

University of Maryland Francis King Carey School of Law

DigitalCommons@UM Carey Law

---

Faculty Scholarship

Francis King Carey School of Law Faculty

---

2013

## Of Civil Wrongs and Rights: *Kiyemba v. Obama* and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11

Katherine L. Vaughns

University of Maryland Francis King Carey School of Law, [kvaughns@law.umaryland.edu](mailto:kvaughns@law.umaryland.edu)

Heather I. Williams

Follow this and additional works at: [https://digitalcommons.law.umaryland.edu/fac\\_pubs](https://digitalcommons.law.umaryland.edu/fac_pubs)



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [International Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legal Remedies Commons](#), and the [President/Executive Department Commons](#)

---

### Digital Commons Citation

20 Asian American Law Journal 7 (2013).

This Article is brought to you for free and open access by the Francis King Carey School of Law Faculty at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

Of Civil Wrongs and Rights: *Kiyemba v. Obama* and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11

Katherine L. Vaughns<sup>†</sup>

INTRODUCTION .....	8
I. <i>KIYEMBA V. OBAMA</i> : FACTUAL AND PROCEDURAL HISTORY .....	11
A. The Case in the Lower Courts .....	12
B. The Supreme Court Grants Certiorari Review .....	14
II. PLACING <i>KIYEMBA</i> IN CONTEXT: DETERIORATION OF THE RULE OF LAW POST-9/11 .....	18
A. Historical Perspective .....	19
B. Post-9/11 Jurisprudence .....	23
C. The Deteriorated Role of the Courts Post-9/11 .....	27
1. The Unreviewable Executive and the Assertion of Inherent Power .....	27
2. The Undermining of the Rule of Law .....	31
III. RE-CONSIDERING <i>KIYEMBA V. OBAMA</i> : THE ILLEGALITY OF INDEFINITE DETENTION, THE INAPPLICABILITY OF IMMIGRATION LAW, AND CHECKING THE UNCHECKED EXECUTIVE .....	34
A. The Illegality of Indefinite Detention and the Remedy Requirement .....	34
B. The Inapplicability of Immigration Law .....	36
C. The Release Remedy .....	39
D. The Unchecked Executive: The Politics of Judicial Abstention .....	42
IV. WHAT IS AT STAKE? .....	45
A. The Irrelevance of <i>Boumediene</i> ? .....	45
B. The Need for Dissent .....	47
CONCLUSION .....	50

---

<sup>†</sup> B.A. (Political Science), J.D., University of California, Berkeley, School of Law. Professor of Law, University of Maryland Francis King Carey School of Law. Heather Williams, a graduate of the University of Maryland Francis King Carey School of Law, assisted in the drafting and editing of this article; however, the article truly was Professor Vaughns' brainchild. Ms. Williams had the honor of knowing Professor Vaughns as a passionate and enthusiastic professor, a dedicated mentor, and a cherished friend. Professor Vaughns passed away before she could approve the final edits of this article; they have been approved, however, by both Ms. Williams and Professor William Reynolds, a colleague, friend, and admirer of Professor Vaughns at Maryland. All of us here at Maryland miss Kathy very much.

“In questions of power, then, let no more be said of confidence in man,  
but bind him down from mischief by the chains of the Constitution.”

—Thomas Jefferson, Kentucky Resolution of 1798<sup>1</sup>

#### INTRODUCTION

About a year and a half before the tenth anniversary of the terrorist attacks of September 11, 2001, the United States Supreme Court was primed to hear oral arguments in a case concerning seventeen detainees who had been held at the Guantanamo Bay Naval Base since 2002. The case, known in its various iterations as *Kiyemba v. Obama*,<sup>2</sup> presented the Court with an opportunity to vindicate the purposes of the writ of habeas corpus by finally and firmly establishing the remedy attached to the right of habeas corpus, a right guaranteed to Guantanamo Bay detainees in the landmark 2008 case of *Boumediene v. Bush*.<sup>3</sup> Instead, after the government had advised the Court of post-*certiorari* developments at the proverbial eleventh hour,<sup>4</sup> the Court subsequently vacated the appeal from a District of Columbia Court of Appeals’ judgment, a decision which found that federal courts lacked the power to release detainees into the continental United States even when other release options were not available, and remanded the case for reconsideration in light of “[t]his change in the underlying facts.”<sup>5</sup> The dismissal of the previously granted cert. petition amounted to a statement to this effect: Why should the Court get involved at this point? Why indeed. The question presented to the Court is a legal—not factual—one that goes to the heart of the separation of powers problem that the lower court created. The Court’s dismissal in a *per curiam* opinion without objection from any of the justices and over the strong objections of the detainees’ lawyers<sup>6</sup> renders the D.C. Circuit’s opinion, reinstated on remand, the final word on the remedy to which habeas petitioners are entitled. That no justice objected to the dismissal gives the appearance of a unified court, and adds strength to the reinstated opinion of

---

1. Thomas Jefferson, The Kentucky Resolution of 1798 (1798), reprinted in Scott Horton, *Jefferson – The Risk of too Much Confidence in Elected Officials*, HARPER’S MAGAZINE (July 4, 2009), <http://harpers.org/blog/2009/07/jefferson-the-risk-of-too-much-confidence-in-elected-government/>.

2. *Kiyemba I*, 130 S. Ct. 458 (2009) (cert. granted).

3. 553 U.S. 723 (2008).

4. See Letter from Elena Kagan, then-U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States (Feb. 19, 2010) available at <http://www.scotusblog.com/wp-content/uploads/2010/02/SG-Kiyemba-letter-2-19-10.pdf> (describing the relocation offers made) [hereinafter Feb. 19, 2010 Kagan Letter]; see also Letter from Sabin Willett, Detainee Counsel in the *Kiyemba v. Obama* Litigation, to William K. Suter, Clerk of the Supreme Court of the United States (Feb. 19, 2010) at 4 available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_08\\_1234\\_PetitionersLetterBrief.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionersLetterBrief.authcheckdam.pdf) [hereinafter Feb. 19, 2010 Willett Letter].

5. *Kiyemba I*, 559 U.S. 131, (2010) (subsequent dismissal and remand).

6. See Feb. 19, 2010 Willett Letter, *supra* note 4, at 2 (arguing that “[r]eview of that constitutionally intolerable decision remains as necessary today as when *certiorari* was granted”).

the lower court, despite its misguided reliance on a doctrine that allows the political branches' policy choices to reign supreme.<sup>7</sup>

This Article considers the ramifications of the *Kiyemba* litigation, focusing particularly on what the case means to our understanding of the rule of law more than ten years after September 11. This Article makes three primary arguments: First, although the Supreme Court provided Guantanamo Bay detainees access to U.S. courts through the writ of habeas corpus, it has failed to provide a meaningful remedy for habeas petitioners, despite ample constitutional and doctrinal authority for doing so. This rights-remedy gap is problematic from a rule of law standpoint, and the gap is well illustrated by the *Kiyemba* litigation.<sup>8</sup> Second, the Court's failure to consider the merits of the case, thus allowing a problematic lower court opinion to stand, has perpetuated confusion in a doctrinal area of constitutional, political, and rhetorical significance. A dissent to the *per curiam* dismissal would, at the very least, have served the significant purpose of articulating core constitutional values. Finally, the D.C. Circuit's application of immigration law to the habeas remedy question in its reinstated opinion in *Kiyemba v. Obama*<sup>9</sup> effectively trumps the detainees' constitutional right to obtain release by substituting immigration law's doctrinally exceptional deference to the Executive for what long has been understood as the core function of habeas corpus: undoing illegal detention by the Executive.

The now-controlling D.C. Circuit opinion offers one viewpoint: habeas relief, when it involves release into the continental United States, is an immigration matter where, by virtue of the branch's plenary power, the Executive's decisions govern. The courts, in the D.C. Circuit's view, have

---

7. See Joshua A. Geltzer, *Decisions Detained: The Courts' Embrace of Complexity in Guantanamo-Related Litigation*, 29 BERK.J. INT'L L. 94, 111 (2011) ("Having granted certiorari, the Supreme Court was expected to have the final say, but ended up vacating the circuit court's opinion, then seeing it reinstated by the D.C. Circuit."); Laura J. Arandes, Note, *Life Without Parole: An Immigration Framework Applies to Potentially Indefinite Detention at Guantanamo Bay*, 86 N.Y.U. L. REV. 1046, 1051 & n.32 (2011) ("While the facts undergirding the Uighurs' original petition for release have changed, the *Kiyemba* decision remains good law.").

8. Caroline W. Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891, 898 (2010) ("[H]istorically[,] habeas remedies were limited to unconditional release. . . . [T]he power to grant the writ has always meant the power to grant the release [of the unlawfully detained].") see also Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1, 5 (2009) ("The nature, scope, and enforcement of remedies shape substantive rights. One of the law's most fundamental maxims is that for every wrong, there must be a remedy.") (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23, 109). But see *Kiyemba I*, 555 F.3d 1022, 1027 (D.C. Cir. 2009) ("Not every violation of a right yields a remedy, even when the right is constitutional. Application of the doctrine of sovereign immunity to defeat a remedy is one common example. Another example, closer to this case, is application of the political question doctrine [to defeat a remedy].").

9. *Kiyemba I*, 555 F.3d 1022 (D.C. Cir. 2009) (reinstating and modifying to take into account new developments in a *per curiam* opinion in *Kiyemba III* cited at 605 F.3d 1046 (D.C. Cir. 2010) (Rogers, J., concurring)).

no part to play because immigration issues fall squarely within the Executive's sovereign prerogative. This approach, I believe, sanctions whatever political remedy the Executive may select—here, diplomatically negotiated resettlement outside of the United States—as a substitute for the legal remedy of release. The D.C. Circuit's view cannot be correct, I argue, because it would mean that, although a court may find that a detainee's imprisonment is unlawful,<sup>10</sup> that court might be powerless to remedy the unlawful imprisonment. Thus, I offer a view contrary to the D.C. Circuit: in order to accord complete habeas relief particularly where, as here, relocation efforts remain long-ongoing, a habeas court must have the authority to admit foreign nationals into the interior of the United States as a remedy for their unlawful detention. Historically, “the writ of habeas corpus was conceived and used as a control against the unlawful use of executive power.”<sup>11</sup> And traditionally, custody of the body transfers to the court in habeas proceedings so that the court may order “the immediate and non-discretionary release of an illegally detained person.”<sup>12</sup> Such authority ensures that the courts of this country are able to act in a way that restores the rule of law, so deeply damaged in the months and years following September 11.

This Article proceeds as follows. In Part I, I provide the factual and procedural history of the *Kiyemba* litigation. In Part II, I consider *Kiyemba*'s context, looking to historical perspectives on the role of courts in wartime, the Supreme Court's post-September 11 jurisprudence, and the development of “national security fundamentalism” in the D.C. Circuit after September 11. In so doing, I discuss how, in the months and years following September 11, the Executive asserted inherent power that rendered it nearly unreviewable and that, through the acquiescence of some courts, significantly undermined the rule of law. In Part III, I reconsider *Kiyemba*, highlighting the illegality of indefinite detention and the right to a corresponding remedy. Contrary to the position taken by the D.C. Circuit, the rights-remedy gap is not an unreviewable facet of the Executive's plenary power over immigration. Instead, it is a practical and necessary reality to be handled by the federal courts. The judiciary's failure to assert its constitutional role in this area, I argue, may be the result

---

10. The first court to review the Uighurs' petition found their detention unlawful. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008) (“[T]his court rules that the government's continued detention of the petitioners is unlawful.”). The D.C. Circuit, while reversing the district court's release order, did not challenge the district court's conclusion that the Uighurs' ongoing detention was unlawful.

11. Brief for Petitioner at 45-46, *Kiyemba I*, 130 S. Ct. 458 (2009) available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_00\\_1234\\_PetitionerAmCuUKParliament.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_00_1234_PetitionerAmCuUKParliament.authcheckdam.pdf); [hereinafter Lord Goldsmith Brief]; see also *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 39.

12. Lord Goldsmith Brief, *supra* note 11, at 46 (observing that “[i]t would be a surprising result that would run counter to this history if the exercise of executive powers—in this instance immigration powers—was allowed to thwart the operation of the writ”).

of judicial abstention caused by political and practical influences on the Court.

I staunchly believe that the habeas right is accompanied by a release remedy. Where there is no threat to the public safety, and where other release options are not available, that remedy must be release into the United States. And above all, I believe that this case is not an immigration matter subject to the prerogatives of the political branches.<sup>13</sup> However, accepting that the practical and political influences described above may continue to prevent courts from awarding such relief, there is nonetheless a need for recognition of the damage that the political remedy of indefinite detention inflicts on the rule of law. Thus, in Part IV, I make a case for the value of an opinion dissenting from the Supreme Court's *per curiam* dismissal in *Kiyemba I*—a reminder, however small, but unquestionably important, that the rule of law remains.

#### I. *KIYEMBA V. OBAMA*: FACTUAL AND PROCEDURAL HISTORY

The legal saga of the seventeen detainees involved in the *Kiyemba* litigation begins, and someday (one hopes) will end, with relocation into the interior of U.S. territory. Sometime early in 2001, a number of Uighurs, a Turkic Muslim minority group from the Xinxiang province in China, which long has been subjected to oppression and torture, fled China for the Tora Bora Mountains of Afghanistan, where they settled into camps.<sup>14</sup> After September 11, 2001, American aerial strikes destroyed the Uighurs' Tora Bora camp.<sup>15</sup> Fleeing their destroyed camp, the unarmed Uighurs crossed into Pakistan,<sup>16</sup> where they were taken in by local villagers and provided with food and shelter.<sup>17</sup> In December 2001, the Uighurs were arrested by the Pakistani government and, for a sizeable bounty, transferred to U.S. custody.<sup>18</sup> In June 2002, the Uighurs were transferred to the naval base at Guantanamo Bay, Cuba, where they remained imprisoned for more

---

13. For example, Congress added a rider to a defense funding bill, the Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, 123 Stat. 1859 to bar use of defense funding to release in the continental U.S. anyone detained at Guantanamo on the date of the bill's enactment. This rider was a political response to the Executive's plan to resettle some of the *Kiyemba I* petitioners in Virginia. See Julian E. Barnes, *U.S. Plans to Accept Several Chinese Muslims From Guantanamo*, L.A. TIMES (Apr. 24, 2009), <http://articles.latimes.com/2009/apr/24/nation/na-gitmo-release24>. As noted in the *Kiyemba I* petition for writ of certiorari, "[r]esponding to highly-charged political opposition to this plan, the President shelved it." Petition for Writ of Certiorari, No. 10-775 *Kiyemba v. Obama*, (Dec. 8, 2010), at 7 (footnote omitted) available at <http://www.lawfareblog.com/wp-content/uploads/2010/12/2010-12-08-Kiyemba-III-petition.pdf>.

