Rights, Remedies, & Habeas Corpus -- The Uighurs, Legally Free but Actually Imprisoned

Caprice L. Roberts
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Caprice L. Roberts†

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For more than seven years, the Uighurs – Turkish Muslims who fled persecution in China only to be sold by Pakistani officials to the U.S. military for a bounty – have languished in the detainment facility in Guantánamo Bay, Cuba. Early on, the U.S. government admitted that the Uighurs are not enemy combatants. This summer, four Uighurs finally received extrajudicial relief and now reside in Bermuda; five secured release to Albania in 2006. Thirteen Uighurs remain confined at Guantánamo with their legal issues unresolved.

Boumediene v. Bush extends the privilege of habeas corpus to detainees held in the U.S. Navy facility at Guantánamo. The Supreme Court did not articulate a clear remedy for detainees who have established a habeas violation. Any precedential value of Boumediene has been hollow for the Uighurs. The federal judiciary, in Kiyemba v. Obama, abdicated its power and denied the release remedy to the Uighurs despite their proven habeas violation. The court applied a harsh body of immigration cases, which do not fit the Uighurs’ factual posture, to bar the federal judiciary from remedying the wrong.

This article offers a theory of federal court jurisdictional and remedial power that properly balances the competing interests of Congress, the Executive, and detainees. In times marked by asymmetric lines of conflict, the federal judiciary must be watchful of political branch power grabs and should lean in favor of exercising jurisdiction and tailoring an appropriate remedy. Only then will the rule of law and appropriate checks and balances be restored for the American government and justice ensured for groups like the Uighurs.

† Visiting Professor of Law, The Catholic University of America; Professor of Law, West Virginia University. The author thanks Andrew M. Wright, Michael P. Allen, James J. Friedberg, Doug Rendleman, Barry Sullivan, and Stephen I. Vladeck for meaningful feedback and provocative discussions about the Uighurs’ dilemma; Andrew Brautigam, Matthew Lincoln Clark, and Allen Mendenhall for helpful research assistance; and Bertha Romine for revisions. This article benefited from presentation and international dialogue at the Sixth Remedies Discussion Forum, University of Aix-Marseille, Aix-en-Provence, France (June 5-6, 2009).
It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound.¹

I. Introduction

The sun sparkles. The waves lap. It is a quintessential summer’s day in June 2009. On the sandy shores of Bermuda, four men take in the ocean for the first time, delighting in their newfound freedom.² Their journey here was arduous and prolonged; it remains controversial.

Days earlier, their fate seemed far less sunny. The four men languished in confinement at the United States Naval Base in Guantánamo Bay, Cuba, otherwise known as Guantánamo or simply Gitmo. A subset of Guantánamo detainees, who are ethnic Uighurs originally from far western China and now known as “the Uighurs,” became unwittingly ensnared in the “war on terror.” Years of confinement and litigation passed. Four of the Uighurs received their freedom through diplomatic efforts. Thirteen Uighurs remain confined at Gitmo.

Persecuted as Turkic Muslims,³ a religious minority in China, the Uighurs fled to Afghanistan. Days after their arrival there, in the winter of 2001, American military forces engaged in a bombing campaign against the Taliban in Jalalabad.⁴ The bombings included a Uighur hamlet.⁵ The Uighurs fled over the mountains into Pakistan and found shelter with local villagers, who turned the Uighurs over to local security forces in exchange for a bounty.⁶ The security forces then delivered the Uighurs to the United States military.⁷ The military took the Uighurs to a detention facility in Kandahar, Afghanistan, for questioning.⁸ The Uighurs claim the military interrogated them for several months while denying them adequate food and baths.⁹ The United States military ultimately transferred the Uighurs to Gitmo.¹⁰ According to the American government’s early posture, the Uighurs received weapons training while in Afghanistan and thus warranted detainment.¹¹

³ Tensions continue to boil in China with ethnic violence erupting this summer and unfortunately resulting in deaths. See, e.g., Edward Wong, China Locks Down Restive Region After Deadly Clashes, N.Y. TIMES, July 7, 2009, at A1 (reporting the death tolls of Uighurs to be 156).
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Arun, supra note 4.
⁹ Id.
¹⁰ Id.
More than seven years later, many of the captured Uighurs, admitted not “enemy combatants,” had no home to which they could safely return. They sought release into the United States. Some feared that releasing the Uighurs on American soil would disrupt relations with China. Some continued to insist that the Uighurs should be denied access to the United States because they were terrorists. American federal courts and habeas corpus relief culminated in a dead end.

White House negotiations brought about the release of four Uighurs to Bermuda. Bermuda’s premier suffered political scorn and remains unwilling to accept any additional Uighurs. While the Bermuda four may have awoken from their detention nightmare, thirteen Uighurs remain in legal limbo at Gitmo awaiting release.

It is hard to imagine the Uighurs’ experiences during their seven years in captivity. Although the Uighurs appear to be headed toward some semblance of justice, their path to justice was long and severe. This article analyzes the role the federal judiciary played, and did not play, in their saga; it highlights the shortcomings of justiciability doctrines that removed judicial review and frustrated the federal judiciary’s proper functioning in the American tripartite system of government.

The Uighurs’ plight is a paradigmatic example of the court’s failure to remedy a wrong. In the broader context, this article explores the essence of the right-remedy nexus. The nature, scope, and enforcement of remedies shape substantive rights. One of the law’s most fundamental maxims is that for every wrong, there must be a remedy. This central tenet of justice resonates in literature, judicial opinions, and the hearts and minds of people around the globe. In Shakespeare’s words, “Things without all remedy, should be without regard: what’s done is done.” The maxim is integral to maintenance of the rule of law, as Chief Justice Marshall emphasized in Marbury v. Madison:

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12 Some of the Uighurs were previously voluntarily released to Albania. See Qassim v. Bush, 466 F.3d 1073 (D.C. Cir. 2006). Their transition into daily life in Albania has been rocky. See Golden, supra note 4.
14 Eckholm, supra note 2.
15 Id.
16 Id.; see also Del Quentin Wilber, Detention Challenges Are Far Off for Many, WASH. POST, at A6 (July 31, 2009) (“Four Uighurs were transferred recently to Bermuda, but 13 remain at Guantánamo Bay.”).
17 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109. “It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded[;]” “it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23, 109).
18 WILLIAM SHAKESPEARE, MACBETH, 3.2.11-12 (Lady Macbeth).
The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.  

Ironically, in *Marbury*, the Court did not issue the remedy because it ruled that jurisdiction was lacking. Thus, in the real world, in fact, not every wrong will yield a remedy. The proper case must be brought, the violation of the right proven, and the court must have the power to exercise jurisdiction and issue the relief. Even though the law sometimes falls short, the justice system should continue to keep faith with the goals underlying the maxim. Accordingly, when the federal courts decline to vindicate fundamental constitutional rights insisting on their lack of power to resolve a particular case, we should examine their judicial reasoning closely. Scrutiny is all the more essential when the failure to provide a remedy results in serious erosion, if not nullification, of the underlying right. It is even more consequential when a remedy withheld leaves unchecked the power of the political branches of government. The stakes are simply too high to sit quietly by if the judiciary has, so to speak, gotten it wrong.

Periodically throughout history of nations, sudden crises jeopardize longstanding maxims of equity. For the United States, every step the government takes in the “Global War on Terror” tests the rule of law, liberty, and justice. Unconventional tactics by terrorists called for swift, powerful action by the United States and its allies. To address the crisis, then-President George W. Bush often sought to exert immense, unprecedented executive power and ultimately obtained congressional authorization and support in sweeping efforts to capture, detain, interrogate, and prosecute those suspected of supporting al Qaeda. President Barack Obama inherited the detainees held at the United States military facility in Guantánamo Bay, Cuba and an expedited trial system by military commissions. He has committed to close Guantánamo, but plans to continue to use a modified version of military tribunals. Judicial review serves as a fundamental check on the political branches, but only if the judiciary possesses the power to act. Heightened threats to a nation pressure political branches to apply significant power. Any time the federal judiciary claims it is powerless to review a case, observers should vigilantly check the court’s decisionmaking. If the call is close and rests on prudential reasoning, the judicial branch must lean in favor of jurisdiction in order to check the political branches that are acting swiftly and boldly in the face of terror threats. Without the judiciary serving as a check on the political branches, arbitrary abuses of power may erode fundamental constitutional rights and the rule of law.

