No. 05-5477

In the
UNITED STATES COURT OF APPEALS
for the
District of Columbia Circuit

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, et al.,

Respondents-Appellees.

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

BRIEF OF AMICI CURIAE, HON. JOHN J. GIBBONS, HON. SHIRLEY M. HUFSTEDLER, HON. TIMOTHY K. LEWIS, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, AND HON. WILLIAM S. SESSIONS, IN SUPPORT OF PETITIONERS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The Petitioners-Appellants (hereafter, "Petitioners") appearing before the district court and this Court in this action are Abu Bakker Qassim and Adel Abdu' Al-Hakim. The Respondents-Appellees include George W. Bush, Donald Rumsfeld, Jay Hood, and Brice Gyurisko (hereafter, collectively, "Appellees," "the Government," or "the Executive").

Amici curiae include the following former federal judges, as further identified in the Interest of Amici section of this brief: The Honorable John J. Gibbons, the Honorable Shirley M. Hufstedler, the Honorable Timothy K. Lewis, the Honorable William A. Norris, the Honorable H. Lee Sarokin, and the Honorable William S. Sessions.

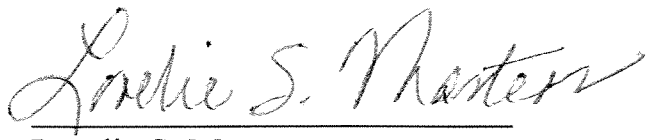
(B) Rulings under Review

The ruling at issue in this Court is the district court's denial of a remedy to Petitioners as part of its final order in *Qassim v. Bush*, No. 05-0497 (D.D.C. Dec. 22, 2005) (Robertson, J.). A copy of the district court's decision can be found in the Joint Appendix ("J.A.") at pages 0346 - 58.

(C) Related Cases

As stated in the Brief of Petitioners-Appellants ("Pet. Br."), this case has previously been before this Court in connection with the Respondents' motion to

stay. *See Qassim v. Bush* (No. 05-5213), *Qassim v. Bush* (No. 05-5240), and *Qassim v. Bush* (No. 05-5249). There are no related cases, as defined in D.C. Circuit Rule 28(a)(1)(C).



Lorelie S. Masters
(DC Cir. No. 32618)

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MISCELLANEOUS

INTERESTS OF AMICI

This case involves the limits of the Executive's power to detain indefinitely non-enemy combatants at the Guantanamo Bay Naval Base. Amici curiae, former federal judges, believe that, in this case, the Executive has advanced and the lower court has accepted a position that threatens the role of the judiciary in safeguarding the rule of law and the balance of power in our national government. Therefore, Amici respectfully submit this brief in support of the petitioners-appellants, Abu Bakker Qassim and Adel Abdu' Al Hakim.

Amici include:

- The Honorable John J. Gibbons, who served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge of that circuit from 1987 to 1990.
- The Honorable Shirley M. Hufstedler, who served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.
- The Honorable Timothy J. Lewis, who served as a judge on the United States District Court for the Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.

- The Honorable William A. Norris, who served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.
- The Honorable H. Lee Sarokin, who served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and as a judge on the United States Court of Appeals for the Third Circuit from 1994 to 1996.
- The Honorable William S. Sessions, who served as a judge on the United States District Court for the Western District of Texas from 1974 to 1987, and as Chief Judge of that court from 1980 to 1987.

The parties have consented to the participation of the above-listed former federal judges as Amici Curiae in support of Petitioners-Appellants. Amici submit this brief to elaborate upon the constitutional obligation of Article III judges to provide a remedy for violations of legal rights and to fashion appropriate and effective relief for habeas corpus petitioners, such as Abu Bakker Qassim and Adel Abdu' Al-Hakim, who are being unlawfully detained by the Executive.

STATUTES AND REGULATIONS

All applicable statutes and provisions of constitutional and international law relevant to this appeal are set forth in Pet. Br. at 2-4, incorporated here by reference.

SUMMARY OF ARGUMENT

The Executive's actions, and the decision of the court below, raise a profound challenge to the role of federal judges in our system of government. The Framers viewed indefinite Executive detention as the greatest danger to a free People and designed our Republic to prevent that most serious abuse of authority. They invested the judiciary with broad equitable powers to remedy injuries to legal rights and ensured that the Great Writ of Habeas Corpus would at all times serve as a bulwark against tyranny, except in the greatest exigency.