14. *Kiyemba I*, 555 F.3d 1022, 1023–24 (D.C. Cir. 2009); Parhat v. Gates, 532 F.3d 834, 837 (D.D.C. 2008).

15. *Kiyemba I*, 555 F.3d at 1024; Parhat, 532 F.3d at 837.

16. See Parhat, 532 F.3d at 837.

17. *Id.*

18. See *id.*; In re Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35 (D.D.C. 2008).

than five years.<sup>19</sup>

In 2004, the Department of Defense held Combatant Status Review Tribunals for the Uighurs.<sup>20</sup> The tribunals determined that the Uighurs were enemy combatants based on a theory that the detained Uighurs had been involved with the East Turkistan Islamic Movement (ETIM), which the State Department had designated a terrorist organization three years after they entered U.S. custody;<sup>21</sup> that the ETIM was associated with Al Qaeda and the Taliban; and that the ETIM had engaged in hostilities against the United States, the Defense Department classified them as enemy combatants.<sup>22</sup> In *Parhat v. Gates*,<sup>23</sup> the D.C. District Court, considering the Uighurs' challenge to their designation, ruled that the government presented insufficient evidence to warrant designating the Uighurs as enemy combatants. Following the *Parhat* decision, the government formally retracted, and never again argued in support of, the Uighurs' classification as enemy combatants.<sup>24</sup>

#### A. *The Case in the Lower Courts*

The Uighurs began filing petitions for habeas corpus in 2005, but due to various congressional enactments and Supreme Court cases, review of the Uighurs' petitions did not begin until 2008. In *In re Guantanamo Bay Detainee Litigation*, which later became known as *Kiyemba I* throughout the appellate and certiorari process, the District Court for the District of Columbia considered the Uighurs' petitions for the first time, concluding that "the Constitution prohibits indefinite detention without just cause," and that, as a result, the government's continued detention of the non-enemy combatant Uighurs was unlawful.<sup>25</sup> Having found the Uighurs' detention unlawful, the trial court ordered the Uighurs' release.<sup>26</sup> However, the court struggled to find a relocation site for the Uighurs upon release. The Uighurs objected to release in China, their native country, citing fear of arrest, torture, or execution.<sup>27</sup> Subsequent efforts by the Executive to find an alternative relocation site for the Uighurs proved unsuccessful, as no other third-party countries were willing to accept the Uighurs, perhaps due to political pressure from the Chinese government or due to the Executive's

---

19. See *Parhat*, 532 F.3d at 837.

20. See *id.* at 838.

21. Samuel Chow, Note, *The Kiyemba Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions*, 19 CARDOZO J. INT'L & COMP. L. 775, 793 n.126 (2011).

22. *Parhat*, 532 F.3d at 838.

23. *Id.* at 834.

24. See Chow, *supra* note 21, at 793 (citing *Kiyemba I*, 555 F.3d 1022, 1024 (D.C. Cir. 2009)). It has been reported that the government knew as early as 2003 that the Uighurs' detention was in error. See CENTER FOR CONSTITUTIONAL RIGHTS, OUR PAGES, <http://ccrjustice.org/ourcases/current-cases/Kiyemba-v.-bush>.

25. *In re Guantanamo Bay Litigation*, 581 F. Supp. 2d 33, 34, 38–39 (D.D.C. 2008).

26. *Id.* at 34.

27. See *Kiyemba I*, 555 F.3d at 1024.

original determination that the Uighurs were worthy of the enemy combatant designation.<sup>28</sup> In their petitions for habeas corpus, the Uighurs sought release into the continental United States, as no other options were available to them at that time.<sup>29</sup>

Considering the release issue, the D.C. District Court acknowledged that the authority to admit aliens has typically been a political inquiry, but noted that these powers are not absolute.<sup>30</sup> However, in the court's view, the Uighurs' case presented "exceptional" circumstances: The government captured the Uighurs and "transported them to a detention facility where they will remain indefinitely."<sup>31</sup> The government had not charged them with a crime, and it "presented no reliable evidence that they would pose a threat to U.S. interests."<sup>32</sup> Moreover, the district court explained, the government "stymied its own efforts to resettle" the Uighurs "by insisting . . . that they were enemy combatants, the same designation given to terrorists willing to detonate themselves amongst crowds of civilians."<sup>33</sup> Because habeas corpus is an "indispensable mechanism for monitoring the separation of powers," the court found that the government's so-called "best efforts" to attempt to resettle the Uighurs did not substantively change the nature of their claims.<sup>34</sup> Instead, according to the district court, the government's unsuccessful efforts to relocate the Uighurs over a period of five years suggested that the Uighurs' detention had "crossed the constitutional threshold into infinitum."<sup>35</sup> Stating that "our system of checks and balances is designed to preserve the fundamental right of liberty," the court granted the Uighurs' request for release into the United States.<sup>36</sup> The government immediately appealed the district court's ruling.

Considering the case on appeal, the Court of Appeals for the District of Columbia began by analyzing "several firmly established propositions."<sup>37</sup> The court first noted the "ancient principle" that a state has the absolute right to exclude or admit aliens and "to prescribe applicable terms and conditions for their exclusion or admission."<sup>38</sup> Since the *Chinese Exclusion Case*,<sup>39</sup> the court explained, the Supreme Court had, "without exception, sustained the exclusive power of the political branches to decide" whether an alien may enter the United States and what the terms

---

28. *See id.*; *see* Chow, *supra* note 21, at 794–95.

29. Chow, *supra* note 21, at 794.

30. *In re Guantanamo Bay Detainee Litig.* 581 F. Supp. 2d at 40.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 42–43.

35. *Id.* at 43.

36. *Id.*

37. *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009).

38. *Id.*

39. *Ping v. United States*, 130 U.S. 581 (1889).



for their entry may be based on the so-called plenary power doctrine.<sup>40</sup> Accordingly, no court has the authority, unless explicitly provided by law, to review a political branch determination of exclusion.<sup>41</sup> Because the Executive determined that the Uighurs should not be permitted entry into the United States, the Court of Appeals found no authority for the district court to set aside that determination.<sup>42</sup> Furthermore, the court stated its uncertainty about whether the Uighurs “would [even] qualify for entry or admission under the immigration laws.”<sup>43</sup> As a result, it was not convinced that their entry into the United States was compelled by law.<sup>44</sup> The mere fact that the Uighurs were found not to be enemy combatants did not, the court stated, qualify them for admission into the United States.<sup>45</sup> In light of these considerations, and based on the fact that no law expressly authorized the court to release the Uighurs into the United States, the Court of Appeals reversed the district court’s release order and remanded for further proceedings consistent with their opinion.<sup>46</sup>

### B. *The Supreme Court Grants Certiorari Review*

In October 2009, the United States Supreme Court granted certiorari in *Kiyemba I* to decide whether a federal court, employing its habeas jurisdiction under *Boumediene v. Bush*, has the power to order the release of individuals detained by the executive for seven years, “where the detention is indefinite and without authorization in law, and release into the continental United States is the only possible remedy.”<sup>47</sup> Between February 3 and February 5, 2010, the parties submitted letters informing the Court that the Swiss government had agreed to accept two of the Uighur petitioners.<sup>48</sup> The other five petitioners were previously offered resettlement by two countries—Palau and “another nation” according to the government—although the detainees rejected those offers for a variety of reasons.<sup>49</sup> According to then-Solicitor General Elena Kagan, these developments eliminated the core factual premise of the case—namely, that

---

40. *Kiyemba I*, 555 F.3d at 1025.

41. *Id.* at 1026 (citing *United States v. Shaughnessy*, 338 U.S. 537, 543 (1950)).

42. *See id.*

43. *Id.* at 1029.

44. *See id.* For a discussion of the Court of Appeals’ views on whether immigration law might provide a valid basis for detention, including the application of refugee, asylum, and parole law, *see id.* at 1029–31.

45. *See id.* at 1029.

46. *Id.* at 1032.

47. *Kiyemba v. Obama*, 130 S. Ct. 458, 559 (2009); Petition for Certiorari, No. 08-1234, *Kiyemba v. Obama*, 130 S. Ct. 458 (Apr. 3, 2009).

48. *See* Tony Mauro, *Supreme Court Orders New Briefing in Uighur Case*, BLOG OF LEGAL TIMES (Feb. 12, 2010, 11:49 AM), <http://legaltimes.typepad.com/blt/2010/02/supreme-court-orders-new-briefing-in-uighur-case.html>.

49. *Id.*; *see also* Feb. 19, 2010 Kagan Letter, *supra* note 4 (describing the relocation offers made).

release into the United States was the only available remedy.<sup>50</sup> In light of these developments, Kagan argued, the Uighurs' continuing presence at Guantanamo was completely "voluntary."<sup>51</sup> On February 12, 2010, the Supreme Court requested that the parties file letter briefs with the Court addressing "the effect, if any, of the developments discussed in the letters submitted by the parties on February 3 and February 5."<sup>52</sup>

On March 1, 2010, the Supreme Court rendered its per curiam opinion in *Kiyemba I*.<sup>53</sup> According to the Court, the change in the underlying facts raised by the February letters "may affect the legal issues presented" to the Court.<sup>54</sup> No lower court had yet ruled "in light of the new facts," and the Supreme Court refused to be the first court to rule on these new factual issues.<sup>55</sup> Accordingly, the Court vacated the judgment of the Court of Appeals and remanded the case with instructions that the lower court determine "in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments."<sup>56</sup> Without saying so explicitly, the Court's per curiam opinion amounted to a determination that the new facts rendered the case moot.

On remand, in what came to be called *Kiyemba III*,<sup>57</sup> the D.C. Court of Appeals reinstated its judgment and opinion in *Kiyemba I*, modified to account for the recent developments in relocating the Uighurs.<sup>58</sup> Shortly thereafter, the Supreme Court denied the Uighurs' renewed petition for certiorari.<sup>59</sup> Justices Breyer, Kennedy, Ginsburg, and Sotomayor issued a brief statement addressing the denial. In their view, the government's resettlement offers, "the lack of any meaningful challenge [by the Uighurs] as to their appropriateness, and the Government's uncontested commitment to continue to work to resettle [the Uighurs] transform [the habeas] claim."<sup>60</sup> Put differently, there is, the justices stated, "no Government-imposed obstacle to petitioners' timely release and appropriate resettlement."<sup>61</sup> If circumstances were to materially change, the justices

---

50. See Feb. 19, 2010 Kagan Letter, *supra* note 4.

51. Linda Greenhouse, *Saved by the Swiss*, N.Y. TIMES (Feb. 11, 2010), <http://opinionator.blogs.nytimes.com/2010/02/11/saved-by-the-swiss/> (describing Kagan's arguments).

52. *Kiyemba v. Obama*, 130 S. Ct. 1498 (No. 08-1234) (2010).

53. *Kiyemba v. Obama*, 559 U.S. 131, (2010) (subsequent dismissal and remand).

54. *Id.*

55. *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

56. *Id.*

57. As for *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010), it relates only tangentially to *Kiyemba I* and *III*. See Stephen I. Vladeck, *Normalizing Guantanamo*, 48 AM. CRIM. L. REV. 1547, 1558-62 (2011) (explaining that *Kiyemba II* involves similar issues raised when the military detention of terrorism suspects is concerned).

58. *Kiyemba v. Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010).

59. *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011).

60. *Id.* at 1631.

61. *Id.*

stated that the Uighurs should “raise their original issue (or related issues) again in the lower courts and this Court.”<sup>62</sup>

Thus, for now, and for at least some of the Uighur detainees, their story did indeed finally end, as it began, in relocation—albeit in relocation to a foreign country. For others, relocation remains little more than a hope. Regardless, at the time that the Supreme Court was presented with the petitions in *Kiyemba I* and *Kiyemba III*, the Uighurs were still being—and had been, for over six years—unlawfully detained by the U.S. government. New factual issues related to continuing diplomatic negotiations for transfer to another country should not have altered the legal requirement to release them, at the very least pending successful completion of the negotiations for their release. While the majority of the Uighurs originally brought to Guantanamo Bay in 2002 have since been relocated, several remain, effectively indefinitely detained, by virtue of their simple desire to select, or at least have a say in, the place where they will live—a right that rule of law principles suggests they are entitled, having had their detention determined unlawful.

Petitioners’ reasons for rejecting available relocation offers are varied, but not without cause. For example, Bahtiyar Mahnut refused to accept Palau’s offer of relocation because that country refused to accept his brother, Arkin Mahmud, who had developed severe mental health problems at Guantanamo after spending considerable time in solitary confinement, due to its purported inability to treat those problems within its borders.<sup>63</sup> And as noted in petitioners’ letter brief to the Court, “[t]he consequences of solitary confinement are psychologically brutal,” and therefore likely to require significant treatment options.<sup>64</sup> Other detainees rejected relocation offers because the proposed locations were not home to an established Uighur community.<sup>65</sup> The group of Uighurs relocated to Albania shortly before the Supreme Court oral argument in the *Kiyemba* case, illustrate the problems that may arise from relocation to foreign lands. The Uighurs now living in Albania live in a refugee camp, monitored by armed guards, and surrounded by razor wire.<sup>66</sup> There is no established Uighur community in Albania, and the Uighurs do not speak the language, making social integration difficult, if not impossible.<sup>67</sup> Moreover, relocated Uighurs have

---

62. *Id.* at 1632.

63. See Del Quentin Wilber, *Uighur’s Chance to Leave Guantanamo Means Leaving Brother*, WASH. POST, (Sept. 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/27/AR2009092703076.html?hpid=topnews&sid=ST2009092703279>.

64. Feb. 19, 2010 Willet Letter, *supra* note 4, at 2 (citing to the Court’s observation of this condition in *In re Medley*, 134 U.S. 160 (1890)).

65. See *Chinese Muslims at Guantanamo Bay Still Need Help Resettling*, FT. WAYNE J. GAZETTE, Mar. 8, 2010, at 11A.

66. Kara Simard, Note, *Innocent at Guantanamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 SUFFOLK TRANSNAT’L L. REV. 365, 386 (2007).

67. See *id.*

often reported social and community alienation due to their political status, and the assumption that either their original designation as “enemy combatants” or their time spent at Guantanamo means that they are violent or dangerous.

