No. 08-1234

In the Supreme Court of the United States

JAMAL KIYEMBA, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Petitioners are aliens who were previously held in military detention at Guantanamo Bay Naval Base in an enemy status and who are now in custody at Guantanamo Bay in a non-enemy status. Because petitioners reasonably fear torture if returned to their home country, the United States government has engaged in extensive diplomatic efforts to locate appropriate alternate countries for their resettlement. All petitioners have either been resettled in other countries or received offers of resettlement.

The question presented is whether the federal courts, exercising habeas corpus jurisdiction, may properly order the United States government to bring petitioners into the United States for release, in contravention of the federal immigration laws and specific statutory bars on their entry.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 555 F.3d 1022. The opinion of the district court (Pet. App. 38a-61a) is reported at 581 F. Supp. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. The petition for a writ of certiorari was filed on April 3, 2009, and granted on October 20, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

Petitioners are individuals who previously were held in military detention as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba. After petitioners filed for writs of habeas corpus, the government concluded that it would no longer seek to hold them as enemy combatants. Petitioners then asked the district court to issue an order requiring the Executive to bring them to and release them in the United States. The district court issued that order, mandating that the Executive take action contrary to federal immigration laws. The court of appeals reversed, explaining that, although petitioners are entitled to release from military detention, their habeas remedy does not extend to an order that would override the immigration laws and the judgment of the political Branches.

The resettlement of petitioners following their habeas release orders has posed unique challenges, but the government's efforts have met with substantial success. The petitioners are members of the Uighur ethnic group in China, who reasonably fear torture if they are returned there. Consistent with established policy, the United States has committed not to return them to China. The government has engaged in sustained diplomatic efforts to locate appropriate alternate countries for resettlement. Of 22 Uighurs originally at Guantanamo Bay, five were resettled in Albania while this case was before the district court, and 10 have been resettled in Bermuda and Palau since that time. On February 3, 2010, the government of Switzerland agreed to accept for resettlement two additional Uighurs, whose transfer is now being planned. The remaining five Uighurs at Guantanamo Bay have each previously received offers of resettlement from two different countries. In short, all

of the Uighurs ever detained at Guantanamo Bay have either resettled in other countries or received offers of resettlement.

1. The situation involving the Uighurs arises in the broader context of military detention at Guantanamo Bay. In Executive Order No. 13,492, issued on January 22, 2009, 74 Fed. Reg. 4897 (E.O. 13,492), the President stated that approximately 800 individuals had been detained as enemy combatants for some period at Guantanamo Bay. *Id.* § 2(a). As a result of the prior Administration's efforts, the President reported, more than 500 of those individuals had been returned home or been resettled in another country. *Ibid.*

The President determined that the "significant concerns" raised by the remaining detentions at Guantanamo Bay justified a focused effort to review the status of each person in military detention there. E.O. 13,492 § 2(b). Accordingly, the President directed Executive Branch officials to undertake "a prompt and thorough review" of each detainee in order to determine whether transfer, release, prosecution, or other disposition of the individual was consistent with the national security and foreign policy interests of the United States and the interests of justice. *Id.* preamble, §§ 1(c), 2(d), 3. And for those individuals whom the review determined should be returned home or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5.

In accordance with the President's directive, the Attorney General formed an interagency Task Force composed of representatives of the Departments of Justice, Defense, State, and Homeland Security, and the Offices of the Director of National Intelligence and the Joint

Chiefs of Staff. See E.O. 13,492 § 4. The Task Force and an interagency Review Panel charged with making decisions based on the Task Force's recommendations have completed the work of reviewing each detainee's status.

In addition, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer. Since accepting his appointment, Ambassador Fried has regularly traveled abroad to meet with representatives of other nations and discuss transfers of Guantanamo Bay detainees. He has focused his efforts on resettling detainees whom the United States could not send to their home countries because of concerns about possible torture.

These efforts have borne fruit. In the past year, 48 individuals have been transferred from Guantanamo Bay to third countries. Detainees have been accepted by Belgium, Bermuda, France, Hungary, Ireland, Palau, Portugal, Slovakia, and Switzerland, in addition to their home countries. Of the 192 persons still held in military custody at Guantanamo Bay, 78 have been approved for transfer, and the United States is engaged in ongoing diplomatic negotiations to repatriate or resettle them.[1]

2. Petitioners are Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority in the far-western region of China. Pet. App. 1a-2a.[2]

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[1] A significant number of detainees approved for transfer are from Yemen. On January 5, 2010, the President suspended any transfers from Guantanamo Bay to Yemen. See *Remarks by the President on Security Reviews* (Jan. 5, 2010) <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>.

[2] Jamal Kiyemba and Ibrahim Mamet, named in the petition as next friends, are not Uighur detainees. C.A. App. 447.

Prior to September 11, 2001, petitioners traveled to Afghanistan, where Uighur camps had been established in the Tora Bora mountains. *Id.* at 2a. After the onset of hostilities in Afghanistan, petitioners were captured by Pakistan or coalition forces, transferred to U.S. military custody, and brought to the Guantanamo Bay Naval Base for detention under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. 1541 note). Pet. App. 2a, 41a; see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2240-2241 (2008). In all, 22 Uighurs were brought there. J.A. 25a.

At Guantanamo Bay, all 22 Uighur detainees were given hearings before Combatant Status Review Tribunals (CSRTs) to determine whether they should be retained in military detention. Pet. App. 2a. For 17 of the 22 Uighur detainees, a CSRT issued a final determination that the record supported continued detention. See *id.* at 2a-3a. Fourteen of the 17 are petitioners in this Court, and the remaining three are respondents supporting the petitioners.[3] The CSRTs determined that the other five Uighur detainees, who are not petitioners or otherwise parties to the proceedings in this Court, should no longer be considered enemy combatants. See *Qassim* v. *Bush*, 407 F. Supp. 2d 198, 199 & n.1 (D.D.C. 2005). The government resettled those five individuals in Albania in May 2006. See Notice of Transfer of Pet'rs at 1, *Mamet* v. *Bush*, No. 05-1886(EGS) (D.D.C. May 5, 2006).

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[3] After the petition was filed, three Uighurs who were parties in the district court and court of appeals, but were not included as petitioners in this Court, Pet. ii n.2, filed a letter with this Court stating that they "wish to remain Petitioners" in this Court. Those three individuals—Abdul Sabour, Khalid Ali, and Sabir Osman—should be considered respondents pursuant to Supreme Court Rule 12.6.

3. Habeas petitions were filed challenging the lawfulness of petitioners' detention. J.A. 21a-154a. In addition, all but one of the petitioners sought review of their CSRT determinations under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739.

In *Parhat* v. *Gates*, 532 F.3d 834 (D.C. Cir. 2008), the court of appeals resolved a DTA case filed by one petitioner, holding that the record before the CSRT did not support his detention as an enemy combatant. Following the *Parhat* decision, in September 2008 the government informed the district court in the habeas proceedings that it would no longer seek to hold any of the Uighur detainees as enemy combatants. See Pet. App. 3a; J.A. 231a-232a, 313a, 426a-427a. The government then moved petitioners and the other Uighurs to a new camp at Guantanamo Bay (Camp Iguana), where they are housed under less restrictive conditions. Pet. App. 3a; J.A. 231a, 426a-427a, 439a n.3.

4. When a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship. China has repeatedly asked the United States to return the Uighurs. But petitioners oppose return to China, because they reasonably fear "arrest, torture or execution" there. Pet. App. 3a; see J.A. 43a-45a, 88a-90a, 133a-135a.

The United States assesses humane treatment concerns in determining destinations for detainees at Guantanamo Bay, and follows a policy of not repatriating or transferring a detainee to a country where he more likely than not would be tortured. See *Munaf* v. *Geren*, 128 S. Ct. 2207, 2226 (2008); J.A. 324a. Accordingly, the United States has agreed not to return petitioners to

China and not to transfer them to any other country that would repatriate them to China. Pet. App. 3a; J.A. 176a.

5. After the decision in *Parhat*, petitioners moved for judgment on their habeas corpus petitions. See Pet. App. 4a, 42a; J.A. 155a-197a; C.A. App. 1466-1467, 1603. They contended that they were entitled to release from detention, and that, because they cannot be returned to China, "'release' can only mean * * * to the United States." J.A. 175a-176a.

The district court ordered the government to bring petitioners into the United States and to release them in Washington, D.C. J.A. 481a-495a; see Pet. App. 4a & n.2. The court acknowledged that its order "strikes at the heart of our constitutional structure" and raises "serious separation-of-powers concerns" by "insinuat-[ing] itself" into political Branches' authority over the admission of aliens. *Id.* at 54a-55a. But the court decided that, because the government could no longer detain petitioners as enemy combatants and could not identify another country to accept them, petitioners were entitled to release in the United States. *Id.* at 46a-50a, 59a-61a.

6. The court of appeals reversed. Pet. App. 1a-37a. The court acknowledged that, under *Boumediene*, petitioners have a right to habeas corpus review, and that the traditional habeas remedy has been "to order the prisoner's release if he was being held unlawfully." *Id.* at 13a. But the court explained that "petitioners are not seeking 'simple release'"; instead, they seek "a court order compelling the Executive to release them into the United States outside the framework of the immigration laws." *Ibid.* The court determined that "never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into

the sovereign territory of a nation and released into the general population." *Id.* at 13a, 15a. The court declined to issue such an order, explaining that the authority to exclude aliens rests exclusively in the political Branches, *id.* at 6a-7a, and it "is not within the province of any court, unless expressly authorized by law, to review [that] determination," *id.* at 8a (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950)).

Judge Rogers concurred in the judgment. Pet. App. 22a-37a. She believed that the district court would have the power to order petitioners' release into the United States if detention were no longer justified, *id.* at 29a-31a, 35a-37a, but that the court should not have done so without first determining whether petitioners were excludable and could be detained under the immigration laws, *id*. at 25a-27a.

7. After the court of appeals' decision in this case, Congress enacted several laws barring the transfer of any persons detained by the Department of Defense at Guantanamo Bay into the United States, except for criminal prosecution, and categorically prohibiting the *release* of such persons in the United States. See pp. 31-34, *infra*.

