[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]

In the

United States Court of Appeals

for the

District of Columbia Circuit

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

JAMAL KIYEMBA, Next Friend, ABDUSABUR DOE, ABDUSAMAD DOE, ABDUNASIR DOE, HAMMAD DOE, HUDHAIFA DOE, JALAAL DOE, KHALID DOE, SAABIR DOE, SAADIQ DOE,

Plaintiffs-Appellees,

- v. -

GEORGE W. BUSH, President of the United States, ROBERT M. GATES, Secretary, United States Department of Defense, JAY HOOD, Army Brigadier General – Commander, Joint Task Force-GTMO, MIKE BUMGARNER, Army Colonel – Commander, Joint Detention Operations Group-JTF-GTMO,

Defendants-Appellants.

On appeal from the United States District Court for the District of Columbia in Civil Case No. 05-01509, Ricardo M. Urbina, United States District Judge

BRIEF *AMICI CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, THE CONSTITUTION PROJECT, THE RUTHERFORD INSTITUTE, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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October 31, 2008

AMICI CURIAE

The Brennan Center for Justice at New York University School of Law

The Constitution Project

The Rutherford Institute

The National Association of Criminal Defense Lawyers

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae* the Brennan Center for Justice at New York University School of Law, the Constitution Project, the Rutherford Institute and the National Association of Criminal Defense Lawyers certify the following:

A. Parties and *Amici*

Except for the following, all parties, intervenors and *amici* appearing before the District Court and in this Court are listed in the Brief for Appellees Jamal Kiyemba, *et al.*

1. ***Amici*:** *Amici* are the Brennan Center for Justice at New York University School of Law, the Constitution Project, the Rutherford Institute, and the National Association of Criminal Defense Lawyers.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellees Jamal Kiyemba, *et al.*

C. Related Cases

Related cases appear in the Brief for Appellees Jamal Kiyemba, *et al.*

CERTIFICATE PURSUANT TO CIRCUIT RULE 29

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* the Brennan Center for Justice at New York University School of Law, the Constitution Project, the Rutherford Institute, and the National Association of Criminal Defense Lawyers certify that as of the date of this certification, no other brief *amicus curiae* of which we are aware addresses the distinctive Separation of Powers implications of the Executive's claim of authority to detain indefinitely conceded non-enemy-combatants whose detention has been found unlawful by a court. In this brief, we discuss why the constitutional role of federal courts under our Constitution's Separation of Powers compels the conclusion that the District Court has authority to order the habeas petitioners' release into the United States—the only effective remedy in this case. As a necessary part of this argument, we also address the Executive's claim that it can repudiate the District Court's release order based on a new-found "wind-up" power. We understand that there will be a brief *amicus curiae* about the Executive's immigration-law arguments, and therefore do not address them here. We further understand that there will be a brief *amicus curiae* filed on behalf of legal historians concerning the history of the Great Writ of Habeas Corpus. We therefore do not address this history. Counsel for *amici* submits that this is the only brief that addresses the larger Separation of Powers questions raised by the Executive's resistance of the District Court's order.

Dated: October 31, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the Brennan Center for Justice at New York University School of Law ("Brennan Center"), the Constitution Project, the Rutherford Institute, and the National Association of Criminal Defense Lawyers make the following disclosures respectively:

The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. No parent companies or publicly-held companies have a 10% or greater ownership in the Brennan Center.

The Constitution Project is a nonprofit corporation and an independent think tank that promotes and defends constitutional safeguards. No parent companies or publicly-held companies have 10% or greater ownership in the Constitution Project.

The Rutherford Institute is a nonprofit corporation that provides legal representation to individuals whose civil liberties are threatened or violated and educates the public about constitutional and human rights issues. No parent companies or publicly-held companies have 10% or greater ownership in the Rutherford Institute.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-partisan trade association that seeks to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for people accused of

crime or wrong-doing. No parent companies or publicly-held companies have 10% or greater ownership in NACDL.