Apparently in the eyes of the Court, however, the Uighurs are “too picky” in their relocation wishes, refusing perfectly good resettlement offers.<sup>68</sup> This undoubtedly is a problematic position. The government wasn’t “very discriminating when [it] scooped them up in Afghanistan, and carried them away,” ultimately detaining the Uighurs for nearly a decade.<sup>69</sup> As one commentator has noted, “[i]s the idea that as long as they aren’t being tortured they should be pleased to find themselves wherever we might put them next? How about a research station in Antarctica?”<sup>70</sup> I believe that habeas relief must be accompanied by a meaningful remedy, in this case, physical freedom, without the restrictions associated with life, albeit in the “least restrictive conditions” available, at the Guantanamo Bay naval base. It also must be accompanied by other rights that the detainees long have been denied, including the right to have some say in the ultimate location where they will live. The Uighurs’ detention has been found to be unlawful; their designation as “enemy combatants” was declared unjustified. They must be relocated from the site of their detention. Surely we cannot blame them for wanting some choice in where they end up. At the very least, pending permanent relocation to an “appropriate country,” mutually selected, the Uighurs could be resettled in an established Uighur community in the United States.<sup>71</sup>

Because the Supreme Court denied certiorari in *Kiyemba III*, the D.C. Circuit’s *Kiyemba I* decision, reinstated as modified, still stands. As commentators have noted, the Supreme Court’s last act—or rather, its failure to act—allows its landmark 2008 decision in *Boumediene* to unravel to the point of its near-evisceration.<sup>72</sup> Without a meaningful remedy, habeas relief means little.<sup>73</sup> Moreover, the D.C. Circuit’s governing opinion does not account for the potentially unending nature of the War on Terror,<sup>74</sup> and incorrectly relies on immigration law as a basis for denying

---

68. See Amy Davidson, *The Uighurs’ Passover Story*, THE NEW YORKER (Apr. 19, 2011), <http://www.newyorker.com/online/blogs/closethread/2011/04/uighurs-supreme-court-guantanamo-passover.html>).

69. See *id.*

70. *Id.*

71. See Amended Brief for Uyghur American Association as Amici Curiae Supporting Petitioners at 16, *Kiyemba v. Bush*, (No. 08-5424) (D.C. Cir. Oct. 20, 2008), available at <http://ccrjustice.org/files/Uyghur%20American%20Association%20-%20Amicus%20Brief.pdf>.

72. See, e.g., Chow, *supra* note 21, at 777; Jennifer L. Milko, Comment, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173, 195 (2012).

73. See *infra* Part II.A.

74. See *infra* Part I.A.2.

release to the Uighur detainees.<sup>75</sup> In *Hamdi*, the Supreme Court stated that it had “no reason to doubt that [lower] courts faced with . . . sensitive matters,” like those raised in *Kiyemba* and the other detainee cases, “will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”<sup>76</sup> The D.C. Circuit’s opinion in *Kiyemba I*, reinstated in *Kiyemba III*, suggests that the Court’s faith was misguided. Rather than balancing the competing interests of national security and individual rights, the court incorrectly employing immigration law’s plenary power doctrine deferred entirely to the decision-making of the executive branch. It is now time—however unlikely—for the Supreme Court to “finish what it started”<sup>77</sup> more than four years ago in *Boumediene*, and definitively rule on the proper remedy to be fashioned by habeas courts in cases related to Guantanamo Bay.

## II. PLACING *KIYEMBA* IN CONTEXT: DETERIORATION OF THE RULE OF LAW POST-9/11

On September 11, 2001, a group of individuals associated with the Al-Qaeda terrorist organization executed a coordinated strike against the United States, resulting in the deaths of 3,000 innocent civilians, the “largest single day death toll from foreign attack on American soil.”<sup>78</sup> Within days of the attacks, the legislative and executive branches began responding with measures designed to prevent future terrorist attacks against the United States.<sup>79</sup> As challenges were made to these measures, the federal courts became involved in an “ongoing dialogue” with the political branches of government<sup>80</sup>—a dialogue that has played out over the course of the last ten years. At the very heart of this dialogue are questions about the proper role of the federal courts in wartime.

These questions are not new. Indeed, in a variety of cases, stretching from the Civil War to the so-called “War on Terror,”<sup>81</sup> courts have

75. See *infra* Part I.B.

76. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion).

77. *Milko*, *supra* note 72, at 197.

78. Saxby Chambliss, *The Future of Detainees in the Global War on Terror: A U.S. Policy Perspective*, 43 U. RICH. L. REV. 821, 821 (2009) (quoting Bob Herbert, *Vital Statistics*, N.Y. TIMES, Oct. 31, 2002, at A27).

79. See, e.g., Katy R. Jackman, Comment, *Preserving the Writ: The Military Commission Act’s Unconstitutional Attempt to Deprive Lawful Resident Aliens of Their Habeas Corpus Rights*, 67 MD. L. REV. 736, 736 (2008).

80. See *Boumediene v. Bush*, 553 U.S. 723, 738 (2008); see also Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 910 (2009) (reviewing BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008)).

81. See also Tom Shields, *I Can’t Believe It’s Not War. . .How They Rebranded a Fiasco*, SUNDAY HERALD, July 31, 2005, at 20 (noting that the Bush administration “phase[d] out the phrase

struggled to negotiate the delicate balance between national security and civil liberties in times of crisis. At times, the courts have strongly asserted their role as protectors of individual rights, and at others, they have failed to live up to their constitutional mandate. These cases are important for three reasons. First, they provide a way of understanding the predicament presented by cases such as *Kiyemba v. Obama*, illustrating lessons learned (or yet to be learned) from our past and explaining how we got here.<sup>82</sup> Second, they encourage us to think about the role of the courts as guarantors of individual liberty, which is pertinent for our purposes because, to the extent that courts are able to fashion meaningful habeas remedies, a significant individual right is protected. Third, they offer a lens for evaluating a claim made by distinguished legal historian Mary Dudziak: That wartime is not the exception to the norm in American history, but the norm itself.<sup>83</sup> If Dudziak is right, how should we understand what have been commonly called the “wartime cases,” and what is their lingering significance today, particularly in the context of the War on Terror, which numerous courts and commentators have defined as a potentially perpetual war?<sup>84</sup>

#### A Historical Perspective

Essential to placing *Kiyemba I* in its larger context is an understanding of how the courts have approached their role in times of war. *Kiyemba I* presented to the Supreme Court an important question: What power does a habeas court have to issue a meaningful remedy? At its core, *Kiyemba I* presents even simpler questions: What role should the courts play in the ongoing, potentially permanent, War on Terror, and what power do they have to remedy violations of individual rights made therein?

As many have noted, the post 9-11 landscape is not the first context in which a debate over the role of courts in times of national crisis has arisen.<sup>85</sup> Indeed, since the founding of this nation, jurists, lawmakers, and

---

“war against terror” and “rebranded, or repositioned to use more nuanced language” the war as “the struggle against violent extremism”); Alex Beam, *Obama’s Newspeak*, BOS. GLOBE, July 10, 2009, at 42 (noting that the Obama administration later rebranded the ongoing conflict as the “overseas contingency operation”).

82. For an interesting discussion of the legal significance of these kinds of “lessons from history,” focusing particularly on the precedential value of cases such as *Ex Parte Quirin*, *Hirota*, and *Eisentrager*, see Harlan Grant Cohen, “Undead” *Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957 (2010).

83. Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1670–71 (2010).

84. See, e.g., *Boumediene*, 553 U.S. at 771 (“[I]f measured from September 11, 2001, to the present, [the War on Terror] is already among the longest wars in American history.”); Janelle Allen, Comment, *Assessing the First Amendment as a Defense for Wikileaks and Other Publishers of Previously Undisclosed Government Information*, 46 U.S.F. L. REV. 783, 788 (2012) (describing the War on Terror as “seemingly perpetual”).

85. See, e.g., Geoffrey R. Stone, *A Culture of Civil Liberties*, 36 RUTGERS L. J., 825, 825 (2005); Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 459–60 (2003).

scholars have debated both the extent to which courts should intervene in conflicts between national security and individual rights, and the balance that should be struck between those competing interests. This area has been well hashed in the legal and historical literature,<sup>86</sup> but a few significant case law examples are worth noting.

In April 1861, one month after his inauguration, President Abraham Lincoln, motivated by a period of riots, bridge-burning, and “deep uneasiness” in the Baltimore-Washington area, authorized the suspension of the writ of habeas corpus.<sup>87</sup> One month later, Union soldiers apprehended John Merryman, a vocal opponent of President Lincoln, accusing him of various acts of treason.<sup>88</sup> Upon his arrest, Merryman petitioned for a writ of habeas corpus.<sup>89</sup> Chief Justice Roger Taney, riding circuit in Maryland at the time, granted Merryman’s petition.<sup>90</sup> Relying on President Lincoln’s suspension of habeas corpus, the detaining officer refused to comply with the writ.<sup>91</sup> Upon learning of the refusal to comply, Chief Justice Taney issued an oral statement from the bench, and several days later, produced a written opinion—*Ex Parte Merryman*.<sup>92</sup> Admonishing President Lincoln,<sup>93</sup> Taney held that only Congress, and not the President acting alone, could suspend the writ.<sup>94</sup> President Lincoln’s response was public. In his July 4 address to a special session of Congress, he made a now-famous statement:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to

---

86. See generally, e.g., DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); Bruce Ackerman, Symposium: A New Constitutional Order?, Keynote Address, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475 (2006); Frank J. Williams, *Abraham Lincoln and Civil Liberties—Then and Now: Old Wine in New Bottles*, 3 ALB. GOV’T L. REV. 533 (2010); Wood, *supra* note 85.

87. REHNQUIST, *supra* note 86, at 22–25.

88. See generally Williams, *supra* note 86, at 533–541 (describing the events surrounding Merryman’s arrest).

89. See *id.*

90. See *id.* at 541–42.

91. See *id.*

92. 17 F. Cas. 144 (1861). *Ex Parte Merryman* was technically issued as an opinion of the Circuit Court for the District of Maryland. Williams, *supra* note 88, at 542. In his original opinion, however, Chief Justice Taney captioned the case “Before the Chief Justice of the Supreme Court of the United States at Chambers.” *Id.* For more on the precedential value of *Merryman*, see *id.* at 542–43.

93. *Merryman*, 16 F. Cas. at 153.

94. *Id.* at 148.

pieces, lest that one be violated?<sup>95</sup>

The Lincoln-Taney show-down is an early example of the potential for conflict between the political and judicial branches in times of national crisis. In *Merryman*, Taney staunchly asserted the courts' role in protecting civil liberties in wartime, habeas corpus chief among them.<sup>96</sup> As his July 4 address made clear, for Lincoln, the habeas question was "a matter of national survival."<sup>97</sup> Although the Lincoln administration largely ignored Taney's order, and although Congress later formally suspended habeas corpus,<sup>98</sup> what matters most—as I develop below—was that a court, or at the very least, an individual justice, stood up for basic constitutional principles and the rule of law, even in the face of an incredible national crisis and the potential dissolution of the nation.

More than eighty years later, the debate about the proper role of the courts in wartime was renewed in the context of various executive and legislative orders and enactments that, *inter alia*, required Japanese-Americans living on the west coast to report to relocation centers, and later, resulted in the physical relocation of large numbers of Japanese-Americans to internment camps.<sup>99</sup> Fred Korematsu, a Japanese-American living in

95. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORK 55 (John G. Nicolay & John Hay eds., New York, Century Co. 1894); see also Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1867 n.107 (2010).

96. To be sure, it is not uncontroversial to suggest that Taney's position in *Merryman* represents support for the rule of law through protection of individual rights. See, e.g., Jerrica A. Giles & Allen C. Guelzo, *Colonel Utley's Emancipation—Or, How Lincoln Offered to Buy a Slave*, 3 MARQ. L. REV. 1263, 1279 (2010) (suggesting that Taney's opinion in *Ex Parte Merryman* constituted an effort "to obstruct the Union war effort" and was grounded in his continuing support of slavery); see also Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 136 n.275 (2008) ("It is worth noting that *Ex Parte Merryman* as written by Justice Taney, himself responsible for endorsing a deprivation of liberty in *Dred Scott* . . ."). However, when separated from his most famous decision or to the extent that the two cases can be reconciled, Taney's opinion in *Merryman* suggests that he viewed suspension of the writ as a simple matter of liberty—that the government could not detain a citizen without permitting him an opportunity to challenge his detention. Timothy S. Huebner, *Lincoln Versus Taney: Liberty, Power, and the Clash of the Constitutional Titans*, 3 ALB. GOV'T L. REV. 615, 638–39 (2010). Huebner offers the following explanation as a potential reconciliation of Chief Justice Taney's decisions in *Merryman* and *Dred Scott*:

[T]he connection between *Dred Scott* and *Merryman* was that, in both instances, Taney [sought to] protect individual rights from the supposedly oppressive acts of the central government. From a modern perspective, of course, the notion of slaveholders possessing the right to own other human beings is both ludicrous and repulsive. But viewed in the context of nineteenth century constitutional thought, Taney's decisions in the two cases were of a piece. The Chief Justice saw protecting the rights of slaveholders from hostile congressional legislation as just as important as protecting the rights of Confederate sympathizers from unlawful arrest and detention.

*Id.*

97. *Id.* at 639; see also Ackerman, *supra* note 86, at 482 ("It was [Lincoln's] insistence on saving the Union, at whatever the cost, that led him to suspend constitutional rights against arbitrary arrest and detention.").

98. REHNQUIST, *supra* note 86, at 39.

99. *Id.* at 192–93.



California, was convicted of violating these exclusion orders.<sup>100</sup> Korematsu challenged his conviction and the “draconian” relocation and internment requirement in federal court, eventually appealing the case to the United States Supreme Court.<sup>101</sup> In *Korematsu v. United States*,<sup>102</sup> a majority of the Court upheld the relocation and internment policy, deferring, with little question, to the military judgment of the political branches.<sup>103</sup> Although the Court acknowledged the “hardships imposed by [the order] upon a large group of American citizens,” it nonetheless concluded that because “hardships are part of war, and war is an aggregation of hardships,” the relocation and internment orders were constitutionally permissible.<sup>104</sup> The majority’s opinion in *Korematsu* has been widely condemned,<sup>105</sup> but never explicitly overturned. Three justices—Roberts, Murphy, and Jackson—issued staunch dissents.<sup>106</sup>

What is significant, in our view, about the *Merryman* and *Korematsu* cases is that they represent moments in our history in which, due to ongoing war, the political branches took actions that denied important civil liberties to certain citizens and non-citizens alike. Chief Justice Taney’s *Merryman* opinion may have been of little practical significance, and the *Korematsu* majority may have simply gotten it wrong, but at least a judicial officer—Taney himself in *Merryman*, the dissenting justices in *Korematsu*—commented on the violation, rising to assert the continued validity of civil liberties, even in times of crisis. While much has been said about what can be learned from these cases, and the other “wartime cases,” what they perhaps best represent is the need for constructive judicial dissent from executive excess in times of national crisis. Of course, such dissent, particularly in times of national crisis, may require judicial courage.<sup>107</sup> An exercise of this courage in the *Kiyemba* cases—whether in the form of complete appellate review, or at the very least, a dissent from the Court’s earlier dismissal—might have reminded the lower courts, at the very least, of their responsibility to adhere to the Constitution, despite national security pressures.