8. Since well before the decision in *Parhat* and the district court order in petitioners' habeas cases, the United States has expended significant diplomatic efforts to resettle the Uighurs at Guantanamo Bay. Prior to January 20, 2009, Executive Branch officials approached a substantial number of countries concerning the Uighurs' resettlement, recognizing that those efforts were laying the groundwork for a potentially lengthy

dialogue with other nations.[4] Building on those past efforts, Ambassador Fried has made resettlement of the Uighurs a top diplomatic priority. In multiple instances, both before and after the United States has approached a nation about accepting some of the Uighurs, China has pressured that nation not to do so.[5]

Nonetheless, the United States' diplomatic efforts have been successful. All of the 22 Uighurs originally at Guantanamo Bay have now either been resettled or received offers of resettlement from other countries. As noted above, the United States transferred five Uighurs to Albania in May 2006, after their CSRTs determined they should no longer be detained. See p. 5, *supra*. The United States resettled four additional Uighur detainees in Bermuda in June 2009.[6] In September 2009, Palau offered to accept 12 of the 13 remaining Uighurs, conditional on their consent.[7] Palau did not make an offer of resettlement to petitioner Arkin Mahmud, whose counsel stated to the press that he has developed mental health problems apparently too serious to be treated in the sparsely populated country.[8] Six of the 12 who re-

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[4] Those efforts in resettling the Uighurs are detailed in three classified declarations, which were filed in the courts below and have been filed with this Court.

[5] See, *e.g.*, Bradley S. Klapper, *China to Swiss: Don't Take Uighurs from Guantanamo* (Jan. 8, 2010) <http://news.yahoo.com/s/ap/20100108/ap_on_re_eu/eu_switzerland_guantanamo>.

[6] Letter from Solicitor General to Clerk of this Court 1 (June 11, 2009). Those individuals are Abdul Nasser, Jalal Jalaldin, Abdul Semet, and Huzaifa Parhat.

[7] Letter from Solicitor General to Clerk of this Court 1-2 (Sept. 23, 2009).

[8] See Del Quentin Wilber, *2 Brothers' Grim Tale of Loyalty and Limbo*, Wash. Post (Sept. 28, 2009) <http://www.washingtonpost.com/

ceived offers from Palau accepted them, and were resettled in Palau in October 2009.[9]

Seven Uighurs thus remain at Guantanamo Bay.[10] On February 3, 2010, the government of Switzerland announced that it would accept two—Arkin Mahmud and his brother, Bahtiyar Mahnut—for resettlement.[11] The remaining five Uighurs (like Bahtiyar Mahnut) previously received an offer of resettlement in Palau, but did not accept it. All five also recently received an offer of resettlement from another country, but they did not accept that offer either, and it was withdrawn after several months. The United States continues its efforts to identify an appropriate country in which to resettle these five Uighurs.

SUMMARY OF ARGUMENT

The writ of habeas corpus is effective at Guantanamo Bay. Since this Court's decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), 28 individuals detained at Guantanamo Bay in an enemy status have prevailed in habeas orders that are no longer subject to appeal. All of those

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wp-dyn/content/article/2009/09/27/AR2009092703076.html> (cited at Pet. Br. 15 n.18).

[9] *United States Transfers Six Uighur Detainees from Guantanamo Bay to Palau* (Oct. 31, 2009) <http://www.justice.gov/opa/pr/2009/October/09-ag-1179.html>. Those individuals are Edham Mamet, Ahmad Tourson, Anwar Hassan, Dawut Abdurehim, Abdul Rahman, and Adel Noori.

[10] Those individuals are Hammad Memet, Arkin Mahmud, Bahtiyar Mahnut, Abdul Razakah, Abdul Sabour, Khalid Ali, and Sabir Osman. The latter three individuals are not petitioners in this Court. See note 3, *supra*.

[11] See *Switzerland Admits Two Uyghurs for Humanitarian Reasons* (Feb. 3, 2010) <http://www.news.admin.ch/message/?lang=en&msg-id=31467>.

28—which includes the Uighur detainees who received habeas orders—have been repatriated or resettled in third countries, or else have received an offer of resettlement in another country or countries.

Petitioners, like others who have prevailed in habeas, are entitled to release from military detention. But petitioners cannot be returned to China, cannot be released into Cuba, and are barred by the immigration laws and specific statutory restrictions from entering the United States. The petitioners at Guantanamo Bay therefore remain in custody, not in an enemy status but instead pending resettlement, in a different and less restrictive location that is still consistent with the general security of the Naval Base.

Petitioners contend that they have a right to be brought to the United States because they have no other exit option from Guantanamo Bay. But the premise of the argument is incorrect: Fifteen of the 22 Uighur detainees have already left Guantanamo Bay for resettlement in other countries, two are expected to leave in the near future, and the remaining five have been offered resettlement in two countries, but have chosen not to accept offers there.

Further, this Court has recognized in *Boumediene*, as well as in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), that habeas is an equitable remedy that takes account of relevant practical and legal constraints on the disposition of habeas petitioners. Here, legal constraints prevent the courts from ordering that petitioners be brought to and released in the United States.

To permit the habeas court to grant such extraordinary relief would be inconsistent with constitutional principles governing control over the Nation's borders. As this Court has long affirmed, the power to admit or

exclude aliens is a sovereign prerogative vested in the political Branches, and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). Congress has exercised that power by imposing detailed restrictions on the entry of aliens under the immigration laws, as well as specific restrictions on the transfer of individuals detained at Guantanamo Bay to the United States. In light of these statutes and constitutional principles, neither *Boumediene* nor the law of habeas corpus justifies granting petitioners the relief they seek. And the Due Process Clause does not confer a substantive right to enter the United States in these circumstances.

Finally, even assuming arguendo that a judicial order compelling the Executive to bring an alien into the United States were justified in some circumstances, the government's sustained and successful efforts to resettle petitioners should preclude such an order in this case. Indeed, in light of the government's success in resettling most of the Uighurs and in obtaining offers to resettle the rest, the Court may wish to dismiss the writ of certiorari as improvidently granted.

ARGUMENT

PETITIONERS HAVE NO RIGHT TO BE BROUGHT TO AND RELEASED IN THE UNITED STATES

A. The Writ Of Habeas Corpus Is Effective At Guantanamo Bay

Since this Court's decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), 28 detainees at Guantanamo Bay (including 17 Uighurs) have prevailed in habeas proceedings under orders that are no longer subject to appeal. All of those individuals have been repatriated or resettled or have received offers of resettlement. The writ of habeas corpus therefore is effective at Guantanamo Bay.

1. Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, this Court held that foreign nationals in military detention at Guantanamo Bay are entitled to the writ of habeas corpus to challenge the lawfulness of their detention. 128 S. Ct. at 2262.

The *Boumediene* Court identified the essential attributes of habeas corpus review guaranteed to detainees by the Constitution. It explained that each detainee must be afforded a meaningful opportunity to demonstrate that he is being held contrary to applicable law, 128 S. Ct. at 2266-2271, and that the habeas court must have "authority to assess the sufficiency of the Government's evidence against the detainee" and to consider "exculpatory evidence that was not considered during [CSRT] proceeding[s]," *id.* at 2270. The Court also noted that the habeas court must have the power "to formulate and issue appropriate orders for relief, including,

if necessary, an order directing the prisoner's release." *Id.* at 2271. The Court did not, however, evaluate the merits of any particular habeas claims or order any relief.

2. Since *Boumediene*, 24 detainees at Guantanamo Bay, in addition to the Uighurs, have had their habeas corpus petitions adjudicated by the courts. Fifteen of those petitions were granted, and nine were denied.[12] In the 15 cases in which the petition was granted, the courts entered essentially the same remedial order, "direct[ing]" the Executive Branch "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release."[13]

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[12] See Benjamin Wittes et al., *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking* 86-87 (Brookings Inst. Jan. 22, 2010) <http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx>.

[13] *Boumediene* v. *Bush*, 579 F. Supp. 2d 191, 198-199 (D.D.C. 2008) (Sabir Lahmar, Mohammed Nechle, Mustafa Idr, Lakhdar Boumediene, Boudella Al Hajj); see *El Gharani* v. *Bush*, 593 F. Supp. 2d 144, 149 (D.D.C. 2009) (Muhammed Al Qarani) (government must "take all necessary and appropriate diplomatic steps to facilitate [petitioner's] release * * * forthwith"); *Basardh* v. *Obama*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009) (Yasim Basardh) (similar); *Ahmed* v. *Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (Ali Bin Ali Aleh) (similar); *Al Ginco* v. *Obama*, 626 F. Supp. 2d 123, 130 (D.D.C. 2009) (Abd Abdul Rassak) (similar); Order at 1, *Al Mutairi* v. *United States*, No. 02-828(CKK) (D.D.C. July 29, 2009) (Khalid Al Mutayri) (similar); Opinion at 41, *Al-Adahi* v. *Obama*, No. 05-280(GK) (D.D.C. Aug. 17, 2009) (Mohammed Al Edah) (similar); Order at 1, *Al Rabiah* v. *United States*, No. 02-828(CKK) (D.D.C. Sept. 17, 2009) (Fouad Al Rabia) (similar); Order at 1, *Mohammed* v. *Obama*, No. 05-1347(GK) (D.D.C. Nov. 19, 2009) (Saiid Farhi) (similar); Order at 1, *Hatim* v. *Obama*, No. 05-1429(RMU) (D.D.C. Dec. 15, 2009) (Said Hatim) (similar).

The habeas order for Mohammed Jawad was more specific. Because the government no longer asserted the authority to detain Jawad

Following those court orders, the government has responded with substantial diplomatic efforts to repatriate or resettle the successful habeas petitioners. The time required for transfer depends on a variety of factors, including whether the individual can be returned to his home country or must be resettled in a third country. As petitioners themselves recognize (Br. 34 n.30), resettlement in particular takes time: the Executive must engage in delicate diplomatic negotiations that often cannot be forced into a particular schedule. Additional time may be needed to obtain and evaluate assurances from the potential receiving government about how it will treat an individual. And such a country often will want to undertake its own extensive review before agreeing to accept a detainee.

Notwithstanding those difficulties, the government's sustained efforts have paid off. The habeas order is final and not subject to appeal in 11 of the 15 cases (not involving the Uighurs) in which a court found the detention to be unauthorized, and all 11 of those individuals have been transferred. For example, Mohammed Jawad, a citizen of Afghanistan, was repatriated to his home country just 24 days after his habeas petition was granted.[14] For Lakhdar Boumediene, more time was required for his resettlement in France; he left Guan-

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under the AUMF, and because Jawad presented evidence that he wished to return home and his home country was prepared to receive him immediately, the government agreed to an order requiring it to "release * * * and transfer him to the custody of the receiving government." Order at 1, *Bacha* v. *Obama*, No. 05-2385(ESH) (D.D.C. July 30, 2009).