The thirteen Uighurs remain in legal limbo. They have proven their right to habeas has been violated by the United States. The Great Writ extends to detainees at Guantánamo, and the United States government now concedes that there is no evidence that the Uighurs are so-

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19 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
20 *Id.* at 175, 177 (ruling that the congressional law creating jurisdiction was void as repugnant to the Constitution and thus that the Court lacked jurisdiction to issue the mandamus remedy despite the existence of the right to the remedy).
called enemy combatants. Yet the remedy of release remains elusive. A federal circuit court reversed the trial court’s order of release into the United States. Unless the United States Supreme Court grants their writ of certiorari, the Uighurs’ habeas rights will remain unvindicated by the courts. Habeas corpus cannot be divorced from the remedy if it is to mean anything at all.

The reason for the Uighurs’ inability to attain the remedy is the judicial determination that the central legal issue in the case should be characterized as an immigration issue involving the government’s right to exclude aliens from entry into the United States. There is little quibbling about the scope of executive and congressional authority over immigration exclusion issues. The power is a sovereign plenary power. Properly construed, however, the Uighurs’ case does not necessarily implicate this sovereign power. It is readily distinguishable because, unlike the traditional immigration exclusion plaintiffs, the Uighurs did not make their way voluntarily to the shores of United States. Rather, the United States government hauled the Uighurs to our de facto shores and now should take some measure of responsibility for having wrongfully detained them at Guantánamo. Denying jurisdiction and the remedy on the basis of immigration precedent is thus fundamentally flawed. At its worst, the denial of the release remedy is an unconstitutional suspension of the writ of habeas corpus.

In a prior article, I maintained that in times marked by asymmetric lines of conflict the federal judiciary must be watchful of power grabs by the political branches. In such times, federal courts should lean in favor of exercising jurisdiction even though prudential grounds might traditionally call for a finding of nonjusticiability on political question grounds. When two branches act in concert to deny a fundamental constitutional right, the federal court must be vigilant not to abdicate its duty to serve as a meaningful check if it appears the second branch has failed to do so. The court may need to act dynamically in the face of potential usurpations of vast power. Although the court may apply doctrines of restraint in rendering its judgment, it is imperative that the court has the ability, when necessary, to exercise its jurisdiction and issue meaningful remedies. The Uighurs’ case presents precisely the issues explored theoretically in my prior article. The instant article will demonstrate why and how the federal judiciary should exercise jurisdiction over the case and provide relief for the Uighurs to ensure the continued vitality of the Great Writ, check proven abuses of political power, and secure freedom for the Uighurs.

The next part of this article provides the background of the Uighurs’ plight set against the backdrop of the Great Writ and the Boumediene case. In Part III, the article explores jurisdiction, political question, and immigration law. Part IV distinguishes the Uighurs’ case from the harsh clutch of immigration precedents, and Part V applies my jurisdictional analysis to the Uighurs’ case to demonstrate that accepting jurisdiction is both possible and preferable under the instant circumstances. I conclude that federal courts should exercise jurisdiction and craft a remedy for the continuing violation of the Great Writ. The court may need to act dynamically to tailor relief to the peculiar circumstances so that it exercises its remedial power within its proper sphere of authority. Only then will the rule of law and appropriate checks and balances be restored for the Uighurs, the American government, and beyond.

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25 Id. at 572.
26 Id. at 573.
II. Detainees and the Great Writ

A. The Great Writ

The soul of liberty cannot live without meaningful habeas corpus. Meaningful habeas corpus requires access to an independent judicial body empowered to: (i) recognize the fundamental right to be free from unlawful imprisonment and (ii) remedy the wrong of its deprivation with release. On a structural level, habeas corpus protects against arbitrary abuse of government power and reins in the branch’s unlawful extension of authority. America imported this structural ground from the writ’s early uses in England. During the 1600s in England, the writ of habeas corpus also served to protect individual liberty.27 America borrowed both functions. The Framers recognized the supreme import of the writ and thus safeguarded its existence in the Constitution: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”28

Where the government has abused its power and thus the confinement is unlawful, the court must restore the individual’s liberty. The classic Latin definition of habeas corpus is an order: we command that you bring forth the body.29 The beauty of habeas corpus lies in the fact that it is “the easy, prompt, and efficient remedy afforded for all unlawful imprisonment.”30 Arbitrary confinement is the “fatal evil,” and habeas corpus is the cure.31 Habeas corpus at its core must include judicial power to order the government to free those unlawfully imprisoned.

Scores of thoughtful scholars have addressed the history,32 import, and perplexities of habeas corpus in American law.33 One interesting, curious historical wrinkle worth noting is that

27 Sir Edward Coke convincingly advocated that the writ should enforce a provision of the Magna Carta: “No free man shall be . . . imprisoned . . . except by the lawful judgment of his peers, or by the law of the land.” MAGNA CARTA, Ch. 39. See also Ex parte Yerger, 75 U.S. (Wall.) 85, 95 (1869) (declaring that the writ’s central role in maintaining liberty—“for centuries esteemed the best and only defence of personal freedom”); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (explaining the role of habeas corpus in protecting the natural right of liberty).


29 See, e.g., ELIZABETH HEIMBACK, LATIN EVERYWHERE, EVERYDAY 28 (2004) (defining literally as “may you have the body (of evidence)” and commonly as the “right of citizens to avoid unlawful imprisonment”); BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 8th ed. 2004) (providing that habeas corpus means “that you have the body”).


the Uighurs’ remedial conundrum might never have arisen at common law because writs of habeas corpus issued as a matter of course and the detainee was in the court’s presence for resolution of the lawfulness of detention. As such, when a court found no authority to detain, it could literally permit the detainee to walk out the courthouse door. Since the 1940s, the Supreme Court has allowed habeas corpus adjudications without the petitioner’s presence.³⁴

For the purposes of this article, the reader need only focus on the essence of the complex habeas arena. This article does not concern whether the detention of the Uighurs is unlawful (it clearly is), but instead it explores the level of power a court must retain to hear a habeas matter and render effective relief where it is admittedly challenging as a practical matter. The essence of habeas can bearticulated with a variety of phrases. The following conception will serve as the working essence for this article: “the Great Writ offers the judicial remedy of discharge to those deprived of their liberty without any—much less due—process.”³⁵ With this focal point, I contend that a court’s denial of the release remedy where the prisoner has proven unlawful confinement eviscerates the habeas corpus right.

B. Boumediene – Access, Progress, and Unanswered Questions

Detainee litigation represents a complex, controversial component of American jurisprudence. Boumediene v. Bush³⁶ represents a pivotal turning point for detainees at Guantánamo. Granted, Boumediene is a 5-4 decision with Justice Kennedy casting the deciding vote. It possesses meaningful import for detainees and habeas corpus law and thus merits at least guarded optimism for judicial review of challenges to unlawful detention.

In Boumediene, petitioners were aliens detained at Guantánamo; the government designated them enemy combatants.³⁷ The detainees raised a challenge that the Supreme Court had thus far avoided resolving:³⁸ “whether they ha[d] the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2.”³⁹ Congress passed the Military Commissions Act (“MCA”), which contained

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³⁵ Tyler, Suspension as an Emergency Power, supra note 32, at 337. See also INS v. St. Cyr, 533 U.S. 289, 301 (2001) (acknowledging the writ’s “historic purpose . . . has been to relieve detention”); Carbo v. United States, 364 U.S. 611, 618 (1961) (affirming that the writ is “designed to relieve an individual from oppressive confinement”).
³⁷ Id. at 2241.
³⁸ Hamdan v. Rumsfeld, 548 U.S. 557, 576-577 (2006) (finding, via statutory interpretation, that the Detainee Treatment Act’s jurisdiction-stripping provision did not apply to pending cases). Congress reacted by passing the Military Commissions Act, which clarified that Congress in fact intended to strip federal court jurisdiction over habeas corpus. The set the stage for the Boumediene Court to address the constitutional questions.
³⁹ Boumediene, 128 S. Ct. at 2241.
in § 7 a jurisdiction-stripping provision that stripped all federal courts (save the Court of Appeals for the District of Columbia Circuit) of jurisdiction over habeas corpus challenges brought by Guantánamo detainees. Section 7 notably stripped federal courts of jurisdiction to hear habeas corpus actions pending at the time of the MCA’s enactment.