Although dissenting opinions have little value as legal precedent, they

---

100. *Id.* at 193.

101. *See id.*

102. 323 U.S. 214 (1945).

103. *See id.* at 217–18.

104. *See id.* at 219.

105. *See, e.g.,* COLE, *supra* note 86, at 99 (“While *Korematsu* itself has not been overruled, it is widely viewed with shame. Eight of the nine sitting Justices on today’s Supreme Court have stated that *Korematsu* was wrongly decided; Justice Antonin Scalia has placed *Korematsu* on par with *Dred Scott*.”); Wood, *supra* note 85, at 469–70 (noting that “many of the lapses from the rule of law (such as the Japanese internments [and cases]) are now widely regarded as shameful episodes that should never be repeated”).

106. *See Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting); *id.* at 242 (Murphy, J., dissenting); *id.* at 247 (Jackson, J., dissenting).

107. *See* Wood, *supra* note 85, at 469–70.

do put the ideas and core principles they state out into the world, where they may influence public opinion, future judicial rulings, or even, perhaps political decisions. The potential to influence public opinion is especially significant where civil rights of unpopular groups are at stake, whether those are the rights of Japanese Americans during WWII or persons who are or perceived to be Muslims today.<sup>108</sup> Furthermore, concurring and dissenting opinions also signal that the Court is not a united front on an issue, which is valuable at least in terms of determining how much weight to give to a judicial decision; and afford opportunities for overturning precedent in the future. Moreover, they signal that careful consideration ought to be given to a divided court's position on important issues involving individual rights, especially in national security cases. Concurring and dissenting opinions are thus very important in a democratic society.<sup>109</sup>

### B. Post-9/11 Jurisprudence

On November 13, 2001, two months after September 11, President George W. Bush issued a military order authorizing the detention and trial by military commission of any non-citizen who the President had "reason to believe" was in any way affiliated with Al Qaeda or terrorism.<sup>110</sup> The order also prohibited detainees from seeking judicial review of the status determination made by the President in the courts of the United States or in international tribunals.<sup>111</sup> So began a series of cases and Congressional enactments that spoke directly to the role of the courts in times of national crisis.

Over a four-year period, the Supreme Court, addressing for the first time the role of the courts in the context of the new War on Terror, made powerful assertions about that role and about the relationship between the courts and the political branches in times of war. In the first of a line of significant cases, the Court held in *Rasul v. Bush*<sup>112</sup> that jurisdiction to "determine the legality of the Executive's potentially indefinite detention of [non-citizen] individuals who claim to be wholly innocent of wrongdoing" lies with the federal courts and that challenges to the legality of such

---

108. See generally, e.g., COLE, *supra* note 86; see also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002), which discusses the public and private discrimination directed towards Muslim and those perceived to be Muslim following September 11.

109. See also CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

110. Military Order of November 13, 2001, §§ 3(a), 4(a), 3 C.F.R. 918, 919–20 (2002), reprinted in 10 U.S.C. § 801 (Supp. V. 2005). See generally Kathleen M. McCarroll, *With Liberty and Justice for All: The November 13, 2001 Military Order Allowing the Use of Military Tribunals to Try Those Suspected of Aiding Terrorists Violates the Rights Guaranteed to Non-Citizen United States Residents Under the Constitution*, 80 U. DET. MERCY L. REV. 231, 233–34 (2003) (detailing the provisions of President Bush's November 13, 2001 military order).

111. Military Order of November 13, 2001, § 2(a), 3 C.F.R. at 919.

112. 542 U.S. 466 (2004).

detentions are to be presented through petitions for a writ of habeas corpus.<sup>113</sup> The same day that it issued its opinion in *Rasul*, the Court ruled in *Hamdi v. Rumsfeld*<sup>114</sup> that detainees<sup>115</sup> are entitled to certain basic due process guarantees, including “notice of the factual basis for classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>116</sup>

In 2006, the Supreme Court decided *Hamdan v. Rumsfeld*,<sup>117</sup> finding that the recently-enacted Detainee Treatment Act of 2005,<sup>118</sup> which purported to strip the federal judiciary of jurisdiction over the habeas petitions of all Guantanamo Bay detainees,<sup>119</sup> did not apply to detainee cases pending at the time of the statute’s enactment.<sup>120</sup> Shortly after the Court decided *Hamdan*, Congress enacted the Military Commissions Act of 2006,<sup>121</sup> which amended the Detainee Treatment Act to explicitly include language stripping the courts of jurisdiction over pending cases. The Military Commissions Act also broadened the scope of the previous act, so that the restrictions on habeas petitions applied to all enemy combatant cases, whether the detainee was located at Guantanamo Bay, or not.<sup>122</sup> The constitutionality of the latter statute was presented to the Supreme Court in *Boumediene v. Bush*,<sup>123</sup> arguably the defining opinion of this period in the Court’s history, and the Court’s final word—to date—in the ongoing War on Terror.<sup>124</sup>

In *Boumediene*, the Court held that the petitioners, a group of foreign nationals designated enemy combatants by the Executive and detained at Guantanamo Bay,<sup>125</sup> are “entitled to the privilege of habeas corpus to

113. *See id.* at 483–85.

114. 542 U.S. 507 (2004) (plurality opinion).

115. The opinion is arguably limited to American citizen detainees. *See* Bruce Miller, *No Virtue in Passivity: The Supreme Court and Ali Al-Marri*, 33 W. NEW ENG. L. REV. 697, 726 (2011) (“The limited resolution offered by . . . *Hamdi* . . . to the questions raised by executive detention without trial is . . . narrowed even further by the fact that the detainee[] in [that] case[] was an] American citizen[.] It is possible that the Justices’ opinion[] . . . [is] largely irrelevant to the fates of hundreds, or perhaps possibly thousands, of non-citizens held without trial in American military custody at various sites, known and unknown, around the world.”).

116. *Hamdi*, 542 U.S. at 533.

117. 548 U.S. 557 (2006).

118. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2739 (2005).

119. *Id.* § 1005(e)(2), 119 Stat. 2739, 2742–43.

120. *Hamdan*, 548 U.S. at 575–84.

121. The Military Commissions Act, U.S.C.A. § 2241(e)(7) (Supp. 2007)).

122. Jackman, *supra* note 79, at 748-49 (citing The Military Commissions Act, *supra* note 121).

123. 553 U.S. 723 (2008).

124. *See* Megan Gaffney, *Boumediene v. Bush: Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L.L. REV. 197, 197 (2009) (“With *Boumediene*, the Court [firmly] asserted its role in the War on Terror.”).

125. The facts of *Boumediene* are as follows: Lakhdar Boumediene, an Algerian national, was picked up, along with five other men, by American forces in Bosnia-Herzegovina, and transported to Guantanamo Bay in 2002, where they were classified as enemy combatants based on allegations that they were involved in terrorist activity. Kim Lane Scheppelle, *The New Judicial Deference*, 92 B.U. L.

challenge the legality of their detention.”<sup>126</sup> The Court also held that the procedures for reviewing the status designation of a detainee provided by Congress in the Detainee Treatment Act were unconstitutional because they did not provide an adequate and effective substitute for habeas corpus.<sup>127</sup> Consequently, to the extent that the Military Commission Act operated to strip the federal courts of jurisdiction over the habeas petitions of Guantanamo detainees, that statute, the Court held, effected an unconstitutional suspension of habeas corpus.<sup>128</sup> Justice Kennedy, writing for the majority, acknowledged the significance of the writ of habeas corpus, referring to it as a “time-tested device” that is central to the “delicate balance of governance,” and explaining that such a balance is itself “the surest safeguard of liberty.”<sup>129</sup>

Just as significant as what *Boumediene* does say, is what it does not. The case does not address the Executive’s authority to detain the Guantanamo Bay detainees, nor does it hold that the writ must issue as to these particular detainees.<sup>130</sup> Instead, the case holds only that the detainees are entitled to access to the writ; the contours of when, if at all, the writ must issue, or the appropriate remedy for the writ upon issuance are not addressed. In the Court’s words, “[t]hese and other questions regarding the legality of the detention,” and presumably, the appropriate remedy if the detention is found unlawful, “are to be resolved in the first instance” by the trial court.<sup>131</sup>

Thus, in the years immediately following 9/11, the Supreme Court took deliberate, if uneven, steps in the direction of affirmatively asserting its role as a guarantor of individual rights in the context of the War on Terror. However, *Boumediene*—which was decided more than four years ago—remains the Court’s last word. In 2010, eight petitions for certiorari related to the continued detention of various prisoners at Guantanamo Bay were presented to the Supreme Court.<sup>132</sup> The Supreme Court denied certiorari as to seven of the eight petitions; the eighth petition was rendered moot.<sup>133</sup> The Supreme Court’s recent silence in this arena is deafening. As I discuss throughout this article, *Kiyemba* presented the Court with an opportunity to break its silence—to make clear rulings on specific remedial issues related to the habeas rights of the Guantanamo detainees and to

---

REV. 89, 137 (2012) (noting that U.S. forces picked up these individuals “despite contrary orders from the highest court [in Bosnia], which had investigated all charges against Boumediene and the others only to find them baseless”). The detainees remained at Guantanamo until their habeas petitions were considered by the Supreme Court in 2008. *Id.*

126. *Boumediene*, 553 U.S. at 771.

127. *See id.* at 779–94.

128. *See id.* at 792.

129. *Id.* at 745.

130. *Id.* at 733.

131. *Id.*

132. *Id.*

133. *See id.* at 189.

reassert the judiciary's ongoing role in securing individual rights in the War on Terror. The Supreme Court missed this opportunity and others, leaving much unsaid.

Justice O'Connor's 2004 plurality opinion in *Hamdi* offered perhaps one of the strongest assertions of the continued and undiminished role of the judiciary in the War on Terror, an assertion that could have been reaffirmed, and reinvigorated, in *Kiyemba*. She rejected "the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in this context, stating that such an assertion "serves only to condense power into a single branch of government."<sup>134</sup> Such concentration of power is contrary to established principles, Justice O'Connor states, as the Court has long "made clear that a state of war is not a blank check for the President when it comes to [individual] rights."<sup>135</sup> Indeed, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."<sup>136</sup> By this metric, *Kiyemba* represents a tragically missed opportunity. The case also represents a missed opportunity because, in the wake of *Boumediene*, the lower federal courts, and particularly the courts located in the District of Columbia, have tended (with some significant exceptions) not to delicately balance the competing interests of national security and civil liberties, but to tip the scales in near-absolute deference to the government's security agenda—thus writing the very "blank check" that Justice O'Connor feared.

In an important 2005 article, distinguished legal scholar Cass Sunstein termed this phenomenon "National Security Fundamentalism."<sup>137</sup> In the D.C. Circuit, where the large majority of cases pertaining to the Guantanamo Bay detainees have been heard, National Security Fundamentalism is ascendant. Cass Sunstein characterizes the D.C. Court of Appeals' approach to these cases as accepting a "highly deferential role for the judiciary" in cases where "national security is threatened."<sup>138</sup> Under this approach, "the president must be permitted to do what needs to be done to protect the country," and the judiciary is, simply, to butt out.<sup>139</sup> Six years later, Sunstein's description of the approach of the D.C. courts to Guantanamo Bay cases remains on point. *Kiyemba I*, and its reinstated and modified counterpart, *Kiyemba III*, are classic examples of a national

---

134. *Hamdi*, 542 U.S. at 535-36 (emphasis omitted).

135. *See id.* at 536.

136. *Id.*

137. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693 (2005).

138. *Id.*

139. *See id.*

security fundamentalist approach to a troubling question involving balancing national security and civil liberties.

*C. The Deteriorated Role of the Courts Post-9/11*

*1. The Unreviewable Executive and the Assertion of Inherent Power*

One week after the 9/11 attacks, Congress passed the Authorization for the Use of Military Force (AUMF),<sup>140</sup> which authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>141</sup> The Bush administration “relied on the AUMF to argue that the scope of its ‘all necessary and appropriate force’ includes the indefinite detention of suspected terrorists as enemy combatants,” an approach that has been adopted, arguably, by the Obama administration.<sup>142</sup> Moreover, President Bush’s November 13, 2001 Military Order “authoriz[ed] the Secretary of Defense to detain any alien the president determined to be a member of al Qaeda; or who had engaged in, aided or abetted, or conspired to commit international terrorism; or who had harbored someone who had done any of those acts.”<sup>143</sup> The Military Order also provided that detainee trials would occur in military tribunals and denied the detainees “the right to seek recourse in any other tribunal, including state and federal courts.”<sup>144</sup> Ostensibly, the government’s plan was to conduct its War on Terror without judicial intervention. The jurisdiction-stripping provisions of the Detainee Treatment and Military Commissions Acts are further evidence of this effort.

Despite the Court’s efforts to ensure that the Guantanamo Bay detainees be accorded some semblance of procedural and substantive rights,<sup>145</sup> the detainees nonetheless have found themselves in a “legal black hole.”<sup>146</sup> The political branches repeatedly denied the detainees their rights. Further, court decisions regarding those rights are slow coming. In many ways, the Bush administration attempted to create an effectively “unreviewable Executive,” as evidenced by the administration’s in-court arguments that the President has the authority to conduct counterterrorism

---

140. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 *et seq.*).

141. *Id.* (codified at 50 U.S.C. § 1544).

142. A. Wallace Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AM. L.J. 245, 248 (2008).

143. *Id.* (citing Military Order of November 13, 2001, § 2(a), 3 C.F.R. at 919).

144. *Id.*

145. *See supra* Part I.A.1.ii.

146. *See generally, e.g.,* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004); *see also* Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 352 (2009) (describing Guantanamo Bay as a “law-free zone”).

measures without judicial intervention by virtue of his “inherent” war powers as “commander-in-chief.”<sup>147</sup> Yet, despite the government’s lack of success in so arguing before the Supreme Court, few, if any, detainees have been released or transferred from the Guantanamo Bay facility without the government’s express acquiescence.<sup>148</sup>

What are the origins of this approach? In response to the first attempted terrorist attack on the World Trade Center in 1993, the Clinton administration adopted the traditional criminal investigative approach used by the FBI, followed by widely-covered jury trials held in the criminal justice system, successful court convictions, and long-term incarcerations.<sup>149</sup> This was, as one commentator has noted, a “quintessentially American way of fighting terrorism,” which in the years following 9/11, “is becoming a rapidly fading memory.”<sup>150</sup> In the days, weeks, and months following 9/11, the Bush administration argued that the magnitude of the 9/11 attacks, coupled with the threat of future attacks, necessarily elevated the previously employed criminal justice paradigm to a war paradigm.<sup>151</sup> Pursuant to the AUMF, President Bush ordered American forces into Afghanistan, where U.S. troops remain stationed

---

147. See, e.g., Jonathan Hafetz, *Military Detention in the “War on Terrorism”: Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 36 (2012); see also U.S. Const. art II, § 2 (the commander-in-chief clause). The Obama Administration has, it appears, “all-but abandoned one of the hallmark arguments of the Bush administration—that the President has inherent power under the Commander-in-Chief clause of Article II to take measures he deems appropriate during wartime, and that congressional attempts to constrain that authority, to the extent they even apply, are unconstitutional.” Stephen I. Vladeck, *The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration*, 26 CONST. COMMENT. 603, 604 (2010).

