No. 08-1234

IN THE
Supreme Court of the United States

JAMAL KIYEMBA, ET AL.
Petitioners,
v.
BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES OF AMERICA, ET. AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR DEFENSE OF DEMOCRACIES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Petitioners are aliens who were previously held in military detention at Guantanamo Bay Naval Base in an enemy status and who are now in custody at Guantanamo Bay in a non-enemy status. Because petitioners reasonably fear torture if returned to their home country, the United States government has engaged in extensive diplomatic efforts to locate appropriate alternate countries for their resettlement. All petitioners have either been resettled in other countries or received offers of resettlement.

The question presented is whether the federal courts, exercising habeas corpus jurisdiction, may properly order the United States government to bring petitioners into the United States for release, in contravention of the federal immigration laws and specific statutory bars on their entry.

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INTEREST OF *AMICUS CURIAE*

The Foundation for Defense of Democracies ("FDD")[1] is a policy institute dedicated to supporting Government efforts to prevent deadly acts of terrorism, defending

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

democratic values, and opposing the ideologies that drive terrorism. FDD was founded shortly after September 11, 2001, to support the defense of democratic societies under assault by terrorism and to engage in the worldwide "war of ideas."

FDD combines expertise on issues of international and "homegrown" terrorism with a thorough understanding of the legal framework undergirding national security. Andrew C. McCarthy, former Assistant U.S. Attorney for the Southern District of New York, directs FDD's Center for Law and Counterterrorism. Daveed Gartenstein-Ross, author of *My Year Inside Radical Islam* (2007) and numerous studies about foreign and domestic terrorism, directs FDD's Center for Terrorism Research. Thomas Joscelyn, an FDD Senior Fellow, is an expert on international terrorism, and has developed specific expertise concerning the records of the prisoners detained at the Guantánamo Bay Naval Base in Cuba—including petitioners.

FDD has a substantial interest in this case, which bears on our Nation's defense against terrorism at home and abroad. Congress has enacted, and the President has signed, statues prohibiting entry into the Nation by aliens who threaten national security—including aliens who, like petitioners, received military-type training from terrorists or have other terrorist connections. FDD supports the enforcement of those laws.

FDD submits this brief to aid the Court's understanding of the general factual and legal context of this case. Although the Government's brief addresses the statutory provisions prohibiting petitioners' release into the domestic civilian population, FDD respectfully submits this brief to inform the Court more fully of the history underlying those statutes, of petitioners' activities prior to detention, and of the practical consequences of granting petitioners' requested relief.

SUMMARY OF ARGUMENT

I. Petitioners are not entitled to release into the United States. They are aliens whose admission is prohibited by federal law. The fact that petitioners are not "enemy combatants" does not affect the applicability and enforceability of other federal laws barring their entry and release into the United States. The federal immigration statutes squarely prohibit entry by persons who, like petitioners, may have received military-type training from terrorists. See *infra* pp. 6-11. Those prohibitions constitute the corporate judgment of the American people through the Government's political Branches, and that judgment is rooted in the Nation's continuing experience in matters of national security.

II. Petitioners demand an unprecedented right of entry into the United States that would, if granted to them, frustrate the conduct of U.S. military operations overseas. The possibility of detained aliens obtaining direct access to the Nation's civilian population would encourage U.S. military and other counterterrorism officials to consider, among other unsatisfactory options, releasing dangerous persons to suboptimal locations or rendering them to foreign governments.

ARGUMENT

The Court should affirm the judgment of the U.S. Court of Appeals and give full effect to the federal immigration laws prohibiting petitioners' release into the United States. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted because release into the United States is not "the only possible effective remedy." See Gov't Br. 51-52.

I. Federal Law Prohibits Petitioners' Release Into The United States And Empowers The Government To Detain Them

Petitioners cannot be admitted into the United States because, *inter alia*, they have received military-type training from terrorists. See *infra* pp. 12-18. And because federal immigration laws bar their admission, the Government may detain them outside of the Nation's borders until it identifies a suitable destination country. The fact that petitioners have not committed belligerent acts against the United States and therefore are not "enemy combatants," Gov't Br. 6-7,[2] does not immunize them against the Government's fundamental authority to exclude and detain inadmissible aliens.

A. The Government May Detain Inadmissible Aliens, Including Those With Terrorist Ties

Petitioners argue that because they have not been found to be enemy combatants for CSRT purposes, they must be released into the United States. Pet. Br. 31-34. Their argument neglects the separate force of federal immigration laws, which independently prohibit petitioners' release into the United States.

Congress has the power and responsibility to regulate entry by aliens—an allocation of authority "as firmly imbedded in the legislative and judicial tissues of our body

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[2] Specifically, no Combatant Status Review Tribunal ("CSRT") has found petitioners to be:

> Individual[s] who [were] part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Parhat v. *Gates*, 532 F.3d 834, 838 (D.C. Cir. 2008) (quoting Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004) (Dep't of Defense); Implementation of Combatant Status Review Tribunal Procedures at 2 (July 29, 2004) (Navy)).

politic as any aspect of our government." *Galvan* v. *Press*, 347 U.S. 522, 531-32 (1954). The Government may detain an alien outside of the Nation's borders, preventing his entry until he demonstrates that he satisfies the standards for admission. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) ("*Mezei*"). And where, as in this case, the Executive Branch detains an alien who never previously entered the Nation, the detained alien has no right to secure his release through habeas corpus. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543-47 (1950) ("*Knauff*").

