite their continued detention.¹⁸² According to the government, *Munaf* supported the argument that “the Government retains the sovereign authority, independent of the authority to detain enemy combatants, to hold petitions incident to barring them from the United States, and pending efforts to resettle them elsewhere.”¹⁸³ This was a *Mezei*-type argument and an effort by the government to extend it to terrorist-based detentions, which it successfully did. As the government would have it, *Boumediene*'s emphasis on the constitutional importance of release had been met in *Munaf* and the D.C. Circuit Court's decision in *Kiyemba*. The government analogized the *Kiyemba* petitioners' request to be released into the United States to the *Munaf* petitioners' request for release as well as an injunction protecting them from the possibility of criminal prosecution.¹⁸⁴ Accordingly, the government argued that the *Kiyemba* petitioners had already been “released,” and merely needed appropriate resettlement.¹⁸⁵ Alternatively, as the government distinguished in *Mezei*, the *Kiyemba* petitioners were no longer being “detained” but were simply being excluded from the United States.¹⁸⁶ It seems “release” becomes a mere status determination rather than functionally serving as relief from unlawful detention, since the detention, for all intents and purposes, is continuing. *Munaf* was, indeed, the first limitation of the writ's remedial application after *Boumediene* had so largely expanded its scope.¹⁸⁷

The government's arguments are seemingly driven by its desire to maintain control over an area of law which it has traditionally regulated, that is, the determination of which individuals may or may not enter the United States. That goal is arguably justified. However, it must still be reconciled with the fact that the “Great Writ” is one of the most important checks the

¹⁸² Reply Brief for Appellants, *supra* note 23, at 13.

¹⁸³ *Id.* at 13.

¹⁸⁴ *Id.* at 14.

¹⁸⁵ *Id.* at 18. *See id.* at 18 n.6.

¹⁸⁶ *Id.* at 14.

¹⁸⁷ *See* Jeffrey H. Fisher, *Detainee Transfers after Munaf: Executive Deference and the Convention Against Torture*, 43 GA. L. REV. 953 (2009).

courts have on arbitrary executive detention.¹⁸⁸ By using immigration to limit the writ's functional application, the government is severely limiting the ability of courts to protect the liberty interests of detainees.

V. AN ALTERNATIVE APPROACH: THE FUNCTIONAL RELEASE THESIS

It seemed the Supreme Court, in *Boumediene*, had the goal of creating a constitutional regime for the application of habeas review. Human rights organizations have since labeled that intended result a “myth” after the D.C. Circuit Court issued the *Kiyemba* decision.¹⁸⁹ While the government in *Kiyemba* did not explicitly concede to such, it did not contend that detainees, who are constitutionally entitled to habeas, also have a right to release if it has been determined their detention is unlawful.¹⁹⁰ It did argue, however, that release as it was guaranteed by habeas corpus was different from the release that the petitioners sought.¹⁹¹ Because *Kiyemba* posed a traditional example of *unlawful* executive detention, the appropriate remedy should logically conform to the traditional approach—namely release. For habeas to be meaningful, indeed for the courts' role in national security to be meaningful, the courts must be able to order functional release—even if it means release into the United States. This alternative approach is necessary for two overarching reasons. First, as a general principle of the courts' role in the United States' tripartite form of government, the erosion of the judiciary's authority to issue meaningful remedies through habeas review is alarming given the ability of the Executive to unilaterally authorize indefinite detentions of constitutionally-protected individuals. This concern, left largely unaddressed in the first petition for writ of certiorari, is addressed with greater and more explicit force in the new petition.¹⁹² Second, the aforementioned executive authority, for all the sweeping power it entails, rests on incredibly shaky legal foundations, namely immigration

¹⁸⁸ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). See FEDERMAN, *supra* note 81, at 165.

¹⁸⁹ AMNESTY INTERNATIONAL, JUDICIAL REVIEW AND REMEDY STILL MORE A MYTH THAN REALITY FOR GUANTANAMO DETAINEES (2009), <http://www.amnesty.org/en/library/asset/AMR51/051/2009/en/9bfb2eb-32fd-4af3-b1b8-6f55e0180c53/amr510512009eng.pdf>.