Ultimately, the Supreme Court invalidated § 7 of the MCA as an unconstitutional suspension of the writ of habeas corpus. Justice Kennedy first examined the history and import of the writ of habeas corpus. He noted “the writ to be an essential mechanism in the separation-of-powers scheme.” Justice Kennedy applied a functional separation-of-powers analysis. According to the Court’s reasoning, “[t]he separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.” The Court rejected the government’s argument that the Constitution’s Suspension Clause should not extend extraterritorially; the majority instead deemed Guantánamo to be under de facto control of the United States. It thus held that the Constitution’s Suspension Clause applied to detainees at Guantánamo. Once the Suspension Clause applied, the Court had to examine the effect of Congress’s strip of federal court jurisdiction over detainee habeas corpus claims. The Court determined that Congress stripped federal court jurisdiction while failing to provide an adequate substitute for habeas corpus. Specifically, the Court found insufficient § 7’s severe limitations on review procedures, which limited review access to only the Court of Appeals for the District of Columbia Circuit over decisions of the Combatant Status Review Tribunals. According to the Court, the detainees need not exhaust the review procedures in the Court of Appeals. Rather, the Court found the detainees were entitled to prompt habeas corpus hearings to challenge the legality of their detentions in federal district court.

The Boumediene detainees were far from having completed a successful habeas corpus petition on the merits. Nevertheless, the Court’s declaration that Guantánamo detainees have a constitutional right to habeas corpus review is significant. The Boumediene Court’s extensive treatment underscored the indispensable role of habeas corpus since America’s founding: “The Framers viewed the 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.” To be clear, the Court left room for flexibility in determining how to remedy a habeas corpus violation proven by a detainee. It noted that “release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted.”

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40 Id.
41 Id. at 2242.
42 Id. at 2240, 2274.
43 Id. at 2246.
44 Id.
45 Id. at 2247.
46 Id. at 2252-53.
47 Id. at 2262.
48 Id. at 2271-74.
49 Id. at 2275.
50 Id. at 2262, 2274-75.
51 Id. at 2244.
52 Id. at 2266.
Admittedly, courts must tailor the remedy to the circumstances of the challenge. For example, if a detainee challenges the military tribunal hearing process as lacking (e.g., insufficient notice of the factual basis for detention), the appropriate remedy might be remanding the case with instructions for the tribunal to initiate heightened procedural guarantees for notice and opportunity. Release would not be justified or appropriate. In fact, the proper remedy in such an instance might be no remedy because it is possible that even if American constitutional due process rights apply to detainees, they may not have been violated or, alternatively, the error may have been harmless. The Uighurs’ case demonstrates that the lack of any legally sufficient grounds for detention provides an appropriate basis for the release remedy. Only release will cure the wrongful imprisonment and restore the integrity of the Great Writ.

C. The Uighurs – “A Series of Unfortunate Events”

For more than seven years, seventeen Uighurs have been detained at Guantánamo Bay, Cuba. The Uighurs have endured a series of unfortunate, even tragic events, including persecution in their homeland and unlawful detainment by the United States. Along the traumatizing road, the Uighurs and their legal counsel managed to attain one legal victory – judicial determination that their detainment is unlawful and the order of release into the United States. To date, however, the victory’s promise remains hollow for thirteen Uighurs. The Uighurs established the right to habeas corpus relief, yet they are unable to obtain the remedy of release. To understand why, one must understand who the Uighurs are as well as the steps along their thus far tragic path.

The Uighurs are a Turkic Muslim minority group. Professor Kahar Barat of Yale University, a participant in a congressional roundtable, explains that, historically, the “Uighurs’ territory was the easternmost edge of the medieval Islamic Empire where religion was loosely organized, isolated, and backward.” In the 10th century, as “the widely displaced oasis population” in East Turkestan was converted to Islam from Buddhism and Christianity, the Uighurs “created a moderate and liberal form of Sunni Islam,” preserving “pre-Islamic and indigenous religious beliefs.”

Centuries later, in 1759, the Manchurians invaded and “blanketed the area with colonial non-Muslim administration and limited the Islamic authority to a secondary position.” In the 20th century, various governments imposed regulations on the Uighurs (Soviet elimination of religion from society, Communist proselytizing of atheism, etc.); thus, the “Uighur people became separated from Islam” as the “[y]ounger generations grew up knowing nothing about the religion” because “the Koran was not available” to them. In the

53 Hamdi v. Rumsfeld, 542 U.S. 507, 5333 (2004) (plurality). Justice O’Connor’s plurality opinion suggests that admitting evidence that, in a federal court, would be inadmissible hearsay might or might not be a sufficient ground to establish lack of due process given the exigencies of ongoing military conflict. Id. at 534.
54 DANIEL HANDLER (pen name LEMONY SNICKET), A SERIES OF UNFORTUNATE EVENTS (1999-2006).
56 Id. at 34.
58 Id. at 6.
59 Id.
60 Id.
1970s, however, China implemented its open-door policy, which allowed the Uighurs to restore their mosques, organize Hajj pilgrimages, and attend Islamabad universities to study Islam. The new environment generated an Islamic renaissance in the region, with mosques filling up, new translations of the Koran coming out, and young Uighurs studying abroad and returning to challenge communist distortions of the Uighur image. The Chinese government viewed these developments as a threat and “responded with a hard-line repressive policy,” putting an end to the Uighurs’ religious freedom, which had lasted from 1978 to 1988. As the “nationalistic revolutions of Sun Yat-sen and Mao wiped out the imperial line and religion from China,” and as the “economic growth and social changes in China simultaneously brought a drastic assimilation of all minority cultures and even Chinese local cultures,” minority groups like the Uighurs suffered under military presence in their homeland. In fact, the military “killed and arrested thousands of religious teachers and students” and in 1997 arrested Uighur children “guilty” of praying during Ramadan. Forbidden from practicing Islam, the Uighurs have, ever since, been subject to “China’s propaganda machine,” which has used “traditional” methods—“fomenting ethnic hatred, demonizing the Uighur image, depicting Uighur resistance as international terrorism, and convincing the international community”—to disenfranchise Islam and the Uighur community.

In the face of oppression in western China, the Uighurs fled to Afghanistan and later relocated to Pakistan. In 2001, Pakistani villagers produced the Uighurs to Pakistani officials, who handed the Uighurs to the United States military for $5,000 per head. In June 2002, the United States military transferred the Uighurs to Guantánamo Bay, and the government designated them enemy combatants.

The reviewing court found evidence supporting the determination of enemy combatant status utterly lacking. In reaction to the court’s opinion, the government resolved that it would cease to deem the seventeen Uighur detainees enemy combatants. Given the developments and the Boumediene watershed opinion, the Uighurs filed motions asserting the unlawfulness of their indefinite confinement. They sought immediate release into the United States or, in the alternative, parole into the United States after the resolution of their habeas petitions.

The United States District Court for the District of Columbia found the Uighurs’ contention persuasive and ruled that “because separation-of-powers concerns do not trump the
very principle upon which this nation was founded—the unalienable right to liberty—the court orders the government to release the petitioners into the United States.”

Notably, the court rejected the government’s arguments that the Executive possessed inherent “authority to ‘wind up’ the petitioners’ detention” and that the court lacked the power to order the Uighurs released into the United States. Determining that the court has a separation-of-powers obligation “to say what the law is,” especially where liberty is at stake, the court granted the requested release into the United States as the effective release remedy for the indefinite, unlawful detainment. The government requested and received a stay from the District of Columbia Circuit Court, to which the government then appealed the case.

The District of Columbia Circuit held that the federal courts lacked the power to grant the relief sought because Congress had not expressly authorized such relief. The opinion, authored by Senior Circuit Judge A. Raymond Randolph, cited the seminal cases on political plenary authority over immigration exclusion matters and reasoned that “it ‘is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.’” It further deemed the remedy unprecedented and extraordinary because, instead of “simple release,” the Uighurs requested and received “a court order compelling the Executive to release them into the United States outside the framework of the immigration laws.” The circuit court chided the lower court’s bold maneuver: “Whatever may be the content of the common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy.”

The *Kiyemba* court also rejected what it deemed the “undercurrent” of the Uighurs’ challenge—“that they deserve to be released into this country after all they have endured at [the] hands of the United States.” “However high-minded” the sentiments, the court concluded that the Uighurs lacked a “legal basis for upsetting settled law and overriding the prerogatives of the political branches.” In the court’s estimation, the lower court, instead of relying on federal statutory or constitutional law, unpersuasively invoked “the maxim *ubi jus, ibi remedium*—where there is a right, there is a remedy.” Accordingly, the circuit court found the federal courts without power to remedy the Uighurs’ ongoing unlawful confinement.

