

2010

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## Recommended Citation

Vladeck, Stephen I., "The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration" (2010). *Constitutional Commentary*. 1029.

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# THE UNREVIEWABLE EXECUTIVE: *KIYEMBA, MAQALEH, AND THE OBAMA ADMINISTRATION*

*Stephen I. Vladeck\**

If Lord Acton was correct that power corrupts,<sup>1</sup> then it should come as no surprise that presidential power tends to corrupt presidents. Especially in light of the current and ongoing threat that transnational terrorism poses to our national security, there are insufficient incentives for presidents of any political stripe voluntarily to accept—let alone champion—constraints on their authority in the name of individual rights. I don't mean to condone this reality, of course, but merely to observe at the outset how unsurprising it is that the Obama Administration has continued many of the more controversial counterterrorism programs begun or expanded during the tenure of President George W. Bush, including initiatives heavily criticized by then-Senator Obama during his presidential campaign.<sup>2</sup>

From military commissions to governmental secrecy, from the detentions at Guantánamo, Bagram, and elsewhere to the increasing use of UAVs to attack—and kill—terrorism suspects around the world, one could fairly draw a number of descriptive comparisons between the national security policies of the forty-fourth U.S. President and those of the forty-third. What's more, such comparisons have increasingly provided fodder for critics at

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\* Professor of Law, American University Washington College of Law. My thanks to Heidi Kitrosser for the invitation to participate in this colloquy, and to Jillian Moo-Young for research assistance. In the interest of full disclosure, I should note that I have co-authored amicus briefs in several of the cases discussed in this essay, including on the merits in support of the petitioners in the Supreme Court in *Boumediene*, in support of certiorari in *Kiyemba II*, in support of the appellees in the D.C. Circuit in *al-Maqaleh*, in support of rehearing en banc in the D.C. Circuit in *al-Bihani*, and in support of the appellants in the Ninth Circuit in *Mohamed*. Needless to say, the views expressed herein are mine alone.

1. See Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 750 (14th ed. 1968) (“Power tends to corrupt and absolute power corrupts absolutely.”).

2. For a fairly thorough and even-handed overview, see Peter Baker, *Obama's War Over Terror*, N.Y. TIMESMAG., Jan. 17, 2010, at 30.

both ends of the political spectrum; an ever-growing number of conservative commentators have found the similarities hypocritical, and just as many liberal observers seem to be taking the analogous nature of the measures as a deeply disheartening reinforcement of the status quo.

My own view, for whatever little it's worth, is that many of the descriptive similarities at the policy level are superficial, and belie far more fundamental distinctions at the constitutional level, where the current administration is far less wedded to claims of unilateral (and infeasible) presidential power than its predecessors. Thus, the Obama Administration has 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<sup>3</sup> to take measures he deems appropriate during wartime, and that congressional attempts to constrain that authority, to the extent they even apply, are unconstitutional.<sup>4</sup>

To similar effect, the current Administration has embraced, rather than objected to, arguments that international law (and international humanitarian law, in particular) have a significant role to play in circumscribing the scope of the President's authority to detain terrorism suspects—and even try them before military commissions.<sup>5</sup> Thus, in *al-Bihani v. Obama*, in which the D.C. Circuit controversially concluded that the President's statutory detention authority is *not* meaningfully constrained by the laws of war,<sup>6</sup> the majority's conclusion to that effect went, as

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3. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

4. See generally Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 950–63 (2007) (describing and documenting the invocations of the “Commander-in-Chief override”). For the magnum opus on the scope of the Commander-in-Chief Clause (produced by two then-academics who are now senior lawyers in the Obama Administration's Office of Legal Counsel), see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb* (Pts. 1–2), 121 HARV. L. REV. 689, 941 (2008). For one example of the current Administration explicitly disavowing the Article II argument, see *Mohammed v. Obama*, No. 05-1347, 2009 WL 4884194, at \*3 (D.D.C. Dec. 16, 2009). See also *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009) (mem.).

5. For an overview of this debate, and its relationship to arguments about the Commander-in-Chief Clause, see Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007).

6. See *al-Bihani v. Obama*, 590 F.3d 866, 871–72 (D.C. Cir. 2010). This conclusion is troubling insofar as it is difficult to square with the Supreme Court's own observations on the subject. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion)

Judge Williams charitably described in his concurrence, “well beyond what even the government ha[d] argued.”<sup>7</sup>

And although the current Administration has, like its predecessors, vigorously defended the scope of the state secrets privilege, and has challenged a pair of Ninth Circuit decisions taking a more nuanced (and less deferential) approach to executive claims thereto,<sup>8</sup> it has not challenged on constitutional grounds proposed legislation that would circumscribe the privilege—an objection that the Bush Administration raised repeatedly.<sup>9</sup>

To be sure, these distinctions have tended not to produce different results in individual cases. Thus, the current Administration continues vigorously to defend on the merits the detention of those non-citizens still in custody at Guantánamo Bay, just as it continues to defend its authority to try certain of the detainees before military commissions. In addition, thanks to statutes like the Military Commissions Acts of 2006<sup>10</sup> and 2009,<sup>11</sup> the FISA Amendments Act of 2008,<sup>12</sup> and others, vanishingly few areas remain in contemporary counterterrorism policy in which the President is operating in the face of clear congressional constraints.

