University of Massachusetts Law Review

Volume 5
Issue 1 *Trends and Issues in Terrorism and the Law*

Article 7

January 2010

The Efficacy of Indefinite Detention: Assessment of Immigration Case Law in *Kiyemba v. Obama*

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THE EFFICACY OF INDEFINITE DETENTION: ASSESSMENT OF IMMIGRATION CASE LAW IN *KIYEMBA V. OBAMA*

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I. INTRODUCTION

As the doors of Guantanamo, the ultimate symbol of the war on terror, begin to close, the government is faced with a herculean task of prosecuting (within federal or military tribunals), transferring, or releasing detainees it has held for over seven years. Since 2002, there have been over 600 Guantanamo detainees who have been released or transferred.[1] Currently, of the 172 detainees that remain, sixty are no longer designated enemy combatants or have no lawful designation justifying continued detention.[2]

Within this group are seventeen Uighurs,[3] Turkic Muslims, who fled to Afghanistan from China because of

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[1] News Release, *Detainee Transfer Announced*, U.S. Department of Defense (Sept. 16, 2010).

[2] John Wesley Hall, *Withering Uighurs*, 33-APR CHAMP 5 (2009). Human Rights Watch, *U.S. Indefinite Detention Authorized but Restricted* (Mar. 7, 2011), http://www.hrw.org/en/news/2011/03/07/us-indefinite-detention-authorized-restricted.

[3] Kiyemba v. Obama, 555 F.3d 1022 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

religious/ political persecution.[4] After the 2002 bombings in the Tora Bora region, they fled again to Pakistan where they were subsequently turned over by bounty hunters to U.S. forces.[5] Even after eight years of detention and the Bush administration's removal of the enemy combatant designation, the fate of five Uighurs remains far from settled.[6]

This note discusses the potential indefinite detention, also called preventative detention, of the Uighur detainees.[7] Until early 2010, the U.S. Government had been unable to resettle seventeen Uighurs for over 5 years.[8] In 2009, the Supreme Court, granted certiorari on the issue of whether federal courts have the authority to "order the release of prisoners held at Guantanamo Bay 'where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.'"[9] However, on March 1, 2010, the Supreme Court vacated and remanded the case to the United States Court of Appeals for the District of Columbia Circuit (hereinafter "Circuit Court II") after each detainee had "received at least one offer of resettlement in another country."[10]

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[4] Mark Memmott, *China Has Executed Nine Uighurs*, NPR (Nov. 9, 2009), http://www.npr.org/blogs/thetwo-way/2009/11/china_has_executed_nine_uighur.html (recently nine Uighurs were executed in China for ethnic violence that was spurred by government policies).

[5] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637; Michael Price, *Guantanamo Update*, 33-NOV CHAMP 55 (2009) ($85,000 was the amount given for the 17 Uighurs).

[6] Kiyemba v. Obama, 559 U.S. __(2010); 130 S.Ct. 1235 (2010) (per curiam).

[7] *See generally* In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[8] Kiyemba v. Obama, 555, F.3d 1022, 1033 n.2 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637 (Rogers, J. concurring).

[9] Kiyemba v. Obama 559, U.S. __ (2010); 130 S.Ct. 1235 (2010).

[10] *Id.*

Although the Circuit Court II must now confront a new question on whether a detainee who is denied an offer for relocation can be released into the U.S, it will likely still have to grapple with the lawfulness of either indefinitely detaining or releasing petitioners into the U.S. As the petitioners have contended in their most recent reply,[11] "there is no admissible record evidence that there is, *today*, somewhere else to go."[12] In this note, we will assume either the legitimacy of the detainees' refusal to resettle or that such refusal has no bearing on the detainees' right to be released in the U.S.[13] Ultimately, this leaves the government with only two options: (1) indefinite detention[14] or (2) their release into the U.S.[15] The initial grant of certiorari by the Supreme Court on Oct. 20, 2009 revealed the manifest importance of addressing this issue, yet with the subsequent order to vacate and remand, the implications of such policy still remain unsettled.[16] Even with the Supreme Court's attempt to avoid the fundamental question of indefinite detention, they will likely have to revisit this issue in the near future.[17]

This note will be limited to assessing the application of Supreme Court immigration cases to *Kiyemba* by first laying out the detailed procedural history. Legal arguments presented between *In re Guantanamo Detainee Litigation* (United States District Court, District of Columbia (hereinafter "District Court")) and *Kiyemba v. Obama* (United States Court of Appeals for the District of Columbia Circuit (hereinafter "Circuit Court I")) are examined next.

