IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, Next Friend, *et al.*,
Appellees,

v.

GEORGE W. BUSH, President of the United States, *et al.*,
Appellants.

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

**MOTION FOR STAY PENDING APPEAL
AND FOR EXPEDITED APPEAL**

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INTRODUCTION AND SUMMARY

Three days ago, the district court ordered the Government to transport 17 Chinese aliens detained at Guantanamo Bay, Cuba, to Washington, D.C. for unconditional release into this country. Those aliens, who undertook arms training at a military camp in Afghanistan to engage in organized insurrection against the Government of China, were taken into custody by U.S. forces and detained at Guantanamo as enemy combatants. In the wake of *Parhat v. Gates*, 532 F.3d 834 (2008), which held that the record before a Combatant Status Review Tribunal (CSRT) did not support petitioner Parhat's detention as an enemy combatant, the Government has moved all 17 detainees to the least restrictive conditions practicable at Guantanamo. The Government has also worked tirelessly to find a country willing to accept them — a task made more difficult by issues that prevent their repatriation to their home country and the government policy against resettling them without adequate assurances of their humane treatment.

The district court recognized that the question of its authority to order petitioners' release into the United States "strikes at the heart of our constitutional structure, raising serious separation of power concerns," and also that the question was not resolved by this Court in *Parhat*. Opinion ("Op.") 12, 13. The district court noted that the most closely analogous precedent, *Shaughnessy v. United States ex rel.*

Mezei, 345 U.S. 206 (1953), weighed *against* release, Op. 7, and that the only other court to consider the question had held that it *lacked* authority to order release in this country, *id.* at 14-15 (discussing *Qassim v. Bush*, 407 F. Supp.2d 198 (D.D.C. 2005)). Nevertheless, the district court asserted the authority to "insinuate itself into a field normally dominated by the political branches," and to order release of aliens into this country, all under the general principle that "[l]iberty finds its liberator in the great writ." Op. 12, 16. That extraordinary holding warrants this Court's review before it is permitted to go into effect.

This case plainly satisfies the requirements for a stay pending appeal. First, the Government is likely to succeed on its appeal and, in any event, certainly has shown a substantial case on the merits. The district court's order conflicts with *Mezei*'s holding that the Government may detain indefinitely an alien who has been excluded from this country but cannot find another country to take him — a holding that the district court erroneously suggested it was free to disregard. The district court's order also contravenes the basic principle that the decision whether to allow an alien into the United States rests exclusively with the political branches. Here the political branches are in agreement: the Executive has determined that petitioners should not be allowed into the United States, and Congress itself, in the immigration statutes, has made a considered judgment that aliens who seek to engage in terrorist activities — broadly defined to include conduct admitted to by these petitioners — are

ineligible for admission. The district court offered no sound basis for holding that statutory provision effectively unconstitutional as applied here.

The balance of harms weighs heavily in favor of a stay. The district court has ordered released into this Nation's capital 17 aliens who, by the court's own description, were detained after they fled from military training camps near Tora Bora, Afghanistan, where they were receiving weapons training. *See* Op. 2-3. That order poses a real and imminent security risk; threatens our constitutional separation of powers; and risks complicating ongoing diplomatic efforts to find a country willing to accept petitioners and treat them humanely. Balanced against the serious harms to the Government and the public at large that would result from the denial of a stay, there are only modest harms to petitioners from granting a stay. As noted, the 17 individuals who are the subject of the district court's order are being held in largely unrestricted conditions, and the Government's underlying appeal could be significantly expedited.

To minimize delay, the Government requests such expedition. We propose that the Court issue a briefing schedule under which the opening merits brief would be due 14 days from the date of the Court's ruling on this motion, the response brief would be due 14 days later, and the reply brief would be due 7 days after that. Oral argument could be scheduled at the Court's earliest convenience following the conclusion of briefing.