Despite holding, correctly in our view, that Petitioners are being detained without legal authority (J.A. 349-51), the district court concluded that it had no power to remedy this obvious wrong: "The question in this case is whether the law gives me the power to do what I believe justice requires. The answer, I believe, is no." (J.A. 352). As former federal judges, we submit this brief to register our strongly-held view that the district court was mistaken in its conclusion that the courts are powerless to remedy unlawful detention in the face of the Executive's "plenary" power to control immigration and foreign policy. In its role as guardian of individual liberties, the Supreme Court has limited the Executive's detention powers, even in wartime, to those within a zone of reasonableness. *E.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Clark v. Martinez*, 543 U.S. 371 (2005); *Rasul v. Bush*, 542 U.S. 466 (2004).

As discussed in this brief and elsewhere in the record, the inherent equitable powers of our federal courts allow a court to use its "broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Consistent with those powers and the jurisprudence on habeas corpus, the district court should be directed to use its broad mandate under 28 U.S.C. § 2243 to fashion an appropriate and effective remedy for the continued, indefinite, and unlawful detention of Petitioners, considering the full range of possible options for rectifying the Government's denial of their fundamental liberty.

For example, the court below could fashion a remedy applied in other cases involving inadmissible aliens. In light of the Supreme Court's ruling in *Clark v. Martinez,* limiting the Executive's asserted power to hold indefinitely aliens found to be inadmissible under immigration statutes, the district judge could release Petitioners into the territorial jurisdiction of the court, under such conditions as the judge may deem proper, including sponsorship by Uighur American citizens who have offered their help in this situation. (J.A. 425-26, 444). Such supervised release would not change their immigration status. Moreover, any violation of the terms of that parole would subject Petitioners to lawful detention. In our view, that remedy, or other such remedies crafted under the district court's broad equitable powers, would recognize and protect the fundamental liberty interests of

Petitioners, while at the same time allowing the court to take any public-interest concerns into account.

ARGUMENT

I. THE FEDERAL COURTS HAVE BROAD EQUITABLE POWERS TO REMEDY PETITIONERS' UNLAWFUL DETENTION.

The Executive's claim that federal courts lack the power to remedy Petitioners' unlawful detention is at odds with the constitutional powers and duties of Article III courts and with the doctrine of separation of powers, which is central to our democratic system.[1] If accepted, the Executive's position would mean that, in this and similar cases, the greatest threat to liberty – indefinite Executive detention – is without a remedy. This would run counter to the ancient maxim, often invoked by the Supreme Court, that the invasion of a legal right requires a remedy. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). It would also eviscerate the Great Writ of habeas corpus, which authorizes and requires the federal courts to order the release of a person unlawfully imprisoned by the Executive. Indeed, accepting the Executive's argument would amount to an unconstitutional suspension of the writ.

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[1] The federal courts have habeas jurisdiction to hear Petitioners' claims. *Rasul*, 542 U.S. at 483-84. To the extent the Government challenges the federal courts' jurisdiction on the basis of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005), that question is addressed in the brief of Petitioners-Appellants. (Pet. Br. at 11-24).

Far from finding support in separation of powers, the Executive's position turns that doctrine on its head. The courts cannot abdicate their power to the Executive when individual liberty hangs in the balance. *E.g.*, *Hamdi*, 542 U.S. at 536-37 (plurality op.). To do so would transfer vast power to the Executive branch, contrary to the Founders' intent, and risk the tyranny to which our Republic has at all times been opposed.

A. Faced with Grave Injury to Petitioners' Legal Rights, the Federal Courts Have the Power and Duty to Grant All Necessary Relief.

The district court's conclusion that Petitioners are without a remedy conflicts with the foundational legal principle that violation of a legal right requires a remedy. "From the earliest years of the Republic, the [Supreme] Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992); *see also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 24 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part) ("Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs."). The injury suffered here – a four-year deprivation of liberty for people whom the Government has

conceded since March 2005 are not enemy combatants – is of the most egregious kind, requiring immediate relief.[2]

Our courts inherited from England the principle that a right requires a remedy. Blackstone described the common-law maxim "*ubi jus, ibi remedium*" as a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." William Blackstone, 3 *Commentaries* *23. Elaborating on that principle, Blackstone further stated that "all possible injuries whatsoever, that did not fall within the cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right, when with-held must have a remedy, and every injury its proper redress." *Id.* *109. *See, e.g.*, *Ashby v. White*, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q.B. 1702) ("If a statute gives a right, the common law will give a remedy to maintain that right.").