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(“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”); *id.* at 548–49 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (advocating a more substantial role for the laws of war in interpreting the President’s authority under the AUMF). Indeed, as this essay went to print, seven of the nine active judges of the D.C. Circuit specifically dismissed that holding as dicta while otherwise denying rehearing en banc. See *al-Bihani v. Obama*, No. 09-5051, 2010 WL 3398392, at \*1 (D.C. Cir. Aug. 31, 2010) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, J.J., concurring in the denial of rehearing en banc).

7. *Al-Bihani*, 590 F.3d at 885 (Williams, J., concurring in the judgment) (citing Appellees’ Unclassified Brief at 23).

8. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009), *vacated*, No. 08-15693, 2010 WL 3489913 (9th Cir. Sept. 8, 2010) (en banc). The earlier decision, which the government has also contested in its briefing to the *en banc* court in *Mohamed*, was *al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007). An 11-judge *en banc* panel of the Ninth Circuit heard argument on December 15, 2009, and a decision remains pending as of this writing.

9. See, e.g., Letter from Michael B. Mukasey, Attorney Gen., to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Mar. 31, 2008), available at <http://www.fas.org/sgp/jud/statesec/ag033108.pdf>.

10. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

11. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.).

12. Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 50 U.S.C.).

As a result, the separation-of-powers disputes that characterized so much of the landscape of national security law during the Bush Administration have given way to cases in which the dispute centers on whether, as Justice Jackson famously put it, “the Federal Government as an undivided whole lacks power.”<sup>13</sup> Suffice it to say, though, that if one looks behind the description of the policies at issue in these cases and to their underlying legal foundations, profound differences *do* exist between the Obama Administration’s and Bush Administration’s approaches to executive power, almost all of which are, at least in my view, generally for the better.

In the essay that follows, rather than elaborate upon these distinctions, I want to highlight one area in which, both on and beneath the surface, I actually do find disturbing similarities between the arguments of the Obama Administration and its predecessors vis-à-vis executive power: the proper role of the federal courts in detainee habeas cases. In particular, my thesis is that arguments against judicial power in habeas cases are effectively arguments in favor of executive power, since they presuppose that the merits of the petitions—whether the detention of the petitioner is legally authorized—are irrelevant.

In other words, even though it is Congress in the current cases that has purportedly divested the federal courts of jurisdiction (or otherwise constrained their authority),<sup>14</sup> and Congress that has purportedly authorized the underlying detention, the real significance of arguing against habeas review is that it is an argument against a vital check on the *Executive’s* detention power. Indeed, congressional authorization for detention would hardly be necessary if, simply by virtue of the detainee’s location or status, the federal courts lacked the power to hear his claims or to provide effective relief. Thus, this essay suggests that a heretofore underappreciated aspect of executive power is that of the anti-judicial (or “unreviewable”) Executive—the idea that arguments against judicial power, especially in habeas cases, inevitably reduce to arguments in favor of presidential prerogative.

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13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–37 (1952) (Jackson, J., concurring).

14. *See, e.g.*, Military Commissions Act of 2006, § 5(a), 120 Stat. 2600, 2631 (codified at 28 U.S.C. § 2241 note) (“No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”).

After laying out this thesis in Part I, Part II turns to three specific cases in which the Obama Administration has continued to contest the habeas corpus powers of the federal courts. The first is *al-Maqaleh v. Gates*, which raises the question whether the Supreme Court's holding in *Boumediene v. Bush*—that the Guantánamo detainees have a constitutional right to habeas corpus<sup>15</sup>—applies to individuals held elsewhere, especially at the “BTIF,” the Bagram Theater Internment Facility in Afghanistan. Although a D.C. district court judge appointed by President George W. Bush held in April 2009 that non-Afghanis picked up outside of Afghanistan *did* have a right to pursue habeas relief in the federal courts, the Obama Administration fiercely contested that decision. As this essay went to print, a three-judge panel of the D.C. Circuit endorsed the Obama Administration's arguments, reversing the district court and holding that the Constitution does not require habeas corpus for non-citizens held at Bagram.<sup>16</sup>

Whereas *Maqaleh* raises the specter of the unreviewable Executive in perhaps its starkest form, the Obama Administration has also defended a pair of 2009 D.C. Circuit decisions identifying narrow limits on the remedial powers of the federal courts even in cases in which, thanks to *Boumediene*, the Suspension Clause unquestionably applies. Thus, the Administration has both opposed certiorari to review and defended on the merits the D.C. Circuit's decision in “*Kiyemba I*,” which held that the D.C. district court lacked the power to order the release of 17 Uighurs detained at Guantánamo (and held to be no longer detainable as enemy combatants<sup>17</sup>) into the United States.<sup>18</sup> In light of developments that may lead to the mooted of the case, the Supreme Court vacated the D.C. Circuit's decision in March 2010. Nevertheless, in the same brief in which it urged that the case had become moot, the Obama Administration continued vigorously to support the Court of Appeals' reasoning, as well.<sup>19</sup>

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15. 128 S. Ct. 2229 (2008).