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[11] *See generally* Brief for Petitioner, Kiyemba v. Obama, No. 08-5424 (D.C. Cir. 2010).

[12] *Id.* at 4 n.1.

[13] Petitioner's argue that the remedy of the "Great Writ is not transportation to a distant island." *Id.* at 13.

[14] The government and the Circuit Court I used the more benign term of "harborage" to designate individuals who are unable to be released into the U.S. and who are therefore currently being "housed" in Guantanamo.

[15] *See* Kiyemba v. Obama 559, U.S. __ (2010); 130 S.Ct. 1235 (2010) (discussing the issues before the Supreme Court prior to its decision to vacate and remand).

[16] Kiyemba v. Obama, 555 F.3d 1022 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[17] *Id.*

The Note then analyzes the relevant Supreme Court immigration case law that formed the basis of the judgment on merits used in both the District and Circuit Court I before the most recent *vacatur*. Lastly, the Note concludes with a potential solution or balanced measure that may accommodate the sovereignty and liberty interests at stake.

II. BACKGROUND & PROCEDURAL HISTORY[18]

The Uighurs, a Turkic Muslim minority group, fled China and lived in Uighur camps in Afghanistan and then Pakistan.[19] It was originally disputed whether these camps were controlled by East Turkistan Islamic Movement (hereinafter "ETIM") and what role the Taliban had in supporting these camps.[20] Once the Uighurs were present in Pakistan, local officials turned them over to Pakistani officials.[21] Subsequently, the Uighurs were turned over to the U.S. military for $5,000 per individual.[22]

On July 29, 2005, Houzaifa Parhat and eight other Uighurs sought habeas relief (*Kiyemba v. Bush*) from their imprisonment in Guantanamo.[23] The case was stayed pending the resolution of *Boumediene v. Bush*.[24] During the interim period, Mr. Parhat filed a petition with the D.C. Circuit Court of Appeals under the Detainee Treatment Act (hereinafter "DTA"). After the ruling in *Boumediene* on June 12, 2008,

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[18] See Center for Constitutional Rights, *Kiyemba v. Obama: Timeline*, http://ccrjustice.org/ourcases/current-cases/kiyemba-v.-bush (last visited June 22, 2010) for more detail on the timeline and procedural history.

[19] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 34-35 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[20] *Id*. at 38.

[21] *Id*. at 35.

[22] *Id.*

[23] Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008).

[24] Center for Constitutional Rights, *Kiyemba v. Obama: Timeline*, http://ccrjustice.org/ourcases/current-cases/kiyemba-v.-bush (last visited June 22, 2010).

the D.C. Circuit Court of Appeals decided *Parhat v. Gates*.[25] In this decision, the Court found that the designation of "enemy combatant" as applied to petitioners was invalid and ordered either the release, transfer, or new Combatant Status Review Tribunal (hereinafter "CSRT") to review the evidence in light of the Court's opinion.

On July 10, 2008, all habeas petitions on behalf of the seventeen Uighurs were consolidated as *Kiyemba v. Bush* under the guidance of Judge Ricardo M. Urbina.[26] Soon thereafter on August 4, 2008, the government informed the District Court that it would not convene a new CSRT for Mr. Parhat.[27] After multiple hearings with the government, Judge Urbina ordered the release of the seventeen Uighur prisoners on October 8, 2008.[28] Immediately, the government sought an emergency stay which the Circuit Court I granted the following day.[29] Eventually, the Circuit Court I granted a stay pending expedited appeal where it reversed the district court's decision on February 18, 2009.[30] Petitioners subsequently filed a petition for writ of certiorari, which was granted on October 20, 2009.[31] On March 1, 2010, the Supreme Court vacated and remanded to the Circuit Court II based on the offer of resettlement to each petitioner, arguing

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[25] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d at 33, 34 (D.D.C. 2008).

[26] Center for Constitutional Rights, *Kiyemba v. Obama: Timeline*, http://ccrjustice.org/ourcases/current-cases/kiyemba-v.-bush (last visited June 22, 2010).

[27] *Id.*

[28] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 43 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[29] Kiyemba v. Obama, 555, F.3d 1022, 1024 n.2 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637. (Rogers, J. concurring).

[30] Center for Constitutional Rights, *Kiyemba v. Obama: Timeline*, http://ccrjustice.org/ourcases/current-cases/kiyemba-v.-bush (last visited June 22, 2010).

