UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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JAMAL KIYEMBA, ET AL Docket No. 05-1509
Petitioners,

v. Washington, D.C.
October 7, 2008
10:20 a.m.

GEORGE W. BUSH, ET AL
Respondents.

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MOTIONS/STATUS HEARING - UIGHURS CASES

BEFORE THE HONORABLE RICARDO M. URBINA
UNITED STATES DISTRICT JUDGE

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P-R-O-C-E-E-D-I-N-G-S

(10:20 A.M.; OPEN COURT.)

THE COURT: Good morning, everyone. All right.

THE DEPUTY CLERK: Matter before the court, Civil Action No. 05-1509, Jamal Kiyemba, et al versus George W. Bush, et al.

Counsel, I ask you to approach the podium to address the Court, please. State your name for the Court and the reporter.

MR. WILLETT: Good morning, Your Honor. Sabin Willett of Bingham McCutchen with my colleagues, Elizabeth Gilson and the Kramer Levin firm, Miller Chevalier and Baker & McKenzie.

We are here this morning on motions for parole and for release, but we will be focusing on the parole motion.

These Guantanamo imprisonments are now, I think --

THE COURT: I think other counsel need to --

MR. WILLETT: I'm sorry, Your Honor.

THE COURT: -- introduce themselves as well. All right.

THE DEPUTY CLERK: We need all counsel to identify yourselves for the record and the reporter.

THE COURT: Even if by reference as was done by other counsel.

MR. O'QUINN: John O'Quinn for the Government, Your

Honor, and I'm joined at counsel table by the Assistant Attorney General for the Civil Division, Gregory Katsas, Mr. Terry Henry, Mr. Sean O'Donnell, Mr. Andrew Warden, Mr. Jud Subar and Mr. David White.

THE COURT: Thank you. Good morning. Good morning, everyone, ladies and gentlemen.

All right. Let me suggest to you how we're going to do things. I'm going to make some preliminary rulings that will put everyone on the same page as far as salient matters are concerned, and then I believe that counsel have provided more than ample briefings on the issues before the Court today.

If counsel really feel the strong need to iterate, and I don't mean reiterate what's already been stated in your very well prepared and generous submissions, if you feel the need to emphasize something once again, you'll have that opportunity briefly. I will make some more rulings, and if those rulings necessitate the calling of witnesses for more information relevant to the issues extent at that point, then we will call the witnesses.

First of all, let me say that the authorizations that have been submitted representing the authority of the Petitioners' counsel to act on their behalf are satisfactory. I accept them and I have examined them, particularly under the guidelines provided by *Adem versus Bush.*

Secondly, I'd like to confirm that the 17 Uighurs before the Court in this matter today have similar factual backgrounds, that is to say that the parties acknowledge that there are no material differences between the individual Petitioners that the Court should be made aware of at this time.

If the answer to that question is "yes," then the factual determination made by this circuit in *Parhat* will apply to all the Petitioners. Are we in agreement?

MR. WILLETT: Your Honor, we believe the Government has conceded that point.

THE COURT: All right. I know that as of September the 30th the remaining -- the Uighurs not previously recognized as non-enemy combatants have now been designated as non- -- or treated as non-enemy combatants; is that correct?

MR. O'QUINN: That's correct, Your Honor.

THE COURT: All right. So is my assumption correct?

MR. O'QUINN: Yes, Your Honor.

THE COURT: All right. Now, both sides have really done an excellent job in presenting their positions and explicating and explaining and interpreting the law and the policies that each side believes behooves this court to rule in a particular fashion.

I have reviewed not only what's been submitted, but I've also done additional research to assist the Court in

finding any other issues that might be salient and resolving the ones that have been squarely presented to the Court.

So, if either side would like to make additional arguments at this time, you may do that. I say briefly and I say please do not reiterate what's already been amply presented.

MR. WILLETT: Your Honor, Sabin Willett for the Petitioners. I am mindful, particularly from the transcript in August, that the Court had already explored these issues, so maybe what I should do is focus merely on what has happened since August. It is touched on in the briefs, but it might be well to emphasize it.

As we argued before, *Parhat* laid out three options for the Government: Release, transfer or re-C-cert. They waived one of them, and we argued that release must mean something different than transfer.

The Government disagreed. They went to the Circuit. They asked for reconsideration on that exact point. They said, "Please clarify that you didn't mean release into the United States." The motion was denied; the mandate issued.

So *Parhat* has been reinforced, and it says what it says about release in three separate places.

The second point is the one we just touched on, which is that on September 30th the Government conceded that everyone is in the same boat. It is well, I think, to

remember that many of these Petitioners have now been in this habeas case since July of 2005 and we only find ourselves at the merits point today because the Government asked for a stay.

It turns out that if they had made returns about who these people really are, they wouldn't have been within the habeas strip at all because they wouldn't have been properly designated as enemy combatants, so the men have already paid a three-year price for that stay, and that's why we think a remedy is so urgent today.

I think Your Honor has on board our points about how to read *Parhat*, and I think you have on board our arguments about the fact that we're not seeking an immigration remedy and our clients wouldn't obtain an immigration status by means of a parole remedy, but one point that came up late in the day perhaps bears emphasis, which is the suspension clause point.

The argument in *Boumediene* was there's an act of Congress and it bars habeas, happens to be called the DTA, and the Supreme Court said no. It's the same argument here, except it's a different set of acts of Congress. They say there's a group of immigration laws that would bar this remedy. There is no way around *Boumediene* from that position because it comes to the same thing.

They say those acts of Congress bar Your Honor from giving the judicial imperative of a remedy in a habeas case,

and so their immigration arguments, even if they were well taken on the statute, which we have argued the briefs they're not, would be barred by the suspension clause.

The last point to make also came out late, and that's because of the September 30th acknowledgment. Running through all of the legal arguments has always been this undertow of, "Well, they're really bad guys. Trust us on this, Judge. Yes, we haven't charged them with a crime for six years, and yes, we won't -- we'll plead no contest to their statuses as noncombatants. Yes, we're telling all of our allies all across the world that they should take them, but whisper, whisper, they're really bad guys."

And we've always been willing to confront that whispering campaign and the Government has barred us from doing that by having them not here. So, today is no day for the Government to be trying to create a new theory of detention.

I think, from Your Honor's opening remarks, that now is not the moment to get into the practical solution. We do have a proffer and we have witnesses available for ample questioning, but I think you don't want us to get there yet, so I'll reserve that for later and leave with you, if I may, Your Honor, with two thoughts, which is that this case, Kiyemba, is of a piece with all the other Guantanamo cases since 2002.

It represents a narrow vision of what the judicial branch is, a vision that has continually been rejected by the courts of appeals and the Supreme Court in *Rasul,* in *Hamdi* and *Hamdan,* in *Boumediene* and *Parhat* itself. The courts above have reinforced the notion that this is the place where cases and controversies are resolved, that courts can give real remedies, and the Government, even to this day, takes a position that would essentially say that no judge in this building can resolve any Guantanamo case.

And what I mean by that is, there's only two places to go from Guantanamo. You can come here or you can go somewhere else in the world, but somewhere else in the world requires the cooperation of a foreign sovereign, and Your Honor cannot order the King of Saudi Arabia or the President of France to accept a prisoner, so the only unilateral order that judiciary can give is the kind of order we seek in this case and the Government says you can't do that.

So, the Government, what they're really saying is, there's no relief any court can give in any of these cases, and we think that's wrong.

You've heard us at great length on the problem of delay and the price paid by our clients for it. I would suggest that if, hypothetically, Your Honor's order were to continue this hearing for 30 days but order that Mr. O'Quinn and I spend that 30 days in Guantanamo, people would think

that a harsh order, but neither Mr. O'Quinn nor I has a greater claim on freedom than these men in light of the Government's concession, and so delay is a price every bit a shock for them as it would be for us in that hypothetical and a price that the Supreme Court said in *Boumediene* must not fall any longer on them.

That's why we ask so urgently for the remedy today and why we are prepared to show you in practical terms how that can be made real from and after this afternoon.

Thank you, Your Honor.