16. See *al-Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

17. See *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

18. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam) (“*Kiyemba I*”), *opinion reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

19. See Brief for the Respondents at 26–51, *Kiyemba I*, 130 S. Ct. 1235 (No. 08-1234).

To similar effect, the Administration also defended the D.C. Circuit's even more sweeping decision in "*Kiyemba II*," which held that the D.C. district court exceeded its authority in issuing injunctive relief that would have required notice to the detainee and an opportunity to be heard prior to the detainee's transfer to a third-party country.<sup>20</sup> As in *Kiyemba I*, the Administration's brief in opposition to certiorari in *Kiyemba II* suggested quite emphatically that these are matters best left to the discretion of the political branches in general, and to the Executive in particular.<sup>21</sup> Whatever the merits of the government's reasoning, the Supreme Court appeared—however tacitly—to agree, denying certiorari in March 2010.<sup>22</sup>

To be clear, my point in this essay is not to take substantive issue with the Obama Administration's arguments in these cases, even though, to be candid, I find them all deeply troubling (in *Kiyemba II*, especially).<sup>23</sup> Rather, my goal is to suggest that, in comparing the Bush and Obama presidencies with regard to executive power, a focus on headline-grabbing topics such as military commissions, governmental secrecy, or electronic surveillance confuses superficial similarities with structural ones. On the whole, the Obama Administration has been far less unilateral in its approach to executive power—but with the important and troubling exception of the cases discussed herein.

## I. HABEAS CORPUS AND THE UNREVIEWABLE EXECUTIVE

### A. THE SUSPENSION CLAUSE AS A CHECK ON THE POLITICAL BRANCHES

One of the more intriguing aspects of Justice Kennedy's opinion for the majority in *Boumediene* was its almost dogmatic focus on the relationship between the Constitution's Suspension

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20. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, No. 09-581, 130 S. Ct. 1880 (2010) ("*Kiyemba II*").

21. See Brief for the Respondents in Opposition at 12–21, *Kiyemba II*, 130 S. Ct. 1880 (2010) (No. 09-581).

22. See 130 S. Ct. 1880 (mem).

23. *Kiyemba II* is perhaps the most disturbing of this triad because it is the decision most likely to have an impact beyond the important but limited universe of detainee habeas cases. As explained below, the D.C. Circuit's analysis, if allowed to stand, could have a significant (and detrimental) impact on the scope of a habeas court's power in more traditional extradition and deportation cases, as well. See *infra* note 81 and accompanying text (noting the impact of *Kiyemba II*, and its inconsistency with other case law).

Clause and the separation of powers.<sup>24</sup> In nearly a dozen distinct places, the *Boumediene* Court referred to the particular role that habeas corpus was meant to play in our system of checks and balances, a sentiment perhaps best captured in the following passage:

The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.<sup>25</sup>

None of this, of course, was new. The importance of habeas corpus at the Founding derived from the extent to which it served as a check on arbitrary executive detention, which Alexander Hamilton decried in *Federalist* No. 84 as one of “the favorite and most formidable instruments of tyranny.”<sup>26</sup> Thus, as Justice Kennedy explained in *Boumediene*, “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”<sup>27</sup> To that end, the Constitution’s Suspension Clause expressly protected “the Privilege of the Writ of Habeas Corpus,” authorizing its suspension only “in Cases of Rebellion or Invasion [when] the public Safety may require it.”<sup>28</sup> Habeas was not about the rights of the detainees nearly as much as it was about the ability of the courts, federal *and* state, to use the writ as a means of checking the political branches in general—and the Executive in particular.<sup>29</sup>

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24. See generally Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009).

25. *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

26. THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. *Boumediene*, 128 S. Ct. at 2244; see also *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”).

28. U.S. CONST. art. I, § 9, cl. 2.

29. For elaboration, see Stephen I. Vladeck, *Common-Law Habeas and the*

In that regard, the Founders' understanding of habeas, as described by Justice Kennedy, closely resembled the prevailing understanding of the scope and purpose of the writ in England, where, as a recent study by Paul Halliday documents, King's Bench had increasingly come to use the writ to consolidate its power, first vis-à-vis other courts and tribunals, and ultimately at the expense of Parliament and the King himself.<sup>30</sup> Deliberately modeling off of the English experience, the Founders included habeas as the only remedy expressly guaranteed by the text of the Constitution.<sup>31</sup>

#### B. FEDERAL HABEAS CORPUS JURISDICTION AND THE SUSPENSION CLAUSE

Although the role that the Suspension Clause was meant to play in our constitutional system is abundantly clear in retrospect, the relationship between the habeas corpus jurisdiction of the lower federal courts and the Clause is far less so—and requires a bit of doctrinal and descriptive elucidation. Indeed, at first blush, it is not at all obvious how a statute taking away jurisdiction Congress was not compelled to confer from courts Congress was not compelled to create could violate the Constitution.

As I've explained previously, “the constitutional problem raised by habeas-stripping statutes does *not* arise solely from their constriction of the jurisdiction of the Article III courts.”<sup>32</sup> Rather, it is a result of the effect of such statutes in *conjunction* with other statutes or lines of doctrine that constrain the ability of other tribunals to entertain such claims.<sup>33</sup>

Put differently, the reason why the jurisdiction of the lower federal courts over habeas petitions from federal prisoners so thoroughly implicates the Suspension Clause is because the lower federal courts are the only tribunals currently with

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*Separation of Powers*, 95 IOWA L. REV. BULL. 39 (2010). See generally ERIC FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 36–41 (2001).

30. See generally PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 160 (2010).

31. The Bill of Rights would add a second constitutionally-grounded remedy via the Just Compensation Clause of the Fifth Amendment.

32. Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71, 74 (2008) (emphasis original).