In sum, given the enormous significance of the issues presented by the district court's unprecedented order, and the significant risk of irreparable injury that would result from denial of a stay, the Government respectfully requests that this Court stay the district court's order pending appeal, and expedite the appeal.[1]

STATEMENT

1. Petitioners are 17 Chinese Uighurs who traveled to Afghanistan to receive weapons training at military camps run by the East Turkistan Islamic Movement (ETIM). *See* Op. 2-3. They were subsequently captured by coalition forces and turned over to the U.S. military, which held them as enemy combatants at Guantanamo Bay. Each petitioner received a hearing before a CSRT to determine whether he was properly detained as an enemy combatant. Virtually all of petitioners testified at those hearings and/or told government interviewers that they had gone to Afghanistan to seek weapons training to fight the Chinese Government.

Thus, many petitioners stated that they were trained to use assault weapons at the camps. *See*, *e.g.*, Mamet (ISN 102) CSRT 32 (stating that he was "given * * * instruction with an AK-47"); Mahnut (ISN 277) CSRT 16 (same); Nasser (ISN 278)

[1] The Government also respectfully requests that, if the Court denies a stay pending appeal, the Court extend the current administrative stay for ten days to permit the Government to file a stay application with the Supreme Court. If such an application is filed, the Government respectfully requests that this Court extend the administrative stay pending the Supreme Court's disposition of the application.

CSRT 28 (same); Hassan (ISN 250) CSRT 2 (same); Memet (ISN 328) CSRT 16 (he "received training on pistols, AK-47, and two types of rifles"); Tourson (ISN 201) CSRT 15 (he "trained to use the rifle"); Sabour (ISN 275) CSRT 15 (the "training we got [was] on the Kalashnikov rifle"); Abdurehim (ISN 289) CSRT 15-16 (same); Ali (ISN 280) CSRT 17-18, 20 (same); Jalaldin (ISN 285) CSRT 20 (same); Osman (ISN 282) CSRT 16, 18 (same); Parhat (ISN 320) CSRT 15, 19 (he "trained on two * * * kinds of weapons," including the Kalashnikov).

The petitioners (with one exception) also explained that they sought this military training for the purpose of attacking China or Chinese interests. Rahman, for example, testified that he sought "training to fight back against the Chinese government." *See* Rahman (ISN 281) CSRT 14, 16. Parhat stated that he went to a camp to "train to fight * * * against the Chinese" and that he "would fight along the side of any group who was against the Chinese." Parhat (ISN 320) CSRT 44, 46. Tourson declared his intent to "go back to fight against the Chinese government." *See* Tourson (ISN 201) CSRT 23; *see also, e.g.,* Noori (ISN 584) CSRT 20 (stating that purpose of his training was "to return to his home and fight the Chinese"); Mahnut (ISN 277) CSRT 41-42 (stating that he wanted to take "action against the Chinese military"); Mamet (ISN 102) CSRT 70; Hassan (ISN 250) CSRT 1; Abdurehim (ISN 289) CSRT 13; Memet (ISN 328) CSRT 17; Semet (ISN 295) CSRT 19; Razakah (ISN 219) CSRT 17; Sabour (ISN 275) CSRT 18; Ali (ISN 280) CSRT 23; Nasser

(ISN 278) CSRT 28; Jalaldin (ISN 285) CSRT 16; Osman (ISN 282) CSRT 16, 19-20, 23.[2]

2. In *Parhat*, this Court reviewed, pursuant to the Detainee Treatment Act, a CSRT's determination that Parhat is an enemy combatant. The Court held that, in order to establish Parhat's enemy combatant status, the Government was required to present reliable evidence that (1) Parhat was part of or supporting ETIM, (2) ETIM was associated with al Qaida or the Taliban, and (3) ETIM is engaged in hostilities against the United States or its coalition partners. 532 F.3d at 843. The Court held that the CSRT's determination was not valid because the evidence "lacked sufficient indicia of * * * reliability" to establish the second and third elements. *Id.* at 836, 844.

However, the Court did not find unreliable the evidence that Parhat had been a part of or a supporter of ETIM, which consisted primarily of "Parhat's own statements and those of other Uighur detainees." *Id.* at 843-44. The Court described Parhat's repeated statements at his CSRT that "the government of China" is his "enemy." *Id.* at 842.