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Amici submit this brief in support of Plaintiffs-Appellees Jamal Kiyemba *et al.* (hereinafter "habeas petitioners"), urging this Court to affirm the District Court's order granting habeas petitioners' motions for release into the United States. *Amici* demonstrate below that the District Court's release order is consistent with the Separation of Powers.

This brief is filed with the consent of all parties and pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

Interest of *Amici*

Amicus the Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Its work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. We are concerned with the dangers that national security policy, including the use of new information technologies, pose to privacy and other constitutional liberties, and are counsel in several cases involving the detention power. The Brennan Center focuses particularly on preservation of the Separation of Powers, which the Framers intended as a bulwark against violations of Americans' freedoms.

Amicus the Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Constitution Project creates coalitions of respected leaders from across the political spectrum who issue consensus

recommendations for policy reforms. After September 11, 2001, the Constitution Project created its Liberty and Security Committee, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to enhance our Nation's security. The committee develops policy recommendations on such issues as United States detention policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights.

In March 2007, the Constitution Project issued a *Statement on Restoring Habeas Corpus Rights Eliminated by the Military Commissions Act*, signed by a broad bipartisan group of approximately 40 political leaders, policy experts, and legal scholars. The signatories to the statement reaffirmed the role of habeas corpus as the preeminent safeguard of individual liberty and separation of powers by providing meaningful judicial review of Executive action. The statement urged that habeas corpus is critical "to prevent the United States from detaining people without legal authority or mistakenly depriving innocent people of their liberty."[1]

Amicus the Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation without charge to

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[1] Statement, and attached list of signatories, available at http://www.constitutionproject.org/pdf/MCA_Statement.pdf

individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with the Rutherford Institute have represented numerous parties before this Court. The Rutherford Institute has also filed *amicus curiae* briefs in cases dealing with critical constitutional issues arising from the current efforts to combat terrorism. *See, e.g.*, *Munaf v. Geren*, 128 S. Ct. 2207 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 507 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

Amicus NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for people accused of crime or wrong-doing. A professional bar association formed in 1958, NACDL has 12,500 direct members—and 95 state, local and international affiliates with another 35,000 members—who include private criminal defense lawyers, public defenders, judges, active U.S. military defense counsel and law professors. Chief among NACDL's objectives are promoting the proper and fair administration of criminal justice and preserving and protecting the U.S. Constitution.

SUMMARY OF ARGUMENT

This appeal presents a challenge to the Judiciary's central role in the Constitution's Separation of Powers. The Suspension Clause prohibits the Executive Branch entirely, and the Legislative Branch except in declared instances of "Rebellion

or Invasion," from intruding on the Judiciary's power to decide habeas petitions and to grant habeas relief where liberty has been denied without lawful basis. U.S. Const. art. I, § 9, cl. 2. The essence of habeas is a court's power to order release if no lawful basis for the continued denial of liberty exists. The Executive claims here that the courts have no effective power to remedy the indefinite detention of conceded non-enemy-combatants who were forcibly taken into U.S. custody. This claim is inconsistent with the Suspension Clause and with *Boumediene v. Bush*. 128 S. Ct. 2229 (2008). Habeas without a remedy is nothing but the issuance of an advisory opinion—and if accepted would amount to a forbidden Executive suspension of the Great Writ. The Great Writ—which is integral to the Constitution's system of checks and balances—*requires* a meaningful remedy if it is to serve its core purpose of checking unlawful Executive action. The Executive's "wind up" argument, moreover, 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 Writ.

