

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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4  
5 JAMAL KIYEMBA, NEXT FRIEND, ET  
6 AL.,

7 Appellees,

No. 08-5424, et al.

8 v.

9 GEORGE W. BUSH, PRESIDENT OF  
10 THE UNITED STATES, ET AL.,

11 Appellants.

12 Monday, November 24, 2008

13 Washington, D.C.

14 The above-entitled matter came on for oral  
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGES HENDERSON AND ROGERS AND SENIOR  
18 CIRCUIT JUDGE RANDOLPH

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 GREGORY G. GARRE, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 SABIN WILLETT, ESQ.  
24  
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P R O C E E D I N G S

THE CLERK: Case number 08-5424, et al., Jamal Kiyemba, Next Friend, et al. versus George W. Bush, President of the United States, et al., appellants. Mr. Garre for the Appellants, Mr. Willett for the Appellees.

JUDGE HENDERSON: Mr. Garre. Good morning.

ORAL ARGUMENT OF GREGORY G. GARRE, ESQ.

ON BEHALF OF THE APPELLANTS

MR. GARRE: Thank you, Judge Henderson, and may it please the Court. With the Court's permission I'd like to reserve three minutes of my time for rebuttal.

The petitioners in these cases are aliens who are being held at the Guantanamo Bay Naval Base in Cuba pending ongoing efforts by the United States to re-settle them to a country that is willing to accept them and provide adequate assurances for their protection. Regrettably, those efforts have not yet proven successful.

After expressing frustration with the lack of success on the diplomatic front the District Court entered an unprecedented order requiring that petitioners be brought to the United States and be released here in the nation's capitol. That extraordinary order is fundamentally flawed in at least three principle respects. First, it contravenes the binding Supreme Court precedent in the *Mezei* case which establishes that inadmissible aliens may be held indefinitely

1 pending efforts to re-settle them to a third county that will  
2 accept them. Second --

3 JUDGE ROGERS: It is true, though, is it not that  
4 *Mezei* was not being in a military prison?

5 MR. GARRE: That's correct, Your Honor. He was  
6 being held in indefinite detention, which is the way that the  
7 Supreme Court described in the *Zadvydas* case on Ellis Island.  
8 The petitioners here are being held by the Department of  
9 Defense, but they are being held in relatively unrestricted  
10 condition on the Guantanamo Bay Naval Base, which is to say --

11 JUDGE ROGERS: And as I understand the Government's  
12 position is this is all part of its powers to wind up.

13 MR. GARRE: I think it's two-fold, Your Honor.

14 JUDGE ROGERS: All right.

15 MR. GARRE: We're asserting two different basis for  
16 the authority to detain the petitioners during this period.  
17 The first, one basis is the authority to wind up their  
18 military detention, as individuals were picked up and  
19 determined initially to be enemy combatants, and we believe  
20 that historically there is strong precedent for the exercise  
21 of that power.

22 JUDGE ROGERS: Yes.

23 MR. GARRE: It's been done in every prior conflict  
24 for a period of years with respect to at least some  
25 individuals, and we think it's supported by the authorization

1 for use of military force. But secondly, we think that there  
2 is an independent inherent constitutional authority which is  
3 recognized by the *Mezei* case to hold aliens who are  
4 apprehended before they get to our borders --

5 JUDGE ROGERS: Let me ask you, though, *Mezei*, the  
6 immigration laws were being applied in that, was it not true?

7 MR. GARRE: That's correct, Your Honor.

8 JUDGE ROGERS: Now, in your pleadings to the  
9 District Court you indicated that, at least as to *Parhat* that  
10 he was not being detained pursuant to the immigration laws.  
11 So, of the two authorities you assert all that's left is the  
12 wind up authority?

13 MR. GARRE: Well, I don't think that that's true,  
14 Your Honor. I think it is --

15 JUDGE ROGERS: What's not true?

16 MR. GARRE: That the only authority left is the wind  
17 up authority.

18 JUDGE ROGERS: Well, you said you had two basis for  
19 holding him, and I'm just trying to examine those.

20 MR. GARRE: We agree, Your Honor. I think, I mean,  
21 you're right that in *Mezei* the Attorney General did point to a  
22 provision in immigration laws to exclude the alien in that  
23 case, Mr. *Mezei*.

24 JUDGE ROGERS: In other words what I'm getting at is  
25 you say you have wind up authority, and what did you tell me?

1 Wind up authority and inherent independent --

2 MR. GARRE: It's an --

3 JUDGE ROGERS: -- authority.

4 MR. GARRE: -- inherent authority to --

5 JUDGE ROGERS: And you cite *Mezei* --

6 MR. GARRE: -- to --

7 JUDGE ROGERS: -- and *Mezei* was applying the

8 immigration statutes. So, my question would be *Mezei* only

9 authorizes continued detention under the immigration laws.

10 MR. GARRE: Well, I don't think that that's true,

11 Your Honor. I think *Mezei* --

12 JUDGE ROGERS: Well --

13 MR. GARRE: -- was very much a constitutional

14 decision, and I think on page 210 --

15 JUDGE ROGERS: But it was constitutional only as to

16 the question of whether he had any due process right to be

17 notified of the charges and have a hearing. I mean, it's an

18 application of the immigration laws, is it not? That's all

19 I'm trying to be clear about.

20 MR. GARRE: And I agree with you that the

21 immigration laws were asserted in that case as a basis for

22 exclusion, but I think there's a different element --

23 JUDGE ROGERS: Okay.

24 MR. GARRE: -- constitutional element of the

25 separation of powers. And what the court said on 210 of its

1 decision is that courts have -- this is from the *Mezei* court,  
2 courts have long recognized the power to expel or exclude as a  
3 fundamental sovereign attribute exercised by the government's  
4 political departments largely immune from judicial control.

5 And that's a theme --

6 JUDGE ROGERS: And all of that's consistent with  
7 Congress having set up the rules of the road in terms of how  
8 people get into this country.

9 MR. GARRE: And --

10 JUDGE ROGERS: If they get in at all, isn't that  
11 correct? And that's what *Mezei* was dealing with, Congress had  
12 set up a statutory scheme and applying it, and looking at the  
13 constitution in light of that and said that, you know,  
14 whatever Congress says basically is due process as far as an  
15 inadmissible alien is concerned.

16 MR. GARRE: Congress has certainly set up a scheme  
17 for immigration laws, but I think it's well settled that the  
18 Executive, as part of those laws, and as part of inherent  
19 constitutional authority has the authority to exclude aliens  
20 who wish to come to our country --

21 JUDGE ROGERS: And what I'm looking for is a Supreme  
22 Court case, or even a statute that says that. In other  
23 words --

24 JUDGE RANDOLPH: That goes back to the Chinese  
25 exclusion cases --

1 JUDGE ROGERS: Right.

2 JUDGE RANDOLPH: -- of more than 100 years ago --

3 JUDGE ROGERS: Yes.

4 JUDGE RANDOLPH: -- and there's a line of Supreme  
5 Court cases. There's probably about 40 Supreme Court cases by  
6 my count that help.

7 MR. GARRE: You're quite right. And the Supreme  
8 Court in the *Shaughnessy* case made clear that this authority  
9 stems not -- and I'm quoting from page, it's 338 U.S. 542,  
10 "stems not only from the legislative power, but is inherent in  
11 executive power to control the foreign affairs of the  
12 nations." And that is the --

13 JUDGE ROGERS: No question about that. But Mr. --  
14 let me just talk about *Parhat* if I may here. He filed a  
15 habeas petition saying he is being unlawfully detained, and I  
16 just want to be clear that the government's position is A. it  
17 has the wind up authority, and B. it has unlimited executive  
18 power. Now, in your brief you cite no part of the  
19 Constitution other than Article One which is the suspension  
20 clause, so it's not under that authority.

21 MR. GARRE: Well, I certainly think Article Two, and  
22 it's the authority recognized in a long line of --

23 JUDGE ROGERS: Well, you don't cite that.

24 MR. GARRE: -- cases.

25 JUDGE ROGERS: It's nowhere cited in your brief.

1           MR. GARRE: Well, certainly we cite the *Mezei* case,  
2 Your Honor, and the Chinese exclusion cases, and this long  
3 line of authority which recognizes as part of the  
4 constitutional fabric, and part of the Executive's inherent  
5 authority to take aliens who have not yet entered the United  
6 States, to hold them, and in appropriate circumstances to re-  
7 settle them to third countries that are willing to accept  
8 them.

9           JUDGE RANDOLPH: Mr. Garre, what law governs --

10          JUDGE ROGERS: Right.

11          JUDGE RANDOLPH: -- the issue that's presented here?

12          MR. GARRE: Well, the federal law, the  
13 constitutional decisions that we have cited we think are  
14 sufficient for the Court to resolve that. Now, we have  
15 explained in our brief we think that the petitioners have to  
16 point to some either constitutional authority or statutory  
17 right to be brought to this country and be released here. And  
18 we think that petitioners have cited neither.