¹⁹⁰ See generally Reply Brief for Appellants, *supra* note 23.

¹⁹¹ *Id.* at 18 n.6.

¹⁹² See Petition for Writ of Certiorari, *supra* note 34, at 11-14.

jurisprudence.

To implement an alternative approach, however, would necessitate reconciliation between two conflicting considerations. First, habeas is only as meaningful as the availability of release—this is the habeas paradigm. Within the habeas framework are two seemingly opposing forces: the *Munaf* limitations on release, and the concept of functional release. Second, the executive branch has traditionally held near-absolute control over who may be excluded from entering the United States—this is the immigration paradigm. The immigration framework, much like its habeas counterpart, also requires acknowledgement of two conflicting analyses. There is the *Mezei* analysis, which held that the United States government had the authority to exclude anyone from its territory. There is also the *Zadvydas* and *Clark* analysis which, as will be discussed, argued against the possibility of indefinite detention even in the context of immigration.

In *Kiyemba*, the government's approach to reconciling these two paradigms was to interpret *Munaf* as limiting the availability of release-plus, and to use *Mezei* and the immigration paradigm as the legal basis for excluding the *Kiyemba* petitioners from the United States. In other words, in balancing the two paradigms, the government found a greater interest in preserving executive authority over immigration. Given the problematic application of *Mezei* as the framework for this immigration-based argument, the government's approach is both unconvincing and troubling. Giving courts the unlimited ability to order release into the United States may not be a desirable remedy in all cases, but there must, at the very least, be exceptions to that general rule. Such an exception should be applied in *Kiyemba*.

The primary concern, noted earlier, is that the government's application of immigration law in *Kiyemba* may be more than inappropriate; it may be unconstitutional. In *Boumediene*, the Supreme Court held that because the Guantanamo detainees were entitled to habeas review, limitations contained in the MCA on the Court's ability to issue such a writ violated the Suspension Clause and were therefore unconstitutional.¹⁹³ The D.C. Circuit Court, in *Kiyemba*, held that the Uighurs were legally entitled to habeas review, but also asserted that their request to be released into the United States was not constitutionally guaranteed.¹⁹⁴ Therefore, in order for the *Kiyemba* holding to be deemed unconstitutional, the

¹⁹³ *Boumediene v. Bush*, 555 U.S. 723, 771 (2008).

¹⁹⁴ *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009).

refusal to grant functional release would have to amount to a de facto suspension of habeas corpus. To arrive at such a conclusion, there needs to be a nexus connecting *Boumediene*'s holding with the requirement that courts be allowed to issue orders of functional release where appropriate—this would link the constitutional guarantee of habeas with the availability of release as a remedy. Indeed, as the analysis in Part II demonstrated, there is a historical nexus linking the writ with the availability of release stemming from the legal traditions of Great Britain and the United States. Therefore, it is logical to conclude that precluding the courts from ordering an unlawfully detained prisoner to be released is, effectively, a suspension of the writ of habeas corpus. However, this conclusion runs in direct contravention to *Munaf*'s release-plus analysis and the immigration paradigm.

Limiting the availability of release-plus, as a general proposition, is not particularly problematic—especially given the *Munaf* context. Yet, there are undesirable consequences in making release-plus unavailable to the *Kiyemba* petitioners. It is necessary, therefore, to distinguish between the “plus” that was sought in *Kiyemba* from that in *Munaf*. *Zadvydas* helps in making that distinction.

A. *Zadvydas* and an Alternative View of Immigration in *Kiyemba*

As a sub-category of foreign relations, immigration is an area of law where the Executive has traditionally established itself as the final authority—much like national security.¹⁹⁵ Classic immigration cases have regularly held that the Executive's authority to exclude is both exclusive and absolute.¹⁹⁶ However, in *Zadvydas v. Davis*, the Supreme Court conditioned that exclusivity on liberty interests and reasonableness grounds.¹⁹⁷ There, the

¹⁹⁵ See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction”); *Chae Chan Ping v. U.S.*, 130 U.S. 581, 603-604 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”).