[31] Kiyemba v. Obama 559, U.S. __ (2010); 130 S.Ct. 1235 (2010) (*per curiam*).

that, "[n]o court has yet ruled in this case in light of the new facts, and we decline to be the first to do so."[32]

III. LEGAL ARGUMENTS: DISTRICT COURT VS. CIRCUIT COURT

A. District Court (Judge Ricardo M. Urbina): The Scope of Executive Power Regarding "Wind Up" Authority & the Power to Exclude

Under *In re Guantanamo Bay Detainee Litigation*, the District Court held that: (1) continued detention exceeds the government's authority to "wind up" the wartime detention and (2) that the District Court has the authority to order the release of detainees into the U.S.[33]

At the outset of his decision, Judge Urbina acknowledged that the "government has absolved the petitioners" of their enemy combatant status, and assuming that the "petitioners were lawfully detained," that the Executive possessed some inherent rights to "wind up" detentions.[34] "Wind up" authority, in times of war, allows the Executive reasonable time for the repatriation of Prisoners of War (hereinafter "POWs").[35] The District Court cited the framework for indefinite detention laid out by *Zadvydas*[36] and *Martinez*.[37] These decisions reasoned that a removable alien is subject to a presumptively lawful period of detention for six months.[38] However, the District Court conceded that these cases were not "strictly analogous" to the instant case.[39]

In contrast, the government's position, as stated by the District Court, was that POWs had been detained for years

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[32] *Id*. (citing *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not of first view.")).

[33] *Id.* at 36-39, 43.

[34] *Id.* at 36.

[35] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 36 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[36] Zadvydas v. Davis, 533 U.S. 678 (2001).

[37] Clark v. Martinez, 543 U.S. 371 (2005).

[38] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d at 37.

[39] *Id.*

after the cessation of hostilities and that the clock for these detainees began to accrue from the time the government abandoned its new CSRT.[40] Furthermore, the government looked at *Mezei*[41] as controlling law. Here, the government argued that Mezei was permanently excluded from entry into the U.S., harbored on Ellis Island, and that no country was willing to receive him.[42] Further, the government emphasized that the "right to enter the United States depends on congressional will, and the courts cannot substitute their judgment for the legislative mandate."[43]

Judge Urbina disagreed that *Mezei* controlled since it was never intended to decide matters of indefinite detention, whereas, *Zadvydas* and *Clark* were specifically concerned with this severe imposition. Consequently, the District Court found that *Mezei* had been undermined by subsequent case law and is distinguishable to the instant case because petitioner was never aware of the evidence used against him and came voluntarily to the U.S.[44]

Finally, in discussing the power to admit or exclude aliens, the District Court readily conceded that "the power to expel or exclude aliens [i]s a fundamental sovereign attribute . . . largely immune from judicial control."[45] Yet, Judge Urbina did not feel the language itself spoke in absolute terms; and therefore, argued for governmental adherence to procedural due process.[46] Additionally, the District Court found that the historical weight of precedent cut against absolute deference.[47] Thus, Judge Urbina concluded that the

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[40] *Id.* at 36-37 (The new CSRT was abandoned in August of 2009.).

[41] Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953).

[42] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 37 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637 (quoting *Mezei*, 345 U.S. at 207).

[43] *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 37 (quoting *Mezei*, 345 U.S. at 216).

[44] *Id*. (citing *Mezei*, 345 U.S. at 208-09).

[45] *Id.* at 40 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[46] *Id.* at 40.

[47] *Id*. at 42.

judicial branch had an obligation to intervene when so required by the Constitution.[48]

B. Circuit Court (Judge Randolph Majority Opinion): Response to District Court's Assertion Regarding the Executive's Limited Right to Exclude

In reversing and remanding the District Court decision, Circuit Court I held that the federal courts lacked the proper authorization to review the Executive's exclusion decision.[49] The majority relied on historical principles that guided nation- states and immigration case law that made entrance of aliens impermeable.[50]

First, Circuit Court I invoked the ancient Roman principle that a "nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission."[51] This principle can be found in Madison's reports during the Constitutional Convention.[52] Additionally, for more than a century, the Supreme Court has recognized the sovereign right of the political branches to exclude aliens beginning with the Chinese Exclusion Case.[53] Judge Randolph, who was part of the majority in Circuit Court I, went on to quote Justice Frankfurter's declaration that the rights of noncitizens rests "wholly outside the concern and competence of the Judiciary."[54]

The second argument presented by the Circuit Court I attacks the basis for the District Court's reliance on *Zadvydas* and *Martinez* while elevating *Mezei*, which the Court found

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[48] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 42 (D.D.C. 2008), *rev'd sub nom*. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[49] Kiyemba v. Obama, 555 F.3d 1022, 1029-1035 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[50] *See generally id.*

[51] *Id.* at 1025.