The Executive's claim conflicts with the Separation of Powers in two ways. First, the Executive's argument would mean that federal courts lack the ability to provide meaningful redress for these petitioners. But this would violate Article III, under which courts can only entertain cases or controversies in which they are able to redress the wrongs asserted. In the case of these habeas petitioners, who are deprived of their liberty without any legal justification, the sole remedy that will redress their

injury is release. The Executive's argument would deprive the federal courts of the ability to grant redress, threatening to turn habeas proceedings into advisory proceedings—a result clearly at odds with the Supreme Court's holding that the Suspension Clause and habeas rights apply to the Guantánamo detainees. *Boumediene*, 128 S. Ct. at 2262.

Second, the Executive seeks to interfere with the Court's Article III authority in another way: The "judicial power" to adjudicate cases and controversies provides the power to issue *final* judgments not subject to revision by the Executive. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). By insisting that a habeas court's release order is subject to the superior authority of the Executive to refuse release or to release at its will in the exercise of "wind-up" authority, the Executive branch effectively would eliminate the Court's power to issue final and dispositive rulings in violation of both Article III and the Suspension Clause.

ARGUMENT

The Executive cannot indefinitely detain conceded non-enemy-combatants who were taken into U.S. custody involuntarily. Whether cast as an exercise of the immigration laws or as part of some makeweight "wind-up" authority, the Executive's asserted power to detain habeas petitioners indefinitely is inconsistent with the Suspension Clause, Article III, and the Constitution's framework of separated powers.

I. THE EXECUTIVE'S ARGUMENT CONFLICTS WITH THE SUPREME COURT'S DECISION IN *BOUMEDIENE* AND, IF ACCEPTED, WOULD BE AN UNLAWFUL SUSPENSION OF HABEAS

The Suspension Clause is central to the Constitution's Separation of Powers architecture. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). It was intended to be a practical and efficacious remedy against lawless Executive detention. The Great Writ "allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.).

It is now beyond question that these habeas petitioners are entitled to invoke the Suspension Clause. *Boumediene*, 128 S. Ct. at 2262 (holding that Suspension Clause applies to Guantánamo detainees). The District Court simply applied *Boumediene* and concluded, based on the extensive record in this case, that release into the United States was the *only* meaningful remedy available.

The Executive claims, however, that the courts have no effectual power to remedy the indefinite detention of conceded non-enemy-combatants forcibly seized and brought to Guantánamo by the U.S., by ordering release. The Executive does not—nor can it—suggest any other possible remedy for habeas petitioners as an alternative to release. It thus carefully avoids any concession indicating that a court

can order changes to habeas petitioners' conditions of confinement at the Naval Base, even if these habeas petitioners' status have changed. Gov't Br. at 9. Nor does it maintain that a federal court could order a detainee's release to a third country. To the contrary, legal authority on which it relies, *id.* at 25-26 (citing *Munaf v. Geren*, 128 S. Ct. 2207 (2008)), instructs that courts' remedial authority does not run against foreign sovereigns, *see Munaf*, 128 S. Ct. at 2221-22. At bottom, therefore, the Executive's breathtaking claim is that it can subject *any* Guantánamo detainee to "*indefinite* detention" despite a federal-court release order because of a remedial vacuum. Gov't Br. at 32-34 (emphasis added).[2]

This claim is inconsistent with the Suspension Clause. The essence of habeas is the court's power to order release if no basis for a continued denial of liberty exists. The power to order release follows inexorably from the Great Writ's practical function in our Separation of Powers—ending unlawful executive detention. "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting); *see also INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing

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[2] Such a claim is particularly incredible in view of the fact that the Executive has undermined any possibility of Habeas petitioners being accepted by other countries through its unsupported assertions in this litigation. *See* William Glaberson, *Release of 17 Guantánamo Detainees Sputters as Officials Debate the Risk*, N.Y. Times, Oct. 16, 2008, at A17.

the legality of Executive detention, and it is in that context that its protections have been strongest."). Hence, as the Supreme Court recently explained, to play its necessary constitutional function, the "typical remedy" in habeas is "release" for a petitioner whose detention has been found to be unlawful. *See Munaf*, 128 S. Ct. at 2211; *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody.").