¹⁹⁶ See *id.*

¹⁹⁷ *Zadvydas v. Davis*, 533 U.S. 678, 690-91, 695-96 (2001).

Executive ordered the removal of resident non-citizens.¹⁹⁸ A provision in the Immigration and Nationality Act (INA) created a 90-day removal period during which the non-citizens were to be held pending removal.¹⁹⁹ The Executive was unable to remove the non-citizens within the ninety day period, after which they filed a habeas petition seeking release.²⁰⁰ The Court held that because continued detention was “potentially permanent,”²⁰¹ and therefore undesirable, the judiciary’s role was to determine the reasonable likelihood of securing removal.²⁰² In making that determination, courts have the authority to decide when a reasonably sufficient period of time has passed.²⁰³ If a court indeed finds that the Executive has detained non-citizens beyond a reasonable period, the court must carry out its “historic purpose”²⁰⁴ and order a conditioned release of the non-citizens.²⁰⁵ The Court did recognize that it was intruding on an area traditionally within the sole province of the Executive.²⁰⁶ Indeed, it pointed out that immigration law is most efficiently addressed by the executive branch.²⁰⁷ However, the Court concluded that the government’s interest was sufficiently protected by creating a “presumptively reasonable period of detention” which would limit when the courts are entitled to act.²⁰⁸ Ultimately, it decided that six months was a reasonable period for which to hold an alien pending removal.²⁰⁹ The Court reaffirmed and subsequently extended this analysis in *Clark v. Martinez* by applying it to inadmissible non-citizens.²¹⁰

If it is, in fact, proper to apply the immigration detention framework to terrorist detentions,²¹¹ then *Kiyemba* is more appropriately analogized to *Zadvydas* than to *Mezei*. Ignatz Mezei was resident non-citizen who was barred from re-entering the

¹⁹⁸ *Id.* at 682.

¹⁹⁹ 8 U.S.C. § 1231(a)(6) (1994).

²⁰⁰ *Zadvydas*, 533 U.S. at 684-85.

²⁰¹ *Id.* at 691.

²⁰² *Id.* at 696-97.

²⁰³ *Id.* at 699.

²⁰⁴ *Id.* (quoting *Brown v. Allen*, 344 U.S. 443, 533).

²⁰⁵ *Zadvydas*, 533 U.S. at 699.

²⁰⁶ *Id.* at 700-01.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 701.

²¹⁰ *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

²¹¹ See *Petition for Writ of Certiorari*, *supra* note 34, at 21 (arguing that immigration law was improperly applied because petitioners did not attempt to enter the United States or apply for immigration status).

United States and detained at Ellis Island.²¹² By staying abroad for eighteen months, Mezei had violated a statute that required resident aliens to return from any trips abroad within a year, thereby relinquishing his right to be in the United States.²¹³ Furthermore, the Supreme Court determined that Mezei's detainment at Ellis Island did not serve the purpose of "entry" into the United States, and characterized his hearing as an exclusion proceeding and not a deportation.²¹⁴ That is to say, the Court was distinguishing between one who had "passed through our gates"²¹⁵ and one "on the threshold of initial entry."²¹⁶ The petitioners in *Zadvydas* were considered within the former category. In that case, petitioners were resident non-citizens who were in deportation proceedings, as opposed to exclusion proceedings.²¹⁷ In *Clark*, the petitioners were Cuban refugees seeking to adjust their status to lawful permanent residents, but became inadmissible because of criminal convictions.²¹⁸ They, too, were considered in the former category. As a practical matter, this meant that the *Zadvydas* and *Clark* petitioners were entitled to greater constitutional and statutory protections that were not available to Mezei.²¹⁹

Therefore, the petitioners' liberty interests turned primarily on the nature of their detainment and less with their right to be in the United States. The two immigration concepts being represented in these cases are *exclusion* and *deportation*, where the former represents removal of an individual who has not yet "entered" the United States, and the latter represents the removal of an individual who has.²²⁰ Mezei was detained while attempting to re-enter the United States in violation of a statute,²²¹ whereas the *Zadvydas* and *Clark* petitioners were already within the United States for immigration purposes.²²² The primary difference was the right at issue—Mezei had no right to be in the United States, whereas deportation meant that the *Zadvydas* and *Clark* petitioners' right to be in the United States was being revoked.