33. See *id.* at 78–80. In particular, I explained that the local courts in the District of Columbia would have the hybrid authority to issue common-law writs against federal officers, but for a statute that expressly deprives them of such power. See *id.* at 77–78 (citing D.C. CODE § 16-1901(b)).

authority to entertain such claims as an original matter. A pair of Supreme Court cases from shortly before and after the Civil War deny such power to the state courts,<sup>34</sup> and *Ex parte Bollman* limits the Supreme Court's jurisdiction over "original" habeas petitions to cases in which there is *some* underlying lower-court decision,<sup>35</sup> so that the Court is effectively exercising "appellate" rather than "original" jurisdiction,<sup>36</sup> at least within the meaning of Article III, section 2. Thus, constraints on the habeas jurisdiction of the lower federal courts invariably implicate the question whether the Suspension Clause affirmatively protects a right to judicial review.

The upshot of this analysis is that arguments against federal habeas jurisdiction are arguments in favor of effectively unreviewable executive detention. Thus, and notwithstanding the Madisonian Compromise or nineteenth-century Supreme Court decisions that have been read to suggest that Congress's power over the jurisdiction of the lower federal courts is plenary,<sup>37</sup> the Supreme Court in *Boumediene* invalidated section 7(a) of the Military Commissions Act of 2006 as applied to Guantánamo,<sup>38</sup> entirely because it deprived the federal courts of jurisdiction over the detainees' habeas petitions without providing an adequate substitute.<sup>39</sup>

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34. See *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). For a superb recent discussion of the background to and significance of these decisions, see Ann Woolhandler & Michael Collins, *The Story of Tarble's Case: State Habeas and Federal Detention*, in *FEDERAL COURTS STORIES* 141 (Judith Resnik & Vicki C. Jackson eds., 2009).

35. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

36. As Justice Souter has helpfully explained, an "original" habeas petition "is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) (citing Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153).

37. See, e.g., Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2036–39 (2009) (rehashing arguments that Congress's power over federal jurisdiction, even in habeas cases, is plenary).

38. Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(e)(1)).

39. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262–75 (2008). Justice Thomas recently suggested that the Court has in fact "left open the question whether statutory efforts to limit [federal habeas jurisdiction] implicate the Suspension Clause." *Noriega v. Pastrana*, 130 S. Ct. 1002, 1006 (2010) (Thomas, J., dissenting from the denial of certiorari). It is incredibly difficult to reconcile such an assertion with *Boumediene*, which necessarily held that a statutory limit on federal habeas jurisdiction violated the Suspension Clause.

It bears emphasizing that claims by the government that the courts lack jurisdiction in habeas cases are seldom based on inherent authority.<sup>40</sup> Because Congress has provided the federal courts with habeas corpus jurisdiction from their inception,<sup>41</sup> it usually takes affirmative action by Congress to withdraw jurisdiction in habeas cases.<sup>42</sup> As a result, the kind of “executive power” that is implicated when the courts’ jurisdiction is challenged is not, at first blush, inherent or unilateral authority; quite to the contrary, it is authority that necessarily finds implicit (or explicit) legislative sanction in the statute purporting to remove jurisdiction.

What is telling, though, is that the preclusion of jurisdiction renders entirely beside the point the question whether Congress has separately provided substantive authorization for the challenged detention. So long as the courts cannot reach the legality of the underlying detention, the only possible effect of the availability of substantive authorization *vel non* would be as it relates to a subsequent—and entirely retrospective—damages action claiming unlawful detention.<sup>43</sup> Even though, at that point, the existence of statutory authorization for the detention may matter a great deal, the odds of recovery for unlawful detention

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40. One relevant counterexample is a provision in the Executive Order creating military commissions promulgated by President Bush in November 2001. Section 7(b)(2) of the order provided that any individual subject to the order “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 7(b)(2), 66 FED. REG. 57,833, 57,835–36 (Nov. 13, 2001). To my knowledge, though (and for good reason), this provision was never invoked.

41. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241(a)).

42. One exception would be instances in which the courts interpreted preexisting statutory language to sweep more narrowly than was previously understood, as, for example, in *Ahrens v. Clark*, 335 U.S. 188 (1948) (holding that the federal habeas statute required petitioners to file their petitions in the district in which they were confined). See generally Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 292–300 (2008) (explaining how the decision in *Ahrens* unintentionally precipitated a set of serious constitutional questions).

43. This exact set of arguments has played out in a fascinating recent academic exchange over the Suspension Clause, and the specific question of whether a valid suspension of habeas corpus merely delays (until the suspension is lifted) judicial review of purportedly unlawful detention, or whether it serves to affirmatively *authorize* the prisoner’s detention for the duration of the suspension. For the competing sides, compare Trevor W. Morrison, Hamdi’s *Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006), and Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007), with David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006), and Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2008).

would still be incredibly long,<sup>44</sup> and, more importantly, the putatively unlawful detention would already have ceased. Practically, then, arguments against federal habeas jurisdiction are arguments in favor of the unreviewable Executive's power to detain, whether pursuant to a statute, some other freestanding legal authority, or neither.

## II. KIYEMBA, MAQALEH, AND THE OBAMA ADMINISTRATION

Separate from its profound legal consequences, the Supreme Court's June 2008 decision in *Boumediene* also had an enormous practical impact, as dozens of cases that had previously been in a six-year-long jurisdictional purgatory have finally been able to proceed in the D.C. district court and D.C. Circuit.<sup>45</sup> In the run of cases, the remaining issues after *Boumediene* have all gone to the merits. But a small handful of cases have raised distinct challenges to the power of the courts, and it is in those cases that the Obama Administration has most directly embraced the anti-reviewability arguments of its predecessors.