THE COURT: Thank you.

MR. O'QUINN: Thank you, Judge Urbina. As the Government acknowledged at the outset, the Department of Defense has determined that it no longer makes sense to contest the enemy combatant status of these 17 Petitioners and that they should be free to go.

The issue is that they have nowhere to go. Now, the United States Government is not actually preventing them from leaving Guantanamo Bay in the sense that if there were a willing country -- if there were a country willing to accept them, they would be free to go. It's the fact that there is no willing country and their own home country is one that U.S. policy prevents us from returning them to force -- forcibly because of humanitarian concerns.

The United States is actively and diligently seeking

to find a country where they can be repatriated, but in the meantime, they are being treated as non-enemy combatants and they've been given living conditions consistent with that treatment.

However, these 17 Petitioners seek what is an unprecedented remedy in having this court order the Government to bring them into the United States to release or parole them where some of them would hope to settle here in the Washington, D.C. area. Now, this was the same issue that was presented to the Court in *Qassim.*

THE COURT: What would you say is the difference between release and parole?

MR. O'QUINN: Well, in this context, Judge Urbina, I'm not sure that there is one. These are terms of art that the Petitioners are using because habeas cases recognize that when you have someone who is in the United States and you don't have any of the immigration or the sovereignty issues implicated, that parole is a lesser included -- a lesser included right that a court may grant, but it presupposes that there's the greater right, which the right ultimately of release.

On the habeas cases that they rely on, all involve persons who were indisputably within the United States where the issues of sovereignty that are presented in this case are simply -- were simply not at issue, not implicated.

This court, as the Supreme Court has made consistently clear in cases like the *Mezei* case in particular, *Mezei versus Shaughnessy, Landon versus Plasencia,* that this court may no more order the United States to bring a person into this country than it could order a foreign country to accept a person. The issue of entry into the United States is one of sovereign prerogative, and so the question that this case presents is really where does the *Boumediene* decision end.

THE COURT: Do you believe that? Do you really believe that this court's authority to order a person into the United States by a United States court is equivalent to this court's authority to order an individual in detention into another country and order another country and another sovereignty to accept that? You really believe that?

MR. O'QUINN: That certainly appeared to be the implication of the Supreme Court's decision in *Mezei*. I mean, the question that this case really presents is where does the right in *Boumediene* end and where do the limitations on the Court's authority, as recognized in *Mezei*, begin?

Mezei is directly analogous here where you have a person who actually had lived in the United States for many years, had a much greater claim for entry into the United States but they were not -- they were not a citizen. They had left the country, and when they attempted to return to the

country, they were inadmissible aliens and they were not admitted into the United States, and they were also not able to return to the countries from which -- from which they came, made several attempts to return to other countries. The Supreme Court recognized that habeas jurisdiction lied and then was presented with the question of whether or not this individual must be released into the country.

The Court concluded the answer to that question was no, even though it recognized that that worked a hardship, and the Government recognizes the current situation works a hardship, and we are actively seeking to find a country that will accept them for repatriation, but that was the consequence in *Mezei* where there was a hardship because the political branches had not deemed to admit the person into the country and there was no country from which they could return.

And I think in this context the Court should be particularly mindful of the consequences of ordering release into this country of someone who had been captured as a suspected enemy combatant. These Petitioners were captured near Tora Bora in late 2001 when the United States military was hunting for Osama bin Laden in the same area. Their capture was consistent with the laws of war, and I don't think anybody can reasonably dispute that it was sound and responsible for our troops on the ground to make the command decision to take them into custody at that time.

For the Court now to say that such individuals, individuals who have received paramilitary training on AK-47, Kalashnikov assault rifles, to be released into the United States because their original basis for detention is one the Government is no longer contesting would fundamentally alter and frankly chill the effective waging of war by the Executive because of the consequence --

THE COURT: The Government has already determined clearly, however, that these detainees were not waging war on the United States, have never waged war on the United States, were not training to wage war on the United States, and to date, I believe the Government has conceded that these people are not a security risk or a danger to the United States; isn't that right?

MR. O'QUINN: That's not quite right, Judge Urbina, in the sense that the United States is not contesting the determination of enemy combatancy. That's another way of saying that the United States presented evidence to the D.C. Circuit to show that Petitioner Parhat was an enemy combatant. The D.C. Circuit said that that evidence was --

THE COURT: D.C. Circuit said that the information the Government was relying on was unreliable and that it could not constitute a basis for concluding that he was an enemy combatant even though the CSRT said he was.

MR. O'QUINN: The D.C. Circuit said that the

Government's evidence that had been presented was insufficient. Because the Government had already determined, separate and apart from that, that it would not be a risk to United States security to release them to a foreign country --

THE COURT: What is the risk to -- the security risk to the United States? What page is that on? What is the security risk to the United States should these people be permitted to live here? What is it? You've had seven years to study this issue. What is the security risk?

MR. O'QUINN: Judge Urbina, these individuals would be inadmissible aliens as under the terrorism --

THE COURT: I'm not talking about status. I'm talking about what is the security risk. What is the risk to national security if these individuals were admitted? Forget about the legal --

MR. O'QUINN: Congress has made the determination, Judge Urbina, that people who received military type training that they received in order to commit insurrection and to take up arms against another country, whether it's the United States or whether it's any other country, are inadmissible aliens because they are a security risk to this country. Congress has made that determination.

They squarely fall into that category. It is undisputed that Petitioner Parhat, for example, undertook weapons training at this camp, whether he was affiliated with

ETIM formally or whether it was any other organization.

THE COURT: Is there any evidence that he was affiliated with ETIM?

MR. O'QUINN: Judge Urbina, there is evidence about him being affiliated with ETIM based on who was running the camp at which he participated, but in terms of inadmissibility into the United States, it's really beside the point of whether or not he was part of ETIM or whether it was part of two or more, whether or not organized.

I'm quoting from the immigration law now: Whether or not organized, who engaged in terrorist activities, and terrorist activities include the plan to commit terrorist activities and that includes the use of firearms for purposes other than personal gain, and in their own testimony, in C-cert proceedings, certainly demonstrates that would be an issue with respect to Petitioners.

The issue before the D.C. Circuit in *Parhat* was not whether or not they would be a danger to the United States or a danger to any particular person in the United States if they were admitted into the country. The limited question before the D.C. Circuit is whether or not they were enemy combatants, which is a much narrower category than whether or not somebody is a terrorist, whether or not they are dangerous, whether or not they should be set free into American society.

THE COURT: So your answer is these -- these Uighurs

are a risk to national security because Congress says so.

MR. O'QUINN: My answer, Judge Urbina, without offering any -- you know, I don't have available to me today any particular specific analysis as to what the threats of -- from a particular individual might be if a particular individual were let loose on the street.

What I do have is Congress' determination, the people who received the training that they received should not be admitted to the United States under all our -- would be ineligible for asylum in the United States. That's Congress' determination, and you're in an area where the Supreme Court has made repeated -- has repeatedly made clear that these are questions that are for the political branches.

All right. I get the thrust of that argument. Move on to your next argument, please, or your next point.

MR. O'QUINN: Judge Urbina, my next point, just to respond to a couple of the points that my colleague made. The D.C. Circuit's decision in *Parhat* does not resolve the issue of release into the United States, and indeed, several of the follow-up cases, there were four other -- there were four other cases involving four of these Petitioners in which the United States agreed to the entry of the same judgment that was entered in *Parhat*, the panel made very clear that the court there was not deciding the issue of what country these persons may be released to.

So that the notion that the D.C. Circuit has already decided that they may be released into the United States, despite the Supreme Court's decision in *Mezei,* despite the long line of Supreme Court cases and D.C. Circuit cases, cases like *Bruno versus Albright* in which the D.C. Circuit made very clear that the issue of entry of somebody into the country is one for the political branches, in the face of all of that, the D.C. Circuit didn't in *sub selentio* and *Parhat* rule they could be admitted into the United States.