The *Parhat* Court ordered the Government to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.* at 851. The Court subsequently entered the same judgment in four additional cases involving similarly situated

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[2] The remaining petitioner, Arkin Mahmud, stated that he was en route to a military training camp, but was captured before he arrived. *See* Mahmud (ISN 103) CSRT 12.

detainees, while explicitly recognizing in response to petitioners' argument that they had a right of release into the United States that the Court was not deciding any "issue regarding the places to which these petitioners may be released." *Abdusemet v. Gates*, No. 07-1509 (D.C. Cir. Sept. 12, 2008). In the wake of those rulings, the Government determined that it would no longer seek to hold the Uighur detainees at Guantanamo as enemy combatants. Because the Executive had made a determination that the detainees should not be permitted into the United States, the Government continues to search for a country that will accept petitioners and provide adequate assurances of their humane treatment. In the meantime, petitioners are being housed as non-enemy combatants, in the least restrictive conditions practicable at Guantanamo.

3. On October 7, 2008, the district court, ruling from the bench, ordered the Government to transport petitioners to the United States for a hearing on Friday, October 10, 2008, at 10:00 a.m., at which time petitioners would be released. Furthermore, the court made clear in its oral ruling that it would not impose any conditions on release on October 10, but would instead consider restrictions at a later hearing, on October 16. *See* Transcript (Tr.) 63-68. The district court issued a written opinion and order on October 8, 2008.

On October 7, 2008, the Government moved for an emergency temporary stay, in order to permit consideration of whether the district court's order should be stayed

pending appeal. The Court granted an administrative stay on October 8, 2008, and ordered the Government to move for a stay pending appeal by October 10, 2008.

ARGUMENT

A STAY IS NECESSARY TO PRESERVE THE STATUS QUO AND TO PREVENT GRAVE HARM TO THE GOVERNMENT AND THE PUBLIC INTEREST

A stay pending appeal is plainly appropriate. The Government can show (1) a "substantial case on the merits" on appeal; (2) a likelihood that it will be irreparably harmed absent a stay; (3) a diminished prospect that petitioners will be substantially harmed if the Court grants a stay; and (4) a public interest in granting a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[3]

A. The Government Has A Substantial Case On The Merits.

The significance of the legal issue on appeal, the absence of any doctrinal or historical support for the district court's ruling, and the strength of the Government's position, all warrant a stay pending appeal.

The extraordinary importance of the issue before this Court is evident on the face of the district court's opinion, which recognizes that the issue is "not a simple

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[3] Petitioners suggested in their opposition to the emergency stay motion that this standard is modified by Fed. R. App. P. 23(c) and 24(d). But *Hilton* makes clear that the decision whether release is appropriate "should be guided" by the traditional stay factors and that any "presumption of correctness" about the initial decision (whether to release a prisoner or to continue his custody) "may be overcome if the traditional stay factors so indicate." 481 U.S. at 777.

one," and raises "serious separation of powers concerns" that "strike[] at the heart of our constitutional structure." Op. 12, 13. *Parhat* gave the Government the option to "release Parhat, to transfer him, or to expeditiously convene a new CSRT," but expressly reserved the question whether the Court could order release under the judicial review provisions of the Detainee Treatment Act. 532 F.3d at 850-851. Furthermore, *Parhat* did not address the question of release *into the United States* — as this Court subsequently recognized, in the course of entering the *Parhat* judgment in additional cases. *See Abdusemet v. Gates*, No. 07-1509 (D.C. Cir. Sept. 12, 2008) (holding, in response to petitioners' argument that *Parhat* judgment entitled them to release into this country, that the Court was not deciding any "issue regarding the places to which these petitioners may be released"). This appeal squarely presents that issue, and the extraordinary nature of the inquiry in itself warrants a stay.

The district court acknowledged that the question of its authority was not "conclusively resolved" by *Parhat* and remains "opaque" under its mandate. Op. 14. The district court further acknowledged that the only other court to decide the question, *Qassim v. Bush*, 407 F. Supp.2d 198 (D.D.C. 2005), had held that habeas courts *lack* authority to order Guantanamo detainees released into the United States. Op. 14-15. And the district court declined to follow the holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), instead relying on decisions that the

court itself recognized were not controlling. Op. 7-8 ("[d]rawing from the principles espoused in *Clark[v. Martinez,* 543 U.S. 371 (2005),] and *Zadvydas[v. Davis*, 533 U.S. 678 (2001)]," while recognizing that those cases "are not strictly analogous to the present inquiry").