Release, moreover, was the historical core of the Great Writ at the time it was incorporated into the Constitution. For centuries, habeas has been the device to release those unlawfully detained by the Executive. *See, e.g.*, 3 *Blackstone Commentaries* 129 (1768) ("[I]f a probable ground be shown, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which may not be denied . . . ."); s*ee also Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail."). Correspondingly, any time there is "actual confinement or the present means of enforcing it," the Writ may issue. *Wales v. Whitney*, 114 U.S. 564, 572 (1885). Without release power, a habeas court is reduced to issuing nothing more than advisory opinions.

Reflecting this historical function of habeas, the Supreme Court has held consistently that "if the imprisonment cannot be shown to conform with the

fundamental requirements of law, *the individual is entitled to his immediate release.*" *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) (emphasis added); *see also Dorsey v. Gill*, 148 F.2d 857, 866 (D.C. Cir. 1945) (*citing ex parte Royall*, 117 U.S. 241, 250 (1886)) ("[A]fter a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith . . . .").

Release is no less the core of habeas' constitutional function when it comes to the extraordinary circumstances of Guantánamo. In *Boumediene*, the Supreme Court held "that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, *including, if necessary, an order directing the prisoner's release.*" *Boumediene*, 128 S. Ct. at 2271 (emphasis added). Indeed, the *Boumediene* Court found that release is a "constitutionally required remedy" in habeas cases. *Id.* Examining the situation of one of the detainees in the instant proceeding, moreover, this Court explained that "in [a habeas action] there is *no question* but that the court will have the power to order him released." *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008) (emphasis added). Since release can mean only release into the United States, *see Munaf*, 128 S. Ct. at 2221-22, *Parhat* is precedent for this Court and also constitutes fair warning to the Executive of the end-game in these actions.

The release power is how habeas safeguards not just physical liberty, but also the freedom from arbitrary government action that is the essence of a free society. To achieve this end, habeas "cuts through all the forms and goes to the very tissue of the structure." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); *accord Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973). The heart of the matter here is the Executive's claim to be able to indefinitely detain non-enemy-combatants whose detention has been found unlawful—a claim that is fundamentally inconsistent with the basic structures of our democratic and free society.

II. RELEASE CANNOT BE THWARTED BY A MAKEWEIGHT CLAIM OF "WIND UP" POWER

At the eleventh hour, the Executive throws a Hail Mary, and conjures a novel claim of power to "wind up" detentions never before presented in this litigation. Gov't Br. at 47-50. Its claim has no basis in law and should be rejected.[3] No statute

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[3] *Amici* do not address the Executive's claim to unfettered authority to detain indefinitely aliens at Guantánamo by exercising the "quintessential sovereign function" of admitting or excluding aliens. Gov't Br. at 21-24. Habeas petitioners and other *amici curiae* briefs have amply explained why this argument fails. *See* Brief of Appellees; Brief of Law Professors as *Amici Curiae* Addressing *Shaughnessy v. United States ex rel. Mezei* and *Clark v. Martinez* and Supporting Affirmance.

Amici note, however, that the assertion of unchecked detention power under an immigration label is also inconsistent with the Separation of Powers.

First, even when the Executive acts with legislative sanction in the immigration field, it remains fully subject to Due Process and the Suspension Clause. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001); *accord St. Cyr*, 533 U.S. 289. But the executive exercises *less* authority when acting without legislative sanction—as here. *Youngstown Sheet & Tube Co. v. Sawyer*, 343

or law-of-war authority allows the Executive to detain habeas petitioners "indefinitely," or even for an uncertain term of years, under the pretense of an orderly wind up.

Any power the Executive had to hold habeas petitioners militarily derives from the Authorization for the Use of Military Force ("AUMF"), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. V); *accord Hamdi*, 542 U.S. at 521 (plurality op.). The Supreme Court in *Hamdi* instructed that the AUMF should be interpreted to include the "fundamental incident[s] of waging war." *Id.* at 518-19.