And the court in *Boumediene* itself doesn't purport to resolve that issue. *Boumediene* makes clear and *Munaf*, decided unanimously on the same day, make abundantly clear that just because a habeas jurisdiction lies doesn't mean that there will always be a remedy of release available. *Munaf* could not be any clearer on that point, recognizing for reasons of comity, in this context reasons of separation of powers, that the remedy of release may not be appropriate in all cases, and this is certainly one of those cases.

THE COURT: Shouldn't those cases be read to mean that release is not always appropriate because, for example, there may be the convening of another CSRT hearing or there may be a retrial or there may be some other circumstance that would militate against the release because further government action is contemplated?

MR. O'QUINN: Judge Urbina, I don't think so because

in *Boumediene* itself, the Court separately referred to the idea of conditional release. But even if that's what *Boumediene* meant when it said that release might not always be available, you can't avoid what the Supreme Court said in *Munaf.* It's -- it is particularly clear in *Munaf* where it says habeas corpus is governed by equitable principles and the Supreme Court has recognized that prudential concerns such as comity may require a federal court to forego the exercise of its habeas power.

So, even if the Court concluded that it had power here, and we would say that *Mezei* demonstrates that the Court simply does not have the power here to order release into the United States, but even if the Court concluded that it did have such power, for the same reasons that Judge Robertson recognized in *Qassim,* this court should forego the exercise of that power.

And let me just turn to --

THE COURT: Of course, Judge Robertson decided *Qassim* before *Parhat* and before *Boumediene* and before the guidance of those cases were provided by our circuit and the Supreme Court.

MR. O'QUINN: That's correct, Your Honor. And in fact, the point that I was next going to make is that nothing -- no intervening decision changes the rationale or the result that should -- that should come from Judge

Robertson's decision. And what I mean by that is if you look at what happened between *Qassim* and today, Congress enacted the Military Commission's Act that removed habeas jurisdiction from Guantanamo Bay.

Now, at the time *Qassim* was decided, the Supreme Court had decided *Rasul*. It predated the decision by Congress to enact the MCA, and so the situation then was exactly the same as the situation today in terms of Supreme Court precedent. That is, the writ ran to Guantanamo Bay and Judge Robertson was faced with exactly the question that the Court is faced with. The MCA was then adopted. *Boumediene* simply restored the status quo ante in terms of finding that the jurisdiction strip was invalid as applied to Petitioners at Guantanamo Bay seeking to challenge their status as enemy combatants.

So, there's nothing about the intervening Supreme Court decision in *Boumediene* that makes any difference whatsoever in terms of affecting or upsetting Judge Robertson's analysis in *Qassim.*

And the same is true of the *Parhat* decision. Again, *Parhat* turned on the fact that the D.C. Circuit concluded that the evidence that the Government had presented was insufficient to show not that petitioner wasn't a member of ETIM, not that petitioner wasn't potentially dangerous if released into the United States, but -- and not that

petitioner wasn't a threat potentially to other countries such as China, and I'll come back to that point in a moment, but simply that the Government had not provided sufficient evidence -- sufficient reliable evidence to show that ETIM was affiliated with al Qaida and thus didn't satisfy the requirement for enemy combatancy, a very narrow and limited question as compared to the question of whether or not there would be any security risks from releasing a person into this country from Guantanamo Bay.

And that brings me back to one of the points that Judge Robertson made in *Qassim.* One of the points that he recognized --

THE COURT: Well, let's not forget that Judge Robertson also concluded that the detention was illegal.

MR. O'QUINN: Well, he did --

THE COURT: Yes, he did decide it was an illegal detention. He said regrettably he did not want to interfere with the functions usually delegated the Executive Branch at that time.

MR. O'QUINN: Well, I think he actually concluded that he could not interfere with the functions that the Constitution gives to the Executive Branch and the Legislative Branch.

I know that Judge Robertson found the detention was unlawful, and with all due respect, I would have to disagree

for the reasons that the Supreme Court set forth in *Mezei*.

Because if the detention -- if the detention for persons who were captured at Tora Bora at a time and a place and under circumstances where there was every reason to believe that there were enemy combatants, and if subsequently the Government determines that it's not proper to hold them as enemy combatants but there's nowhere to release them to in terms of you can't send them back to their home country and no third country is willing to accept them, we would submit that that falls within the Government's authority to orderly wind-up detention, but whether you agree with that or not, it's exactly like the situation -- we now find ourselves exactly in the situation that the Supreme Court confronted in *Mezei.*

THE COURT: Well, let's talk about *Mezei.* *Mezei* concerned an alien permanently excluded from the United States on security grounds but stranded on Ellis Island because other countries would not take him back. The Government, in that case, would not disclose to the district court the evidence by which it determined the Petitioner to be a threat to the public interest and the court.

The court, in turn, determined that the detention -- that detention longer than 21 months was excessive. That's what the court said. The court then directed the petitioner's conditional parole on bond and the Supreme Court in a 5-4

decision back in 1953, I think it was when this case was decided, deemed the petitioner's detention on Ellis Island the equivalent of being stopped at the border.

It held that times being what they are, that's a quote, and whatever or individual estimate of Congress' policy to exclude without hearing aliens who pose a threat to the public, and the fears on which it rests, the petitioner's right to enter the United States depends on the congressional will and courts cannot substitute their judgment for the legislative mandate.

Commenting further on *Mezei,* to the extent that *Mezei* held that indefinite detention of excludable aliens is constitutionally permissible, there have been a number of decisions that dispute that and question it. The Sixth Circuit surmised that that conclusion has been fatally undermined by the court's later decisions, and I think we can all cite additional decisions that may undermine it.

The facts in that case, of course, were quite different than the ones that we're looking at here. I don't think that that case is on all fours with this case. But in any event, proceed.

MR. O'QUINN: Well, Judge Urbina, you're right, there were some significant differences in the facts.

THE COURT: There were two cases, in particular, that created -- that had created a distinction. One is called

Zadvydas, right, and the other is *Clark versus Martinez.*

MR. O'QUINN: Well, Judge Urbina, *Zadvydas* and *Clark* do not in any way upset the Supreme Court's decision in *Mezei.* *Zadvydas* involved persons who were within the United States and were being -- who had been admitted to the United States. They were admitted aliens who, as *Zadvydas* recognized, there is a strong current that runs through Supreme Court precedent that there is a fundamental distinction between aliens who are in the United States and aliens who are not in the United States, and *Zadvydas* seized upon that distinction, used it to engage in not in a constitutional holding but in constitutional avoidance to construe the statute to find that for somebody who was being removed from the United States, the Attorney General could only hold them -- it was then the Attorney General, now the Secretary of Homeland Security -- can only hold them for six months absent a showing that they were reasonably likely to be removed in the near future.

That's fundamentally different because it involves people who had effected an entry into the United States. *Clark versus Martinez* did not extend that holding because the Court suggested that the constitutional avoidance issues presented in *Zadvydas* applied to admissible aliens. In fact, Justice Scalia's opinion for the majority there specifically said that that wasn't the basis for the decision at all.

The basis for the decision in *Clark* was the fact

that because the Court had construed the statute -- the removal statute a particular way in *Zadvydas* in order to avoid any potential constitutional implications for persons who had been admitted into the United Stated and had full due process rights, that because the Court had construed the statute a certain way as to them, the Court had to apply the same statutory language, the same statute to all aliens who were covered by the statute the same way.

I think it's very important to note, as Justice Kennedy's dissent in *Zadvydas* does, what the Supreme Court in *Zadvydas* specifically distinguished the *Mezei* case recognizing that there was a fundamental difference between aliens who are inside the United States and aliens who are outside the United States.

And the fact that habeas corpus runs to Guantanamo Bay doesn't change that analysis because habeas corpus ran to Ellis Island where the petitioner in *Mezei* was located. So neither *Zadvydas* nor *Clark versus Martinez* in any way upset the holding in *Mezei*, and frankly, even if they do cast potential doubt on it, the Supreme Court in *Agostin versus Felton* has instructed the courts of appeals and the district court that if a precedent of this court has direct application in a case yet appears to rest on a reason rejected in some other line of decisions, the court of appeals should follow the case which directly controls leaving to this court the

prerogative of overruling its own decisions.