[14] *United States Transfers Guantanamo Bay Detainee to Afghanistan* (Aug. 24, 2009) <http://www.justice.gov/opa/pr/2009/August/09-ag-837.html>.

tanamo Bay in May 2009, approximately six months after his habeas petition was granted.[15] The average time required to transfer a successful habeas petitioner has been just over three months.[16]

Four non-Uighurs whose habeas corpus petitions were granted by the district court remain at Guantanamo Bay. The United States has appealed two of these orders.[17] In one of these two, the district court has stayed its order pending appeal;[18] in the other, the United States has agreed to continue diplomatic efforts to

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[15] *United States Transfers Lakhdar Boumediene to France* (May 15, 2009) <http://www.justice.gov/opa/pr/2009/May/09-ag-477.html>.

[16] Sabir Lahmar, a citizen of Algeria, had his habeas corpus petition granted on November 20, 2008, and was resettled in France on November 30, 2009. Mohammed Nechle, Mustafa Air Idr, and Boudella Al Hajj, citizens of Algeria, had their petitions granted on November 20, 2008, and were resettled in Bosnia on December 15, 2008. Muhammed Al Qarani, a citizen of Chad, had his habeas corpus petition granted on January 14, 2009, and was repatriated to Chad on June 10, 2009. Ali Bin Ali Aleh, a citizen of Yemen, had his habeas petition granted on May 5, 2009, and was repatriated to Yemen on September 25, 2009. Abd Abdul Rassak, a citizen of Syria, had his petition granted on June 22, 2009, and was resettled in a third country well before the end of 2009. Khalid Al Mutayri, a citizen of Kuwait, had his petition granted on July 29, 2009, and was repatriated to Kuwait on October 8, 2009. Fouad Al Rabia, a citizen of Kuwait, had his habeas petition granted on September 17, 2009, and was repatriated to Kuwait on December 9, 2009. These data were compiled by the component of the Justice Department's Civil Division responsible for the habeas cases.

[17] See 09-5339 Docket entry No. 1 (D.C. Cir. Oct. 5, 2009) (Mohammed Al Edah); 09-5200 Docket entry No. 1 (D.C. Cir. May 29, 2009) (Yasim Basardh).

[18] See Order at 5, *Al-Adahi* v. *Obama*, No. 05-280(GK) (D.D.C. Dec. 9, 2009) (Mohammed Al Edah).

resettle the individual pending appeal.[19] In the remaining two cases, the government is currently deciding whether to appeal.[20]

The United States thus has responded promptly to orders granting habeas corpus relief, and it has repatriated, resettled, or secured offers of resettlement for all of the successful habeas petitioners, including the Uighurs. Through this process, the United States has demonstrated its respect for the principles and processes set forth by this Court in *Boumediene*, and the habeas corpus petitioners have obtained relief.

Despite these efforts and the results they have brought about, petitioners contend (Br. 20, 21) that habeas corpus review has "accomplished little" or "nothing." They highlight the cases of three individuals, but as we have explained, the government has transferred all three—two before petitioners filed their brief. See note 16, *supra*. Sabir Lahmar, a citizen of Algeria, was resettled in France on November 30, 2009, approximately one year after his habeas petition was granted.[21] The State Department reports that his resettlement took longer than usual because, after the government had engaged in intensive diplomatic efforts, Lahmar objected to a transfer to a country in which he had ini-

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[19] Yasim Basardh's habeas petition was granted on April 15, 2009. Although the United States has appealed, it also has agreed to continue diplomatic efforts to resettle him and has filed status reports with the district court documenting its resettlement efforts. See 05-889(ESH) Docket entry No. 157 (D.D.C. June 30, 2009); *id.* Docket entry No. 165 (D.D.C. Aug. 14, 2009).

[20] These cases involve Saiid Farhi and Said Hatim.

[21] *United States Transfers a Guantanamo Bay Detainee to France* (Dec. 1, 2009) <http://www.justice.gov/opa/pr/2009/December/09-ag-1289.html>.

tially expressed interest; as a consequence, the government had to restart discussions with another nation (France). Khalid Al Mutayri was repatriated to Kuwait on October 8, 2009, just over two months after his petition was granted.[22] And Fouad Al Rabia likewise was transferred from Guantanamo Bay, again less than three months after his habeas order.[23] Petitioners are simply wrong to claim that this Court's decision in *Boumediene* has had no effect.

B. Petitioners Are Entitled To Release From Military Detention Under The AUMF, But Not To An Order Requiring That They Be Brought To The United States

1. Petitioners have obtained the habeas corpus review that *Boumediene* requires. Following the D.C. Circuit's decision in *Parhat* v. *Gates*, 532 F.3d 834 (2008), the government conceded the writ in all the Uighurs' cases and informed the district court that it would no longer detain them as enemy combatants. Pet. App. 3a; J.A. 231a, 313a, 426a-427a.

The question here is what consequences flow from that determination. As petitioners acknowledge, the usual result would be "release of the prisoner to his

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[22] *United States Transfers Two Guantanamo Bay Detainees to Kuwait and Belgium* (Oct. 9, 2009) <http://www.justice.gov/opa/pr/2009/October/09-opa-1095.html>.

[23] *United States Transfers One Guantanamo Bay Detainee to Kuwait* (Dec. 9, 2009) <http://www.justice.gov/opa/pr/2009/December/09-ag-1323.html>.

Petitioners also cite (Br. 21) the case of Umar Abdulayev. He has not received a final order from the habeas court, and his circumstances therefore are not relevant to the way in which the government is complying with *Boumediene*. The situation is explained in a sealed order in *In re Guantanamo Bay Litigation*, No. 05-2386(RBW) (D.D.C. Oct. 20, 2008).

home country." J.A. 189a n.13. But as petitioners further concede (*ibid.*), this is an "unusual case," because petitioners reasonably fear mistreatment in China. See Pet. App. 3a. The United States' policy is not to send a person released from detention to a country where he more likely than not would be tortured. The United States cannot transfer or release the Uighurs into Cuba, the country where the Naval Base is located, because the government of Cuba has not agreed to accept them. Petitioners have never sought admission into the United States under the immigration laws, see *ibid.*; Pet. Br. 18, and indeed they disavow any reliance on the immigration laws in this case.

Notwithstanding these constraints, ten of the 17 Uighurs who obtained habeas release orders have been resettled. See pp. 9-10, *supra*. Bermuda and Palau have not only treated these men humanely, but have welcomed and worked to integrate them into their societies. See, *e.g.*, Pet. Br. 14-15.[24] Because those men are no longer in U.S. custody, their habeas petitions are moot. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998). Two petitioners accepted a resettlement offer from the government of Switzerland on February 3, 2010, although the actual transfer cannot be effectuated until 15 days after Congress is notified, see Department

[24] Contrary to petitioners' suggestion (Br. 15 n.17), the six men resettled in Palau are not in jeopardy of becoming stateless. Although the President of Palau agreed to resettle the men on a "temporary" basis, he has set no time limit on their residency in Palau. Jonathan Kaminsky, *6 Former Guantanamo Detainees Resettle in Palau* (Nov. 1, 2009) (quoting President of Palau) <http://abcnews.go.com/International/wireStory?id=8967363>. The United States continues its best efforts to identify an appropriate permanent resettlement location for those six men, whether in Palau or elsewhere.

of Homeland Security Appropriations Act, 2010 (DHS Act), Pub. L. No. 111-83, § 552(e), 123 Stat. 2178, and necessary arrangements are made in Switzerland. The government has long considered the transfer of one of those two petitioners to be the most difficult to accomplish because of circumstances unique to his case. The remaining five Uighurs at Guantanamo Bay have each received two offers of resettlement to other countries, but did not accept those offers. One of those offers, from Palau, might again be made available; in the event that the remaining Uighurs were to request resettlement there, the United States would again approach the Palauan government about that possibility. And the United States continues to pursue other resettlement options for these five. Contrary to petitioners' suggestion (Br. 33), the Executive has never viewed its efforts to resettle the Uighurs as futile—only as complex and difficult. And its determined and persistent efforts have met with substantial success.

The Executive has not sought immunity from judicial oversight in these endeavors. In other cases, upon concluding that a person should be released from military detention, the habeas courts have ordered the government to take appropriate diplomatic measures to ensure repatriation or resettlement, and have taken steps to monitor the government's efforts. And in all such cases (assuming the release order has become final), a transfer has occurred. See pp. 15-16, *supra.* This case therefore comes to the Court as the government is undertaking good-faith repatriation or resettlement efforts on behalf of petitioners and other individuals ordered released from military detention, and is providing requested updates to the courts about those efforts. Nothing in *Boumediene* or in any prior case law suggests that

such substantial undertakings by the Executive are a constitutionally inadequate response to a habeas court's order of release.

2. The petitioners who have not already been resettled are currently housed at Camp Iguana at Guantanamo Bay, which also has been used as temporary housing for other persons awaiting transfer after successfully challenging their military detention. Petitioners have "significantly more living privileges" than persons held in military detention at other facilities on the Base. J.A. 313a n.3, 426a-427a. Camp Iguana includes an air-conditioned living space, a recreation yard, and an activity room. J.A. 313a n.3, 439a n.3. Petitioners have access to a variety of entertainment and recreational equipment, special food items, and library materials. *Ibid.*[25]

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[25] Petitioners contend (Br. 12) that they cannot make telephone calls or accept visitors, and that they are chained to the floor when they meet with their attorneys. That is incorrect. The Department of Defense has informed this Office that petitioners have had the ability to make phone calls to relatives and family members since April 2008, but that they have generally declined to do so in part because they fear for their relatives' safety in China. Petitioners also may send and receive mail, and their legal mail is not screened. Their non-legal mail is screened for operational purposes, but the Uighurs do not typically send mail to family and friends in China because of fear for their safety.

As to meeting with counsel (Pet. Br. 12), the Department of Defense has informed this Office that petitioners have generally chosen to meet with counsel outside, communicating through a chain-link fence without any bodily restraints. Petitioners' counsel has asked to meet with petitioners inside the fence, and the government would permit that, but petitioners themselves have usually not agreed. On certain occasions in the past, detainees were restrained when meeting with their counsel in a small room. But the Department of Defense has informed this Office that restraints will not be used in the future during such private meetings, unless specific safety, security, or operations concerns arise.

