

FROM THE PRESIDENT

JOHN WESLEY HALL

Withering Uighurs

On Jan. 22, 2009, President Obama issued a series of Executive Orders that put an end to some of the worst Bush-era policies on the detention and interrogation of terrorism suspects. Obama banned the use of torture, ordered the CIA to close its secret “black site” prisons, halted the Military Commissions, and directed the Department of Defense to shutter the prison camps at Guantánamo Bay.¹ Although this action demonstrated a willingness to follow the Constitution and restore the rule of law, the Orders fell short of an about-face, delegating most of the heavy lifting to a Cabinet-level review panel and leaving the door open to the indefinite detention of many so-called “enemy combatants” in American custody.

Over the past three months, there have been troubling signs that President Obama is considering an indefinite detention “escape hatch” for detainees who cannot be released or easily prosecuted.² This would be a terrible mistake. If, as the president declared in his Inaugural Address, “[w]e reject as false the choice between our safety and our ideals,” then we must also explicitly reject the idea that the president can seize and indefinitely detain “enemy combatants” without charge or trial.

President Obama touched on this issue in his much-anticipated Executive Order on the “Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities,” which divides the current population of Guantánamo detainees into three loose categories: (1) detainees eligible for transfer or release; (2) detainees who will face prosecution; and (3) the remainder, whose disposition will be determined by “lawful means.”³ The Order creates an inter-agency review panel led by Attorney General Holder to handle the messy business of sorting the Guantánamo prison population, including the even messier business of recommending how to treat detainees who will not be prosecuted but cannot be safely repatriated or resettled.

Since January 2002, approximately 533 Guantánamo

detainees have been released or transferred into the custody of another country.⁴ Approximately 241 remain. Of those 241, the government concedes that 60 are either “no longer enemy combatants” or that it does not have the legal authority to detain them.⁶ Nonetheless, these individuals remain prisoners of the United States.

Included in this category of eligible parolees is a group of 17 ethnic Chinese Muslims, known as Uighurs, who have been detained without charge for the last seven years. The Uighurs fled western China for Afghanistan in fear of political and religious persecution and then fled Afghanistan for Pakistan when the United States began bombing Tora Bora in 2001. Pakistani villagers turned in the displaced Uighurs for an \$85,000 bounty.⁷

Although the Bush administration ultimately admitted that the Uighurs are “no longer enemy combatants” and conceded that it lacked a legal basis for their continued detention at Guantánamo, it appealed a 2008 district court decision (*Kiyemba v. Obama*) ordering the Uighurs’ release into the United States. Attorneys for the Bush Justice Department maintained that the courts simply have no authority to order their release from custody.⁸ The D.C. Court of Appeals agreed, and in late February 2009, perhaps unaware of the irony, ruled that the Uighurs cannot be repatriated to China without violating the Convention Against Torture and that they cannot be released into the United States without violating domestic immigration law.⁹ As a result, the Uighurs remain imprisoned in Guantánamo under a *de facto* regime of indefinite executive detention. As NACDL argued in an *amicus* brief submitted on behalf of the Uighurs, this position is “little more than a euphemism for indefinite detention in defiance of final judgment from a *habeas* court, and, in effect, an executive suspension of the [Great] Writ.”¹⁰ Moreover, it is inconsistent with the Supreme Court’s decision in *Boumediene v. Bush*, which recognized that the essence of *habeas* relief is the “freedom from arbitrary and unlawful restraint.”¹¹

President Obama is in a unique position not only to bring justice to the Uighurs, but also to protect the Great Writ and renounce President Bush’s unconstitutional regime of indefinite detention. While the president should press forward with diplomatic efforts to resettle the Uighurs in a third country or else admit them into the United States, he should not allow *Kiyemba* to remain on the books. As at least one district court has recognized, *Kiyemba* — if it remains good law — may mean that the courts do not have jurisdiction to proceed with *habeas* review in cases where the Department of Defense has deemed the petitioners eligible for release.¹²

The Obama administration appeared to map a course for confronting opinions like *Kiyemba* when it asked the Supreme Court to vacate a fractured Fourth Circuit opinion in *al-Marri v. Spagone*. The circuit court upheld the president’s authority to indefinitely detain Ali al-Marri, a legal U.S. resident, as an “enemy combatant” in a Navy brig in South Carolina. On Feb. 26, 2009, the Obama Justice Department transferred him to civilian custody and indicted him for providing material support to Al Qaeda. But rather than simply

John Wesley Hall is the 50th president of NACDL. A former assistant prosecutor, he has been in private practice concentrating in criminal defense since 1979. He is the author of *SEARCH AND SEIZURE* (3d ed. 2000; 4th ed. forthcoming) published by Lexis Law Publishing. Hall is listed in Best Lawyers in America in criminal defense. He writes daily on the law of search and seizure at www.FourthAmendment.com. He is also

the author of *PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE* (3d ed. 2005) published by Thomson West.

JOHN WESLEY HALL

1311 Broadway
Little Rock, AR 72202
501-371-9131

Fax 501-378-0888

E-MAIL forhall@aol.com

seek dismissal of *al-Marri's* Supreme Court appeal as moot — as the Bush administration did in the case of alleged “dirty bomber” Jose Padilla — the Obama administration requested vacatur of the Fourth Circuit decision.¹³ On March 6, the Supreme Court agreed, removing *al-Marri* from the books and striking a significant post-mortem blow to the Bush administration’s defense of indefinite detention.¹⁴

The administration needs to follow its own lead in the *Kiyemba* case. As in *al-Marri*, the *Kiyemba* case presents President Obama with a window of opportunity to explicitly repudiate the Bush detention policies and restore the rule of law. If the Supreme Court chooses to grant *certiorari*, the president should request to vacate the D.C. Circuit decision and make it absolutely clear that indefinite detention of “enemy combatants” captured outside the battlefield is unconstitutional as a matter of law and unacceptable as a matter of fundamental American ideals.