But there is *no* law-of-war authority for the indefinite detention of civilians who are not determined to be a danger. Indeed, even "[d]etainees [properly classified as combatants] in the 'war on terror' may not be held until the 'cessation of

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U.S. 579, 637-38 (1952) (Jackson, J., concurring). Its detention claim here therefore *a fortiori* fails.

Second, the Executive's interpretation of the immigration statutes to authorize the habeas petitioners' indefinite detention, Gov't Br. 27-30, cannot be squared with longstanding canons of construction embodying separation-of-powers principles. Confronted by claims that trench on core constitutional liberties, the Supreme Court has instructed that it will only consider those claims when *Congress* has issued a clear statement of its intent to approach the constitutional line. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959). Absent such a statement, it simply cannot be assumed that Congress has delegated to the executive the terrifying power to indefinitely detain innocent persons. *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes.").

The Government here, however, points to no clear legislative authorization for the indefinite detention of innocent civilians. In our system of separated powers, this alone is sufficient to defeat its claim of unfettered detention authority. *See Greene*, 360 U.S. at 507.

hostilities.' They may only be held *so long as the particular detainee at issue represents a danger or threat to the detaining power.*" Sean D. Murphy, *Evolving Geneva Convention Paradigms in the 'War on Terrorism": Applying the Core Rules to Persons Deemed "Unprivileged Combatants,"* 75 Geo. Wash. L. Rev. 1105, 1164 (2007) (emphasis added).[4] *A fortiori*, habeas petitioners—whom the Executive has no authority to detain under the AUMF—must now be released from military custody because a judicial determination (unchallenged by the Executive) has already been made that their detention is unlawful.

The Nation, and the courts, faced a choice like this one once before. The situation of Jamal Kiyemba and his co-petitioners can be analogized to that of a post-World War II detainee: Mitsuye Endo.[5] Adjudicating her habeas action, the Supreme

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[4] Persons detained as prisoners of war *must* be released "without delay after the cessation of active hostilities." Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 1956 WL 54809. Of course, habeas petitioners were not categorized as prisoners of war. Even if they were ever properly detained as combatants—and there the record suggests the contrary—they cannot be so detained now.

In addition, it is quite clear that whatever limited authority created by the Fourth Geneva Convention to detain civilians who pose a security risk has no relevance here, where the Government has conceded that the habeas petitioners pose no risk to the United States. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 42, 43, 78, 132 Aug. 12, 1949, 6 U.S.T. 3516, 1956 WL 54810. There is, therefore, no authority under the laws of war to hold habeas petitioners.

[5] Bizarrely, the Government invokes the logistical problems raised when it has had to release thousands (or hundreds of thousands) of conceded *enemy combatants* who have been properly held during a conflict. Gov't Br. 48-49. It does not explain how these utterly dissimilar factual situations apply to these

Court held that even though Endo might have been lawfully detained initially under the March 1942 internment statute, once her loyalty had been established, the Executive lacked any authority to hold her even with the war ongoing. *Ex parte Endo*, 323 U.S. 283, 302 (1944). As in the case at bar, the Government argued that even though no doubt lingered as to Endo's loyalty, it nonetheless "maintain[ed] that detention [was allowed] for an additional period after leave clearance has been granted is an essential step in the evacuation program" because of the necessity of a "planned and orderly relocation." *Id.* at 295-96. That is, Endo's jailors' claimed authority to "wind up" her internment in an orderly way.