Petitioners argue that the Government's power to detain such aliens indefinitely is recognized only in cases of aliens "who come voluntarily to the border," not aliens who come involuntarily. Pet. Br. 37-39. But that distinction is found nowhere in *Mezei* or *Knauff*. See *Mezei*, 345 U.S. at 212-13; see also Gov't Br. 37-39.

Nor are petitioners correct that the Government's detention power is limited to six months. See Pet. Br. 45-46 (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001)). *Zadvydas* recognized a six-month detention limit only for aliens who had already entered the United States, not aliens who—like petitioners—had never previously entered. *Zadvydas*, 533 U.S. at 692-95. "The distinction between an alien who has effected an entry into the United States and one who has never entered" is one that "runs through immigration law." *Id.* at 693. "[I]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Ibid.* Thus, petitioners—along with all other aliens not previously admitted to the United States—may be detained by the Government "indefinitely" until it "find[s] another country to accept [them]." *Id.* at 692 (citing *Mezei*, 345 U.S. at 215-16).

Petitioners cannot avoid the Government's well-established power to prevent aliens' entry by arguing that they want only to be "released" into the United States, not "admitted." Pet. Br. 35-36; see Gov't Br. 30-31. Other than "parole" (a wholly discretionary grant from the Secretary of Homeland Security, see Gov't Br. 30), admission is the *only* lawful basis for entry into the United States. 8 U.S.C. §1101(a)(13)(A); Gov't Br. 29-30. And the burden is on the alien, not the Government, to demonstrate that he is "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. §1225(b)(2)(A). Until petitioners satisfy the requirements for admission, they may not enter the United States.

B. Federal Laws Barring Entry By Terrorists And Aliens Connected To Terrorism Reflect The Nation's Hard-Earned Experience In Matters Of National Security

Federal law bars the admission of aliens whom the Government reasonably suspects of engaging in certain terrorist or terrorism-related activities. Among the prohibited classes of aliens are those who have engaged in terrorist activity; those who are members of a terrorist organization; those whom the Secretary of Homeland Security or Attorney General "knows, or has reasonable ground to believe, [are] engaged in or [are] likely to engage after entry in any terrorist activity"; those who endorse terrorist activity; and those who received "military-type training" from terrorist organizations. *Id.* §1182(a)(3)(B). As explained in detail below, pp 12-20, petitioners' records more than justify the Government's conclusion that the terrorism-related prohibitions against entry apply to them.

Petitioners casually dismiss not only these statutes, Pet. Br. 32, 42, 45, 46, but also appropriations bills (mere "post-hoc 2009 legislation") directly prohibiting their release into the United States, *id.* at 49. Perfunctory

treatment of this comprehensive body of law, passed by Congress and signed by the President, does ill service to both the statutory text and the historical national experience underlying the evolution of those statutes. Congress' determination that the Government must prohibit entry by aliens whose records suggest a material threat to the Nation's domestic civilian population is rooted in the history of our Nation's self-defense, including the difficult lessons learned through catastrophic acts of terrorism.

Aliens' initial entry into the Nation is a core matter of national security, committed to the political Branches. The power to regulate aliens' initial entry—and not, as petitioners propose (Br. 35), the power to expel aliens already inside the Nation's borders—is the primary guard against "unprotected spot[s] in the Nation's armor." *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 602 (1953), *quoted in Zadvydas*, 533 U.S. at 695-96.

For decades following the Nation's Founding, immigration policy was fixed not by legislation but by the Executive Branch's exercise of "inherent * * * executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542. As early as 1875, however, Congress began to pass laws prohibiting entry by dangerous aliens. The Act of March 3, 1875 authorized the exclusion of criminal aliens. 18 Stat. 477. It codified what largely had been the status quo. "As to criminals, the power of exclusion has always been exercised, even in the absence of any statute on the subject." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 608 (1889).

In the late twentieth century, as the Nation grew increasingly aware of the specific threat of terrorism, Congress began to address the threat directly through immigration laws. The Immigration Act of 1990, for instance, prohibited the admission of any alien who "has engaged in terrorist activity" or whom "a consular officer

or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity." Pub. L. No. 101-649, §601(a)(3)(B), 104 Stat. 4978, codified at 8 U.S.C. §1182(a)(3)(B)(i). The Act defined "terrorist activity" to include activities such as "[t]he use of any * * * explosive, firearm, or other weapon or dangerous device * * * with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." *Id.* §601(a)(3)(B)(iii)(V)(b), codified at 8 U.S.C. §1182(a)(3)(B)(iii)(V)(b).