148. See Linda Greenhouse, *The Mystery of Guantanamo Bay*, 27 BERK. J. INT’L L. 1, 3–4 (2009) (describing what she calls “the mystery of Guantanamo Bay”: “How can it be that nearly seven years after the first detainees arrived at the prison there—after numerous courtroom battles, the most significant of which resulted in defeats for the Bush Administration’s position—not a single detainee has ever been released, by order of any court or any other body in a position of authority, against the wishes of the Administration?”).

149. Nathan Goetting, *The National Defense Authorization Act for Fiscal Year 2012: Battlefield Earth*, 68 NAT’L LAW. GUILD REV. 247, 248 (2011) (“In 1995 Ramzi Yousef, Pakistani national, jihadist militant, and nephew of future 9/11 planner Khalid Muhammed, was arrested in Islamabad and extradited to New York where, upon being afforded his constitutional trial rights, the same as any other criminal defendant, he was convicted by a civilian judge in a federal district court for the 1993 bombing of the World Trade Center. Since his conviction the U.S. criminal justice system has dealt with him severely and effectively. He is serving a life sentence in solitary confinement in the so-called ‘Alcatraz of the Rockies,’ the federal supermax prison in Colorado.”).

150. See *id.*

151. See President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 40 Weekly Comp. Pres. Doc. 94, 96 (Jan. 20, 2004) [hereinafter Bush State of the Union] (“I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.”).

today—the longest war in U.S. history.<sup>152</sup> Pursuant to the November 2001 Military Order, American troops began capturing, and subsequently detaining, hundreds of individuals at military camps. Some detainees have now been in American custody for more than a decade.<sup>153</sup> One might ask what explains the difference between the two approaches. Arguably, one approach is in pursuit of a legal avenue for redress; the other permits Executive-level secrecy. More than three thousand civilians lost their lives in the 2001 attacks, compared to the six who died in the 1993 bombing eight years earlier.<sup>154</sup> The perpetrators of the 2001 attack on the World Trade Center and Pentagon were suicide actors; unlike the perpetrators of the 1993 bombing, none survived. These significant differences presented the administration with an opportunity to turn to “the dark side” in meeting the new terrorist threat.<sup>155</sup>

In declaring this a “war on terror,” the Bush administration followed previous administrations in declaring a policy-oriented war on a particular evil—this time, terrorism.<sup>156</sup> But no previous administration had taken the notion of political war to this degree, modifying the war paradigm from mere rhetoric to actual military conflict, notwithstanding, in many instances, the nation’s Constitution, laws, and treaties.<sup>157</sup> In conducting the War on Terror, the administration embarked down a slippery slope of governance in flagrant disregard of individual rights and civil liberties and without transparency, promising that it was protecting the nation against future terrorist threats. Under this approach, the nation found itself falling into the nadir of unfulfilled constitutional guarantees and judicial oversight—or worse, neglect.

As explained above, this behavior is not wholly surprising for presidents during wartime or a national emergency. And although it is the courts’ role to protect individual rights and sanction their infringement, the Bush administration’s wartime detainee policies remained immune from judicial scrutiny until 2004. Consequently, it was not until the Supreme Court’s 2004 decision in *Rasul v. Bush* that the Uighurs gained access to the courts by habeas review. Due to various legislative actions, that access

---

152. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

153. Eric Sandberg-Zakian, *Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention*, 2 HARV. NAT’L SEC. J. 491, 492 (2011) (noting the length of some detainees’ military detentions).

154. Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565, 570 n.23 (2003).

155. See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008) (describing how the decisions made post-9/11 impacted constitutional rights).

156. See Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1871 (2004) (“The Cold War. The War on Poverty. The War on Crime. The War on Drugs. The War on Terrorism. Apparently, it isn’t enough to call a high-priority initiative a High-Priority Initiative. If it’s really important, only a wimp refuses to call it war.”).

157. See *id.* at 1902.



was to be short lived. Only upon issuance of the *Boumediene* decision did the Uighurs gain definitive access to the American judicial system. Until that point, they had been languishing in indefinite detention for nearly six years. Another year would pass before a federal court ordered their release. While some of the Uighur detainees were released pursuant to government agreements, none were released pursuant to court order. If there ever was a time for the Court to act, to step in, acknowledge, and remedy a basic injustice, namely, the unlawful and ongoing detention of a group of individuals that present no threat to the security of the United States, but were the victims of an excessive executive approach post-9/11, surely that time was when the Court was presented with *Kiyemba III*.

Perhaps what is most frustrating about the present situation is that it is entirely of the government's own making. It was the government's rush to action that resulted in the detention of a number of individuals entirely unrelated to terrorism. In the Uighurs' case, the government was aware early on that they were not terrorists, yet it persisted in treating them as such until it finally conceded otherwise.<sup>158</sup> And in its external relocation efforts, the government is now attempting to foist the consequences of its own follies, forays, and missteps onto other countries, while refusing to consider internal relocation, which would allow it to claim responsibility for, and remedy, the wrongs of its own creation.

In 2009, the Obama administration began to pursue fertile avenues for transferring the Uighurs into the continental interior of the United States.<sup>159</sup> But, "in the face of congressional objections," largely registered by Republican critics, reigniting fear-mongering notions about releasing terrorists into our midst,<sup>160</sup> "the White House lost its nerve."<sup>161</sup> These concerns, however, are a political matter—and should not influence the courts, as I describe below. Once a habeas court has determined that detention is unlawful, political opposition to release locations should not alter the legal requirement to release them immediately, at the very least, as I have noted, pending the completion of external relocation negotiations.<sup>162</sup> Any other result undermines *Boumediene*, undermines the rule of law, and affords the Executive, in contravention of the separation of powers, unreviewable discretion to control the detention of individuals captured

---

158. See *supra* note 24 and accompanying text.

159. Carol Rosenberg, *Why Obama Hasn't Closed Guantanamo Camps*, MIAMI HERALD (Jan. 7, 2012), <http://www.miamiherald.com/2012/01/07/2578082/why-obama-hasnt-closed-guantanamo.html>; Samuel C. Kauffman, *Guantanamo Bay Prison Inmates Cleared for Release Continue to Languish*, OREGONIAN (Jan. 11, 2012), [http://www.oregonlive.com/opinion/index.ssf/2012/01/guantanamo\\_bay\\_prison\\_inmates.html](http://www.oregonlive.com/opinion/index.ssf/2012/01/guantanamo_bay_prison_inmates.html).

160. See Barbara Ferguson, *Scattering Begins of Detainees from Gitmo*, ARAB NEWS, June 13, 2009. Similar rumblings were made when the Obama administration made efforts to conduct terrorist trials in the American federal criminal system.

161. Rosenberg, *supra* note 159.

162. See *infra* Part IA.

during the War on Terror—even individuals long-ago found to be innocent of wrongdoing.

## 2. *The Undermining of the Rule of Law*

As history will recall, in May 1977, former President Richard M. Nixon famously told British interviewer David Frost that “when the President does it, that means that it is not illegal.”<sup>163</sup> The Bush administration, taking a page out of Nixon’s playbook, used various tactics, apparently effectively, to “dismantle constitutional checks and balances and to circumvent the rule of law.”<sup>164</sup> In so doing, the administration took advantage of 9/11 to assert “the most staggering view of unlimited presidential power since Nixon’s assertion of imperial prerogatives.”<sup>165</sup> The D.C. Circuit’s opinion in *Kiyemba III*, reinstating as modified its opinion in *Kiyemba I*, is, as I have noted, now governing precedent. That earlier opinion, adopting a view that the government had argued all along, re-characterizes the law pertaining to detainees at Guantanamo Bay as a matter of immigration. Immigration is an area of law where the sovereign prerogative on which an individual is admitted or excluded from entry into the United States is virtually immune from judicial review.<sup>166</sup> The Bush administration long ago adopted the position that judicial review of its detention policies would frustrate its war efforts and its Commander-in-Chief authority, so that efforts to fit *Kiyemba* within the immigration framework worked to the government’s benefit. But, as the *Boumediene* Court explained, “the exercise of [the Executive’s Commander-in-Chief] powers is vindicated, not eroded, when [or if] confirmed” by the judiciary.<sup>167</sup>

In 2007, Ninth Circuit Judge A. Wallace Tashima observed that the rule of law—touted by the United States throughout the world since the end of World War II—has been “steadily undermined . . . since we began the so-called ‘War on Terror.’”<sup>168</sup> “The American legal messenger,” Tashima

---

163. DAVID FROST, *FROST/NIXON: BEHIND THE SCENES OF THE NIXON INTERVIEWS* 89 (2007); *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16; see generally *FROST/NIXON* (Universal Pictures 2008).

164. CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007) (describing the Bush Administration’s policies as creating an “imperial Presidency”).

165. Robin Lindley, *The Return of the Imperial Presidency: An Interview with Charlie Savage*, HISTORY NEWS NETWORK (Jan. 7, 2008), <http://hnn.us/node/44951> (quote is taken from Lindley’s pre-interview remarks).

166. The first clue is that the Uighurs are referred to by the D.C. Circuit as “aliens,” which is a term of art found in the Immigration and Nationality Act. Characterizing the Uighurs as aliens places them in the orbit of immigration law, when in reality, they are foreign nationals not seeking to immigrate to this country. Rather, they are seeking release as part of the substantive remedy required for determined unlawful detention.

167. *Boumediene*, 553 U.S. at 797.

168. Tashima, *supra* note 142, at 245.

notes, “has been regarded throughout the world as a trusted figure of goodwill, mainly by virtue of close identification with the message borne: that the rule of law is fundamental to a free, open, and pluralistic society,” that the United States represents “a government of laws and not of persons,” and that “no one—not even the President—is above the law.”<sup>169</sup> But, according to Tashima, the actions that the United States has “taken in the War on Terror, especially [through] our detention policies, have belied our commitment to the rule of law and caused [a] dramatic shift in world opinion,” so that the War on Terror has been greeted internationally with “increasing skepticism and even hostility.”<sup>170</sup> Put differently, the United States has shot the messenger—and with it, goes the message, the commitment to the rule of law, and our international credibility.

The primary assassin in this “assault on the role of law” is the argument “that the President is not bound by law—that he can flout the Constitution, treaties, and statutes of the United States as Commander-in-Chief during times of war.”<sup>171</sup> Also wreaking havoc on the rule of law is the notion, described above, that the President’s actions in times of war are unreviewable, and that the judiciary has no role to play in checking wartime policies—a notion perpetuated by placement of issues like those raised in *Kiyemba* within the immigration framework.

How can the Executive take such an approach as its legal defense, despite swearing, upon inauguration, to “preserve, protect[,] and defend the Constitution of the United States,”<sup>172</sup> and despite constitutional directive that he “take Care that the Laws be faithfully executed”?<sup>173</sup> As distinguished co-authors Charles Fried and Gregory Fried observe, the oath of office does not mention defending national security.<sup>174</sup> Rather, “the president’s duty is explicitly to the law, not [to] some vague goal beyond the law.”<sup>175</sup> According to these authors, “[t]he law is our defense against tyranny, the arbitrary imposition of one person’s will over all others, and against anarchy, the ungoverned combat of many people’s wills.”<sup>176</sup> If, as the Executive has done since 9/11, “we cut down the laws to lay hold of our enemies,” where are we to “hide when the Devil turns round on us, armed with the power of the state?”<sup>177</sup> If a reminder of the oath undertaken, the values underlying it, and the need to engage all three branches of government in protecting those values were necessary, the

---

169. *Id.*

170. *Id.*

171. *Id.* at 246.

172. U.S. CONST. art. II, § 1, cl. 8.

173. U.S. CONST. art. II, § 3, cl. 5.

174. CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* 152 (2010).

175. *Id.*

176. *Id.* at 129.

177. *Id.*

Executive would need to look no further than the pages of the Supreme Court Reporter.

In *Ex Parte Milligan*,<sup>178</sup> for example, the Supreme Court stated that the Constitution “is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>179</sup> Central to this protection is the separation of powers, by which one branch of government is not permitted to go unchecked. Indeed, as Justice O’Connor stated in the *Hamdi* case, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>180</sup> And even the Executive’s war power “does not remove constitutional limitations,” including the separation of powers, “safeguarding essential liberties.”<sup>181</sup>

According to the *Milligan* Court, the founding fathers “knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war.”<sup>182</sup> How frequently or of what length, “human foresight could not tell.”<sup>183</sup> But, the founders knew that “unlimited power, wherever lodged at such a time, was especially hazardous to freemen.”<sup>184</sup> For this reason, “they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation.”<sup>185</sup> These safeguards cannot be disturbed by any one branch, unless the Constitution so provides—and with the checks authorized therein.<sup>186</sup> Indeed, “[t]o hold [that] the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not [the courts], say ‘what the law is.’”<sup>187</sup> And “our basic charter cannot be contracted away like this.”<sup>188</sup> To the extent that it has been—through executive action, paired with judicial inaction—the rule of law is undermined. We can and we must do better. The Constitution, and those who drafted it, would demand so.

---

178. 71 U.S. 2 (1866).

179. *Id.* at 120-21.

180. *Hamdi*, 542 U.S. at 536.

181. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also* *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[It was] the central judgment of the Framers . . . that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”).

182. *Ex Parte Milligan*, 71 U.S. at 125.

183. *Id.*

184. *Id.*

185. *Id.* (emphasis omitted).

186. *See id.*

187. *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

188. *Id.*

By reconsidering the opportunities presented, and missed, by the *Kiyemba v. Obama* case, we might see ways that we could do better, ways that we could restore the rule of law to its rightful place in our system of government and in that government's policy choices.

III. RE-CONSIDERING *KIYEMBA V. OBAMA*: THE ILLEGALITY OF INDEFINITE DETENTION, THE INAPPLICABILITY OF IMMIGRATION LAW, AND CHECKING THE UNCHECKED EXECUTIVE

A. *The Illegality of Indefinite Detention and the Remedy Requirement*

The writ of habeas corpus, “derived from the Latin meaning ‘you have the body’” and incorporated into American law from the British common law, safeguards individual liberty “by affording people seized by the government the right to question the grounds for their detention before a judge.”<sup>189</sup> The writ does more than “protect the freedom of the individual from unlawful restraint.”<sup>190</sup> It also represents “an important structural function in our constitutional system,” ensuring “checks and balances among the branches” and “adherence to the rule of law.”<sup>191</sup> Put simply, the writ protects against indefinite and unchecked detention.