²¹² *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208-09 (1953).

²¹³ *Id.*

²¹⁴ *Id.* at 213.

²¹⁵ *Id.* at 212.

²¹⁶ *Id.*

²¹⁷ *Zadvydas*, 533 U.S. at 684-85.

²¹⁸ *Clark*, 543 U.S. at 374.

²¹⁹ *Mezei*, 345 U.S. at 215-16.

²²⁰ *See generally* 8 U.S.C. § 1229(a) (2006).

²²¹ *Mezei*, 345 U.S. at 208.

²²² *Zadvydas*, 533 U.S. at 684; *Clark*, 543 U.S. at 374.

The difficulty with analogizing *Kiyemba* to these cases is that the petitioners do not fall under either of those characterizations. Regardless of whether the *Kiyemba* petitioners were captured at the “gates” or beyond them, the fact that they were forced into the jurisdiction of the United States is relevant,²²³ given the Court’s emphasis on the underlying rationale for the detention. *Mezei* was attempting to re-enter the country in violation of the law and was considered a national security threat.²²⁴ This is in contrast with the *Zadvydas* petitioners who posed no such threat and were in the United States lawfully.²²⁵ The Court even extended the remedial protections of habeas review to the petitioners in *Clark* despite their unlawful presence.²²⁶ The Court allowed their release into the United States solely on the basis of their indefinite detention.

Furthermore, as the *Kiyemba* petitioners pointed out, the concern in *Mezei* that the United States would be forced to take in foreigners once they “sailed past [our] horizon” is not pertinent because it was the Executive that ordered them here.²²⁷ Indeed, it seems that while *Mezei* supported broad executive authority over immigration, it did not sanction broad detention authority.²²⁸ This is particularly true when viewed in light of the decision in *Zadvydas* and *Clark*—both suggested that liberty interests trump immigration authority under certain circumstances. *Kiyemba*, therefore, is arguably more comparable to *Zadvydas* and *Clark* because the liberty interests of the *Kiyemba* petitioners were stripped when they were “shackled” and delivered into United States jurisdiction.²²⁹

In *Kiyemba*, the government was correct in pointing out that *Zadvydas* and *Clark* relied on the interpretation of a statute that did not apply in the present case.²³⁰ However, the absence of an applicable statute is irrelevant. What these two cases revealed was a preference for the liberty interests of an individual subject to indefinite detention over an inflexible immigration framework regardless of that statute.

²²³ Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L. J. 1, 17, 30 (2009).

²²⁴ *Mezei*, 345 U.S. at 208-209.

²²⁵ *Zadvydas*, 533 U.S. at 684.

²²⁶ *Clark*, 543 U.S. at 378.

²²⁷ Corrected Brief of Petitioners-Appellees, *supra* note 126, at 33.

²²⁸ *Id.*

²²⁹ *Id.* See Roberts, *supra* note 223, at 23.

²³⁰ Reply Brief for Appellants, *supra* note 23, at 5.

B. Reconciling This Alternative Approach with Munaf

There are three elements that must be taken into account in concluding that the *Kiyemba* petitioners were entitled to functional release. First, the illegality of the detainee's detention had been determined. This factor is derived from the traditional application of habeas relief, i.e. release, in the context of executive detentions discussed in Part II.B. Second, the liberty interests of a detainee being indefinitely held trump the interests the government has in maintaining absolute control over its borders. This principle is illustrated in *Zadvydas*.²³¹ Finally, and most important, the maintenance of the integrity of habeas corpus is dependent on the *meaningful* opportunity for release—that is, functional release. This concept is derived from the historical development of the writ and the subsequent holding in *Boumediene* which emphasized the application of the writ as the primary check the courts have on the Executive in terrorist detentions.²³²

In applying this three-pronged framework, *Munaf's* limitations on release-plus can be reconciled with the release of the *Kiyemba* petitioners. Such an analysis would require insight into: (1) the nature of the detention; (2) the nature of the interests involved; and (3) the constitutional sufficiency of the relief applied.