The Nation grew more aware of the threat of terrorism after the 1993 bombing of the World Trade Center. Congress responded by passing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. That Act reinforced the Nation's commitment to preventing terrorist-trained aliens from entering by expanding the list of inadmissible aliens to include not only those suspected of having personally engaged in terrorist activity, but also those who are representatives or members of terrorist organizations. *Id.* §411, codified as amended at 8 U.S.C. §1182(a)(3)(B)(i). In enacting this law, Congress stressed that "the prevention of alien terrorists from entering the United States in the first place * * * present[s] among the most intractable problems of immigration enforcement. The stakes in such cases are compelling: protecting the very lives and safety of U.S. residents, and preserving the national security." H.R. Rep. No. 383, 104th Cong., 1st Sess. 53 (1995). "The object of preventing terrorist aliens from entering the U.S. is equally important to the national interest as the removal of alien terrorists. On this question, the demands of due process are negligible, and Congress is free to set criteria for admission and screening

procedures that it deems to be in the national interest." *Id.* at 58.[3]

Five years later, in response to the catastrophic terrorist attacks of September 11, 2001, Congress further expanded the class of aliens whose entry is categorically prohibited on terrorism-related grounds. Congress amended the laws to exclude not only terrorists themselves and members or representatives of terrorist organizations, but also aliens suspected of having "associated" with a terrorist organization, or those suspected of intending to engage in activities that threaten public safety. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §411(a)(2), 115 Stat. 272, codified at 8 U.S.C. §1182(a)(3)(F). That Act also broadened the definitions of "terrorist activity" and "engaged in terrorist activity," and expanded the Attorney General's authority to detain aliens whom he suspects of involvement in terrorism. *Id.* §§411(a)(1) & 412, codified at 8 U.S.C. §§1182(a)(3)(B) & 1226a.

The next year, Congress transferred immigration authority to the newly-created Department of Homeland Security ("DHS"). See, *e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, §441, 116 Stat. 2135. The House Report described DHS's fundamental mission as "preventing terrorist attacks within the United States, reducing the United States' vulnerability to terrorism, minimizing the damages from attacks, and assisting in recovery from any attacks, should they occur." H.R. Rep. No. 609(I), 107th Cong., 2d Sess. 63 (2002). A

[3] In 1996, Congress also added incitement of terrorist activity as grounds for exclusion. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, §342(a)(2), 110 Stat. 3009, codified at 8 U.S.C. §1182(a)(3)(B)(i)(III).

critical component of DHS's mission is "securing U.S. borders" because, "as recent events have illustrated, the Nation's democratic tradition of free and open borders is at once its greatest strength and most easily exploitable liability." *Id.* at 63-64.

In addition to conducting its own post-September 11 deliberations, Congress created the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") to research the events responsible for that catastrophic breach of national security and to propose reforms. In 2004, the 9/11 Commission issued its public report, which stressed immigration law's central role in national security. Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004) ("*The 9/11 Commission Report*"). The 9/11 Commission observed that "[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected." *Id.* at 383. It stressed that "[t]he border and immigration system" must serve "as a vital element of counterterrorism." *Id.* at 387.

In response to the 9/11 Commission's recommendations, Congress acted. Recognizing that national security was threatened not only by active terrorists and members of terrorist organizations, but also by non-members who were trained by these groups, Congress prohibited admission of aliens who have received "military-type training" from terrorist organizations. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, §103(a), 119 Stat. 231, codified at 8 U.S.C. §1182(a)(3)(B)(i)(VIII). That provision's sponsor stressed that the goal of the REAL ID Act's immigration provisions "is straightforward. It seeks to prevent another 9/11-type attack by disrupting terrorist travel." 151 Cong. Rec. H454 (daily ed. Feb. 9, 2005) (Rep.

Sensenbrenner). Quoting the 9/11 Commission, he stressed that "[a]buse of the immigration system and the lack of interior enforcement were working together to support terrorist activities." *Ibid.*

In sum, at no point in the history of federal immigration law have the political Branches evinced an intent to allow aliens—especially aliens with apparent ties to terrorism—to enter the United States simply because they are not "enemy combatants," applicable immigration prohibitions notwithstanding. Instead, at every turn, Congress and the President have responded to the Nation's national-security experience by *barring* terrorists, terrorist affiliates, and persons trained by terrorists from entering the country. Congress passed each of the aforementioned statutes to confirm and expand the President's ability to protect the Nation's domestic civilian population. And in administering those statutes, the President's authority is at "its maximum" because he "acts pursuant to an express * * * authorization of Congress[.]" *Medellin* v. *Texas*, 128 S. Ct. 1346, 1350 (2008) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

Finally, the immigration laws prohibiting petitioners' release into the United States are not the result of hasty judgment or political partisanship. Rather, they embody the sustained bipartisan consensus of both Republican and Democratic Presidents and Republican- and Democratic-controlled Congresses—the epitome of sound federal governance. See *The Federalist No. 10* (James Madison); *cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2354 (2008).

C. Petitioners' Records Support Prohibiting Their Entry On Terrorism-Related Grounds

Petitioners are among the categories of aliens prohibited from entering the United States on terrorism-related grounds. Gov't Br. 29-31. They downplay the nature of their activities in Afghanistan: they claim that they merely "had been living in Afghanistan," Pet. Br. 5, and that their weapons training merely was of the sort received by "[m]illions of American civilians, and hundreds and thousands of servicemen and women," Br. of Appellees at 4, *Bush* v. *Kiyemba*, D.C. Cir. Nos. 08-5424 *et al.* (filed Nov. 3, 2008).