### A. THE ARGUMENT AGAINST JURISDICTION: MAQALEH

One of the most significant questions that *Boumediene* left unanswered was whether the majority's conclusion that the Suspension Clause "has full effect at Guantanamo Bay"<sup>46</sup> was based on analysis that was unique to Guantánamo, or whether comparable reasoning would also support extending the Suspension Clause to other extraterritorial U.S. detention sites, especially the Bagram Theater Internment Facility (BTIF) in Afghanistan.<sup>47</sup> The Bush Administration vigorously opposed any extension of *Boumediene* in a quartet of cases arising out of

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44. Cf. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (holding, in sweeping terms, that no Bivens remedy could be available for a non-citizen who alleged that he had been subjected to extraordinary rendition), *cert. denied*, 130 S. Ct. 3409 (2010).

45. For a careful analysis of the voluminous body of post-*Boumediene* habeas litigation in the D.C. courts, see Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010). See also BENJAMIN WITES ET AL., THE BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2010).

46. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

47. The issue had arisen prior to *Boumediene*, but the matter was held in abeyance pending the Supreme Court's disposition of the jurisdictional issues raised therein. See *al-Maqaleh v. Gates*, 06-1669, 2007 WL 2059128 (D.D.C. July 18, 2007).

Bagram that were argued before Judge Bates in the D.C. district court on January 7, 2009, and resolved in a pair of decisions handed down three months later.

In *al-Maqaleh v. Gates*, Judge Bates ruled that, applying *Boumediene's* analysis, the Suspension Clause should also have “full effect” at Bagram, at least where the detainee was not initially detained within Afghanistan.<sup>48</sup> Although Bates also suggested that practical obstacles counseled against habeas review in cases arising out of Bagram where the petitioner was a citizen of Afghanistan,<sup>49</sup> the effect of his analysis was to sustain jurisdiction in three of the four cases before him,<sup>50</sup> and to grant the government’s motion to dismiss in the fourth case.<sup>51</sup>

The Obama Administration, which had briefly noted (in response to a query from Judge Bates) that it adhered to the Bush Administration’s position in the district court,<sup>52</sup> pursued an immediate appeal to the D.C. Circuit.<sup>53</sup> And in their briefing to the Court of Appeals, the Administration argued forcefully for reversal—and against habeas jurisdiction for any of the Bagram detainees. Arguing that section 7(a) of the MCA continued to preclude statutory jurisdiction notwithstanding *Boumediene*, the government’s brief offered three reasons why the

petitioners’ attempt to analogize Bagram to Guantanamo fails. First, unlike Guantanamo, Bagram Airfield is located in a distant and active war zone. Second, Bagram has been in existence for only a short time, was never part of, or carved out of, U.S. territory to remain under de facto U.S. sovereignty separate and apart from the sovereignty of the nation in which the base is situated, and is not intended to serve as a permanent facility to advance independent U.S. interests. Third, Bagram serves the military mission of strengthening Afghan sovereignty, and the government must therefore take into account the views of our allies (most prominently the Afghan government, but also the many other

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48. *al-Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009).

49. *Id.* at 230–31.

50. *See id.* at 232–33.

51. *See Wazir v. Gates*, 629 F. Supp. 2d 63 (D.D.C. 2009).

52. *See al-Maqaleh*, 604 F. Supp. 2d at 210 (“Because of the change in the Presidential Administration, the Court on January 22, 2009 invited respondents to notify the Court whether they intended to refine the position that they had taken to date. On February 20, 2009, respondents informed the Court that ‘the Government adheres to its previously articulated position.’”).

53. *See al-Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009) (certifying the issues presented in *al-Maqaleh* for interlocutory appeal under 28 U.S.C. § 1292(b), and granting a stay pending appeal).

nations whose troops are stationed at Bagram). Unlike at Guantanamo, where our allies are many miles away and the Cuban government exerts no influence on the military mission, at Bagram the United States needs the cooperation of both the Afghan government and its coalition allies to achieve its mission: to defeat the common enemies of Afghanistan and the United States and, by doing so, to restore full control of the country to the Afghan government.<sup>54</sup>

In short, the heart of the Obama Administration's argument (like the Bush Administration position that it inherited) was that *Boumediene* was a *sui generis* decision, limited to the exceptional and unique physical, legal, and practical circumstances of Guantánamo, and that there were compelling reasons not to extend its analysis of the Suspension Clause to Bagram.<sup>55</sup> A three-judge panel of the D.C. Circuit unanimously accepted that position in May, 2010, ruling that the practical obstacles were too great to justify extending the protections of the Suspension Clause to non-citizens at Bagram—even if they were not picked up in, or citizens of, Afghanistan.<sup>56</sup>

#### B. THE ARGUMENT AGAINST REMEDIAL POWER: *KIYEMBA I*

Although *Maqaleh* is the only detainee case thus far in which the Obama Administration has expressly embraced arguments against the habeas corpus jurisdiction of the federal courts, it has also endorsed a pair of decisions by the D.C. Circuit suggesting that, even where the federal courts *do* have subject-matter jurisdiction, the scope of their powers to fashion relief in detainee habeas cases is quite limited.<sup>57</sup>

In *Parhat v. Gates*, a petition to review a Combatant Status Review Tribunal (“CSRT”) resolved just over one week after

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54. Reply Brief for the Respondents-Appellants at 4, *al-Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. filed Nov. 16, 2009).