The district court's reasoning and conclusion are in error. At the very least, the court's analysis is open to substantial doubt, warranting a stay pending appeal.

First, the district court's holding that it is unlawful to keep petitioners at Guantanamo Bay, Cuba, outside the United States, pending efforts to find a country to accept them, is flatly inconsistent with *Mezei*. There, the Supreme Court held that an alien detained indefinitely at Ellis Island because he had been permanently excluded from this country under the immigration laws, and could not find another country willing to admit him, had no constitutional right to be released into the United States. That was so even though the alien had previously resided in the United States for 28 years, and the grounds for his exclusion were undisclosed. A fortiori, *Mezei* controls here, because petitioners are outside the United States, have never previously been in this country, and have never applied for admission to the United States, thereby triggering the statutory processes for seeking entry.

The district court erroneously sought to distinguish *Mezei* on the ground that the detention in *Mezei* was not indefinite. Op. 7; *but see Zadvydas*, 533 U.S. at 693 ("*Mezei,* like the present cases, involves indefinite detention."). The district court

also reasoned incorrectly that *Mezei* has been undermined by *Zadvydas* and *Clark.* Op. 7-8. *Zadvydas* was a case of statutory construction, not a constitutional holding; *Clark,* similarly, was decided purely on statutory grounds. *See* 543 U.S. at 386; *see also* 8 U.S.C. § 1101(a)(38) (defining United States for purposes of the Immigration and Nationality Act (INA) to exclude Guantanamo). Furthermore, *Zadvydas* specifically distinguished *Mezei* based on the "critical distinction" between aliens such as Mezei and these petitioners, who have not been lawfully admitted to the United States, and aliens such as the *Zadvydas* petitioners, who had lawfully entered the country. 532 U.S. at 692-693. *Zadvydas* also explicitly declined to consider whether "subsequent developments have undermined *Mezei*'s legal authority," *id.* at 694 — thus underscoring that it is the Supreme Court's prerogative to overrule its own decisions, and that "lower courts lack authority to determine whether adherence to a judgment of [the Supreme] Court is inequitable." *Agostini v. Felton,* 521 U.S. 203, 258 (1997).[4]

The district court also sought to distinguish *Mezei* on factual grounds, but the

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[4] The district court also cited *Rosales-Garcia v. Holland,* 322 F.3d 386 (6th Cir. 2003), for the proposition that *Mezei* is no longer good law. *Rosales-Garcia* is only a constitutional avoidance case, not a holding regarding the constitutional rights of aliens who have not made an entry into the United States. *Rosales-Garcia* also recognized that "special circumstances involving national security" present different issues from those present in ordinary immigration cases. *Id.* at 414. And in any event, *Rosales-Garcia*'s reasoning as to *Mezei* is fatally flawed, because it relies entirely on cases that do *not* involve aliens. *Id.*

putative differences weigh against the court's holding. The district court reasoned that the *Mezei* Court was "unaware of what evidence, if any, existed against the petitioner," because the Government had refused to provide any. Op. 8. But surely the Government does not obtain greater latitude to detain an alien simply by refusing to provide to a court the evidence supporting its decision not to admit the alien. The district court also emphasized that the alien in *Mezei* came voluntarily to the United States. Op. 8, 16. But this distinction cuts against petitioners, who have not come to the United States *at all* under 8 U.S.C. § 1101(a)(38), and whose lack of any "voluntary connection" to the United States is another reason why their constitutional claims cannot succeed. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271-272 (1990). Moreover, even under the district court's reasoning, the petitioners "were lawfully detained" at the outset, Op. 5, pending a reasonable opportunity to determine whether individuals training at military camps in Taliban-controlled Afghanistan in 2001 were in fact combatants against the United States and its coalition forces, as opposed to combatants only against a different nation. The Government brought petitioners to Guantanamo in accord with established wartime practice to remove suspected enemy combatants from the field of battle to a safer location; this surely does not constitute "manipulation," as the district court erroneously suggested. Op. 16. A determination by the courts or the Executive that petitioners could no longer be detained as enemy combatants did not mean that petitioners became free to enter

the United States without regard to defined restrictions on entry under the Nation's immigration laws, or that the Government was without authority to detain them at Guantanamo on the distinct legal ground that they could not enter the United States and could not find another place to go.