Petitioners of course are not free to move about Guantanamo Bay while they await resettlement, and Camp Iguana is surrounded by a security fence. The entire location is a United States Naval Base, subject to numerous regulations and controls by the base commander to maintain the security of the installation, the operations, intelligence, and military personnel, and the civilians who provide support services. As this Court has observed, "[t]he power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961) (quoting 26 Op. Att'y Gen. 91, 92 (1906)). That power extends to all military and civilian personnel on the Base, which is in an isolated location in a foreign country. A habeas release order in this context is a determination that a detainee did not have the requisite connection with al Qaida or the Taliban. Such an order does not eliminate all concerns for the security and order of the Base that the commander has the responsibility and broad discretion to protect.

The government thus has acted reasonably in holding petitioners who remain at Guantanamo Bay in custody at Camp Iguana pending resettlement. But in any case, the question whether petitioners should be kept at Camp Iguana or treated in some different way at Guantanamo Bay pending resettlement has no bearing on the extraordinary judicial order petitioners seek, which is to require the government to bring petitioners to the United States for release.

3. a. Nothing in *Boumediene* justifies the order entered by the district court requiring the government to bring the petitioners at Guantanamo Bay to the United

States. The Court did not order any particular remedy in *Boumediene*, or even address the merits of any detainee's habeas claim. See 128 S. Ct. at 2277. And it in no way suggested that the detainees in that case had any right to be brought to the United States. That issue did not arise in the case because the *Boumediene* petitioners told the Court that "a release order would clearly not raise any diplomatic concerns given that Bosnia has repeatedly stated its willingness to accept the Boumediene Petitioners' return." Pet. Reply Br. at 18, *Boumediene*, *supra* (Nos. 06-1195 & 06-1196) (internal quotation marks and citation omitted).

In fact, the Court observed in *Boumediene* that "common-law habeas corpus was, above all, an adaptable remedy," and its "precise application and scope changed depending upon the circumstances." 128 S. Ct. at 2267. Before extending the writ to Guantanamo Bay, the Court considered "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 2259. And the Court indicated that the appropriate remedy can take into account equitable principles and practical constraints: Although "the habeas court must have the power to order the conditional release of an individual unlawfully detained," a detainee's immediate release "need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Id.* at 2266. A fortiori, that is true of an order releasing the petitioners at Guantanamo Bay into the United States.

This Court's decision in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), confirms that prudential and legal constraints shape the available habeas corpus remedy. In *Munaf*, the Court considered whether a habeas court reviewing the lawfulness of the detention of U.S. citizens

by U.S. forces in Iraq could enjoin the transfer of those detainees to Iraqi custody. *Id.* at 2213. The court observed that "habeas corpus is 'governed by equitable principles,'" and "prudential concerns" may be considered in fashioning appropriate relief. *Id.* at 2200-2221. Turning to the specific relief requested in that case, the Court noted that the petitioners did not seek "simple release," but something more—an injunction barring their transfer to Iraqi custody. *Id.* at 2221-2222. That relief, the Court held, would "interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders," and would "intrude upon the authority of the Executive in military and national security affairs." *Id.* at 2218, 2220 (quotation marks and citations omitted). The Court thus concluded that petitioners were not entitled to their requested relief. *Id.* at 2224-2225.

Here, as in *Munaf*, petitioners do not seek "simple release." 128 S. Ct. at 2221. Instead, they seek an unprecedented judicial order requiring the government to bring them to the United States, in contravention of laws barring their entry and in derogation of the long-recognized power of the political Branches to control entry into the United States. See pp. 26-42, *infra.*

b. The discussions of remedy in *Boumediene* and *Munaf* are consistent with the historical understanding of the writ. This Court has long recognized that "habeas corpus is, at its core, an equitable remedy." *Schlup* v. *Delo*, 513 U.S. 298, 319 (1995); see 28 U.S.C. 2243; *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 209-210 (1951). For example, this Court has held that "federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court."

Hilton v. *Braunskill*, 481 U.S. 770, 775 (1987) (citing cases). Similarly, the Court has recognized that a habeas petitioner's status may preclude his immediate and outright release. For example, if a successful habeas petitioner in federal custody is subject to state charges, that person may be transferred to state custody rather than released altogether. See, *e.g.*, *Coleman* v. *Tennessee*, 97 U.S. 509, 518-520 (1879). And if habeas corpus is granted to an individual who is an alien, the habeas court may order that the individual be taken into immigration custody, rather than released outright. See 8 C.F.R. 287.7(d) (authorizing filing of detainer to hold aliens until immigration officials can take them into custody).

Petitioners' case also involves constraints (although different in kind) on a habeas court's exercise of remedial authority. Petitioners are indisputably entitled to release from military detention under the AUMF, and consistent with that entitlement, the United States has worked to resettle all of them in appropriate countries. But legal and practical realities currently prevent petitioners' outright and immediate release. The United States cannot return petitioners to China (nor do petitioners want to go there). And statutes bar petitioners from entering the United States. In these circumstances, a habeas court acts appropriately in granting the writ and ordering that the government cease detaining the individuals in an enemy status, while allowing the government to pursue opportunities for resettlement in other countries, as well as to hold the individuals in suitable conditions of custody pending the success of those efforts.

C. A Judicial Order That Petitioners Be Brought To The United States For Release Would Work An Unprecedented Incursion On The Political Branches' Control Over The Nation's Borders

The judicial order petitioners seek in this case would conflict with constitutional principles governing control over the borders and with statutes barring petitioners' entry.

1. The power to admit or exclude aliens is a sovereign prerogative vested in the political Branches

a. For centuries, the power to admit or exclude aliens has been recognized as a power "inherent in sovereignty, and essential to self-preservation." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). During the Middle Ages, the King of England restricted persons from foreign kingdoms from entering the realm "in order to [secure] the peace and safety of the kingdom." Matthew Hale, *De Portibus Maris*, reprinted in 1 *A Collection of Tracts Relative to the Law of England* 89-90 (Frances Hargrave ed. 1787). By the sixteenth and seventeenth centuries, the King's power to restrain the entry of aliens was well-established. 10 William Holdsworth, *A History of English Law* 395 (1938). There was "no doubt that Jeffreys, C.J., was warranted in saying in 1684, 'I conceive the King had an absolute power to forbid foreigners * * * from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure." *Id.* at 395-396 (quoting *The East India Co.* v. *Sandys*, 10 Howell's St. Tr. 371, 530-531 (1684)).

That fundamental attribute of national sovereignty remains widely recognized in the international community in modern times. See, *e.g.*, *Case of Abdolkhani* v.

Turkey, No. 30471/08, § 72 (2009) (Eur. Ct. H.R.) (recognizing the right of states "as a matter of international law and subject to their treaty obligations" to control the entry of aliens); accord, *e.g.*, *Rex* v. *Bottrill*, [1947] 1 K.B. 41, 51 ("One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State.") (quoting *Attorney General for Canada* v. *Cain*, [1906] A.C. 542, 546 (P.C.)); *Musgrove* v. *Toy*, [1891] A.C. 272, 282 (P.C.) (appeal from Supreme Court of Victoria).

The principle of sovereign control over national borders is reflected in the Convention on the Status of Aliens, to which the United States has been a party since 1930. Convention Regarding the Status of Aliens, *adopted* Feb. 20, 1928, art. 1, 46 Stat. 2754, 132 L.N.T.S. 307 ("States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."). The principle also is evident in the various agreements relating to refugees, which establish that individuals have a right to seek asylum without imposing any concomitant duty on states to permit refugees to enter. See, *e.g.*, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-187 (1993) (discussing Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577); see also, *e.g.*, *Regina* v. *Immigration Officer at Prague Airport*, [2004] UKHL 55 ¶ 12, at 11 (appeal taken from E.W.C.A. Civ.) (opinion of Lord Bingham of Cornhill) ("[E]ven those fleeing from foreign persecution have had no right to be admitted."); *Minister for Immigration* v. *Ibrahim* [2000] H.C.A. 55, ¶ 137 (Austl.) ("[N]o individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.").

b. In drafting the Constitution, the Framers conferred on the federal government sovereign rights and powers "equal to the right and power of the other members of the international family." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-318 (1936). The Constitution thus vests the power to admit or exclude aliens "in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war." *Nishimura Ekiu*, 142 U.S. at 659. That power belongs, in particular, to the political Branches. *Ibid.*; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 & n.6 (1972) (noting that "the Court's general reaffirmations" of the political Branches' exclusive authority to admit or exclude aliens "have been legion").

Control of the Nation's borders is vested in the political Branches because that control is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"—all matters "exclusively entrusted to the political branches of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Preserving the political Branches' authority to decide whether an alien should be allowed entry also serves "the obvious necessity that the Nation speak with one voice" on such matters. *Zadvydas* v. *Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting); accord, *e.g.*, *Munaf*, 128 S. Ct. at 2226.

c. Consistent with those principles, this Court "without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Kleindienst*, 408 U.S. at 766 (quoting

Boutilier v. *INS*, 387 U.S. 118, 123 (1967)). So too the Court has upheld the Executive's "inherent" power to administer the immigration laws. *Knauff*, 338 U.S. at 542. In that regard, the Court has held that admission to the United States "is a privilege granted by the sovereign United States Government," *ibid.* and has repeatedly made clear that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543; accord, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 796 (1977); *Kleindienst*, 408 U.S. at 766-767.

2. The political Branches have determined that petitioners should not be transferred to and released in the United States

a. Congress has exercised its authority to control the Nation's borders by enacting detailed restrictions, to be administered by the Executive, to determine which aliens may enter the United States. Under the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, any person who is not a citizen or national of the United States and who seeks admission must ordinarily apply for and obtain an appropriate visa, for which the alien is ineligible if he does not satisfy specified criteria. 8 U.S.C. 1182(a)(7)(A) and (B); see 8 U.S.C. 1201.[26] Even upon issuance of a visa, an alien may not be admitted to the United States unless, upon arrival at a port of entry, an immigration officer finds that he is "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A); see 8 U.S.C. 1201(h).

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[26] The visa requirement does not apply to certain persons, *e.g.*, 8 U.S.C. 1157, 1181(c) (aliens admitted as refugees), and may be waived in certain circumstances, *e.g.*, 8 U.S.C. 1182(d)(4), 1187.