Notes

1. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (“Ensuring Lawful Interrogations”); Exec. Order No. 13,492, 74

Fed. Reg. 4897 (Jan. 22, 2009) (“Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities”); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) (“Review of Detention Policy Options”).

2. See, e.g., Respondents’ Memorandum in Support of a Stay of Proceedings Involving Petitioners Who Were Previously Approved for Transfer at 5, *Al Sanani v. Obama*, No. 05-CV-2386 (D.D.C. Mar. 9, 2009); Peter Finn, 4 Cases Illustrate Guantánamo Quandaries, WASH. POST, Feb. 16, 2001, at A1.

3. President Barack Obama, Inaugural Address (Jan. 20, 2009).

4. Exec. Order No. 13,492, 74 Fed. Reg. 4897 § 4(c)(2)-(c)(4) (Jan. 22, 2009).

5. *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited Mar. 11, 2009).

6. Kevin Sullivan, *Freed Detainee in U.K. Tells of Abuse by U.S.*, WASH. POST, Feb. 24, 2009, at A7; Del Quentin Wilber, *Chinese Muslims Ordered Released from Guantánamo*, WASH. POST, Oct. 8, 2008, at A1.

7. 581 F. Supp. 2d 33, 35 (D.D.C. 2008).

8. Brief of Respondents-Appellants at 15-16, *Kiyemba v. Obama*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429, 2009 WL 383618 (D.C. Cir. Oct. 24, 2008).

9. *Kiyemba v. Obama*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429, 2009 WL 383618, at *5 (D.C. Cir. Feb. 18, 2009).

10. Brief *Amici Curiae* of the Brennan Center for Justice et al. in Support of Plaintiffs-Appellees and Urging Affirmance at 4, *Kiyemba v. Obama*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429, 2009 WL 383618 (D.C. Cir. Oct. 31, 2008).

11. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

12. Respondents’ Memorandum in Support of a Stay of Proceedings Involving Petitioners Who Were Previously Approved for Transfer, *supra* note 2, at 5 (“Because *Kiyemba v. Bush* . . . forecloses the possibility of a court order directing the government to transfer a detainee into the United States, in many cases there will be no relief as to the fact of detention available beyond already mandated diplomatic efforts to find an appropriate receiving country.”).

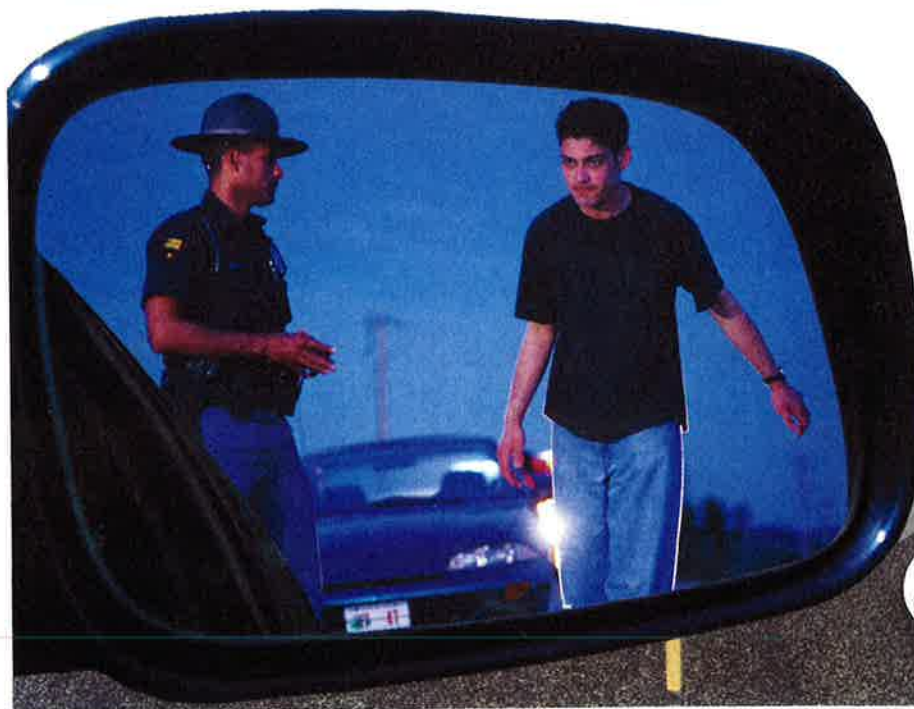
13. Reply Brief in Support of the Motion to Dismiss or, in the Alternative, to Vacate the Judgment Below and Remand with Directions to Dismiss the Case as Moot at 6, *al-Marri v. Spagone*, No. 08-368 (Mar. 4, 2009).

14. *al-Marri v. Spagone*, No. 08-368, 2009 WL 564940, at *1 (2009), *vacating* 534 F.3d 213 (4th Cir. 2008). ■

NACDL & NCDD Present the 13th Annual DUI Seminar

DWI Means Defend With Ingenuity

Join NACDL in the city of lights — Las Vegas — for the best DUI seminar anywhere. An all-encompassing seminar presented by some of the nation’s elite DUI Defense attorneys, this CLE is a must attend for all DUI lawyers from novice to expert. Save the date, you don’t want to miss this extraordinary seminar!



October 8-10, 2009
Caesars Palace
Hotel & Casino
Las Vegas, NV

Location:

Caesars Palace Hotel & Casino
 3570 Las Vegas Boulevard
 Las Vegas, NV 89109

Reservations: 800-634-6661
 For more information, visit

[www.nacdl.org/
meetings](http://www.nacdl.org/meetings)