[52] *Id.* at n.5.

[53] *Id.* at 1025.

[54] *Id.* at 1026.

"analogous to [*Kiyemba*] . . . in several ways."[55] As stated previously, upon Mezei's return to the U.S., he was denied entry at the border and efforts to resettle him elsewhere failed.[56] What the Circuit Court I gleaned from *Mezei's* ruling was a rejection of the District Court's assertion that the judiciary has the authority to release petitioners into the U.S.[57] In addition, the Circuit Court I found that *Zadvydas* and *Martinez* dealt with interpretation of immigration laws not the Constitution. *Zadvydas* was further distinguished because it involved an alien who had already entered the U.S.[58] In sum, the Circuit Court I asserted that no habeas court has ever, since Edward I, "ordered such an extraordinary remedy."[59]

IV. THE SCOPE OF EXECUTIVE & JUDICIAL AUTHORITY: THE RIGHT TO ADMIT OR EXCLUDE, THE RIGHT TO RELEASE OR DETAIN

In assessing the arguments put forth by the District and Circuit Court I, our analysis will be supplemented by briefs/petitions submitted to the Circuit Court I & II and the Supreme Court. The crux of the analysis will focus on the major Supreme Court immigration cases that were heavily relied upon by both the parties and the courts. Even with the recent remand of the case to the Circuit Court II, if the Circuit Court II finds that there is no impact regarding a detainee's release into the U.S. because of his refusal to be exiled to a foreign land, the subsequent analysis of immigration case law remains highly relevant.

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[55] Kiyemba v. Obama 555 F.3d 1022, 1027 (2009), vacated, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[56] Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 209 (1953).

[57] Kiyemba v. Obama, 555 F.3d 1022, 1027 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[58] *Id.* at 1028.

[59] *Id*.; *But see*, Brief for Petitioner at 10, Kiyemba v. Obama, No. 08-5424 (D.C. Cir. 2010).

A. The Role of Immigration Law in Kiyemba v. Obama

In its opening brief to the Supreme Court, petitioners asserted that although the government and the Circuit Court I characterize petitioners' request for immigration relief; "this has never been an immigration case."[60] This is what makes the arguments on both sides so compelling. Nonetheless, immigration law is integral to the disposition of the remanded case. The most influential immigration cases in this litigation are *Mezei*, *Zydvdays*, and *Martinez*.

1. *Mezei*

Both the Circuit Court I Majority in *Kiyemba* and the government heavily relied on *Mezei*, a cold war case litigated in the 1950s during both the Korean War and the McCarthy era.[61] According to the government, the case stood as affirmation of the political branches supreme authority in the area of foreign policy and immigration.[62] Similar to the Circuit Court I judgment, the court in *Mezei* had habeas jurisdiction and held that any decision regarding the entry of an alien belonged to the political branches of government and not the judiciary.[63] This rationale is crucial in the Government's and Circuit Court's conclusion that the detainees are not unlawfully detained but excluded from entry. Consequently, their residence in Guantanamo Bay is tantamount to "harborage" similar to Mezei's situation at Ellis Island.[64] In validating this claim, the government pointed to the current benign conditions of the detainees' residence[65]

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[60] Brief of Petitioners at 35, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536.

[61] Brief of Amici Curiae Law Professors in Support of Petitioners at 4, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4759115.

[62] Brief for the Respondents at 13-16, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 497333.

[63] Kiyemba v. Obama, 555 F.3d 1022, 1028 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

[64] Brief for the Respondents at 35-36, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 497333.

[65] *Id.* at 9.

and their ability to leave Guantanamo Bay, if any country was willing to take them.

Additionally, the Circuit Court draws a sharp distinction between "simple release," release of aliens into the country of their nationality/citizenship, versus release of aliens into the territory of the U.S, which the Circuit Court I believed fell outside the framework of immigration laws.[66] This invariably led to the question of whether "petitioners have a constitutional right to enter the United States . . . absent compliance with, federal immigration laws."[67] Both the government and the Circuit Court I believed that well settled precedent of "an unbroken string of . . . decisions dating back more than a century" forecloses such possibility.[68]

On the contrary, petitioners contended that the rationale behind excluding *Mezei* was based on the government's fear of foreign enemies dropping off potential spies to perform espionage[69] and then forcing the Executive to allow them entry.[70] Juxtaposing this rationale to the current situation where petitioners are here only at the Executive's behest, reveals two disparate factual scenarios. By equating the two, *Mezei* would stand for the proposition that the "Executive is shielded from dilemmas of its own making."[71] This is an untenable position.