The statutory criteria for admissibility are designed, among other things, to ensure that the alien's admission is consistent with considerations of public safety, *e.g.*, 8 U.S.C. 1182(a)(1)(A)(i) and (2) (prohibiting admission of aliens who have "a communicable disease of public health significance" or who have committed certain crimes), and of national security, *e.g.*, 8 U.S.C. 1182(a)(3)(B) (prohibiting admission of aliens who, *inter alia*, have engaged or are likely to engage in terrorist activity, or are members of a terrorist organization). These and other determinations under the INA require difficult judgments about an alien's suitability for admission that often "implicate questions of foreign relations," and that fall within the Executive's special competence. *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163-1164 (2009) (internal quotation marks and citation omitted); accord *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

An alien who has not been approved for admission may be permitted physical presence in the United States only if the Secretary of Homeland Security exercises her discretion to grant him parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 6 U.S.C. 202(4), 557. Although parole permits the alien to physically enter the United States, it does not constitute "entry" in a legal sense, *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958), and is revocable in the Secretary's discretion.

Petitioners are aliens who have at no time been physically present in the United States. See 8 U.S.C. 1101(a)(38) (defining "United States"); cf. *Sale*, 509 U.S. at 166, 182, 187 (INA and Refugee Convention prohibitions on "return" of aliens seeking protection as refugees apply only to aliens already present in United States, and therefore do not apply to Haitian migrants

interdicted at sea, some of whom were detained at Guantanamo Bay). Petitioners have not demonstrated their admissibility pursuant to the normal statutory standards and procedures under the immigration laws, nor has the Secretary of Homeland Security granted them parole. Indeed, petitioners disavow any reliance on those laws in this case, contending (Pet. Br. 35-36) that the immigration laws do not apply to them because they seek "release" in rather than "admission" to the United States. But an alien outside the United States cannot circumvent the INA by relabeling his entry a "release."

b. Congress has also enacted a series of specific restrictions on the transfer of detainees from Guantanamo Bay to the United States. The first restriction was enacted on June 24, 2009, as part of the Supplemental Appropriations Act, 2009 (SAA), Pub. L. No. 111-32, 123 Stat. 1859. The SAA prohibited the use of any funds made available by that Act or any prior Act to release or transfer into the United States any individual detained as of June 24, 2009 at the Guantanamo Bay Naval Station, with a limited exception for transfers for the purpose of prosecution or detention during legal proceedings. § 14103, 123 Stat. 1920; see also Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B, §§ 106(3), 115, 123 Stat. 2046 (extending the SAA's transfer restrictions through October 31, 2009). Congress subsequently prohibited the use of any federal funds at all to release in the United States or, with the same limited exception, to transfer into the United States any person detained at Guantanamo Bay as of June 24, 2009. Department of Homeland Security Appropriations Act (DHS Act), Pub. L. No. 111-83, § 552, 123 Stat. 2177; Department of the Interior, Environ-

ment, and Related Agencies Appropriations Act, 2010 (DOI Act), Pub. L. No. 111-88, § 428, 123 Stat. 2962; Consolidated Appropriations Act, 2010 (CAA), Pub. L. No. 111-117, § 532 (2009); Department of Defense Appropriations Act, 2010 (Defense Act), Pub. L. No. 111-118, § 9011 (2009); see also National Defense Authorization Act for Fiscal Year 2010 (NDAA), Pub. L. No. 111-84, § 1041, 123 Stat. 2454 (prohibiting use of Department of Defense funds "to release into the United States, its territories, or possessions," any non-citizen at Guantanamo Bay who is "in the custody or under the effective control of the Department of Defense" or "otherwise under detention").[27]

Petitioners argue (Br. 49-52) that, to avoid constitutional difficulties, this Court should read those statutory transfer restrictions not to apply to them. But a straightforward reading of the restrictions gives rise to no constitutional difficulties under the Suspension Clause. See pp. 22-25, *supra*, and 35-41, *infra*. And petitioners' proposed readings fail in any event because they are not "fairly possible" constructions of the legislation. Pet. Br. 49 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001)).

Characterizing the transfer restrictions as "[*p*]*ost-hoc* legislation," petitioners first urge the Court to construe them "to apply only prospectively." Pet. Br. 49.

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[27] Some of the enactments also bar the use of any funds made available by the Act "to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba." DHS Act § 552(f), 123 Stat. 2179; CAA § 532(f).

But this exhortation cannot help petitioners because the restrictions are by their nature only prospective: They apply to transfers to the United States that have not yet occurred. Although the legislation undoubtedly affects the propriety of the district court's order of relief in this case, that does not mean it has an impermissible retroactive effect as applied to petitioners. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

Petitioners next argue (Br. 49-52) that this Court should construe the transfer restrictions' reference to persons "detained" at Guantanamo Bay as of June 24, 2009, to exclude individuals who had prevailed in habeas as of that date. Petitioners contend (*id.* at 48, 50) that, if only as a matter of "semantics," their habeas orders meant that they were no longer "detained" in June 2009—even though the very premise of their suit is that their detention continues.

Petitioners are correct that they were no longer detained in an enemy status as of June 24, 2009. But the ordinary meaning of the word "detained" is not so limited. See *Webster's Third New International Dictionary* 616 (1993) (defining the verb "detain" as "to hold or keep in or as if in custody"). At the time Congress enacted the legislation at issue, petitioners remained in custody of the Department of Defense at Camp Iguana, awaiting resettlement to another country. The text of the provisions at issue, naturally read, includes persons held in this capacity. And indeed, the legislative history of the statutory restrictions indicates that the prospect of transferring the Uighurs themselves partly animated the legislation. During the floor debates on the SAA,

legislators expressed concern that, without the transfer restriction, the Executive would release certain Uighur detainees in the United States, given the policy of not returning detainees to countries in which they would likely be tortured. See, *e.g.*, 155 Cong. Rec. H5618 (daily ed. May 14, 2009) (Rep. Tiahrt); see also, *e.g.*, *id.* at H5621 (Rep. Wolf); *id.* at S5589 (daily ed. May 19, 2009) (Sen. McConnell); *id.* at S5605-S5606 (Sen. Hatch); *id.* at S5653 (daily ed. May 20, 2009) (Sen. Thune). Particularly when considered in light of that history, Congress's restrictions on the release in the United States of persons detained at Guantanamo Bay cannot plausibly be read to exclude petitioners from their compass.

Petitioners finally contend (Br. 51) that the transfer restrictions apply only to specific agencies and that petitioners could therefore be "surrendered to the custody of another agency in order to give effect to a judicial order." Petitioners are correct that the funding limitation in the NDAA governs spending only by the Department of Defense. NDAA § 1041(a), 123 Stat. 2454. But the other acts, by their terms, prohibit *any* expenditure of federal funds to transfer Guantanamo Bay detainees into the United States for release here. DHS Act § 552(a), 123 Stat. 2177; DOI Act § 428(a), 123 Stat. 2962; CAA § 532(a); Defense Act § 9011(a).[28]

[28] Because Congress has exercised its power to enact comprehensive and specific rules for the admission or exclusion of aliens, this case does not present the question whether the Executive has what petitioners call an "immanent power" to exclude beyond that which is conferred by statute. Pet. Br. 42-44. Petitioners' reliance on (Br. 44) *United States* v. *Libellants & Claimants of the Schooner Amistad*, 40 U.S. (15 Pet.) 518 (1841), is misplaced for the same reason. Contrary to petitioners' premise, the government does not here rely on any notion of extra-statutory executive power. Moreover, that case involved property and persons all physically present in Connecticut. No issue arose about the

3. The statutory bars to petitioners' entry do not violate the Suspension Clause

The remedy sought in this case is unprecedented. Petitioners have not identified any decision in which a habeas court has ordered the Executive to bring an alien housed abroad into the country and to release him here. Pet. App. 13a n.13.[29] Indeed, the court of appeals was "certain" that, "[w]hatever may be the content of common law habeas corpus," "no habeas court since the time of Edward I ever ordered such an extraordinary remedy." *Id.* at 13a. There are sound reasons why this Court should not be the first to do so.

Petitioners contend (Br. 36, 40-41, 50) that, if federal law bars them from entering the United States, that law violates the Suspension Clause because "U.S. release is the only way to achieve" release from Guantanamo Bay. But petitioners' argument misconceives the nature of the habeas remedy to which they are entitled and mis-

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power of the courts to override the political Branches' control of the borders, and nothing in the decision suggests that a court could order aliens not physically present in the United States to be brought to the country and released here.

[29] Petitioners cite (Br. 30) *Du Castro's Case*, (1697) 92 Eng. Rep. 816 (K.B.), but that opaque one-paragraph decision addressed only whether an alien in Britain could seek habeas corpus relief; it did not address whether a foreigner outside the country could obtain an order requiring his admission. Petitioners also cite (Br. 39) *United States ex rel. Bradley* v. *Watkins*, 163 F.2d 328 (2d Cir. 1947), but that case is similarly inapposite. The alien there had been physically present in the United States for six years, but had not "made an entry" in a legal sense. *Id.* at 330. He did not ask the court for admission into the United States, explaining "that he ha[d] no desire to enter the United States but wishe[d] to ship out as a seaman on a foreign bound vessel." *Id.* at 332. The court of appeals granted relief, specifically noting that "he ha[d] no right to enter the United States." *Ibid.*

describes their own situation. Petitioners do not remain in U.S. custody at Guantanamo Bay as enemy combatants, which was the status they successfully challenged in their habeas petitions. They remain at Guantanamo Bay either because they have not accepted offers of resettlement or, in the case of the two individuals who have accepted recent offers, their transfer has not yet been effected. Under these circumstances, petitioners' continued custody pending resettlement raises no Suspension Clause concerns, and thus furnishes no basis to override the judgment of the political Branches.

a. The exclusion of petitioners at Guantanamo Bay from other countries, including the United States, necessarily limits their resettlement options and constrains their freedom. But this Court has never considered that result sufficient to justify a judicial order requiring that an alien be allowed into the United States in contravention of the law and judgment of the political Branches. Indeed, the Court has declined to issue such a mandate even when the alien is at the very border of the United States.

In *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court considered a habeas petition filed by a former long-term resident alien who was refused admission upon his return to the United States, and was "stranded in his temporary haven on Ellis Island because other countries [would] not take him back." *Id.* at 207. Agreeing with Judge Learned Hand that no alien lawfully excluded from this country "can force us to admit him" even if "there is no country which will accept him," *United States ex rel. Mezei* v. *Shaughnessy*, 195 F.2d 964, 970 (2d Cir. 1952) (dissenting opinion), the Court held that Mezei was not entitled even to temporary admission to the United States pending his reset-

tlement elsewhere. *Mezei*, 345 U.S. at 207, 210, 215-216. The Court explained that the power to exclude aliens is "a fundamental sovereign attribute" vested in the political Branches, *id.* at 210, and that Mezei did not have an enforceable right to enter the United States, *id.* at 216. See also *ibid.* ("[T]he right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.").