But their account does not withstand scrutiny. Publicly-available documents establish that petitioners received "military-type training" from al Qaida operatives, rendering them categorically inadmissible. 8 U.S.C. §1182(a)(3)(B)(i)(VIII).

1. *The ETIM*

For a complete account of Petitioners' pre-detention activities, one must consider the context in which they were captured and detained. Petitioners' choice of location speaks for itself. As early as 2000, in the days preceding al Qaida's attack on New York and Washington, petitioners were trained by a designated al Qaida affiliate at camps run by senior terrorists.

Petitioners primarily were at a camp in Afghanistan's Tora Bora Mountains, a known stronghold for al Qaida and the Taliban. United States Special Operations Command, *History* 93 (2007). The camp was run by two notorious terror chieftains, Hassan Mahsum and Abdul Haq, central figures in the history of the East Turkistan Islamic Movement ("ETIM").[4] According to a recent

[4] The ETIM also is known by other names, including the Eastern Turkistan Islamic Party. See U.S. Dep't of Treasury, *Treasury*

ETIM propaganda video, Mahsum founded the ETIM and moved its base of operations to the Taliban's Afghanistan in the late 1990s to train its members for jihad against the Chinese government.[5] The ETIM returned the Taliban's hospitality in kind, as ETIM members "fought alongside" al Qaida and Taliban forces during Operation Enduring Freedom in late 2001.[6]

Mahsum was killed in raids on al Qaida-associated facilities in Pakistan in October 2003.[7] The ETIM later stated that Mahsum "was martyred in one [of] the operations that [was] launched in order to re-establish the Islamic Emirate of Afghanistan after fighting courageously."[8]

Mahsum was replaced by the aforementioned Abdul Haq, a dedicated jihadist with longstanding ties to both al Qaida and the Taliban. Haq ran the ETIM's Tora Bora training camp in the Taliban's Afghanistan along with Mahsum, so he was a natural pick to succeed Mahsum as the group's leader. Haq rose quickly within al Qaida's ranks. In March 2009, the ETIM released an interview with Haq, who reminisced about fighting with Taliban forces in Afghanistan and referred reverently to Osama

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Targets Leader of Group Tied to Al Qaida (Apr. 20, 2009) <http://www.ustreas.gov/press/releases/tg92.htm>.

[5] The Nine Eleven Finding Answers ("NEFA") Foundation, *TIP [Turkestan Islamic Party]: Steadfastness and Preparations for Jihad in the Cause of Allah* (Jan. 20, 2009) <http://www.nefafoundation.org/miscellaneous/FeaturedDocs/nefatip0409-4.pdf>.

[6] U.S. Dep't of State, *Patterns of Global Terrorism 2003*, at 144 (Apr. 24, 2004) <http://www.state.gov/documents/organization/31912.pdf>.

[7] *Ibid.* The State Department also reported that the "ETIM has received training and financial assistance from al-Qaida." *Ibid.*

[8] The NEFA Foundation, *supra*, *TIP: Steadfastness and Preparations for Jihad in the Cause of Allah*.

bin Laden.[9] As of 2005, "Haq was also a member of al Qaida's Shura Council," which is reserved for only those senior terrorists whom Osama bin Laden and al Qaida find most trustworthy.[10]

Petitioners downplay the ETIM's record by quoting a U.S. official's impromptu statement, in a 2001 press conference, that the United States did not consider the ETIM to be a "terrorist group." See Pet. Br. 4. But Petitioners ignore the same official's further comments stressing that although the ETIM was not yet considered a terrorist organization, many of its members were, in fact, terrorists. Press Conf., Amb. Francis X. Taylor, Beijing, China (Dec. 6, 2001) <http://avalon.law.yale.edu/sept11/taylor_003.asp>.

And far more probative than a single official's informal remarks in 2001 is the fact that the State Department now recognizes the ETIM as a terrorist organization, see Pet. Br. 5,[11] as does the Treasury Department.[12] The ETIM's propaganda videos render its agenda and

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[9] The NEFA Foundation has published a two-part translation of the interview . The NEFA Foundation, *Shaykh Abdul Haq: Interview—Part I* (Mar. 14, 2009) <http://www.nefafoundation.org/miscellaneous/nefa_tipadulhaqintvupart1.pdf>; The NEFA Foundation, *Shaykh Abdul Haq: Interview—Part II* (Mar. 26, 2009) <http://www.nefafoundation.org/miscellaneous/nefa_tipabdulhaqintvupart2.pdf>.

[10] U.S. Dep't of the Treasury, *supra*, *Treasury Targets Leader of Group Tied to Al Qaida* (Apr. 20, 2009); see also *The 9/11 Commission Report* at 56.

[11] See also U.S. Dep't of State, *supra*, *Patterns of Global Terrorism 2003* at 144 ("ETIM has received training and financial assistance from al-Qaida").