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75 Id.
76 Id. at 35, 38-39, 42-43.
77 Id. at 39, 42-43.
79 Id. at *2.
80 Id. at *7 (quoting *Knauff*, 338 U.S. at 543).
81 Id. at *4. (quoting *Munaf v. Geren*, ___ U.S. ___, 128 S. Ct. 2207, 2221 (2008) (internal quotations omitted)).
82 Id.
83 Id. The court also noted that “the writ has never been compensatory in nature.” Id. at *5.
84 Id. at *5.
85 Id.
86 Id. at *3. For a provocative argument that the right-remedy maxim is guaranteed by the constitutional due process clause, see Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004). The Uighurs would need to establish that the Constitution’s due process clause applies to detainees at Guantánamo in order to maximize Professor Thomas’s theory. Not surprisingly, the *Kiyemba* court noted that the Uighurs “cannot take advantage of it.” *Kiyemba*, 2009 WL 383618, at *3, n.10.
Judge Judith Rogers concurred in the District of Columbia Circuit opinion, but only on the ground that the district court prematurely granted release. Judge Rogers pointedly stated, “I cannot join the court’s analysis because it is not faithful to Boumediene and would compromise both the Great Writ as a check on arbitrary detention and the balance of powers over exclusion and admission and release of aliens into the United States recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court.”

Judge Rogers and Judge Randolph, for the majority, engaged in a spirited, and at times vitriolic, exchange. She charges that the majority’s opinion “compromises . . . the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause,” and eviscerates the federal habeas courts’ ability to exercise a core function of Article III: to utilize the habeas release remedy to ensure liberty. Ultimately, Judge Rogers’s true bone of contention with the district court’s order of release is the timeliness of the order. She concluded that the district court should hear the government’s alternate basis for detention and ascertain that the Uighurs detention is unlawful and then the district court would, pursuant to Supreme Court precedent, possess the “power to order them conditionally released into the country.”

Significantly, Judge Rogers rejects the notion that the order of release into the United States is unprecedented. She relies on Clark v. Martinez for the proposition that “a district court has exactly the power that the majority today finds lacking—the power to order an unadmitted alien released into the United States when detention would otherwise be indefinite.” She reasoned that the district court has the power to order the remedy because, in Clark, the Court, having found confinement unlawful, then “ordered the aliens released into the United States.” As the majority retorts, however, the Clark case factually involved aliens who had entered the United States, unlike the Uighurs. Thus, the release remedy is not wholly unprecedented as the majority claimed, but the Uighurs must establish that they should possess access to the remedy by arguing that their case warrants application of the Clark rationale that sanctions the court’s power to act.

The Uighurs may attain their deserved remedy of release without the aid of the courts. This result may unfold based upon the promised closure of Guantánamo, but closure does not resolve practical problems for placing the Uighurs. Another possibility, and perhaps the optimal route, is that the Executive will forge a solution for the Uighurs who remain confined. This solution would involve release into another country or into the United States. Returning the Uighurs to China is not a viable or palatable option. As a humanitarian and moral matter, I
hope that the Uighurs secure their release as quickly as possible from any branch of government 
that will deliver it. If the political branches effectuate release tomorrow or a year from now, it is 
crucial that scholarly attention be given to the federal judiciary’s power over habeas corpus 
petitions and remedies. Effective habeas jurisdiction and relief must exist for the federal courts 
to meet their essential Article III functions of checking and balancing the coordinate political 
branches and ensuring individual liberty. Courts’ ability to perform these essential functions, 
however, suffered a death blow from the federal appellate court’s application of immigration 
precedent.

III. Jurisdiction, Nonjusticiable Political Questions, and Immigration Power

A. Nonjusticiable Political Questions

The political question doctrine represents a significant restraint on the federal judiciary. 
It is a judicially created doctrine with a rich history. The Supreme Court acknowledged its force 
early in the life of the federal judiciary: “Questions, in their nature political, or which are, by the 
constitution and the laws, submitted to the executive, can never be made in this court.” As 
stated, the doctrine sounds mandatory rather than discretionary.

A finding of nonjusticiability based on political question is arguably mandatory if the 
Constitution establishes the basis for the determination that the issue belongs to political 
branches and not the judicial branch. Issues constituting nonjusticiable political questions 
include the constitutional guarantee of the republican form of government and the Senate’s 
power to try impeachments. In Nixon v. United States, for example, the Court ruled that 
explicit language of the Constitution textually committed the issue exclusively to a political 
branch rather than the judicial branch.

In the war-power context, federal courts have a long tradition of hearing cases in which a 
private party challenges a determination of “enemy” status. One federal court decision, coined 
“the sole outlier,” held an “enemy” determination not subject to any judicial review, despite

detainees to China for two reasons: their repatriation would be seen as a justification of China’s discriminatory 
policy toward its Uighur citizens, which would make it more difficult for Washington to promote the peaceful 
instability it favors in the Xinjiang region, and there are genuine concerns for the detainees’ safety if they return to 
China.”); Kiyemba, 2009 WL 383618, at *1 (recognizing that the Uighurs “fear that if they are returned to China 
they will face arrest, torture or execution[ ]” and that it is “United States policy . . . not to transfer individuals to 
countries where they will be subject to mistreatment”).

99 Marbury, 5 U.S. at 170.
100 Nixon v. United States, 206 U.S. 224 (1993) (ruling that impeachment of a federal judge was constitutionally 
committed exclusively to the Senate).
101 Luther v. Borden, 48 U.S. 1 (1849) (holding that enforcement of the republican form of government clause of 
Article IV of the Constitution was a political question committed to the Executive and Congress).
102 Nixon, 206 U.S. 224.
103 Id. at 228.
104 Stephen I. Vladeck, Enemy Aliens, Enemy Property, and Access to the Courts, 11 LEWIS & CLARK L. REV. 963, 
965 (2007) (asserting a long and rich tradition of United States courts hearing cases where the government and a 
private party disagreed regarding whether the private party was an “enemy”).
105 Id. at 986.
following on the heels of the Supreme Court’s *Hamdi* decision.\textsuperscript{106} The *Hamdi* plurality warned that the President does not possess a “blank check” simply due to wartime status\textsuperscript{107} and thus judicial review would not be cabined during wartime.\textsuperscript{108} The United States Court of Appeals for the Federal Circuit, in *El-Shifa Pharmaceutical Industries Co. v. United States*,\textsuperscript{109} dismissed jurisdiction on the basis of the political question doctrine by inferring commitment to the political branches from the Constitution’s text and structure.\textsuperscript{110} *El-Shifa* involved then-President Clinton’s decision that private property owned by aliens in Sudan constituted “enemy property.”\textsuperscript{111} The court ruled the designation, and thus the plaintiff’s allegation of an improper taking without just compensation, not subject to any judicial review.\textsuperscript{112} The lower court in an opinion by Judge Baskir also dismissed the case but on broad assertions of deference to the President’s determination rather than a direct invocation of the political question doctrine.\textsuperscript{113} Judge Clevenger, writing for the Federal Circuit, affirmed the lower court’s opinion in its entirety but formally cast the President’s designation as a nonjusticiable political question under *Baker*.\textsuperscript{114} The Federal Circuit distinguished the *Hamdi* decision on the basis that *Hamdi* involved an enemy combatant designation pursuant to the President’s power to detain indefinitely captures enemy combatants versus the *El-Shifa* context of the President’s “go/no go” determination.\textsuperscript{115} Ultimately, the Federal Circuit ruled that, given the “contrary set of facts,” the political question doctrine “counsels deference to the President’s extraterritorial enemy property determination.”\textsuperscript{116}

Even granting that the President requires and the Constitution provides vast war powers, including latitude in making good-faith designations of regarding enemy status, it is dangerous to cede an entire field of decisionmaking exclusively to the political branches. Further, it is unclear how the Constitution commits all issues surrounding the designation of enemy property “solely” to the political branches.\textsuperscript{117} Cases like *El-Shifa* demonstrate the potential sweeping significance of a federal court’s determination that it has no role in reviewing the case and its “open-ended deference to the Executive Branch”\textsuperscript{118} – the political branches are immune from any liability for the damage caused by its errors. It is even more dangerous when the federal judiciary cedes

\textsuperscript{107} Id. at 536.
\textsuperscript{108} Id. at 535-36.
\textsuperscript{109} 378 F.3d 1346 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005).
\textsuperscript{110} Id. at 1362-64.
\textsuperscript{111} Id. at 1362.
\textsuperscript{112} Id.
\textsuperscript{114} 378 F.3d 1346, 1362-64 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005).
\textsuperscript{115} Id. at 1369.
\textsuperscript{116} Id.
\textsuperscript{117} For example, should a federal court be able to review the issue of whether the property is properly designated enemy property by the President where the United States is not at war with the situs country, i.e., Sudan. See Vladeck, *Enemy Aliens*, supra note 104, at 994 (arguing that the context of non-congressional authorization should stimulate “more searching judicial review into the determination by the Executive Branch, rather than less”). The Federal Circuit did not resolve the question of whether judicial review would exist to address the complex question of the proper allocation of power between Congress and the President in exercising war powers, including enemy property determinations. *El-Shifa*, 378 F.3d at 1370.
\textsuperscript{118} Vladeck, *Enemy Aliens*, supra note 104, at 993-94 (offering a multi-pronged critique of the Federal Circuit’s “puzzling” decision to preclude judicial review on the basis of the political question doctrine).
review and remedial power over arbitrary suspensions of the writ and unlawful detainment of individuals.