55. Indeed, as an amicus brief in support of the Petitioners-Appellees (that I co-authored) noted, many of the Obama Administration's arguments about the obstacles Bagram presented for habeas litigation were eerily similar to arguments the Bush Administration had made about the obstacles *Guantánamo* presented for habeas litigation—arguments that, the brief suggested, practice has since decisively repudiated. See Brief for Non-Governmental Organizations as *Amici Curiae* in Support of Appellees, *al-Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. filed Nov. 6, 2009).

56. See *al-Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

57. See *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) (“*Kiyemba II*”); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam) (“*Kiyemba I*”), *opinion reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

*Boumediene*, the D.C. Circuit had concluded that the government lacked the authority to detain Uighurs—members of a Turkic Muslim minority group from the Xinjiang province near China’s western border—as “enemy combatants.”<sup>58</sup> In light of the government’s decision not to challenge the *Parhat* ruling,<sup>59</sup> the detainees subsequently filed habeas petitions, arguing that, given the absence of authority for their continued detention, they were entitled to be released. Moreover, because they could not be repatriated to China, and because it appeared that there was no third-party country willing to take them, the Uighurs argued that they were specifically entitled to release into the United States, if no other option was immediately available.

In October 2008, D.C. District Court Judge Ricardo Urbina granted the Uighurs’ petitions, ordering the government to produce the detainees in his courtroom in order to determine what conditions should be placed upon their release.<sup>60</sup> The government successfully obtained an immediate stay of Judge Urbina’s decision and a stay pending appeal, and the D.C. Circuit heard argument just under seven weeks later. At issue, the Bush Administration’s Justice Department argued, was the plenary power that the political branches exercised over immigration. Thus, although the petitioners *were* protected by the Suspension Clause in light of *Boumediene*, the federal courts lacked the power to order their release into the United States. Given that there was no other country then in a position to take all of the Uighurs, the government’s argument, in effect, was that the Uighurs had received all the relief that the courts had the power to provide, even though they remained in U.S. custody at Guantánamo.

In *Kiyemba I*, issued in February 2009, the D.C. Circuit agreed.<sup>61</sup> Relying heavily on a pair of Supreme Court immigration decisions from the 1950s,<sup>62</sup> the court concluded that the decision whether to admit a non-citizen into the United States was purely for the executive branch, and that no statute or constitutional provision—including the Due Process Clause, which the court

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58. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

59. Because *Parhat* was a statutory appeal as provided by the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, *see id.* at 835, the subsequent habeas petitions were necessary because the D.C. Circuit had no authority in the context of its *Parhat* decision to order release.

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

61. *Kiyemba I*, 555 F.3d 1022.

62. The two cases are *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

concluded did not apply to the Guantánamo detainees notwithstanding *Boumediene*<sup>63</sup>—“expressly authorized” the courts to override that prerogative.<sup>64</sup>

Although all of the briefing and arguments before the D.C. Circuit took place on the Bush Administration’s watch, the Obama Administration subsequently opposed certiorari when the Uighurs petitioned for it,<sup>65</sup> and thoroughly defended at least large swaths of the Court of Appeals’ decision in its merits brief after the Court granted review.<sup>66</sup> Thus, as the brief opposing certiorari argued, the Uighurs had already obtained all of the relief that the courts could provide, and *Mezei* and *Knauff* suggested that the courts are otherwise barred from interfering with the Uighurs’ lawful exclusion from the United States.<sup>67</sup>

Moreover, although the government’s brief on the merits concluded by suggesting that intervening developments had effectively mooted the Uighurs’ cases, that suggestion came after 38 pages of argument defending Judge Randolph’s opinion for the D.C. Circuit. As the brief argued,

To permit the habeas court to grant such extraordinary relief would be inconsistent with constitutional principles governing control over the Nation’s borders. As this Court has long affirmed, the power to admit or exclude aliens is a sovereign prerogative vested in the political Branches, and “it is not within the province of any court, unless expressly authorized by law, to review [that] determination.” Congress has exercised that power by imposing detailed restrictions on the entry of aliens under the immigration laws, as well as specific restrictions on the transfer of individuals detained at Guantanamo Bay to the United States. In light of these statutes and constitutional principles, neither *Boumediene* nor the law of habeas corpus justifies granting petitioners the relief they seek. And the Due Process Clause does not confer a substantive right to enter the United States in these circumstances.<sup>68</sup>

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63. See *Kiyemba I*, 555 F.3d at 1026.

64. See *id.* at 1026–27.

65. See Brief for Respondents in Opposition, *Kiyemba v. Obama*, 130 S. Ct. 458 (2009) (No. 08-1234).

66. See Brief for Respondents, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam) (No. 08-1234).

67. See Brief for Respondents in Opposition at 12–15, *Kiyemba I* (No. 08-1234).

68. See Brief for Respondents at 11–12, *Kiyemba I* (No. 08-1234) (alteration in original; citation omitted).

To be fair, as the last line of the above quote suggests, the Obama Administration did not make as much out of the D.C. Circuit's conclusory due process holding as they otherwise might have (either in their briefing to the Supreme Court in *Kiyemba I* or in other Guantánamo habeas cases).<sup>69</sup> But the core of the argument—that the federal courts lack the power to effectuate the release of a detainee held outside the territorial United States when there is no obvious place to send them—replicates the heart of the D.C. Circuit's analysis.