While the scope of the writ and its continued viability remain the subject of significant debate, most scholars and jurists agree that the Suspension Clause, the writ's constitutional enshrinement, “protects the writ ‘as it existed in 1789.’”<sup>192</sup> But as distinguished legal scholar Stephen Vladeck notes in a 2011 book review, however, “that limited point of consensus begs a separate question: what was the scope of the writ” at the time of the founding?<sup>193</sup> While jurists and scholars have reached differing conclusions on that point, evidence suggests that habeas, as understood by the framers, included a guarantee of relief. Such evidence indicates that the habeas remedy, as much as access to the writ itself, is an essential part of the constitutional guarantee.<sup>194</sup> Moreover, the early framers viewed habeas

---

189. Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 CHAP. L. REV. 439, 439–40 (2009). Following its common law incorporation, the writ was enshrined in the Constitution, which provides that “[t]he 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.” U.S. CONST., art. I, sec. 9, cl. 2.

190. Hafetz, *supra* note 189, at 400.

191. *Id.*

192. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); Stephen I. Vladeck, Book Review, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 942 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (Harv. Univ. Press 2010)).

193. Vladeck, *supra* note 192, at 942.

194. See generally Brief of Scholars of Nineteenth-Century American Legal History as Amici Curiae in Support of Petitioners, *Kiyemba v. Obama*, 130 S. Ct. 1498 (2008) (arguing that *United States v. Libellants & Claimants of the Schooner Amistad*, 40 U.S. 518 (1841) provides early American precedent for the release of the Uighurs into the United States); Brief of Retired Federal Judges as

as “an essential check on executive power,”<sup>195</sup> and the ultimate guarantor of individual liberties. Alexander Hamilton, quoting Blackstone, referred to habeas as “the bulwark of our liberties,” and, like others, thought habeas to be “such a powerful check on tyranny that a separate Bill of Rights was unnecessary.”<sup>196</sup> Indeed, as Justice Salmon Chase noted in 1868, almost one hundred years after the founding, “The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom.”<sup>197</sup> It has been, stated differently, the most esteemed of constitutional rights. It would make little sense, in view of this long history, for the right to come unaccompanied by a meaningful remedy.

The dissent in *Hamdi* drives this point home. According to Justice Scalia, joined by Justice Stevens, nothing short of bringing criminal charges (if sufficient evidence warranted such charges) would permit an American citizen’s continued detention at Guantanamo Bay.<sup>198</sup> Without such charges, an unqualified release from indefinite detention was necessary.<sup>199</sup> Because the Constitution speaks of “persons” and not “citizens” in the Bill of Rights, the same is, likely, true for noncitizens cleared of all terrorist-related activity, such as the Uighurs. But, since *Hamdi*, the Supreme Court has not again considered the appropriate remedy for a successful habeas petitioner.<sup>200</sup> Rather, the D.C. Circuit’s opinion in *Kiyemba I* as modified on remand, remains the final word on the matter. Because that court mischaracterized *Kiyemba* as an immigration case, as I explain below, rather than a case involving the habeas right and its corresponding remedy, the enduring nature of the writ remains up in the air.

The habeas right’s jurisprudential pedigree is outstanding: indeed, its origins are firmly planted in the thirteenth century’s Magna Carta.<sup>201</sup> The plenary power doctrine—the immigration doctrine on which the D.C. Circuit’s opinion rests, on grounds arguably based in national security fundamentalism<sup>202</sup>—is a judicial creation of the late nineteenth century.<sup>203</sup>

---

Amici Curiae in Support of Petitioners at 13, *Kiyemba v. Obama*, 130 S. Ct. 1498 (arguing that “release from unlawful Executive detention” is the only remedy “that is faithful to the Framers’ separation-of-powers scheme and fulfills the fundamental promise of habeas”).

195. Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1369 (2010).

196. Redish & McNamara, *supra*, note 195, at 1369–70 (citing The Federalist No. 84 (Alexander Hamilton)).

197. *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

198. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2005) (Scalia, J., dissenting).

199. *See id.*

200. *See In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 39 (D.D.C. 2008) (“The Supreme Court’s most recent pronouncement regarding Guantanamo detainees assured them certain procedural guarantees, but hedged when discussing remedy.”). *Hamdi* was, of course, decided prior to *Boumediene*.

201. Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 691–92 (2009).

202. The commitment to application of the plenary power doctrine permits the political branches virtual carte blanche over detainees, as immigration matters are largely immune from judicial review.

It should not trump rights long embedded in our constitutional history.

*B. The Inapplicability of Immigration Law*

Distinguished immigration law professor Stephen Legomsky once wrote, “[i]mmigration law is a constitutional oddity.”<sup>204</sup> The oddity began in the late nineteenth century, when the Supreme Court handed down a pair of cases declaring that Congress possesses a “plenary power” to regulate immigration law—to exclude and expel those immigrants who seek admission (or are admitted) into the United States, whether temporarily or as permanent residents. These foundational cases are *Ping v. United States*, commonly known as *The Chinese Exclusion Case*,<sup>205</sup> and *Fong Yue Ting v. United States*, which could properly be called *The Chinese Expulsion Case*.<sup>206</sup> In the former case, which involved the exclusion of a returning permanent resident under certain statutory enactments, the Supreme Court established the plenary power doctrine.<sup>207</sup> In the latter case, the Supreme Court extended the plenary power doctrine to deportation proceedings.<sup>208</sup> Scholars have long considered both cases shameful precedents sanctioning legislation explicitly based on racial grounds.<sup>209</sup>

*Ping* involved a returning Chinese national seeking readmission into the United States.<sup>210</sup> Ping had resided in the United States prior to his trip to China to visit family and friends, and had obtained the requisite certificate to return to his lawful residence.<sup>211</sup> However, as Ping was en route back to the United States, Congress passed the Chinese Exclusion Act, barring the admission of racially ethnic Chinese individuals into the continental United States.<sup>212</sup> *Ting* involved the deportation of a resident Chinese national who did not have a certificate of lawful presence signed

---

For a case illustrating this immunity, see *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

203. See *Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

204. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984); see Peter H. Schuck, *The Transformation of Immigration Law*, 84 COL. L. REV. 1, 3 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, and judicial role that animate the rest of our legal system.”).

205. 130 U.S. 581 (1889).

206. 149 U.S. 698 (1893).

207. *Ping*, 130 U.S. at 600-11.

208. *Ting*, 149 U.S. at 711-14.

209. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 305 (2d ed. 1996); Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 503 (2001); Francis Valdes, *Outsider Jurisprudence, Critical Pedagogy, and Social Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 65 (2003).

210. *Ping*, 130 U.S. at 581.

211. *Id.* at 581-82.

212. *Id.* at 589-90.

by a white witness.<sup>213</sup> Endorsing the racially-motivated legislation in both cases, the Court attributed the source of the federal power of immigration to international law—specifically, to the notion of a sovereign prerogative exercised in the national interest.<sup>214</sup>

Indeed, in another significant immigration case, *Ekiu v. United States*,<sup>215</sup> the Court declared it an accepted maxim of international law that “every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”<sup>216</sup> Pursuant to this maxim, the Court reaffirmed the plenary power doctrine.<sup>217</sup>

Under that doctrine, the political branches’ authority to exercise power over immigration matters is considered absolute as a matter of substantive policy choices regarding who may enter, and remain within the continental United States<sup>218</sup>—notwithstanding the fact that no express authority to regulate immigration exists within any of Congress’s constitutionally enumerated powers.<sup>219</sup> The doctrine, however, is subject to some constitutional limitations.<sup>220</sup> Indeed, where the legislative reach extends in some meaningful way beyond admission, entry, exclusion, or deportation, the full panoply of constitutional rights may be triggered. In *Yamataya v. Fisher*,<sup>221</sup> for example, the Court observed that “administrative officers, when executing the provisions of a[n immigration] statute involving the

---

213. *Ting*, 149 U.S. at 698. For more on this line of cases and the cultural atmosphere in which both the statutes and the cases were enacted and handed down, see STEPHEN H. LEGOMSKY AND CRISTINA M. RODRIGUEZ, *IMMIGRATION & REFUGEE LAW & POLICY* 119 (5<sup>th</sup> ed. 2009) (citing FRANK F. CHUMAN, *THE BAMBOO PEOPLE* 3–4 (1976)).

214. *See id.* at 119–20.

215. 142 U.S. 651 (1892).

216. *Id.* at 659.

217. *Id.* at 651–64 (citing to *Chae Chan Ping*, 130 U.S. 581, 604–609 (1889)); *see also* *Fong Yue Ting*, 149 U.S. 698 (1893); *cf.* Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 555 (2008) (indicating that *Chae Chan Ping* and *Fong Yue Ting* are the two key constitutional cases establishing the plenary power doctrine in immigration law.).

218. *Cf.* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–28 (1953) (Jackson, J., dissenting) (drawing a distinction between substantive and procedural due process, and noting that the former is more susceptible to political whims, while the later must be fiercely guarded by the judiciary); *id.* at 218–24 (“Substantively, due process of law renders what is due to a strong state as well as to a free individual. It tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means. . . . Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which compromise substantive law.”).

219. LEGOMSKY, *supra* note 213, at 115–16.

220. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

221. 189 U.S. 86 (1903).



liberty of persons,” whether or not those persons entered the country lawfully, may not “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”<sup>222</sup> Similarly, in *Wong Wing v. United States*, the Court invalidated a provision in the Chinese Exclusion Act that imprisoned Chinese persons found to be unlawfully present in the United States and punished with hard labor or deportation, explaining that the legislation exceeded matters within the purview of immigration.<sup>223</sup>

In these cases, constitutional guarantees trumped the plenary power doctrine. Put differently, in *Yamataya* and *Wong Wing*, the Supreme Court found that Congress had overstepped the boundary of authority created by the plenary power doctrine, and veered into an area of substantive and procedural constitutional rights. *Kiyemba* presents a similar case. As the first judge to hear the Uighurs’ claims noted, the fundamental sovereign right to exclude or expel aliens from the interior of the United States “does not mean that the third branch is frozen in place,” unable to step in where constitutional rights are at stake.<sup>224</sup> Rather, the branches should be guided by “the principle that personal liberty is secured by adherence to separation of powers.”<sup>225</sup>

The district judge presiding over the Uighurs’ petitions was prepared to order their release, pending a hearing on the precise contours of that release. The release remedy certainly would have been conditional, as the Uighurs would have no immigration status. As a statutory matter, however, release would have been possible under the Executive’s parole power. The Immigration and Nationality Act<sup>226</sup> gives the Executive the authority to exercise the parole power when a significant public interest or urgent humanitarian concern is implicated.<sup>227</sup> Both factors are present in the Uighurs’ case. First, a strong argument can be made that the Uighurs’ situation presents a significant public interest: Their continued detention has been judicially declared unlawful. Consistent with adherence to the rule of law, they should have been released as soon as judicially-determined conditions were established.<sup>228</sup> Second, as for the urgency of

---

222. *Yamataya v. Fisher*, 189 U.S. 86, 100.

223. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

224. *See In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 42 n.5 (D.D.C. 2008).

225. *Id.* at 42 (citation and internal quotation marks omitted).

226. Pub. L. 89-236 (1965) [hereinafter INA].

227. *Id.* § 212(d)(5)(A).

228. *See, e.g.*, Brian R. Farrell, *Access to Habeas Corpus: A Human Rights Analysis of U.S. Practices in the War on Terrorism*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 3, 6 (2011) (“By providing this judicial check on executive authority, habeas corpus ensures compliance with the rule of law.”); Douglass Cassel, *Liberty, Judicial Review, and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37, 37 (2008) (describing the *Boumediene* decision as one in which the Court “defended individual liberty, judicial review . . . , and ultimately the rule of law”); Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 136 (2008) (“[T]he Great Writ gives the judicial branch of government a crucial rule-of-law function.”).

the humanitarian concern, it was the Executive's action in prosecuting its "War on Terror" that created this situation—not the conduct of the Uighurs. Moreover, the duration of their detention, particularly in light of the fact that they are not now nor were they ever really enemy combatants, adds urgency to the humanitarian concern. Thus, an Executive grant of parole would have been a viable option in this case, if the Executive was ever serious about facilitating the Uighurs' release through the immigration law mechanism.

Moreover, the Supreme Court has stated previously that an individual paroled into the United States is not considered to have been admitted or gained immigration status.<sup>229</sup> As such, the D.C. Circuit's rationale about a judge's inability to accord them immigration status simply does not figure into a judicially-ordered release remedy. In any event, though assignment of an immigration status is not required to facilitate the Uighurs' release, the fact is that, in *Boumediene*, the Supreme Court determined that the Guantanamo Bay naval base is, as a functional matter, a part of the sovereign territory of the United States, such that the Suspension Clause must run there.<sup>230</sup> Because Guantanamo Bay, the site of the Uighurs' detention, has been deemed a part of the territory of the United States, the proverbial ship, to wit, the idea that the Uighurs' release involves "admission" into U.S. territory, has already sailed.

### C. *The Release Remedy*

The *Kiyemba* litigation is about the need for an appropriate habeas remedy. As such, immigration law does not prohibit the courts from ordering release into the interior of the United States as a constitutionally required remedy for unlawful detention. And because this is a habeas matter and not a case about aliens seeking admission, an order releasing these petitioners into the interior of the United States does not invade the sovereign prerogative of the political branches of government to make admission decisions pursuant to this country's immigration laws. Yet, even in immigration cases, the Supreme Court has recognized the right—at least as a statutory matter, grounded in constitutional concerns—of noncitizens who are indefinitely detained to be released conditionally. For example, in *Zadvydas v. Davis*<sup>231</sup> and *Clark v. Martinez*,<sup>232</sup> two cases that are, admittedly, not strictly analogous to the Uighurs' case, the Supreme Court

---

229. *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

230. In so doing, the Court rejected the geographic formalism of *Johnson v. Eisentrager*, 339 U.S. 763 (1950). See *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009) (finding that after balancing the factors articulated in *Boumediene*, American courts had jurisdiction to entertain habeas petitions of detainees held at the Bagram Air Base in Afghanistan). *But see* *Al-Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (finding that habeas jurisdiction did not run to Bagram under the factors stated in *Boumediene*).

231. 533 U.S. 678 (2001).

232. 543 U.S. 371 (2005).

found no congressional intent in the governing immigration statute to detain noncitizens indefinitely, including those who are treated, for various reasons, as not having made entry under immigration law.