Furthermore, petitioners stated that their current detention had no legal basis, whereas Mezei's exclusion was based on statutory authorization.[72] This is an important distinction since petitioners sought no relief through immigration

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[66] Kiyemba v. Obama, 555 F.3d 1022, 1028 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637; Munaf v. Geren, 128 S.Ct. 2207, 2221 (2008).

[67] Brief for the Respondents in Opposition at 13, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 1526934.

[68] *Id.* at 13-14.

[69] Brief of Amici Curiae Law Professors in Support of Petitioners at 11, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4759115 (citing Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953) (No. 139)).

[70] Petition for Writ of Certiorari at 29, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 934097.

[71] *Id.*

[72] *Id.*

mechanisms.[73] Irrespective of this fact, the *Kiyemba* majority (Circuit Court I) recast the discussion from a unilateral act of Executive authority to petitioners seeking admission into the U.S.[74] Petitioners counter that there is no basis for immigration law to be triggered since they neither applied for immigration status nor sought entry at the border.[75]

2. *Zadvydas* & *Martinez*

If the Circuit Court I and the government are to be successful in using *Mezei* as a sword of absolute authority, as plenary power over immigration for the political branches, they must first penetrate petitioners' shield in the form of *Zadvydas* and *Martinez*.[76] Petitioners forcefully argued that in limited circumstances the "right to release - even of concededly undocumented aliens - has trumped the powers of the political branches over immigration." The principle that arises from these two cases, and relied upon by Judge Urbina in his decision is that a presumptive period of six months detention is permitted.[77] However, if after this period, removal to another country is not "reasonably foreseeable," conditional release is the only remedy.[78]

In contrast, the government and the Circuit Court I argued that Zadvydas, unlike petitioners, was living within the U.S. as a lawful permanent resident at the time of his removal.[79] Yet, they would have had difficulty escaping *Martinez*, where the Court held that if detention became unlawful, even inadmissible aliens who had been stopped at the border had a right to be released into the U.S.[80] Additionally, petitioners in

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[73] *Id.*

[74] *Id.* at 24.

[75] *Id.* at 25.

[76] Zadvydas v. Davis, 533 U.S. 678, 696 (2001); Clark v. Martinez, 543 U.S. 371 (2005).

[77] *Id.*

[78] *Id.*

[79] Brief for the Respondents in Opposition at 17, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 1526934.

[80] Brief Amicus Curiae of the ACLU in Support of the Petition for Certiorari at 8, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 1304719.

Zadvydas and *Martinez* were "adjudicated" as criminals and conditional release was still upheld.[81] However, the *Zadvydas* Court proclaimed "[n]either do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[82] Since petitioners in *Kiyemba* are neither enemy combatants, terrorists, nor pose a threat to our national security, they fall outside the qualifications made in *Zadvydas*.[83]

B. Can Mezei, Zydvydas, and Martinez be Reconciled?

It is clear that two competing principles are at stake in this discussion: The liberty interest of those who are unlawfully detained versus the sovereign right of a nation to exclude. At one end of the spectrum, applicants at the border receive minimal constitutional guarantees. Yet, can we say that those who have come involuntarily are applicants at the border? It is easy to argue that a greater duty is owed to those who have established permanent connections with the State, and are therefore justified in receiving greater constitutional protections. Nevertheless, in this scenario, what duty is owed to those we have brought involuntarily to our borders, who have no connections to the U.S., and who we have imprisoned for over eight years? In fighting a war, must we leave ourselves susceptible to inviting in those who for various reasons may not be designated enemy combatants? In the case of *United States ex rel. Bradley v. Watkins*,[84] Judge Swan seemingly answers these difficult questions and

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[81] Petition for Writ of Certiorari at 27, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 934097.

[82] Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

[83] Brief of Petitioners at 36, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536 ("The irony is that Petitioners present no threat to anyone (demonstrated by the Executive's encouragement of resettlement . . .), while the usual alien in this situation has committed a crime of some kind.").

[84] United States *ex rel.* Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947).

poignantly denounces unchecked Executive authority, in the context of World War II, when he states:

> The theory that an alien can be seized on foreign soil by armed forces of the United States Navy, brought as a prisoner to our shores, turned over to immigration authorities as being an "applicant for admission to the United States," held in custody by them for nearly six years, and then deported to [Norway] by virtue of exclusion order savors of those very ideologies against which our nation has just fought the greatest war of history.[85]

In wrestling with these difficult questions, we evaluate the arguments and themes which intersect with immigration law and arose throughout the litigation proceedings. Briefly, the note will examine: The Executive's "wind up" authority, "harborage", conditional release, and sovereignty.