In March 2010, the Supreme Court avoided the merits by taking up the Obama Administration's suggestion that the intervening change in circumstances had all-but mooted the petitioners' claims. As the Court's terse per curiam decision noted,

[E]ach of the detainees at issue in this case has received at least one offer of resettlement in another country. Most of the detainees have accepted an offer of resettlement; five detainees, however, have rejected two such offers and are still being held at Guantanamo Bay.

This change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so.<sup>70</sup>

Thus, the Court vacated the D.C. Circuit's decision in *Kiyemba I*, and remanded for the Court of Appeals to "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>71</sup> Notwithstanding the Supreme Court's suggestion (along with the implications of the fact that it had vacated the original decision), the same panel of the D.C. Circuit reached the same result on remand for effectively the same reasons, concluding that the change in circumstances had no bearing on the original analysis.<sup>72</sup>

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69. Indeed, and notwithstanding the D.C. Circuit's analysis, the government's merits brief in *Kiyemba I* specifically asserted that, "[f]or purposes of this case, the question is *not* whether petitioners have any rights under the Due Process Clause while they are at Guantanamo Bay." *Id.* at 43 (emphasis added).

70. *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (per curiam).

71. *Id.*

72. See *Kiyemba v. Obama*, 605 U.S. F.3d 1046 (D.C. Cir. 2010) (per curiam). *But see id.* at 1048–52 (Rogers, J., concurring in the judgment) (suggesting that the change in circumstances provided a narrower ground on which to deny relief).

C. THE ARGUMENT AGAINST EQUITABLE POWERS:  
*KIYEMBA II*

The last case in this trilogy was actually the first to be filed, dating back to requests by nine of the Uighurs in 2005 to an injunction requiring the Government to provide 30 days' notice to the district court and to counsel before transferring them from Guantánamo. The district court granted the requested relief in a pair of orders issued in September 2005, only to have the jurisdictional morass caused by the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 (which was finally resolved in *Boumediene*) forestall further consideration until the fall of 2008.<sup>73</sup> And while the district court's October 2008 decision in *Kiyemba I* would have mooted the injunction had it been affirmed, the D.C. Circuit's reversal of that decision the following February reinvigorated both as a practical and legal matter the questions raised in the case, now referred to as "*Kiyemba II*."

In a supplemental brief filed in September 2008, the Bush Administration's Justice Department offered two distinct theories for why the district court's injunction could not be sustained. First, notwithstanding *Boumediene*, the government maintained that section 7(a) of the MCA divested the federal courts of jurisdiction over the detainees' claims. Distinguishing the Supreme Court's analysis in *Boumediene*, the government reasoned that the kind of relief sought by the petitioners—and imposed by the district court—fell outside of the scope of habeas corpus protected by the Suspension Clause. As such, section 7(a)'s removal of jurisdiction did not raise any constitutional concerns.<sup>74</sup>

In the alternative, the government argued, even if the courts had *statutory* jurisdiction, the relief ordered by the district court exceeded the court's equitable authority, especially in light of the Supreme Court's intervening decision in *Munaf v. Geren*.<sup>75</sup> Specifically, the government's brief cast *Munaf* as barring the courts from second-guessing the President's determination that

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73. See, e.g., *Kiyemba v. Bush*, 219 Fed. App'x 7 (D.C. Cir. 2007) (dismissing the case for lack of jurisdiction).

74. See Supplemental Brief for Appellants, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*") (Nos. 05-5487, 05-5489).

75. 128 S. Ct. 2207 (2008) (holding that, although the federal courts have jurisdiction over habeas petitions brought by U.S. citizens detained in Iraq, the government's assurance that the detainees did not face torture if transferred to Iraqi custody precluded the petitioners from prevailing on the merits).

the petitioner did not credibly fear torture, and thereby precluding injunctive relief to bar the detainee's transfer to a third-party country.<sup>76</sup>

On the merits, the D.C. Circuit rejected the government's first contention—that the petitioners' claims fell outside the core of the Suspension Clause and were therefore not unconstitutionally precluded by section 7(a) of the MCA. A divided majority of the three-judge panel, however, wholeheartedly endorsed the government's second argument, concluding that “[o]ur analysis of [the petitioners'] claims is controlled by the Supreme Court's recent decision in *Munaf*.”<sup>77</sup> As Judge Ginsburg explained,

The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws.<sup>78</sup>

The Court of Appeals therefore held that the district court lacked the authority to require notice or a hearing prior to one of the petitioners' transfer to an as-yet-unspecified third-party country,<sup>79</sup> even though, as Judge Griffith explained in dissent,

[T]he *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful. There was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer. In considering the *Munaf* petitioners' request to enjoin their transfers, the district court [there] had the benefit of competing arguments

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76. Supplemental Brief for Appellants at 23–25, *Kiyemba II*, 561 F.3d 509 (Nos. 05-5487, 05-5489).

77. *Kiyemba II*, 561 F.3d at 514.

78. *Id.* at 516.