So, whether or not the Sixth Circuit thinks that *Mezei* is still good law, it is still the binding precedent unless and until the Supreme Court itself decides to overrule it. And the reasons for that are exactly the reasons the judge -- that Judge Robertson recognized in *Qassim,* which is that an order requiring release into the United States, even into some kind of parole bubble, some legal fictitional status in which they would be here but would not have been admitted, would have national security and diplomatic implications beyond the competence or authority of this court.

And while I'm not in a position to talk about specific issues of national security, certainly there would be concerns about our relationship, for example, with other countries, say, for example, China, if the Court put the Government in a position of not being able to speak with one voice, and that's something that the *Munaf* decision harkens back to.

In these issues where you potentially -- where courts are potentially treading in the areas that the Constitution commits to the political branches, that you have to be particularly circumspect because of the potential for interference with foreign relations and with diplomacy, needless to say, and I can't speak to with any specificity in this setting, but the Court's aware of what we provided in our

classified declarations and there certainly would be concerns that would be implicated were the Court to undermine the ability of the Government to speak with one voice in regard to its determination on whether or not to release or admit somebody into the United States itself.

If the Court has no further questions.

THE COURT: I think you covered them all. Thank you, sir.

MR. O'QUINN: Thank you.

THE COURT: All right. You may have a brief moment in rebuttal.

MR. WILLETT: Your Honor, I think one of the particular benefits of the parole remedy here is that there will be conditions, and parole is something you can revoke, so if any of these concerns of Mr. O'Quinn actually were realized in some way or threatened to be realized, that can be protected against through monitoring, through reporting, through conditions as to where people travel and the kinds of things that the Court's familiar with.

Mezei is a volunteer. He comes to the border. Our clients are bought for bounties, they're shackled, they're put on a plane, they're brought to Guantanamo in chains. They are brought here. This is a problem that the Government's making, and they are brought to a place where the Supreme Court says the constitutional privilege of habeas corpus runs, and then

it says the alternative scheme Congress gave was inadequate because it didn't provide for release.

And then *Parhat*. I still don't follow the Government's argument on *Parhat.* *Parhat* orders them to release or transfer, and whatever we think that means, we can all agree four months later they haven't done either one. It's an order. It's final. It hasn't been stayed by anybody, so in one sense all we're doing in this habeas case is carrying out an order that was given by the Circuit in the only way that's available to us; in fact, the most limited way that's available to us through parole.

I'd never heard anyone suggest before that our relationships with other nations are a lawful basis to hold somebody in a prison. I mean, we release people all the time from Sri Lanka, from Vietnam, from Cuba in the cases cited in the papers. All of them actually did present some real risk, and the district judges said, we read *Clark,* there's no basis for the detention.

Thank you, Your Honor.

THE COURT: After detaining 17 Uighurs in Guantanamo Bay, Cuba for almost seven years, free until recently from judicial oversight, I think the moment has arrived for the Court to shine the light -- shine the constitutional -- the light of constitutionality on the reasons for that detention past and prospective in determining whether the detention is

itself legal and in further determining what if any remedy the Court is empowered to apply.

Indeed, our circuit has examined this situation through the lenses provided in the *Parhat* case and has determined that in that particular instance there was a lack of sufficient indicia of reliability to support a finding made by a military court with respect to that individual's status as an enemy combatant.

After reviewing this circuit's decision in *Parhat versus Gates,* the Government concluded that it no longer considered the 17 Uighur detainees enemy combatants. In light of these developments and the Supreme Court's recent rulings in *Boumediene versus Bush*, restoring the Court's jurisdiction over detainees' habeas corpus petitions, the detainees filed motions alleging that their continued detention is unlawful and requesting that the Court order the Government to release them into the United States.

Because the Constitution prohibits indefinite detention without cause, the Government -- the Government's continued detention of Petitioners is unlawful. Furthermore, because of separation-of-powers concerns do not trump the very principle upon which this nation was founded, the unalienable right to liberty, the Court orders the Government to release the Petitioners into the United States.

Congress passed the Authorization for use of

Military Force authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations or persons.

As the Supreme Court found in *Hamdi versus Rumsfeld* and again in *Boumediene versus Bush,* inclusive in this grant is the authority to detain individuals who fought against the United States in Afghanistan for the duration of that particular conflict. The Deputy Secretary of Defense issued an order on July the 7th, 2004 setting forth an enemy combatant standard to assist military tribunals in deciding whether to detain someone caught in the theater of war.

This standard defines an enemy combatant as, quote, an individual who was part or supporting -- part of or supporting Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Thus far, this standard is the only one recognized by the Supreme Court for legally detaining individuals under the Authorization For Use of Military Force Act.

In this case, the Government has already absolved the Petitioners of their enemy combatant title; that is to

say, they have indicated that none of these 17 are to be treated as enemy combatants, so its theory for continued detention is based on an inherent Executive authority to quote/unquote wind-up detentions in an orderly fashion.

Initially, the Petitioners' protest that this wind-up authority should -- should it exist, would not apply to them because they were never lawfully detained in the first instance, but in *Boumediene*, the Supreme Court made it clear that habeas is not available the moment a person is taken into custody, and in any event, the record is too undeveloped as to the circumstances regarding their transfer from Pakistan officials to U.S. custody to make that determination.

As stated in *Qassim versus Bush* by a judge in this court, my esteemed colleague and friend, Judge Robertson, the Government's use of the "Kafkaesque" term should no longer -- the term being "no longer enemy combatants," deliberately begs the question whether these Petitioners ever were enemy combatants.

Accordingly, the Court assumes, for the sake of this discussion, that the Petitioners were lawfully detained and that the Executive does have some inherent authority to wind up wartime detentions. The parties bicker over how long the Executive may detain individuals pursuant to its wind-up authority.

The Petitioners contend that the Government

determined long ago that it cannot effect transfer, and after five years of failed efforts, any wind-up authority has been used up. The Government recites examples of past wars in which the United States has detained prisoners of war for several years after the ending of hostilities, noting that thousands of Iraqis held after the Gulf War, the hundred thousand -- hundred thousand Chinese and Korean prisoners of war detained at the end of the Korean War and thousands of prisoners of war at the end of World War II who did not want to repatriate.

The Government then concludes that because it determined only days ago to forego its option of attempting to conduct a new combat status review tribunal, that the continued detention is constitutional.

The court in *Qassim* informed its decision on this point by looking to analogous immigrant statutes. Citing the Supreme Court cases of *Zadvydas versus Davis* and *Clark versus Martinez*, the *Qassim* court observed that the presumptive limit to detain an inadmissible or removable alien is six months. The Court concluded that the Government's nine-month detention of the Petitioners after determining that the Petitioners were no longer an enemy combatant was unlawful.

Zadvydas and *Clark* cases, however, are not strictly analogous to the present inquiry. Both *Zadvydas* and *Clark* interpret an immigration statute as authorizing the Government

to detain aliens for six months, a presumptively reasonable period.

The Court chose to not read the statute to authorize indefinite detention because such a reading would approach constitutional limits. In these constitutional limits, we find the resolution of the issue before the Court. It is these constitutional limits that are at issue in this case.

The Government argues that the Supreme Court case of *Shaughnessy versus United States ex rel. Mezei,* M-e-z-e-i, provides a better read on the constitutional limits to detention than either the *Zadvydas* or *Clark* case.

At the Court -- as the Court has stated, the *Mezei* case concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back. The Government would not disclose to the courts the evidence by which it considered the petitioner to be a threat to the public interest; nevertheless, the Supreme Court, in a 5-4 decision, deemed the petitioner's detention on Ellis Island the equivalent of being stopped at the border.

It held that times being what they are, at that time the Cold War -- I believe the issue was whether he was a Communist -- and whatever our individual estimate of Congress' policy to exclude aliens who pose a threat without holding a hearing and the fears on which it rests, the petitioner's

right to enter the United States depends on congressional will and the courts cannot substitute their judgment for the legislative mandate, close quotes.

