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INTRODUCTION

Immigration law is a central justification for why five men remain detained indefinitely at Guantánamo despite having writs of habeas approved in 2008. Since then, the Court of Appeals in *Kiyemba v. Obama I*, *II*, and *III* has used plenary powers reasoning to justify detentions. This reasoning defers immigration issues to the political branches and denies rights protections because of alien status or presence overseas. These five detainees are Uighurs, Turkic Muslims from China, and are noncombatants. Their cases have raised significant constitutional habeas issues, but use immigration law to justify detention.

This Article makes two arguments. First, immigration law—that is, plenary powers and statutory law—provides a fallback justification for Guantánamo detentions. Even though the *Kiyemba* decisions are viewed as habeas cases, immigration law plays a central role in making detention legal. Second, a complex political quagmire in the United States and in foreign affairs explains why political, as opposed to judicial, solutions cannot free these men. The executive branch has not used its parole power to release these men into the United States, thus avoiding indefinite detention and separation of powers concerns. A transnational analysis of the relevant political considerations highlights the influence of law's assumptions regarding alienage, culture, geopolitics, and the War on Terror.

Immigration law is playing a central role in justifying detentions on Guantánamo, nine years after detentions began and after detainees have secured three victories in the Supreme Court.[1] In the *Kiyemba v. Obama* cases, immigration law doctrine provided the legal basis for keeping five noncombatant men in indefinite detention, even after a district court approved their writ of habeas in 2008. In these cases, immigration law appeared as a norm barring judicial review for political questions and a rights limitation based on alien status or their location outside domestic borders. These are hallmark norms of immigration law's plenary power doctrine. Court opinions refer to immigration law in the form of the plenary power doctrine and statutory law. The *Kiyemba* cases concerned Uighurs who are still unable to secure release from Guantánamo after nine years of detention, though they have writs of habeas corpus and the executive has not classified them as unlawful enemy combatants since 2008.[2] Consequently, in all

1. Guantánamo detentions began in January of 2002. As of September 27, 2011, 171 men remain detained. Seven hundred seventy-nine men were detained on Guantánamo during the nine-year period from 2002 to 2011, with the majority now released or relocated. *See* Andrei Scheinknan et al., *The Guantánamo Docket: Detainees*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees (last visited Oct., 14, 2011). Judicial victories for detainees include: Boumediene v. Bush, 553 U.S. 723, 733 (2008) (finding detainees have the constitutional privilege of the writ of habeas corpus), Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (holding military commissions created by the executive to be unauthorized by law and inconsistent with the Uniform Code of Military Justice and the Geneva Conventions), and Rasul v. Bush, 542 U.S. 466, 480–84 (2004) (finding the federal habeas corpus statute applies to the base).

2. Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008); *In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35–37 (D.D.C. 2008).

three *Kiyemba v. Obama* cases, the Court of Appeals for the District of Columbia Circuit has rejected judicial remedies for these detainees. These remedies could secure their release or enjoin their resettlement in China. The Supreme Court has repeatedly denied certiorari review of *Kiyemba* appellate decisions, most recently in April of 2011. The five Uighur detainees remain unable to secure their release from Guantánamo—the appellate decisions bar their habeas release and use immigration law to justify detention. These detentions are particularly significant given *Boumediene v. Bush*, in which the Supreme Court found that detainees have the right of constitutional habeas corpus, even as aliens held in an extraterritorial location.

This Article analyzes the legal puzzle of ongoing Uighur detention in Guantánamo, which is characterized by indefinite detention for noncombatants. The legal puzzle is the result of a doctrinal clash between an extraterritorial Constitution, with the Supreme Court protecting habeas for alien detainees in *Boumediene*, and the plenary power doctrine which precludes most constitutional protections for aliens. The Article makes two central arguments. First, immigration law, mostly in the form of plenary power reasoning, provides a fallback or default set of legal justifications to detain individuals in Guantánamo. As the *Kiyemba* cases illustrate, after significant constitutional habeas protections are afforded to detainees and their detention is found to be unlawful, immigration law provides the political branches generous authority to continue detentions. While much scholarly and public attention highlights the *Kiyemba* cases as settling doctrinal habeas debates, these cases also clearly emphasize immigration law, in statutory law and in the plenary power doctrine, as justifications for detention. By repeatedly relying on immigration law, the *Kiyemba* cases stress how dependable and secure this doctrine is to exclude aliens from constitutional rights protections. For immigration and alienage issues, the doctrine precludes judicial remedies and only permits political solutions exclusively from the executive or Congress. A political remedy for the Uighur detainees appears extremely unlikely, given the impasse created by China, U.S. domestic politics, and the detainees' own choices.

The Article's second argument is that Uighur detentions are facilitated by assumptions in the law. The Article applies a transnational analysis to show not only how Uighurs are victims of judicial and political indifference in the United States, but also that their detention is facilitated by a critical context. From this context, detention is the product of normative assumptions in diplomacy, culture, geopolitics, individual rights, and the War on Terror. These assumptions facilitate their detention, making both the legal and political solutions inoperative. An initial version of this Article was presented on the symposium panel "Race and Immigration Law."

This Introduction provides a more detailed history of the three *Kiyemba* cases involving the Uighur detainees, their ultimate resolutions in the Court of Appeals for the D.C. Circuit, and their relation to habeas debates. In October of 2009, the

Supreme Court granted certiorari appeals from these detainees in two cases, each named *Kiyemba v. Obama*. Early in 2010, the Court remanded one case to the D.C. Circuit Court of Appeals, which then reinstated its prior decision after incorporating new factual developments. For the other case it simply denied certiorari without explanation. Both decisions effectively continued detention for the Uighurs. The first case, referred to as *Kiyemba I*, considered whether courts may order habeas release into the United States for base detainees when they cannot be relocated home or to a third state.[3] This decision was reinstated in *Kiyemba III*.[4] *Kiyemba I* and *Kiyemba III* addressed the same basic issues of habeas release, potential release into the United States, and court-ordered releases. *Kiyemba II* concerned whether detainees are entitled to notice of their habeas transfer, so that they may contest their relocation to states that may torture or detain them.[5] The D.C. Circuit held that habeas does not require this notice and that concerns for judicial deference and international comity precluded judicial inquiry into the executive's relocation efforts. In 2010, a new petition for certiorari for *Kiyemba III* was filed with the Supreme Court.[6] On April 18, 2011, the Supreme Court denied this petition.[7] Justice Breyer, accompanied by Justices Kennedy, Ginsburg, and Sotomayor, offered a statement emphasizing that the detainees do have resettlement options and that the government is not imposing any obstacles to their "timely release and appropriate settlement."[8]

While all of the *Kiyemba* cases raised constitutional issues regarding common law habeas,[9] habeas remedies, and separation of powers, they demonstrate that

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3. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1023 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011) (mem.).

4. Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046, 1047 (D.C. Cir. 2010). Its appeal was filed before the Supreme Court and docketed as number 10-775. Petition for Writ of Certiorari, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2010) (No. 10-775) [hereinafter *Kiyemba III* Petition]; Lyle Denniston, *"*Kiyemba III*" Reaches Court*, SCOTUSBLOG (Dec. 8, 2010, 4:22 PM), http://www.scotusblog.com/2010/12/kiyemba-iii-reaches-court.

5. *See* Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) (mem.).

6. *See Kiyemba III* Petition, *supra* note 5; *see also A Right Without a Remedy*, N.Y. TIMES, Mar. 1, 2011, at A26 (arguing that the pending *Kiyemba III* certiorari petition raises issues of preserving judicial power and that the Court of Appeals in *Kiyemba I* nullifies the Supreme Court's holding in *Boumediene* and judicial checks on arbitrary detentions).

7. Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (mem.).

8. *Id.*; *see also* Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. TIMES, Apr. 19, 2011, at A18; Warren Richey, *Supreme Court Refuses to Hear Guantánamo Bay Detainee Case*, CHRISTIAN SCI. MONITOR (Apr. 18, 2011), http://www.csmonitor.com/USA/Justice/2011/0418/Supreme-Court-refuses-to-hear-Guantanamo-Bay-detainee-case.

9. Many scholars have explored the habeas law implications of *Kiyemba* detentions. *See* Joseph Pace, *Suspending the Writ at Guantánamo: Take III?*, 119 YALE L.J. 825 (2010) (arguing that legislation requiring the executive to notify Congress of base detainee release or resettlement violates the Constitution's Suspension Clause); Caprice L. Roberts, *Rights, Remedies, & Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1 (2009); Caroline Wells Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891 (2010). There is also

immigration law doctrine provides generous justification for detention even in situations when noncombatants are detained indefinitely.[10] In theory, if certiorari were granted in any of the *Kiyemba* cases, the Supreme Court may provide the next step in habeas doctrine since *Boumediene v. Bush* found constitutional habeas does protect base detainees.[11] In *Boumediene* the Supreme Court held that habeas extends despite detainees' noncitizen status and their presence outside domestic borders. Accordingly, before the *Kiyemba* disputes in 2009, alienage and extraterritorial location were not formal bars to constitutional rights or judicial remedies. This Article argues that by relying on immigration law to justify detentions, the *Kiyemba* triumvirate suggests immigration law provides courts a way to minimize the effect of *Boumediene*: extraterritorial habeas for aliens is checked by plenary powers reasoning regarding political questions, alien status, and their

considerable scholarly work on habeas developments since *Boumediene*. *See* Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 462 (2010) (describing *Boumediene* as presenting a new separation of powers theory to increase judicial review and to provide force to a new common law of habeas); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 259–60 (2009) (arguing that *Boumediene* confirms the "functional approach" to extraterritorial application of constitutional rights); Gerald L. Neuman, *The Habeas Corpus Suspension Clause after* Boumediene v. Bush*,* 110 COLUM. L. REV. 537, 538 (2010) (arguing that *Boumediene* affirms that the Suspension Clause guarantees some judicial review, for citizens and noncitizens, against unlawful detention); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010) (arguing that the Court's use of habeas in the War on Terror cases represents questions about the role of courts in constitutional ordering); Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009) (emphasizing that *Boumediene*'s habeas approach is presented as a separation of powers concern but it focuses on the geographic reach of habeas); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) (describing how historical research of habeas for the 1502 to 1798 period shows separation of powers justifications for the writ and reasoning recent constitutional habeas doctrine); Stephen I. Vladeck, *The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration*, 26 CONST. COMMENT. 603 (2010) (arguing limits on judicial review, especially limits on habeas, are really efforts to increase executive power, and also comparing Bush and Obama approaches). For a description of these habeas proceeding developments, not limited to Uighur detention, see Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 141–75 (2010).

10. This Article focuses primarily on alienage and immigration law relevant to base detentions since *Boumediene v. Bush* was decided in 2008. The base, immigration, and constitutional law issues were previously raised in the Haitian and Cuban refugee contexts in the early 1990s. *See* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1506 (11th Cir. 1995) (finding the constitutional right to judicial review does not apply on the base); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1236, 1326–29 (2d Cir. 1992) (finding constitutional claims for base detainees likely to succeed); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1049 (E.D.N.Y 1993) (vacated by order to a settlement agreement). The Bush Administration interpreted these cases as suggesting habeas did not apply to the base for War on Terror detainees. *See* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142–43 (2006). Although usually not reported, refugees unrelated to the War on Terror still remain on the base. *See* Sonia R. Farber, *Forgotten at Guantánamo: The* Boumediene *Decision and Its Implications for Refugees at the Base under the Obama Administration*, 98 CALIF. L. REV. 989, 997 (2010).

11. Boumediene v. Bush, 553 U.S. 723, 724 (2008).

location. The *Kiyemba* cases suggest that the plenary powers doctrine, as applied to aliens detained overseas, limits extraterritorial constitutional protections implied in *Boumediene*.

The D.C. Circuit's reasoning sanctioning detention reflects hallmark plenary powers doctrine norms. The Supreme Court effectively agreed with this reasoning, as evident in its denial of certiorari in *Kiyemba III*. These plenary powers doctrine norms include: deference for political questions, the denial of certain rights to aliens, and that an alien's physical location precludes rights protection. Even if the Supreme Court did actually rule in a *Kiyemba* dispute, it would most likely focus on habeas and not limit the immigration law justifications in Court of Appeals' opinions.[12] Nevertheless, the doctrinal consistency of plenary powers effectively has shaped the legal identity of these five Uighurs. They are aliens in overseas detention.

Immigration law doctrine provides a fallback in the form of an established set of legal tools to exclude foreign nationals, even after the Supreme Court found that significant constitutional and extraterritorial checks apply to these Guantánamo detentions.[13] This fallback quality of immigration law now stands out, after three Supreme Court cases since 2004 have checked the Guantánamo detention program[14] and detainees have won a majority of petitions for habeas release since *Boumediene*.[15] The *Kiyemba* detainees,[16] Yusef Abbas, Hajiakbar

12. The *Kiyemba III* Petition overwhelmingly focused on habeas and judicial power issues versus limiting or overturning plenary power determinations in immigration law. The legal question presented was: "whether a judicial officer of the United States, having jurisdiction of the habeas corpus petition of an alien transported by the Executive to an offshore prison and there held without lawful basis, has any judicial power to direct the prisoner's release." *Kiyemba III* Petition, *supra* note 4, at i. Sections iii–iv of the petition presented five reasons for granting the petition with four focused on habeas, separation of powers, the Suspension clause, or judicial power and one focused on Fifth Amendment due process rights.

13. *See id.* at 1 (arguing that the Court of Appeals reasoned that the detainee's "alien status left Article III courts powerless to direct a remedy").

14. *See, e.g.*, *Boumediene*, 553 U.S. at 724; Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding military commissions initially created by the executive to be unauthorized by law); Rasul v. Bush, 542 U.S. 466 (2004) (holding alien detainees have statutory habeas rights).

15. So far detainees have won thirty-seven out of fifty-seven habeas cases. Twenty-four petitions have been granted with the detainee released. Thirteen detainees have had their petition granted but are still detained. Overall, 172 men are still detained at the base. *Guantanamo Habeas Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS (Feb. 9, 2011), http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf.

16. This Article argues that the five Uighurs are detained because they cannot leave the base, have restricted living arrangements there, and cannot move as freely as most base residents, especially compared to those working for the U.S. Navy. The Uighur petitioners emphasize how it is not accurate to rely on the Government's view that they are "housed" on the base. *See* Reply to Brief in Opposition, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2010) (No. 10-775). The Government contends that the five Uighurs who remain on the base are not detained, since they are not held at the military detention center on the base, reside in a different location than "detainees," and have received resettlement offers. *See* Brief in Opposition, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2010) (No.10-775). Seventeen Uighurs, of the original twenty-two, accepted resettlement offers from Palau,

Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak,[17] share similar identities with Chae Chan Ping,[18] Ignatz Mezei,[19] and Kestutis Zadvydas,[20] the aliens in leading immigration cases. The detention or exclusion of these noncitizens is primarily justified by the plenary powers doctrine, while constitutional arguments in favor of release has proven ineffective. The plenary powers doctrine has kept the Uighurs detained for nine years. By framing legal issues, immigration law precludes habeas relief. The Uighurs' detention is illegal, but release is not required by law, even after nine years and habeas approval.[21]

This Article proceeds in three parts. Part I describes relevant tenets of U.S. immigration law doctrine used to justify Guantánamo detentions, which are plenary deference limiting judicial review, rights exclusions based on alien status, and similar exclusions because an alien is physically outside domestic borders. It refers to these legal norms as "plenary power reasoning." Part II presents how opinions in Guantánamo cases incorporate this law. This section also presents the executive's power to parole aliens into the United States as an option to end base detention for these men and avoid constitutional issues evident in habeas release or immigration law. Part III explores the nonlegal forces that contribute to these exclusionary pressures: insider/outsider dynamics of citizenship and alienage, critical race approaches to base detainee nationalities, and the cultural and geopolitical assumptions of the War on Terror. It proposes examining these forces from transnational perspectives. This Article concludes by relating immigration law's exclusionary pressures with the nonlegal and transnational forces that contribute to and feed off these pressures, particularly with regard to Uighurs and the War on Terror.[22]

Switzerland, Bermuda, or Albania. For descriptions of why the five are not detained and the history of resettlement options and writ of certiorari petitions, see Letter from Elena Kagan, U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States (Feb. 19, 2010), http://www.scotusblog.com/wp-content/uploads/2010/02/SG-Kiyemba-letter-2-19-10.pdf.

17. Scheinkman et al., *supra* note 1; *see also In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35 (D.D.C. 2008) (citing reports that the "government provides these detainees special housing . . . while efforts continue to resettle them in a foreign country").

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

19. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

20. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

21. In theory, legal questions regarding detention may be resolved by doctrines other than immigration law, such as due process, habeas corpus, or laws of war. This Article does not address these doctrines.