19          JUDGE RANDOLPH: *Boumediene* said look, they have  
20 habeas corpus, right, but we're not going to say what the law  
21 is that governs. We're not going to say whether the  
22 Constitution applies to people held in Guantanamo other than  
23 the suspension clause. And we're not going to say whether  
24 they have any statutory right. The most I get out of  
25 *Boumediene* is that one can, and you can tweak this out, say

1 that if there's an evidentiary mistake that's been made in  
2 holding an individual, that person is entitled to some relief.  
3 But as far as applying the due process clause or whatever, the  
4 Supreme Court didn't say one way or the other.

5 MR. GARRE: Well, we certainly think you're quite  
6 right, Judge Randolph.

7 JUDGE RANDOLPH: And there's precedent in this  
8 circuit to hold, for us to hold that the due process clause  
9 applies in Guantanamo would require us to en banc this case  
10 because there's a line of precedent in this court saying that  
11 aliens without property and without presence in the sovereign  
12 territory of the United States have no constitutional rights  
13 under the due process clause.

14 MR. GARRE: That's right, Your Honor. That's the  
15 law of this circuit, it's the law of the Supreme Court, which  
16 the Supreme Court in the *Boumediene* case did not revisit or  
17 overturn, and you're right, that that is a holding which  
18 pertains to the effect of the suspension clause on the  
19 Guantanamo Bay Naval Base. And I think the *Munaf* case, which  
20 was decided the same day as *Boumediene* by the Supreme Court,  
21 is very important in construing the effect of the suspension  
22 clause.

23 JUDGE RANDOLPH: Did the District Court here rely on  
24 the due process clause to come up with a remedy that says  
25 release these people in Washington, D.C.?

1           MR. GARRE: Your Honor, I don't think that that is,  
2 it explicitly based its decision on the due process clause.  
3 Certainly the District Court reached the conclusion that the  
4 Constitution required that these individuals be brought here  
5 and released. The only constitutional provision that the  
6 Supreme Court has recognized applies on Guantanamo is the  
7 suspension clause. The Supreme Court in *Boumediene* and *Munaf*  
8 made clear that the suspension clause does not require release  
9 in every case, that habeas is an equitable remedy, it's an  
10 adaptable remedy, and the *Munaf* case underscores that even  
11 where individuals may invoke the writ, and even if they would  
12 otherwise be entitled to be released that foreign policies,  
13 security considerations can preclude transfer to foreign  
14 countries, or preclude in the *Munaf* case release and transfer  
15 to the United States.

16           JUDGE RANDOLPH: Is it the government's --

17           JUDGE ROGERS: Let me ask you, isn't that --

18           JUDGE RANDOLPH: -- position that these individuals  
19 are terrorists?

20           MR. GARRE: No, Your Honor, these individuals are  
21 not any longer being held as enemy combatants.

22           JUDGE RANDOLPH: No, no, no. That's a different  
23 question. Under the immigration laws anybody that trains in a  
24 terrorist camp is not entitled to enter the United States,  
25 even if they're training to commit terrorist acts against, not

1 against the United States but in other countries. So, I ask  
2 again, I understand these individuals to the extent that they  
3 were, you know, going to engage if they were in hostilities it  
4 wasn't against the United States, I think there's some  
5 evidence that they were going to engage in activities against  
6 China. But my question is within the meaning of the  
7 immigration laws are these individual terrorists?

8 MR. GARRE: And let me answer that by saying first,  
9 the government hasn't made a specific determination whether  
10 those exclusions would apply. But within the framework of the  
11 immigration laws I think it's very likely that they would for  
12 this reason, under the immigration laws aliens cannot be  
13 brought here and admitted unless it is established clearly and  
14 beyond doubt that they have a right to be here, and that's set  
15 forth in 8 U.S.C. 1225B(2)(a). And under the terrorist  
16 activity exclusions individuals who engage in the use of  
17 firearms, train in the use of firearms, and intend to use  
18 those for unlawful purposes or endanger other people would  
19 fall within the terrorist activity exclusion.

20 Now, these individuals are, I think each case has to be  
21 looked at individually, and so I'm reluctant to put them, lump  
22 them all together.

23 JUDGE ROGERS: That's why I just want to be --

24 MR. GARRE: But yes, broadly --

25 JUDGE ROGERS: -- clear, it's the wind up authority,

1 it's this inherent sovereign power, and then are you also  
2 saying that even within the immigration system set up by  
3 Congress there -- I just need to be clear, either you're  
4 saying that as an alternative basis if the immigration laws  
5 apply it is the government's position it would be highly  
6 unlikely they would be admitted into the United States?

7 MR. GARRE: Yes, that's certainly --

8 JUDGE ROGERS: All right.

9 MR. GARRE: -- the government's position. Now, the  
10 immigration laws do not, and this gets back to Judge  
11 Randolph's --

12 JUDGE ROGERS: Do not what?

13 MR. GARRE: -- question --

14 JUDGE ROGERS: Yes.

15 MR. GARRE: -- by their terms they do not apply to  
16 individuals at Guantanamo Bay, that's express provision of the  
17 immigration laws. But if you got to the question of whether  
18 they are entitled to be admitted, and again, the burden is on  
19 them, a very high burden that Congress has established to show  
20 that they're entitled to be admitted. Unless --

21 JUDGE ROGERS: So, let me just so I'm clear, the  
22 government is not -- they filed a petition for habeas saying  
23 there is no authority under which we are lawfully detained,  
24 and the government agreed they were no longer enemy  
25 combatants.

1 MR. GARRE: Yes.

2 JUDGE ROGERS: And the government elected not to  
3 identify another ground, and when the District Court asked  
4 whether the government had any evidence these people were  
5 dangerous the government elected not to provide the District  
6 Court with any evidence.

7 MR. GARRE: No, that's true, Your Honor. The  
8 government's position is that we have the authority to hold  
9 these individuals pending re-settlement efforts, that the  
10 question of dangerousness or harmlessness while I think it was  
11 relevant to the stay ultimately is not relevant or controlling  
12 as to the authority to detain them.

13 JUDGE ROGERS: As to the habeas. So, it's all back  
14 down to the wind up authority.

15 MR. GARRE: The wind up authority and the --

16 JUDGE ROGERS: All right.

17 MR. GARRE: -- inherent constitutional authority  
18 that the Supreme Court recognized in the *Mezei* case, Your  
19 Honor.

20 JUDGE HENDERSON: Can I ask you about the *Mezei*  
21 case? If we treat this as an exclusion proceeding now,  
22 because *Boumediene* has told us they're entitled to have a  
23 petition for habeas relief reviewed. And if you'll go to  
24 *Mezei*, do you have it in front of you, a copy of it? At head  
25 note seven through nine through nine the court says neither

1 respondent's harborage on Ellis Island, nor his prior  
2 residence here transforms this into something other than an  
3 exclusion proceeding.

4 Now, if you were to say neither the fact that the  
5 (indiscernible) are at Guantanamo forcibly, and that they  
6 cannot at this point be settled anywhere else does not do  
7 anything to change this from an exclusion proceeding. Then  
8 the court says he may be habeas corpus test the validity of  
9 his exclusion.

10 Now, that seems to indicate that there's some judicial  
11 review, but then at the very end of the opinion the court says  
12 we don't have whatever the fears of letting this *Mezei* in,  
13 whatever our individual estimate of that policy and the fears  
14 on which is rests his right to enter the U.S. depends on  
15 congressional will and courts cannot substitute their judgment  
16 for that legislative mandate.

17 Now, how do you square that with that sentence about by  
18 habeas he can challenge the validity of the exclusion if you,  
19 just for the purposes of my question, say that we are now at  
20 an exclusion proceeding?

21 MR. GARRE: Right. And I think we're here and we  
22 don't contest that these petitioners have the right to come to  
23 a habeas court and to say release us, to say that we're  
24 entitled to appropriate relief, and we've litigated that, and  
25 the relief that the District Court ordered in this case to

1 release them and bring them here to the United States is not a  
2 relief that is available to them in habeas, it's not a relief  
3 that's available to them under our Constitution or our laws.  
4 And so our answer is they have a right to come into court and  
5 to invoke their habeas petition rights established by  
6 *Boumediene*, but at the end of the day they're in the same  
7 position as Mr. Mezei, neither our Constitution nor our laws  
8 entitle them to be brought into the United States and released  
9 here.

10 And if I could just in a minute --

11 JUDGE ROGERS: Could I just ask, though --

12 MR. GARRE: -- if I have --

13 JUDGE ROGERS: -- Mr. Garre, so I'm clear, has the  
14 government taken the position that were they to apply under  
15 the immigration laws there is absolutely no basis on which  
16 they could be admitted?