The Court disagrees with the Government's assertion that the logic of *Mezei* and that decision applies with even greater force to this case. The opening sentence of *Mezei* -- of the *Mezei* decision, noting that the petitioner is stranded in his temporary haven, indicates that the court was not intending to tackle the constitutionality of indefinite detention. To the extent that *Mezei* and the court did make a determination as to indefinite detention, it has either been distinguished or ignored by subsequent courts.

For example, the Sixth Circuit in *Rosales-Garcia versus Holland* observed that the Court's conclusion in *Mezei* regarding the indefinite detention at issue has been undermined by post-*Mezei* cases that regard indefinite detention as raising constitutional concerns.

Furthermore, the *Clark* court did not bother distinguishing its holding from the holding in *Mezei* and *Zadvydas*, and the *Zadvydas* court explained that the cases differed in that the alien in Mezei was stopped at the border seeking re-entry, whereas the alien in Zadvydas was already inside the United States.

Additionally, a couple of very important distinctions exist between *Mezei* and this case. First, the

Mezei court was unaware of what evidence, if any, existed against the petitioner. And because the Court accepted the Government's unsupported allegations as true, the *Mezei* court and its determination regarding continued detention is categorically different from the determination facing this court.

Here, pursuant to the Detainee Treatment Act and *Boumediene,* the Government represented evidence justifying its detention of the petitioners but failed to meet its burden.

Secondly, *Mezei,* the petitioner, unlike the current Petitioners, came voluntarily to the United States seeking admission. Drawing primarily from the principles espoused in *Clark* and *Zadvydas,* those cases, the Court concludes that the constitutional authority to wind-up detentions during wartime ceases once, one, detention becomes effectively indefinite; and two, it is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and three, an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional.

First, in determining whether the detention has become effectively indefinite, the Court considers what efforts have been made to secure release for the Petitioners and then uses that to evaluate the likelihood that these efforts or any supplemental efforts will be successful in the

future.

Looking back, the Government had already cleared 10 of the Petitioners for release by then and by the end of 2003. The Government cleared an additional five Uighurs for release or transfer in 2005; one of the -- one for transfer in 2006 and one for transfer in May of this year.

Throughout this period, the Government has been engaged in quote/unquote, extensive diplomatic efforts, close quote, to resettle the Petitioners.

Accordingly, the Government cannot provide a date by which it anticipates release or transferring the Petitioners, and their detention has become -- accordingly, has become effectively indefinite.

The second element has also been satisfied by the Circuit's decision in *Parhat versus Gates.* The Circuit observed that it is undisputed that the petitioner is not a member of al Qaida or the Taliban and that he has never participated in any hostile action against the United States or its allies, thus dispelling any concerns that the Petitioners would return to the field of battle.

Finally, as to the last element, the Government acknowledges that it is -- that it no longer considers the Petitioners to be enemy combatants and it has only presented one alternative theory for detaining the Petitioners, its wind-up authority. Accordingly, this element has not been --

this element has been satisfied as well.

The Court's authority to order the release of an alien unlawfully detained into the United States has not been directly addressed by any court. The Supreme Court's most recent pronouncement in *Boumediene* regarding Guantanamo detainees assured them certain procedural guarantees but hedged when discussing remedy.

The Court qualified that release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted. In *Hamdi,* the Court concluded that absent a suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process, to make his way to court with a challenge to the factual basis for his detention by his government.

Under its broad constitutional authority, Congress has authorized the Secretary of Homeland Security to parole and/or admit aliens into the United States. It is undisputed that he has not acted in this authority -- on this authority with respect to the Petitioners in this case.

Normally, the discussion would end here and the Court would have no reason to insinuate itself into a field normally dominated by the political branches; however, the circumstances now pending before the Court are exceptional. The Government captured the Petitioners and transported them to a detention facility where they will remain indefinitely.

The Government has not charged these petitioners with a crime and has presented no reliable evidence that they would pose a threat to U.S. interests. Moreover, the Government has stymied its own efforts to resettle the Petitioners by insisting, until recently, that they were enemy combatants, the same designation given to terrorists willing to detonate themselves amongst crowds of civilians.

The Petitioners' request that the Court order their release into the United States is not a simple one. It strikes at the heart of our constitutional structure, raising serious separation-of-powers concerns.

The Petitioners argue that the Circuit's *Parhat* decision resolved any separation of powers issue when it ordered the Government to release a Uighur Petitioner well aware of the fact that release could only mean release into the United States.

The Government counters that the Circuit explicitly reserved judgment as to whether it even had the authority to release the Petitioner under the DTA and filed a motion with the Circuit requesting clarification of its order. The Petitioners' retort that the Circuit's denial of the Government's request for clarification, quote, resolved the question of whether it may order release pursuant to the DTA.

As stated at the outset of this opinion, the Court's focus is on assessing the validity of the final decision of a

CSRT. The Circuit holds that the evidence was insufficient to support the CSRT's determination and explicitly reserves judgment as to whether the DTA grants the Circuit authority to release detainees.

And the Circuit noted in a recent order explaining the *Parhat* decision to four other Uighur detainees, quote, no issue regarding the places to which these Petitioners may be released is before this panel. But, in the *Parhat* decision, the Circuit also explicitly directs the Government, quote, to release or to transfer the petitioner, or to expeditiously hold a new CSRT consistent with this opinion, and declares that there is no question but that the district court will have the power to order Parhat released, close quotes.

Regardless of whether these statements arose by fit of aspiration or simple inadvertence, the Circuit's message is muddied. As this circuit noted in *Department of Labor versus Insurance Company of North America,* it is not for this court to clarify the Circuit's intent to read into the language reasoning and explanation that are simply not there.

Thus, the Court does not consider the Circuit's *Parhat* decision to have resolved this court's authority to order the Petitioners released into the United States. The Government proposes that this court follow the holding reached by a fellow district judge in *Qassim versus Bush.*

In assessing the weight to be accorded *Qassim,* the

Court notes the legal landscape has changed since *Qassim* was issued in 2005. In June of this year, the Supreme Court handed down its *Boumediene* decision unequivocally extending to Guantanamo detainees the constitutional right to habeas corpus, and in the process, the Court re-emphasized the importance of the writ in preserving liberty.

The Court succinctly states that the writ must be effective. Additionally, this court's decision -- this Circuit's decision in *Parhat* observed that it is undisputed that a Uighur detainee is not a member of al Qaida or the Taliban and that he has never participated in any hostile actions against the United States or its allies.

In addition to not having the benefit of these recent cases, the case law cited in *Qassim* is not entirely supportive of the absolute deference the Court affords the political branches or that the Court is urged to afford the political branches. The *Qassim* court initially proffers a sound proposition, quote, a strong and consistent current runs through immigration/alien exclusion cases that respect -- and respects and differs -- defers, excuse me -- that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens, close quotes.

But then the Court extends this deference to circumstances, including indefinite detention without cause.

Such absolute deference cannot bear the weight of case law. As cases cited in *Qassim* recognize, the power to exclude or expel aliens is vested in the political branches, except so far as the judicial department is authorized by treaty or statute, or is required by the Constitution to intervene.

Boumediene -- the *Boumediene* court noted that these qualifications are important, indeed essential to preserving habeas corpus; it says, quote, an indispensable mechanism for monitoring the separation of powers, speaking of habeas corpus. The judicial authority to consider habeas petitions is derived from the guiding principle that personal liberty is secured by adherence to separate powers -- excuse me -- by adherence to separation of powers. And the Supreme Court further determined in *Immigration & Naturalization Service versus St. Cyr,* C-y-r, that the court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release.

Liberty finds its liberator in the great writ, and the great writ, in turn, finds protection under the Constitution.

The political branches may not simply dispense with these protections, thereby limiting the scope of habeas review

by asserting that they are using their best efforts to resettle the Petitioners in another country. These efforts have failed for the last four years and have no foreseeable date by which they may succeed.

As the court in *Boumediene* recognize, to accede to such manipulation would grant the political branches, quote, the power to switch the Constitution on or off at will, close quotes.

This, quote, will permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this court, speaking of the Supreme Court, say what the law is. Clearly, each branch has its own function: The Executive Branch to enforce the law, the Legislative Branch to write the law, and the Judicial Branch to interpret the law.