[12] U.S. Dep't of the Treasury, *Recent OFAC Actions* (Sept. 3, 2002) <http://www.treas.gov/offices/enforcement/ofac/actions/20020903.shtml>; U.S. Dep't of the Treasury, *supra*, *Treasury Targets Leader of Group Tied to Al Qaida* (Apr. 20, 2009).

ideology unmistakable; its members routinely call for jihad while standing in front of al Qaida's black flag.[13]

Although the ETIM primarily has focused its efforts against China, there is strong evidence, cited by the Government since 2002, that the organization has expanded its list of targets to include the United States. "In May 2002, two ETIM members were deported to China from Kyrgyzstan for plotting to attack the [U.S.] Embassy in Kyrgyzstan as well as other [U.S.] interests abroad." U.S. Dep't of State, *Patterns of Global Terrorism 2003* at 144. And in 2001, ETIM forces joined al Qaida and the Taliban in battle against the United States, *ibid*, even though Chinese military forces were not involved. See Congressional Research Service, *Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support* at 7 (Oct. 17, 2001). Such coordination is unsurprising; al Qaida routinely adopts local jihadist groups around the world (*e.g.*, Algeria, Somalia, Libya, Egypt, Indonesia) and folds these organizations into its global jihad. *The 9/11 Commission Report* at 58.

In the final analysis, the only definition of "terrorist organization" relevant to this case is the one set forth in the immigration laws, which defines "terrorist organization" broadly to include both *de jure* and *de facto* terrorist organizations. 8 U.S.C. § 1182(a)(3)(B)(vi). There can be no reasonable doubt that the ETIM meets that standard.

2. *Petitioners' pre-detention activities*

Petitioners were among Mahsum's and Haq's recruits. For example, Petitioner Bahtiyar Mahnut (one of the two

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[13] The NEFA Foundation translated one such ETIM propaganda tape. The NEFA Foundation, *supra*, *TIP [Turkestan Islamic Party]: Steadfastness and Preparations for Jihad in the Cause of Allah* (Jan. 20, 2009).

Uighurs accepted by Switzerland) told his CSRT that "[t]he person running the camp was named Abdul Haq, and he was a Uighur." Bahtiyar Mahnut, CSRT Transcript at 1.[14] Mahnut explained that Haq oversaw his integration into the ETIM's training program:

> The first day I came to the camp, Abdul Haq told me that I had to give him my passport and whenever I wanted to leave I could ask for it back. He then took my passport from me. Our clothing and baggage [were] inside the house at the time. We left everything in the house when we left.

Bahtiyar Mahnut, CSRT Transcript at 5. Mahnut's account is consistent with al Qaida's *modus operandi*: new recruits frequently are commanded to turn over their passports and other identifying information. See Peter Bergen, *The Osama Bin Laden I Know* 100 (2006) (trial testimony of al Qaida terrorist). Recruits assume a new identity and *nom de guerre*. *Id.* at 45 (trial testimony of al Qaida terrorist).

Only two of the seven original petitioners in this Court remain active petitioners: Hammad Memet (a.k.a. "Ahmed Mohamed") and Abdul Razakah (a.k.a. "Abdul Razak").[15] Both men received military-type training from al Qaida or supported the Tora Bora camp where such training occurred. Memet admitted that he was

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[14] During his administrative review board hearing, Mahnut also conceded that Hassan Mahsum visited the Tora Bora camp while he was training there. *Summary of Administrative Review Board Proceedings for ISN 277* at 4. This and all other CSRT or Administrative Review Board documents cited in this brief are available online, <http://projects.nytimes.com/guantanamo/country/china>.

[15] Two of the seven (Bahtiyar Mahnut and Arkin Mahmud) remain petitioners in this case, but have been accepted for release to Switzerland. The other three (Abdul Sabour, Khalid Ali, and Sabir Osman) declined to petition this Court for review for the D.C. Circuit's decision. See Gov't Br. 5 n.3.

trained at the ETIM's Tora Bora camp. Ahmed Mohamed, CSRT Transcript, at 4. He admitted that he arrived at the Uighur Tora Bora training camp in November 2000, and was there when the camp was bombed by coalition forces in October 2001. *Id.* at 4-5. He further admitted that the camp was run by the aforementioned terrorist, Abdul Haq, *id.* at 6-7, who conducted much of the training, *id.* at 8. He agreed that he "received training on pistols, AK-47[s], and two types of rifles while at the Uighur Tora Bora training camp." *Id.* at 4.

As for Razakeh, U.S. officials determined that he bought supplies for the ETIM's Tora Bora training camp. *Unclassified Summary of Evidence for Administrative Review Board in the Case of Qadir, Abdal Razak* at 1 (Oct. 24, 2005). U.S. officials found that Razakeh "sought out and joined" the ETIM after learning that Mahsum "was running a political organization to protect Uighurs' rights." *Ibid.* Razakeh also "was given a machine gun to defend himself." *Ibid.*

Publicly-available records buttress the Government's conclusion that the three Uighurs who refused release to Palau and who are no longer petitioners in this case—Abdul Sabour, Khalid Ali, and Sabir Osman, see Gov't Br. 5 n.3—were sufficiently tied to terrorism to render them inadmissible under the immigration laws.[16] In light of

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[16] All three were trained at the ETIM's Tora Bora camp. Two of the three—Khalid Ali (a.k.a. "Saidullah Khalik") and Sabir Osman (a.k.a. "Hajiakbar Abdulghupur")—testified during Petitioner Bahtiyar Mahnut's CSRT. They both admitted that Abdul Haq ran the ETIM's Tora Bora training camp. Bahtiyar Mahnut, CSRT Transcript, at 13, 17. During his own CSRT, Osman admitted that he was trained at the Tora Bora camp, and explained that Abdul Haq "was in charge of the group" and "the one responsible for the camp." Hajiakbar Abdulghupur, CSRT Transcript at 8, 9, 13. The third, Abdul Sabour (a.k.a. "Yusef Abbas"), explained during his CSRT

their records, the Government is justified in finding that federal law prohibits their admission into the Nation. See, *e.g.*, 8 U.S.C. §1182(a)(3)(B)(i)(VIII).