17 MR. GARRE: We have --

18 JUDGE ROGERS: In other words, has the Department of  
19 Homeland Security made any determination in this case?

20 MR. GARRE: No, Your Honor, we haven't made an  
21 immigration law decision. They haven't invoked, attempted to  
22 invoke that authority. The District Court didn't --

23 JUDGE ROGERS: I'll get to that --

24 MR. GARRE: -- analyze it under it. I want to be  
25 clear, though, we think it's very unlikely that they would

1 be --

2 JUDGE ROGERS: Oh, I understand your position --

3 MR. GARRE: -- entitled to be --

4 JUDGE ROGERS: -- you think it's unlikely, but  
5 you're not making an argument to this court, are you, that  
6 they are barred from pursuing any possible remedy they might  
7 have under the immigration statutes established by Congress  
8 controlling how aliens can apply for admission?

9 MR. GARRE: We're not, Your Honor. Of course --

10 JUDGE ROGERS: All right.

11 MR. GARRE: -- those statutes don't apply to  
12 Guantanamo, and I want to be clear that we don't think that  
13 they would have any -- we think it's unlikely they would have  
14 that right, but the Department of Homeland Security hasn't  
15 made that determination, and we're not here today to tell you  
16 that.

17 JUDGE ROGERS: Well --

18 MR. GARRE: If I could just --

19 JUDGE ROGERS: -- are you suggesting that because  
20 the government -- if I can split up the habeas relief, one is  
21 the question about are they detained as enemy combatants? And  
22 so the District Court says I'm granting the writ to that  
23 extent. Now, the government has chosen for presumably for  
24 reasons of convenience and administrative ease to keep them in  
25 a military prison facility. Now, is it as a result of that

1 choice by the government that they are barred from seeking  
2 relief under the immigration statutes?

3 MR. GARRE: No, Your Honor. They could attempt to  
4 seek relief. We think that they have pointed to no statutory  
5 right that entitles --

6 JUDGE ROGERS: No, no. I just --

7 MR. GARRE: -- them to be brought here.

8 JUDGE ROGERS: -- want to know if they're barred. I  
9 need to be very clear about what the government's position is  
10 that when you say the immigration statutes do not apply to  
11 Guantanamo does that mean that someone you're holding at  
12 Guantanamo pursuant to this wind up authority has no way of  
13 exercising any opportunity to pursue relief under the  
14 immigration statutes?

15 MR. GARRE: And I think the answer to that is no  
16 insofar --

17 JUDGE ROGERS: All right.

18 MR. GARRE: -- as they can seek to petition the  
19 government in any way that they would find appropriate to  
20 attempt to get, for example, parole, or something like that,  
21 they have no statutory right by which they can exercise that,  
22 but they could sort of attempt to pursue that by letters or  
23 other mechanisms.

24 JUDGE ROGERS: Well, they filed in the District  
25 Court motions for parole into the United States. Now, the

1 District Court never reached those motions because it declared  
2 them to be moot in light of its decision on remedy. But those  
3 motions were before the District Court.

4 MR. GARRE: Well, and in theory the District Court  
5 could entertain those if this court reversed the extraordinary  
6 order which is quite different before it. But again, I want  
7 to be clear, our position is that they have no statutory right  
8 to go into court to insist on parole, or admission, or any  
9 other immigration law status.

10 And if I could just, and I realize I've gone over my  
11 time, but just discuss briefly the problems of ordering these  
12 individuals be brought into the United States. First, that  
13 not only overrides the judgment of the political branches on  
14 these matters, which pertain to sensitive foreign policy and  
15 security considerations. Second --

16 JUDGE ROGERS: But Congress has set up a scheme even  
17 under the Patriot Act that gives discretion to the Secretary  
18 of the Department of Homeland Security. And even under *Mezei*  
19 situation the Attorney General had such authority, and  
20 ultimately did parole Mr. Mezei into the United States.

21 MR. GARRE: And certainly --

22 JUDGE ROGERS: So, those --

23 MR. GARRE: -- the government --

24 JUDGE ROGERS: -- decisions have not yet been made,  
25 is that correct?

1 MR. GARRE: That's correct.

2 JUDGE ROGERS: All right.

3 MR. GARRE: Certainly the government retains that  
4 discretion. It could choose to parole individuals in the  
5 United States at any point in time. It has determined not to  
6 do so to date, it's position is that these individuals should  
7 be resettled to foreign countries.

8 The second --

9 JUDGE ROGERS: Well, that decision hasn't even been  
10 made, has it? I mean, do we have any ruling by the Secretary  
11 of Homeland Security?

12 MR. GARRE: No, but certainly, and I want to be  
13 clear, I mean, the government's position, and I'm here today  
14 to tell you that, is that these individuals --

15 JUDGE ROGERS: I know you are, but I don't see any  
16 representation about what the Secretary of the Department of  
17 Homeland Security has determined in these cases, and that's  
18 where the authority under the statutes Congress has created --

19 MR. GARRE: It has not made that --

20 JUDGE ROGERS: -- has placed --

21 MR. GARRE: -- specific determination.

22 JUDGE ROGERS: All right.

23 MR. GARRE: But our position, the United States  
24 government's position --

25 JUDGE RANDOLPH: You represent the President.

1           MR. GARRE: Representing the President here, our  
2 position is that these individuals should not be allowed to  
3 enter the United States and should be resettled to a third  
4 country. Bringing them here would also interfere in an  
5 important respect with the foreign policy efforts to resettle  
6 them to other countries, because it is possible that if they  
7 were brought here countries that who otherwise might be  
8 willing to accept these individuals would much rather have  
9 them remain here in the United States.

10           Bringing them here also could create immigration laws or  
11 rights of privileges, it's quite well settled that aliens  
12 outside the United States do not enjoy privileges and  
13 protections that aliens who come to the United States once  
14 they set foot on our shores have protections. And of course,  
15 it's reasonable for the government to assume that individuals  
16 who have been held by the United States government for several  
17 years, many of which is enemy combatants, may not have the  
18 United States on their favorite country list, and so it's  
19 reasonable for the government to take those considerations  
20 into account and make a determination that the appropriate  
21 course is to seek to resettle these individuals to a third  
22 country that is willing to accept them, provide adequate  
23 assurances for their protections, that effort is ongoing and  
24 active.

25           JUDGE RANDOLPH: If they wanted, if any one of these

1 individuals who wanted to go back to China, you know, fine,  
2 you're protecting us, you're not going to send us back to our  
3 home country, but I waive that, I want to go back to China,  
4 would the United States send them back?

5 MR. GARRE: Yes. I mean, our position is that they  
6 could waive protections that they might otherwise have. The  
7 United States policy is that it will not send them back to  
8 China because we have not received adequate assurances for  
9 their protections, but they could waive that, Your Honor. If  
10 there are no further questions.

11 JUDGE HENDERSON: I just had one question. Did you  
12 all get so far, I know Judge Urbina ordered them to come to  
13 another hearing, did you all get so far as to discuss if their  
14 release was imminent, which it sounded like it was, what their  
15 status would be as aliens? I mean, what type of visa, or  
16 anything like that, did you get into that?

17 MR. GARRE: Certainly not with the court, Your  
18 Honor. I mean, they certainly would not be admitted. At most  
19 they might have some status equivalent to a paroled alien.  
20 But I think one of the fundamental problems with the District  
21 Court's order is it was entered outside of the framework of  
22 the immigration laws which aren't addressed to this situation.  
23 The government --

24 JUDGE ROGERS: Actually, the District Court was  
25 prepared to hear from the Department of Homeland Security, and

1 the Department of Homeland Security requested a weeks time to  
2 get its views together.

3 MR. GARRE: And obvious --

4 JUDGE ROGERS: Isn't that correct?

5 MR. GARRE: I believe that's true, Your Honor.

6 Obviously, the government took --

7 JUDGE ROGERS: Yes.

8 MR. GARRE: -- swift action to being this case to  
9 the Court of Appeals to seek a stay because --

10 JUDGE ROGERS: Sure.

11 MR. GARRE: -- fundamentally, regardless of the  
12 immigration label that might be placed on them once they're in  
13 the United States, the government's position is that the  
14 District Court had no right under our laws to order that they  
15 be flown to the United States and be released here.

16 JUDGE HENDERSON: All right. Thank you.

17 MR. GARRE: We reserve any time for rebuttal. Thank  
18 you --

19 JUDGE HENDERSON: Okay.

20 MR. GARRE: -- Your Honors.

21 JUDGE HENDERSON: We'll give you some time. Mr.  
22 Willett.

23 ORAL ARGUMENT OF SABIN WILLETT, ESQ.

24 ON BEHALF OF THE APPELLEES

25 MR. WILLETT: Thank you, Judge Henderson, and may it

1 please the Court. Since the government rests such weight on  
2 *Mezei* let's begin there. I think they're very right to say  
3 that we're not concerned about the dissents and posterity and  
4 the academics, but they're very wrong about what the holding  
5 in *Mezei* is. *Mezei* does not hold that the Executive has power  
6 to detain indefinitely persons that it is excluding. In fact,  
7 habeas is simply the vehicle in *Mezei* for attacking  
8 collaterally an exclusion order. We don't have an exclusion  
9 order in this case.