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[2] We note that, according to the most recent report available from the United States Department of State, Uighurs, like other minorities in China, have been subject to brutal repression and execution by the Chinese government for their religious beliefs. United States Department of State, Bureau of Democracy, Human Rights, and Country Report on Human Rights Practices, *China (Including Tibet, Hong Kong, and Macau)*, 2004 (Feb. 28, 2005) (J.A. 141-47); *see also* Amnesty International Report, People's Republic of China, *Uighurs Fleeing Persecution as China Wages Its "War on Terror,"* at 10 (Feb. 17, 2004) (J.A. 169). We understand that further information and background on the Uighurs is contained in the Amicus Curiae brief being submitted by the Uyghur American Association.

The principle is reflected in James Madison's proclamation in *The Federalist* that "a right implies a remedy." *The Federalist* No. 43, at 274 (James Madison) (Clinton Rossiter, ed., 1961). Chief Justice Marshall famously invoked the principle in *Marbury v. Madison*, declaring that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163. Since *Marbury*, the Supreme Court has repeatedly reaffirmed the principle that, to be effective, a legal right requires a remedy. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), for example, the Court noted that, "if the remedy cannot be applied by the circuit court of this district, it exists nowhere." *Id.* at 624; *see also, e.g.*, *Gwinnett County*, 503 U.S. at 66-71; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39-40 (1916); *Dooley v. United States*, 182 U.S. 222, 229 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 176-77 (1901).

To be sure, various legal doctrines, such as standing and justiciability, may prevent a federal court from reaching the merits in a particular case. But, once a court has reached the merits and determined that a party has suffered a legal injury, as occurred in this case when the lower court held that the Executive's now indefinite detention of Petitioners "unlawful" (J.A. 351), that court has the power

and duty to grant all necessary remedies, fashioned to fit the situation at hand "as law and justice require." 28 U.S.C. § 2243. As this Court declared in *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973), "[a]ssuming a determination of constitutional violations, it is undeniable that the Federal courts having subject-matter jurisdiction also have broad equitable power to remedy and obviate all traces of the constitutional wrong." *Id.* at 966. This pronouncement echoed the Supreme Court's earlier declaration that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

Petitioners have been detained without legal authority for more than four years, and almost one year since a Combatant Status Review Tribunal found that Petitioners are not enemy combatants. The injustice Petitioners continue to suffer is of the gravest kind. Having properly concluded that Petitioners' detention is unlawful, the district court should have used, as discussed further below, "[t]he scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes," *Harris v. Nelson*, 394 U.S. 286, 291 (1969) – to create an appropriate and effective remedy here.

B. The Great Writ of Habeas Corpus Gives the Federal Courts Broad Equitable Powers to Order the Release of Persons Unlawfully Detained by the Executive.

The district court's refusal to provide a remedy for Petitioners' unlawful detention is at odds with the history and purpose of the writ of habeas corpus. Habeas has long been "the great and efficacious writ in all manners of illegal confinement," William Blackstone, 3 *Commentaries* *131, and "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action," *Harris*, 394 U.S. at 290-91; *see also Lonchar v. Thomas*, 517 U.S. 314, 322 (1996); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

In *Rasul*, the Supreme Court made clear that the writ extends to Petitioners: "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." 542 U.S. at 484; *see also id.* at 485. Failing to remedy Petitioners' manifestly unlawful detention would render futile the federal court's habeas jurisdiction in this and similar cases, and would abandon judges' historic obligation on habeas to "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243.

The Supreme Court's holding in *Rasul* arose in part from its long-standing recognition that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that

its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). Developed as a tool to limit detention by the King, the writ "became an integral part of our common-law heritage by the time the Colonies achieved independence, and received explicit recognition in our Constitution," *Rasul*, 542 U.S. at 473-74 (internal quotation marks omitted).