In addition to being at odds with *Mezei*, the district court's release order violates the fundamental precept that the decision whether to admit an alien into the United States rests solely with the political branches. *See, e.g., Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (recognizing "the power to exclude aliens as inherent in sovereignty * * * and to be exercised exclusively by the political branches"); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (admission of alien is "sovereign prerogative"). This is a fundamental aspect of the inextricable link between government policies toward aliens and the conduct of foreign relations and, ultimately, national security. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Immigration is a quintessential sovereign function. For the judiciary to interfere in this realm is to threaten the political branches' ability to speak with one voice in the international arena.

Here, the Executive has determined that petitioners should not be allowed into the United States. Furthermore, Congress has made a legislative judgment in the immigration laws that individuals who seek to commit terrorist acts against a sovereign Government — and who receive weapons training for the purpose of doing

so — are not safe to be admitted into the United States. *See* 8 U.S.C. § 1182(a)(3)(B). Congress has also authorized the Government to detain aliens for extended periods if there are reasonable grounds to believe that those aliens are inadmissible under 8 U.S.C. § 1182(a)(3)(B) or otherwise pose a danger to national security. *See* 8 U.S.C. § 1226a(a)(1), (3). This statute was enacted in response to *Zadvydas*, in which the Supreme Court recognized that, in cases of "terrorism or other special circumstances, * * * special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. The district court's release order not only thwarts the limitations recognized in *Zadvydas* on the right to release of even lawfully admitted aliens, but also contravenes the normal operation of the immigration laws.

The district court conceded that it would not "normally" have a basis for "insinuating" itself into the political branches' decision regarding the admission of aliens into the United States. Op. 12. The court nevertheless claimed authority to intervene in this "exceptional" case, on the theory that the political branches' exclusive authority is superseded by petitioners' asserted constitutional right to release in this country. Op. 12, 16. But *no* decision of this Court or of the Supreme Court embraces such an expansive view of judicial authority. Indeed, as discussed, *Mezei* holds the exact opposite. And although the Supreme Court held in *Boumediene*

v. Bush, 128 S. Ct. 2229 (2008), that Guantanamo detainees have a constitutional right to habeas corpus to challenge the lawfulness of their detention, the Court did not hold that an alien is entitled in every instance to an order of release — much less, as petitioners here seek, an order that would require them to be brought to the United States and released into the general population (concepts that are nowhere addressed in the *Boumediene* decision). Even as to an order of release into another country, *Boumediene* recognized that 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; *see also* Op. 9 (*Boumediene* "hedged when discussing remedy"). And in *Munaf v. Geren*, 128 S. Ct. 2207, 2218 (2008), the Court admonished courts exercising habeas jurisdiction to be "reluctant to intrude upon the authority of the Executive in military and national security affairs." This is just such a case, in which the district court's order of release improperly interferes with a fundamental attribute of national sovereignty and the political branches' authority over the admission of aliens into the United States.

The district court also suggested that it was not required to defer to the judgment of the political branches that petitioners should not be admitted into the United States, because the Government assertedly had "subvert[ed] diplomatic efforts to secure alternative channels for release" by describing petitioners as "enemy combatants." Op. 16; *see* Op. 12-13 (asserting that Government's characterization of petitioners as "enemy combatants" has "stymied" efforts to locate country willing

to accept them). Putting aside the district court's own correct assumption that petitioners "were lawfully detained" pending a definitive status determination, Op. 5, this is the same sort of judicial second-guessing of diplomatic negotiations with foreign governments that the Supreme Court recently made clear was improper. *Munaf*, 128 S. Ct. at 2226 (refusing to review adequacy of assurances that Iraqi Government would not torture habeas petitioners).[5]

Finally, the district court erred in failing to give adequate weight to the Executive's authority, as part of its power to detain suspected enemy combatants, to return former enemy combatants or individuals ultimately determined not to be proven enemy combatants to their home country or another country. The district court accepted the proposition that the Government has such authority, but held it inapplicable because, in the court's view, petitioners' detention has become effectively indefinite and further diplomatic efforts are unlikely to bear fruit. Op. 8-9. But the legal validity of petitioner Parhat's detention as an enemy combatant was resolved just a few short weeks ago, and the Government's subsequent determination to apply that ruling to all Uighur petitioners is even more recent. Even assuming, contrary to our submission above, that a court could ever properly order that an alien