22. This Article, and in particular Part III, is part of a larger project examining how Guantánamo detention disputes reflect cultural assumptions in U.S. law on extraterritorial authority. For examples of this postcolonial, historic and cultural approach to Guantánamo, see Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117 (2009) [hereinafter Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*]; Hernández-López, *Guantánamo as a "Legal Black Hole," supra* note 9, at 141–214; Ernesto Hernández-López, *Guantánamo as Outside and Inside the U.S.: Why Is a Base a Legal Anomaly?*, 18 AM. U. J. GENDER SOC. POL'Y & L. 471 (2010). As empire expands geographically, the law of extraterritorial authority becomes the conduit for contesting cultural and political values. *See generally* LAUREN BENTON, LAW

I. THE EXCLUSIONS OF PLENARY POWERS

Limiting judicial review through justifications of implicit autonomy in international sovereignty, the plenary power doctrine has been central to foreign relations and immigration law doctrines since it was first developed in the *Chinese Exclusion Case* in 1889.[23] This doctrine has been a predictable, stable, and relatively untouched set of legal norms permitting courts to be "hands-off" on migration issues, thereby supporting executive and legislative immigration policies.[24] It has been used historically to exclude aliens, while it now serves as a way to preclude Uighur release, despite their detention being unlawful. Importantly, the doctrine allows the political branches to devise and enforce immigration policy with a sense of security that there will not be many judicial checks.[25] This autonomy, effective in court holdings and in crafting policy, has been found to be settled law.[26] When the doctrine is used, courts may not review executive branch decisions regarding how to interpret or enforce immigration law.[27] At times, the Supreme Court and courts in general have deviated from using the plenary power doctrine to resolve a case and instead relied on statutory canons of interpretation to limit the doctrine's

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AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900 (Cambridge Univ. Press 2002) (presenting litigation in imperial peripheries establishes legitimacy for empires with examples from the Ottoman Empire, and the British in India, Africa, Oceania, and others); Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 COMP. STUD. SOC'Y & HIST. 563 (1999) (describing colonial jurisdictional disputes as shaping the modern colonial state while simultaneously responding to boundary conflicts); Lauren Benton, *Constitutions and Empires*, 31 LAW & SOC. INQUIRY 177 (2006) (presenting an "imperial turn" in socio-legal scholarship that examines the ambiguity of territorial status, construction of legal subjecthood, and importance of imperial legal culture); Christina Duffy Burnett, *"They say I am not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2009) (examining jurisprudence on citizenship and alienage for the unincorporated territory of Puerto Rico as U.S. empire grew after 1898).

23. *See Chae Chan Ping*, 130 U.S. at 609 (finding international sovereignty as the source of the federal government's authority to regulate the entry and removal of migrants); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 (1987) (federal regulation of aliens).

24. *Cf.* Demore v. Kim, 538 U.S. 510, 510–21 (2003) (finding that Congress may make rules for aliens that would be unacceptable to citizens). *See also* GABRIEL J. CHIN ET AL., IMMIGRATION AND THE CONSTITUTION 25 (2000); KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW ¶ 3.B.1, at 102–05 (LexisNexis 2009) (describing the doctrine's history, application in jurisprudence and policy contexts, use in the War on Terror, and recent statutory limits); RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 22.2 (4th ed. 2010) (reporting that the Supreme Court describes Congress's power over admission of aliens as "absolute").

25. *See, e.g.*, Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,583, 52,585 (Aug. 12, 2002) (codified at 8 C.F.R. §§ 214, 264) (referring to plenary power precedents to answer inquiries about discrimination, as justification for executive immigration enforcement applied to aliens of certain nationalities).

26. *See* JOHNSON ET AL., *supra* note 24, ¶ 3.B.1; GABRIEL J. CHIN ET AL., *supra* note 24; ROTUNDA & NOWAK, *supra* note 24, § 22.2.

27. Lees v. United States, 150 U.S. 476, 480 (1893); Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893).

effect.[28] But, these examples are isolated, typically focus on aliens inside the United States and statutory holdings, or never really apply when national security concerns are raised.[29]

To make sense of how these norms play out in legal disputes, Professor Stephen Legomsky describes the doctrine's main points. He identifies six legal positions used to justify the doctrine's normative position on judicial review: (1) the constitutionality of immigration law is inherently a political question because it is part of foreign affairs; (2) aliens are "guests" trying to assert a "privilege" as opposed to "members" of the United States asserting a "right"; (3) it is unfair for aliens to benefit from international law remedies and U.S. constitutional law; (4) aliens have no allegiance to the United States and thus cannot enjoy full constitutional protection; (5) the power to regulate immigration is inherent in sovereignty and separate from constitutional limits; and (6) for exclusion proceedings an alien has not yet entered the United States and thus constitutional limits do not apply.[30] Importantly, immigration law scholarship often focuses on the issue of an alien's territorial location.[31]

These six positions give weight to the legal reasoning that courts will not review immigration issues, since the political branches have plenary authority over them. Throughout U.S. history this position has been articulated in myriad ways. Plenary powers have been justified as part of international sovereignty.[32] The United States' international sovereignty is "necessarily exclusive and absolute. It is

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28. *See generally* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 242–43 (5th ed. 2009) (describing "cracks" in the doctrine that developed over the past decades but how it is still utilized by courts).

29. For descriptions of how the statutory interpretation limitations on the plenary power doctrine relate to foreign relations, see generally Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANS'L L. 1345 (2007) and Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340–41 (2001). For discussions on how statutory holdings help evade the plenary power doctrine's exclusionary norms, see Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990), Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992), Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984), and Brian G. Slocum, *Canons, the Plenary Power Doctrine and Immigration Law*, 34 FL. ST. UNIV. L. REV. 364 (2007).

30. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 927–28 (1995).

31. Immigration law scholars often refer to these territorial issues as involving "entry" or "border" analysis. *See generally* Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407 (2002); Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017 (2007).

32. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (stating that plenary power, as applied to immigration, is not "expressly affirmed by the Constitution," and is sourced within "the law of nations"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (citing EMER DE VATTEL, THE LAW OF NATIONS bk. II, §§ 94, 100 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1876), and ROBERT PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW ch. 10, § 220 (Fred B. Rothman & Co. 1985)).

susceptible to no limitation not imposed by itself."[33] Because of this, immigration and foreign relations issues belong to the political branches, specifically the executive and Congress.[34] In particular, many of the key plenary power cases coincided with protracted foreign relations contests such as Chinese Exclusion or the Cold War. These cases affirmed that a governmental power to exclude or deport foreign nationals was separate from many checks in constitutional law. Providing this autonomy for the political branches to treat migrants differently than citizens, plenary power immigration cases reflect domestic anxieties regarding foreign relations and immigration.[35]

The foundational plenary power cases, the *Chinese Exclusion Case* (1889), *Nishimura v. United States* (1892), and *Fong Yue Ting v. United States* (1893),[36] excluded or deported Asians and Asian Americans with little regard for blatantly discriminatory effects and racist reasoning. The policy was to use cultural and economic justifications to exclude nonwhite migrants on the basis of race. The plenary power doctrine facilitated this policy by providing policymakers and courts with the ability to avoid constitutional limitations for noncitizens. The doctrine's genesis was very much a racially and culturally discriminatory effort of the U.S. government.[37] While its more recent applications in judicial opinions and policy pronouncements often avoid explicit racist reasoning and appear racially neutral, the doctrine still fosters racist and xenophobic forces in the law.[38] This racist

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33. Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (quoting Schooner Exch. v. McFadden, 11 U.S. 116, 136 (1812)).

34. *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (describing immigration issues as "committed to the political branches," either legislative or executive, because they implicate foreign relations and political and economic matters); *Chae Chan Ping*, 130 U.S. at 603 (stating that entry issues belong to Congress and are not "open to controversy"); Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853–54 (1987).

35. *See Matthews*, 426 U.S. at 81 (finding that the executive or legislature should have the greatest authority and discretion over decisions involving foreign aliens because foreign nations may be implicated); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (stating that immigration issues are "intricately interwoven" with foreign relations, needed for "[republic] form of government" and thus "largely immune from judicial inquiry"); *Fong Yue Ting*, 149 U.S. at 711–13 (stating that the United States is a sovereign nation having the right to control foreign relations); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 704–05 (2002) (describing the height of the Cold War and deference in immigration issues as evidence of "extreme judicial deference").

36. *Fong Yue Ting*, 149 U.S. at 698; *Nishimura Ekiu*, 142 U.S. at 651; *Chae Chan Ping*, 130 U.S. at 581.

37. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998), *reprinted in* 19 IMMIGR. & NAT'LITY L. REV. 3 (1998); Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 79 (2001) (originally published in 5 CITIZENSHIP STUD. 57 (2001)); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592 (2002), *reprinted in* 23 IMMIGR. & NAT'LITY L. REV. 561 (2002) (arguing that national citizenship is not representative of identity and acceptance in the United States).

38. *See* Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008), http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/minorities,-

impact and intent has not been overlooked by courts, which refer to the doctrine as established by legal precedent despite these effects. Justice Frankfurter explained: "whether immigration laws have been crude and cruel, whether they have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[39]

In summation, the plenary power doctrine has a well-established and living history of denying aliens the most basic constitutional rights in American law. This protracted relevance predates the ongoing nearly decade-long Guantánamo detentions. The doctrine's utility in foreign relations, immigration affairs, and extraterritorial authority has contributed to cultural and national security anxieties. Its past corresponds with important social histories of U.S. foreign relations such as Chinese Exclusion and the Cold War.[40] The doctrine is still employed actively by the government in its arguments in War on Terror litigation and in crafting legislation.[41] Scholars had argued that various Supreme Court decisions in 2001,[42] including the Supreme Court's finding in *Zadvydas v. Davis* that Congress's immigration authority is "subject to important constitutional limitations,"[43] announced the plenary power doctrine's demise.[44] However, the doctrine has been reinvigorated by political and judicial responses to the War on Terror.[45]

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immigrant-and-otherwise (describing how the doctrine permits courts to limit substantive constitutional protections for migrants and minorities in terms of equal protection and due process rights); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to "Is There a Plenary Power Doctrine?*," 14 GEO. IMMIGR. L.J. 289 (2000) (examining the doctrine's ongoing contribution to de facto racist policies, including agency and legal interpretations of the Constitution and statutes); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557 (2006) (reporting how the doctrine allows for the different treatment of nonwhite citizens and applying this framework to nonwhite suspects in the context of the War on Terror); *see also Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring).

39. *Harisiades*, 342 U.S. at 597.

40. *See, e.g.*, Spiro, *supra* note 35, at, 704–5.

41. *See generally* JOHNSON ET AL., *supra* note 24, ¶ 3.B.1; Johnson, *Minorities, supra* note 38, at 77; *see, e.g.*, Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,585, *supra* note 28.

42. These also include INS v. St. Cyr, 533 U.S. 289, 310–14 (2001) (affirming that constitutional habeas corpus review of removal orders existed despite Congressional elimination of judicial review) and Nguyen v. INS,. 533 U.S. 53, 96–97 (2001) (O'Connor, J., dissenting) (declining to apply plenary power reasoning to determine whether a person born outside the United States to unwed parents, where the father was a U.S. citizen, is a U.S. citizen under the Immigration and Nationality Act).

43. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

44. *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2001). For earlier predictions of the plenary power doctrine's demise see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (1999); Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (1999); Schuck, *supra* note 29.

45. For descriptions of this see JOHNSON ET AL., *supra* note 24, ¶ 3.B.1, at 103–05. *See generally* NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY (2007) (describing the recent uses of the plenary power doctrine in response to the War on Terror).

II. IMMIGRATION LAW: THE FALLBACK DOCTRINAL JUSTIFICATION FOR GUANTÁNAMO DETENTIONS

Since the Supreme Court in *Boumediene* found that detainees' alien status and their physical location outside U.S. borders did not bar access to constitutional habeas,[46] judicial review of base detentions has continued on an anomalous path. Suspending legal norms in a geographic area for reasons of political necessity, this anomaly is historic since the United States first occupied Cuba in 1898 and leased the base after 1903.[47] Much of this anomaly has to do with practical hurdles or substantive determinations of overseas adjudication. But independent of these anomalies, immigration law provides stable doctrinal justifications to continue detention, even in the prolonged and extreme cases of the *Kiyemba* detainees. For the alien detained overseas, plenary power reasoning creates a doctrinal wall between constitutional habeas and historic rights exclusions.

To explain how exclusionary assumptions in immigration law came to frame Guantánamo habeas litigation six years after detentions began, and persisted for years after that, this Section describes how judicial opinions refer to immigration law. Mentioned in varying levels of detail in *Boumediene*, *Kiyemba I*, *Kiyemba II*, and *Kiyemba III*, these issues include: political deference for noncitizen issues; territorial and/or border reasoning to justify rights exclusions (i.e. aliens do not enjoy constitutional rights, aliens do not have a right to enter the United States, or the base is outside sovereign jurisdiction); immigration law statutes do not apply to the base; and detainees need a nonimmigrant or immigrant basis to enter the United States. An examination of these judicial opinions suggests that prodetention opinions consistently refer to noncitizen exclusions with plenary reasoning, but the relevance of this doctrine increased after the Supreme Court and district court affirmed constitutional rights protections for aliens detained overseas. In short, plenary power assumptions operate as a "fallback" set of norms to exclude

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46. Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).

47. *See* JANA K. LIPMAN, GUANTÁNAMO: A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION 11–14 (2009) (describing the base's anomalous quality and how it is separate and distanced from the city of Guantánamo in Cuba); Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba*, *supra* note 22 (analyzing the base's legal anomaly as historic, an intended result of U.S. foreign policy since 1898, and influential in detention jurisprudence); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201, 1228–33 (1996) (defining legal anomaly and describing its relevance to U.S. law and Guantánamo); Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 3–5, 42–44 (2004) (examining how Guantánamo's designation as an anomalous zone shapes the legality of War on Terror detentions). Aside from the anomaly examined in this Article, detainees have recently faced a series of legal ambiguities in contesting their detention. These include whether military commissions will be reinstituted, the executive's detention authority requires a preponderance of evidence standard to continue detention, hearsay evidence is permitted, and torture or illegal interrogations make witness statements impermissible. *See* Hernández-López, *supra* note 9, at 199–207; Benjamin Wittes et al., *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking* (Jan. 22, 2010), http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

noncitizens, even when they enjoy constitutional habeas, are not combatants, and have been in detention for nearly nine years. In situations like the *Kiyemba* cases, when there are potentially dueling doctrinal approaches of extending habeas release or relying on deference to the political branches, the utility of the plenary power doctrine stands out. Here, the doctrine appears more applicable due to the location of the detainees at an overseas base and the diplomatic difficulty of their resettlement. The plenary power doctrine's utility is triggered explicitly by political resistance concerning the War on Terror and national security, and implicitly by notions of the foreign national "Other," feeding off fears of Muslims, Asians, Chinese, or something other than Western, Christian, and democratic.[48]

A. Boumediene*: Limits on Alien Status and Location as Bars to Constitutional Habeas*

In *Boumediene*, the Court treated immigration issues—alien status, border and territorial reasoning, and extraterritorial constitutional rights—as important to its holding, but by no means were these issues critical aspects of its holding. The decision was mostly framed as a separation-of-powers matter concerning an unconstitutional suspension of habeas corpus.[49] The Court found the Constitution's Suspension Clause, including a constitutional privilege to the writ of habeas corpus, does protect base detainees, despite their status as noncitizens and their location outside domestic borders.[50] It pronounced a constitutional basis for its holding, finding the 2006 Military Commissions Act (MCA) and the 2005 Detainee Treatment Act (DTA) are inadequate substitutes for habeas, and thus unconstitutional.[51] It affirmed many doctrinal points regarding constitutional habeas that have developed since the 2001 immigration law decision *INS v. St. Cyr*.[52] In the *Boumediene* opinions, immigration law and alienage issues stood out in

48. *See* Hernández-López, *supra* note 9, at 199–207 (providing critical race analysis of the War on Terror's cultural assumptions and base detainee nationalities). Detention trends are consistent with discrimination in domestic War on Terror law and policies. For analysis of this discrimination see Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1302 (2004), Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 298–99 (2002), Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 218 (2005), Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and after September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2–3 (2002),and Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–82 (2002); Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 581–82 (2007).

49. *See* Vladeck, *The New Habeas Revisionism*, *supra* note 9, at 966–70 (describing how the *Boumediene* Court emphasizes separation of powers justifications).

50. *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (referring to U.S. CONST. art. I, § 9, cl. 2).

51. *Id.* at 771–96.

52. INS v. St. Cyr, 533 U.S. 289 (2001) (stating that the Suspension Clause protects the writ of habeas corpus and includes, at a minimum, habeas corpus protections as they existed in 1789). Gerald L. Neuman explains that these developments, which generally relate to the Suspension Clause, implicate a mixture of rights protections and separation of powers, the Clause's extraterritorial effect, judicial power to order release, and a balancing test. *See* Neuman, *The Habeas Corpus Suspension Clause after* Boumediene v. Bush, *supra* note 9, at 540–56.

four ways: (1) how the majority initially presented the issue before the Court; (2) how the court used a functional test to determine what constitutional provisions have extraterritorial application; (3) how the court used the common-law history of habeas; (4) and how the majority distinguished traditional plenary power exclusions in prodetention reasoning to support its conclusions.[53] The following paragraphs explain the importance each of these factors plays in the Boumediene decision and in the role immigration law plays in overseas detention issues.

First, the majority opinion, authored by Justice Anthony Kennedy, raised the issue of aliens when presenting the question before the Court.[54] It began by stating that the petitioners are aliens, designated as enemy combatants, and detained at the base.[55] It noted detainees on the base also include aliens who are not petitioners.[56] In holding that petitioners have a habeas privilege, it stressed three important immigration issues: that the question before the court involve aliens;[57] that similarly situated detainees are aliens even if they are not petitioners; and that aliens are the ones who ask for and are confirmed to have a constitutional privilege.[58] It framed the issues and answered the question in a manner that fully incorporated detainees as aliens with access to habeas jurisdiction, despite their noncitizen status.

The way the Court framed the issue as involving aliens and the suspension of constitutional habeas became extremely important in its justification for its holding. The Court presented the issue as one of suspending the Constitution, and then alienage became a less important concern, and definitely not a bar. Even though the matter involved aliens and aliens located overseas, Justice Kennedy framed the debate as one of suspending the Constitution and separation of powers.[59] Meanwhile, the dissents focused on alien status as a bar to extraterritorial habeas.[60] Both dissenting opinions emphasized how for the first time ever the Court was holding that aliens detained overseas enjoy constitutional

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53. *See Boumediene*, 553 U.S. at 732, 739, 747–48, 766–70.