3. *Petitioners' subjective motivations are immaterial*

Despite petitioners' records and the ETIM's history, petitioners assert that they harbor no animus toward the United States. Pet. for Cert. at 4-5. Their subjective intent, even if taken at face value, is immaterial; the federal immigration statutes bar *all* who have received terrorist training or have other terrorist connections, not only those with anti-American intentions. 8 U.S.C. §1182(a)(3)(B)(i). That objective, bright-line rule is well justified in light of the Nation's experience with domestic terrorism. On several occasions, terrorists have attacked non-U.S. targets on American soil, harming not only their target but also American civilians caught in the crossfire.

Petitioners' proposed release site, Washington, D.C., was the site of one such attack. In 1976 a car bomb killed Orlando Letelier, a Chilean policy researcher and political opponent of Chile's Augusto Pinochet. The bomb was traced to three groups—Chile's Dirección Nacional, the Chilean secret police, and the Coordinacion de Organizaciones Revolucionaries Unidas (an anti-Castro group)—none of which had avowed anti-U.S. intentions. See *Chile Sentences Two Generals for Letelier Killing*, N.Y. Times, Nov. 13, 1993, at 7.

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that he was shown how to use a Kalashnikov rifle at the Tora Bora camp by a Uighur named "Abdul Maxum," which is likely a reference to Hassan Mahsum. Yusef Abbas, CSRT Transcript at 4. Furthermore, U.S. officials found that Sabour "participated in the battle of Tora Bora," "was wounded as a result of coalition bombing, and received medical treatment from the Taliban." *Summary of Evidence for Combatant Status Review Tribunal—ABBAS, Yusef*, at 1 (Nov. 3, 2004).

Nevertheless, one American was killed in the attack, and another one was injured. *Ibid.*

Similarly, after Fidel Castro seized power in Cuba, many of his political enemies fled to the United States, formed anti-Castro organizations and commenced a war of terror against Cuba, Castro, and Castro apologists. In 1975 alone, anti-Castro activists bombed the Miami FBI office, a Social Security office, and myriad other government buildings; they exploded several bombs in New York; they bombed the Miami International Airport; and they attempted several assassinations, including one car bomb that cost a prominent radio broadcaster both legs.[17] More recently, anti-Castro terrorists twice firebombed a travel agency operated by a Cuban-American who advocated opening dialogue with the Castro regime.[18]

None of this is to suggest that petitioners necessarily harbor such intentions against Chinese or other non-U.S. assets or personnel in the United States. The only consideration relevant under the immigration laws is that all aliens must satisfy the requirements for admission prior to their lawful entry into the Nation, and that aliens who have received military-type training from terrorists, or who are otherwise connected to terrorism, are categorically prohibited from securing such admission. Because petitioners have not proven that they satisfy the

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[17] *Cuban Extremists in U.S. A Growing Terror Threat*, U.S. News & World Report, Dec. 6, 1976, at 29-35; Timothy S. Robinson & Stephen J. Lynton, *Evidence Links Letelier Death to Anti-Castro Unit*, Wash. Post, Feb. 1, 1977, at A1, A8.

[18] Luisa Yanez, *Exile's Business is Hit By Firebomb*, Sun-Sentinel (South Florida), Aug. 2, 1996, at 3B; Wayne Smith *et al.*, *Sanctuary for Terrorists?*, International Policy Report, Jan. 2006, at 7 <http://ciponline.org/cuba/ipr/SanctuaryForTerrorists.pdf>.

standards for admission, their admission is prohibited, and their entry is unlawful.

D. Neither *Boumediene* Specifically, Nor Habeas Law Generally, Entitles Petitioners To Enter The United States In Violation Of Federal Immigration Law

1. *The substantive issue before this Court was not decided in* Boumediene

In *Boumediene* v. *Bush*, this Court decided only one issue: whether the federal district courts have jurisdiction to hear habeas petitions filed by Guantánamo Bay detainees. 128 S. Ct. 2229, 2271 (2008). The Court repeatedly emphasized that "our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined." *Id.* at 2277; see also *id.* at 2271 ("The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage."); *id.* at 2279 ("The Court [does not] say what due process rights the detainees possess") (Roberts, C.J., dissenting)).

Despite the Court's clear statement that *Boumediene* decided no issues of substantive legal rights, petitioners argue that the *Boumediene* decision *controls* this case, such that federal courts are *commanded* to release petitioners into the United States. Pet. Br. 23-35. Petitioners' characterization of *Boumediene*'s effect is premised upon their assertion that the Government can detain petitioners if and only if they are found to be enemy combatants. *See id.* at 34-35. But as explained above, "enemy combatant" status is not the only legal obstacle to a detainee's release into the United States, and aliens may be detained for reasons other than "enemy combatant" status. Petitioners' release into the

civilian population is governed by *all* applicable laws, including the immigration laws that secure the borders.