Thus, the unilateral carte blanche authority the political branches purportedly wield over the Uighurs is not in keeping with our system of governance. As the Court in *Hamdi* held, quote, whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it's -- it most assuredly envisions a role for all three branches when individual liberties are at stake, close quote.

Accordingly, because the Petitioners' detention has

already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the Court grants the Petitioners' motion for release into the United States.

A formal opinion will follow which further elaborates on the points made during this summary explanation of the Court's decision.

Therefore, the Petitioners' motion for release into the United States is granted, and the motion for immediate release on parole pending resolution of their habeas corpus petitions is moot.

I will now take testimony related to what assurances and what conditions proposed by the Petitioners, as accompanying their release into this community, and we'll take a 10-minutes recess.

THE DEPUTY CLERK: All rise.

(A BRIEF RECESS WAS TAKEN.)

THE DEPUTY CLERK: Remain seated. This honorable court is again in session.

MR. O'QUINN: Your Honor, we appreciate the Court's ruling and will want to review it.

What I would ask on behalf of the Government is if we could have a stay pending appeal of the Court's ruling. I don't know whether appeal at this point would be authorized. That's something that would have to be conferred by the

Solicitor General. I can tell you those discussions are under way, but I'm not in a position to say that one way or the other.

As the Court said, the Court recognized that no court, other than the *Qassim* court, has directly addressed the issue of release into the United States before. The Court also recognized in the opinion that you read that there is serious separation-of-powers concerns implicated here, and for those reasons and reasons that we're happy to make in a more formal and more complete motion, the Government would seek a stay.

A stay would serve two purposes. One, for the Government to review its options and seek appeal if that is ultimately authorized; and No. 2, also to -- it might very well provide some opportunity to discuss and determine what our position would be on some of the issues that I think that the Petitioners would like to raise today; namely, what would be the implications of the Petitioners' release into the United States and what would immediately follow.

The Court ruled that the Government did not have authority to detain them at Guantanamo Bay because they were no longer being treated as enemy combatants. If, however, they are inadmissible aliens for the reasons that I articulate, particularly under 8 U.S.C. 1182 (a)(3)(B), then if they were in the United States, it may very well be that

DHS would be required to take them into custody pending removal proceedings.

Those are all things that the Government would need some time to assess. I'm sure that opposing counsel would appreciate the opportunity to at least discuss what options might look like if they ultimately are to be released into the United States, and as I said at the outset, of course, there are serious issues for the Government to consider, vis-a-vis, appeal.

So, I know that my colleague is prepared to put on witnesses. The Government's position would be that that is premature and would ask that the Court would --

THE COURT: What is that noise?

THE DEPUTY CLERK: I believe someone has an electronic device on. All electronic devices such as cell phones or Blackberrys are to be turned off.

THE COURT: Otherwise, it interferes with the voice system in the courtroom and with the court reporter's ability to hear what's being said, so if you've got a Blackberry or cell phone or anything else, turn it off, please.

All right. Finish up.

MR. O'QUINN: I just would ask that the Court would stay its ruling pending review.

THE COURT: All right.

MR. O'QUINN: Thank you.

MR. WILLETT: Your Honor, for all the reasons that you mentioned in your order, we would ask you to deny the motion for stay. I have no doubt that there will be some effort to seek an appellate ruling, but it really would be for the Court of Appeals to say whether this is a case that merits a stay, and given their close examination of the same case in *Parhat,* it seems remote indeed that one would be granted, so we would ask that the stay be -- request for stay be denied.

We are prepared, in response to your remarks, to either put on evidence or perhaps it might be more efficient to make a proffer as to where these people would go and what arrangements are in place, and I also have some proposals for conditions.

Now, I understand that your ruling was on release and that parole is now moot, but we've always been willing to give the Court and the Government the comfort of conditions, and so I would propose to go into that as well.

THE COURT: All right. Let me put it this way: If the Court of Appeals concludes that my ruling should stand, it would be my intention to have these -- this group of Uighurs admitted to the United States back before me every six months or so, so that I could take a close look at their adjustment and how they're complying with the conditions we might decide -- agree upon today.

Because I think the Court of Appeals should have the

full scope of what -- of the implications and the full scope of evidence relevant to the reality of these individuals being released into the United States, I think that a proffer and a proposal of conditions that would govern their presence here is appropriate, so the Court of Appeals cannot only look at the law and look at the circumstances but could also look at the facts that will accompany their presence here should their status be legitimized by the Court.

So, the bottom line is, I want to either take evidence, or I get proffers that are clear and certain so that the Court of Appeals can look at that as part of its deliberations in the case.

Second of all, I think that the decision on whether or not there should be a stay should be that of the Court of Appeals. I have urged that there is, in my view, a pressing need to have these people who have been incarcerated for seven years, to have those conditions changed as promptly as possible.

I'm not in a -- I'm not disposed to grant the stay, but it may be that arguments can be presented to the Court of Appeals that will persuade it. All of this means more delay, and delay is the name of the game up until this point. Everything has been delayed.

Third of all, this suggestion that if this court mandates something and the Court of Appeals approves it and

these individuals are brought into the United States by virtue of the Court's directives, that they may be descended upon by I.C.E. officials, arrested and taken into custody, that's not how the three branches of government work together. That is not how things work.

That would be inappropriate to even suggest that at this point one branch of government makes a firm decision on the legitimacy of someone's presence in the country and another branch goes out and scurries to get these individuals now present by virtue of the Court's directives arrested. I assume that won't happen. I certainly wouldn't take it kindly.

But in any event, put on your evidence or give us the proffer that underlies the conditions that you are about to recommend.

MR. WILLETT: Thank you, Your Honor. And I'll begin, if I may, with Susan Krehbiel. I will proffer her evidence. If Susan would stand.

You can sit down now, Susan. Thank you. Susan is with the Lutheran Immigration & Refugee Services based in Baltimore, Maryland. Since 1939, this organization, working closely with the State Department, has been responsible for the resettlement of hundreds -- I'm sorry, of tens of thousands of refugees from all over the world fleeing disasters of every kind, war, famine, genocide, the like.

LIRS works through a network. She will testify of 26 affiliates and 20 suboffices through the country. They have closely worked with, in this case, a network of churches, synagogues and mosques, and other entities in the D.C. area to provide what's called scattered site housing and support for as many as 17 of the Uighur men.

So, these arrangements, which she could describe to you, would be for a place to live, some financial support limited, food, medical care, transportation, details of that kind.

Second, Your Honor, we would proffer the evidence of Kent Spriggs. I would ask Mr. Spriggs to stand for a moment. Kent is an attorney from Tallahassee, Florida. He represented several detainees in Guantanamo cases with considerably more skill than we have. His clients are home. But he has organized a network of both lay and clergy in the Tallahassee area who are deeply experienced in the problems of refugee resettlement, having done this for Vietnamese, for Mariel boatlift refugees and for Katrina victims.

He has -- and we can put into the record -- a commitment from 19 leaders in faith communities in Tallahassee, Christian, Jewish, Muslim, all of whom have offered their personal welcome and support and their commitment to rally those communities to provide practical support for three Uighurs.

And we submitted with our papers a detailed plan that explains that this goes to the level of a spiritual home, the Islamic Center of Tallahassee, of housing, of jobs, of transportation, of healthcare, language training in general, social integration. This has been done before and on a much greater scale, actually, than is involved here.

Next, Your Honor, I'd ask Ms. Rebiya Kadeer to stand. You may sit. Thanks.

Rebiya is president of the World Uighur Congress and of the Uighur American Association. She lives in the D.C. area and she's probably the world's most famous Uighur dissident. She spent almost six years in a Chinese prison. She has a son in a Chinese prison today. She was at one time one of the wealthiest and most successful businesswomen in all of China, but when she went to speak out about Uighur conditions, she was imprisoned. And after Human Rights organizations rallied to her cause, Secretary of State Rice personally interceded and she was admitted to this country as a refugee.

She was awarded the Norwegian Rafto Prize. She has been honored by the First Lady and by President Bush himself.