First, the petitioners in *Munaf* did not argue that their detentions were substantively unlawful.²³³ They contended that their detention was unlawful on procedural grounds, but made no argument that they were innocent of the crimes alleged against them.²³⁴ Whereas in *Kiyemba*, the government had already conceded that the petitioners were being unlawfully detained.²³⁵ This conclusion would suggest that detentions with substantive infirmities are more abhorrent than those with only procedural ones. Perhaps this distinction made the refusal to grant “release” in *Munaf*²³⁶ more acceptable in the context of habeas review.

²³¹ *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

²³² *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

²³³ *Munaf*, 553 U.S. at 692.

²³⁴ *See id.*

²³⁵ *Kiyemba*, 555 F.3d at 1024.

²³⁶ Omar and Munaf were not necessarily seeking “release” in the traditional sense—that is, they sought to avoid Iraqi custody through an injunction and not necessarily absolute release from custody in general. Additionally, though they do argue that their detention is unlawful, they make that argument on procedural grounds. *Munaf*, 553 U.S. at 692.

Indeed, the *Munaf* petitioners were seeking to avoid the likely detention by Iraqi officials.²³⁷

The second prong is to examine how the liberty interest of the *Munaf* petitioners balanced against the government interest at issue. *Kiyemba* is instructive in determining the outcome of the second element. As the prototypical situation where functional release is most desirable, it presents relevant factors that should be taken into account when deciding the appropriateness of that release. The first factor is the assumption that the detainee is being unlawfully held—which, as it has already been concluded, is present in *Kiyemba*. Additionally, reasonable application of legal remedies short of release into the United States should be exhausted. This factor is derived from the lengthy resettlement process the *Kiyemba* petitioners had been subjected to and the limitations created by the reasonableness analysis in *Zadvydas*. Determining when legal remedies have sufficiently been exhausted may present separate problems, such as deciding when the government should give up on pending resettlements efforts with third-party countries. Here, there may be value in putting a timeframe on when the detention should cease regardless of resettlement efforts—as the Court did in *Zadvydas*.²³⁸ If the timeframe analysis were applied to the *Kiyemba* petitioners, it is likely a court would find that the unlawful detentions had well exceeded any reasonable limit that would be placed on resettling them since they had been held unlawfully since 2002—especially given that the timeframe given in *Zadvydas* was only six months.²³⁹ In the case of non-citizens, the presumption that the detainees do not voluntarily enter United States jurisdiction, while not dispositive, is at the very least relevant. In contrast, relevant government interests may include possible national security risks that may exist short of justifying military detention. Others may include social costs²⁴⁰ or other non-legal considerations that might

²³⁷ *Id.* at 702-04.

²³⁸ *Zadvydas*, 533 U.S. at 701. *But see id.* (“This six-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”).

²³⁹ *Zadvydas*, 533 U.S. at 701.

²⁴⁰ E.g., housing, transportation, employment, healthcare, etc. However, in *Kiyemba* specifically, refugee resettlement programs have voiced their willingness to take responsibility for such costs should the Uighurs be released into the United States. Brief of Amicus Curiae, Uyghur American Association in Support of Brief of Petitioners at 17, *Kiyemba I*, 555 F.3d 1022 (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429), 2009 WL 1304718.

make release of the detainee in the United States undesirable.²⁴¹

The government interest in *Kiyemba* was its immigration authority, which *Zadvydas* indicated was a flexible one.²⁴² In *Munaf*, however, the government interest was twofold: its international obligations as well as preserving comity between the United States and a foreign sovereign's ability to legitimately conduct its own criminal prosecutions.²⁴³ Based on these conclusions, it would seem that the *Munaf* petitioners' habeas appeal is derived from a weaker legal basis than the *Kiyemba* petitioners'. While the government interests were not necessarily analogous, there is, at the very least a legal foundation supporting the proposition that indefinite detention is not a desirable alternative to maintaining immigration authority—this is derived from *Zadvydas*.²⁴⁴ Therefore, the “plus” that the *Kiyemba* petitioners were seeking is far more analogous to *Zadvydas* than it is to *Munaf*, and one that the Supreme Court has held can be appropriately applied.²⁴⁵