The political question doctrine may operate as a jurisdictional barrier to a much broader set of cases based on any of the remaining five more prudential grounds of Baker. Despite the fact that cases are otherwise justiciable, a federal court may find the matter a nonjusticiable political question if the court lacks judicially discoverable techniques for effectively handling the matter.\(^\text{119}\) This functional concern is a matter of prudence rather than a prohibition. Similarly, other comity reasons may warrant declining jurisdiction.\(^\text{120}\) Again, respect for the expertise of another branch, for example, is a discretionary rationale for restraint rather than a mandate that jurisdiction cannot exist.

If clear text of the Constitution commits an issue solely to a political branch, then a federal court must dismiss the matter as a nonjusticiable political question. To the extent the justification for application of political question is prudential in a given case, however, the ground warrants heightened scrutiny in certain circumstances. Those special circumstances may arise when core individual rights are threatened by a significant use of political power by one branch with inadequate oversight by another governmental branch. The federal judiciary has an obligation to protect its essential functions, including effective judicial review. Such cases may represent close judgment calls. But given that the heart of our constitutional democracy may be at stake, clear constitutional grounds must justify a dismissal of jurisdiction or refusal to render relief. Accepting jurisdiction and then artfully crafting the remedy to demonstrate respect for the expertise of the political branches may best maintain the delicate balance of interbranch tension.

**B. Immigration Cases, Political Questions, and Sovereign Power**

1. **Political Plenary Power over Federal Immigration**
   – Power to Exclude Aliens

   a. **The Chinese Exclusion Case**

   A seminal case for political plenary power over immigration is *Chae Chan Ping v. United States (the Chinese Exclusion Case)*.\(^\text{121}\) The historical context of the case sets the stage for the Supreme Court’s finding of broad, implied constitutional powers over federal immigration. The mid- to late-1800s constituted a time of acute racial strife for America’s west coast.\(^\text{122}\) While rebellion erupted in China in 1850, California experienced vast economic growth in the wake of the gold rush.\(^\text{123}\) California thus needed inexpensive laborers – Chinese people fleeing war-torn

\(^{119}\) Baker v. Carr, 369 U.S. 186 (1962) (analyzing a host of factors for determining whether an issue raises a nonjusticiable political question and holding that reapportionment of state legislative districts is justiciable because it is not, in fact, a political question).

\(^{120}\) See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (holding that the issue of whether the President, without Senate approval, could unilaterally break a defense treaty with China, constituted a nonjusticiable political question).

\(^{121}\) 130 U.S. 581 (1889).


\(^{123}\) CHUMAN, supra note 122, at 3.
China. The completion of a transcontinental railroad in 1869 created a new connection between the eastern United States and the west coast and brought new workers from all over America. American organized labor, flexing its emerging political muscle, claimed that Chinese labor created a glut that required elimination.

Congress responded in 1882 by passing legislation that excluded the Chinese from immigrating into the United States. This legislation contained a caveat that permitted the issuance of certification in order to enable Chinese who had been living in the United States since 1880 to leave and return. Chae Chan Ping, a Chinese laborer and the plaintiff in The Chinese Exclusion Case, lawfully immigrated to the United States in 1875. He acquired the proper certification and departed for a visit to China in 1887. During his return voyage in 1888, Congress passed legislation (“the 1888 Act”) that terminated the certificate program and barred the return of Chinese laborers who had already obtained valid certificates. One week after passage of the 1888 Act, Chae Chan Ping arrived in the United States. The United States government excluded him from reentry.

The Chinese Exclusion Case, “the granddaddy of all immigration cases,” addressed whether the 1888 Act violated the United States Constitution and treaties between the United States and China (the Burlingame Treaty of 1868 and the supplemental 1880 Treaty). In 1889, Justice Field, speaking for a unanimous Supreme Court, reaffirmed the political plenary powers over the admission and exclusion of aliens. The Court noted that the legislative power to exclude as an arm of the government was not open for debate. It reasoned that the sovereign power of all nations includes such power and concerns “the right of self preservation.” The Court firmly declared the sweep of its reasoning:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

As for the Chinese laborers at bar, the Court concluded that any license they may have secured prior to the 1888 Act to return to the United States post departure was “held at the will of the

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124 Id.
125 Id.
126 Id. at 4.
127 Id.
128 LEGOMSKY, supra note 122, at 108.
129 Id.
130 Id. at 109.
131 Id.
132 Id.
133 Id. at 108.
134 130 U.S. 581 (1889).
135 Id. at 603.
136 Id.
137 Id. ("Jurisdiction over its own territory . . . is an incident of every independent nation.").
138 Id. at 609.
Last but not least, the Court directed any grounds of complaint by the Chinese laborers were “not questions for judicial determination” but instead should be lodged with “the political department of our government, which is alone competent to act upon the subject.” Accordingly, The Chinese Exclusion Case set the course for limited, if any, judicial involvement in matters of exclusion of aliens.

b. **Immigration Jurisprudence: Status as Determinative**

Congressional power over questions of admission of aliens is vast and all encompassing. The cases that follow The Chinese Exclusion Case demonstrate that status is determinative of whether and to what extent rights are due to individuals considered aliens. The pivotal distinction is whether the alien has “entered” the United States. An alien who has entered will receive greater constitutional protections than aliens excluded at United States borders.

i. **Favored Class: Aliens Who Have Entered**

An alien who has entered the United States lawfully or unlawfully receives and may invoke such constitutional protections as those provided by the Fourth and Fourteenth Amendment. Aliens who have not yet entered the United States will not fare as well.

It remains true, however, that aliens who have entered may not be entitled to the full panoply of American constitutional rights as citizens. In fact, congressional legislation that treats alien noncitizens differently than citizens is not “invidious” discrimination. A complex body of cases outlines the nature of rights due to aliens who have entered, but the exact parameters due depends on the particular facts. Generally, some modicum of constitutional rights are due, but courts have condoned a lesser level of rights than citizens enjoy, at least partially on the ground that regulation of alien noncitizens is an area “committed to the political branches” rather than the judiciary. The federal judiciary serves in a judicial review function in some of these cases, but largely it defers to the political branches regarding the regulation of alien noncitizens. The political branches, for example, control issues regarding the grounds and procedures for deportation of aliens as part of the administration of foreign affairs and war powers; such matters are thus “largely immune from judicial inquiry or interference.” For the purposes of this article, it is sufficient to appreciate that on the whole aliens who have entered receive preferred treatment over aliens who are excluded at America’s borders.

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139 Id. The Court also reasoned that Congress could modify or repeal treaties, especially when treaties failed to forbid alteration, without the interference of the courts. Thus, even though the 1888 Act violated the treaty with China, the Court would not pass judgment on it.

140 Id.

141 Fiallo v. Bell, 430 U.S. 787, 792 (1977) (acknowledging that “over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens”) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

142 This distinction may demonstrate the Jesuit saying “it is better to ask for forgiveness than permission.”


144 Id. at 81.

145 Id.

146 Id. (confirming that the regulation of alien visitors to the United States as committed to the political branches).

The United States government maintains that the Uighurs have not entered the United States. If viewed from an immigration perspective, the immigration cases that likely will govern are those involving aliens who had not entered the United States but were excluded at its borders. The consequences of this classification are significant. Ultimately, I argue that the Uighurs should not be converted into an exclusion immigration context, at least not yet.

Although I argue that the Uighurs’ case is distinguishable from classic exclusion cases, the following two sections summarize the expanse of political power, the lack of judicial power to resolve the dispute, and the extremely limited nature of rights for aliens who have not entered the United States.