54. *Id.* at 732.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 739 (asking whether the detainees' statuses as enemy combatants and aliens or their presence on an extraterritorial base precludes constitutional habeas protections); *id.* at 742–45 (presenting constitutional habeas as a separation of powers issue, reflected in the framers' intent, framers' debates, habeas and immigration precedent, and recent War on Terror jurisprudence (referring to Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004))).

60. *See id.* at 803 (Roberts, C.J., dissenting) (finding that the political branches provide adequate constitutional rights for aliens captured abroad); *id.* at 825–26 (emphasizing how the Court affirms various rights to alien enemy combatants abroad and that these are "greater procedural protections" ever afforded to enemy detainees citizens and aliens); *id.* at 834–40 (Scalia, J., dissenting) (emphasizing that alien status is a bar to habeas overseas, which was established in *Eisentrager* and *The Insular Cases*).

rights during times of war.[61] This is contrary to substantial precedent.[62] The Court acknowledged that the holding was novel, but prior precedents did not offer "any precise historical parallel."[63] For Guantánamo and the War on Terror, detention is under executive order, the conflict's duration makes it the longest in U.S. history, and the United States is in complete control of the base even though technically not sovereign.[64] With a functional test emphasizing practical inquiries, alien status becomes less of a bar to extend habeas overseas.

Second, when answering questions concerning the Constitution's extraterritorial application, the Court addressed issues about alien status and presence inside and outside domestic borders.[65] The Court reasoned that constitutional authority over the base requires that base detentions be subject to habeas proceedings, as long as those proceedings are not "impracticable and anomalous."[66] Doing this, it avoided a bright-line or formal test for extraterritorial constitutional questions. Such a test could focus on sovereignty, detainee location, or alienage. Instead, the Court devised a functional test to determine which constitutional provisions apply to this overseas location under American control.[67] This test examines three factors: (1) the citizenship and status of the detainee, and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the detainee's entitlement to the writ.[68]

Importantly, this test decreases the importance of alien status when deciding extraterritorial constitutional issues.[69] The test mentions detainee "status," which refers to whether they are combatants or have been tried by a military tribunal. The Court included citizenship and thus alienage as issues to be examined along

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61. *See id.* at 826–27 (Scalia, J., dissenting).

62. *See id.* at 834–37, 841 (Scalia, J., dissenting).

63. *Id.* at 770–71.

64. *Id.* at 771.

65. *Id.* at 756–61.

66. *Id.* at 759 (citing Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

67. *Id.* at 765–66. Gerald L. Neuman presents the holding in *Boumediene* as rejecting "formalistic reliance" on factors such as nationality and location, and presenting functionalism as the "standard methodology." *See* Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, *supra* note 9, at 261; *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009) (arguing for a different extraterritorial test, initially examining first if a constitutional guarantee applies and then how it may be enforced).

68. *Boumediene*, 553 U.S. at 766. These concerns are procedural and substantive. The test could be procedural if there was an executive determination or some process involving notice, ability to contest, or legal representation. The test also substantively identifies the detainee's citizenship and combatant status.

69. Importantly, this functional test has been applied by a district court to detentions in Afghanistan. Emphasizing nationality as a critical factor, the court found that non-Afghans brought to Afghanistan to be detained did enjoy the privilege of habeas. In contrast, Afghans in detention in Afghanistan did not enjoy habeas. *See* Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

with two other subparts, the detainee's status as a combatant or noncombatant and how this determination was made.[70] Citizenship and alien status are part of larger questions weighing additional concerns, such as the practical obstacles in determining the detainee's right to the writ.[71]

This functional test places less weight on alien status than does the *Johnson v. Eisentrager* test for extraterritorial habeas.[72] The government, dissenting opinions, and prodetention judicial reasoning all use this older test.[73] It begins with the inquiry whether the detainee is an "enemy alien" and whether the detainee has been in or resided in the United States.[74] The *Eisentrager* test similarly references factors to highlight a detainee's physical location to preclude access to the writ.[75] These factors include if the detainee was captured outside or imprisoned outside the United States.[76] Compared to the *Boumediene* test, the *Eisentrager* approach frames the inquiry with factors that more easily exclude noncitizens by focusing on alienage, location, and sovereignty.[77]

In addition to de-emphasizing alienage, the *Boumediene* functional test limited the importance of territorial location as a bright-line factor. These indicia could refer to de jure sovereignty or to the detainee being outside domestic borders. Instead, the Court noted the United States has de facto sovereignty on the base, because of complete control and jurisdiction.[78] Citing the *Insular Cases* as precedent, the Court held that the Constitution applies overseas on its own force but that not all of its provisions extend.[79] Following these precedents, *Boumediene* noted that a significant factor for examination is whether habeas proceedings would be practical.[80] As such, alien status and de jure sovereignty are not categorical bars. One of the *Insular Cases*, *Balzac v. Porto Rico*, found that noncitizens enjoy fundamental constitutional rights.[81] The Court referred to this despite the fact that the United States lacks de jure sovereignty over Guantánamo.[82] The *Boumediene* Court explained that for all practical purposes the

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70. *See Boumediene*, 553 U.S. at 766.

71. *See id.*

72. Johnson v. Eisentrager, 339 U.S. 763, 777 (1950).

73. *See Boumediene*, 553 U.S. at 828 (Scalia, J., dissenting) (stating how using the *Eisentrager* test, the administration determined habeas did not extend to Guantánamo); *see also id.* at 834–43 (describing why the *Eisentrager* test is not a functional test, why it applies to Guantánamo detentions, and how it is manipulated by the *Boumediene* majority).

74. *Eisentrager,* 339 U.S. at 777.

75. *Id.* at 777–78 (referring to factors such as the alien's residence in the United States; the site where the alien was captured, tried, and convicted in a military commission outside the United States; and the site where the alien was imprisoned).

76. *Id.*

77. *See id.*

78. *Boumediene*, 553 U.S. at 755.

79. *Id.* at 756–60.

80. *See id.* at 762–63, 769.

81. *See id.* at 758 (citing Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922)).

82. *Id.* at 753–55.

United States has de facto sovereignty and that no other sovereign controls the base at Guantánamo.[83] It reasoned that neither Congress nor the executive has the power to turn off the Constitution at the base.[84]

Instead of using bright-line tests, which would more likely exclude noncitizens, the functional test prioritizes what is practical and possible.[85] The Court developed the test from precedents[86] such as the *Insular Cases*,[87] *Reid v. Covert*,[88] *Eisentrager*[89] (reading more into its approach than its holding), and Justice Kennedy's own concurrence in *United States v. Verdugo-Urquidez*.[90] Although it would not be practical to enforce all constitutional provisions abroad,[91] this does not preclude some extraterritorial constitutional protections extended to the base.

Third, in its extensive examination of common law habeas history, the *Boumediene* Court found that potential immigration law limitations, such as alien status and territorial reasoning, do not preclude habeas corpus on the base. It referred to *St. Cyr*'s finding that constitutional habeas at a minimum includes common law habeas from when the framers wrote the Constitution.[92] It stressed that foreign nationals, enemy aliens, and geographic concerns were not bars to habeas jurisdiction in 1789.[93] Many cases from colonial and English legal histories highlight this.[94] This history does not provide precedent entirely applicable to the Guantánamo or War on Terror situations, but it is informative.

Fourth, siding with the Government's defense of base detentions, dissenting opinions referred to more traditional plenary power reasoning. Four justices joined these opinions, namely Chief Justice Roberts and Justices Alito, Scalia, and Thomas, suggesting that the *Boumediene* holdings may have a limited long-term effect, since later cases may check the broad findings on alien rights, habeas, territorial reasoning, and extraterritorial rights. These dissenting opinions proffered deferential reasoning for the political branches in foreign relations and war, the political branches' relevant expertise, the detention program as a political

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83. *See id.* at 753–55.

84. *See id.* at 765.

85. *See id.* at 766–67, 770–71.

86. *See id.* at 758–62.

87. *See, e.g.*, *Balzac*, 258 U.S. 298; Downes v. Bidwell, 182 U.S. 244 (1901).

88. Reid v. Covert, 354 U.S. 1 (1957).

89. Johnson v. Eisentrager, 339 U.S. 763, 763 (1950).

90. United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

91. *See Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

92. *See id.* at 746; *see generally* Neuman, *The Habeas Corpus Suspension Clause after* Boumediene v. Bush, *supra* note 9, at 537.

93. *See Boumediene*, 553 U.S. at 746 (citing INS v. St. Cyr, 533 U.S. 289, 300–01 (2001)).

94. *Id.* at 747–48 (describing Sommersett's Case, (1772) 20 How. St. Tr. 1, 80–82; Case of Three Spanish Sailors, (1779) 96 Eng. Rep. 775 (C.P.), 2 Black. W. 1324; King v. Schiever, (1759) 97 Eng. Rep. 551 (K.B.) 765, 2 Burr. 765; and Du Castro's Case, (1697) 92 Eng. Rep. 816 (K.B.), Fort. 195).

matter, and the significance of alien status and presence outside U.S. sovereignty.[95] Justice Scalia's dissenting opinion provided the most direct reference to plenary powers. It began by highlighting that this is the first time alien enemies detained abroad during war enjoy the writ of habeas.[96] He explained that precedent justifies alien rights exclusions. He explained how historically, whether in common law or more recently, the writ does not extend to aliens abroad. The opinion argued that the Court manipulates the *Eisentrager* test.[97] He added that the *Insular Cases* are different than Guantánamo, since the United States was and is sovereign in Puerto Rico. Those cases along with *Reid* did not concern alien rights but spoke about citizens' rights instead; as such the Court was misapplying prior precedent.[98] Chief Justice Roberts's dissenting opinion emphasized procedural matters, especially why the DTA is an adequate substitute for habeas. He noted that the Court was striking down the most generous procedures ever afforded to aliens detained as enemy combatants, that the DTA provides aliens more due process rights than required for citizens, and that habeas is a flexible remedy and thus can be limited for aliens.[99] The Roberts dissent ended by summarizing what lawyers, detainees, Congress, and the rule of law gain from the Court's holding. Noting these developments are bad, the dissent stated that alien detainees get increased litigation and lawyers will shape alien detention policy.[100]

In sum, in *Boumediene* the Court found that aliens's status and location are not bars to extraterritorial constitutional rights protections. With this, alien detainees may file habeas petitions to seek their release in district court in the District of Columbia. It highlighted the length of detention and separation of powers concerns, implicit in habeas as a check on arbitrary detentions and executive power, as justifying these protections. Doctrinally, this was achieved by using a functional test to determine what constitutional provisions have extraterritorial application. This test minimized the relevance of alien status, albeit not fully eliminating it, as a factor against constitutional rights protections. Common law habeas history was not interpreted as barring aliens or nonsovereign locations from habeas jurisdiction. The dissenting opinions highlighted the deference implicit in plenary power reasoning and applied it to the specific facts of a War on Terror and detentions in this war.

B. The Kiyemba *Triumvirate: Immigration Law and the Fallback to Detain After Habeas*

Despite the Court's holding in *Boumediene*, the *Kiyemba I* and *III* cases suggest that plenary power reasoning shapes the legal treatment of aliens detained

95. *See generally id.*
96. *Id.* at 826–27 (Scalia, J., dissenting).
97. *Id.* at 834.
98. *See id.* at 836.
99. *See id.* at 801–02 (Roberts, C.J., dissenting).
100. *See id.* at 826.

overseas. Here, plenary power reasoning permits the political branches to continue detaining five men indefinitely and excludes courts from reviewing these policies or ordering their release. The relevance of this doctrine, despite recent constitutional and prior statutory limitations,[101] contributes to persistent puzzles in immigration law. The quick shift from rights-protection in *Boumediene* in 2008 to rights-exclusion in *Kiyemba* the next year, facilitated easily and almost seamlessly with plenary power reasoning, points to the doctrine's fallback role in American law's treatment of foreign nationals. Historically, the United States has resorted to limiting alien rights and using immigration law to create domestic anxieties when faced with a national security crisis.[102] To make sense of how an extraterritorial Constitution fits in a plenary power world, this subsection first describes the special factual circumstances of the legal quagmire for the five Uighur detainees, the petitioners in all three *Kiyemba* cases. The subsection then highlights how plenary power reasoning shapes the legal justifications for denying the release of detainees into the United States, citing *Kiyemba I* from 2009 and *Kiyemba III* from 2010.

The *Kiyemba* detainees provide a complex set of factual issues regarding their detention, their choice not to accept relocation options provided by the executive, and China's treatment of Uighurs and its counterterrorism policies.[103] Twenty-two Uighur detainees were brought to Guantánamo in July of 2002. They were captured in Pakistan and suspected of receiving terrorism training at a Uighur camp in the Tora Bora mountains of Afghanistan.[104] The U.S. military paid a bounty to have them turned over. Since then, habeas proceedings have shown, and the executive eventually agreed, that these men were not enemy combatants.

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101. *See, e.g.*, *id.* at 732 (finding that constitutional rights protections for alien detainees have extraterritorial application); Clark v. Martinez, 543 U.S. 371, 386 (2005); Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (finding indefinite detention of aliens illegal for statutory reasons and explicitly stating that plenary power over immigration is "subject to important constitutional limitations").

102. For a description of the historical process of sacrificing noncitizen rights for national security in the United States, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955, 959 (2002). For a description of how War on Terror responses continue this, see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 298–99 (2002).

103. For the facts described in this paragraph, see generally Roberts, *supra* note 9, Linda Greenhouse, *Saved by the Swiss*, N.Y. TIMES: OPINIONATOR, Feb. 11, 2010, *available at* http://opinionator.blogs.nytimes.com/2010/02/11/saved-by-the-swiss/, and Letter from Elena Kagan, *supra* note 16 (describing to the Supreme Court the history of Uighur detention on the base, habeas litigation, and resettlement offers).

104. The precise nature of the location of these camps, how long the Uighurs were there, and what training they received, if any, remains debated in legal pleadings and orders. This information is invariably under government seal as confidential. Yet, the executive concedes that all of the Uighur detainees are not unlawful enemy combatants and that the *Parhat* holding applies to all of them. *See In re* Guantánamo Bay Detainee Litig., 581 F. Supp. 2d 33, 35 (D.D.C. 2008). For the most developed discussion of their reasons for leaving China, stay and training at a Uighur camp in Afghanistan, flight from Afghanistan after the U.S. military campaign in October 2008, and capture in Pakistan in December 2008, see Parhat v. Gates, 532 F.3d 834, 837–38, 843–44 (D.C. Cir. 2008).

They did not take up arms or have any plans to attack the United States or its citizens. Seventeen Uighur detainees accepted resettlement options in Albania, Bermuda, Palau, or Switzerland. In 2010, the remaining five received offers to relocate in Palau or Switzerland. So far, they do not want to resettle there since these locations cannot provide a Uighur community or needed medical services. The government argues and the Court of Appeals seems convinced that the remaining detainees can receive the same offers to resettle if they express such an interest.[105] Most of the issues remain confidential and under seal due to their diplomatic sensitivity, but the Supreme Court's recent denial of certiorari in *Kiyemba III* suggests that the Court found that resettlement options, most likely to Palau and to another undisclosed location, may be provided to the detainees if they want them.[106]

China has exerted diplomatic pressure on countries to not provide resettlement offers to the Uighurs.[107] Palau on the other hand has no formal relations with China and is heavily dependent on the United States for economic aid and international security.[108] This close relationship with the United States led the small island nation to offer resettlement options to the Uighurs. After Palau received twelve Uighurs in 2009, U.S. and Palau officials denied reports that the island nation agreed to resettle them in return for increased U.S. economic aid.[109]

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105. *See* Reply to Brief in Opposition at 3, Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2010) (No. 10-775).

106. *See* Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1631 (2011) (mem.).

107. China wants the Uighurs returned to China. For descriptions of China's position, see generally *Beijing Says 17 Released Guantánamo Uighurs Are Terrorists Who US Should Hand Back to China*, IRISH TIMES, June.12, 2009, at 12, *available at* 2009 WLNR 11246488; *China Pressures Palau over Uighurs*, ABC ASIA PAC. NEWS (Jul. 19, 2011), http://abcasiapacificnews.com/stories/201107/3273013.htm?desktop (reporting Palau's President describes China is barring Chinese investment in Palau); Frank Ching, *Thorny Problem of the Guantanamo Uighurs*, NEW STRAITS TIMES, Dec. 23, 2010, *available at* 2010 WLNR 2533760; Erik Eckholm, *After 7 Years, Uighurs Go from Prison to Paradise*, INT'L HERALD TRIB., June 16, 2009, at 5, *available at* 2009 WLNR 11454127; Ritt Goldstein, *Is China Spying on Uighurs Abroad?*, CHRISTIAN SCI. MONITOR, July 14, 2009, at 9–10, *available at* 2009 WLNR 13395028; and Carol Rosenberg, *Guantánamo Bay Prison Camps: Swiss to Take 2 Uighur Detainees*, MIA. HER., Feb. 4, 2010, *available at* 2010 WLNR 2301555.