Third, and finally, is the constitutional sufficiency of the relief applied. As history has demonstrated, among the courts' primary roles and duties in the constitutional scheme is to provide a check against unlawful imprisonment.²⁴⁶ Where, as in this case, non-citizen detainees are held unlawfully and indefinitely it cannot be said that the duty of the habeas court has been constitutionally fulfilled. This is a situation wholly distinct from *Munaf*. Habeas corpus, as a mechanism against unlawful executive detention, cannot be relegated as merely a procedural instrument. In order for it to function as an offensive writ against intrusions into the liberty interests of individuals and thereby adequately perform its

²⁴¹ Arkin Mahmud, one of the *Kiyemba* petitioners, suffers from severe mental health issues. See Editorial, *The Meaning of Freedom*, WASH. POST, Sept. 29, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/09/28/AR2009092803062.html> (“Arkin Mahmud, who since his detention and prolonged solitary confinement at the naval base has suffered from serious mental health problems.”). Whether the mental, emotional, or physical state of a detainee is a relevant, or even an appropriate element, is arguable. However, it is, nevertheless, helpful to glean from the facts in *Kiyemba* certain factors that the government may deem important in assessing its overall interest in allowing the detainees to enter the United States. Mahmud has since found asylum in Switzerland. Rebecca Crootof & Oona A. Hathaway, *Hear the Uighurs: The Critical Guantanamo Case the Supreme Court Should Not Duck*, SLATE, Feb. 17, 2010, <http://www.slate.com/id/2245024>.

²⁴² *Zadvydas*, 533 U.S. at 701.

²⁴³ *Munaf*, 553 U.S. at 692.

²⁴⁴ *Zadvydas*, 533 U.S. at 701.

²⁴⁵ *Id.*

²⁴⁶ See generally *supra* Part II.B.

constitutional mandate, it must carry with it the weight of authority to substantively grant functional release. Without the ability to order functional release, the habeas courts would be rendered powerless.

C. Lingerin Concerns

Yet, skepticism about this form of “balancing” test remains,²⁴⁷ particularly as it pertains to a challenge to the Executive’s war powers²⁴⁸ and also to the strength and source of the liberty interests that supposedly counterbalance it.

In *Hamdi v. Rumsfeld*,²⁴⁹ Justice O’Connor applied the *Mathews* Test,²⁵⁰ holding that the procedures used in determining a detainee’s status were constitutionally insufficient.²⁵¹ Indeed, the test proposed in this Note is similar to that espoused in *Mathews*, where the Supreme Court determined that the amount of due process required should be based on a balance of private interests, government interests, and the risk of erroneous deprivation.²⁵² It is also the test that Justice Thomas, in his *Hamdi* dissent, regards as inappropriately applied to terrorist detentions.²⁵³ There are traditional concerns associated with balancing tests such as quantifying factors that cannot be quantified without a degree of arbitrariness (e.g., establishing a *reasonable* timeframe for resettling detainees).²⁵⁴ Moreover, because the Fifth Amendment has not yet extended to Guantanamo detainees,²⁵⁵ a balancing test, traditionally grounded in liberty interest derived from due process rights is arguably inappropriate on those grounds. While that

²⁴⁷ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987).

²⁴⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (Thomas, J., dissenting) (“I do not think that the Federal Government’s war power can be balanced away by this Court.”).

²⁴⁹ *Id.* at 507.

²⁵⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

²⁵¹ *Hamdi*, 542 U.S. at 532-33.

²⁵² *Mathews*, 424 U.S. at 335.

²⁵³ *Hamdi*, 542 U.S. at 579.

²⁵⁴ *Zadvydas*, 533 U.S. at 701. See Aleinkioff, *supra* note 216, at 992-93.

²⁵⁵ *Kiyemba*, 555 F.3d at 1026 (stating that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”).

argument is dubious given *Rasul* and *Boumediene*,²⁵⁶ the issue can be countered with the inherent liberty interests that are created by a right to the writ of habeas corpus, at least insofar as it pertains to an individual interest against unlawful detentions. It would be difficult to argue that the private interests created by that right are less deserving of consideration against government interests than are those created by the Fifth Amendment.