[5] In any event, the district court's assertion that the United States has "stymied" its own diplomatic efforts is factually erroneous, as its own opinion makes clear. *See* Op. 13 n.3 (classified footnote).

who has never been to this country nonetheless could be brought and released into the United States, surely the Government would be entitled to a reasonable period of time to continue its efforts to resettle petitioners, in light of recently changed circumstances.[6]

For all these reasons, the Government's position on appeal presents, at a minimum, substantial questions for the Court.

B. The Balance Of Harms Weighs Strongly In Favor Of A Stay.

Denial of a stay of the district court's order threatens significant and irreparable harm to the United States and the general public. First, the district court's order to

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[6] Historically, individuals detained as enemy combatants who cannot be returned to their home countries have been held for lengthy periods after the conclusion of hostilities pending repatriation. At the end of 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 for more than a year and a half, pending a determination of how best to resettle them. *See* Charmatz & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391, 392 (1953); 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). After World War II, Allied Forces spent several years dealing with issues relating to the repatriation of prisoners of war. *See id.* at 145-156 & n.53; Charmatz & Wit, *supra*, 62 YALE L.J. at 401 nn.46, 48, 404 n.70; 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* 80 (1979). Thousands of Iraqis were detained by the United States and its allies after the First Gulf War because they refused to be repatriated in their native country. *See* Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, at 707-708 (April 1992) (http://www.ndu.edu/library/epubs/cpgw.pdf).

release the detainees into the United States impinges on the political branches' exclusive constitutional and statutory authority over the admission of aliens into the United States, and over the winding up of the detention of former enemy combatants, including the identification of an appropriate country for relocation. These decisions implicate sensitive matters of foreign relations and national security, where judicial intrusion could have serious adverse consequences. *See Munaf*, 128 S. Ct. at 2226; *cf. Jama v. ICE*, 543 U.S. 335, 348 (2005) (recognizing that, even in run-of-the-mill removal proceeding, "selection of a removed alien's destination[] may implicate our relations with foreign powers"). By itself, this interference with Executive authority constitutes irreparable harm. *See Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576, 2587-2588 (2004); *Ex parte Peru*, 318 U.S. 578, 586-588 (1943).

Compliance with the district court's release order would also cause the Government irreparable harm by clouding the clear legal and factual distinction between petitioners' present status as inadmissible aliens who are not physically present in the United States and who have no claim of right to enter, *see Mezei*, 345 U.S. at 216, and their desired status as aliens in the United States, *see Zadvydas*, 533 U.S. at 692-694. Significantly, the district court suggested that the Government would not be permitted to institute immigration proceedings against petitioners following their release, Tr. 48, notwithstanding that they are plainly inadmissible under the immigration laws. *See* 8 U.S.C § 1182(a)(3)(B).

Finally, compliance with the district court's order would pose a serious security risk and a risk to the broader interests of the United States. The district court recognized that petitioners were taken into detention following weapons training at military camps in Afghanistan. Op. 2-3. Nevertheless, the district court ordered the release of these trained fighters into the country that has held them in detention for the past several years. Furthermore, the district court ordered petitioners released in Washington, D.C., without any limitations on their liberty for at least six days,[7] and has also ordered that the Government may not even apply the immigration laws governing terrorists that would normally apply to protect the United States against harm. Under these circumstances, it is self-evident that compliance with the district

[7] In its oral ruling, the district court made clear that the detainees would be released prior to the court's consideration at a subsequent hearing of whether to impose any conditions on release. *See* Tr. 63-68 (Government Counsel: "[I]n the meantime, from the Friday that they arrive [in the United States] until the Thursday of the hearing, there will be no supervision of them, is that my understanding of the Court's order?" Court: "That's right."). In their opposition to the Government's emergency motion for a temporary stay, petitioners suggested that the Government waived the opportunity to identify any harms that would be posed by their release. In fact, however, the district court ruled prior to the October 7 hearing that the only outstanding issues to be decided at the hearing were ones "of law," and not "factual issues." Sept. 29, 2008, Minute Order. Furthermore, the district court was fully aware at the October 7 hearing of the Government's position that release of petitioners into the United States would pose a danger to the public. *See, e.g.*, Tr. 14 (government counsel's statement that petitioners were "individuals who have received paramilitary training on AK-47, Kalashnikov assault rifles"), 15-16 (government counsel's argument that release of petitioners would pose a security risk because of their prior "military type training * * * in order to commit insurrection and to take up arms against another country").