108. *See* EDIBERTO ROMÁN, OTHER AMERICAN COLONIES 237–44 (2006) (analyzing current dependence in economic, legal, and foreign relations terms between U.S. territorial possessions in the Pacific Ocean including Palau, a Free Associated State, and the United States); *see also* Bernadette Carreon, *Uighur Refugees Plead to Leave Pacific Island*, AFP HOSTED BY GOOGLE NEWS (June 14, 2010) (discussing that these resettlement offers have not been favorably received by the Uighurs), http://www.google.com/hostednews/afp/article/ALeqM5iz5PF3FdBzhDua1GoRn6lYV5haFQ; Sam Strangeways, *UK Will Not Issue Passports to the Uighur Four—Gozney*, ROYAL GAZETTE ONLINE (June 11, 2010, 12:01 AM, last updated Feb. 11, 2001, 8:27 AM), http://www.royalgazette.com/article/20100611/NEWS/306119920.

109. *See* Mark Landler, *Palau Agrees to Take Chinese Detainees, Helping Obama's Guantánamo Plan,* N.Y. TIMES, June 10, 2009, at A6 (describing that Palau has relations with Taiwan and not China and benefits from long-term development aid from the U.S.); *see also* Julian E. Barnes, *Palau Deal May Not End Uighur Issue: The Island Nation Has Tentatively Agreed to Take 17 Guantánamo Detainees, but the Stay May Be Temporary,* L.A. TIMES, June 11, 2009, at A16 (presenting arguments that recent negotiations

As described in Part III, a variety of nonlegal issues explain why the current *Kiyemba* impasse continues. Regarding the legal treatment aliens receive, these issues point to important lessons on the nonlegal and transnational importance of foreign relations. Similarly, these factual developments point to implicit goals: to protect the five Uighurs from torture and prosecution in China or elsewhere and to attain their consent for any resettlement. Viewed from the perspective of protecting individual rights, these are positive steps, better than a forced return, but not as good as a secured judicial release into the United States. A release would not be as confined as the present situation of being on a small part of a base with no ability to leave it. These facts continue to develop with their public disclosure subject to significant diplomatic and national security controls. Perhaps as the *Knauff* and *Mezei* immigration cases from the Cold War era suggest, disclosure of all the facts may require historical distance and archival access.[110] Charles Weisselberg has shown that political solutions for Knauff and Mezei, permitting their presence in the United States, were actually quite different than the plenary power holdings in their Supreme Court cases.[111] These cases found that judicial inquiry into the justifications for exclusion were precluded. Congress and the executive instead worked to let them enter and remain in the United States.

1. Kiyemba I*: Immigration Law Trumps Habeas and Justifies Indefinite Detention*

Despite this nonlegal context, the ease with which the plenary power is applied to Uighur detention illuminates a great deal about how U.S. law treats aliens. This begins with the Court of Appeals overturning a district court finding that the Uighur detainees were unlawfully held on the base.[112] On February 18, 2009, in *Kiyemba I* the Court of Appeals decided in favor of the government's appeal of a district court order to release the detainees into the United States. In an opinion written by Judge Randolph and joined by Judge Henderson, the court found that habeas does not require a detainee be released into the United States. In addition, the opinion held that the judiciary cannot second-guess or review political questions regarding diplomatic efforts to resettle them or their entry into the United States.[113] To justify why these are political questions and why rights should be excluded, the opinion relied heavily on plenary power precedents. Its interpretation of the doctrine provided myriad justifications for why foreigners are

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between Palau and the United States regarding its 1994 compact of association and $200 million aid from the United States motivated the Uighur resettlement negotiations).

110. *Cf.* 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 (1995).

111. *Id.*

112. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022 (D.C. Cir. 2009). The district court opinion is *In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008).

113. *Kiyemba I*, 555 F.3d at 1029 (holding that the judiciary does not have the power to intervene when the executive is continuing efforts to resettle the detainees).

treated differently by U.S. law and why judicial review of these decisions is prohibited. In this opinion, the doctrinal wall between an alien's constitutional rights and plenary power exclusions appears as a necessary outgrowth from international law's history since antiquity and *Chinese Exclusion*.

Kiyemba I referred to plenary powers and immigration law in three general ways: justifications for political deference in constitutional and international law; territorial reasoning to justify rights exclusions, relevant to aliens and the base; and statutory bars in the Immigration and Nationality Act (INA) to detainee release into the United States, in terms of their inadmissibility and a required visa basis for entry. These three findings in immigration law sustain the justification that a court cannot order a habeas release into the United States. Viewed in doctrinal terms, plenary deference, territorial reasoning, and statutory bars shape the way immigration law contributes to the legal decision not to release the detainees. The plenary power doctrine exerts a normative influence in these three ways, despite the detainees' writ of habeas being approved by a district court and the executive no longer classifying them as enemy combatants. Put simply, courts have previously found that their detention is illegal and the Government does not have a basis to detain them. Despite these reasons to release them, the *Kiyemba* cases found that Congress's and the executive's plenary power over immigration justifies their detention, even if detention is indefinite. These cases made these findings after some significant factual developments: among other things, the executive has worked hard to relocate these detainees,[114] it does not want to send them to China out of fear for their detention and torture,[115] and it is unable to find a suitable location for these relocations due to China's diplomatic pressure and the detainees rejecting offers.[116]

First, the *Kiyemba I* opinion drew a clear doctrinal link between international law's ancient history and the court's present choice not to review the Obama administration's policy to keep the Uighur detainees on the base. This deference is a product of a nation-state's right to exclude or admit foreigners. This sovereign right was recognized in Roman times and by the Constitutional Convention, and remains an "important postulate" in international law.[117] It is part of U.S. law, necessary for international relations and for defense from foreign encroachments.[118] Sixteen case precedents from 1889 to 2003 support the idea that "without exception" it is "the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States and on what terms."[119] This power represents a "whole volume" of history and precludes

114. Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046, 1049 (D.C. Cir. 2010).
115. *Kiyemba I*, 555 F.3d at 1024.
116. *Kiyemba III*, 605 F.3d at 1049.
117. *Id.* at 1025.
118. *Id.*
119. *Id.* at 1025–26.

any judicial review, unless it is expressly authorized by law. Here, the *Kiyemba I* court concluded, the executive has "determined not to allow them to enter."[120]

Second, emphasizing the territorial location of the detainees and the base, the *Kiyemba I* opinion examined what rights aliens have while detained overseas. It noted that the district court did not specify what statute or treaty authorizes an order to enter the United States, and instead only mentioned the Constitution generally.[121] Deducing that the district court referred to the Due Process Clause in the Constitution's Fifth Amendment, the *Kiyemba I* opinion highlighted that aliens do not possess due process rights without property or presence in the United States.[122] Congress determined in the INA and the DTA that Guantánamo is not part of U.S. sovereign territory.[123] The district court reasoned that detainee release is required under the maxim of "where there is a right, there is a remedy."[124] The Court of Appeals discounted this reasoning since statutory and constitutional law suggest the contrary—that there is no basis for alien detainees to enter the United States. For aliens, entering the United States is a privilege and not a right.[125] The terms of this privilege are political and thus cannot be reviewed by the judiciary.[126] When reviewing whether the detainees have a right to enter the United States, the court's reasoning focused on territorial location and political questions and discounts rights claims. This reflects hallmark plenary power reasoning. This occurs even though the district court found detention was illegal when it approved their habeas petition, and in *Boumediene* the Supreme Court reasoned that the lack of U.S. sovereignty did not bar habeas rights protections on the base.[127]

To emphasize that its conclusions reflect established plenary power reasoning, the *Kiyemba I* court discussed three important Supreme Court immigration law decisions: *Shaughnessy v. United States ex rel Mezei* (1953), *Zadvydas v. Davis* (2001), and *Clark v. Martinez* (2005).[128] The Court of Appeals capitalized on the location of the detainees to rely on the plenary power doctrine's emphasis on whether an alien has entered the United States. Focusing on the normative

120. *Id.* at 1026.

121. *Id.*

122. *Id.* (holding that district court language "suggests the court may have had [due process] in mind").

123. *Id.* at 1026 n.9 (stating that Congress has determined the base is not part of "sovereign territory" of the United States and citing the Detainee Treatment Act § 1005(g), 119 Stat. 2743, and Immigration and Nationality Act, 8 § USC 1101(a)(38)). *But see* Boumediene v. Bush, 553 U.S. 723, 755 (2008) (stating that it is an "obvious and uncontested fact" that the U.S. "maintains *de facto* sovereignty over this territory . . . by virtue of its complete jurisdiction and control over" it); Rasul v. Bush, 542 U.S. 446, 487 (2004) (Kennedy, J. concurring) (finding that the base is in "every practical respect a United States territory" and referring to its "unchallenged and indefinite control").

124. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1027 (D.C. Cir. 2009).

125. *Id.*

126. *See id.* at 1026–27.

127. *See Boumediene*, 553 U.S. at 753–54.

128. *See Kiyemba I*, 555 F.3d at 1027–28.

significance of location for immigration law, the cases all concern aliens in indefinite detention, with *Mezei* affirming detention power and *Zadvydas* and *Clark* finding that detention is illegal.[129] *Mezei* is presented as most analogous to the Uighur detainees, with common traits of: an alien at the border seeking entry, no third country to receive the alien, a finding that the alien was not deprived of a constitutional right despite the potential of indefinite detention, and a finding that the judiciary could not question the Attorney General's judgment not to release the alien into the United States.[130] Comparing these prior cases with the current facts, the Court noted an alien's location outside the U.S. border sustains determinations that aliens do not have constitutional rights and that executive judgment cannot be questioned. Focusing on location, alien status, and political deference, these findings reflect classic plenary power justifications. *Zadvydas* and *Clark* are distinguished since in those cases the alien had already entered the United States, with the Court noting that "constitutional protections available to persons inside" are "unavailable to aliens outside our geographic borders.[131] Plus, both holdings relied on statutory versus constitutional interpretations.

Third, in *Kiyemba I* the court stressed statutory reasoning in immigration law. It found that there is no statutory basis in the INA to order or permit the detainees to enter the United States.[132] Habeas does not qualify as a reason to enter.[133] In other words, because immigration issues belong to the political branches, to enter the United States, aliens must look to a statutory basis provided by Congress or to executive efforts. Because the *Kiyemba* detainees do not fit within this framework they cannot enter.[134] The *Kiyemba I* opinion noted that the Uighur detainees do not have a basis to enter under such categories as permanent residents, nonimmigrants, refugees, or parolees.[135] They have not applied for admission pursuant to immigration laws.[136] Like a primer for family- or employment-based visas, the *Kiyemba I* opinion neatly presented these categories and statutory references in the INA.[137] It then stated procedural requirements for entry or numerical limitations, which bar entry for the detainees.[138] Said simply,

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129. Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

130. *Kiyemba I*, 555 F.3d at 1027.

131. *See id.* at 1028 (citing *Zadvydas*, 533 U.S. at 693).

132. *Id.*

133. *See id.*

134. *See id.*

135. *See id.* at 1030–31.

136. *Id.* at 1031.

137. *Id.* at 1030–31 (describing family-sponsored immigrants, employment-based immigrants, and the tiers of preferences for employment-based immigrant categories); *id.* at 1030 n.15 (describing classes of nonimmigrants in 8 U.S.C. § 1101(a)(15) such as career diplomats, temporary visitors for business or pleasure, aliens in transit, ship or airplane crew members, students, temporary workers, aliens with extraordinary abilities, entertainers and athletes, religious workers, and informants for terrorist organizations or for criminal investigations).

138. *Id.* at 1031.

the court suggested that the detainees apply for visas like any other foreign nationals trying to enter.[139] It even noted that the Attorney General has the discretion to find detainees inadmissible as terrorists, and these grounds for exclusion cannot be waived for refugees seeking asylum.[140] The court suggested that even if the Uighurs cannot be legally detained as combatants their alleged relation to "terrorist activity" may pose a bar to entry. A court cannot review this bar and the executive cannot waive it.[141] However, this only applies to aliens seeking entry as refugees,[142] which the detainees are not. Moreover these grounds for being inadmissible, codified as INA section 212(a)(3)(B),[143] require far more proof than has been suggested by the Court of Appeals. The *Parhat* decision and executive classifications since then have found that all the Uighur detainees are not combatants.[144] Unless these facts are distinct enough to warrant a 212(a)(3)(B) finding, the court may be premature in suggesting these as grounds not to let them enter the United States.[145] In particular, in order to find aliens inadmissible because of terrorist activities, it is required that they "engage" or are "likely" to engage in terrorism, have the intention to cause death or bodily harm, are a member of a terrorist group, endorse terrorist activity, or received military training from a terrorist organization.[146] These must be associated with a specific terrorist activity or a terrorist organization.[147]

The Court added that the executive has the power to parole aliens into the

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139. *See id.* at 1030 (citing 8 U.S.C. § 1201(a)(1)(B), which mandates certain nonimmigrants apply for visas, even for temporary admission).

140. *Id.* at 1031 (citing 8 U.S.C. § 1157(c)(3)).

141. *Id.* (noting 8 U.S.C. § 1157(c)(3) "specifically prohibits waiver of the terrorist ground").

142. 8 U.S.C. § 1157(c)(3) (2006). Section 1157(c)(3) addresses which bars to entry the Attorney General may and may not waive, but only regarding "[a]dmission by Attorney General of *refugees*." 8 U.S.C. § 1157(c) [emphasis added].

143. 8 U.S.C. § 212(a)(3)(B) (2006) (codification of Immigration and Nationality Act § 212(a)(3)(B)).

144. *Kiyemba I*, 555 F.3d at 1024 (noting that after removing Parhat's classification as an enemy combatant, "[t]he government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the [Kiyemba I] petitioners should be detained as enemy combatants."); Parhat v. Gates, 532 F.3d 834, 850 (D.C. Cir. 2008) (holding that the government presented insufficient evidence to classify Parhat as an enemy combatant on the basis of his involvement in Eastern Turkistan Islamic Movement).

145. Increasing terrorism-related grounds for inadmissibility and their impact on asylum petitions have been criticized as inconsistent with the humanitarian purpose of refugee law. *See generally* Susan Benesch & Devon Chaffee, *The Ever-Expanding Material Support Bar: An Unjust Obstacle for Refugees and Asylum Seekers*, 83 INTERPRETER RELEASES 465 (2006); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101 (2006).

146. 8 U.S.C. § 1182(a)(3)(B)(i)(I–IX) (2006) (describing the nine grounds for inadmissibility based on terrorist activities); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 443 (summarizing these grounds for inadmissibility).

147. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006) (defining and summarizing "terrorist activity"); 8 U.S.C. § 1182(a)(3)(B)(vi) (2006) (defining "terrorist organization").

United States; however, this requires an alien already be applying for admission.[148] Here, the detainees have not applied. Ultimately, aliens are not eligible for admission unless they have applied, and even then numeric limits and other considerations may make them ineligible. Interestingly, common law habeas before 1789, which is what courts look to since the *St. Cyr* decision, supports habeas to bring detainees to the United States.[149] Steven Vladeck argues that this common law history of habeas should provide a basis to release the Uighurs.[150]

Judge Rogers provided a separate opinion concurring in the judgment but disagreeing with the court's habeas analysis. She noted that the district court erred in ordering release without hearing from the executive as to whether there was an alternative basis for detention.[151] Rogers's opinion disagreed with the court's plenary power analysis and proposed an approach presented as more consistent with *Boumediene*'s protection of extraterritorial habeas. The court's decision in *Kiyemba I* was not faithful to the *Boumediene* holding and compromised habeas as a check on arbitrary detention and the balance of powers in exclusion and admission of aliens.[152] Judge Rogers's opinion noted that the executive offered no reason to justify detention, and therefore the immigration law justifications should have been assessed by the district court.[153] *Zadvydas*, *Clark*, and *Mezei* stand for the proposition that there must be statutory or Congressional justification to detain aliens. In *Zadvydas*, the Supreme Court suggested that the plenary power was "subject to important constitutional limitations" which could be reviewed by the judiciary after it looked to a statutory basis to detain, expressing the political branches' immigration authority.[154] In *Mezei*, Congress had specifically authorized the power to detain.[155] Here in *Kiyemba I*, detainees had a writ of habeas approved and there was no basis to detain them. Judge Rogers presented this as unfaithful to *Boumediene* and inconsistent with separation of powers. Similarly, the court's decision is inconsistent with *Boumediene*'s rejection of a territorial rationale to bar habeas at Guantánamo.[156]

Judge Rogers's opinion pinpointed the doctrinal conflict posed by *Boumediene* and the ongoing detention of the Uighurs. It stated that *Kiyemba I*'s reasoning tends to conflate the power of the executive to classify an alien as "admitted" within the meaning of immigration statutes and the power of a habeas court to

148. *Kiyemba I*, 555 F.3d at 1031 ("The parole remedy, 8 U.S.C. § 1182(d)(5)(A) . . . is specifically limited to 'any alien applying for admission.'").

149. *See* Vladeck, *The New Habeas Revisionism*, *supra* note 9, at 972 (describing how historic habeas practice focused on equity and bringing the prisoner before the court, suggesting remedies sought by *Kiyemba* detainees are similar to historic practice).

150. *See id.*

151. *Kiyemba I*, 555 F.3d at 1032 (Rogers, J., concurring).

152. *Id.* at 1032.

153. *Id.* at 1033.

154. *See id.* at 1034 (citing Zadvydas v. Davis, 533 U.S. 678, 695 (2001)).

155. *Id.* at 1036.