Accordingly, if one determines that the Uighurs’ case must be treated as an immigration exclusion case, the federal appellate court appropriately reversed the release order and dismissed jurisdiction. Given the nature of habeas rights for Guantánamo detainees, coupled with the Uighurs’ involuntary path to American de facto shores, I conclude that these harsh consequences are not required. An explication and comparison of the foundational immigration materials and the federal appellate court’s reasoning in the Uighurs’ case should demonstrate the reasonableness of this conclusion.

ii. Disfavored Class: Excluded Aliens in Constitutional Limbo

It is textbook American immigration law that “an alien who seeks admission to this country may not do so under any claim of right.” Rather, in the words of the Supreme Court, “[t]he exclusion of aliens is a fundamental act of sovereignty.” The root of this sovereign power dates back to the Romans and may stem from “the ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion.” The combination of *Knauff v. Shaughnessy* and *Shaughnessy v. Mezei* establish that aliens arriving at the United States border or port of entry constitute a disfavored class of noncitizens involved in exclusion proceedings. As stated, the disfavored receive limited, if any, constitutional due process protection in contrast to the favored

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148 *See Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009)* (“With respect to these seventeen petitioners, the Executive Branch has determined not to allow them to enter the United States.”). As a matter of geographic territory, the Uighurs remain on Guantánamo, which belongs to Cuba. The United States is a de facto sovereign over the Guantánamo Bay territory. *Boumediene*, 128 S. Ct. at 2253 (“As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory”).


151 *Id.*

152 EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 33, 44-48 (1915).

153 *Kiyemba*, 2009 WL 383618, at *2 & n.3-4 (citing immigration cases, CLEMENT LINCOLN BOUVÉ, EXCLUSION AND EXPULSION OF ALIENS 4 & n.3 (1912), and II EMMERICH DE VATTTEL, LE DROIT DES GENS §§ 94, 100 (1758)).


155 345 U.S. 206 (1953).
class. In fact, any rights extended to aliens seeking entry into the United States are primarily if not solely dependent on congressional action and executive discretion.\footnote{Knauff, 338 U.S. at 542-43 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").}

\textit{Knauff} and \textit{Mezei} render a bright line of demarcation around immigration admission policies with the political branches inside the lines controlling the field and the judiciary outside the decisionmaking sphere. The \textit{Mezei} Court echoed the refrain that \textquote{[c]ourts have long recognized the power to expel or exclude aliens as a fundamental attribute exercised by the Government’s political departments largely immune from judicial control.\footnote{Knauff, 338 U.S. at 542-43 (“Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”).}}\footnote{Mezei, 345 U.S. at 210-11.} The judicial branch has not only shown deference but also acknowledged the political department’s ownership over exclusion matters. Specifically, the federal branch has ruled such cases beyond the court’s power based on their political nature. Political question doctrine supports the denial of jurisdiction on a variety of bases including two common grounds: a finding that the Constitution textually commits the matter solely to a political branch or the federal judicial branch lacks manageable judicial standards for handling the dispute.\footnote{Baker v. Carr, 369 U.S. 186 (1962).} Additionally, the courts view political branch authority as stemming from sovereign and inherent power.\footnote{Knauff, 338 U.S. at 542 (recognizing that the authority to exclude aliens "is a fundamental act of sovereignty" and that "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation").}

The facts of \textit{Mezei} raise notable parallels to the Uighurs, but ultimately should not determine the Uighurs’ instant fate. In particular, both \textit{Mezei} and the Uighurs’ case involve the vexing conundrum of people without a country—aliens in territorial limbo. In \textit{Mezei}, an alien sought admission to the United States.\footnote{Mezei, 345 U.S. at 208.} The United States denied his legal entry.\footnote{Id. (providing that the United States Attorney General denied admission on the basis that the alien’s entry would be "prejudicial to the public interest").} He had also unsuccessfully sought entry into a host of other countries.\footnote{Id. at 208-09.} Stranded at Ellis Island, he filed a series of habeas petitions in order to challenge what he deemed unlawful confinement by the United States.\footnote{Id. at 209.}

Ultimately, Mezei lost because the Court viewed his Ellis Island detention as similar to being stopped at the border.\footnote{Id. at 215.} Despite the government’s refusal to disclose its evidence in support of its determination that Mezei constituted a threat to the public interest, the Supreme Court, in a 5-4 opinion, ruled that continued exclusion, while “stranded in his temporary haven on Ellis Island,”\footnote{Id. at 207.} did not deprive Mezei of “any statutory or constitutional right.”\footnote{Id. But see id. 220 (Jackson, J., dissenting) (chiding the majority’s determination that Mezei was free to depart the United States to the country of his choosing: "That might mean freedom, if only he were an amphibian!").} Noting the context of the Cold War, the Court held: “Whatever our individual estimate of [congressional policy to exclude particular aliens] and the fears on which it rests, [Mezei’s] right to enter the
United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.\footnote{Mezei, 345 U.S. at 216.} Without a hearing right to secure his release, Mezei received no judicial relief but instead awaited possible discretionary aid of the political branches, which ultimately arrived in the form of parole.\footnote{Political relief arrived seventeen months after the Mezei Court’s denial of habeas relief, the Attorney General released Mezei on parole, although Mezei never became a United States citizen. See Charles D. Weisselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei, 143 U. PA. L. REV. 933, 979-84 (1995).}

2. Limits on Plenary Power

With respect to due process rights of excluded aliens, the Knauff Court held that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”\footnote{Knauff, 338 U.S. at 543.} Mezei, with its harsh consequences on those trapped outside the borders, affirmed and deepened Knauff’s harshness. The limited conception of alien due process rights from Knauff and Mezei, however, may be less authoritative today according to scholarly critiques.\footnote{The “extreme” nature of the Knauff-Mezei doctrine “has provoked a steady stream of critical academic commentary, and some post-1950s decisions suggest that modification of the doctrine may be possible.” Aleinkoff, Martin, Motomura, & Fullerton, supra note 149, at 950-91. For examples of scholars claiming significant erosion of the plenary power doctrine, see infra note 183.} Yet Knauff and Mezei remain good law, and courts frequently rely on them as precedent.\footnote{See, e.g., Zadvydas v. Davis, 533 U.S. 678, 721 (2001); Kiyemba, 2009 WL 383618, at *2.} Times of national security crisis may also bolster reliance on the Knauff/Mezei doctrine. The following section notes some possible inroads on the narrow view of rights owed to excluded aliens.

Limits exist to the scope of the government’s power over immigration issues.\footnote{See, e.g., Zadvydas, 533 U.S. at 695 (emphasizing that the “plenary powers” doctrine regarding congressional power to create immigration law are “subject to important constitutional limitations”).} The Court has ruled that some level of due process must exist for immigrants even in the exclusion line of cases. For example, in an early case, Yamataya v. Fisher (The Japanese Immigrant Case),\footnote{189 U.S. 86 (1903).} the Court announced the scope of process due: “no person shall be deprived of his liberty without opportunity, at some time, to be heard before such officers, in respect of the matters upon which that liberty depends.”\footnote{Id. at 101.} Although the Court clarified the judiciary’s role in providing independent review of due process, the Yamataya case involved an alien who had already entered the country. The Uighurs will likely be unable to argue convincingly that they are on all fours with Yamataya.

Another case lessened the severity of Knauff’s force. The Court, in Kwong Hai Chew v. Colding,\footnote{344 U.S. 590 (1953).} held that a resident alien who was returning to the United States from a brief trip abroad “could not be excluded without the procedural due process to which he would have been entitled” had he not exited the United States.\footnote{Id. at 596.} Again, the Uighurs are factually distinguishable
in that they have never entered the United States and thus are closer in analogy to aliens the government seeks to exclude rather than deport. The Court decided both *Mezei* and *Chew* in 1953. Professor Henry Hart, in the same year, published his seminal dialogue on congressional power to control federal court jurisdiction.\(^{177}\) He sharply criticized *Knauff* and *Mezei* for denying rights based on status distinctions and for failing to acknowledge “[t]he great and generating principle of this whole body of law—that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus.”\(^{178}\)

Although *Mezei* followed directly on the heels of *Chew*,\(^{179}\) the Court revived *Chew*’s ameliorating themes with a 1982 decision in *Landon v. Plasencia*.\(^{180}\) The *Plasencia* Court ultimately remanded for the appellate court to determine whether the government afforded the requisite process due under the circumstances.\(^{181}\) Recognizing that the process may not “impose an undue burden on the government,” the Court deemed that to ensure a fair exclusion hearing, the government must “provide Plasencia an opportunity to present her case effectively.”\(^{182}\) According to some scholars, such judicial treatments demonstrate an erosion of the plenary power doctrine.\(^{183}\)

No doubt, however, the Uighurs’ path becomes much steeper if immigration exclusion jurisprudence controls. If one views the immigration exclusion cases as governing the Uighurs’ case, it will be quite difficult, if not impossible, for the court to resolve the dispute and render an effective remedy. The arguable erosion of the *Knauff/Mezei* stronghold, however, creates space for the potential argument that the judiciary is not powerless with respect to assisting the Uighurs. Further, the slippage demonstrates that political power is not limitless. If new judicial nominations shift the Supreme Court farther away from the plenary power doctrine,\(^{184}\) it may lead in the direction of Justice Jackson’s forceful dissent in *Mezei*. He began by noting that, in 1953, “[f]ortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial.”\(^{185}\) He also described the English roots of America’s habeas tradition as a restraint on executive abuses in the form of “oppressive


\(^{178}\) Id. at 1393.