In *Zadvydas*, the Court found that lawful permanent residents who had been ordered deported, but lacked any place to relocate, could not be detained indefinitely following their removal proceedings.<sup>233</sup> Although the Court's decision in this case was based on statutory grounds, the Court nonetheless recognized that the immigration power was subject to constitutional constraints.<sup>234</sup> In *Martinez*, the Court extended its ruling in *Zadvydas*, which was decided on statutory interpretation grounds, to Cuban immigrants, who through the entry fiction and despite their physical presence in the interior of the United States, are without constitutional rights whatsoever. In each case, the Court interpreted the governing statute as only authorizing the government to detain noncitizens for a presumptively reasonable period; once removal from this country to another location is no longer "reasonably foreseeable," the continued detention of the noncitizens is no longer permissible, and the government must conditionally release them.<sup>235</sup>

As for *Kiyemba*, in the district court, the government asserted that the Executive may detain individuals pursuant to its inherent "wind-up" authority, the purported authority to detain individuals associated with a conflict for some period of time following the end of that conflict.<sup>236</sup> It then argued that *Shaughnessy v. United States ex rel. Mezei*<sup>237</sup> "provides a better read on the constitutional limits to detention than either *Zadvydas* or *Clark*."<sup>238</sup> *Mezei* is a case that involved "an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries [would] not take him back."<sup>239</sup> The district court, reviewing the Uighurs' petitions, found several very important distinctions between *Mezei* and the petitions before the court: First, *Mezei* was an immigration case; *Kiyemba* is not. Unlike in *Mezei*, the Uighurs are not seeking immigrant admission to the United

---

233. *Zadvydas*, 533 U.S. at 689 ("In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention [after removal proceedings are complete].").

234. *Id.*

235. *Id.* at 700-01 (observing that the court believed that Congress doubted the constitutionality of detention that lasted longer than six months.). It is worth noting that, in the context of the Guantanamo Bay detainees, *Boumediene* guaranteed the detainees "some form of 'conditional release' if [it is found that] there is no basis for their detention." Arandes, *supra* note 7, at 1081 (citing *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

236. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 36-37 (D.D.C. 2008).

237. 345 U.S. 206 (1953).

238. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 37.

239. *Mezei*, 345 U.S. at 207.

States.<sup>240</sup> Second, in *Mezei*, the lower court was not aware of the evidence against the petitioner's admission because it was confidential and undisclosed; in the case of the Uighurs, the government presented evidence supposedly "justifying" their detention, but "failed to meet its burden."<sup>241</sup> Consequently, the court concluded—"drawing from the principles espoused in the *Clark* and *Zadvydas* cases and from the Executive's authority as Commander in Chief"—that the asserted constitutional authority to "wind up" matters administratively prior to release had ceased.<sup>242</sup> I agree.

Relying on *Mezei*, and largely ignoring *Boumediene*,<sup>243</sup> the D.C. Circuit Court of Appeals found that the district court lacked the requisite authority to order the government to admit the Uighurs into the continental United States. In so doing, the court refused to appreciate a key distinction: The habeas court would not be ordering the admission of the Uighurs into the United States under immigration law. Rather, their release is mandated by the constitutional guarantee of habeas relief, particularly as the Uighurs' plight was in no way of their own making.<sup>244</sup> In light of the foregoing, it is clear that, until the Supreme Court explicitly rules on the constitutional remedy available to such detainees (as distinguished from the right to challenge the lawfulness of their detention, which was established by *Boumediene*), the D.C. Circuit will continue to misguidedly apply immigration law to an issue plainly outside of its purview, with the effect of granting nearly unreviewable discretion to the Executive and therefore, leaving the Uighurs indefinitely and unlawfully detained at Guantanamo Bay until the Executive is able to secure a relocation destination.

As stated in the Uighurs' certiorari petition, as a constitutional matter, "the President's discretionary release of a prisoner is no different from his discretionary imprisonment: each proceeds from unchecked power."<sup>245</sup> To

---

240. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 38 ("[T]he *Mezei* petitioner, unlike the [Uighurs], came voluntarily to the United States, seeking admission." (citing *Mezei*, 345 U.S. at 208)).

241. *Id.* (stating that the evidence was presented pursuant to the Detainee Treatment Act).

242. *Id.* at 38-39.

243. Concurring in the judgment, Judge Rogers found the majority's analysis to be "not faithful to *Boumediene*." *Kiyemba I*, 555 F.3d at 1032 (Rogers, J., concurring). The majority's analysis, Judge Rogers continues, "compromises both the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause . . . , and the balance of powers regarding exclusion and admission and release of aliens into the country . . . to reside in the Congress, the Executive, and the *habeas* court." *Id.*

244. The government had expressed concerns, during briefings, that releasing the Uighurs into the United States might mean that foreign enemies would dump "volunteers" on our doorstep, knowing that they could eventually be released into the United States. Petition for Writ of Certiorari at 29, *Kiyemba*, 130 S. Ct. 458 (No. 08-1234). That concern should have no sway in the Uighurs' case however: The Uighurs were present at Guantanamo solely as a result of the government's post-9/11 tactics, as described above. *Mezei* does not hold, as the government wishes, that it can be shielded from problems of its own making.

245. *Id.* at 34-35.

view the question of release as based on sovereign prerogative in the administration of immigration law, while viewing the question of imprisonment as based on constitutional authority is, put simply, senseless and without precedent. It cannot be that the two inquiries are unrelated; they both undoubtedly implicate individual constitutional rights and the separation of powers. Having refused to resolve this matter, the Supreme Court has left the separation of powers out of balance and tilting dangerously toward unilateralism.

*D. The Unchecked Executive: The Politics of Judicial Abstention*

After being reversed three times in a row in *Rasul*, *Hamdan*, and then *Boumediene*, the D.C. Circuit finally managed in *Kiyemba* to reassert, and have effectively sanctioned, its highly deferential stance towards the Executive in cases involving national security. In particular, the D.C. Circuit concluded that an order mandating the Uighurs' release into the continental United States would impermissibly interfere with the political branches' exclusive authority over immigration matters. But this reasoning is legal ground that the Supreme Court has already implicitly—and another three-judge panel of the D.C. Circuit more explicitly—covered earlier. As such, the Bush administration's strategy in employing the "war" paradigm at all costs and without any judicial intervention, while unsuccessful in the Supreme Court, has finally paid off in troubling, and binding, fashion in the D.C. Court of Appeals, where, national security fundamentalism reigns supreme and the Executive's powers as "Commander-in-Chief" can be exercised with little, if any, real check; arguably leading to judicial abstention in cases involving national security.

The consequences of the *Kiyemba* decision potentially continue today, for example, with passage of the National Defense Authorization Act of 2012,<sup>246</sup> which President Obama signed, with reservations, into law on December 31, 2011.<sup>247</sup> This defense authorization bill contains detainee provisions that civil liberties groups and human rights advocates have strongly opposed.<sup>248</sup> The bill's supporters strenuously objected to the assertion that these provisions authorize the indefinite detention of U.S. citizens.<sup>249</sup> In signing the bill, President Obama later issued a statement to

---

246. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011). <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>.

247. David Nakamura, *Obama Signs Defense Bill, Pledges to Maintain Legal Rights of U.S. Citizens*, WASH. POST (Dec. 31, 2011), [http://www.washingtonpost.com/politics/obama-signs-defense-bill-pledges-to-maintain-legal-rights-of-terror-suspects/2011/12/31/gIQATzkbSP\\_story.html](http://www.washingtonpost.com/politics/obama-signs-defense-bill-pledges-to-maintain-legal-rights-of-terror-suspects/2011/12/31/gIQATzkbSP_story.html).

248. See, e.g., *Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act*, AMERICAN CIVIL LIBERTIES UNION (Feb. 22, 2012), <http://www.aclu.org/indefinite-detention-endless-worldwide-war-and-2012-national-defense-authorization-act>.

249. See, e.g., Felicia Sonmez & Joby Warrick, *Congress Sends Defense Bill to Obama After Reworking Detainee Provisions*, WASH. POST (Dec. 15, 2011), <http://www.washingtonpost.com/politics/congress-sends-defense-bill-to-obama-after-reworking->

the effect that although he had reservations about some of the provisions, he “vowed to use discretion when applying” them.<sup>250</sup> Of course, that does not mean another administration would do the same, especially if courts abstain from their role as protectors of individual rights.

In the years after 9/11, the Supreme Court asserted its role incrementally, slowly entering into the debate about the rights of enemy combatant detainees. This was a “somewhat novel role” for the Court.<sup>251</sup> Unsurprisingly, in so doing, the Court’s intervention “strengthened detainee rights, enlarged the role of the judiciary, and rebuked broad assertions of executive power.”<sup>252</sup> Also unsurprisingly, the Court’s decisions in this arena “prompted strong reactions from the other two branches.”<sup>253</sup> This may be so because, as Chief Justice Rehnquist noted, the Court had, in the past, recognized the primacy of liberty interests only in quieter times, after national emergencies had terminated or perhaps before they ever began.<sup>254</sup> However, since the twentieth century, wartime has been the “normal state of affairs.”<sup>255</sup> If perpetual war is the new “normal,” the political branches likely will be in a permanent state of alert. Thus, it remains for the courts to exercise vigilance and courage about protecting individual rights, even if these assertions of judicial authority come as a surprise to the political branches of government.<sup>256</sup> But courts, like any other institution, are susceptible to being swayed by influences external to the law. Joseph Margulies and Hope Metcalf make this very point in a 2011 article, noting that much of the post-9/11 scholarship mirrors this country’s early wartime cases and “envisions a country that veers off course at the onset of a military emergency but gradually steers back to a peacetime norm once the threat recedes, via primarily legal interventions.”<sup>257</sup> This model, they state, “cannot explain a sudden return to the repressive wilderness just at the moment when it seemed the country had recovered its moral bearings.”<sup>258</sup> *Kiyemba* is very much a return to the repressive wilderness.

In thinking about the practical and political considerations that inevitably play a role in judicial decisionmaking (or non-decisionmaking, as the case may be), I note that the Court tends to be reluctant to decide

---

detainee-provisions/2011/12/15/gIQAh1vhwO\_story.html.

250. Nakamura, *supra* note 247. Obama further stated that his Administration would “not authorize the indefinite military detention without trial of American citizens.” *Id.*

251. Josh Benson, Comment, *The Guantánamo Game: A Public choice Perspective on Judicial Review in Wartime*, 97 CALIF. L. REV. 1219, 1219 (2009).

252. *Id.*

253. *Id.*

254. REHNQUIST, *supra* note 86, at 15.

255. Dudziak, *supra* note 83, at 1698 n.173.

256. See generally Wood, *supra* note 85.

257. Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 456 (2011).

258. *Id.*

constitutional cases if it can avoid doing so, as it did in *Kiyemba*. Arguably, this doctrine of judicial abstention is tied to concerns of institutional viability, in the form of public perception, and to concerns about respecting the separation of powers.<sup>259</sup> But, as Justice Douglas once famously noted, when considering the separation of powers, the Court should be mindful of Chief Justice Marshall's admonition that "it is a *constitution* we are expounding."<sup>260</sup> Consequently, "[i]t is far more important [for the Court] to be respectful to the Constitution than to a coordinate branch of government."<sup>261</sup> And while brave jurists have made such assertions throughout the Court's history, the Court is not without some pessimism about its ability to effectively protect civil liberties in wartimes or national emergencies. For example, in *Korematsu*—one of the worst examples of judicial deference in times of crisis—Justice Jackson dissented, but he did so "with explicit resignation about judicial powerlessness," and concern that it was widely believed that "civilian courts, up to and including his own Supreme Court, perhaps should abstain from attempting to hold military commanders to constitutional limits in wartime."<sup>262</sup> Significantly, even when faced with the belief that the effort may be futile, Justice Jackson dissented. As I describe in the following section, that dissent serves a valuable purpose. But, for the moment, I must consider the external influences on the court that resulted in that feeling of judicial futility.

In the *Kiyemba* case, the influences of both politics and public perception dominated. For example, the government's relocation efforts could be construed as an effort to remove the case from the Court's grasp—resolving the Uighurs' plight, without necessitating judicial review.<sup>263</sup> Through its "delay-then-moot strategy," the Executive controlled the Court's ability to determine a significant constitutional issue—the appropriate remedy for a habeas violation—by eliminating the Court's power to review the case.<sup>264</sup> The motivation for this strategy remains

---

259. See Patrick R. Hugg, *Federalism's Full Circle*, 35 LOY. L. REV. 13, 61 n.284 (1989) ("One justification for abstention is that it will limit perceptions [of intrusion and] protect the Court from hostile public reaction.").

260. *Massachusetts v. Laird*, 400 U.S. 886, 894 (1970) (Douglas, J., dissenting).

261. See *id.* at 894 n.3 (citing G. HAUSNER, *INDIVIDUAL RIGHTS IN THE COURTS OF ISRAEL* 228 (1958)).

262. John Q. Barrett, *A Commander's Power, a Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 LAW & CONTEMP. PROBS. 57–58 (2005). See generally Robert Jackson, *Wartime Security & Liberty Under Law*, 1 BUFF. L. REV. 103 (1951) (discussing the balance of liberty and security in times of national crisis).

263. Feb. 19, 2010 Willett Letter, *supra* note 4, at 3-4 (describing what Willett refers to as the Executive's "repeated efforts to avoid review in detention cases," noting that the "delay-then-moot strategy" has not been confined to the Uighurs, and citing *Rasul v. Bush* and *Padilla v. Hanft* as examples of similar cases).

264. See *id.* at 4 (stating that the government's relocation "efforts have been timed for the eleventh hour, in order to avoid [the Supreme] Court's review of an important principle governing all of the [Gitmo] detention cases").

uncertain. It is tied perhaps, at least in the Obama administration, to the congressional grilling received by former Secretary of Defense Robert Gates on the possibility of transferring the Uighurs into the interior of the United States.<sup>265</sup> In the face of widespread objection and fear mongering, the Obama administration ultimately bowed to congressional pressure, and terminated efforts to relocate the Uighurs within the continental United States.<sup>266</sup> More significantly, the Executive made these efforts the basis for its request that the Supreme Court deny continued review in *Kiyemba*.

#### IV. WHAT IS AT STAKE?

The *Kiyemba* litigation arose in a fascinating context: the War on Terror, with all of its Executive excess, fear-mongering, and deprivation of individual rights. But it must be remembered that, at moments in the War on Terror and before, the courts of this country have risen above politics, and above fear, to resolutely declare the ongoing vitality of the rule of law. The Supreme Court itself has done so, most recently in *Boumediene v. Bush*. In the years since that decision, holes in the Court's doctrine have become apparent; and it is time for the Supreme Court to speak again, and to clearly articulate the remedy that accompanies the habeas corpus right. As I describe below, the rule of law remains viable only so long as there are those who are willing to defend it, to honor it, and to enforce it. A public reminder that such commitment exists could do much to invigorate in the public, and one hopes, in the government, a renewed obligation to the rule of law.