156. *See id.* at 1038.

allow an alien physically in the country.[157] This is inconsistent with the writ's history of requiring release. This debate between the dueling views on habeas would have served as the main issue for any Supreme Court review in *Kiyemba III*, had certiorari been granted in that case. Detainees developed this argument along three lines. First, they argued that the Court of Appeals incorrectly applied immigration law, which bars their entry, to a habeas release issue.[158] Second, they claimed that habeas release and the Suspension Clause trump the political branches' immigration authority.[159] Therefore, they are entitled to release from the base since they are held unlawfully and the executive took them to Guantánamo. The Supreme Court has prioritized the right of release, even for undocumented aliens. This right of release trumps the immigration powers of the political branches.[160]

After initially granting certiorari review, on March 1, 2010, the Supreme Court vacated the *Kiyemba I* judgment and remanded the case to the Court of Appeals to determine if further proceedings were needed for the disposition of the case.[161] This occurred after all Uighur detainees had received or accepted offers to resettle. When the Court granted certiorari review the legal issue was whether a federal court exercising habeas jurisdiction has the power to release base detainees "where the Executive detention is indefinite and without authorization in law" and release into the continental United States is the "only possible effective remedy."[162]

2. Kiyemba III*: Immigration Law as the Entry "Framework" That Trumps Habeas Release*

On May 28, 2010, in *Kiyemba III*, the Court of Appeals reinstated its initial judgment and opinion from February 18, 2009.[163] Over a year after *Kiyemba I* was decided, five detainees were still on the same island, unable to leave. Continuing prior legal reasoning emphasizing plenary powers, the *Kiyemba III* opinion incorporated factual developments regarding relocation efforts and Congressional legislation. The court's per curiam opinion began by emphasizing that the detainees have no right to be released into the United States, judicial inquiry into the issues is inappropriate because they are political, and the political branches have exclusive power to decide which aliens enter and on what terms.[164] Since *Kiyemba I*, Congress has spoken on the matter by prohibiting public expenditures

157. *Id.* at 1036–37.

158. *See Kiyemba III* Petition, *supra* note 4, at 21.

159. *Id.* at 21–22.

160. *Id.* at 22–24 (referring to Zadvydas v. Davis, 533 U.S. 678, 689 (2001) and Clark v. Martinez, 543 U.S. 371, 371 (2005)).

161. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (per curiam.), *aff'd on remand*, 605 F. 2d 1046 (D.C. Cir 2010).

162. *Id.*

163. *Id.* at 1047.

164. *Id.* at 1048.

to relocate Guantánamo detainees into the United States. The *Kiyemba III* Court interpreted seven military spending bills, effectively barring detainee relocation in the United States generally, as Congress's statement regarding the specific fate of these five detainees.[165] These bills do not suspend constitutional habeas, as the DTA and MCA did, since the detainees never possessed a constitutional right to be relocated into the United States.[166] Judge Rogers's concurring opinion drew a distinction between the *Kiyemba I* situation of indefinite detention, when the district court granted the writ of habeas corpus and the Supreme Court then granted writ of certiorari, and the May 2010 circumstance in which the Uighur detainees would not consent to being relocated.[167] The Uighurs thus "hold the keys" to their release from Guantánamo.[168] She noted this after describing habeas as an adaptable remedy and noting that there is a legal difference between a court's power to issue the writ and its power to order release.[169]

The government incorporated many of the *Kiyemba I* findings in its position to deny certiorari review in *Kiyemba III*. It presented the question in this appeal as including this notion that detainees are "outside the framework of immigration laws" and asking for relief.[170] The government argued that the district court approved habeas only because no resettlement options existed then[171] and immigration law, in plenary power doctrine and statutory terms, bars their release into the United States.[172] The government's position emphasized immigration law as the basis for detention and exclusion; that habeas is working, leading to release for other detainees; and that all Uighur detainees have received resettlement options.[173] In April 2011, the Supreme Court denied the detainees' petition for certiorari review.[174] Justice Kagan took no part in the decision, since she had been

165. *See id.* at 1048 (referring to Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920 (2009); Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, div. B., § 115, 123 Stat. 2023, 2046 (2009); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2142, 2177–78 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454–55 (2009); Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, div. A, § 428, 123 Stat. 2904, 2962 (2009); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3034, 3156 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466–67 (2009)).

166. *Id.* at 1048.

167. *Id.* at 1048–49 (Rogers, J., concurring).

168. *Id.* at 1050.

169. *Id.* at 1049 (citing Boumediene v. Bush, 553 U.S. 723, 780, 787 (2008), and Munaf v. Geren, 553 U.S. 674, 693 (2008)).

170. Brief for the Respondents in Opposition at I, Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (No. 10-775).

171. *Id.* at 12–13.

172. *See id.* at 18–23.

173. Letter from Edwin S. Kneedler, Deputy Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States (Apr. 13, 2011), http://www.scotusblog.com/wp-content/uploads/2011/04/OSG-letter-in-Kiyemba-III-4-13-11.pdf.

174. *See* Kiyemba v. Obama (*Kiyemba III*),605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct.

Solicitor General during earlier pleadings in the case. Joined by three other Justices, Justice Breyer's statement explained that there was no legal issue since the detainees have received resettlement options and the government was not creating an obstacle to their release.[175] In 2009, certiorari had initially been granted when no remedy seemed available at that time.[176] But now the detainees had resettlement options and they had not shown these options pose any threat of torture for them.[177] For these four justices, the issue concerned whether the detainees have any options to be relocated. It was presumed that the detainees do not accept these options since they did not choose the locations and have no connections to them, they have been in detention for over nine years and do not trust the government, and they never chose to be captured by the United States in Pakistan or taken to a detention center in the Caribbean Sea.

In sum, the *Kiyemba I* and *Kiyemba III* Court of Appeals opinions illustrate repeated and poignant plenary power references to justify detention for aliens, which at this point is indefinite. Despite extraterritorial constitutional habeas protections in *Boumediene*, immigration law faithfully serves the role of a fallback doctrine to exclude rights protections. The habeas issue of release into the United States may reach the Supreme Court for a ruling if it is presented as indefinite detention for the five petitioners. The Court's wording of its denial of certiorari in *Kiyemba I* and its reasons for remanding the case, and Judge Rogers's concurrence in *Kiyemba III* point to the significance of any issue raising the possibility of indefinite detention.[178]

3. Kiyemba II*: The Politics of Torture and International Comity Stop Alien Release*

Also focusing on limits for court-ordered habeas release, *Kiyemba II* relied on plenary power reasoning to exclude courts from reviewing executive resettlement efforts for detainees. *Kiyemba II*'s analysis more directly commented on international sovereignty, since the question concerned potential torture or detention by another state after detainee resettlement. Like in *Kiyemba I*, the main legal issues in *Kiyemba II* were court-ordered habeas remedies and whether the executive must comply with them. This case involved the same detainees, but their legal claim was to have a court order the executive either not to resettle them, or to provide notice if they were to be resettled. In this sense, the decision examined the Uighurs' legal claims and protections about leaving the base. On its face the case appeared to present a common law habeas question, but the plenary power doctrine and statutory immigration law remain extremely relevant. Plenary power

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1631 (2011) (mem.).

175. *Id.*

176. *Id.*

177. *Id.*

178. *See* Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1235 (D.C. Cir. 2009); *Kiyemba III*, 605 F.3d at 1048.

reasoning was invoked to justify judicial deference and explain why noncitizens receive fewer rights protections than citizens do. Focusing legal clarification on judicial and executive roles in overseas habeas release, *Kiyemba II* regarded detention issues of wide-reaching significance. In *Munaf v. Geren* the Supreme Court addressed similar issues regarding the detention of U.S. citizens in Iraq. On the same day as *Boumediene*, a unanimous court in *Munaf* found it had habeas jurisdiction for U.S. citizen detainees in Iraq, but approved their transfer to Iraqi authority, despite the alleged threat of torture.[179] Even though it had habeas jurisdiction, the Court decided not to exercise it. Guantánamo detainees contested similar transfers out of fear of torture once transferred to Algeria. Accordingly, *Kiyemba II*'s doctrinal reverberations, and thus plenary power reliance, may impact detentions far beyond those concerning the Uighurs or Guantánamo.[180] So far, three Supreme Court Justices provided a dissenting opinion in the denial of certiorari in 2010 regarding a transfer bar for a detainee resettled in Algeria,who feared torture there.[181] As this suggests, in the future this issue may be reviewed by the Supreme Court.

Specifically, in the *Kiyemba II* decision, the D.C. Circuit Court of Appeals used plenary reasoning, focusing on foreign relations and international comity, to find that detainees were not entitled to a thirty-day notice before being transferred from Guantánamo.[182] The detainees argued that such notice was necessary because they would be tortured or prosecuted if returned to China. Writing for the court, Judge Ginsburg presented two plenary elements in its reasoning.

First, the *Kiyemba II* court held that courts cannot review issues involving torture to stop detainee relocation, because these issues are political. It noted that when the executive has declared a policy to not transfer detainees to a country that will likely torture them, a district court may not "second-guess" the executive's assessment of this likelihood.[183] These assessments belong to the political branches and not the judiciary.[184] The court referred to reasoning in *Munaf* that

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179. Munaf v. Geren, 553 U.S. 674 (2008); *see also* Harlan Grant Cohen, *International Decision:* Munaf v. Geren, 102 AM J. INT'L L. 854 (2008).

180. For instance, the certiorari petition in *Khadr v. Obama* was filed with the Supreme Court on these issues. Petition for Writ of Certiorari, Khadr v. Obama, 131 S. Ct. 2900 (2010) (No. 10-751). Also, an Algerian detainee who had filed a similar writ of certiorari, Petition for Writ of Certiorari, Mohammed v. Obama, 131 S. Ct. 2091 (2011) (No. 10-746), was recently transferred to Algeria, despite concerns of torture and pending petition for certiorari. *See* Lyle Denniston, *One Significant Detainee Case Over?*, SCOTUSBLOG (Jan. 6, 2011, 7:08 PM), http://www.scotusblog.com/2011/01/one-detainee-case-over. *Cf In re* Guantanamo Bay Detainee Litig., 706 F. Supp. 2d 120 (D.D.C. 2010); Lyle Denniston, *"*Kiyemba II*," Back Again?*, SCOTUSBLOG (Apr. 28, 2010, 8:37 PM), http://www.scotusblog.com/2010/04/kiyemba-ii-back-again.

181. Mohammed v. Obama, 131 S. Ct. 32 (2010) (No. 10A52) (denying the detainee's petition to stay his transfer with dissents by Justices Breyer, Ginsburg, and Sotomayor, explaining the petition raises "important questions" "not resolved" by *Munaf v. Geren*).

182. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 511 (D.C. Cir. 2009).

183. *Id.* at 516.

184. *See id.* at 514.

the likelihood of torture is a serious concern, but that habeas did not bar the transfer of U.S. citizens to Iraq.[185] The *Kiyemba* detainees argued that their claims are different and not controlled by *Munaf*, since they seek a bar to removal under the Convention Against Torture.[186] But the court explained that judicial review is only available for Convention claims if the alien is challenging a final removal order, and here they were not.[187] Accordingly, the court found that because they were not in immigration proceedings they could not use the Convention to challenge a removal order. By finding the issue to be political, the court used plenary reasoning to avoid intervention.

The court also added statutory reasoning concerning the immigration proceedings to further find it cannot stop any resettlement. The *Kiyemba II* decision also found that not being in removal proceedings bars judicial review of the plaintiffs' resettlement. Similarly, in *Kiyemba I* and *III*, the court found that because the plaintiffs had not sought entry into the United States through immigration law procedures they could not be released into the United States. Accordingly, despite complex habeas and international relations issues, immigration law provides a fallback to continue their detention.

Second, the court deferred to international comity to reject the detainee claim that relocation is barred because they will be detained or prosecuted.[188] Here the court highlighted that the United States limits its jurisdiction to its own territory and that the detainee claims invoke foreign governments and foreign laws. According to the court, international norms of comity—mostly respect for foreign jurisdiction and sovereignty—and separation of power principles preclude judicial inquiry concerning the potential torture of these plaintiffs in whichever country the executive chooses to send them.[189] The executive should not be second-guessed, so that it is able to conduct the intelligence and negotiations these matters necessitate. Effectively, this reasoning related detainee release with political concerns implicit in diplomacy and foreign relations.

Judge Kavanaugh's concurring opinion emphasized plenary power reasoning, that aliens have no right of entry and their detention is permitted for territorial and wartime reasons. It explained that the detainees as aliens are claiming more rights than what is afforded to U.S. citizens in *Munaf*.[190] Next, the opinion explained that the law of wartime and regular immigration precludes detainees from receiving any treatment different than *Munaf*. Here, detainees are like aliens at the border or port of entry who have no constitutional right to enter.[191] The

185. *Id.* at 514 (citing *Munaf*, 553 U.S. at 678).

186. *Id.* at 514–15 (referring to the Convention Against Torture, as implemented in 8 U.S.C. § 1231).

187. *Id.* at 515.

188. *Id.* at 515–16.

189. *Id.* at 515.

190. *See id.* at 517–18.

191. *Id.* at 519 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–13, 222–

Kavanaugh concurrence further indicated that because these are wartime aliens, even if not enemy combatants, the executive may detain and transfer them without judicial oversight.[192] In this case, the complication was that they do not want to return to China and had no right to enter the United States.[193] Judge Kavanaugh indicated that this detention and transfer practice is in accord with historical precedent, resting on confidential information and diplomacy.[194] Accordingly, any judicial role here is limited because these matters regard immigration policies and international negotiations.[195]

A more sympathetic view of detainee rights was presented in Judge Griffith's opinion, which concurred in part and dissented in part. It stressed that habeas requires the ability to challenge the government's detention and that this is effectively denied without notice before transfer.[196] Judge Griffith noted that *Munaf* detainees did have notice of their transfer to Iraq, and thus that case did not apply to the Uighurs in Guantánamo.[197] Judge Griffith treated habeas as a central obstacle to the plaintiffs' continued detention since it requires the jailer to justify detention and, if granted, the detainees must be released.[198] The court opinions in *Kiyemba I* and *Kiyemba II*, however, did not take habeas concerns as seriously. Judge Griffith's opinion ended by focusing on the *Boumediene* description of the Great Writ, which would be greatly diminished without the ability to challenge the executive's assurances that their resettlement would not lead to torture or continued detention.[199]

Kiyemba II appears on its face as a case about habeas release, but its justifications in deferring to the executive and limiting alien rights reflect traditional plenary power norms. *Kiyemba I* addressed whether alien detainees may enter the United States, while *Kiyemba II* examined whether the same aliens may be transferred outside United States jurisdiction without first giving notice. For this in-bound and out-bound analysis, the plenary power doctrine severely limits what a court may review or order. The same doctrine excludes noncitizens from rights protections both for situations concerning release into the United States and for those regarding transfer out of U.S. control. *Kiyemba II* did this as the court still preserved its habeas jurisdiction but decided not to order release.[200] Similarly, the court employed statutory immigration law analysis to bar its intervention in this matter—for instance, by enjoining the executive from resettling a detainee after a

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23 (1953); Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022 (D.C. Cir. 2009)).

192. *Kiyemba II,* 561 F.3d at 519–20.
193. *Id.* at 519 n.5.
194. *See id.* at 519–20.
195. *See id.* at 521.
196. *See id.* at 525–26.
197. *Id.*
198. *See id.* at 524.
199. *See id.* at 526.
200. *See id.* at 512–13.

writ of habeas has been granted.

The doctrinal impact of these legal debates is enormous. Similar factual circumstances may apply to other countries. The transfer of detainees to Algeria in 2010 shows that the law of overseas habeas release potentially impacts transfers to myriad states where torture and other human rights abuses are a concern.[201] Three judges raised vociferous dissents in a denial for an en banc hearing in the Court of Appeals for *Kiyemba II*. They noted the court's habeas reasoning was "fundamentally flawed" and inconsistent with *Boumediene* and habeas guarantees since the seventeenth century.[202] Similarly three Supreme Court justices, out of four needed to approve certiorari, may view the *Kiyemba II* issues as distinct from *Munaf*.[203]

C. Kiyemba *and Immigration Law: Limited Legal Solutions in the Face of Immovable Politics*

Kiyemba I, *II*, and *III* show how immigration law doctrines, in particular but not limited to plenary powers, justify detention even after they have been found to be unlawful by a district court and long after the executive has ceased classifying detainees as enemy combatants. While certiorari petitions and appellate review of *Kiyemba* cases focus on habeas doctrine, immigration law operates as a fallback to keep detention legal, even if it is indefinite. This doctrinal quagmire is the product of factual complexities presented by the detention of these Uighurs. The executive and judiciary argue that the detainees are choosing not to accept the limited resettlement options provided and that this keeps them on the base. But it is the U.S. government that placed these men in this situation after so many years. Executive choices to detain Uighurs on Guantánamo, rather than choices made by the Uighurs, created these problems. In this regard, *Kiyemba* detainees differ greatly from many aliens in most immigration law cases, who chose to enter the United States. Given this factual and legal impasse, the executive, consistent with historical practice, employs immigration law as an instrument to detain aliens and deny rights protections in times of national security. Foreign policy objectives, in this case the War on Terror, set the stage for this treatment of aliens. Here the foreign nationals are Uighurs resisting China, caught in the Afghanistan conflict, and brought by the United States government to Cuba.

In theory, court-ordered habeas release from the extraterritorial jurisdiction of Guantánamo could result in their release, but the doctrinal challenges to this are substantial. Put simply, the judiciary does not find that developing this doctrine is as important as the challenges it creates, even if it effectively turns an eye away from the likelihood of indefinite detention. At the Court of Appeals and Supreme

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201. *See supra* note 180.