1. "Wind Up" Authority

Judge Urbina, in countering the government's assertions regarding its "wind up" authority, presented a three-part test in determining its constitutionality. He succinctly explained that the authority to "wind up" ceases when: "(1) detention becomes effectively indefinite; (2) there is a reasonable certainty that petitioner will not return to the battlefield to fight against the U.S.; and (3) an alternative legal justification has not been provided for continued detention."[86] The District Court reasoned that all three grounds have been met since the government is unable to relocate petitioners, there is no

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[85] Brief of Petitioners at 39, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536 (quoting *Bradley*, 163 F.2d at 332).

[86] In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 38 (D.D.C. 2008), *rev'd sub nom.* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637.

dispute regarding petitioner's lack of membership or involvement with al Qaida or the Taliban, and that "wind up" authority is an insufficient alternate legal justification for continued detention.[87] Thus, the District Court found the government's continued detention of petitioners to be unlawful.[88]

It is interesting that the Circuit Court I never considered the arguments regarding "wind up" authority, which were raised by the government and answered by the District Court. However, in the government's *Opposition Brief to the Petition for Writ of Certiorari*, it argued once again that the Executive has wartime authority and cited historical cases.[89] One case the government cited was the cease-fire in the Korean War where approximately 100,000 Chinese and North Koreans were held as POWs and were unable to return to their home countries.[90] Resettlement of these individuals took over two years.[91] The second case stems from the first Persian Gulf War where "[t]housands of Iraqis were detained by the United States and its allies . . . because they refused to be repatriated to their native country."[92] Notably, there was no mention of the time frame upon which it took to resettle these POWs. The government believes that these examples are dispositive of the U.S. right to "house" detainees at Guantanamo for a reasonable time until resettlement is possible.[93]

In Judge Roger's concurring opinion, she pointed out that the majority did not discuss the Executive's "wind up" authority and notes that both the Geneva Conventions and U.S. Army policy "require repatriation of POWs without

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[87] *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 38.

[88] *Id.* at 39.

[89] Brief for the Respondents in Opposition at 25, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 1526934.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

delay."[94] Moreover, she addressed the lack of specificity in the government's period for holding the Iraqi detainees after the cessation of hostilities. According to the Department of Defense Report to Congress, over 80,000 POWs were "repatriated or granted refugee status within Saudi Arabia within six months."[95]

The problem with the government's argument is that these "petitioners . . . have never been treated as POWs, have been imprisoned . . . for over seven years, and . . . the Executive's unsuccessful efforts to locate a suitable country for release had been on-going for more than five years."[96] Another crucial distinction is the relative number of detainees in each situation. There is no doubt that it would be nearly impossible for the U.S. to absorb thousands of POWs, nor would it have a duty to assume such a responsibility. Nevertheless, there are only five petitioners remaining and such numbers do not create an overwhelming logistical, cost, or security dilemma.[97] In responding to the government's argument, petitioners plainly asserted that where the Executive may need reasonable time to accommodate POWs, this concept does not apply to civilians, and more importantly, whatever "wind up" authority existed, ended with the decisions in *Zadvydas* and *Martinez*.[98]

Finally, neither the government, nor the Circuit Court I, discusses the possibility of conditional release and how that may mitigate the government's concerns.

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[94] Kiyemba v. Obama, 555 F.3d 1022, 1033 n.2 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637. (Rogers, J., concurring) (internal citation omitted).

[95] *Id.*

[96] *Id.*

[97] Kiyemba v. Obama, 559 U.S. ___(2010); 130 S.Ct. 1235 (2010) (per curiam).

[98] Brief of Petitioners at 47, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536 (citing Zadvydas v. Davis, 533 U.S. 678, 696 (2001); Clark v. Martinez, 543 U.S. 371 (2005)).

2. Conditional Release

There is limited discussion about what steps could be taken to mitigate the concerns of the government in releasing petitioners into the U.S. Soon after his decision, Judge Urbina had scheduled a briefing with Homeland Security to discuss the details of a conditional release.[99] However, the Circuit Court I granted an emergency stay of the proceeding pending its resolution of the case.[100] Judge Rogers briefly described the "detailed plan" as including: Help from organizations such as the Lutheran Immigration and Refugee Services, the President of the World Uighur Congress, housing with Uighur families, transportation, financial support and care.[101]

Nevertheless, Judge Urbina issued their immediate release one week prior to consultation with Homeland Security.[102] The government raised a valid argument that it should be given "a full opportunity to present any relevant information bearing on . . . the conditions of their release before taking the drastic step of ordering petitioners brought here."[103] Frustrated by the Executive's delay tactics, Judge Urbina was unwilling to concede any more time to the government. Nonetheless, if the Circuit Court II on remand does issue petitioners' release, the government should be given a meaningful opportunity to present its arguments on permissible restrictions.