A unanimous Court curtly dismissed this "wind-up" claim:

> We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

Id. at 297. At a minimum, *Endo* reinforces the rule that absent a clear statement from Congress, executive detention—especially of "concede[d]" non-enemy-combatants innocent of any hostility to the U.S.—is illegal, if not unconstitutional. *See* Patrick O. Gudridge, *Remember Endo?*, 116 Harv. L. Rev. 1933, 1953 (2003) ("[I]n Justice Douglas's analysis, the Constitution prompted the construction of the order and the

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habeas petitioners for whom a perfectly feasible avenue of release is available. *See* Uighur Am. Ass'n *Amicus* Brief. And it simply fails to address the closest precedent—*Endo*.

statute, and thus the conclusion that Endo's detention was illegal."). The District Court here, therefore, simply followed the Supreme Court's lead in *Endo* in ordering expeditious release. Kiyemba and his co-petitioners, to be sure, are not United States citizens as Endo was. But this distinction makes no difference to the constitutional calculus when it comes to the Due Process and habeas rights at issue here. *See Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1884) (confirming constitutional rights extend to non-citizens); *see also Boumediene*, 128 S. Ct. at 2262 (extending Suspension Clause to encompass instant habeas petitioners).

Endo's holding is confirmed by countless cases where federal courts have directed that a person who cannot lawfully be detained must be "unconditionally released." *Endo*, 323 U.S. at 297; *see also Nelson v. Day*, No. CV-00-00145-RFC, 76 Fed. App. 213, 214 (9th Cir. Sept. 29, 2003) (finding it "certainly disturbing" that Plaintiff remained in custody 54 days following successful habeas petition). Detention thereafter violates the Due Process Clause. *See Young v. City of Little Rock,* 249 F.3d 730, 735-36 (8th Cir. 2001) (sustaining substantial jury verdict in favor of an unlawfully detained § 1983 plaintiff who, after being ordered released at a probable cause hearing, was detained for approximately three hours, despite the city's argument that it must be allowed time to carry out certain administrative formalities or "out-processing" procedures); *Slone v. Herman,* 983 F.2d 107, 110 (8th Cir. 1993) (noting that once "the state lost its lawful authority to hold Slone . . . any continued

detention unlawfully deprived Slone of his liberty, [which] . . . is protected from unlawful state deprivation by the due process clause of the Fourteenth Amendment.").

Moreover, as a practical matter, there can be no "winding up" by the Executive, since its arguments in this litigation have undermined the possibility of finding alternative homes for the habeas petitioners. *See Release of 17 Guantánamo Detainees Sputters as Officials Debate the Risk* (quoting State Department official that the Executive's description of habeas petitioners as a "danger to the public" has "made it impossible to conduct negotiations" regarding their resettlement and short-circuited efforts to transfer habeas petitioners to other countries).

III. THE CONSTITUTION'S SYSTEM OF SEPARATED POWERS COMPELS RELEASE

The Executive's claim of unfettered authority to detain habeas petitioners in the face of a contrary federal-court order raises two serious Separation of Powers concerns. *First*, the Executive's argument would mean that federal courts have no ability to provide meaningful redress for these petitioners when exercising jurisdiction guaranteed by the Suspension Clause, a result that would deprive the Court of Article III jurisdiction and turn habeas proceedings into merely advisory exercises. *Second*, the Executive seeks to interfere impermissibly with the Court's Article III power to issue *final* judgments not subject to revision by the political branches.

A. The Executive's Claim Of Detention Authority Pits The Suspension Clause And Article III Into Needless and Irreconcilable Conflict

The Executive's claim that there is no available remedy in these cases is inconsistent with Article III's investiture of "judicial Power" in the federal courts. U.S. Const. art. III, § 1. The Constitution creates "three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982); *see also Mistretta v. United States,* 488 U.S. 361, 380 (1989) ("[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

Article III adjudication includes power to remedy disputes. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies . . . ."). Indeed, the Supreme Court has held that the exercise of Article III jurisdiction demands "redressibility," *i.e.*, some possibility of remedy, at its threshold. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (noting that the constitutional requirement for a "case" or "controversy" requires redressibility, *i.e.*, that a plaintiff be able to personally "benefit in a tangible way from the court's intervention") (citation omitted). Redressibility is necessary to ensure that Article III jurisdiction is proper and effective. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,

571 (1992) (denying standing where "the only injury in fact respondents complain of requires action . . . and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.").