In dissenting opinions, Justice Black (345 U.S. at 218) and Justice Jackson (*id.* at 224-228) sharply criticized the process by which Mezei had been excluded from the United States, based on confidential information without a hearing. See *Mezei*, 345 U.S. at 210-211. But no Member of the Court questioned the proposition that an alien lawfully excluded from the United States has no constitutional right to enter, even if the consequence of exclusion is that the alien must remain in U.S. custody at the border pending identification of another country willing to accept him. See *id.* at 227-228 (Jackson, J., dissenting). A fortiori that proposition applies to aliens outside the United States.

Although petitioners (Br. 37 n.33) note that *Mezei* "has been widely criticized," they acknowledge (*id.* at 38 n.34) that the criticism has largely focused on the lawfulness of the process by which a long-term resident returning to the United States was refused admission. Petitioners themselves do not question the basic tenet, from which no Member of the Court dissented, that an alien who is lawfully excluded from the United States has no right to enter, even if there is no other place he can go. See *id.* at 37-38.

Petitioners contend (Br. 38), however, that *Mezei* is distinguishable because "Mezei really was 'free to leave'" Ellis Island, and indeed left twice. The freedom

to which petitioners refer was Mezei's freedom to "ship[] out" to other countries only to be refused permission to land and then to return to U.S. custody on Ellis Island. *Mezei*, 345 U.S. at 208-209. But there is no difference in this respect, except one cutting in the opposite direction. As in *Mezei*, the government here is not blocking resettlement of the excluded aliens; more than in *Mezei*, the government has made determined and extensive efforts to facilitate the resettlement of petitioners. And as a result of those efforts, all seven Uighurs at Guantanamo Bay, unlike Mezei himself, have received an invitation from another country, even if not all those offers were accepted.

Petitioners also contend (Pet. Br. 37-40) that *Mezei* is distinguishable because Mezei appeared voluntarily at the border, while they were brought involuntarily to Guantanamo Bay. *Mezei*, they contend, implicates "a legitimate Executive concern," which they say is not present here, that "volunteers could claim admission by beaching themselves." *Id.* at 38. But the difference is less great than petitioners contend, because at this point, given that all have received offers of resettlement, their presence at Guantanamo Bay has become voluntary (although they do not, of course, have the full range of choices they would like). In any event, no part of the Court's opinion in *Mezei* expressed concerns about inadmissible aliens deliberately "beaching themselves" on U.S. shores; indeed, Mezei himself, who left his freedom abroad only upon receipt of an immigration visa, would not fairly fit that description. See 345 U.S. at 208; *id.* at 219, 227 (Jackson, J., dissenting). The Court's concern in *Mezei* was, rather, one of respect for the political Branches' authority to control the Nation's borders. See

id. at 216. That concern applies with particular force in this case.

b. This Court's decisions in *Zadvydas*, *supra*, and *Clark* v. *Martinez*, 543 U.S. 371 (2005), are not to the contrary. Cf. Pet. Br. 45-47.

The statute at issue in *Zadvydas* and *Martinez*, 8 U.S.C. 1231(a)(6), authorizes detention of aliens subject to final orders of removal from the United States after the statutory 90-day removal period. See 8 U.S.C. 1231(a)(1)(A) and (2); 8 U.S.C. 1231(a)(6); *Zadvydas*, 533 U.S. at 683. In *Zadvydas*, this Court considered whether Section 1231(a)(6) authorized continued detention of two lawful permanent residents whose removal orders had not been effectuated because no country had agreed to accept them. *Id.* at 684-686. The Court concluded that reading the statute to permit the potentially indefinite detention of the aliens, once removal was "no longer practically attainable," would raise serious due process concerns. *Id*. at 690-696. In the absence of a clear congressional intent to the contrary, the Court held that the statute should be interpreted generally to limit the period of detention to a time "reasonably necessary to secure removal." *Id.* at 696-699.

In identifying the relevant constitutional concerns, the Court expressly distinguished a situation in which an alien previously admitted to the United States is detained pending removal from one in which, as in *Mezei*, an alien is stopped before entry and remains in U.S. custody pending disposition. *Zadvydas*, 533 U.S. at 693 (citing *Mezei*, 345 U.S. at 693); see *id.* at 682 ("Aliens who have not yet gained initial admission to this country would present a very different question."); *id.* at 693 (noting that the "distinction between an alien who has effected an entry into the United States and one who has

never entered runs throughout immigration law"). The Court therefore explained that its decision would not affect "the political branches' authority to control entry into the United States" or leave an "'unprotected spot in the Nation's armor.'" *Id.* at 695-696 (quoting *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 602 (1953)).

In *Martinez*, the Court applied Section 1231(a)(6), as it had been interpreted in *Zadvydas*, to the detention of aliens who had been paroled into the United States, and thus were treated for purposes of immigration law as though they had been stopped at the border. 543 U.S. at 378; see *Zadvydas*, 533 U.S. at 693. The Court did not dispute that the constitutional concerns underlying the Court's statutory interpretation in *Zadvydas* were "not present" for aliens never admitted to the United States. *Martinez*, 543 U.S. at 380. "Be that as it may," the Court explained, "it cannot justify giving the *same* detention provision a different meaning" when applied to aliens who had not been admitted. *Ibid.* If the Court's reading of the statute, as applied to inadmissible aliens, compromised the political Branches' ability to secure national borders, the Court reasoned that "Congress can attend to it." *Id.* at 386.

Congress of course has attended to the matter at issue in this case, both in the INA and in the recently enacted specific statutory bars. *Martinez* thus provides no support for the primary proposition for which petitioners cite it: that an alien who is in U.S. custody outside the United States is constitutionally entitled to admission to the United States if he cannot find another country willing to accept him. See Pet. Br. 45-46. That proposition would be especially misguided in the circumstances of this case, in which all seven of the Uighurs

remaining at Guantanamo Bay have received offers of resettlement in other countries.

4. A judicial order overriding the judgment of the political Branches would adversely affect important U.S. interests

To hold for the first time in this case that an alien has a constitutional right to enter the United States in contravention of Acts of Congress and the judgment of the political Branches would undermine fundamental interests associated with the federal power to control national borders.

At the most basic level, this result would enable petitioners and others in a similar situation to bypass Executive enforcement of statutes designed to ensure that the admission of aliens is consistent with considerations of public safety and national security. As described above, the congressional judgments relevant here are reflected not only in the general standards and procedures of the INA, but also in specific statutory provisions. Those judgments are entitled to respect from the Judiciary.

Granting petitioners' requested relief also could interfere with the government's ongoing efforts to resettle in other countries persons entitled to release from military detention at Guantanamo Bay. As described earlier, the government has made assiduous and successful efforts in response to habeas orders to repatriate these individuals or, when necessary, to identify alternate countries for resettlement. Providing detainees with a judicially enforceable right to be released in the United States could hamper diplomatic approaches to other countries to admit these persons. See *Zadvydas*, 533 U.S. at 711 (Kennedy, J., dissenting) (noting that an

alien's home country may "ignore or disclaim responsibility to accept [his] return" if the alien has a right to release in the United States). And recognition of such a right might cause detainees to refuse or discourage offers from other countries that, for whatever reason, they view as less desirable than the United States. See id. at 713 (Kennedy, J., dissenting).

Construing the Suspension Clause as petitioners propose also would operate at cross-purposes with the government's humanitarian obligations. Petitioners remain at Guantanamo Bay because they reasonably fear torture in China, and the United States, consistent with established policy, will not return them to that country. A court order requiring that petitioners be brought to the United States—in the face of the political Branches' contrary judgment—would impose heavy burdens on the Nation's commitment to abide by humanitarian norms. Cf. Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391-392, 414 (1953) (raising concerns that states might forcibly repatriate prisoners of war "if the obligation not to repatriate were to involve a further obligation to provide a permanent home for displaced prisoners").

D. The Habeas Statute Does Not Authorize A Judicial Order Compelling Petitioners' Transfer To And Release In The United States

As an alternative to their argument that the Suspension Clause requires a judicial order transferring them to the United States, petitioners contend (Br. 52-59) that such an order is warranted to remedy asserted Due Process Clause and Geneva Convention violations cognizable under the federal habeas statute, 28 U.S.C. 2241.

Assuming petitioners' habeas rights flow from Section 2241 as well as the Constitution, see *Kiyemba* v. *Obama*, 561 F.3d 509, 512 n.2 (D.C. Cir. 2009), petition for cert. pending, No. 09-581 (filed Nov. 10, 2009); but see *Boumediene* v. *Bush*, 128 S. Ct. at 2278 (Souter, J., concurring), their reliance on the habeas statute adds nothing to their arguments based on common-law habeas rights protected by the Suspension Clause and provides no support for granting the unprecedented relief they seek.

1. Petitioners contend (Br. 53-55) that, as aliens outside the United States, they are entitled to the protections of the Due Process Clause of the Fifth Amendment, and they then briefly assert (*id.* at 55) that the Due Process Clause requires the order they seek.

For purposes of this case, the question is not whether petitioners have any rights under the Due Process Clause while they are at Guantanamo Bay. As this Court has explained in another case involving the release of aliens from custody, "'substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it] is asked to break new ground in this field.'" *Reno* v. *Flores*, 507 U.S. 292, 302 (1993) (first set of brackets in original; citation omitted). Here, petitioners claim a substantive due process right to be brought to and released in the United States if another country has not yet been identified that will accept them. But even disregarding that all petitioners remaining at Guantanamo Bay have received offers of resettlement from other countries, the law is clear that aliens who have not been granted authority to enter the United States under the immigration laws have no due process

right to do so. See *Mezei*, 345 U.S. at 215; *Harisiades*, 342 U.S. at 588-591.

Zadvydas, on which petitioners rely (Br. 55), does not support their position. As explained above, pp. 39-40, *supra*, *Zadvydas* concerned a question of statutory interpretation in a case involving an alien in the United States who had previously been admitted for permanent residence. In describing the due process concerns underlying its interpretation of the statute, the Court emphasized the "basic territorial distinction" between an alien who has entered the United States and one who has not, *Zadvydas*, 533 U.S. at 694, and disclaimed any intent to undermine "the political branches' authority to control entry into the United States," *id.* at 695.