court's release order could pose a threat to the public at large, and to U.S. interests. As the only other district court to consider the propriety of releasing Guantanamo detainees into the United States has recognized, such an order has "national security and diplomatic implications beyond the competence or the authority of" a district court. *Qassim*, 407 F. Supp.2d at 203.

In contrast, petitioners would not be substantially harmed by the granting of a stay. Petitioners are present in Guantanamo in the least restrictive conditions practicable, given the status of Guantanamo as a U.S. military base; they are in special communal housing with access to all areas of their camp, including an outdoor recreation space and picnic area, an air-conditioned bunk house, an activity room, a television equipped with a VCR and DVD, and various recreational items. Petitioners have expanded access to special food items, shower facilities, and library materials. Furthermore, any delay in their ultimate release from custody as a result of this stay motion would be relatively brief, given the highly expedited basis on which the Government proposes briefing and arguing this appeal. In these circumstances, the balance of harms weighs decisively in favor of a stay.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court grant a stay pending appeal, and expedite the appeal.

Respectfully submitted,

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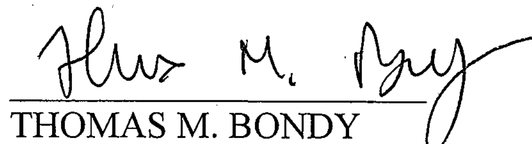
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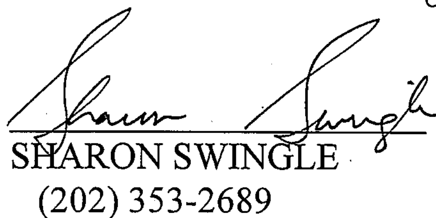
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OCTOBER 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, I filed and served the foregoing Motion for Stay Pending Appeal And For Expedited Appeal by causing an original and four copies to be delivered to the Court via hand delivery, and by causing copies to be delivered to the following counsel of record by electronic service simultaneously with the filing of the motion and by overnight delivery, postage prepaid:

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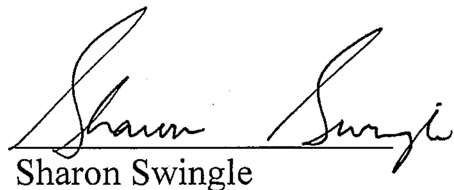


Sharon Swingle

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Respondents-Movants respectfully submit this Certificate as to Parties, Rulings and Related Cases:

(A) Parties and Amici:

Jamal Kiyemba, as next friend.

Abdusabur Doe

Abdusamad Doe

Abdunasir Doe

Hammad Doe

Hudhaifa Doe

Jallal Doe

Khalid Doe

Saabir Doe

Saadiq Doe

Ibrahim Mamet, as next friend

Edham Mamet

Usama Hasan Abu Kabir, as next friend

Sadar Doe

Arkeen Doe

Ahmad Doe

Abdur Razakah

Ali Thabid

Abdul Ghaffar

Adel Noori

George W. Bush

Donald Rumsfeld

Jay Hood

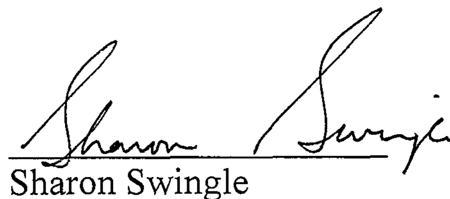
Mike Bumgarner

(B) Ruling Under Review

The ruling under review is Judge Ricardo M. Urbina's decision to grant petitioners' motion to for release into the United States. Judge Urbina issued his decision orally from the bench on October 7, 2008 in district court case numbers 05-1509, 05-1602, 05-1704, 05-2370, 05-2398, and 08-1310, and entered a written order on October 8, 2008.

(C) Related Cases

The Government is aware of no related cases.



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