\(^{179}\) The Court issued the *Mezei* opinion one month after *Chew*.

\(^{180}\) 459 U.S. 21, 33 (1982) (construing *Chew*’s holding as constitutional despite the *Chew* Court’s characterization of the issue as statutory).

\(^{181}\) Id. at 38.

\(^{182}\) Id. at 37.


\(^{184}\) Cf. Hart, *supra* note 177, at 1396 (“[T]he judges who sit for the time being on the court authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people’s sense of justice.”).

\(^{185}\) *Mezei*, 345 U.S. 206, 218 (Jackson, J., dissenting).
and lawless” imprisonment.\textsuperscript{186} With conviction and reliance on Lord Mansfield’s application of the writ of habeas corpus in favor of a slave on a ship anchored in the Thames,\textsuperscript{187} Justice Jackson maintained that the writ must protect “an alien whose keep, in legal theory, is just outside our gates.”\textsuperscript{188} Justice Jackson feared the government might confine individuals indefinitely for undisclosed reasons.\textsuperscript{189} After arguing that “basic fairness in hearing procedures should not vary with the status of the accused,”\textsuperscript{190} he asserted that indefinite confinement was “no longer . . . justified” because rather than being “ancillary to exclusion” it had become “an end in itself.”\textsuperscript{191}

Although the Uighurs can hope for a shift in judicial interpretation to take hold, “[t]he appeal to principle is still open and, so long as courts of the United States sit with general jurisdiction in habeas corpus, that means an appeal to them and their successors.”\textsuperscript{192} The ideal pragmatic platform, as I articulate in this article, is for the Uighurs to establish that the immigration exclusion cases are distinguishable and the judiciary maintains the authority to remedy the habeas corpus violation with release.

**IV. Reconciling the Immigration Cases**

The immigration cases, if applicable, leave little room to assist the Uighurs’ plight for justice. Such a conclusion is not the necessary result. The combination of the nature of the right at stake – the Great Writ – and the unique status of the Uighurs render the immigration analogy an improper fit. Also, most of the discussed immigration cases were decided before the United States became a party to the international conventions codifying the principle of non-refoulment,\textsuperscript{193} which prohibits the signatory countries from returning refugees into a region where they may again encounter persecution.\textsuperscript{194} If freed from the grip of immigration precedent, the Uighurs have a much better opportunity to secure judicial aid.

The nature of the Uighurs’ status, however, should save them from this dismal body of immigration jurisprudence. The distinguishing feature for the Uighurs is that the United States brought the Uighurs to Guantánamo against their will. The Boumediene Court found that the United States has de facto control of Guantánamo. Because the United States government hauled the Uighurs to an American-controlled location, the Uighurs’ case is distinguishable from the traditional immigration cases regarding exclusion in which individuals arrived, for example, voluntarily on Ellis Island.

\textsuperscript{186} Id.
\textsuperscript{187} Id. (citing Somersett’s Case, 20 How. St. Tr. 1; 2 Campbell, Lives of the Chief Justices 418; Fiddes, Lord Mansfield and The Sommersett Case, 50 L.Q. Rev. 499).
\textsuperscript{188} Id. at 219.
\textsuperscript{189} Id. at 220.
\textsuperscript{190} Id. at 225.
\textsuperscript{191} Id. at 227.
\textsuperscript{192} Hart, supra note 177, at 1396.
\textsuperscript{194} The Scope and Content of the Principle of Non-Refoulement: Opinion (2.1), in Refugee Protection in International Law (Sir Elihu Lauterpacht and Daniel Bethlehem eds., Cambridge Univ. Press, 2003), available at: http://www.unhchr.org/419c75ce4.html.
In fairness, the Uighurs were voluntarily in Afghanistan and then traveled to Pakistan where the United States military took custody of them. So, for the sake of argument, one could assume that the United States had authority to capture and detain the Uighurs initially and the same problem might have inevitably arisen once it became clear that the United States no longer had authority to hold them. The problem is not, however, the same as the Uighurs’ present conundrum. If the United States military had discovered its error early, it could have let the Uighurs go in Afghanistan. The Uighurs had assumed the risk of being in Afghanistan (and arguably Pakistan); the Uighurs did not assume the risk of being in Guantanamo, which possesses unique geographic and stigmatic consequences.

An analogy to tort law—specifically to voluntarily assuming a duty of care—may aid the analysis. In the American tradition, one who walks by an injured individual on the side of the road owes no duty to stop and help. If one opts to stop and take the individual into her garage to render aid, however, one assumes a duty to the victim. Similarly, the United States government had no duty to assist the Uighurs plight against their alleged oppressor, the Chinese government. The United States chose to pay a bounty for the Uighurs, transferred them to de facto United States territory, and wrongfully detained them at Guantánamo. Further, pursuant to the principle of non-refoulment, the United States possesses an affirmative obligation in certain immigration cases to not return individuals to areas where they will again face persecution. These facts alter the relationship such that the United States affirmatively assumed a responsibility for the care and placement of the Uighurs.

In an ideal world, we could attain full corrective justice by returning the Uighurs to their homeland. The Uighurs assert real threats of persecution by China. Given their good-faith claim of persecution, returning the Uighurs to China, Afghanistan, or Pakistan is morally unacceptable even if feasible. Other countries are also unwilling to accept the Uighurs due to fears of uneasy diplomatic relations with or retaliation by China. Despite the genuine practical difficulties, the United States owes a duty to the Uighurs. The judiciary need not take a position on the appropriate avenue for placement. The factual reality that the United States may be the only locale that might work does not render the federal judiciary powerless to exercise jurisdiction and order release for an ongoing habeas corpus violation.

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195 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Tentative Draft No. 4, 2004) (“An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other.”).
196 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 (Tentative Draft No. 4, 2004) (“An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship. Special relationships imposing this duty include a custodian with those in its custody, if the custodian is required by law to take custody or voluntarily takes custody of the other and the custodian has a superior ability to protect the other.”). The majority of American states have Good Samaritan laws that shield rescuers from tort liability for attempting to aid the injured, but tort law imposes a duty of care on those who assume special relationship or become custodians. The government’s removal and transfer of the Uighurs to Guantánamo created a special relationship.
197 Wolfe, supra note 98 (explaining that other countries are unwilling to accept the Uighur detainees because the countries are concerned about their diplomatic relations with China); see also Demetri Sevastopulo, US Fails to Find Homes for Uighur Detainees, FIN. TIMES (Oct. 28, 2004), http://www.ft.com/cms/s/0/21cda54-2873-11d9-9308-00000e2511c8.html (last accessed May 25, 2009) (reporting that the United States unsuccessfully approached the following countries to accept the Uighurs: Switzerland, Finland, Norway, Italy, France, Portugal, Austria, and Turkey).
Even if the voluntariness of arrival is not dispositive, the federal appellate court erred in automatically converting the Uighurs’ case into an immigration matter that raises a nonremediable political question. The case as filed in the federal district court was a habeas action that sought to challenge confinement as unlawful. Jurisdiction over this issue exists. The federal district court possessed the authority to declare the detainment an arbitrary exercise of government power as well as a violation of the Uighurs’ individual rights to be free from unlawful confinement. The court’s jurisdiction should include the power to issue a remedy for the unlawful confinement.