Since that time, it has been the unflagging obligation of a federal judge exercising habeas jurisdiction to provide an effective remedy if he or she concludes that detention by the Executive is unlawful. The only way to deprive federal judges of their statutory and constitutional duty to grant habeas relief over cases within their jurisdiction is for Congress to suspend the writ. U.S. Const. art. I, § 9, cl. 2; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) ("If at any time the public safety should require the suspension of the powers vested . . . in the courts of the United States, it is for the legislature to say so."); Joseph Story, *Commentaries on the Constitution of the United States* § 1336 (1833). Congress certainly has not suspended the judicial habeas power here, and, indeed, it would be a miscarriage of justice to deny habeas relief to Petitioners, who have been found guilty of no crime and were seized by bounty hunters and brought by force

to Guantanamo Bay and held there for years by the Executive. Particularly under these circumstances, it is our view that the district court should have provided an effective remedy for Petitioners' unlawful detention.

C. The Failure to Remedy Petitioners' Unlawful Detention Would Violate Separation of Powers.

The Framers established a government based on a separation of powers in order to prevent "accumulation of all powers legislative, executive and judiciary in the same hands," which the Framers believed to be "the very definition of tyranny." *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter, ed., 1961). This separation of powers "is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It would raise serious separation of powers concerns for a federal court to cede its habeas powers to the Executive because the writ is, at its core, a remedy against Executive detention, a firewall between individual liberty and Executive power. *Rasul*, 542 U.S. at 474 ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.") (quoting *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting)).

Habeas corpus is an equitable remedy, enforced by the courts under our system of checks and balances, to remedy the excesses of the Executive when he unlawfully detains an individual. As the Supreme Court has stated, "the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536 (plurality op.). The district court's failure to provide a remedy for Petitioners' unlawful detention is inconsistent with the well-settled understanding of the function of habeas corpus and the judicial role in ensuring the separation of powers. As Chief Justice Burger explained, "A doctrine that allowed transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention." *Swain*, 430 U.S. at 386 (Burger, C.J., concurring in part and concurring in judgment).

As former federal judges, we believe it imperative that the Court enforce the equitable remedy inherent in the Great Writ to avoid the concentration of power in the Executive that our constitutional system was intended to prevent.

II. THE DISTRICT COURT SHOULD BE DIRECTED TO FASHION AN APPROPRIATE REMEDY.

A. The District Court Has the Power and Obligation Here to Grant an Effective Remedy.

The district court mistakenly concluded that it could not provide an effective remedy for Petitioners' unlawful detention. This Court should accordingly remand to the district court with instructions to grant relief consistent with the purpose of habeas and the wrong here. *See* Pet. Br. at 9-10.

A federal judge's duty to provide an effective remedy is at its zenith when an individual is unlawfully deprived of his liberty. *See, e.g., Fay v. Noia*, 372 U.S. 391, 400 (1963) (habeas affords a "swift and imperative remedy in all cases of illegal restraint or confinement"), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977). Habeas corpus is not, and has never been, "a static, narrow, formalistic remedy," *Jones v. Cunningham*, 371 U.S. 236, 243 (1971); rather, as the Supreme Court has often reminded us, "is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), "governed by equitable principles," *Sanders v. United States*, 373 U.S. 1, 17 (1963) (citation omitted). *See also Harris*, 394 U.S. at 291 ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."). The federal habeas statute directs every judge to "summarily hear and determine the facts, and dispose of the matter as law and

justice require." 28 U.S.C. § 2243. A habeas court's power to fashion an effective and appropriate remedy is thus far-reaching and extends to this case.

As the Supreme Court recognized in *Jones v. Cunningham*, 371 U.S. 236 (1963), the scope of the writ "has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.* at 243. Under 28 U.S.C. § 2243, a federal judge has "broad discretion in conditioning a judgment granting habeas relief." *Hilton*, 481 U.S. at 775; *see also, e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) ("mandate [of § 2243] is broad with respect to the relief that may be granted."). Thus, the broad judicial power conferred by the writ includes the authority not only to order a prisoner's release, but also to fashion relief appropriate to the circumstances. For example, a court may order release and at the same time impose suitable and appropriate conditions on that release, including parole or other conditions tailored to the facts. *See, e.g.*, *Barth v. Clise*, 79 U.S. 400, 402 (1870) (authority of habeas court to release prisoner on bail); *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) (per curiam) ("inherent" power of habeas judge to grant bail or release); *Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) ("Absent a clear direction from Congress, federal judicial power is unaltered, and the authority of the federal courts to admit to bail parties properly within their

jurisdiction remains unqualified."); *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955).