10 And in fact, you see from Justice Clark's opinion they go  
11 to every extremity to call this thing something other than  
12 detention. It's a harborage, it's a haven, it's a temporary  
13 refuge. Now, the scholarship and the dissents all deride  
14 that.

15 JUDGE RANDOLPH: Now, the individual there was free  
16 to go but he had nowhere to go.

17 MR. WILLETT: But he left twice, Your Honor. He  
18 left twice --

19 JUDGE RANDOLPH: But he was free to leave --

20 MR. WILLETT: He was free to leave.

21 JUDGE RANDOLPH: -- but he had no place where he  
22 could go.

23 MR. WILLETT: And our clients are not free to leave,  
24 and that's why you see such an extravagant effort in the  
25 briefs to --

1 JUDGE RANDOLPH: Well, you heard the --

2 MR. WILLETT: -- refer to this --

3 JUDGE RANDOLPH: -- United States just say they can  
4 go to China.

5 MR. WILLETT: Well, that's equivalent to them  
6 putting a bullet through their head, Your Honor. I mean, you  
7 can read the (indiscernible) association (indiscernible) to  
8 see what the State Department thinks of China. This is not  
9 something we made up.

10 The fact is they have nowhere to go, and the government  
11 agrees with us on this, that China is inappropriate for these  
12 men. And it is indeed a prison. I mean, you don't have to --  
13 never mind what they say in their briefs about housing, not a  
14 month ago we went to Judge Urbina to see if we could meet our  
15 clients at this housing without them being chained to the  
16 floor, and they rushed into court saying that's inappropriate,  
17 it would be intrusion into our management of a prison. It's a  
18 prison, and that's the difference. Mezei is a volunteer, he  
19 checks himself in to Ellis Island, and he's free to check  
20 himself out, which he does twice, and there's an exclusion  
21 order.

22 Now, all of the government's concerns about its  
23 immigration powers are in fact unaffected by this case because  
24 when the men are released they are susceptible to deportation.  
25 If indeed they could satisfy a panel of, or an immigration

1 judge on the point that you put, Judge Randolph, then they  
2 could be deported if they find a place for them to go. But  
3 I --

4 JUDGE ROGERS: But let me ask you in the District  
5 Court in filing motions for parole into the United States  
6 haven't the petitioners acknowledged that this scheme, this  
7 statutory scheme established by Congress exists, and for them  
8 to gain admission into the United States they are not immune  
9 from the immigration laws and consequently that was why they  
10 filed a motion for parole?

11 MR. WILLETT: That's quite right, Your Honor. And  
12 we should be clear the parole we sought was *Baker v. Sard*  
13 parole that's ancillary to a habeas case, it was not an  
14 immigration status.

15 Now, if Judge Urbina is permitted to go forward and  
16 impose the conditions he was on the point of imposing then at  
17 that point the government can if it chooses parole them in  
18 order to make clear that they have no immigration status, or  
19 it can leave them as *Martinez* and *Zadvydas* and others have  
20 been left with no immigration status at all, it's up to them.

21 JUDGE ROGERS: I didn't hear that last sentence,  
22 sorry.

23 MR. WILLETT: They have a choice, they can either  
24 parole them, which makes clear they have no immigration rights  
25 and they can be deported, or they can do nothing, in which

1 case they will be left as unlawful aliens who are physically  
2 present, as I believe was the case for *Martinez* and *Zadvydas*,  
3 but who simply can't be detained indefinitely once we've  
4 reached the point, as we have reached long ago in this case,  
5 where there is no deportation in prospect.

6 JUDGE ROGERS: Well, I'm just trying to understand  
7 the schemes we have here, and if the petition is that the  
8 government cannot -- has not pointed to any lawful basis for  
9 holding them, that is one type of decision. And as I  
10 understand the government's argument it's that under the  
11 Constitution -- these are my words, not the government's  
12 words, but under the Constitution Congress has been vested the  
13 authority to enact laws regarding the means by which anyone  
14 can seek admission into this country.

15 MR. WILLETT: Sure.

16 JUDGE ROGERS: And while a habeas writ may issue,  
17 nonetheless before you can be admitted into this country there  
18 are immigration statutes to be addressed. And their position  
19 is that the petitioners have yet to pursue those remedies.

20 MR. WILLETT: They have said that, Your Honor. But  
21 the second we pursue it they're going to say you're not in a  
22 place where you're authorized to pursue it.

23 JUDGE ROGERS: Well, we heard this morning from  
24 counsel representing the President of the United States that  
25 they are not taking the position that the immigration laws are

1 unavailable to your clients. Now, whether they succeed under  
2 the immigration laws is a different question. But at least --

3 MR. WILLETT: Right.

4 JUDGE ROGERS: -- as I heard counsel, and he can  
5 correct me on rebuttal if I've misunderstood his position,  
6 they are free notwithstanding their presence in the Guantanamo  
7 military prison to pursue any possible remedies they might  
8 have under the immigration statutes.

9 MR. WILLETT: That may be. I'll be delighted to see  
10 if Mr. Garre is smiling behind me to agree with Your Honor's  
11 characterization of what he said. But the fact of the matter  
12 is that --

13 JUDGE ROGERS: Well, I don't want to be uncertain  
14 about that. All right? And I question counsel I thought  
15 rather closely on that, and he can change his position if he  
16 wants to on rebuttal, but as I understood it, and I would  
17 leave this courtroom at this moment with the understanding the  
18 United States was not taking the position --

19 MR. WILLETT: Well, Your Honor --

20 JUDGE ROGERS: -- that they did not pursue remedies  
21 under the immigration laws.

22 MR. WILLETT: As would I. But I've often been  
23 disappointed after --

24 JUDGE ROGERS: All right. Well, answer the  
25 question.

1           MR. WILLETT: -- I've left courtrooms. But the  
2 point I would make here is that it is no substitute for habeas  
3 for me to be able to pursue a discretionary remedy with the  
4 President. And that's all immigration -- you might well do  
5 that, and they might reject it, but it's not a substitute for  
6 getting released from a prison.

7           JUDGE RANDOLPH: You're saying that your clients  
8 might apply, or will apply for admission pursuant to the  
9 immigration laws, is that --

10          MR. WILLETT: If they're here we have to see what  
11 the government does with us.

12          JUDGE RANDOLPH: Why do they have to be here to make  
13 application?

14          MR. WILLETT: Because there's a --

15          JUDGE RANDOLPH: Why don't they make application  
16 where they are now? Most aliens in fact probably, and, you  
17 know, I don't know what the numbers are, but the aliens  
18 seeking to come to this country from Europe, and from Africa,  
19 and from the Middle East and whatever they don't say hey, I  
20 have to come to the United States in order to apply for  
21 admission. They make their applications overseas.

22          MR. WILLETT: Your Honor --

23          JUDGE RANDOLPH: So, why can't your --

24          MR. WILLETT: -- the statute is geographically  
25 specific, and the government's brief points this out, it's

1 geographically specific about where you have to have dry feet  
2 to make such an application, and Guantanamo Bay is not such a  
3 place. In fact, other people have attempted this and have  
4 failed. The government itself in it's brief says that we  
5 don't have standing to seek that remedy.

6 But my point simply is to say even if we did, the fact  
7 that we could go ask for mercy from the very branch of  
8 government that is imprisoning us today is no substitute from  
9 release from a prisons, and that's --

10 JUDGE RANDOLPH: Well, suppose --

11 MR. WILLETT: -- what we've asked for.

12 JUDGE RANDOLPH: -- there are people held in  
13 Afghanistan under the same circumstances, they were caught in  
14 Tora Bora, you know, doing weapons training and they are from  
15 Western China, do those people -- and the government says no,  
16 no, no, they're not enemy combatants, the United States holds  
17 them, where the coalition of forces was I don't think it  
18 matters, are they entitled to be released into the United  
19 States?

20 MR. WILLETT: No, Your Honor. I mean, first of all,  
21 that's happened often, and those people are released in  
22 Afghanistan. But it happens at the time, it happens shortly  
23 after capture, and --

24 JUDGE RANDOLPH: Well, suppose it's a month, and  
25 what is shortly after? Suppose it's two months.

1                   MR. WILLETT: I don't know where to draw the line,  
2 but it's not six years, Your Honor.

3                   JUDGE RANDOLPH: If people are training in terrorist  
4 activities, and I'm not saying one way or the other because I  
5 don't know that there's a clear determination about your  
6 clients, but we have -- suppose there are individuals who are  
7 trained terrorists and they're going back to whatever the  
8 country is, whether it's Russia, or China, or whatever, the  
9 United States captures, determines that they're not against  
10 the United States, not enemy combatants, but no other country  
11 in the world wants them because they're terrorists, do they  
12 have to be released into the United States? Isn't that your  
13 position?