Petitioners suggest that the decision below conflicts with the general rule that "[r]elease is the remedy in habeas." Pet. Br. 27; see generally *id.* at 27-29. But release is *not* habeas's exclusive remedy. Over one hundred and forty years ago, Congress amended the federal habeas statute to eliminate outright release as the exclusive remedy, and to direct the courts instead to dispose of each case "as law and justice require." See *Wilkinson* v. *Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (analyzing 28 U.S.C. §2243). This Court has "interpreted this broader remedial language to permit relief short of release." *Ibid.* Thus, habeas relief may include either unconditional or conditional release where appropriate, but it may also include "[o]rders essentially in the nature of a declaratory judgment," such as in cases where a prisoner held for two independent reasons cannot demonstrate that one of the grounds for confinement is unlawful. 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice And Procedure* §33.4, at 1695 (2005); see also *Preiser* v. *Rodriguez*, 411 U.S. 475, 487-88 (1973); *Walker* v. *Wainwright*, 390 U.S. 337, 336-37 (1968).

Non-release relief is entirely consistent with habeas's core purpose: "the great object of [*habeas corpus*] is the liberation of those who may be imprisoned without sufficient cause." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830), *quoted in* Pet. Br. 26. The object of habeas is not to free persons *lawfully* imprisoned, such as petitioners lawfully held under the immigration laws.

2. *Petitioners identify no case in which habeas corpus entitled aliens to enter despite specific statutory prohibitions barring their entry*

Petitioners request unprecedented relief: release into the United States, statutory prohibitions notwithstanding. They identify not a single precedent in which a court granted habeas relief to an alien, allowing the alien to enter the United States for the first time despite a statute independently prohibiting his entry. The three cases on which they primarily rely are unavailing.

a. Petitioners argue that the precedent most analogous to the case before this Court is a sixty-year-old Second Circuit case that this Court has never cited. *United States ex rel. Bradley* v. *Watkins*, 163 F.2d 328 (2d Cir. 1947), *cited in* Pet. Br. 39. But *Bradley* held only that a prisoner brought to the United States may not be compelled to apply for admission when he does not want to remain here. 163 F.2d at 330. The Second Circuit released Bradley, who "ha[d] no right to enter the United States," precisely because he intended to depart Ellis Island on the first available ship: "He is an experienced seaman and states through his counsel that he has *no desire to enter the United States* but wishes to ship out as a seaman on a foreign bound vessel. He has this privilege and it will *rid the United States of an alien who has no right to remain here.*" *Id.* at 332 (emphasis added). Here, by contrast, petitioners demand not to leave the United States, but to be "resettled" here in "more permanent arrangements," Pet. Br. 17, where local organizations would attempt to "integrate [them] into American society," Br. of Uyghur Am. Ass'n at 3.

Moreover, shortly after deciding *Bradley*, the Second Circuit reiterated that aliens may not use habeas corpus to secure their entry into the United States if their entry is otherwise prohibited:

> Since he was brought here against his will, he is entitled to depart as and whither he pleases, provided only that he can gain admission at his chosen destination. *But he is not entitled to depart when he pleases, or to remain here indefinitely, simply because he did not choose to come here*.

United States ex rel. Schirrmeister v. *Watkins*, 171 F.2d 858, 860 (2d Cir. 1949) (emphasis added). The court also stressed that if an alien, like petitioners here, refuses to depart for a willing nation, then the Government may hold him indefinitely. *Ibid.* In other words, the Second Circuit endorsed the Government's position, not petitioners'.

b. Petitioners suggest that the celebrated *Amistad* case demonstrates that the Executive Branch has no inherent authority to detain excluded aliens. Pet. Br. 44 (citing *United States* v. *Libellants of Amistad*, 40 U.S. 518 (1841). Setting aside the fact that the Government's exclusion and detention of petitioners are wholly justified by federal statutes, thereby rendering resort to the President's inherent authority unnecessary, *Amistad* did not hold that excluded, detained aliens are entitled to release into the United States where statutes prohibit such release. Quite the contrary: In *Amistad*, the Government specifically conceded that federal statutes did *not* bar the aliens' entry into the United States. 40 U.S. at 596.[19] Thus, *Amistad* is not analogous to a case where federal statutes *do* bar petitioners' entry.

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[19] The *amicus* brief devoted exclusively to *Amistad* stresses that the Government argued in that case (before the district court) that a statute barred the Africans' entry, but the brief fails to recognize the Government's subsequent concession that the statute did *not* bar their entry. See Br. of. Scholars of Nineteenth-Century Am. Legal History 8, 10-13.

c. Finally, petitioners cite a three-centuries-old English case as historical evidence that alien status did not prevent domestic release of prisoners. Pet. Br. 30 (citing *DuCastro's Case*, 92 Eng. Rep. 816 (K.B. 1697)). Petitioners do not actually engage the text of *DuCastro's Case*; their analysis is based wholly on a law review article's interpretation of that case. See *id.* (citing Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 Va. L. Rev. 575, 605-06 (2008)).