The district court’s order that the government release the Uighurs into the United States triggered the potential classification of the case as an immigration issue. Thus, although perhaps limited by the Uighurs’ remedial request, the court should have ordered a termination of the unlawful confinement and a release of the Uighurs from Guantánamo within a specified time period. The time limit creates the necessary pressure but balances the powers appropriately because the court leaves the details of administering the remedy to the government. Only an injunction ordering release will remedy the irreparable harm being done. Such an injunction order would not have activated the trip-wire of immigration. It would not render the case a zero-sum game per the appellate court’s rigid logic. The order could leave the intricate decisionmaking regarding the how and where questions to the branches best suited to tailor the relief – the political branches. This remedial path would preserve the government’s plenary power over immigration, the judiciary’s review and remedial power, and the significance of habeas corpus.

The court might be warranted in issuing a more robust remedy. The Uighurs’ case poses a genuine conundrum for relief. The intersection of habeas corpus with immigration exclusion policy creates an arena of potentially overlapping branch powers. In this “zone of twilight,” the balance of the equities may tip in favor of the court issuing an order of release into the United States because of the role the United States played in creating the problem. The judiciary would be wise, however, to leave the details of implementation to the political branches. The government could fashion the relief on historical precedent such as: President Jimmy Carter’s refugee camps for the port of Mariel Cuban refugees or the Attorney General’s use of parole authority to grant temporary stays to aliens who otherwise appear unqualified for admission.

The political branches have creative tools at their disposal. Congress and the Executive should determine the proper course. The judiciary, however, must maintain its authority to rectify an ongoing habeas corpus violation. The right to habeas is clear, and the consequences of no remedy are dire for the rule of law and for the individual Uighurs. How far the court may go

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198 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (conceptualizing a “zone of twilight” in which two branches of government have “concurrent authority”); see also Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952) ("It is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution.").


in crafting a remedy is a delicate matter, but at minimum the court should exercise jurisdiction, check the government’s abuse, and order release.

V. Application of Alignment Thesis to the Uighurs’ Case

We are no doubt living in interesting times. Extraordinary times may well call for extraordinary measures by the political branches of government. The federal judiciary may wisely give the political branches a wide berth, but it should not turn a blind eye. An ongoing violation of an applicable constitutional right should not go unreviewed and unremedied lightly.

The federal courts at issue grappled in good faith with vexing issues raised by the Uighurs’ allegations. Ultimately, the highest court to pass on the matter determined that it was powerless to resolve the case or remedy the wrong. In this section, I maintain that the federal judiciary is not powerless, despite the potential political question. The federal judiciary possesses the authority under Article III of the Constitution to hear the Uighurs’ case, which is otherwise justiciable. Prudential reasons exist for finding that the case poses a nonjusticiable political question, but the context and rights at stake outweigh those prudential reasons.

Federal courts should lean towards accepting jurisdiction in cases like the Uighurs because two political branches of government have acted in concert to threaten core constitutional rights. Alternatively, the Executive exceeded limitations imposed by Congress and operated at the Executive’s “lowest ebb” of power.\(^{201}\) Certainly one political branch, Congress, may serve as an effective check on another political branch, the Executive. Given the pressures of the global war on terror, Congress has often not served as a meaningful check on potential abuses of presidential power. It is in these moments that judicial review is all the more essential. In fact, judicial review should be exercised unless constitutionally prohibited.

Of the traditional justifications for the political question doctrine, the one with the strongest constitutional force is the textual commitment ground. Although the immigration cases rely on this ground (as well as others), they differ from traditional political question cases because the text of the Constitution does not explicitly commit exclusion of aliens to the political branches. Rather the power stems from extra-constitutional sources such as implied, inherent powers as sovereign. If the commitment stems from implied powers, the political question doctrine may be inapplicable under a strict construction of the textual commitment factor. The doubt presented by this gray area may mean declining jurisdiction is not required. Other political question rationales, including judicial functionality and interbranch respect, suggest moving cautiously, but not halting all review.

Despite the interstitial nature of the source of political branch authority over immigration admission issues, however, there is little argument that the judiciary has any legitimate business overseeing the intricacies of immigration admission and exclusion policies. Genuine separation-of-powers spheres exist and should be respected. With respect to the Uighurs’ case, however,

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\(^{201}\) Hamdan v. Rumsfeld, 548 U.S. 557, 639 (2006) (Kennedy, J., concurring) (“If the President has exceeded these limits [– Congress’s governing principles for military courts –] this becomes a case of conflict between the Presidential and congressional action – a case within Justice Jackson’s third category, not the second or first.”); Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
the context and gravity of harm dictates that the Court lean in favor of jurisdiction and remedying the wrong unless it constitutionally lacks the power to do so.

Regardless of the potential for academic debate on whether the nature of the political question strips the judiciary of power to resolve the dispute, the arena may be super-political. The Supreme Court has repeatedly acknowledged the plenary authority of the political branches in determining exclusion policies and ceded the field as generally beyond the judiciary’s purview. Accordingly, the Uighurs best tack remains arguing that the immigration exclusion cases do not govern.

The immigration jurisprudence should not apply because of the distinguishable status of the Uighurs as being brought to Guantánamo involuntarily. Also the remedy of release may be possible without converting the matter into a political determination if the court tailors a broad injunction to provide the government with sufficient flexibility to choose the path of implementation. If the judiciary simply orders release from Guantánamo within a specified amount of time, the order would not raise the immigration admission issue. In fairness, the practical reality of placement difficulties may mean that a general injunctive order is simply the court doing through the back door what it cannot do through the front. If it is simply the court doing what it should not do, the court should act because of the gravity of the damage to the habeas corpus right.

Further, the government shifted the burden of responsibility for curing the unlawful confinement because it brought the Uighurs to de facto American territory. The government has a moral duty to correct the wrong, and it should also have a legal duty to release the Uighurs. The absence of the judicial remedy of release disembodies the right of habeas corpus. Although Boumediene crystallized the notion that Guantánamo detainees possess American habeas corpus rights, the Kiyemba opinion pulls the constitutional rug out from underneath the Uighurs. In effect, the Kiyemba opinion unconstitutionally suspends the Great Writ. With the judiciary removing itself from the equation, the Uighurs are left to the goodwill of the political branches. This result is legally flawed. The government insists that the Uighurs, like all aliens, have no constitutional right of entry into the United States. True. But as Justice Jackson artfully maintained in Mezei, “[d]espite the impeccable legal logic of the Government’s argument on this point, it leads to an artificial and unreal conclusion.” It is imperative that the federal judiciary maintain some ability to review, apply pressure, and enforce a meaningful remedy with respect to proven habeas corpus violations such as the Uighurs’ case.

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202 See, e.g., Harisiades, 342 U.S. at 588-89 (“It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); see also id. at 596 (emphasizing that the sovereign political determination of admission of aliens is “wholly outside the concern and competence of the Judiciary”) (Frankfurter, J., concurring).

203 The government successfully argued this point in Mezei, but even if one remains persuaded by Mezei, the Uighurs present a stronger equitable case given the United States’ role in bringing them to Guantánamo.

204 Mezei, 345 U.S. at 220 (Jackson, J., dissenting).
VI. Conclusion

The Uighurs are de jure entitled to liberty but thirteen of them remain de facto imprisoned. This result is wrong. It is wrong as a matter of the justice owed each individual wrongly detained. It is wrong for placing a judicial imprimatur on an unlawful, arbitrary abuse of government power. It is wrong for its role in unconstitutionally suspending the writ of habeas corpus. It is wrong for its failure to serve as a check on usurpations of power by the political branches. It is wrong for its abdication of review. And it is wrong for its denial of any and all remedies for a proven constitutional violation. At minimum, the federal judiciary should exercise jurisdiction over the Uighurs’ case and remedy the habeas corpus violation.

The court may opt to provide a timeline and leave the specifics for enforcement up to the political branches. The Executive may determine that an appropriate course might entail release conditioned on proper immigration completion. In order to provide meaningful judicial review, the federal judiciary must order injunctive relief and be prepared to enforce contempt if necessary to stimulate government action.

In an area rife with controversy, political stalemate may result without intentional fault of individual actors. Guantánamo raises tough problems without simple solutions. Both Congress and the Executive may rightly fear political backlash should the Uighurs disrupt the communities in which they gain entry or violate the law in any way. Yet the American government should take responsibility for its missteps, including the wrongful detainment of the Uighurs. To the extent that political momentum stalls, the federal judiciary can and should play its intended role by accepting jurisdiction and ordering an appropriate remedy of release for the proven violation of habeas corpus. Only then will some measure of meaning be breathed back into the rule of law as it applies to the thus far tragic case of the Uighurs.

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