14                   MR. WILLETT: That is not my position, Your Honor.  
15 First of all, if they were such people, they might well,  
16 depending on their affiliation, fall within the authorization  
17 for the use of military force. And I can't let this moment go  
18 by without saying that every single thing that has ever been  
19 alleged about our clients and what they did, you and I can do  
20 this weekend 23 miles from here at a gun camp in Virginia. I  
21 mean, there is nothing terrorist about what is alleged about  
22 these people. And we have this cloud of that word that hovers  
23 over the case, but on every case, including when Judge Urbina  
24 asked them --

25                   JUDGE RANDOLPH: No, we could do it in Virginia, we

1 can also do it, the same kind of training at Paris Island.

2 MR. WILLETT: Your Honor, tearing down a firearm and  
3 putting it back together and shooting at a target which is 100  
4 percent of what's been alleged here is something that is not  
5 even military, and it's something millions of Americans do,  
6 and ought to do, and it's lawful to do, and it doesn't make  
7 these people somehow --

8 JUDGE RANDOLPH: What kind of firearms were they?

9 MR. WILLETT: There was a semi-automatic weapon, and  
10 there was a pistol. Mainly they didn't have ammunition is  
11 what I understand. But the fact of the matter is you'd be  
12 hard-pressed in Afghanistan in 2001 to find a village that  
13 didn't have a semi-automatic weapon in it. There was nothing  
14 hostile about this, there was no direct evidence of any kind  
15 of intent to do harm to anyone.

16 JUDGE RANDOLPH: Suppose there was.

17 MR. WILLETT: That's a different case.

18 JUDGE RANDOLPH: Well, I know that. But does the  
19 district judge's decision depend upon whether these  
20 individuals were training to commit terrorist acts in China or  
21 not?

22 MR. WILLETT: The district judge's decision depends  
23 upon whether there is a lawful basis authorized by Congress  
24 for the President to hold them in a prison.

25 JUDGE RANDOLPH: Is that a yes or a no? I mean,

1 does the --

2 MR. WILLETT: Well --

3 JUDGE RANDOLPH: -- District Court's decision depend  
4 upon whether the individuals were training in terrorist  
5 activities? I can't because he --

6 MR. WILLETT: I --

7 JUDGE RANDOLPH: -- made no factual determination of  
8 that.

9 MR. WILLETT: Well, that's not correct, Your Honor,  
10 because the government ran up the white flag and it said we  
11 don't have any basis to detain these people, so there was no  
12 occasion for Judge Urbina to make a factual determination.

13 JUDGE RANDOLPH: Would the United States have a  
14 basis for detaining people who were planning to commit  
15 terrorist activities in China?

16 MR. WILLETT: Not unless there was an --

17 JUDGE RANDOLPH: No, not --

18 MR. WILLETT: -- association with --

19 JUDGE RANDOLPH: No.

20 MR. WILLETT: -- the Taliban or --

21 JUDGE RANDOLPH: No. So the United States would say  
22 we don't have any basis under the authorization for military  
23 force to detain people who were going to commit terrorist  
24 acts, not against us, but against China.

25 MR. WILLETT: Your Honor, the actual terrorist act

1 would be a crime under our law and the law of China, and --

2 JUDGE RANDOLPH: Not an actual.

3 MR. WILLETT: -- it might be --

4 JUDGE RANDOLPH: I'm talking about training.

5 MR. WILLETT: Well, I mean the planning for such an  
6 act.

7 JUDGE RANDOLPH: If they did training now, if  
8 anybody that is in any of these camps, was in any of these  
9 camps in Tora Bora, if they were training now they would be  
10 committing a criminal offense.

11 MR. WILLETT: Training to --

12 JUDGE RANDOLPH: Because the organization has been  
13 deemed by the State Department to be a terrorist organization.

14 MR. WILLETT: Yes, if they were --

15 JUDGE RANDOLPH: The organization that --

16 MR. WILLETT: -- if they --

17 JUDGE RANDOLPH: -- trained them is now considered  
18 on the --

19 MR. WILLETT: Right.

20 JUDGE RANDOLPH: -- State Department's list as a  
21 terrorist --

22 MR. WILLETT: Well --

23 JUDGE RANDOLPH: -- organization.

24 MR. WILLETT: -- wait a minute, Your Honor, there's  
25 nothing in this record that says these people were part of

1 that organization. In fact, I urge you to look at the  
2 citations --

3 JUDGE RANDOLPH: No, I'm talking about --

4 MR. WILLETT: -- on the government's brief.

5 JUDGE RANDOLPH: -- whether they were part of it,  
6 I'm talking about whether they were trained by it.

7 MR. WILLETT: Well, I don't know what the difference  
8 is, Your Honor.

9 JUDGE ROGERS: But is --

10 JUDGE RANDOLPH: Well, the difference is a federal  
11 felony offense, that's the difference under --

12 JUDGE ROGERS: You know --

13 JUDGE RANDOLPH: -- 18 U.S.C. 2339(d).

14 JUDGE ROGERS: Of course who was it, *Zadvydas* or  
15 *Clark* who had been convicted of several felonies?

16 MR. WILLETT: Yes.

17 JUDGE ROGERS: I mean, that's not what the  
18 government's argument is here, as I understand it. Their  
19 argument is they are maintaining these people at Guantanamo  
20 under inherent constitutional authority of the sovereign to  
21 hold people in the interest of national security, and as part  
22 of the wind up authority. And as I understand your position  
23 it's that they are being held in a military prison, and that,  
24 and I want to be clear about this, were they moved, for  
25 example, to Ellis Island would you have the same argument?

1           MR. WILLETT: Your Honor, we would still have a  
2 remedy in habeas, but the argument would be different, because  
3 the movement to Ellis Island would have been contrived by the  
4 government as opposed to Mezei's movement who goes there on  
5 his own. The fact is we're -- and this is something the  
6 government didn't talk about in their argument, but *Boumediene*  
7 held that the habeas judge has to have power to order release.  
8 This court in *Parhat* directed the government to release or  
9 transfer Parhat five months and four days ago.

10           So, if you don't have that power, if the only result is  
11 that you shift someone to Ellis Island, that that's a  
12 contrivance against the release remedy, which in this unusual  
13 case --

14           JUDGE ROGERS: As I understood it, though, the  
15 argument could be that it's not a contrivance in the sense  
16 that the government has removed him from Guantanamo, so he is  
17 no longer there. But as with Mr. Mezei, he is being held  
18 pursuant to the immigration statutes.

19           MR. WILLETT: You know, Your Honor, we looked at  
20 that case, which came up in their reply, and it turns out  
21 there's another decision that no one cited from the Second  
22 Circuit called *Bradley v. Watkins*, the citation is 163 F.2d  
23 328, and that's a Norwegian civilian who was captured just  
24 before the Second World War and brought to Ellis Island, and  
25 it goes up to the Second Circuit, and a panel of the Second

1 Circuit says that he cannot be held in a prison pending  
2 deportation. In fact, I don't know what the difference would  
3 be here.

4 What we're really talking about in this case is where do  
5 these people go while the government attempts to deport them?  
6 Why do they sit in a military prison? They're not enemy  
7 combatants.

8 JUDGE RANDOLPH: What law are you invoking? Are you  
9 relying on the common law of habeas as it existed in 1789?

10 MR. WILLETT: Yes, Your Honor, I'm saying there's an  
11 absence of a legal basis to detain them. In *Boumediene* it was  
12 held that the government has to come up with a legal basis to  
13 detain them. The only basis they pointed to was the AUMF, and  
14 then they abandoned that when asked for evidence by the habeas  
15 judge. So, where's there a null set, where there's nothing  
16 the petitioner is entitled to release, and that's one of the  
17 holdings of *Boumediene*.

18 JUDGE ROGERS: I mean, I found the *Amikas* (phonetic  
19 sp.) briefs to be very helpful in this case, but what I  
20 haven't found is all of these cases talk about release, but  
21 they don't tell us a lot about what that means because it's  
22 perfectly obvious in the context. And even in *Boumediene*  
23 where the Supreme Court talks about release may not always be  
24 the appropriate remedy, that habeas is flexible, etcetera, and  
25 they cite a case where the petitioner was held for re-trial --

1 MR. WILLETT: Right.

2 JUDGE ROGERS: -- because charges were pending. So,  
3 the argument might run here, although it's not the argument as  
4 I have heard it from the government, that they are being held  
5 if the process were to move forward under our immigration  
6 statutes. And --

7 MR. WILLETT: Well --

8 JUDGE ROGERS: -- the alternative argument in the  
9 government's brief is that it should be given an opportunity  
10 since it only recently decided not to pursue new CSRT  
11 hearings, an opportunity to proceed under the immigration  
12 laws, although they said, you know, your clients have failed  
13 to apply.