In seeking to strike a balance between the relative interests at stake, the Circuit Court II should also look at *Zadvydas*' instruction pending mandated release where "such an order did not confer a legal right to 'live at large' but

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[99] Kiyemba v. Obama, 555 F.3d 1022, 1034 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637 (Rogers, J., concurring).

[100] *Id.* at 1024 n.2.

[101] *Id.* at 1034 n.2 (Rogers, J., concurring).

[102] *Id.* at 1034 (Rogers, J., concurring) ("The district court declined to stay the proceedings, noting that petitioners had already been imprisoned for seven years and delay had been the 'name of the game' in the Executive's litigation strategy.").

[103] Kiyemba v. Obama, 555 F.3d 1022, 1033 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637 (Rogers, J., concurring).

merely a right to be 'supervis[ed] under release conditions that may not be violated.'"[104] Moreover, our immigration statute allows for noncitizens to be released into the U.S. without conferring them any statutory rights.[105] This mechanism of being a "parolee" should allay the concerns of the government, since no legal status is conferred on the aliens and their entrance into the U.S. "shall not be regarded as an admission of the alien."[106] In weighing the interests at stake, conditional release provides a modicum of fairness, whereas, the government's concept of "harborage" of petitioners seems nebulous at best.

3. "Harborage"

In a bold assessment, the government contended that petitioners were no longer detained and were currently being:

> housed at Guantanamo pending the identification of a third country where they may resettle. Petitioners are being housed in relatively unrestrictive conditions, given the status of Guantanamo as a U.S. military base. *See* J.A. 1246 & n.3 (describing conditions). Petitioners are in special communal housing with access to all areas of their camp, including an outdoor recreation space and picnic area. Petitioners sleep in an air-conditioned bunk house, and have the use of an activity room equipped with various recreational items, including a television with VCR and DVD players. Petitioners also have

[104] Brief Amicus Curiae of the ACLU in Support of the Petition for Certiorari at 12 n.5, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 1304719 (citing Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (citation omitted)).

[105] *Id.*

[106] *Id.* (citing Leng May Ma v. Barber, 357 U.S. 185, 188 (1958)).

> access to special food items, shower facilities, and library materials.[107]

Even though petitioners' facilities have improved, they are still surrounded by razor wire fences and armed guards.[108] They have limited communication with the outside, and their only visitors are their lawyers and the Red Cross.[109] Even *Mezei* had far more freedom, since he left by boat twice to European countries that ultimately denied him.[110] Logically, "[a]s long as the prison gate is locked and the fence is patrolled, the prisoners are not released."[111]

A compelling argument against "harborage" is that Mezei's situation was never termed a "detention" by Justice Clark, rather, the terms or euphemisms employed by the government and the Circuit Court I such as: "Harborage", "temporary haven", and "exclusion" serve as a crucial distinction to *Mezei's* holding, "and thus to the case's precedential force."[112]

4. Sovereignty

Both the government and Circuit Court I lay forth a plethora of case law supporting the Executive and Congressional authority to exclude aliens from entry into the U.S. Yet, they overlook a key question: Whether sovereignty is maintained by keeping individuals stateless? Seemingly, the war on terror may continue for a generation or longer. If so, isn't the whole concept of sovereignty undermined by potentially creating a class of stateless people? Here, petitioners would likely be persecuted in their home country,

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[107] Brief for Appellants at 9, Kiyemba v. Obama, 555 F.3d 1022, No. 08-5424 (D.C. Cir. 2009).

[108] Brief of Petitioners at 48, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536.

[109] *Id.*

[110] Brief of Amici Curiae Law Professors in Support of Petitioners at 5, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4759115.

[111] *Id.* at 48.

[112] *Id.* at 38.

are not given POW status, and if the government prevails again at the Circuit Court II, it will be left with one final chance to seek a grant of certiorari from the Supreme Court while having spent over a decade in detention.