202. *See* Order Denying Petition for Initial En Banc Hearing, Obama v. Abdah, 630 F.3d 1047 (2011); *see also* Lyle Denniston, Munaf S*equel Left Undisturbed*, SCOTUSBLOG (Jan. 11, 2011, 7:00 PM), http://www.scotusblog.com/2011/01/munaf-sequel-left-undisturbed.

203. *See supra* note 181 and accompanying text.

Court levels, the judiciary appears hesitant to make new extraterritorial rights determinations, which would be the outcome of a court order to release them from a U.S. base in Cuba. Similarly, such an order would potentially meddle with diplomatic efforts, upsetting separation of powers. *Kiyemba II* clearly shows that the judiciary will not question or try to check this executive power. To resettle these men, the executive negotiates with the consular officers from diplomatic corps from countries other than China. Moreover, the *Kiyemba III* petition asks that a habeas remedy, in the form of release from Guantánamo, requires domestic entry into the United States. As described below, this can be achieved with the executive's authority to parole aliens into the United States. However, this requires the political will of the President and the Department of Homeland Security. Given popular resistance of Americans and lawmakers to relocating Guantánamo detainees domestically, this seems unlikely for now. More generally, the Obama administration has eliminated plans to create a new detention center in Illinois for base inmates or to try them in domestic courts because of the political fallout.[204] This resistance is fueled by popular and public anxieties about the War on Terror and the judiciary's role in this conflict.[205] The problem here remains that the law defers solutions to the political branches. National and global politics inhibit the development of these solutions. The detainees, the United States, and China all resist the options provided so far.

In October 2009, the Supreme Court did grant certiorari for detainee petitions in *Kiyemba I* and *II* when it appeared that they would remain indefinitely on the base with no option to be resettled. A few months later, the detainees received new resettlement offers from Palau and Switzerland. The Supreme Court then declined to review these cases.[206] Justice Breyer, joined by three justices, argued that the detainees had options to relocate, but that the Uighurs were choosing not to accept them. He added that there had been no meaningful challenge to the appropriateness of these offers and that the Government presented "uncontested commitment" to resettle them.[207] As such, there was "no Government-imposed obstacle" to the Uighurs' timely release and "appropriate resettlement."[208]

The remaining five detainees have rejected these offers for various reasons. Given that they have been detained in Guantánamo since 2002, captured in Pakistan a decade ago, and interrogated by Chinese officials while on the base,

204. *See generally* Charlie Savage, *House Panel Rejects a Plan to Shift Detainees to Illinois*, N.Y. TIMES, May 21, 2010, at A18.

205. *See* MJ Lee, *Eric Holder: We Aim to Close Gitmo Before Election Day*, POLITICO (Sept. 20, 2011, 9:46 AM), http://www.politico.com/news/stories/0911/64083.html; MJ Lee, *Rep. Adam Smith: Hard to Close Gitmo by '12*, POLITICO, (Sept. 21, 2011, 5:44 PM), http://www.politico.com/news/stories/0911/64083.html.

206. Kiyemba v. Obama, 131 S. Ct. 1631 (2011) (mem.).

207. *Id.*

208. *Id.*

they are suspicious of what American authorities tell them. They have no connections to Palau or Switzerland. They understandably seek some security and cultural familiarity, which they argue a Uighur community in the United States would provide. It is also reported that relocation experiences of former detainees in Bermuda, Albania, and Palau provide far less than what was promised. The legal and factual developments leave the courts asking why the detainees refuse to accept the resettlement options provided. The court is unwilling to be more reflective of how the United States has treated these noncombatants. Instead the court simply asks whether their continued detention is illegal and whether their release is required by law. In spite of the doctrinal limbos created by immigration, foreign relations, and habeas law, the judiciary presents the detainees as "hold[ing] the keys" to their release.[209]

D. Parole: Political Limitations Trump Immigration Law's Power to End Detentions

Under the executive's authority, parole remains a viable legal option to release the five Uighurs from the base. With parole, the executive permits an alien to enter the United States without any particular visa or refugee status.[210] The court in *Kiyemba I* discounted this option, claiming it requires that an alien must be applying for admission and that an alien refugee cannot qualify unless it is for "compelling reasons in the public interest."[211] This is troubling given parole's flexibility and historic use. It has been used by the United States on various occasions when aliens did not have a designated legal right to enter the United States, including Hungarian refugees after 1956, Cuban and Southeast Asian refugees before the Refugee Act of 1980, Soviet Union nationals after 1988, and Cuban refugees in 1994.[212] Presidents have used the power of parole to permit the entry of foreigners when visa categories did not neatly match up or were used up, at times allowing entry for large groups of foreigners.[213]

The court though overlooks how parole can easily remedy the problems of indefinite detention, detainees without any specific right to enter the United States, unclear extraterritorial reach of habeas remedies, and an ineffective habeas release order. Statutory law and migration practices, benefiting from a long history and case precedent, suggest that the Uighurs can be paroled in the United States. The problem is that the executive does not want to do so, given domestic political resistance and foreign relations concerns. If the appropriate departments of the

209. *See* Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046, 1050 (D.C. Cir. 2010).

210. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 664 (6th ed. 2008) (describing parole as an "outstandingly flexible tool" for the executive that allows for an alien's "physical presence" despite disqualifications such as § 212(a) inadmissibility, lack of eligibility under nationality quotas, or other preferences).

211. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1031 (2009) (referring to 8 U.S.C. § 1182(d)(5)(A)).

212. ALEINIKOFF ET AL., *supra* note 210, at 664–65.

213. *Id.*

executive branch worked to allow the Uighurs to enter the United States, they could easily be paroled without acting outside the authority of the Department of Homeland Security or State.

Developed by the administrative ingenuity of immigration officials early last century, parole is a remedy allowing a noncitizen to travel away from the border and immigration detention.[214] It is currently provided for in INA section 212(d)(5),[215] with its regulations in 8 C.F.R. § 212.5.[216] The Uighurs arguably qualify for either of the two statutory justifications for parole, which are for "urgent humanitarian reasons" or "significant public benefit."[217] Their detention for nine years on a U.S. base, capture in and transport from Pakistan, and inability to return home or to third countries may meet the humanitarian and public benefit justifications. The regulations provide various examples of these justifications, involving juvenile, family, pregnancy, medical, and court appearance reasons.[218] With parole for "urgent humanitarian reasons," the United States could end their indefinite detention, which surely deprives them of important liberties. While their parole entry into the United States would result in the "significant public benefit" of ending this detention, it raises foreign relations and constitutional habeas problems. The most obvious way to craft a parole remedy would be to determine that their continued detention "is not in the public interest," or that their entry into the United States fulfills a humanitarian need. This could be determined by officials authorized to grant parole.[219] These are mostly Assistant Secretary and Director level officials in the Department of Homeland Security, also including district directors, special agents, and field directors.[220] The regulations state that any parole justification is determined on a "case-by-case basis,"[221] suggesting legal precedent or parole categories would not be created by such a remedy.

Political will is needed from the President or Secretary of Homeland Security to decide to parole the Uighurs into the United States, and so far this has been lacking, given the nonlegal context described below. These arguments assume what is in the public and court record. It is arguable that the executive branch, in the form of military, intelligence, homeland security, and foreign relations officials, has access to information justifying decisions to deny parole for the detainees. Parole is a remedy option provided that the alien does not "present a security risk"

214. *Id.* at 663.

215. The authority to parole is discretionary. Parole is "temporary" and may be prescribed "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (2006).

216. 8 C.F.R. § 212.5 (2011).

217. *Id.* § 212.5(b).

218. *Id.* § 212.5(b)(1–4).

219. *Id.* § 212.5(b)(5).

220. *Id.* § 212.5(a).

221. *Id.* § 212.5(b).

or "risk of absconding."[222] Information kept under seal may in theory suggest that their security or flight risk is likely. Similarly, the executive may find that the Uighurs' parole into the United States could threaten diplomatic relations with China, and is thus inconsistent with the "public interest."[223] These two political determinations by the executive branch may preclude parole for these five men.

Regardless, the court in *Kiyemba I* quickly dismissed parole, even though the remedy is a legal option within the immigration law framework. The Court could have urged this option or have suggested that the executive explore it, instead of quickly reverting to plenary reasoning and simple statutory bars. Five men remain in detention indefinitely after they were brought against their will from Pakistan to Cuba. The Court justified detention on Guantánamo as legal within immigration law. But immigration law itself provides legal and established ways to permit entry in the United States. Parole is a flexible option that respects the separation of power concerns and political questions used to justify the plenary power doctrine.[224] Parole's legal codification, agency interpretation, and varied use for decades suggest that this remedy for the Uighurs could end indefinite detention and avoid encroaching on political authority.

If the executive did choose to parole these five men, it would be based on its political choices, weighing domestic and foreign relations issues. This option is consistent with immigration law practice and has been used historically, in situations such as *Mezei* and *Knauff*, when courts left an alien in indefinite exclusion or indefinite detention due to perceived foreign relations and national security concerns.[225] Parole is a flexible and legal option applied for decades in situations like the ones faced by the *Kiyemba* detainees.

The Supreme Court has argued that parole developed as an administrative tool is necessary to avoid "needless confinement" and does not affect an alien's immigration status.[226] Since it eliminates detention for aliens who are not likely to abscond, it "reflects humane qualities of an enlightened civilization."[227] Parole is not equivalent to admission.[228] The executive may require detailed conditions for any parole, including: assurances that the alien will appear in hearings or depart the United States when required to do so; a paid bond; counsel or sponsor to ensure their appearances and departure; community ties and known addresses of close relatives; and periodic reporting.[229] Parole is not automatically renewed and may

222. *Id.*
223. *Id.* § 212.5(b)(5).
224. The executive decision to parole is close to plenary and provides for broad discretion. *See* 8 U.S.C. § 1226(a)(2)(B) (2006); 3B AM. JUR. 2D, *Aliens and Citizens* § 1327 (1962) (summarizing interpretations by Courts of Appeal on parole authority).
225. Weisselberg, *supra* note 110, at 951–52.
226. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).
227. *Id.*
228. 8 U.S.C. § 1182(d)(5)(A) (2006).
229. 8 C.F.R. § 212.5(d)(1)–(3) (2011).

be terminated without written notice.[230]

The Uighurs are not classified as or have not been found to be refugees, but the Court presented this as a bar to their parole. An alien who is a refugee may be paroled into the United States for "compelling reasons in the public interest."[231] The INA explains that these reasons are "with respect to that particular alien" being paroled versus admitted as refugee.[232] For the Uighurs the particular reasons could be that they do not meet refugee persecution standards, did not freely leave Pakistan and were taken to an overseas American base by the United States, and the status quo risks indefinite detention and continuing unlawful detention. Regardless, they are not seeking asylum or classification as refugees, so the Court's argument may be premature or misplaced. Furthermore, refugee status is not a complete bar to parole, since aliens who establish a credible fear of persecution or torture may be paroled into the United States. ICE interprets parole in INA section 212(d)(5)[233] as permitting its agents to release aliens who establish a credible fear of persecution or torture.[234] While this interpretation applies to aliens in situations quite different from the Uighurs, since they are not applying for asylum or have been not been detained under expedited removal, it does suggest parole is not a categorical bar for aliens claiming persecution or torture.

The Court also stated parole is limited to aliens seeking admissions and that the Uighurs were not doing that. Established parole practices and agency interpretation suggest aliens who are paroled do not need to be actually applying for admission. The Department of Homeland Security's Immigration and Customs Enforcement (ICE) functions with the position that aliens apprehended at the border may be eligible for parole.[235] Aliens may be paroled if they are "arriving aliens,"[236] which includes aliens who do not actually apply for admission, such as those apprehended at the border or those interdicted and brought to the United States "even if they are not seeking admission."[237] The Uighurs, who were captured in Pakistan and taken to a U.S. base, never sought to enter the United States before being detained. Their situation is similar to the "arriving alien" criteria involving apprehension and interdiction.

In sum, the *Kiyemba* triumvirate of cases has justified detention of the Uighurs with immigration law, in the form of statutory and plenary power

230. *Id.* § 212.5(e) (2011).

231. 8 U.S.C. § 1182(d)(5)(B).

232. *Id.*

233. *See supra* note 215.

234. IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK 145–46 (12th ed. 2010) (summarizing Memorandum from John Morton, Asst. Sec., Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009) (published on AILA InfoNet at Doc. No. 09121760)).

235. *Id.* at 141.

236. 8 C.F.R. § 1.1(q) and § 1001.1(q).

237. KURZBAN, *supra* note 234, at 141–43.

justifications. This effectively nullifies constitutional holdings that the Uighurs' detention is unlawful and the corresponding district court order for their habeas release. A legal and political remedy is available in immigration law with the executive's power to parole the detainees into the United States. This would effectively accomplish what the detainees seek in *Kiyemba II* and *III*, that is, release from Guantánamo and no resettlement in China. It would also avoid creating any new doctrinal findings of court-ordered release (when the executive can choose not to comply), habeas remedies in extraterritorial jurisdiction, judicial review of resettlement negotiations, and entry into the domestic United States for aliens currently located on an extraterritorial base.

III. UIGHURS' TRANSNATIONAL LEGAL IDENTITY: ALIEN, DETAINEE, AND THE WAR ON TERROR

This Section begins to identify the nonlegal forces that facilitate the law's exclusionary pressures for Uighurs at Guantánamo. Importantly, the debates raised by the *Kiyemba* cases could be resolved by various political developments. In theory, plenary power reasoning places the *Kiyemba* issues within the authority of the executive or legislative branches, which are more capable in resolving these matters. Court opinions invariably point to executive expertise in diplomacy or Congressional positions as expressions of sovereign will as the reasons why these two branches, rather than the judiciary, should handle these detention and immigration issues. The problem for the *Kiyemba* plaintiffs is that political solutions are not possible given the political situation of their country of origin, how they were captured and taken to Guantánamo, and the judiciary's contested role in the War on Terror. Given the limitations in U.S. law as it has been interpreted so far, the Uighurs must rely on the political branches, as opposed to the judiciary, for resolution to their plight. But there are no ready solutions in the political realm either. This Part highlights how nonlegal issues that are much broader in scope than potential judicial release after habeas is granted keep these men detained. As such, even though plenary power reasoning operates as a fallback to legally justify their detention, and the habeas doctrine for now does not support a court-ordered release, nonlegal developments keep them detained.

Though, as described above, legal doctrine authorizing detention is easily justified, what is far less probable is a nonlegal resolution. Uighur detention on Guantánamo could easily end if the United States permits their domestic entry as parolees on a humanitarian basis; permits the domestic entry of base detainees or some *Kiyemba* detainees to convince third countries of its good will so they will provide resettlement offers to *Kiyemba* detainees; resettles them despite their current protest; or achieves greater international goodwill by ending all Guantánamo detentions.[238] Similarly, China could accept the Uighur detainees but

238. Congress has very clearly stated it does not want any Guantánamo detainees brought to

not prosecute, detain, or torture them, or ignore their resettlement in third countries or the United States. A third country could not worry about diplomatic tensions with China because it accepts the Uighur detainees, or offer detainees resettlement despite U.S. refusal to accept detainees domestically. These political options for the United States or China and individual choices for the detainees would end the detention for these five men. This section refers to these options to examine the causes of this current impasse that concern policy rather than law.

The majority of these options suggest that international relations between China, the United States, and third countries create the *Kiyemba* legal impasse. These developments are not fully disclosed due to their national security and diplomatic sensitivities. News stories, Wikileaks distribution of diplomatic communiqués, and the Government's position in *Kiyemba* litigation point to the secretive nature of resettlement options.[239] The U.S.-specific reasons suggest that cultural barriers preclude the Uighurs' entry, since aliens, base detainees, and formerly suspected terrorists are barred from entering. Very simply, diplomatic progress or change in domestic attitudes about bringing detainees to the United States could resolve the *Kiyemba* impasse. This would make the application of plenary powers and new habeas determinations unnecessary. Nonetheless, all of the reasons presented above feed the current legal impasse. Their genesis lies in conflicts in the international system that the law is forced to address.

It is important to place *Kiyemba* detentions in the context of historic indefinite detention justified by immigration law doctrine such as *Mezei*. So far there has been an effort to protect the detainees from mistreatment in China and/or protect their wishes not to be resettled without their approval. In theory this is a more favorable situation than the indefinite detention limbo on Ellis Island upheld by the Supreme Court in *Mezei*.[240]

To make sense of the law's limitations in resolving the *Kiyemba* debates and the context that lead to indefinite detentions, this section raises two points. First, it describes relevant assumptions in the law of alienage and Guantánamo detentions in the War on Terror. The Uighurs' detention predicament is consistent with exclusionary effects in the law of alienage and overseas detentions. While

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the United States *See* Carol Rosenberg, *How Congress Helped Thwart Obama's Plan to Close Guantánamo*, MIAMI HERALD, Jan. 23, 2011, at A1.

239. For descriptions of the intense diplomatic negotiations and secrecy of Uighur resettlements, see generally Charlie Savage & Andrew W. Lehren, *Cables Depict Coaxing by U.S. in Bid to Clear Guantánamo's Prison*, N.Y. TIMES, Nov. 30, 2010, at A1, and Nancy Talanian, *WikiLeaks Release Cables on Guantánamo, Bagram, and Rendition: What Might Have Been*, HUFFINGTON POST, Dec. 10, 2010, http://www.huffingtonpost.com/nancy-talanian/wikileaks-releases-cables_b_795083.html.

240. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (affirming Mezei's indefinite detention on Ellis Island, with justifications in Congressional legislation and plenary power deference for national security matters, after no third state would accept him). *But see* Weisselberg, *supra* note 110 (describing the executive compromise permitting Mezei to be paroled into the United States and how the historical record shows the exaggerated national security justifications to exclude Mezei).