14 MR. WILLETT: Well, a couple of points to unpack,  
15 Your Honor. On August 4th they ran up the white flag on  
16 *Parhat*.

17 JUDGE ROGERS: Yes.

18 MR. WILLETT: On August 18th they did the same with  
19 four other of these petitioners.

20 JUDGE ROGERS: Yes.

21 MR. WILLETT: And it wasn't until September 30th  
22 that they had to in fact --

23 JUDGE ROGERS: Yes.

24 MR. WILLETT: -- put their chips on the table, they  
25 had every opportunity to say this was an immigration case.

1 And call me fussy, but if I don't plead something I usually  
2 get -- I don't get a chance to come up to the Court of  
3 Appeals --

4 JUDGE ROGERS: Well, interestingly --

5 MR. WILLETT: -- and plead it there.

6 JUDGE ROGERS: -- and it was not included in the  
7 voluminous record submitted for this case, but it is part of  
8 the District Court record, in opposing *Parhat's* motion for  
9 parole, and I understand it was collateral to habeas,  
10 nevertheless, the government did make these arguments that it  
11 is now making to this court. So, those arguments were before  
12 the District Court, and he did not address them.

13 MR. WILLETT: It's true, Your Honor, although  
14 they've never filed a return, and they never -- you know,  
15 they're supposed to certify the true cause of the jailing.  
16 And this, Judge Randolph, I neglected to say to you, we also  
17 have a statutory right under 2243 and 2241, because we're not  
18 enemy combatants, we're not carved out by the strip. And --

19 JUDGE RANDOLPH: Okay. Assume 2241 applies.

20 MR. WILLETT: Right.

21 JUDGE RANDOLPH: And that says that you're entitled  
22 to the writ if you're being held in violation of the law or  
23 the Constitution or treaties, but put that aside, are you  
24 claiming that your clients are being held in violation of the  
25 Constitution?

1 MR. WILLETT: The law and the Constitution, Your  
2 Honor.

3 JUDGE RANDOLPH: No, but what provision of the  
4 Constitution?

5 MR. WILLETT: The suspension clause, which runs  
6 to --

7 JUDGE RANDOLPH: But the suspension --

8 MR. WILLETT: -- Guantanamo.

9 JUDGE RANDOLPH: -- clause has no -- the suspension  
10 clause is you have a right to habeas corpus. I'm dealing with  
11 2241, that doesn't mean everybody that has a right to a writ  
12 of habeas corpus under 2241 has a right to release. You --

13 MR. WILLETT: No, you have to --

14 JUDGE RANDOLPH: Right, it has to show it's a  
15 violation of some other provision of the Constitution, so what  
16 is it?

17 MR. WILLETT: Well, it impresses upon the  
18 government, the jailer, the obligation to justify in law the  
19 detention.

20 JUDGE RANDOLPH: What provision of the Constitution  
21 is it that's being violated?

22 MR. WILLETT: I think that is the read of the  
23 suspension clause under *Boumediene*, Your Honor.

24 JUDGE RANDOLPH: Wait a minute. If the suspension  
25 clause invokes the regular writ of habeas corpus, you know, 28

1 U.S.C. 2241, then you're into that whole line of cases,  
2 thousands of cases in this country that say you have to show a  
3 specific provision of the Constitution that's being violated  
4 by holding you, and you don't come back and say ah, 2241,  
5 habeas corpus, that's not the answer. You've got to show the  
6 Fourth Amendment, is it the, you know, is it the Fifth  
7 Amendment, is it the Eighth Amendment, you know, is it the due  
8 process clause, which one?

9 MR. WILLETT: It is as least so much of the due  
10 process clause that involves holding somebody indefinitely in  
11 a prison. That you can tease at least out of *Zadvydas*, Your  
12 Honor. And that is consistent with the suspension clause  
13 (indiscernible).

14 JUDGE RANDOLPH: Well, this gets back to the point  
15 that I mentioned to General Garre, and they're -- the cases in  
16 our court hold that there is no due process right of an alien  
17 who's never been in the United States and has no property  
18 here.

19 MR. WILLETT: Well, Your Honor, there's no --

20 JUDGE RANDOLPH: So, the Supreme Court didn't say  
21 one way or the other, they said all right, writ of habeas  
22 corpus, that's it, but we're not telling you what the law is  
23 that governs it. Our court says there are no due process  
24 rights.

25 MR. WILLETT: Your Honor, your court has said

1 there's no due process right to entry, to gain admission.

2 JUDGE RANDOLPH: No, no, no. That's not what it  
3 said. That's not what it said. The case is *People's Mujah*  
4 *Hadin v. Secretary of State* I think is the name of it. I've  
5 got it somewhere.

6 MR. WILLETT: That's the case about the records, I  
7 believe, Your Honor.

8 JUDGE RANDOLPH: Yes, and there are other cases,  
9 too. There's a *22 Sovereignty*, there's -- I don't know.  
10 There's at least three or four decisions in our court that  
11 hold that. So --

12 MR. WILLETT: The --

13 JUDGE RANDOLPH: Oh, here it is. It's -- I don't  
14 think the parties cite this, it's 182 F.3d at page 22, and it  
15 says a foreign alien without property or presence, I'm  
16 reading, in this country has no constitutional rights under  
17 the due process clause.

18 MR. WILLETT: But he was not in a prison, Your  
19 Honor. He was just contesting whether I believe he could be  
20 deported. And we concede that --

21 JUDGE RANDOLPH: No, that was not a -- that was a  
22 terrorist case.

23 MR. WILLETT: All right. It was whether an  
24 organization would be designated as one of these  
25 organizations.

1 JUDGE RANDOLPH: Right.

2 MR. WILLETT: It wasn't about whether somebody was  
3 in a prison, the most fundamental point of habeas corpus. And  
4 the problem is here, if you think about it just last week  
5 Judge Leon issued an order in the *Boumediene* case, and in  
6 fact, Boumediene himself was ordered to be, I think the order  
7 was that the government go about forthwith engaging in  
8 diplomacy to arrange his return home, which there's no reason  
9 to think that won't work in that case, and in most cases.

10 What if it doesn't work? What does Judge Leon do then?  
11 Does he throw up his hands and he's all done? Boumediene sits  
12 in the isolation cell where he is this morning?

13 JUDGE ROGERS: Well, that's what Judge Robertson  
14 did.

15 MR. WILLETT: That was three years ago, Your Honor,  
16 before the -- in effect, if you look at the first 18 pages of  
17 the classified record the government has proved in spades they  
18 are not going to succeed with this resettlement, they have  
19 been at it for four years, they have tried everywhere in the  
20 world, they have worked judiciously, and the judge had a  
21 factual record before him that the imprisonment had long ago  
22 become indefinite.

23 JUDGE RANDOLPH: Yes, but that's *Mezei*, that's  
24 exactly -- the Supreme Court said if the government can't  
25 relocate the individual they have to hold, they have -- what

1 are they going to do?

2 MR. WILLETT: Your Honor, *Mezei* --

3 JUDGE RANDOLPH: The other option in the Supreme  
4 Court in the *Mezei* case was release the individual into the  
5 United States, and the Supreme Court said no, that's not an  
6 option.

7 MR. WILLETT: They said that's not an option with  
8 respect to a volunteer who comes to the doorstep and knocks.  
9 We have people who were brought here to a military prison.  
10 Think about it this way, there are 10 military facilities  
11 within 400 miles of Miami Beach, habeas corpus runs to every  
12 one of them. If the pilot of that C-17 lands at Eglin, or  
13 Jacksonville, or Pensacola Naval Air Station those men are  
14 free like Martinez years ago. But because he lands at  
15 Guantanamo they sit there forever. That's not a great writ,  
16 Your Honor, that's a flight plan. And how can we say, how can  
17 we give any meaning to the *Boumediene* decision if it turns on  
18 the flight plan of the C-17?

19 JUDGE RANDOLPH: Well, it's the same thing with  
20 Mexico. The Supreme Court has held that the, you know, the  
21 Constitution doesn't extend with -- if the United States  
22 agents go into Mexico and that's their flight plan and they  
23 grab an alien there and bring him back that he doesn't have a  
24 Fourth Amendment right to probable cause or anything else.  
25 So, what's the difference between what the Supreme Court held

1 in that case I can't pronounce, you know which one I'm talking  
2 about, and your hypothetical? It's the same thing.

3 MR. WILLETT: Six years in a military prison is the  
4 difference.

5 JUDGE RANDOLPH: That guy was convicted of drug  
6 offenses, and he's probably spending 30 years in prison.

7 MR. WILLETT: And our clients are not even warriors,  
8 they're civilians. They're not charged with a crime, they're  
9 not our enemies. I realize I've gone long over my time, and I  
10 also realize that it takes awhile to write decisions, but you  
11 did enter a stay, and if this Court could possibly vacate that  
12 stay and let Judge Urbina get back to the work of conditioning  
13 this release as he was on the point of doing we would be most  
14 grateful. Thank you.