Here, the district court could have used many options to relieve Petitioners of their unlawful detention while also ensuring that any legitimate government concerns were adequately addressed. Specifically, the district court could have used available models from other contexts to fashion relief, perhaps after a hearing dedicated to that purpose. The immigration context, for example, although not directly applicable here, provides a variety of possible alternatives to Petitioners' continued, indefinite detention. Looking to habeas relief granted in immigration cases for guidance, the district court could have ordered that Petitioners be released within the court's territorial jurisdiction under appropriate conditions of supervision. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) ("[deportable] alien's release may . . . be conditioned on any of the various forms of supervised release that are appropriate in the circumstances"); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002) (ordering petitioner's immediate release from custody pending removal from United States, while providing for consideration of appropriate conditions of release); *see also Louis v. Nelson*, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982) (ordering supervised release of non-citizens pending determination of their claim for admission to United States). The district court could thus have looked to the range of conditions imposed on aliens pending their

removal from the United States. *See* 8 U.S.C. § 1231(a)(3) (requirement that alien, *inter alia*, undergo periodic examination by government official; provide information about habits, associations, and activities; and obey reasonable restrictions on his conduct). And, the court could order that sanctions, including confinement, be imposed if Petitioners were ever to violate those conditions. *Zadvydas*, 533 U.S. at 699-700; *id.* at 696 ("[Choice] is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated.") (citation omitted).

Under another model, from the pretrial services program used in the District of Columbia, the district court could have imposed suitable conditions on release to ensure public safety. That program provides for varying levels of supervision, monitors compliance with conditions of release, ensures appearances for scheduled court hearings, and provides for participation in social services programs in the community. 18 U.S.C. § 3142(c); D.C. Stat. § 23-1321(c)(1); 28 C.F.R. § 800.3(b). Conditions of release can include: remaining under the supervision of a designated person or organization that agrees to assume such supervision; abiding by specified restrictions on personal associations, place of abode, or travel; reporting on a regular basis to a designated law enforcement agency or official; and executing a bail bond. 18 U.S.C. § 3142(c)(1)(B); D.C. Stat. § 23-1321(c)(1)(B); *see also* District of Columbia Pretrial Services Agency, "PSA's Mission and

Values," *available at* http://www.dcpsa.gov (describing agency's ability to fashion release programs that address issues such as housing, medical, educational, and health issues to help promote responsible behavior and protect public safety). The pre-trial services program routinely and successfully provides for the supervised release of individuals who have been charged with crimes.[3] An order imposing similar conditions certainly could provide a basis for fashioning a suitable remedy for Petitioners, who are not and who have never been charged here with any offense.

The district court could have released Petitioners to members of the Uighur American community who have offered to help settle Petitioners in this country by providing homes and jobs. As stated above, we understand that the Uighur community in the United States was ready to make that commitment in the court below (J.A. 425-26, 444) and is filing a separate Amicus Curiae brief in this Court to confirm its commitment to assist the Uighur Petitioners here and to help them meet any conditions of release. It is our view that this is a factor that should be given strong consideration in fashioning a suitable remedy in proceedings on remand.

At a minimum, the court should hold a hearing to discuss appropriate means of addressing Petitioners' unlawful detention. The district court declined to hold a

[3] In order to ensure appearance at future court dates under this program, courts routinely release people to a private custodian.

hearing with Petitioners present because the court deemed their case to present only issues of law. (J.A. 352-53). Fashioning an appropriate remedy, however, would likely raise factual questions. The district court, exercising its habeas jurisdiction, has the power to order the Government to produce Petitioners for such a hearing. 28 U.S.C. § 2243; *Walker v. Johnston*, 312 U.S. 275, 285 (1941). As discussed in II.B *infra*, ordering them to be present in the District of Columbia for a hearing would not alter their immigration status, and the district court's concerns in that regard, while understandable, were not well-founded.

B. Recent Supreme Court Jurisprudence Supports Petitioners' Request for Relief Here.

In denying relief, the district court, in our view, mistakenly believed that Petitioners' immigration status eliminated its power and duty to fashion an effective remedy for their unlawful detention. (J.A. 355-57). This is not an immigration case, and no immigration proceedings have been commenced against or by Petitioners. However, the Supreme Court's recent decisions on habeas issues arising in the immigration context support our conclusion here that Petitioners are entitled to relief. Those cases confirm that the Executive's conceded authority to regulate foreign policy in general, and immigration in particular, does not nullify the historic and necessary check on Executive power and indefinite detention promised by the Great Writ. *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001). In both cases, the Supreme Court ruled

that lengthy detentions of non-citizens by immigration authorities had, in fact, become indefinite and thus unlawful, requiring relief. In both cases, the Supreme Court concluded that release was the appropriate remedy. Release under such circumstances does not, as the lower court feared, change habeas petitioners' immigration status or confer any rights upon them to which they are not currently entitled. *Cf. Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted."); *Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (upholding exclusion of noncitizen temporarily released into country as minor years earlier). Release merely allows individuals to be free from unlawful detention, while subject to suitable restrictions, pending resolution of ongoing or future matters arising under the immigration laws. We respectfully submit that this same logic applies here.