Ultimately, the government must realize that this void, or black hole, is mostly of its own doing. Although it continued to make references to the petitioner's connections to al Qaida or the Taliban through affiliations with Eastern Turkistan Islamic Movement, both the District Court and Circuit Court I seemed satisfied with the decision in *Parhat*, "that the government had not presented sufficient evidence that the Eastern Turkistan Islamic Movement was associated with al Qaida or the Taliban, or had engaged in hostilities against the United States."[113] Thus, by penalizing those who are unlawfully detained, especially where there is no countervailing security threat, fundamental principles of fairness and due process will inevitably be eroded. It is crucial to remember *Zadvydas'* poignant assertion that the political branches' plenary power is "subject to important constitutional limitations."[114]

The key distinction in this debate rests on the voluntariness or involuntariness of the alien to find himself at the threshold of the U.S. border. If the U.S. were compelled to take enemy aliens entrenched at our gate, U.S. sovereignty would be compromised. However, the compulsion here is different. First, petitioners were brought to our border, then their status was changed by the government to reflect that they were no longer considered enemy combatants, and finally, U.S. laws preclude the government from sending petitioners to their home country for fear of torture or mistreatment. There is no external force that compels us to release petitioners into the U.S.; it is our own principle of justice that mandates such release, and thus, our sovereignty is preserved by the same laws which breathe life into its core.

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[113] Kiyemba v. Obama, 555 F.3d 1022, 1034 (2009), *vacated*, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 935637 (citing Parhat v. Gates, 532 F.3d 834, 850 (2008)).

[114] *Kiyemba*, 555 F.3d at 1034.

Though the government vigorously denies that *Martinez* judicially compelled the release of these petitioners because it is based on statutory construction; whenever a "serious constitutional threat is raised by reading a statute to permit indefinite detention, the doctrine of constitutional avoidance applies."[115] Therefore, since no express detention power exists in the Authorized Use of Military Force (AUMF), the constitutional presumption in both *Zadvydas* and *Martinez* regarding a six-month limit to detention should control.[116]

V. CONCLUSION

It is imperative to keep in mind that unchecked Executive authority allowed for the use of indefinite detention during the Alien Sedition Acts of 1798 and Japanese internment of World War II.[117] Each incident was given official sanction because they were cloaked in the language of protecting national security. These events serve as perpetual reminders that tremendous caution must always be taken when restricting liberty. Nevertheless, the world cannot continue to be a repository for America's mistakes and miscalculations when addressing the war on terror. The government needs to find a mechanism that does not first designate individuals as enemy combatants aligned with terrorists and then later seek their removal hoping that other nations will willingly embrace them.

In this scenario, where petitioners are not considered a threat to the U.S., it behooves the U.S. government to take responsibility for involuntarily bringing petitioners to the threshold of our gates. How can the U.S. correct its mistake of detaining those who have not been charged with a crime for over eight years, if its only remedy is to keep them in the same prison but with fewer restrictions? In the attempt to analogize or distinguish the various immigration cases, the

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[115] Brief of Petitioners at 46, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4709536 (citing Clark v. Martinez, 543 U.S. 371, 380-81 (2005)).

[116] *Id.* (citing Zadvydas v. Davis, 533 U.S. 678 (2001)).

[117] Michael Price, *Guantanamo Update*, 33-NOV CHAMP 55 (2009).

reasonable conclusion is that no case neatly resolves the impasse.

Both parties have compelling support. However, without recognizing that the Constitution permits some limitation on the political branches, the result is an unfettered discretion over the lives of unlawfully detained individuals. Ironically, maintaining America's sovereignty leads to acts which erode fairness and due process; the fundamentals on which that sovereignty rests are themselves compromised. Even if the government takes an uncompromising stand, society is unlikely to tolerate such injustice; as was seen with Mezei eventually being paroled into the country.[118] Whereas *Mezei* represents the high-water mark of governmental authority, much criticism from both the judiciary and scholars has substantially eroded its impact.[119]

There are potential alternatives to placate both parties. One way is for the government to set terms for the condition of petitioners' release and "parole" them into the U.S. without conferring any rights that "accompany admission or entry."[120] Even *Mezei* found that an individual paroled into the country maintains the status as one "on the threshold of initial entry."[121] This mechanism seems to ideally balance the Separation of Powers Doctrine (balancing the individual domains of the three branches of government) and elevates petitioners' argument that *Zadvydas* and *Martinez* reject any notion that releasing aliens into the U.S. exceeds judicial authority. In the end, exclusion and detention need not go together.[122]

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[118] Brief of Amici Curiae Law Professors in Support of Petitioners at 15, Kiyemba v. Obama, 130 S.Ct. 458 (2009) (No. 08-1234), 2009 WL 4759115.

[119] *Id.* at 14-15.

[120] *Id.* at 22.

[121] Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 212 (1953).

[122] Brief of Law Professors at 16, *Kiyemba*, 130 S.Ct. 458 (No. 08-1234), 2009 WL 4759115.