15 JUDGE ROGERS: All right.

16 THE CLERK: No time remaining.

17 JUDGE HENDERSON: Okay. Why don't you take a couple  
18 of minutes?

19 ORAL ARGUMENT OF GREGORY G. GARRE, ESQ.

20 ON BEHALF OF THE APPELLANTS

21 MR. GARRE: Thank you, Your Honors. Let me be clear  
22 at the outset that the United States' position is not that the  
23 resettlement efforts are hopeless. There are active, ongoing  
24 discussions right now and the United States is doing its best  
25 to resettle these people to a third country that will accept

1 them. Second --

2 JUDGE RANDOLPH: To pick up on the petitioners's  
3 argument, they say that you have no legal authority to hold  
4 them any longer. What is your legal authority?

5 MR. GARRE: Well, it's two-fold, it's the wind up  
6 authority, and it's the authority in *Mezei* to take aliens who  
7 wish to enter the United States and to hold them so that they  
8 do not unlawfully enter the United States until you can  
9 resettle them to a country that is willing to accept them.  
10 That's a constitutional decision in *Mezei*. The political  
11 branches have also -- Congress has made clear that the  
12 Executive need not admit aliens that it determines is not in  
13 the United States interest to admit.

14 The *Boumediene* case, to get back to Mr. Willett's point,  
15 as you recognize, Judge Rogers, it doesn't hold that the  
16 suspension clause requires release in every case, in fact, it  
17 specifically says that release is not required in every case  
18 on page 2266 of the decision.

19 JUDGE ROGERS: But the one --

20 MR. GARRE: The *Munaf* --

21 JUDGE ROGERS: -- cite the court gave was where  
22 there were charges pending against the petitioner, and so back  
23 to Judge Randolph's question, if the wind up authority has  
24 exhausted itself because it's gone on for so many years  
25 unsuccessfully, and these current proceedings have not helped

1 that process, and the District Court found therefore these  
2 petitioners are facing indefinite detention, the government's  
3 reliance on *Mezei* suggests that you can't hold him in a  
4 military prison as distinct from providing an accommodation to  
5 him, such as Ellis Island.

6 MR. GARRE: Well --

7 JUDGE ROGERS: I mean, we've never thought of Ellis  
8 Island in the same way we think of Guantanamo military  
9 facilities.

10 MR. GARRE: Two points on that, Your Honor. First,  
11 *Mezei* makes clear that you can hold them indefinitely, that's  
12 the way the court, the Supreme Court described it in *Zadvydas*,  
13 and Mr. *Mezei* had been held for three years by the time of the  
14 decision. Second, the fact that they're being held in  
15 Guantanamo Bay, many aliens have been held on Guantanamo Bay.  
16 Haitian refugees who have been interdicted at sea brought  
17 involuntarily to Guantanamo Bay --

18 JUDGE ROGERS: I was going to ask you --

19 MR. GARRE: -- and brought back --

20 JUDGE ROGERS: -- what about -- are all those people  
21 still being held in the immigration camps in Florida?

22 MR. GARRE: No, Your Honor. Well, the vast majority  
23 of the Haitians that were brought to Guantanamo Bay were held  
24 there and then brought back to Haiti, or resettled to other  
25 countries. In the 1980s and 1990s there were hundreds of

1 Mariel Cubans who sought to enter this country, were  
2 interdicted, and then were -- the United States undertook  
3 efforts to re-send them to other third countries that would  
4 take them where they were safe. Many of those individuals  
5 were held for several years, as long as a decade until they  
6 could be resettled.

7 So, although the petitioners' situation is certainly  
8 regrettable, it is not unprecedented. And the fact that they  
9 are being held on Guantanamo Bay doesn't give them a right to  
10 be brought into the United States.

11 JUDGE ROGERS: Of course, again, these were all  
12 people who were voluntarily seeking admission, and even in the  
13 case you rely on in *Munaf* the Supreme Court noted that the  
14 U.S. citizens had voluntarily gone to Iraq where they were  
15 facing criminal charges. So, I want to be clear, is it the  
16 government's position that in connection with a habeas  
17 petition that the District Court would lack authority to  
18 direct the government to remove the petitioners from a  
19 military prison, and perhaps it has authority to hold them  
20 somewhere else, but cannot continue to hold them in a military  
21 prison?

22 MR. GARRE: Our position is that the District Court  
23 lacks the authority to order that they be brought to the  
24 United States. The District Court would lack the authority to  
25 say you can't hold them on Guantanamo Bay, you have to bring

1 them to Ellis Island. That transfer itself, and now Mr. --

2 JUDGE ROGERS: So, in other words, after all these  
3 years of fighting about habeas corpus, whether under the  
4 statute or the Constitution, if the United States policy means  
5 that a person cannot be returned to the country of which they  
6 are a citizen, then they can be indefinitely held in the  
7 military prison from which they are seeking relief?

8 MR. GARRE: Well, they can be indefinitely held,  
9 Your Honor, that's clear. Now, when the *Parhat* --

10 JUDGE ROGERS: Well, it's a military prison,  
11 correct?

12 MR. GARRE: They could be held by the Department of  
13 Defense. But I want to be clear, Your Honor, when the  
14 *Parhat* --

15 JUDGE ROGERS: Is it a military prison? Be clear  
16 about that.

17 MR. GARRE: They are being held by the Department of  
18 Defense. Now, petitioners --

19 JUDGE ROGERS: In a military prison?

20 MR. GARRE: -- describe it as a military prison,  
21 Your Honor, and we could debate about whether any detention  
22 facility operated by the Department of Defense is a military  
23 prison. The point that I want to make is, that I would like  
24 to make is that when these individuals were determined not to  
25 be enemy combatants they were taken out of the restrictive

1 conditions where the enemy combatants are being held at  
2 Guantanamo Bay and put into an entirely different facility  
3 with much --

4 JUDGE ROGERS: What I want to be --

5 MR. GARRE: -- less restrictive conditions.

6 JUDGE RANDOLPH: There's a prison on Ellis Island.

7 I guess Mr. Mezei was in a prison --

8 JUDGE ROGERS: No, no, no.

9 JUDGE RANDOLPH: -- that the Supreme Court decision  
10 doesn't turn on that, does it?

11 MR. GARRE: Well, I think that that's correct, Your  
12 Honor.

13 JUDGE ROGERS: But what I'm trying --

14 MR. GARRE: And certainly --

15 JUDGE ROGERS: -- to get at is whether the  
16 government's position is that a habeas petition reaches the  
17 conditions of confinement, as well as the ultimate question of  
18 release.

19 MR. GARRE: It doesn't prevent a habeas court to  
20 dictate the conditions of confinement. I think there are  
21 many --

22 JUDGE ROGERS: Well, we heard --

23 MR. GARRE: -- decisions --

24 JUDGE ROGERS: -- a representative of the President  
25 tell us just the other day in one of these Guantanamo cases

1 that habeas is very broad, and so there's no need for judicial  
2 review of these CSRTs because habeas can handle everything.  
3 So, the question I have is if habeas is so broad then why does  
4 it not reach conditions of confinement? Indeed, we have an en  
5 banc case from this circuit that says habeas can reach  
6 conditions of confinement, albeit in the mental health  
7 context. But at least that's the law of the circuit at this  
8 point.

9 MR. GARRE: And I think there are many decisions  
10 from other circuits, and I think there is --

11 JUDGE ROGERS: Well, we're in this circuit.

12 JUDGE RANDOLPH: And the Supreme Court.

13 MR. GARRE: And the Supreme Court.

14 JUDGE RANDOLPH: And the Supreme Court that holds  
15 that even for citizens habeas doesn't reach conditions of  
16 confinement. If you have a problem with that you bring a  
17 (indiscernible) action, or a 1983 action.

18 MR. GARRE: That's correct, Your Honor. And these  
19 individuals were taken immediately out of custody as enemy  
20 combatants and put into the separate housing where they have  
21 free access within the housing, access to DVDs, access to  
22 special libraries, special housing facilities, and the like.

23 JUDGE RANDOLPH: General Garre, I just wanted to ask  
24 you, you mentioned the Supreme Court's statement several times  
25 and it's opinion in *Boumediene*, we called it *Boumediene* when

1 it was in this court, but I don't know. *Boumediene*, is that  
2 what you call it now? But the court said that you have to be  
3 able to order conditional release, it was those two words,  
4 conditional release. Do you know what the court meant by,  
5 what is conditional release?

6 MR. GARRE: I don't know specifically what the court  
7 meant in *Boumediene*. I think you could argue that petitioners  
8 have conditional release here insofar as they can be ordered  
9 to be released to a third country that they have a right to  
10 enter. Right now --

11 JUDGE RANDOLPH: They're released on condition that  
12 we can find a country to take you.

13 MR. GARRE: That's right.

14 JUDGE RANDOLPH: So, the Supreme Court never really  
15 defined what it meant by conditional release, but what I'm  
16 wondering is exactly what you said, whether in fact these  
17 people are already conditionally released.