Uighur detentions continue, their situation reflects larger exclusionary trends in immigration law and detention policies. Insider/outsider dynamics of citizenship and alienage, de facto discrimination based on the nationalities of Guantánamo detainees, and cultural and geopolitical assumptions about the War on Terror shape what legal options the *Kiyemba* detainees may receive. The legal doctrine applied to these detentions is framed by significant assumptions on citizenship and alienage, racial exclusion, and overseas military operations. To begin exploring why this happens, and to provide the context that creates legal disputes and then limits their resolution, this section initiates a transnational exploration.[241]

Second, this section employs a transnational analysis of Uighur migration from China to a U.S. base in Cuba. Identifying the geopolitical contexts evident in their path from Western China to Central Asia, this uncovers how unlikely a political resolution to their detention will be. For migrants ("aliens" as the law refers to them), "transnational analysis" examines actors, forces, and events that contribute to peoples' movement across international borders.[242] Importantly, this approach does not solely focus on the perspective of receiving migrants. For example, such an analysis of Mexico-U.S. migration would look at push-and-pull factors in both countries and the crossborder forces that facilitate this movement. Transnational analysis of migration examines the movement of persons from the perspectives of sending states, receiving states, and the space connecting these sites of departure and receipt. The first location is often called a "home," "sending," or "departure" state, while the second location is labeled the "host," "receipt," or "destination" state. The third focus, the "connecting space," includes examples such as social networks, commerce and trade, crossborder ideologies, refugee flight, foreign relations, crossborder conflicts, labor flows, and travel. These unite or facilitate population movements across political borders. In sum, a transnational examination of migration looks for causes and effects from three different perspectives: sending, receiving, and the space in between.[243]

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241. Judge Philip Jessup defined "transnational law" as "all law which regulates actions or events that transcend national frontiers." PHILLIP JESSUP, TRANSNATIONAL LAW: STORRS LECTURES ON JURISPRUDENCE 2 (1956).

242. This approach builds on transnational methodologies to examine plenary power and international sovereignty. *See* Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law*, *supra* note 29, at 1355–57. Migration scholars provide detailed descriptions of transnationalism. Rainer Bauböck suggests that "political transnationalism" happens when migrants having "overlapping memberships" in independent and territorially separated polities. *See* Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37 INT'L MIGRATION REV. 700, 700–02 (2003). Linda Basch et al. define "'transnationalism' as the processes by which immigrants forge and sustain multi-stranded social relations that link to together their societies of origin and settlement" which "cross geographic, cultural, and political borders." *See* NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION STATES 7 (Linda Basch et al. eds., 1994).

243. David Fitzgerald provides a sophisticated discussion of transnational methodologies in *Towards a Theoretical Ethnography of Migration*, 29 QUALITATIVE SOC. 1 (2006).

When legal doctrine is studied with an appreciation for the context it is applied to, the normative influence of transnational forces begins to appear. In the *Kiyemba* cases, the doctrine concerns habeas and plenary powers, and the context is Uighur detention in the War on Terror. The forced migration of the detainees, who were literally captured and taken against their will, occurred when the U.S. military transported them from Pakistan to the base at Guantánamo. But a whole host of transnational events and actors also influences why these Uighur men are detained and how U.S. law responds. Transnational influences operate in China as the sending state, the United States as the receiving state, and in the connections between both states.

Legal doctrine applied to Uighur detentions implicates assumptions about citizenship and alienage, racial exclusion, and overseas military operations. Transnational influences shape these assumptions. These influences come from China, the United States, and connecting forces between them—for example, terrorism and counterterrorism, ideologies of human and individual rights, overseas military operations, diplomacy, and foreign relations.

A. Uighur Detention as Racism: Exclusion in Alienage, Nationalities, and War on Terror

The *Kiyemba* cases show how alienage can be a powerful doctrinal barrier to recognizing rights protections for noncombatant detainees, even after the Supreme Court in *Boumediene* affirmed generous extraterritorial habeas protections for noncitizens.[244] Linda Bosniak's proposal to examine the normative force of alienage and citizenship together illuminates a great deal in the *Kiyemba* legal debates. In *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Bosniak explains that these two legal doctrines are motivated by distinct concerns. This explains their divergent and at times contradictory determinations.[245] Legal norms concerning aliens focus on "hard" distinctions applied to outsiders and to those who are viewed as possible threats to the community.[246] Looking outside, to threats or to the unknown, alienage and immigration law poses "hard" doctrinal barriers, whereas more permissive "soft" reasoning for citizenship norms may afford resident aliens increased rights protections.[247] Citizenship's focus on equality and harmonious community support this "soft" and tolerant quality.

Bosniak's suggestion of "hard" outside and "soft" inside reasoning sheds light on the *Kiyemba* quagmire, suggested by the taglines: habeas release v. rights

244. *See* discussion *supra* Part II.B–C.

245. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 1–2 (2006). Linda K. Kerber describes indefinite detention for aliens as part of a long-term historical trend of "stateless" persons as "Citizen's Other." *See generally* Linda K. Kerber, *Presidential Address: The Stateless as the Citizen's Other: A View from the United States*, 112 AM. HIST. REV. 1 (2007).

246. BOSNIAK, *supra* note 245, at 4–5.

247. *Id.*

denials and an extraterritorial Constitution v. plenary power exclusions. *Boumediene* affirmed common law habeas when aliens, even when they are held overseas, are captured during military conflict, and are not members of the U.S. community. Since the Court focused on habeas suspension and its disruption to separations of powers, "soft" legal reasoning permitted judicial review. An incident of this would be alien rights protections. *Boumediene*'s main narrative remains one of habeas and separation of powers.[248] Even if its focus on habeas may be less about individual rights than about the role of courts, this is consistent with historic common law habeas practice.[249] *Kiyemba I* presents a far more elaborate question that becomes an alienage issue.[250] This results in the plaintiffs' exclusion because they are regarded as aliens before the law as opposed to incidents of a separation of powers debate. Here in *Kiyemba I* and *III*, detainees asked to be relocated to the United States. For this, courts would order the executive to release them. *Kiyemba II* suggests human rights and antitorture protections justify judicial limits on the diplomacy of resettlement.[251] In both cases, the judicial orders implicate governmental powers protected by plenary reasoning—for example, migration, foreign relations, diplomacy, war, alien entry, and extraterritorial jurisdiction. Factually and legally, the *Kiyemba* cases present social and cultural realities far less abstract than habeas suspension. *Boumediene* petitioners asked the court for judicial review. *Kiyemba* petitioners asked to live in the United States, came from China, asked for human rights protections, were caught in Pakistan, were regarded as terrorists, have been detained in Guantánamo for nearly nine years, and are Muslims.[252] At one point, Departments of Homeland Security and Justice officials proposed permitting some Uighur detainees to be released into Virginia.[253] These plans became impossible politically for any detainee, much less Uighurs. Bosniak's "hard" and "soft" approach inspires asking: what justifies legal reasoning to exclude or include? When this approach is applied to the Uighurs, it appears that alien exclusions are fueled by cultural assumptions on race and on overseas military operations.

Next, with an examination of detainee nationalities and their exclusion from legal protections, the detention program at Guantánamo reflects de facto racist discrimination. Base detentions and "unlawful enemy combatants" classifications

248. *See* discussion *supra* Part II.A. In order to have the Supreme Court review their petition, Uighur detainees still present their case as one concerning the "elemental aspect" of judicial power and how the Court of Appeals delegates a "quintessentially judicial function to" the executive. *See Kiyemba III* Petition, *supra* note 4, at 3.

249. *See* Vladeck, *The New Habeas Revisionism*, *supra* note 10.

250. *See* discussion *supra* Part II.B.

251. *See* discussion *supra* Part II.B.iii.

252. *Cf.* Saban Willett, Union Club Address (Feb. 17, 2011), *available at* http://www.lawfareblog.com/wp-content/uploads/2011/02/Saban-Willett-Feb-17-Speech.pdf (speech from a detainee's attorney describing U.S. xenophobia as influencing policies to bar Uighur detainee entry).

253. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 16, 2010, at 52.

created proxies in American law to specifically exclude persons from rights protections.[254] Initial White House justifications claimed that unlawful enemy combatants did not enjoy protections in international law and that this resembled historic denials of similar rights for savages or barbarians in colonial wars.[255] Interestingly, a *Washington Post* report states that the Chinese detainee population was twenty-two, placing China in the second tier of nationalities represented along with Algeria.[256] Of these twenty-two, five remain detained and brought the claims in the *Kiyemba* cases. Compiling the numbers of all base detainees since 2002, the *Washington Post* reports Afghanistan, Saudi Arabia, Yemen, and Pakistan each had more than seventy, making them the most represented. But Chinese detainees (i.e., the Uighurs) include a sizably larger population than those from forty-four other countries.[257] Most of these detainees may be from countries, especially the top four mentioned, from which the United States had particular strategic reasons to detain based on the Afghanistan campaign. China's sizable population at the base, relative to all 779 inmates, does suggest Chinese nationality was relevant to the choice to detain them. Based on reviews of *WikiLeaks* documents released in April of 2011, the *New York Times* reports a detainee's country of origin appears as the most important factor for determining if they can be released.[258]

Drawing inferences concerning the law's racial exclusions from detainee demographics is difficult.[259] Detainee nationalities indicate that most are from the Persian Gulf or Central Asia, regions vital to American security in terms of the War on Terror and regional geopolitics. The Uighur homeland and the place the Uighurs were captured are both in Central Asia. Because American law reserves detention primarily for these populations, detention practices suggest a

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254. When incorporated by the Court in *Hamdi v. Rumsfeld*, the "enemy combatant" classification did not enjoy firm doctrinal support. *See* Jenny S. Martinez, Hamdi v. Rumsfeld. *124 S. Ct. 2633. United States Supreme Court, June 28, 2004*, 98 AM. J. INT'L L. 782, 785–87 (2004) (explaining that no statute had defined or used the term and that the laws of war and international humanitarian law do not frequently use the term).

255. *See generally* Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants:' A Postcolonial Look at International Humanitarian Law's 'Other,' in* INTERNATIONAL LAW AND ITS OTHERS 298–301 (Anne Orford ed., 2006).

256. *See Names of the Detained: Results*, WASH. POST, http://projects.washingtonpost.com/guantanamo/search/ (last visited Sept. 30, 2011). The database is based on the 2006 list released by the Pentagon, unofficial sources, news accounts, legal documents, interviews with attorneys and relatives, and online sources.

257. For a more detailed discussion of how detainee nationality demographics suggest de facto discrimination and its correlation to the geopolitics of the War on Terror, see Hernández-López, *Guantánamo as a "Legal Black Hole," supra* note 9.

258. *See* Scott Shane & Benjamin Weiser, *Judging Detainees' Risk, Often with Flawed Evidence*, N.Y. TIMES, Apr. 25, 2011, at A1.

259. BENJAMIN WITTES ET AL., BROOKINGS INST., THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 1, 3 (2008), *available at* http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx?rssid=wittesb (follow "Full Report" hyperlink) (stating the Dept. of Defense has declined to give a precise number of those actually held and information is "strangely obscure" with changes to the population's makeup remaining "fuzzy").

discriminatory impact in the detention program's application. With regard to the twenty-two Uighurs, detainees from China appear not as an accident, isolated or limited. One or two men represent the majority of the forty-eight nationalities at the base detention center.[260] This suggests it is not an accident or aberration that China is one of the most represented countries at the base detention center, with twenty-two out of 779 detainees being from this particular nationality.

Referring to American law's racialization of foreigners and the War on Terror, critical race legal scholarship inspires inquiries on base detentions and race. It elucidates how immigration and alienage law stems from, and never fully breaks with, social mechanisms to exclude certain races from American rights protections. Kevin Johnson describes how alienage serves as a proxy for race in U.S. law.[261] He ties in history, social, legal, foreign, and domestic analyses. Immigration law, with explicit intent or ignored effect, discriminates against citizens and noncitizens of color. Johnson explains not only how social biases feed lawmaking, but how racism provided the initial reasoning for sovereignty-based immigration doctrine.[262] The plenary power doctrine justifies why political branches have plenary powers in foreign relations, overseas territories, and immigration matters. This frames how American law approaches base detention, by focusing jurisprudence on national security, base location, and detainee alienage.

Uighur detention on Guantánamo is produced by a far larger and complex set of political, economic, and cultural events, most notably the War on Terror. Despite legal ambiguity on habeas or alienage, the exclusionary culture of detentions, and the clear normative stance of the plenary powers doctrine, the War on Terror has produced a serious set of global events and resulted in nearly 800 men being detained on the base. The law justifying Uighur detentions is just one element of this. As such, understanding what motivates this armed conflict may help explain why legal exclusions are applied to alien detainees. Historical trends in foreign and economic relations and American culture assumptions have facilitated this war for nearly a decade. The impasse felt by the *Kiyemba* detainees is a product of the War on Terror and, more specifically, long-term foreign relations trends which seek to intervene overseas. Similar to the exclusionary assumptions of alienage and detention, the historic propensity for U.S. foreign relations to intervene overseas creates the context which results in Uighur detentions.

The United States has presented the War on Terror as a war for civilization

260. *See generally Names of the Detained in Guantanamo Bay, Cuba*, WASH. POST, http://projects.washingtonpost.com/guantanamo/ (last visited Sept. 30, 2011); *The Guantánamo Docket: Citizenship*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/by-country (last visited Sept. 30, 2011).

261. *See* Johnson, *Race*, *supra* note 38, at 291–96.

262. *See id.* at 290–91.

that entails fighting an irrational and lawless enemy.[263] Early in 2002, when news broke about Guantánamo detentions, the White House presented the detainees as Al-Qaeda murderers, the "worst of the worst," and because of their suicidal nature, willingness, and training, individuals who will "go out and kill and destroy and engage in suicide."[264] Since then, Government reports on detainees confirm that this was far from true.[265] America's preeminence on the global stage and unrivaled power foments its duty to save civilization. Issued by the White House, *The National Security Strategy of the United States of America* repeatedly conveys this humanitarian duty in the War.[266] As such, American values and its goals for the War on Terror became universal objectives for the whole world.[267]

U.S. foreign relations history suggests that economic and cultural motives mutually support overseas military involvement. William Appleman Williams's *Tragedy of American Diplomacy* explains how economic objectives, accompanied by military means to enforce them and the willingness to impose American ideals

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263. Natsu Taylor Saito presents five premises for the War on Terror: (1) the enemy is evil; (2) evil is embodied in the terrorist and rogue state; (3) enemies will not act rationally and normal rules of war do not apply; (4) Western civilization, representing universal values of freedom and democracy, is being defended; and (5) "the United States embodies the highest stage of . . . civilization." Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 67, 69 (2008).

264. Ari Fleischer, White House Press Sec'y, White House Briefing (Jan. 23, 2002), *available at* http://transcripts.cnn.com/transcripts/0201/23/se.01.html.

265. *See* GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (2010), http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf?sid=ST2010052803890 (stating that roughly ten percent of detainees played a direct role in attacks on the U.S., twenty percent had significant organizational roles in Al Qaeda or associated groups, less than ten percent were Taliban leaders or members of anticoalition militia groups, the majority were "[l]ow-level foreign fighters" lacking any leadership or specialized role in Al Qaeda, the Taliban, or associated groups, and approximately five percent did not fit into any of these four categories).

266. The 2002 National Security Strategy of the United States of America described the United States as:

> Possess[ing] unprecedented—and unequalled—strength and influence in the world. Sustained by faith in the principles of liberty, and the value of a free society, this position comes with unparalleled responsibilities, obligations, and opportunity. The great strength of this nation must be used to promote a balance of power that favors freedom.

OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NAT'L SEC. STRATEGY OF THE U.S.A. 1 (Sept. 2002), *available at* http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf.

While later National Security Strategies issued by Presidents Bush and Obama distance themselves from unilateralism, preemptive force, and the security focus primarily on Islamic terrorism, they still highlight American superiority and a duty to lead in international affairs. *See, e.g.*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NAT'L SEC. STRATEGY MAY 2010, at 1 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (presenting military superiority as underpinning global security and explaining that, after decades of leadership, the United States will "continue to underwrite global security," "focuse[s] on renewing American leadership," and "recognizes the fundamental connection between our national security, our national competitiveness, resilience, and moral example").

267. *See* Susanne Soederberg, *The War on Terrorism and American Empire*, *in* THE WAR ON TERRORISM AND THE AMERICAN 'EMPIRE' AFTER THE COLD WAR 165–66 (Alejandro Colás & Richard Saull eds., 2006).

abroad, masked foreign policy initiatives as neutral.[268] This began with the "Open Door" policy of the 1890s. The idea that economic frontiers were not coextensive with territorial frontiers encapsulated American expansion during the fall of formal European colonialism, consequent decolonization, two world wars, and the Cold War.[269] Public discourse raises similar viewpoints when referring to combat in Iraq and Afghanistan: superpower status, economic size, overseas influence, and American exceptionalism regarding multilateral obligations, international law, and human rights.[270] Historian and former U.S. Army Colonel Andrew J. Bacevich makes this argument after examining foreign, military, and economic policies and their domestic cultural influence.[271] He argues that the U.S. empire is based on American objectives of "openness" seeking to remove barriers for the "movement of goods, capital, people, and ideas" and "fostering an integrated international order conducive to American interests, governed by American norms, regulated by American power, and, above all, satisfying the expectations of the American people for ever-greater abundance."[272] Consistently since World War I, these objectives are presented as security for capitalism and democracy but more realistically they represent an American need to influence and dominate. Military policies support these objectives by seeking international order and promoting U.S. interests with technical and logistic superiority stretched across the globe. Domestically, Americans are seduced by militarism and interventions overseas, making the world safe for free trade and democratic values.[273] Cultural notions of the good life and freedom—easy credit, abundant oil, and cheap goods—create a need for U.S. empire-building in foreign, military, and economic terms.[274]

These cultural and economic forces, often resulting in war or armed struggle overseas, produce Uighur detentions. The foreign policy narrative stresses humanitarian duty and cultural neutrality in this context. In sum, Uighur-detainee rights exclusion is a product of legal determinations on alien status; detentions focused on certain nationalities, specifically from the Persian Gulf or Central Asia; and the War on Terror motivated by economic objectives and ideologies of

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268. *See* WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 191 (3d ed. 1972).