Additionally, there are ever-present concerns surrounding separation of powers. The degree to which the Court is concerning itself with foreign relations issues is unprecedented,²⁵⁷ which means any application of a balancing test would be usurping powers of the political branches that were traditionally exercised without the possibility of judicial participation. There is a general hesitation in potentially augmenting the courts' authority in terrorist detentions.²⁵⁸ Yet, separation-of-powers concerns must be reconciled with the opposing, though equally compelling, counter-part—our government's system of checks and balances. Since the ideal of our tripartite government system is one where areas of authority are clearly defined, an augmentation of jurisdiction by the courts may seem suspicious. However, the idea of an unchecked Executive with the authority to indefinitely detain individuals (who the government itself has determined have no legal basis for detention) is equally, if not more so, disquieting. Moreover, the historical role of habeas courts as the final arbiter of a detention's legality provides a legitimate counter-argument that it is in fact the Executive that is intruding upon the judiciary's traditional authority.²⁵⁹ It does so by appropriating itself as the sole source of a functional remedy, thereby interfering with the courts' habeas authority.

There are also criticisms not that the judiciary should not be involved with terrorist detentions, but that the means in which its role is justified should not rely on immigration law.²⁶⁰ There is a valid concern in applying immigration law since it frames the issue

²⁵⁶ See Petition for Writ of Certiorari, *supra* note 34, at 26.

²⁵⁷ The Court typically deferred to the political branches in these matters. See *supra* note 3.

²⁵⁸ See *Boumediene v. Bush*, 553 U.S. 723, 831 (2008) (Scalia, J., dissenting) (“[A]s today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails”); Fahy, *supra* note 112, at 210 (“What does seem abundantly clear is that the Court’s most recent foray into foreign affairs has produced far more chaos when certainty is needed.” (referring to *Boumediene*)).

²⁵⁹ Petition for Writ of Certiorari, *supra* note 34, at 14.

²⁶⁰ Roberts, *supra* note 223, at 30.

in the immigration context—which means the Executive presumptively has the right to prevent Guantanamo detainees from entering the United States. In a sense, by framing it in the immigration context, it creates precedent for establishing greater obstacles in remedying unlawful detentions. However, this criticism is addressed by the fact that diplomatic resettlements should be the ideal remedy, and where entry into the United States would serve as a last resort. The emphasis should not be on the augmentation of judicial authority in terrorist detentions; rather, the emphasis should be on creating a framework for terrorist detentions where the detainees' liberty interests are adequately protected.

VI. CONCLUSION

Nearly ten years after September 11, 2001, the maxim that the United States is fighting a new type of war has become deeply engrained in our political culture.²⁶¹ Debates concerning how our government must combat this new terrorist enemy are ongoing. It is in this current of change that the courts find themselves in areas of law they have traditionally left to the political branches. This Note does not contend that the courts should intrude on long-established practices and understandings of the role of the Executive or of Congress, but rather that there are circumstances where the courts *must* be given the authority to act. The courts must have the authority to compel the Executive to act in circumstances where individual liberty is stripped away without legal bases, and where the Executive is either unable or unwilling to act. The legal foundation on which the courts rest this authority is neither novel nor cursory, but well founded in the British and American legal tradition of the writ of habeas corpus. The decision by the D.C. Circuit Court in *Kiyemba* to curtail the effectiveness of the writ in the very circumstances it was designed to correct is a step backward in the development of the judiciary's necessary role in terrorist detentions.

Indeed, *Kiyemba* presented a paradox in which it seemed there was no possible solution except indefinite detention. Yet, as this Note demonstrates, there are alternatives to the D.C. Circuit

²⁶¹ See generally BRUCE HOFFMAN, *INSIDE TERRORISM* (2006); LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11* (2007); JOHN ROBB, *BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION* (2007); MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* (3d ed. 2003).

Court's conclusion in *Kiyemba*. While a balancing test is certainly not the only means by which that decision might be corrected, its importance lays in the implication that individual freedom and the right from arbitrary detention should not rely on the unilateral authority of the Executive.