Petitioners' reliance upon Halliday's and White's interpretation of *DuCastro's Case* is misplaced. Professor Philip Hamburger's research suggests that DuCastro was released under habeas corpus not *in spite of alien status*, but precisely because the court evidently found him *not to be an alien*. See Philip Hamburger, *Beyond Protection*, 109 Colum. L. Rev. 1823, 1889-90 & n.214 (2009). As Hamburger concludes, the history of habeas corpus supports the Government's position: "The eighteenth-century evidence thus makes clear that prisoners of war could not get writs of habeas, regardless of whether or not they were held within sovereign territory." *Id.* at 1893.

II. Ordering Petitioners' Release Into The United States Would Impair U.S. Military Operations Overseas

A decision that aliens not found to be "enemy combatants" are entitled to be released into the domestic civilian population would have dire national security consequences. It would undercut the Nation's detention policies at overseas bases that, although "technically outside the sovereign territory of the United States," could be deemed by a court to be "[i]n every practical sense * * * within the constant jurisdiction of the United States" and thus within the courts' habeas jurisdiction. *Boumediene*, 128 S. Ct. at 2260-61.

Preventative detention is an invaluable tool in the military's offensive and humanitarian operations. The U.S. Army and Marine Corps *Counterinsurgency Field Manual* instructs that detention of individuals suspected of terrorist activity is a "critical component[] to any military operation." U.S. Dep't of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual 3-24*, at 7-40 (2006). This liberal policy toward detention serves at least three purposes: (i) it protects the safety of American servicemen; (ii) it protects the peaceful populations in whose midst the U.S. military serves, and whose society is defended by the Nation's use of military force; and (iii) it protects the persons detained who might otherwise need to be neutralized by other means.

Petitioners' relief, if granted, would place military personnel on the horns of a dilemma. If American servicemen have reason to believe that a possibly hostile person has not yet committed acts rendering him an "enemy combatant," and that once apprehended the person may not be releasable either to his home country or to other countries, then they will have to choose between two poor options: detain the person and risk giving him a right of entry to the United States, or leave the person undetained and risk harm to either U.S. military forces or the surrounding population.

Petitioners' requested relief also would have negative consequences off the field of combat. If the Government could no longer detain inadmissible aliens yet lacked a suitable destination country, it may be confronted with the unpalatable choice of either returning the detainees to a willing but inappropriate country, or affording the detainees a *de facto* right of entry into the United States.

This second problem is one of immediate urgency in light of recent events. Although the friendly nations of Bermuda and Palau have been willing to accept petitioners, many of the remaining detainees are

welcome only in nations that cannot reasonably assure the United States that they will prevent the detainees from engaging in terrorist activity. Such concerns are bolstered by recent press accounts that the Department of Defense has found that *twenty percent* of released Guantánamo Bay detainees engaged in subsequent terrorist activities. See Elisabeth Bumiller, *Many Ex-Detainees Said to be Engaged in Terror*, N.Y. Times, Jan. 7, 2010, at A16.[20]

And petitioners' requested relief would have broad ramifications because petitioners are not alone in their unwillingness to return to their home countries. In addition to the Yemenis who have been cleared for release but cannot be repatriated due to the threat of terrorism, there reportedly are detainees from Algeria and Tajikistan who, like petitioners, have been cleared for release but fear persecution if they are returned to their native countries. Peter Finn, *Administration Makes Progress on Resettling Detainees*, Wash. Post, Aug. 20, 2009, at A3. This set of un-returnable detainees could increase if the U.S. Court of Appeals for the D.C. Circuit affirms a federal district court's decision that jurisdiction to hear habeas petitions extends to Bagram Air Base in Afghanistan or other military bases. See *Al Maqaleh* v. *Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009), appeal docketed, No. 09-5265 (D.C. Cir. July 31, 2009). There are 750 detainees at the Bagram base alone. Alissa J. Rubin & Sangar Rahimi, *Bagram Detainees Named by U.S.*, N.Y. Times, Jan. 17, 2010, at A6.

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[20] The December 2009 attempted terrorist attack on a U.S.-bound plane may have been one such case. According to press reports, former Guantánamo detainees command the al Qaida cell in Yemen that claims responsibility for the attack. Sudarsan Raghavan, *Former Guantanamo Detainees Fuel Growing Al-Qaeda Cell*, Wash. Post, Dec. 30, 2009, at A3.

These considerations have never been weightier than today. Shortly before this brief was filed, the Senate Intelligence Committee convened a hearing to question the Director of National Intelligence, the Director of Central Intelligence, and the Director of the Federal Bureau of Investigation. The three officials unanimously testified that they are "certain" that terrorists will attempt another attack in the United States in the near future. Mark Mazzetti, *Al Qaeda Intent on Attack, Senators Told*, N.Y. Times, Feb. 3, 2010, at A6. That direct, explicit, public warning by the leaders of the Nation's intelligence community is without precedent, even in the immediate aftermath of the attacks of September 11, 2001. To allow inadmissible aliens a right of release into the domestic civilian population would undermine the immigration laws, an invaluable tool of national self-defense, at a dangerous moment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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