2. Petitioners also err in contending (Br. 55-59) that they are entitled to enter the United States under the provisions of the Third and Fourth Geneva Conventions. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Petitioners' argument fails as an initial matter because the Geneva Conventions are not judicially enforceable in actions brought by individuals in United States courts. See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 5, 120 Stat. 2631 ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or

territories."). Petitioners contend (Br. 58) that Section 5 of the MCA bars reliance only on certain provisions of the Geneva Conventions, such as those "affording the prisoner of war rights to garden tools and musical instruments," and does not address the Geneva Convention rights they seek to invoke. But their limited reading finds no support in the text of Section 5, which draws no distinction among the various provisions of the Conventions.

Petitioners also contend (Br. 58-59) that, because Congress did not specify an effective date for Section 5, it does not apply to cases pending at the time it was enacted. But Congress enacted Section 5 to "clarif[y]" the law, not to change it, H.R. Rep. No. 731, 109th Cong., 2d Sess. 39 (2006), and did so with the detainees at Guantanamo Bay squarely in mind. At the time the MCA was enacted, no court of appeals had held that the Geneva Conventions were privately enforceable in United States courts. This Court, moreover, had held that a previous version of the Geneva Convention did not confer privately enforceable rights, *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 n.14 (1950), and had assumed without deciding that the 1949 Conventions similarly were not privately enforceable, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 627-628 (2004). Under these circumstances, and because petitioners seek prospective relief beyond simple release, no issue of retroactivity arises.[30]

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[30] Although the government explained in its brief in opposition that Section 5 bars petitioners' reliance on the Geneva Conventions, Br. in Opp. 23-24, petitioners have not argued in either their reply brief at the petition stage or in their opening brief on the merits that the application of Section 5 to the asserted Geneva Convention rights they invoke would raise concerns under the Suspension Clause. The court of appeals, moreover, did not address that issue in the decision below.

In any event, none of the provisions on which petitioners rely provides support for the extraordinary relief they seek. Articles 132 through 135 of the Fourth Geneva Convention provide for the release and return to last place of residence or repatriation of civilian internees upon the cessation of hostilities. 6 U.S.T. at 3606-3608, 75 U.N.T.S. at 376-378. Even if petitioners were civilian internees, those provisions do not require a state to admit such persons into its territory after releasing them. To the contrary, Article 135 expressly contemplates that the State may "refuse[] permission to reside in its territory" even "to a released internee who previously had his permanent domicile therein." 6 U.S.T. at 3608, 75 U.N.T.S. at 378.

The commentary to Article 135, on which petitioners rely (Br. 56), provides no greater support for their argument. Like Article 135 itself, the commentary focuses on individuals who have been domiciled in the state in which they have been detained, and refers to the state's humanitarian obligation to tolerate a former internee's continued presence, on a temporary basis, if he opposes repatriation for fear of persecution. International Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Treatment and Protection of*

There is thus no occasion for the Court to address the issue here. See *Noriega* v. *Pastrana*, No. 09-35 (Jan. 25, 2010), slip op. 8, 13 n.12 (Thomas, J., dissenting from denial of certiorari); see also, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address issues not passed on in court of appeals). In any event, the application of Section 5 to petitioners' Geneva Convention claims in this case raises no Suspension Clause concerns. There is neither historical evidence nor modern precedent suggesting that the constitutional content of the writ of habeas corpus includes a right to enter a foreign country, or to obtain relief under a treaty that Congress has declared to be not judicially enforceable.

Civilian Persons in Time of War 519 (Jean S. Pictet ed. 1958). The commentary does not address the situation of persons who, like petitioners, seek to enter the state for the first time, nor does it treat even temporary refuge in the state as a legally enforceable right under the Convention.

Petitioners also rely (Br. 56-57) on Common Article 3, found in the Third and Fourth Geneva Conventions, which guarantees the humane treatment of persons not actively engaged in hostilities. 6 U.S.T. at 3318, 3518; 75 U.N.T.S. at 136, 288. Even if, as petitioners argue (Br. 57), that guarantee of humane treatment could be the source of a right of release from detention after the cessation of hostilities, petitioners cite no authority, and we are aware of none, to suggest that it also includes a right to be brought into the territory of the detaining state.

E. Even Assuming Arguendo That A Court In Some Circumstance Might Have The Power To Enter The Order Petitioners Seek, The Government's Sustained And Successful Resettlement Efforts Should Preclude Such An Order Here

Even were the Court to conclude that the right to release from military detention might under some circumstances encompass a right to enter the United States in contravention of the political Branches' judgment, there is no basis for such an extraordinary order here. The government's efforts to resettle petitioners, which have necessarily involved complex negotiations and processes, compare favorably to similar, historic efforts to repatriate prisoners of war. And the government's efforts here have met with sufficient success—the completed or planned resettlement of all but five of the Uighurs and offers of resettlement to those five—to

preclude any conclusion that such an order of last resort is appropriate here.

1. Petitioners agree that any order requiring release of an alien at Guantanamo Bay should afford the government some time to arrange for his transfer to a destination other than the United States. Petitioners contend, however, that "[i]n all cases a short time should be fixed." Pet. Br. 34 n.30. Noting that "[d]omestic *habeas* grants customarily result in actual freedom in mere days," petitioners suggest that it is "within the competence of the *habeas* judge" to determine whether a week is sufficient or whether the case is sufficiently complex that "a longer period" might be appropriate. *Ibid.*

The amount of time necessary for repatriation or resettlement of military detainees is not easy to fix. The process requires the United States to engage in delicate diplomatic negotiations, to make expert judgments about conditions in foreign countries, and to solicit and evaluate foreign countries' assurances of humane treatment. The foreign government involved, too, must make its own, often extensive internal evaluations about the appropriateness of the placement; the government may interview the prospective resettlement candidate and may run approval of the transfer through a formal decisionmaking process. Once a foreign government agrees to accept a person for resettlement, further time may be needed to develop a plan for the logistics of the move and the integration of the person into society. Those processes generally take significantly longer than the "mere days" petitioners would use as a benchmark of reasonableness. Pet. Br. 34 n.30.

2. Historical practice regarding repatriation of prisoners of war is instructive in evaluating the reasonableness of resettlement efforts for persons detained at

Guantanamo Bay. Cf. Pet. Br. 47 (acknowledging that "[i]n past conflicts the Executive needed time to accommodate the logistics of repatriation of prisoners of war"). At the close of recent conflicts, detainees who have opposed return to their home countries for fear of mistreatment have often been held for extended periods pending resettlement.

During World War II, Allied forces captured approximately 500,000 Soviet nationals who were serving with the German Army and fighting in German uniform. See Christiane Shields Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights*, in *World in Transition: Challenges to Human Rights, Development and World Order* 77 (Henry H. Han ed., 1979). The Soviet nationals, many of whom the German Army had forced to fight, were sent back to the Soviet Union despite their fears of execution or confinement in forced labor camps. See *id.* at 78. In all, Allied forces repatriated more than two million Soviet prisoners of war, including both former combatants and displaced persons, a substantial number against their will. See Nikolai Tolstoy, *The Secret Betrayal* 315-316 (1977); Julius Epstein, *Operation Keelhaul: The Story of Forced Repatriation from 1944 to the Present* 1-2, 71-72, 99-102 (1973). Many of the repatriated Soviet nationals were subjected to horrific treatment upon their return, including summary execution, rape, and transport to forced labor camps. See Tolstoy 310-311, 315-316, 319, 351, 357; Epstein 81-83, 89-91.

In response to that experience, states at the close of later conflicts began to hold prisoners of war who opposed repatriation rather than forcibly returning them to their home countries. After the start of cease-fire negotiations in the Korean War, the United Nations

Command held approximately 100,000 Chinese and North Korean prisoners of war who refused to return to their native countries, many for more than two years, based on apparent concerns that repatriated prisoners "most likely would be sent to forced labor camps or arbitrarily executed." Charmatz & Wit, 62 Yale L.J. at 392, 412; Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War* 157-165 (1977).

Similarly, by the end of the First Gulf War, the United States and allied forces had detained tens of thousands of Iraqi prisoners of war, some 13,000 of whom refused repatriation. See Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* App. 661-663, 671-672, 703-708 (Apr. 1992) <http://www.ndu.edu/library/epubs/cpgw.pdf>. Those detainees were ultimately reclassified as refugees. Thousands remained in internment camps in Saudi Arabia for more than two years as arrangements were made for their humanitarian transfer to alternate countries, including the United States. See William Claiborne, *Controversy Puzzles Iraqi Refugees: Ex-Soldiers Promised Resettlement Here Become Lawmakers' Targets*, Wash. Post, Sept. 16, 1993, at A3.

3. Although petitioners resist (Br. 47) comparisons to prisoners of war in prior conflicts, they are similarly situated in relevant respects. Petitioners were apprehended near an area of active hostilities and detained as enemy combatants; their detention on that basis has ended, and they now oppose repatriation. As in earlier conflicts, the United States has honored a commitment not to return them to their home country, where they

reasonably fear torture, and it has made diligent efforts to identify alternate countries for resettlement.

As history shows, that process takes time. Petitioners' continued presence at Camp Iguana pending resettlement is consistent with the experience of prisoners in prior conflicts who have opposed repatriation. The Uighurs at Guantanamo Bay have been subject to habeas orders since September 2008. The United States has since successfully identified countries willing to resettle every one of them. The five Uighurs remaining at Guantanamo Bay, after the transfer of two to Switzerland, all will have received two offers of resettlement to foreign countries. Under the circumstances, the extraordinary order petitioners seek, if legally available at all, is not warranted.

F. Subsequent Developments Have Undermined The Factual Premise Of The District Court's Order And This Court's Writ Of Certiorari

The district court ordered that petitioners be transferred to the United States for release on the premise that there was no other means by which petitioners could leave U.S. custody at Guantanamo Bay. See Pet. App. 58a-60a. The question on which this Court granted review proceeded from the same premise. See Pet. i ("Whether a federal court exercising its *habeas* jurisdiction, as confirmed by *Boumediene v. Bush*, has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in the law, and release into the continental United States is the only possible effective remedy.") (citation omitted).