269. Lloyd C. Gardner, *Foreword* to WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY ix, x (paperback ed. 2009).

270. *See generally* EMPIRE'S LAW: THE AMERICAN IMPERIAL PROJECT AND THE "WAR TO REMAKE THE WORLD" (Amy Bartholomew ed., 2006); Tony Judt, *Dreams of Empire*, 51 N.Y. REV. BOOKS, Nov. 4, 2004, *available at* http://www.nybooks.com/articles/archives/2004/nov/04/dreams-of-empire/; Paul Krugman, *White Man's Burden*, N.Y. TIMES, Sept. 24, 2002, at A27. For a sympathetic view of American empire, see Niall Ferguson, *Hegemony or Empire?*, 82 FOREIGN AFFAIRS 154 (2003).

271. *See* ANDREW J. BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY 3 (2002).

272. *Id.* at 88.

273. *See generally* ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR (2005).

274. *See generally id.*

superiority and humanitarian duty. This context creates the need, so argued, for overseas detention programs and, more importantly, to become involved in Central Asian affairs. Uighur detentions in Guantánamo are a product of this context. They are not the accident that habeas litigation positions suggest. As described below, similar forces facilitate migrant sending, receiving, and cross-border activity. *Kiyemba* detainees have been in a series of hotbeds of legal, cultural, and geopolitical contests. These include the autonomous Xinjiang region in China, Afghanistan and Pakistan in Central Asia, and a U.S. base in Cuba.

B. Transnational Influences in China, the United States, and Between the Two Countries

Transnational events and actors greatly influence why aliens are excluded from legal protections, discrimination clouds detentions policies, and culture and economics motivate a War on Terror. In order to explore the context wherein law applies to these three issues, this subsection identifies the transnational forces influential for Uighur detentions on Guantánamo. This nonlegal picture helps explain why the law excludes aliens from legal protections.[275] These identifications are brief and focused on providing a big-picture and diverse view of the transnational phenomena of Uighur detention.

The motivations for why Uighurs would emigrate from China point to significant cultural and material contests. Their homeland and site of departure is the autonomous region of Xinjiang in China. Uighur identity articulates an ideological and cultural currency motivating separatism and consciousness that crosses China's political borders. This emanates from a region characterized by highly volatile contests to secure resources and control of territory and international borders. This region's history includes the Soviet invasion of Afghanistan, the Kashmir dispute between India and Pakistan, separatist tensions in western China, and resource-rich and institutionally weak Central Asian states.[276]

The departure context in China for Uighur detainees points to various migration push-factors in terms of contested membership in China, state violence and popular resistance, and a state increasing its control over its borders, resources, and populations.[277] Relevant to *Kiyemba* detainees, the context in China includes: Uighur separatism; religious persecution by the Chinese government; a historic quest for political control of Xinjiang, the western autonomous region where Uighurs reside; increased economic exploitation of Xinjiang's cotton,

275. *See generally* Preeti Bhattacharji, *Uighurs and China's Xinjiang Region*, COUNCIL ON FOREIGN RELATIONS: BACKGROUNDER (July 6, 2009), http://www.cfr.org/china/uighurs-chinas-xinjiang-region/p16870; Chien-peng Chung, *China's "War on Terror": September 11 and Uighur Separatism*, 81 FOREIGN AFF. 8 (2002).

276. *See generally* Bhattachariji, *supra* note 275; Chung, *supra* note 275.

277. For descriptions of Uighurs, Uighur separatism, China's persecution of them, and the War on Terror, see Bhattacharji, *supra* note 275 and Chung, *supra* note 275.

natural gas, mineral resources, and oil; and volatile geopolitics just west of Xinjiang. Xinjiang borders Russia, Mongolia, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, and India.[278] To state that this is close to global geopolitical contests is an understatement. Literally, various wars are to its west and the militarily powerful and huge China is to its east. The China-Xinjiang relationship is not entirely stable, with separatist violence threatening the recent Olympics and Xinjiang achieving political independence from China twice last century.[279]

Domestically, the U.S. context points to similar cultural and material struggles facilitating increased military involvement overseas, in this case in Afghanistan and Pakistan. The transnational pressure for increased foreign presence is outward from the United States, but with important legal contests domestically. The War on Terror represents ideological and material debates, implicit in self-defense, eliminating security threats, a geopolitical fight for resources and territory, and supporting governments in the region.[280] Despite dramatic events overseas, the War on Terror inserts itself domestically in a myriad of political and legal debates. When the *Kiyemba* detainees were brought to the base, they entered a hotbed of political and legal contests, developing since the United States responded militarily to the September 11, 2001, attacks.[281] On the global stage, they represented efforts by China to convince the world of Uighur terrorism's link to Al Qaeda, and for the United States they represented a way to gain China's support in the War on Terror, which was especially needed in its early stages.[282] The resettlement of Uighur detainees created domestic political crises in Bermuda, with these executive choices fueling larger political debates.[283]

At the U.S. base at Guantánamo, the Uighurs arrived in a context deeply

278. *See* Bhattacharji, *supra* note 275; Chung *supra* note 275, at 10–11.

279. *See* Bhattacharji *supra* note 275.

280. For descriptions of the interplay between domestic politics and ideology and the War on Terror, see generally BACEVICH, THE NEW AMERICAN MILITARISM, *supra* note 273, ANDREW J. BACEVICH, THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM (1st ed. 2008), NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW (2010), and Hernández-López, *supra* note 9; and Soederberg, *supra* note 267, at 165–66.

281. For descriptions of these legal and ideological debates fueling and responding to War on Terror, see generally DAVID D. COLE, JUSTICE AT WAR: THE MEN AND IDEAS THAT SHAPED AMERICA'S WAR ON TERROR (2008), DAVID D. COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2006), and DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007).

282. *See* Goldstein, *supra* note 107 (describing China's attempt to present Uighur detainees as reflecting Uighur terrorists); Louisa Lim, *Tiny Island to Take 17 Guantanamo Detainees*, NATIONAL PUBLIC RADIO (June 10, 2009), http://www.npr.org/templates/story/story.php?storyId=105188932 (arguing the Uighurs were detained to obtain China's support in the War on Terror); Editorial, *Pawns in Guantanamo's Game*, BOSTON GLOBE (Mar. 11, 2007), http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2007/03/11/pawns_in_guantanamos_game/.

283. *See Wikileaks: Bermuda Sought Help on Crime*, BERNEWS (Feb. 10, 2011), http://bernews.com/2011/02/wikileaks-bermuda-sought-help-on-crime; Eckholm, *supra* note 107.

divided about how to legally resolve foreign relations contests and interrelated anxieties about foreigners, alien terrorist suspects, and the United States' role as sole superpower. This receiving-state context includes: the legal anomaly intrinsic to the base's extraterritorial authority; separation of powers contests implicit in limiting judicial review; a divided electorate and political branches concerning foreign relations and especially regarding the need for and legality of Guantánamo detentions; antimigrant politics in response to immigrants who are mostly non-European (i.e., not white); foreign relations often shaped by exceptionalism and unilateralism, despite international critiques of this; and repeated military presence, or the threat of such presence, in states populated primarily by non-European populations, specifically Iraq, Afghanistan, Iran, and North Korea and historically with bases in over ninety-eight countries.[284]

Connecting the Uighur homeland and the United States are the transnational forces of violence and military activity in Central Asia, drawing American attention and consequently becoming part of domestic U.S. debates. Similarly, Uighur separatism or claims to self-determination enter the U.S.-China relations dialogue. Extremely relevant to Uighur detentions, China and the United States both exert diplomatic influence which cannot be ignored, and neither state's will is easily imposed on the other. This means that China is able to deter other nations from resettling the Uighur-detainees and China will detain them if they are returned. The United States succeeds in not admitting them or returning them to China. All the while, a diplomacy and policy stalemate keeps five men trapped on Guantánamo. These developments remain highly secretive and unknown at this time, as suggested by U.S. State Department communiqués from *WikiLeaks* and the Government's position on keeping detainee information secret in *Kiyemba I*, *II*, and *III*.[285]

The context connecting Uighur-departure and U.S.-reception includes: the *Kiyemba* detainees traveling to Pakistan and/or Afghanistan; the Al-Qaeda training center of Tora Bora in Afghanistan, where international terrorists migrated; civil war and military intervention in Afghanistan; fluid political borders in Central Asia; terrorist groups and counterterrorism efforts in Central Asia; a decade-long War on Terror without clearly defined enemies, objectives, or duration; the United States' active role in Central Asian and Middle Eastern geopolitics; a resource war for energy supplies and their markets in these regions with the United States as the superpower and largest consumer; simultaneous diplomatic rivalry and cooperation between the United States and China; and extraterritorial detentions and interrogations programs.

In summation, the transnational context for Uighur detention suggests a

284. For the number of U.S. bases overseas, see generally CHRIS BEST & DAVID VINE, ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA (2009).

285. *See supra* note 239 and accompanying text.

common discourse in the United States, China, and Central Asia. This includes: limited legal protections for individuals, unchecked state power, foreign relations influencing what individual rights are protected, and military action responding to domestic and geopolitical pressures. Uighur detainees on Guantánamo may represent a new class of stateless persons, detained and excluded by the United States, persecuted by China, and unwelcomed by third states. For them indefinite detention may amount to the role expulsion historically played for stateless populations such as Jews, Roma (Gypsies), Palestinians, and Native Americans.[286]

IV. CONCLUSION

This Article raises two significant points about how immigration law has been central to justifications to keep five noncombatant men detained indefinitely at Guantánamo, despite their approved writ of habeas corpus in 2008. First, the Court of Appeals for the D.C. Circuit has relied on immigration law, mostly in the form of the plenary powers doctrine, to justify these detentions.[287] Even though the *Kiyemba* triumvirate raised significant constitutional issues regarding habeas remedies, they "fall back" on immigration law to continue detentions. The Supreme Court has effectively agreed with these interpretations by not granting certiorari review.

This reliance on plenary powers is especially important because the Supreme Court held, in *Boumediene*, that detainees on Guantánamo enjoy constitutional habeas rights. These rights are not barred by alien status or presence outside domestic borders. The *Kiyemba* cases may be inconsistent with these extraterritorial constitutional guarantees if the goal of *Boumediene* was to secure habeas release.[288] The *Kiyemba* cases suggest that after aliens gain access to significant constitutional rights, courts return to exclusionary immigration law norms, mostly within the plenary powers doctrine.

Second, understanding the nonlegal context of Uighur detentions helps explain why the current impasse exists.[289] Although the *Kiyemba* quagmire appears as "habeas remedies versus constitutional habeas rights" or "plenary power

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286. For a discussion of stateless populations as citizenship's other, see Kerber, *supra* note 245, at 7, 17, 28.

287. *See* discussion *supra* Parts II.A (examining *Boumediene*'s extraterritorial habeas protections for alien detainees on the base); II.B.i–ii (analyzing *Kiyemba I* and *III*, habeas release, and the plenary power doctrine); and II.B.iii (describing *Kiyemba II*, notice of habeas transfer, and the plenary power doctrine).

288. *See Kiyemba III* Petition, *supra* note 4, at 2–3 (presenting the Court of Appeal holding as in "direct conflict" with *Boumediene,* since it requires judicial relief of release, and the detainees are now only left with political relief).

289. *See* discussion *supra* Parts III (describing transnational analysis of migration); II.A (presenting critical theory on alienage and detention laws, de facto discrimination based on detainee nationalities, and the cultural and economic motives for U.S. foreign policies including the War on Terror); and III.B (applying a transnational migration analysis to Uighur detentions and U.S. and China's motivations).

exclusions versus an extraterritorial Constitution," the lack of a political resolution may be the most significant force in continuing the detentions. The plenary powers doctrine effectively bars judicial review so the political branches can resolve these issues (i.e., to release, relocate, or detain the Uighurs). The *Kiyemba* triumvirate squarely places the fate of the Uighurs within the authority of the political branches. As interpreted by the Court of Appeals, immigration law doctrine facilitates detention, but it does not propose or provide any remedy to end detention that is not political. In fact, it quickly discounts the executive's power to parole aliens into the United States, which would end Uighur detention and avoid the separation of powers issues implicit in habeas release or immigration entry. Parole is a remedy with substantial legal force and historical practice, crafted specifically for these kinds of situations. Otherwise foreign relations, exercised by the executive and Congress, or other legislative remedies could stop this detention impasse. These solutions are extremely unlikely given the developments since 2008. Political options seem increasingly difficult to reach between Congress, U.S. diplomats, China, third states, and the detainees.

This doctrinal quagmire, wherein law is unable to end illegal detention, inspires asking what assumptions led to this. Critical legal theory shows that the law applied to Guantánamo results in insider/outsider dynamics of alienage and de facto discrimination based on the nationalities of detainees. It also highlights how the War on Terror's cultural and geopolitical assumptions facilitate Uighur detention on Guantánamo.

To make sense of this from a transnational perspective, the Article explores what motivates these legal assumptions and the positions of China, the United States, and Uighur detainees. This is done with a transnational focus on Uighur departure from China, receipt under U.S. authority, and the War on Terror's cross border influence. Studying these sending, receiving, and transnational contexts, the law's weakness stands out because a political resolution for Uighur detention seems highly unlikely to resolve these contests.

Assumptions about diplomacy, culture, geopolitics, individual rights, and the War on Terror frame how the law approaches Guantánamo. In particular, the Uighurs migrated (at times freely and other times forcibly) to a series of extremely contested locations, specifically Xinjiang, China, eastern Afghanistan, northwest Pakistan, and the U.S. Naval Station at Guantánamo Bay, Cuba. At each of these locations there are limited checks on state power, a strong foreign relations influence on the protection of individual rights and military action in response to domestic and geopolitical needs. Habeas corpus guarantees and the plenary powers doctrine appear as small domestic instruments in larger conflicts on a global stage. These include the cultural, economic, and political contests occurring in the War on Terror, geopolitics in Central Asia, violent popular movements, and China's westward expansion. This transnational analysis illuminates why "aliens detained overseas" are excluded from significant legal protections. Associations

with sending, receiving, and transnational controversies explain what motivates legal exclusions for these aliens. The significance of transnational politics on overseas detention law has become increasingly apparent with President Obama's executive Order regarding other Guantánamo detainees.[290]

Immigration law plays a vital role in keeping Uighurs detained in Guantánamo despite significant constitutional rights affirmed in *Boumediene* and by a district court. The *Kiyemba* cases illustrate how adaptable and powerful the plenary powers doctrine is. They suggest that an extraterritorial Constitution with habeas rights for aliens overseas must confront entrenched exclusionary reasoning, benefiting from judicial precedent since the *Chinese Exclusion Case*. A transnational analysis of the Uighurs, the War on Terror, China, and American assumptions suggest why plenary power succeeds in keeping these men detained with no end in sight. These two points shed light on how powerful immigration law doctrine can be in sanctioning the indefinite detention of noncombatants. They illuminate how a "Persistent Puzzle in Immigration" builds on a legal history of exclusion entrenched in precedent and that a critical nonlegal context benefits from these exclusions. The *Kiyemba* cases show that immigration law sees these detentions as legal. Contemplating a release for the five Uighurs, Yusef Abbas, Hajiakbar Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak, inspires asking: why are they detained?

290. To understand the Obama Administration's current approach to Guantánamo detentions see Exec. Order No. 13,567, 70 Fed. Reg. 13277 (Mar. 7, 2011), addressing indefinite detention, an inability to transfer detainees, and the influence of domestic and Congressional politics. *See also* White House, Office of the Press Sec'y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/03/07 /fact-sheet-new-actions-guant-namo-and-detainee-policy. The Executive Order implicitly acknowledges that for some detainees, predicted to be nearly fifty of the 172 remaining, detentions may be indefinite. It emphasizes that until now it has been near impossible to transfer many detainees from Guantánamo. The Administration explicitly states that Congress has stifled the executive's ability to prosecute detainees. Because the Executive Order does not focus on detainees with habeas approved, it does not directly impact the Uighurs. It focuses mostly on detainees who have had their habeas petitions denied, will be tried by military commissions, or may be transferred from the base but without a habeas release order from a court. The Executive Order creates a long-term system of review for detainees who are not released or have yet to be tried in the revived military commissions or in domestic courts. *See* Editorial, *The Prison That Won't Go Away*, N.Y. TIMES (Mar. 8, 2011), http://www.nytimes.com/2011/03/09/opinion/09wed2.html?_r=2&ref=opinion&adxnnlx=1299672090-BnZtNbKyTjS8G6ymtnGzVg&pagewanted=print; *see also* Peter Finn & Anne E. Kornblut, *Obama Allows Indefinite Detention*, WASH. POST, Mar. 8, 2011, at A1 (discussing the Executive Order authorizing the continuation of indefinite Guantánamo detentions).