

**In the
United States Court of Appeals
for the
District of Columbia Circuit**

GEORGE W. BUSH, ET AL.,

Respondents-Appellants,

v.

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR INITIAL HEARING OF APPEAL EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*

The parties, intervenors, and *amici* appearing before the district court and this Court in this action are:

Petitioners-Appellees: Jamal Kiyemba,^{*} as next friend, Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, Sabir Osman, Ibrahim Mamet, as next friend, Edham Mamet, Abdul Razakah, Ahmad Tourson, Arkina Amahmuc, Bahtiyar Mahnut, Ali Mohammad, Thabid, Abdul Ghaffar, and Adel Noori;

Respondents-Appellants: George W. Bush, Donald Rumsfeld, Jay Hood, and Mike Bumgarner.

Amici: Respondent-Appellants have consented to the filing of amicus briefs by the following: (1) The Brennan Center, The Constitution Project, The Rutherford Institute, and the National Association of Criminal Defense Lawyers; (2) The National Immigrant Justice Center; (3) The Uighur American Association; (4) Law Professors Michael Churgin, Niels Frenzen, Bill Ong Hing, Kevin Johnson, Daniel Kanstroom, Steven H. Legomsky, Gerald Neuman, Margaret Taylor, Susan Akram, Chuck Weisselberg, Hiroshi Motomura, Sarah H. Cleveland, Michael J. Wishnie, Leti Volpp; (5) Legal and historian *habeas* scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker,

^{*} Each Petitioner-Appellee also directly authorized counsel to act in these cases.

William M. Wiecek, Abraham R. Wagner, Cornell W. Clayton, David M. Cobin, Mark R. Shulman, Marcy Tanter, Samuel B. Hoff, Nancy C. Unger, and Karl Manheim.

(B) Rulings Under Review

The ruling at issue on appeal is the district court's final judgment granting Appellees' respective motions for judgment on their habeas petitions and ordering their release into the continental United States, entered on October 8, 2008 in *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), *Kiyemba v. Bush*, No. 05-1509 (RMU), *Mamet v. Bush*, 05-1602 (RMU), *Kabir v. Bush*, No. 05-1704 (RMU), *Razakah v. Bush*, No. 05-2370 (RMU), *Thabid v. Bush*, No. 05-2398 (RMU), and *Gaffar v. Bush*, No. 08-1310 (RMU).

(C) Related Cases

The Executive's appeal on the issue of prior notice of transfer is currently pending before the Court in *Kiyemba v. Bush*, No. 05-5487, 05-5489, argued September 25, 2008.

All Petitioners-Appellees other than Ali Mohammad filed DTA Petitions in this Court: *Parhat v. Gates*, No. 06-1397 (judgment for Petitioner: June 20, 2008); *Semet v. Gates*, No. 07-1509 (judgment for Petitioner: Sept. 12, 2008); *Jalaldin v. Gates*, No. 07-1510 (judgment for Petitioner: Sept. 12, 2008); *Ali v. Gates*, No. 07-1511 (judgment for Petitioner: Sept. 12, 2008); *Osman v. Gates*, No. 07-1512 (judgment for Petitioner: Sept. 12, 2008); *Mahnut v. Gates*, No. 07-1066; *Mahmud v. Gates*, No. 07-1110; *Abdurahman v. Gates*, No. 07-1303; *Nasser v. Gates*, No. 07-1340; *Thabid v. Gates*, No. 07-1341; *Amhud v. Gates*, No. 07-1342;

Razakah v. Gates, No. 07-1350; *Sabour v. Gates*, No. 07-1508; *Memet v. Gates*, No. 07-1523; *Tourson v. Gates*, No. 08-1033; and *Noori v. Gates*, No. 08-1060.