At the time the district court issued its order, the government had transferred for resettlement in another

country five of the 22 Uighurs originally held in military detention at Guantanamo Bay. Since the district court issued its order, the government has resettled another 10 Uighurs in other countries. On February 3, 2010, the government of Switzerland announced that it would admit for residence two additional Uighurs, including the one who has presented the greatest resettlement challenge. The five other Uighurs who remain in custody at Guantanamo Bay (two of whom are petitioners in this Court) have all received offers of resettlement in Palau, as well as a second country, but have chosen not to accept them. Although the second country has formally withdrawn its offer, Palau's offer might again be made available, although further discussions with the Palauan government would have to occur. And the United States continues to work to identify other options for resettlement.

It was never the case, given the extensive diplomatic efforts undertaken by the United States to resettle petitioners, that a judicial order of release into the United States—in contravention of the immigration laws and specific statutory bars on the transfer of Guantanamo Bay detainees for release in the United States—was "the only possible effective" means for petitioners to leave U.S. custody at Guantanamo Bay. Pet. i. But even if that once legitimately seemed the case, it is not so now. Because these developments eliminate the factual premise of the question presented in this case, the Court may wish to dismiss the writ of certiorari as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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APPENDIX

1. Article I, Section 9, Clause 2 of the United States Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 28 U.S.C. 2241 provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the dis-

trict within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

4. 28 U.S.C. 2243 provides:

Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it ap-

pears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

5. The Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, provides:

(a) None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia.

(b) None of the funds made available in this or any prior Act may be used to transfer an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, for the purpose of detention in the continental United States, Alaska, Hawaii, or the District of Columbia, except as provided in subsection (c).

(c) None of the funds made available in this or any prior Act may be used to transfer an individual who is detained, as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, for the purposes of prosecuting such individual, or detaining such individual during legal proceedings, until 45 days after the plan detailed in subsection (d) is received.

(d) The President shall submit to the Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of the date of enactment of this Act. Such plan shall include, at a minimum, each of the following for each such individual:

(1) The findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer of the individual.

(2) The costs associated with transferring the individual in question.

(3) The legal rationale and associated court demands for transfer.

(4) A plan for mitigation of any risk described in paragraph (1).

(5) A copy of a notification to the Governor of the State to which the individual will be transferred or to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

(e) None of the funds made available in this or any prior Act may be used to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba, as of the date of enactment of this Act, to the country of such individual's nationality or last habitual residence or to any other country other than the United States, unless the President submits to the Congress, in classified form 15 days prior to such transfer, the following information:

(1) The name of any individual to be transferred or released and the country to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with another country for acceptance of such individual, including the amount of any financial assistance related to such agreement.

(f) Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.

6. The Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2177, provides:

(a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

(b) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guan-

tanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purpose of detention, except as provided in subsection (c).

(c) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purposes of prosecuting such individual, or detaining such individual during legal proceedings, until 45 days after the plan described in subsection (d) is received.

(d) The President shall submit to Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of June 24, 2009. Such plan shall include, at a minimum, each of the following for each such individual:

(1) A determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred.

(2) A determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of

terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were transferred to such a facility.

(3) The costs associated with transferring the individual in question.

(4) The legal rationale and associated court demands for transfer.

(5) A plan for mitigation of any risks described in paragraphs (1), (2), and (7).

(6) A copy of a notification to the Governor of the State to which the individual will be transferred, to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia, or to any United States territories with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

(7) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer and the actions taken to mitigate such risk.

(e) None of the funds made available in this or any other Act may be used to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba, as of June 24, 2009, to the country of such individual's nationality or last habitual residence or to any other

country other than the United States or to a freely associated State, unless the President submits to the Congress, in classified form, at least 15 days prior to such transfer or release, the following information:

(1) The name of any individual to be transferred or released and the country or the freely associated State to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with the country or the freely associated State for the acceptance of such individual, including the amount of any financial assistance related to such agreement.

(f) None of the funds made available in this Act may be used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba.

(g) In this section, the term "freely associated States" means the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau.

(h) Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.

7. The National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1401, 123 Stat. 2454, provides:

LIMITATION ON USE OF FUNDS FOR THE TRANSFER OR RELEASE OF INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA.

(a) RELEASE PROHIBITION.—During the period beginning on October 1, 2009, and ending on December 31, 2010, the Secretary of Defense may not use any of the amounts authorized to be appropriated in this Act or otherwise available to the Department of Defense to release into the United States, its territories, or possessions, any individual described in subsection (e).

(b) TRANSFER LIMITATION.—During the period beginning on October 1, 2009, and ending on December 31, 2010, the Secretary of Defense may not use any of the amounts authorized to be appropriated in this Act or otherwise available to the Department of Defense to transfer any individual described in subsection (e) to the United States, its territories, or possessions, until 45 days after the President has submitted to the congressional defense committees the plan described in subsection (c).

(c) COMPREHENSIVE PLAN REQUIRED.—The President shall submit to the congressional defense committees a plan for the disposition of each individual described in subsection (e) who is proposed to be transferred to the United States, its territories, or possessions. Such plan for each individual shall include, at a minimum—

(1) an assessment of the risk that the individual described in subsection (e) poses to the national security of the United States, its territories, or possessions;

(2) a proposal for the disposition of each such individual; (3) the measures to be taken to mitigate any risks described in paragraph (1);

(4) the location or locations at which the individual will be held under the proposal for disposition required by paragraph (2);

(5) the costs associated with executing the plan, including technical and financial assistance required to be provided to State and local law enforcement agencies, if necessary, to carry out the plan;

(6) a summary of the consultation required in subsection (d); and

(7) a certification by the Attorney General that under the plan the individual poses little or no security risk to the United States, its territories, or possessions.

(d) CONSULTATION REQUIRED.—The President shall consult with the chief executive of the State, the

District of Columbia, or the territory or possession of the United States to which the disposition in subsection (c)(2) includes transfer to that State, District of Columbia, or territory or possession.

(e) DETAINEES DESCRIBED.—An individual described in this subsection is any individual who is located at United States Naval Station, Guantanamo Bay, Cuba, as of October 1, 2009, who—

(1) is not a citizen of the United States; and

(2) is—

(A) in the custody or under the effective control of the Department of Defense; or

(B) otherwise under detention at the United States Naval Station, Guantanamo Bay, Cuba.

8. The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 428, 123 Stat. 2962, provides:

(a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

(b) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station,

Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purpose of detention, except as provided in subsection (c).

(c) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purposes of prosecuting such individual, or detaining such individual during legal proceedings, until 45 days after the plan described in subsection (d) is received.

(d) The President shall submit to Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of June 24, 2009. Such plan shall include, at a minimum, each of the following for each such individual:

(1) A determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred.

(2) A determination of the risk that the individual might advocate, coerce, or incite violent extrem-

ism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were transferred to such a facility.

(3) The costs associated with transferring the individual in question.

(4) The legal rationale and associated court demands for transfer.

(5) A plan for mitigation of any risks described in paragraphs (1), (2), and (7).

(6) A copy of a notification to the Governor of the State to which the individual will be transferred, to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia, or to any United States territories with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

(7) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer and the actions taken to mitigate such risk.

(e) None of the funds made available in this or any other Act may be used to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba, as of June 24, 2009, to the country of such individual's

nationality or last habitual residence or to any other country other than the United States or to a freely associated State, unless the President submits to the Congress, in classified form, at least 15 days prior to such transfer or release, the following information:

(1) The name of any individual to be transferred or released and the country or the freely associated State to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with the country or the freely associated State for the acceptance of such individual, including the amount of any financial assistance related to such agreement.

(f) In this section, the term "freely associated States" means the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau.

(g) Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.

9. The Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 532, provides:

(a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

(b) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purpose of detention, except as provided in subsection (c).

(c) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purposes of prosecuting such individual, or detaining such individual

during legal proceedings, until 45 days after the plan described in subsection (d) is received.

(d) The President shall submit to Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of June 24, 2009. Such plan shall include, at a minimum, each of the following for each such individual:

(1) A determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred.

(2) A determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were transferred to such a facility.

(3) The costs associated with transferring the individual in question.

(4) The legal rationale and associated court demands for transfer.

(5) A plan for mitigation of any risks described in paragraphs (1), (2), and (7).

(6) A copy of a notification to the Governor of the State to which the individual will be transferred, to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia, or to any United States territories with a certif-

ication by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

(7) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer and the actions taken to mitigate such risk.

(e) None of the funds made available in this or any other Act may be used to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba, as of June 24, 2009, to the country of such individual's nationality or last habitual residence or to any other country other than the United States or to a freely associated State, unless the President submits to the Congress, in classified form, at least 15 days prior to such transfer or release, the following information:

(1) The name of any individual to be transferred or released and the country or the freely associated State to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with the country or the freely associated State for the acceptance of such individual, including the amount of any financial assistance related to such agreement.

(f) None of the funds made available in this Act may be used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba.

(g) In this section, the term "freely associated States" means the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau.

(h) Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.

10. The Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, provides:

(a) None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

(b) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purpose of detention, except as provided in subsection (c).

(c) None of the funds made available in this or any other Act may be used to transfer an individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI), for the purposes of prosecuting such individual, or detaining such individual during legal proceedings, until 45 days after the plan described in subsection (d) is received.

(d) The President shall submit to Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of June 24, 2009. Such plan shall include, at a minimum, each of the following for each such individual:

(1) A determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred.

(2) A determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were transferred to such a facility.

(3) The costs associated with transferring the individual in question.

(4) The legal rationale and associated court demands for transfer.

(5) A plan for mitigation of any risks described in paragraphs (1), (2), and (7).

(6) A copy of a notification to the Governor of the State to which the individual will be transferred, to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia, or to any United States territories with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

(7) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer and the actions taken to mitigate such risk.

(e) None of the funds made available in this or any other Act may be used to transfer or release an individ-

ual detained at Naval Station, Guantanamo Bay, Cuba, as of June 24, 2009, to the country of such individual's nationality or last habitual residence or to any other country other than the United States or to a freely associated State, unless the President submits to the Congress, in classified form, at least 15 days prior to such transfer or release, the following information:

(1) The name of any individual to be transferred or released and the country or the freely associated State to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with the country or the freely associated State for the acceptance of such individual, including the amount of any financial assistance related to such agreement.

(f) In this section, the term "freely associated States" means the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau.

(g) Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287, provides in pertinent part:

* * * * *

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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CHAPTER XII

RELEASE, REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

ARTICLE 132

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of

residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

ARTICLE 133

Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

ARTICLE 134

The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

ARTICLE 135

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the costs of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

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