Now, Ms. Kadeer has organized 17 Uighur families in the Washington area, some of whom are in the courtroom today, and all of whom have made two commitments. The first is a short-term housing commitment as a bridge between the release

of the men and the more permanent solution that Susan at Lutheran Services and Kent with the Tallahassee group have lined up.

And the second is a longer term support arrangement that is logistical in nature. So, for language support, for transportation support, for a culturation, for helping people get to their meetings that they may need to get to for purposes of reporting, things of that kind, there is a tremendous amount of support from the Uighur American community which has followed these cases with great interest.

And last, if I can ask Sara Beinert to stand. Sara is the large donor coordinator for the Center for Constitutional Rights in New York City, an organization well known to this court as -- for its prominence in the Guantanamo litigation.

What you may not know, however, is that it also serves as a clearinghouse for so many concerned citizens around the country who want to help and do something about what they perceive as an injustice, and many of those have made financial contributions.

Ms. Beinert has located a substantial donor, a former successful software businessman who has made a very substantial financial commitment to help resettle such Guantanamo detainees as courts may admit to the country.

Now, I would prefer if I could identify his name and

the extent of the commitment to the Court and counsel off the record just to preserve his privacy, but it is a substantial commitment that she can provide details about.

So, Your Honor, those are the highlights of the program that exists now, and all of these witnesses are available for your questions or the Government's if you would like more detail. If the Government wants to pass on that, I can proceed to what might make sense as a set of orders to accompany your order on the motion for release.

THE COURT: Well, let me ask the Government, do you wish to make inquiry of any of these persons proffered as resources for the Petitioners should their release be secured?

MR. O'QUINN: Judge Urbina, I don't think it would make good sense and be good use of the Court's time for the Government to make such inquiries.

In terms of what conditions might be for persons who the Court would bring into the country under some heretofore undefined status, I think, presents issues for the Department of Homeland Security in terms of what conditions that they might want to impose. Because of the nature of this hearing today in which the Court had noticed that it was going to be a hearing on a motion for release and had noticed in its minute order that the factual issues weren't going to be presented, I don't think we're prepared to make a proffer in terms of what DHS would like to see in terms of conditions.

I understand the Court's concern and I didn't mean to suggest that, you know, it would be, you know, follow as the night does the day that, you know, the moment they showed up in the United States they would be potentially taken into custody. All I'm saying, Your Honor, is that in terms of the INA itself, there are various provisions that would be implicated by their presence in the country that are not implicated while they're outside the country.

I don't know how all that would play out. It's a lot of complicated issues. So, the way to -- I understand that the Court is not inclined itself to grant a stay. If the Court were to -- perhaps the Court would consider granting what I'd call an administrative stay just for purposes of us to be able to put our papers to the Court of Appeals, and then this issue, on terms of what conditions might potentially look like, is something that could potentially be addressed by the Court at a further point in time.

THE COURT: Well, if what you're asking for is a period of time in order to review matters and determine whether or not you're going to pursue appeal or not, that's one thing, but if what you're asking me to do today is to issue a stay on the order itself, I'm not inclined to do that. So if you can clarify precisely.

I mean, I certainly would want to give you and the Attorney General and the Department of Justice time to sort

things out. I don't want you-all to make a hurried decision because my view is that discussions might very well -- could very well resolve matters that now appear to be in controversy, but I'm not going to undermine my own decision by granting a stay because I don't feel and I don't recognize that there is a reason for me to grant a stay under the circumstances, so tell me precisely what you need.

MR. O'QUINN: Judge Urbina, if you would give us a week to be able to discuss the matter internally to take on appeal if the Government determines that an appeal is -- to seek a stay from the Court of Appeals if the Government determines that an appeal is appropriate, and that would also, if an appeal was not taken at that time, because the Government has, obviously, a longer period of time than that, at the conclusion of that period of time, perhaps we would be in a better situation to engage in terms of what release into the United States should actually look like.

THE COURT: All right. And all of that, of course, presupposes good faith on everyone's part because what you're asking me to do is to hold off on executing the order that goes along with this judgment --

MR. O'QUINN: I am --

THE COURT: -- for a week.

MR. O'QUINN: For a week. And in the course of that week, Judge Urbina, we would file our stay papers assuming

that the decision to make -- to take an appeal was made, file our stay papers with the Court of Appeals. If the Court of Appeals granted a stay, then obviously that would be -- that would be that, and if it didn't, then we'd be in a position to better -- in a better position to deal with the specific issues of logistics that I think the Court wants to get into now.

THE COURT: All right.

MR. WILLETT: Your Honor, I would ask to add to the evidentiary record two exhibits.

THE COURT: Do you have a response to the request that's just been made that the Court hold off a week on issuing the order or executing the order so that you-all may have some time and the Government may have some time to review its options?

MR. WILLETT: Yes, Your Honor. Here is my proposal on that. I am going to suggest a set of conditions, one of which would be that your order, which we would suggest enter today, require that the prisoners be brought here on no later than Friday.

That would give the Government time to seek a stay if it is so minded to do and we will be in conference with them immediately following this hearing if they want that as well, but I don't see why we have to wait a week. They have to be focused on this case. It's the first Guantanamo merits

case. They have to have considered their options already, so I would suggest that your order simply set a date in the calendar by which the men must be here and then they either get a stay of that or they don't, and Friday is the suggestion.

THE COURT: And where would they be accommodated? Where would they be placed?

MS. MANNING: Well, my suggestion is --

THE COURT: Is that based on the suggestions you've made with respect to resources that can be provided by the persons you've introduced to the Court?

MR. WILLETT: Yes, if they were to be brought here or to some other place by the parties' agreement in this area, then they would be met both by the service groups we've talked about from the Lutheran group and the Tallahassee group and also by the Uighur American community itself and the 17 families who are prepared right now to provide the immediate bridge, and one of the exhibits I want to offer relates to that.

So, whichever day you pick, even if you were to name tomorrow, which is probably not feasible, logistically, but whichever day you pick, we'll be ready to literally accept those men as they arrive.

Now, if the Government says, "Look, this courtroom is not the right place to do that handover; we want to do it

at Andrews Air Force base," or whatever they may say, that's fine, too. I'm sure we could reach agreement on that as long as it's not North Dakota or somewhere, but that would be my suggestion that your order -- that you order that entry today, set a deadline that will require them to either obtain a stay or not prior to that deadline.

MR. O'QUINN: Judge Urbina, the only point I wanted to make in response is that if the Court is inclined to set a date certain by which they must be brought into the United States before any -- the Court engages in any kind of hearing on what that might look like, if it is the Court's position that there is no role for DHS, for immigration and customs enforcement to play, we'd ask that the Court spell that out in its order so that that issue can be teed up for the Court of Appeals.

As I said, I think it's a separate issue from the issue of ordering release as to their current conditions.

THE COURT: What do you mean by "no role"?

MR. O'QUINN: I mean, that is sort of the question, Judge Urbina. I mean, if you bring them into the country with no status at all, which is what your order would do, we're in completely unchartered territory. Normally, people who are in the country without any kind of status can be taken into custody. It would depend on -- and particularly persons who -- and I'm happy to walk through a litany of their own

admissions as to why it puts them in this category, but persons who would be covered by 1182 would, I think, actually be required under law to be taken into custody pending removal proceedings.

Now, I understand that that seems somewhat at loggerheads with what the Court is hoping to accomplish with its order. I think that's a function of the fact that we are in completely unchartered territory once somebody is ordered into the country having had no previous -- no previous status in the country, and so that's part of why my suggestion would be that if the Court -- you know, this is a -- I understand this to be a -- an injunction. You're ordering them to be brought into the country.

If the Court gives us a week, we can explore our options with the Court of Appeals, and then separate and apart from that, we can explore with the Department of Homeland Security what if any role it thinks that it would play if they were brought into the -- if they were brought into the country, and if a stay was not granted by the Court of Appeals, then we could have a hearing in which the Court can hear from the Government what we think the consequences of them coming into the country might potentially be and what -- what conditions, what arrangements, whether that's anything again ranging from whether our view is that the law would potentially require them to be taken into some from of

protective custody or all the way through to whether it's some sort of reporting requirement or what have you. Those are all issues that this court could then deal with then.