It is now beyond doubt that the instant habeas actions are justiciable "cases or controversies" under Article III. *Boumediene*, 128 S. Ct. at 2262. But by arguing that federal courts lack any power of meaningful redress in these cases, the Executive in effect contends that the constitutionally guaranteed investiture of habeas jurisdiction cannot satisfy the redressibility prong of Article III's standing requirement. In effect, the Executive argues, federal courts in this circumstance issue only advisory opinions.

But the Constitution creates no such irremediable conflict between its fundamental principles: These cases are jurisdictionally proper under the Suspension Clause, and also proper exercises of Article III authority because the District Court does have power to grant effective relief—here, release into the United States. *Boumediene*, 128 S. Ct. at 2271 ("[T]he judicial officer must have adequate authority to . . . formulate and issue appropriate orders for relief, *including, if necessary, an order directing the prisoner's release.*") (emphasis added); *supra* at 6-10.

Accepting the Executive's argument would, moreover, introduce an anomaly into the constitutional scheme of Separation of Powers because it would allow the Executive to accept or resist jurisdiction based on its discretion to invoke its

novel "wind up" or immigration theories against detainees. This would impermissibly allow the "political branches [to] have the power to switch the Constitution on or off at will." *Id.* at 2259. That untenable situation, "in which Congress and the President, not this Court, say 'what the law is,'" however, is not the law. *Id.* (*citing Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

B. The Executive's Exercise Of Indefinite Detention Authority Would Itself Violate Separation Of Powers

The Executive's sweeping claim of power to detain conceded non-enemy-combatants indefinitely is irreconcilable with the Separation of Powers for a second reason: It disregards the judiciary's core Article III authority by allowing the executive branch to revise final judgments.

Article III vests all "judicial Power" in the "Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution" under Article III. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J. dissenting) ("Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks.").

One such power is the authority to issue final judgments that cannot be revised or corrected by the political branches. To the Framers, "[t]he judicial Power" required power to resolve cases and controversies definitely and without revision or correction by the political branches. U.S. Const, art. III, § 1. They thus "crafted [Article III] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis in original); *accord Miller v. French*, 530 U.S. 327, 342 (2000).

This principle was first applied in 1792. Three different circuit-court panels of Justices and judges—including John Jay, James Wilson, and James Iredell—each rejected the proposition that a federal court's "judgments (for its opinions are its judgments) might . . . have been revised and controlled by the legislature, and by an officer in the executive department." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.*. Such "revision and control" of a Court of Claim's judgment by an executive officer, explained one panel, was "radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States." *Id.* (statement of Wilson, J., Blair, J., and Peters, D.C.J.); *see also id.* (statement of Iredell, J., and Sitgreaves, J.) ("[N]o court of the United States can, under any circumstances, in our

opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself . . . ."); *see also United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852) (applying *Hayburn's Case*).

The Supreme Court and this Court have since zealously hewed to the principle that "'[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.'" *AFGE, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 353 (D.C. Cir. 2007) (quoting *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)); *accord Hohn v. United States*, 524 U.S. 236, 245-46 (1998); *Morrison v. Olsen*, 487 U.S. 654, 677-78 & n.15 (1988).

Certain of our most renowned presidents have also expounded this principle. In 1809, President James Madison explained "the Executive of the U. States is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is especially enjoined by statute to carry it into effect any such degree." Letter from President James Madison to Governor Simon Snyder (Apr. 13, 1809), in 2 *Letters and Other Writings of James Madison* 438, 438-39 (Philadelphia, J.B. Lipincott 1865). A half-century later, President Lincoln affirmed this fundamental constitutional predicate in his first inaugural. *See* Abraham Lincoln, First Inaugural Address (March 4, 1861) ("I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme

Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as the object of that suit . . . .”). That presidential statement applies equally to all Article III courts.