79. Judge Kavanaugh added a lengthy concurrence explaining why he believed the petitioners' claims were patently without merit, and responding more directly to Judge Griffith's partial dissent. *See id.* at 516–22 (Kavanaugh, J., concurring).

from the petitioners and the government for each specific transfer.<sup>80</sup>

Thus, the *Kiyemba II* majority's analysis would seem to preclude *any* federal court in *any* case in which an individual seeks to challenge his transfer to another country (including extradition and deportation cases, for example) from second-guessing the executive branch's determination (or the other country's diplomatic assurance) that the detainee does not face torture upon his transfer.<sup>81</sup>

Perhaps because of those disturbing implications, the D.C. Circuit's denial of the detainees' petition for rehearing en banc was over three dissenting votes.<sup>82</sup> In November 2009, the detainees filed a petition for certiorari, and the Obama Administration's opposition, filed in February 2010, again defended the D.C. Circuit on the merits. Specifically, the government's opposition to certiorari stressed, as relevant here, that (1) "there is no basis for believing that petitioners likely would be tortured by any country that will receive them";<sup>83</sup> (2) as such, "the court of appeals correctly held that this case 'is controlled by the Supreme Court's recent decision in *Munaf*'";<sup>84</sup> (3) the petitioners' attempts to distinguish *Munaf* were without merit;<sup>85</sup> and (4) "this case does not raise any issue about whether a habeas corpus remedy is available to enjoin a detainee's transfer to another country when the receiving country would continue to detain the individual on behalf of the United States," because the petitioners had failed adequately to preserve that argument before the D.C. Circuit.<sup>86</sup>

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80. See *id.* at 526 (Griffith, J., concurring in the judgment in part and dissenting in part).

81. But see *Munaf v. Geren*, 128 S. Ct. 2207, 2228 (2008) (Souter, J., concurring) ("[N]othing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case [where the executive branch decides to transfer a detainee notwithstanding its conclusion that the detainee is likely to be tortured], and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it."); *Khouzam v. Att'y Gen.*, 549 F.3d 235 (3d Cir. 2008) (holding, after *Munaf*, that an alien was denied due process because he was not given notice and a full and fair hearing prior to his transfer to Egypt, even though the government had received diplomatic assurances from the Egyptian government that the alien would not be tortured).

82. See *Kiyemba II*, 561 F.3d at 509 n.\*\* (noting the dissents of Judges Rogers, Tatel, and Griffith).

83. Brief for the Respondents in Opposition at 13, *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010) (No. 09-581).

84. *Id.* at 19.

85. See *id.* at 21–23.

86. *Id.* at 23–24.

Notwithstanding its vacatur three weeks earlier of the D.C. Circuit's decision in *Kiyemba I*,<sup>87</sup> the Supreme Court on March 22, 2010 denied certiorari in *Kiyemba II* without explanation, leaving intact the lower court's decision.<sup>88</sup> Thus, although *Maqaleh* raises perhaps the most obviously "jurisdictional" question of the post-*Boumediene* cases, *Kiyemba II* may have the most sweeping implications outside the hyperspecific subset of terrorism detention cases, for it is based on a far more generalized view of the scope of a federal district court's powers in a habeas case. And to the extent that the Obama Administration has thus far defended the D.C. Circuit's opinion, it is, yet again, arguing for broader executive authority at the expense of the judiciary.

### III. CONCLUSION: HABEAS AND THE UNREVIEWABLE EXECUTIVE

It seems increasingly likely that none of these three cases will ever produce decisions on the merits from the Supreme Court.<sup>89</sup> Already as of this writing, the Obama Administration appears to have successfully mooted *Kiyemba I* (and, perhaps indirectly, *Kiyemba II*) by arranging for the transfer of each of the Uighurs to a third-party country.<sup>90</sup> And since, if confirmed, Justice Kagan would likely have to recuse from considering *Maqaleh* (which would leave at most four possible votes for reversal), it also appears that the Supreme Court will not have the final word on that subject either. As a result, the Obama Administration's role in these cases may well turn out in hindsight to have been decidedly minor, and not part of the broader historical portfolio of its approach to executive power.

But for the time being, as these cases remain live (or at least relatively fresh in our memories), the similarities between the Obama Administration's arguments and those made by the Bush

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87. See *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

88. See *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010) (mem.).

89. In that sense, these three cases may join other significant challenges to post-9/11 counterterrorism policies that were successfully mooted prior to (and perhaps in order to defeat) Supreme Court review. See, e.g., *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.); *Padilla v. Hanft*, 547 U.S. 1062 (2006) (mem.). For a more general discussion of the significance of the Court's decisions "not to decide" these cases, among others, see Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 913–17 (2009) (book review).

90. See, e.g., Del Quentin Wilbur & Peter Finn, *Switzerland to Resettle Uighur Brothers from Guantanamo*, WASH. POST, Feb. 4, 2010, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302417.html>.

Administration cannot be gainsaid. Arguments against the power of the federal courts to entertain habeas petitions from individuals in federal custody, or to be able to fashion appropriate relief in cases in which the petitioners prevail on the merits, are inherently arguments in favor of the Executive—far more so than defending these cases on the substance of the government’s authority. I will save for another day my own view of the merits of these cases.<sup>91</sup> But what seems abundantly clear for present purposes is that, especially in light of *Boumediene*, the merits should be left to the courts, and not to the President, no matter his politics.

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91. For the extent to which the D.C. Circuit’s recent decisions in these (and other) detention cases are inconsistent with the Founders’ understanding of the Suspension Clause, see Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. (forthcoming Feb. 2011) (reviewing HALLIDAY, *supra* note 30).