##### A. The Irrelevance of *Boumediene*?

Why is the Supreme Court's refusal to consider *Kiyemba* of such significance? It has, as counsel for the Uighurs noted, left the D.C. Circuit's *Kiyemba I* ruling "cemented in place," and rendered *Boumediene v. Bush* "of little practical relevance."<sup>267</sup> Indeed, "[w]ithout further enforcement by [the Supreme] Court of *Boumediene*'s unmistakable mandate, the D.C. Circuit's contrary approach will lead to further protracted delay in the resolution of Guantanamo detainees' rights and continued failure by the courts to follow *Boumediene*'s teaching with regard to extraterritorial application of the Constitution."<sup>268</sup> This is

---

265. See Julian E. Barnes, *Gates Backs Plan to Let Detainees In*, L.A. TIMES, May 1, 2009, at 13. Gates is not the only official to have been grilled on the possibility of releasing the Uighurs into the United States. See, e.g., Sara Sorcher, *Counterterrorism Nominee Grilled on Guantanamo*, NAT'L J. DAILY, July 27, 2011.

266. Kauffman, *supra* note 159 (noting the congressional objection to release into the United States).

267. Feb. 19, 2010 Willett Letter, *supra* note 4, at 1.

268. Brief Amicus Curiae of the American Civil Liberties Union in Support of the Petition for Certiorari at 23, *Kiyemba v. Obama*, 130 S. Ct. 1235 (Dec. 11, 2009) (No. 08-1234).



precisely what has happened—if not worse. Review in the D.C. federal courts, the sole adjudicators of the rights of the Guantanamo Bay detainees,<sup>269</sup> is halted by the uncertainty of the remedy to be provided to a successful habeas petitioner.<sup>270</sup> Indeed, some Guantanamo detainees “are denied hearings altogether, as courts conclude that they have no judicial remedy power beyond Executive discretion.”<sup>271</sup> Thus, Guantanamo detainees can expect no relief whatsoever other than what the Executive provides.

So, we return to where we started: with an unchecked Executive and a judicial branch that knowingly refuses to intervene. Perhaps the Court’s unwillingness to entertain *Kiyemba* on the merits signals its desire to no longer be involved in the political debate surrounding the detainees.<sup>272</sup> Indeed, *Boumediene* was, arguably, decided only after it became clear that the Court could no longer avoid the constitutional issue—pressed previously in *Hamdan* and *Rasul*. Thus, with the entry of a new, theoretically enlightened administration, perhaps the Court was prepared to bow out gracefully, hoping that the need to bring the judiciary into the wartime power debate, and consequently jeopardizing its institutional reputation,<sup>273</sup> would be reduced. But, the decision to bow out gracefully had the very opposite effect—undermining the Court’s credibility and costing the Court its moral high ground. Recognizing the role that practical and political factors can potentially influence courts, arguably such external factors may have guided the Court in its review of the *Kiyemba* cases. In any event, the Court refused to “go to bat” when the going got tough.

If courts do not carry out their role as protectors of individual liberty interests, then it remains for others—including dissenting jurists—to sound the alarm. In the years leading up to and immediately following *Boumediene*, hope for the continued viability of the rule of law remained strong, as did hope that national security fundamentalism would not be a mainstay. However, by denying review in *Kiyemba*, the Supreme Court has allowed another court to gain the upper hand, dictating outcomes in the Guantanamo habeas cases.<sup>274</sup> As Linda Greenhouse recently noted, since

---

269. Christine Waring, Note, *The Removal of International Law from Guantanamo Detainee Litigation: Problems and Implications of Al-Bihani v. Obama*, 43 GEO. J. INT’L L. 927, 956 (2012).

270. Feb. 19, 2010 Willett Letter, *supra* note 4, at 4 (explaining that a post-*Kiyemba* habeas court “can only ask the Executive jailer to take ‘necessary and appropriate diplomatic steps’” as a remedy for unlawful detention, and noting that this so-called “remedy” allows “the Executive to nullify a judicial [remedy] ruling” entirely).

271. *Id.* at 4 (citing sealed orders filed separately under seal).

272. *Cf.*, e.g., *Basardh v. Obama*, 612 F. Supp. 2d 30, 33 (D.D.C. 2009) (noting an instance in which the court was “spared from having to wade into the debate over whether” due process applies to noncitizen detainees).

273. After all, these were a series of 5-4 decisions, with a great deal of vitriol from the losing sides.

274. See Linda Greenhouse, *Goodbye to Gitmo*, Opinionator Blog, N.Y. TIMES (May 16, 2012), <http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/>.

*Boumediene*, “the justices have basically permitted the Guantanamo issue to be outsourced—not, of course, to another country, but to another court, a few blocks down Constitution Avenue: the United States Court of Appeals for the District of Columbia Circuit.”<sup>275</sup> There, review “has been anything but meaningful.”<sup>276</sup> Indeed, the D.C. Circuit “has been something very close to a rubber stamp” for the Executive’s war on terrorism decisions.<sup>277</sup> Surely, this abdication is troubling, particularly in light of the “institutional pride”<sup>278</sup> displayed by the Court in the years immediately following 9/11. Greenhouse demands that “the Supreme Court take the rein back into its own hands, and as Chief Justice John Marshall famously promised, tell us what the law is.”<sup>279</sup> And if not all of the Court—all nine justices, with their widely ranging views—at the very least, there should have been a justice willing to vocalize the error of this way. There should have been a dissent.

### B. *The Need for Dissent*

A dissent from the denial of certiorari in either *Kiyemba I* or *Kiyemba III* would have given voice to the observations and concerns about the meaning of freedom, the appropriate application of the separation of powers doctrine, and the continuing viability of the rule of law described above. There is ample authority to support such a dissent, and examples throughout the Court’s history, even its recent history, that support a justice’s decision to author a dissent to a denial of certiorari or a dismissal. Justice Jackson’s dissenting opinion in *Mezei* provides a model for giving voice to similar concerns. There, he noted, “it is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial.”<sup>280</sup> Indeed, Justice Jackson noted, such imprisonment “has been considered oppressive and lawless since [King] John, at Runnymede, pledged that no free man should be imprisoned, disposed, outlawed, or exiled save by the judgment of his peers or by the law of the land,” and the “judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.”<sup>281</sup> Strongly demanding judicial enforcement of due process, Justice Jackson stated, “[i]t still is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country.”<sup>282</sup> He concluded with a simple, yet enduringly powerful statement: “No one can

---

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting).

281. *Id.* at 218–19.

282. *See id.* at 227–28.

make me believe that we are that far gone.”<sup>283</sup> With these words, Justice Jackson gave voice to the rule of law. And while these words come in a dissent, they resonate today, more than fifty years later, as clearly as any portion of the majority’s opinion. Indeed, what was true for Justice Jackson is true today: We cannot be made to believe that we are so far gone that individuals, subjected to indefinite and unlawful detention, must continue to suffer in confinement and may not enjoy the remedy associated with the relief that they so sought.

Early in the series of cases involving the indefinite detention of individuals unilaterally labeled “enemy combatants,” the Supreme Court, in *Rumsfeld v. Padilla*,<sup>284</sup> dismissed a detainee’s petition on technical grounds, avoiding the merits raised therein. Justice Stevens authored a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer, in which he took exception to the Court’s minimization of the issues at stake in the case.<sup>285</sup> Justice Stevens explained:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. . . . For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.<sup>286</sup>

Three years later, the Court denied the initial petition for certiorari review in *Boumediene v. Bush* for technical reasons related to the exhaustion of available remedies.<sup>287</sup> Justice Breyer, joined by Justice Souter and Justice Ginsburg, filed an opinion dissenting from the denial of certiorari, stating that they would have granted the petitions for certiorari and ordered expedited argument.<sup>288</sup> For Justice Breyer, the issue presented—whether the Military Commissions Act of 2006 deprived the courts of jurisdiction to consider the detainees’ habeas claims was unconstitutional—deserved “the Court’s immediate attention.”<sup>289</sup> He explained: “In view of the public importance of the questions raised by [the Uighurs’] petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, . . . we [must] consider and decide [such] questions without any avoidable delay.”<sup>290</sup> As Justice Breyer explained, “the ‘province’ of the Great Writ, ‘shaped to guarantee the most fundamental of all rights, is to provide an effective *and speedy* instrument

---

283. *Id.* at 228.

284. 542 U.S. 426 (2004).

285. *See id.* at 455 (Stevens, J., dissenting).

286. *Id.* at 465.

287. 549 U.S. 1328 (2007).

288. *See id.* at 1329 (Breyer, J., dissenting).

289. *Id.* at 1329–30.

290. *Id.* at 1333 (quoting *Ex Parte Quirin*, 317 U.S. 1, 19 (1942)).

by which judicial inquiry may be had into the legality of the detention of a person.”<sup>291</sup> Significantly, he noted:

[P]etitioners have been held for more than five years. They have not obtained judicial review of their habeas claims. If petitioners are right about the law, immediate review may avoid an additional year or more of imprisonment. If they are wrong, our review is nevertheless appropriate to help establish the boundaries of the constitutional provision of the writ of habeas corpus. [Moreover,] whether petitioners are right or wrong, our prompt review will diminish the legal uncertainty that now surrounds the application to Guantanamo detainees of this fundamental constitutional principle.<sup>292</sup>

Likewise, I assert that the Court should have considered *Kiyemba* on the merits. So doing would have avoided the uncertainty surrounding application of *Boumediene* to habeas remedies. It also may have avoided additional months or years of detention for the Uighurs, and would have allowed the Court to shape the outer contours of the writ of habeas corpus by defining the writ’s remedial aspect. But, given the Court’s apparent unwillingness to do so, the very least that was necessary was a dissenting opinion—a statement acknowledging the import of these issues and giving voice to concerns about the meaning of freedom, separation of powers, and the rule of law, particularly as we pass the ten year mark since 9/11.

Without Supreme Court intervention, Guantanamo Bay remains a legal black hole. Although detainees’ detentions may be judicially deemed unlawful, the possibility of release from the base without the Executive’s consent seems almost hopeless. As Muneer Ahmad wrote in a recent article, Guantanamo has become a place where the remaining detainees have “no right to have rights,” or at least, if they have rights, they have no right to a remedy for their violation.<sup>293</sup> Likewise, Lyle Denniston has recently noted that the Supreme Court, by denying certiorari review in seven separate detainee appeals, has “confirmed emphatically . . . that it is not now inclined to further second-guess the government’s detention policy.”<sup>294</sup> Not one of these denials was accompanied by a dissent. Thus, the fate of the Guantanamo detainees, including the remaining Uighurs, rests, as I described above, largely in the hands of the political branches and the D.C. Circuit.

Linda Greenhouse recently argued that “[t]he fate of the detainees,

---

291. *Id.* at 1330 (quoting *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

292. *Id.* (citations and internal quotation marks omitted).

293. Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 N.W. L. REV. 1683, 1687 (2009). Ahmad goes on to argue that, by consistently referring the detainees as terrorists, and by consistently denying them access to our legal system, the detainees have been largely dehumanized.

294. Lyle Denniston, *Court Bypasses All New Detainee Cases (Final Update)*, SCOTUSBLOG (June 11, 2012, 10:56 AM), <http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/>.

now numbering 169 and in some instances entering a second decade of confinement, was, after all, never the [Supreme Court's] principal interest."<sup>295</sup> Instead, the Court was motivated "primarily [by] a separation-of-powers concern"; that concern "fueled the inter-branch drama of 2004 to 2008, during which a shrinking minority, over increasingly sharp dissents, pushed back against the Bush administration and Congress to assert the court's own institutional authority."<sup>296</sup> The Court's concern, I believe, must be both: It must assert the continued viability of the rule of law on behalf of those whose rights have been violated, and on behalf of the judiciary, whose ongoing role is essential to maintaining our constitutional structure. At the very least, a dissent could make this point.

#### CONCLUSION

As Justice Jackson famously noted, I find it hard to believe that a person—regardless of citizenship—can be incarcerated in a territory of this country indefinitely, without charge or without trial; I find it equally hard to believe that a person can be found unlawfully detained, but remain so. Yet, this apparently is the way that it is in the aftermath of 9/11, particularly because the Court has ended its dialogue on the subject of justice for Guantanamo detainees. The fact that no member of the Court spoke out in dissent in *Kiyemba* is unfortunate; the misapplication of immigration law, resulting in the ongoing detention of some Uighurs is simply inhumane. Upon a finding that their detention was unlawful, immediate release was the only appropriate remedy and, indeed, is the remedy demanded by centuries of English and American law, as well as basic humanitarian and human rights concerns. Put simply, the two Uighurs remaining at Guantanamo Bay are entering the second decade of their detention, despite having been cleared entirely of terrorist affiliation. This is not the rule of law, nor is it a fact that we should ignore. The writ of habeas corpus provides a mechanism for resolving this situation. It must be applied.

While *Boumediene v. Bush* was heralded as the end of the Bush administration's failed detention policies,<sup>297</sup> it has not been so for the Uighurs, and the other detainees, remaining at Guantanamo Bay. With the Obama administration adopting many of the Bush administration's policies, and with the D.C. Circuit rubber stamping those actions, Supreme Court action is needed. Whether the Uighurs will ever know freedom and American justice is yet to be determined. So far it has not happened. But the promise of *Boumediene*—the promise of our Constitution—demands it.

---

295. Greenhouse, *Goodbye to Gitmo*, *supra* note 274.

296. *Id.*

297. *Supreme Court Restores Rule of Law to Guantanamo*—[Boumediene] *Decision Represents Beginning of End of Failed Detention Policy*, Says ALCU, AMERICAN CIVIL LIBERTIES UNION (June 12, 2008), <http://www.aclu.org/national-security/supreme-court-restores-rule-law-guantanamo>.

2013]

*OF CIVIL WRONGS AND RIGHTS*

51

And the ultimate responsibility for expounding that Constitution lies with our highest court.<sup>298</sup>

To paraphrase Benjamin Franklin, we have a republic, but only if we can keep it.<sup>299</sup> Review of *Kiyemba* by the Supreme Court, or in the very least, a meaningful dissent by a single justice from the denials and dismissals of review, might have given voice to the importance of the rule of law in a democratic society, and might have gone a long way toward keeping the republic we have been given well within our grasp.

---

298. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

299. Adam Marinelli, *A Call for the Proper Recognition of Habeas Corpus in the 21st Century*, 3 CHARLESTON L. REV. 689, 690 (2009) (“On being asked whether the Constitutional Convention had created a republic or a monarchy, Benjamin Franklin prophetically replied, ‘[a] republic, if you can keep it.’”) (citing JAMES P. PFIFFNER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* 56 (2008)).