18 MR. GARRE: I mean, that certainly would be our  
19 position, Your Honor. And I think in thinking about what  
20 *Boumediene* said we also think you have to look at *Munaf*  
21 decided the same day, and of course in thinking about what the  
22 suspension clause means you have to look at *Mezei* which  
23 interpreted the writ in that case.

24 It is regrettable the situation that these petitioners  
25 are in. The United States is doing its best to find a third

1 country that is willing to accept them, but the United States  
2 courts lack the authority to order that these petitioners be  
3 brought to the United States and be released in the nation's  
4 capitol. If there are no --

5 JUDGE ROGERS: Well, I think it's interesting that  
6 even in the brief in this court, the United States refers to  
7 these petitioners as being a threat to national security. I  
8 mean, that's the innuendo stated in the brief without any  
9 citation, it refers to their dangerousness. So, I mean, we  
10 have to be clear where the United States is on this if there's  
11 going to be any success to getting another country to accept  
12 these petitioners.

13 MR. GARRE: And I think you're right, Your Honor,  
14 that you have to be careful insofar as it could impact  
15 resettlement efforts. Certainly Congress has made a  
16 categorical determination that aliens who may have engaged in  
17 terrorist activities as described in the statute, including  
18 aliens who have engaged in military style training and who  
19 intend to do harm to others are not entitled to be admitted.  
20 I think any --

21 JUDGE ROGERS: But I think isn't there a lot in your  
22 brief that we have yet to know how the Department of Homeland  
23 Security is going to interpret this? You may be 100 percent  
24 right, but we don't know that.

25 MR. GARRE: Your Honor --

1 JUDGE ROGERS: I mean, none of this has happened  
2 yet.

3 MR. GARRE: That's true, Your Honor. And again, as  
4 I indicated to Judge Randolph earlier, our position on behalf  
5 of the President is that these individuals are not entitled to  
6 be admitted to the United States. But to get back to our  
7 exchange, it is true that the United States' position is that  
8 these individuals may seek whatever avenues are available to  
9 them under the immigration law that they may seek visas as  
10 aliens outside the United States.

11 JUDGE ROGERS: And that the government would not  
12 file a motion to dismiss on the grounds that the immigration  
13 laws do not apply to someone who is housed pending rendition  
14 at Guantanamo.

15 MR. GARRE: Well, I think that the laws are very  
16 specific about how they apply --

17 JUDGE ROGERS: So, does that mean you would file a  
18 motion to dismiss on that ground?

19 MR. GARRE: The individuals here, to take an  
20 example, Your Honor, I think you have to look at the different  
21 immigration law avenues, they could petition others to seek  
22 refuge status. Now, that's a discretionary thing that the  
23 Executive can grant. They would have no right of judicial  
24 review to challenge that, but certainly the United States  
25 wouldn't challenge their efforts to petition for refugee

1 status.

2 JUDGE ROGERS: On the ground that those laws don't  
3 apply to Guantanamo?

4 MR. GARRE: Well --

5 JUDGE RANDOLPH: They'd apply to individuals, it's  
6 not geographically based.

7 MR. GARRE: Right. Any alien --

8 JUDGE RANDOLPH: Yes.

9 MR. GARRE: -- can apply --

10 JUDGE RANDOLPH: Anywhere in the world --

11 MR. GARRE: -- for refugee status --

12 JUDGE RANDOLPH: -- you can file for  
13 (indiscernible).

14 MR. GARRE: -- or parole. I mean, parole is a  
15 purely discretionary determination.

16 JUDGE ROGERS: So, are you reading --

17 MR. GARRE: They would not --

18 JUDGE ROGERS: -- that provision in the immigration  
19 statute simply to mean the immigration laws as such don't  
20 apply to the island of Guantanamo, or the --

21 MR. GARRE: Yes.

22 JUDGE ROGERS: -- island on which --

23 MR. GARRE: There's --

24 JUDGE ROGERS: -- Guantanamo is located?

25 MR. GARRE: -- no -- individuals, aliens held on

1 Guantanamo are no different for immigration law purposes than  
2 aliens held in Tora Bora and Afghanistan where these  
3 individuals initially were. That's the import of the  
4 provision of immigration laws which makes clear that those  
5 rights do not extend to Guantanamo. But that doesn't prevent  
6 an alien from Afghanistan from seeking to gain admission to  
7 the United States, and similarly these petitioners could seek  
8 to take advantage of those discretionary avenues.

9 JUDGE ROGERS: I mean, what I'm trying to understand  
10 is simply when we talk about meaningful relief it is not 10  
11 more years of litigation as to whether the immigration laws  
12 apply to Guantanamo. That's what I'm trying to understand in  
13 your position representing the President today.

14 MR. GARRE: The immigration laws do not apply to  
15 Guantanamo, Your Honor. The Executive could make a  
16 discretionary decision to grant these petitioners or any other  
17 aliens parole to the United States. That's a decision the  
18 Executive could make. It is not made that --

19 JUDGE ROGERS: And could the Executive also make a  
20 decision on admission?

21 MR. GARRE: The Executive could make a decision on  
22 temporary admission, I believe, Your Honor.

23 JUDGE ROGERS: On permanent admission?

24 MR. GARRE: Subject only to the exclusions that  
25 Congress has specified, including the terrorist activity

1 exclusion. I think that parole would be the discretionary  
2 immigration law box that probably would most likely apply  
3 here. Now, the government's position is that these  
4 individuals should not be paroled into the United States, and  
5 that the District Court had no right to order that they be  
6 brought into the United States.

7           And fundamentally, whatever avenues they might pursue  
8 under the immigration laws, we're here today because the  
9 District Court ordered that they be brought into the United  
10 States and released here.

11           JUDGE RANDOLPH: Is Mr. Willett correct that only  
12 two of the individuals were, there was evidence that only two  
13 of them received what you call military-type training?

14           MR. GARRE: I think that that's incorrect, Your  
15 Honor. I think that many of the individuals -- and each case  
16 has to be considered individually, we certainly agree with  
17 that. But many of them, if not most of them under my  
18 understanding have admitted to participating in training camps  
19 in Afghanistan.

20           JUDGE ROGERS: Counsel --

21           MR. GARRE: Now, they've argued that --

22           JUDGE RANDOLPH: And the --

23           JUDGE ROGERS: -- you know, you cannot make that  
24 representation --

25           JUDGE RANDOLPH: May I just follow up --

1           JUDGE ROGERS:  -- based on the evidence in this  
2 record.  I mean, we have to be very careful here.  The  
3 petitioners made certain representations in their brief, you  
4 did not dispute them in your reply brief, you did not dispute  
5 them in the District Court.  So, let's be very careful here  
6 before we taint people without evidence.

7           MR. GARRE:  Your Honor, and I agree.  I want to be  
8 clear, though, to follow up on that, I'm not saying that by  
9 acknowledging that they attended a training camp that they  
10 have taken the position that those training camps were  
11 terrorist related.  Certainly, their position is that they are  
12 not.  These were --

13           JUDGE ROGERS:  They weren't --

14           MR. GARRE:  They were not.

15           JUDGE ROGERS:  -- terrorist organizations when they  
16 were there.  It was afterward.  I mean, there are so many  
17 different things.  But we're not getting into the evidence  
18 here, but it's just that these statements are made, and when  
19 the government had an opportunity when the District Court  
20 specifically requested information, the government elected not  
21 to provide any evidence.  So, that's the record this court is  
22 dealing with.

23           MR. GARRE:  And Your Honor, I was referring to  
24 statements in the (indiscernible) records, the unclassified  
25 records that are before the court in the joint appendix.  But

1 I do want to be clear, Your Honor --

2 JUDGE RANDOLPH: I didn't ask you for a finding, I  
3 asked you whether there was any evidence in the record.

4 MR. GARRE: And I believe -- right.

5 JUDGE RANDOLPH: And you answered me correctly,  
6 there was.

7 MR. GARRE: Right.

8 JUDGE RANDOLPH: So --

9 MR. GARRE: But I certainly want to be clear,  
10 because I agree with Judge Rogers, we have to be very careful  
11 on this, that any threat assessment we believe is for the  
12 Executive to make has to be made on a case-by-case basis,  
13 and --

14 JUDGE HENDERSON: And *Mezei* says that. *Mezei* in the  
15 very last sentence says whatever our individual estimate of  
16 that policy and the fears on which it rests it is for the  
17 Congressional will and we cannot substitute our judgment. Any  
18 more questions?

19 MR. GARRE: That's correct, Your Honor.

20 JUDGE HENDERSON: All right, we're going to take a  
21 recess, and the Clerk is going to clear the courtroom because  
22 we have some classified questions we want to ask.

23 MR. GARRE: Thank you, Your Honor.

24 (Recess.)

25

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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November 27, 2008

DEPOSITION SERVICES, INC.