If the Court is just simply saying, "Well, they are going to be released into society and there is no role for the Government to play in the sense of, you know, DHS," you know, maybe normally for persons who meet these criterion, you would have reporting requirements or not, but the Court's view is that because it's ordering them brought into the country, that is without condition as if they have all of the vestiges of having been admitted into the country, that itself presents a separation-of-powers issues.

But if that were the case, then there wouldn't be a role for DHS to play. So, I really think this is a function of us being in somewhat unchartered territory once the Court orders somebody who doesn't previously have any status and hasn't been in the country into the country. So that's the distinction that I'm trying to draw, Your Honor.

THE COURT: Okay. Uh-huh. I understand. What does Tuesday's --

(PAUSE.)

THE COURT: All right. I think the way to proceed, as far as I'm concerned, is this: I am going to order that the Petitioners be brought into the country by Saturday. We will have a hearing on Thursday. What time, Mr. Dales?

THE DEPUTY CLERK: We can do it 2:00 o'clock.

THE COURT: 2:00 o'clock.

MR. WILLETT: The hearing as it would be on conditions?

THE COURT: Yeah, the hearing would be on conditions. A representative of Homeland Security should be present. I do not expect that these Uighurs will be molested or bothered by any member of the United States Government. I'm a federal judge, I've issued an order, and what it says it says and what it implies, it implies, and that's comity among the branches. Nothing will happen to these people until Thursday when this hearing convenes.

A representative of Homeland Security will be present and that individual at that time, through counsel, if necessary, can state its position and lay out its view on what the necessities of the situation are, legal or -- legally or otherwise, but nothing is to bother these people until I see them on Thursday. No one is to bother these people until I see them on Thursday, and they are all to be present here in this courtroom.

MR. WILLETT: On Saturday?

THE COURT: On Thursday. We have the hearing on Thursday. They all are to be here in the country by Saturday.

MR. WILLETT: Okay. And where would they come on Saturday, because, Your Honor, we would arrange for the -- do

you want them ordered brought here or some other place that we agree?

THE COURT: Well, the --

MR. WILLETT: So that we can arrange the handoff.

THE COURT: What are you recommending?

MR. WILLETT: Well, my guess is that here, particularly on a Saturday, it may be infeasible to meet actually.

THE COURT: Friday.

MR. WILLETT: All right. Then I suggest that Your Honor order that they be brought to the courtroom at an hour that you will name on Friday, unless the Government and counsel agree on some other place of hand-over which may be more convenient, and I don't -- the Government will have better ideas on that than I do.

THE COURT: All right. It is so ordered.

MR. WILLETT: Okay. Your Honor, may I add two items to the record? And I've shown these to counsel for the Government.

The first is a statement on resettlement of Uighur parolees from Tallahassee, Florida, and it is the commitment of 19 members of the faith communities in Tallahassee to support the enterprise I describe in the proffer.
Mr. Spriggs, who's in the court, would testify that each of the persons on what I'll call Petitioner's Exhibit 1 has

expressed his or her support for this enterprise.

THE COURT: All right. So we will convene here on Friday. The handoff will take place. The hearing, taking other matters into consideration, will happen on the following Thursday.

MR. WILLETT: Your Honor, I've just been advised that -- and this may apply to both sides. That Thursday is Yom Kippur. I think the judge has ordered this Thursday.

THE COURT: Next Thursday.

MR. WILLETT: I'm sorry, Your Honor.

THE COURT: They will be here by Friday. The following Thursday is when we'll have the hearing.

MR. WILLETT: Your Honor, I am completely confused about the dates.

MR. O'QUINN: I think I'm confused as well, Judge Urbina. I thought that the idea was to have a hearing prior to a time when they would be brought into the country.

THE COURT: No.

MR. O'QUINN: What are you --

THE COURT: Speak up. I can't hear you.

THE DEPUTY CLERK: The Court is still in session.

THE COURT: All right. Please, please, please.

MR. O'QUINN: What I had requested, Judge Urbina, was that we have a hearing on the issues that -- as to what their conditions -- what restrictions, if any, there would be

once they were in the country, that that hearing take place before they be brought into the country.

If they're brought into the country first, I think we'll be in some sort of a uncertainty in limbo as to what -- you know, what law applies, what the conditions are, and frankly, what you have in mind, and so --

THE COURT: Well, there has already been a list of resources referenced. Let me ask counsel for the Petitioners: Are these individuals, either collectively or individually, able and willing to provide housing and support for these individuals from Friday of this week through Thursday of next week when the hearing will be convened?

MR. WILLETT: Yes, Your Honor.

THE COURT: All right. That's the way it's going to be.

MR. O'QUINN: Okay. And I take that, from the Court's order, that DHS could not take them into custody or interview them or anything?

THE COURT: DHS will have a full opportunity here because they will all be here and they will be permitted whatever access DHS or the Attorney General feels is necessary to ensuring the interests that you are protecting.

MR. O'QUINN: Okay. But in the meantime, from the Friday that they arrive until the Thursday of the hearing, there will be no supervision of them; is that my understanding

of the Court's order?

THE COURT: That's right.

MR. O'QUINN: Okay. Thank you, Your Honor.

MR. WILLETT: Your Honor, may I then, just so that we have them in the record, if there's going to be some sort of quick trip to another court, can I offer in evidence these two exhibits?

THE COURT: Yes. What I would like you to do is to memorialize once again, for purposes of attachment to the record of this case and for review by the Court of Appeals, if necessary, the proffers that you have made with the description of the individuals ready, willing and able to take -- to provide assistance and what other documents you have.

MR. WILLETT: There were two -- two statements, Your Honor, one from the Tallahassee group. I'm sorry, Your Honor. Maybe what you're asking me to do is to present the entire proffer in writing later today?

THE COURT: That's right.

MR. WILLETT: Okay.

THE COURT: So, in time, that it can be attached to the record in this case for use by the Government and review by the Court of Appeals.

MR. WILLETT: We will present -- we will file that later today. We'll serve the Government that proffer in

writing today.

THE COURT: All right.

MR. WILLETT: And can I just be clear about the dates that have been ordered? It is Friday of this week.

THE COURT: Friday of this week is the 10th.

MR. WILLETT: And on that day we are to be back before Your Honor with the prisoners present to discuss conditions?

THE COURT: Correct. And then -- well, we've set Thursday of next week for the actual hearing. I want to meet with these Uighurs and I want to have them here. I want to see the individuals who will be taking custody of them pending the hearing on Thursday, and then on Thursday is when the Department of Homeland Security and any other persons that the Government wishes to have present will be available to represent their position and to examine any witnesses that you present in support of your position.

MR. WILLETT: Thank you, Your Honor.

THE COURT: 2 o'clock.

MR. WILLETT: What time on Friday, Your Honor?

THE COURT: Friday, 10:00 o'clock. And Thursday the 16th, 2:00 o'clock.

MR. WILLETT: Thank you very much, Your Honor.

MR. TIRSCHWELL: Judge, could we still have one minute to discuss something?

THE COURT: All right. Let's finish up, please.

MR. TIRSCHWELL: Thank you.

(PAUSE.)

MR. WILLETT: Your Honor, one last thing. My colleague reminds me that the Government was kind enough to permit our colleague, Wells Dixon, who is in Guantanamo right now, to actually meet with the Petitioners together -- This has never been permitted before -- later today.

So I am very gratified that they'll actually be able to learn of Your Honor's order, perhaps -- provided we can find some way to communicate the message to Mr. Dixon, but I'll ask the Government to help us accomplish that this afternoon.

THE COURT: All right. I'm sure the Government will assist you if it's possible.

MR. WILLETT: Thank you, Your Honor.

THE COURT: All right, Mr. Dales.

THE DEPUTY CLERK: All rise.

(PROCEEDINGS END AT 12:16 P.M.)

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CERTIFICATE OF REPORTER

I, Catalina Kerr, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Catalina Kerr Date