The Executive's position in this case turns Madison's and Lincoln's wisdom on its head. The Executive claims that in a Guantánamo habeas action, the Executive has unilateral power to suspend or alter a federal court's order it finds unpalatable. Even if this Court affirms the District Court's conclusion that the Executive has no authority to hold habeas petitioners as "enemy combatants," it asserts discretion as to whether it can detain or release them. In effect, the Executive claims practical power to revise or suspend the unavoidable operative effect of a District Court judgment. The Separation of Powers itself, however, prohibits such arrogation of power by the Executive. "[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties," including the issuance of final judgments. *Loving v. United States*, 517 U.S. 748, 757 (1996).

Separation of Powers concerns are at their zenith here for two reasons. *First*, a "concern of encroachment and aggrandizement . . . has animated . . . separation-of-powers jurisprudence." *Mistretta*, 488 U.S. *at* 382. The Executive's claims here not only trench on individual rights, they also impermissibly expand unchecked executive power at the expense of a coordinate branch.

Second, the Executive's claim is asymmetric in that it works to nullify judgments against the Government, while leaving intact judgments rendered for the Government. Under their "wind up" theory, it is only judgments *against* the Government that are made ineffectual because a holding that a detainee may lawfully be held would presumably be fully enforced. The Supreme Court has warned, however, that political-branch intrusions to "decide a controversy in the Government's own favor" are disfavored. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402-04 (1980). Asymmetric treatment of judgments for and against the Government therefore raises clear constitutional red flags.

The Executive cannot avoid this result merely by recharacterizing its argument as a claim of "wind up" or immigration power. *See supra* at 10-15 (explaining why "wind up" theory is incorrect). *Hayburn's Case* and its progeny teach that the finality of a federal court judgment is not simply a matter of a legal conclusion, but also encompasses the *practical* consequences of that judgment. The flaw in the Invalid Pensions Act of 1792 at issue in *Hayburn's Case*, for example, was to allow for executive revision in cases of *both* "imposition" and "mistake." Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 244 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324); *cf. Gordon v. United States*, 69 U.S. 561, 561 (1864) (app. reproducing draft op. of Taney, C.J. not adopted by Court) ("The award of execution is a part, and an essential part of every judgment passed by a court

exercising judicial power."). The Court did not pause to ask if the practical effect of its judgments would be nullified based on a perception of legal error, or for the sake of convenience. Rather, *any* interference with the practical consequences of a final judgment raises Separation of Powers concerns. "Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy . . . ." *Plaut*, 514 U.S. at 227. The Executive cannot undo those specific judgments without violating a "fundamental principle" of the Constitution. *Id.* at 219.

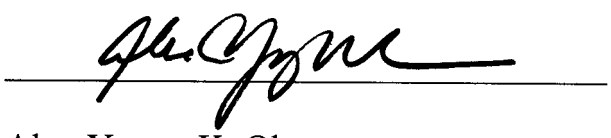
However the Executive chooses to characterize its claim to detain indefinitely habeas petitioners, that claim runs counter to the Separation of Powers. For this reason, this Court should reject the Executive's attempt to obtain a "blank check" to disregard selectively unfavorable habeas judgments. *Hamdi*, 542 U.S. at 536 (plurality op.).

Conclusion

For the reasons set forth above, the Court should affirm the District Court's order and expeditiously order the release of conceded non-enemy-combatants who pose no danger to the United States.

Dated: October 31, 2008

Respectfully submitted,



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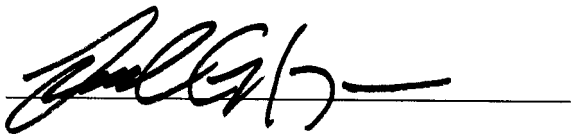

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