Susan Baker Manning (Bar No. 50125)

PETITION FOR EN BANC HEARING OF APPEAL

Pursuant to Fed. R. App. P. 35(a)(2), Petitioners-Appellees (“Appellees”) request *en banc* consideration of this appeal in the first instance. As grounds, Appellees say:

1. The appeal presents two questions of exceptional importance: (i) whether, in a case in which there is no affirmative law justifying indefinite Executive detention, the Executive nevertheless may unilaterally avoid providing any *habeas corpus* relief by the assertion of discretionary immigration powers conferred by statute, and (ii) whether a federal district court constitutionally may withhold *habeas* relief to an alien non-enemy civilian who enjoys the constitutional privilege of *habeas corpus* and is within the court’s jurisdiction, and who is held indefinitely by the Executive in a military prison. On each of these questions, the Executive’s position conflicts with the Supreme Court’s decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

2. This appeal also presents the risk of inconsistency with *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), a final judgment of this Court that has neither been appealed nor stayed. On June 20, 2008, in *Parhat*, the Court ordered the Executive to release or transfer Appellee Huzaifa Parhat. *Parhat*, 532 F.3d at 837.¹ It has done neither.²

¹ The Court also gave the Executive the option of “expeditiously conven[ing] a new Combatant Status Review Tribunal to consider evidence submitted in a

3. This case also presents the first review of a final *habeas* judgment following the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The district court is now managing hundreds of cases that were stalled for many years. The Executive's assertions here concerning remedy raise considerable confusion for that court. As Appellees' merits brief shows, a ruling that these Appellees have no remedy would eliminate *judicial* remedy for all Guantánamo prisoners, and make release from that prison solely a function of Executive discretion and unreviewable diplomacy with foreign sovereigns. An early and definitive resolution of this issue would greatly assist the district court's management of hundreds of *habeas corpus* cases.

manner consistent with this opinion.” *Parhat*, 532 F.3d at 837. In August, 2008, the Executive waived this option. Respondent's Petition for Rehearing at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008). On September 9, 2008, the Court—acting at the government's request entered—the same judgment as *Parhat* in the DTA cases of Appellees Abdusemet, Jalal Jalaldin, Khalid Ali, and Sabir Osman. Judgment in Nos. 07-1509, 07-1510, 07-1511, and 07-1512 (D.C. Cir. Sept. 30, 2008). The Executive likewise has waived in these cases the option to convene another Combatant Status Review Tribunal. Notice of Status, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), Civil Action Nos. . 05-1509 (RMU), 05-1602 (RMU), 05-1704 (RMU), 05-2370 (RMU), 05-2398 (RMU), and 08-1310 RMU) (conceding non-combatant status as to all Appellees).

² The Executive disputes the meaning of “release.” But there is no dispute that, more than four months after this Court issued its order, *Parhat* has not been released under any meaning of the word, or transferred. Thus there is no genuine dispute that the Secretary of Defense has not complied with the mandate of *Parhat v. Gates*.

4. The Court is familiar with the background of these extraordinary cases from the previous litigation of the Executive's stay requests and its review of Appellees' request for *en banc* review of the stay order, the panel's order thereon, and the dissenting statement. Order, *Kiyemba v. Bush*, No. 08-5424 (D.C. Cir. Oct. 24, 2008).

5. Appellees prevailed below. As the judgment of District Court Judge Urbina and the dissenting statement of Circuit Court Judge Rogers make clear, they present a strong claim for affirmance. But for a stay issued by a divided panel, they would no longer be held in a military prison.

6. Appellees recognize that first-instance review *en banc* is disfavored. We submit, however, that the exceptional importance of the issues presented in this appeal make ultimate *en banc* review a likely prospect. The inevitable delays of a serial *en banc* process can be avoided only if the process commences now.

WHEREFORE, Petitioners-Appellees request that the *en banc* Court of Appeals hear this appeal, and that the Court grant to them such other and further relief as may be just and proper.

October 31, 2008

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CERTIFICATE OF SERVICE

I certify that, on this 31st day of October, 2008, I served the foregoing Petition for Initial Hearing of Appeal En Banc on counsel of record for Respondents-Appellants by causing a copy to be sent electronically and by Federal Express to Sharon Swingle, Appellate Staff, Civil Division, Room 7250, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.



Susan Baker Manning