In *Martinez,* two "inadmissible" aliens, who had arrived on our shores from Cuba in 1980 as part of the Mariel Boatlift, had been ordered removed from the United States by a court following immigration proceedings. The Supreme Court ruled that, because their detentions, in fact, had become indefinite, both were entitled to have their petitions for writs of habeas corpus granted notwithstanding their convictions for various violent crimes committed after their arrival in the

United States. 543 U.S. at 386-87.[4] The Government there was not able to repatriate them to Cuba, and had ceased efforts to do so. Relying on *Zadvydas*, which had held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized," 533 U.S. at 699, the Court extended the *Zadvydas* holding, which applied to aliens who had been adjudicated "deportable," to aliens who have been adjudicated "inadmissible" because they had committed aggravated felonies in this country. *Martinez*, 543 U.S. at 386-87.

As *Zadvydas* and *Martinez* make clear, the Executive's authority to regulate immigration must yield before the Judiciary's duty to remedy indefinite and unlawful detention. *See Zadvydas*, 533 U.S. at 695-96. The Court in both cases concluded that six months was a reasonable period in which to effect removal and that, after the expiration of that presumptively reasonable period, individuals were subject to release once removal was "no longer reasonably foreseeable." *Martinez*,

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[4] Martinez had been convicted in the United States of assault with a deadly weapon twice, burglary, petty theft with a prior conviction, and attempted copulation by force. The second petitioner, Benitez, had been convicted in the United States of grand theft; armed robbery twice; armed burglary twice; aggravated battery; carrying a concealed weapon; unlawful possession of a firearm; and unlawful possession, sale or delivery of a firearm with an altered serial number. 543 U.S. at 374-75. In contrast, Petitioners here have not been charged with, let alone found guilty of any crime and, in fact, were found not to be enemy combatants by the Executive's Combatant Status Review Tribunal process almost a year ago.

543 U.S. at 383; *Zadvydas*, 533 U.S. at 701.[5] On remand in *Martinez* and in *Benitez v. Mata*, the consolidated case, petitioners were released.[6]

Since the Supreme Court decided *Martinez* in January 2005, courts have applied it and its antecedent *Zadvydas* in other cases, resulting in the release of other aliens without any change in their immigration status.[7] One court, relying upon *Zadvydas*, found no reasonable likelihood that the petitioner would be removed from the United States in the foreseeable future, but allowed the Government 30 additional days to attempt to secure the petitioner's removal to his home country, Antigua. However, "[a]t the conclusion of these 30 days, if the Government has not received the needed travel documents, Petitioner will be released on parole pending the resolution of his removal from the United States."

---

[5] The Court in both cases was construing an immigration statute, 8 U.S.C. § 1231, which provided a 90-day period from the date an administrative order of removal becomes final in which to effect the removal of an alien. The Court placed a limiting construction on the statute to prevent indefinite and unlawful detention.

[6] The Eleventh Circuit granted Benitez's petition for habeas corpus under § 2241 and ordered that he "be paroled and released subject to (1) the conditions set forth in his release, and (2) a change in the reasonable foreseeability of his removal to Cuba so that detention becomes necessary to effectuate his removal." *Benitez v. Wallis*, 402 F.3d 1133, 1136 (11th Cir. 2005).

[7] *E.g.*, *Sierra v. Romine*, 543 U.S. 1087 (2005) (judgment below vacated, case remanded for proceedings consistent with *Martinez*); *Sanchez v. Attorney General, United States,* No. 04-2740, 146 Fed. Appx. 547 (3d Cir. July 13, 2005) (per curiam) (appeal dismissed as moot because Government did not show that petitioner's release was reasonably foreseeable and had released him under *Martinez*). In *Sanchez,* the United States Court of Appeals for the Third Circuit stated that Sanchez's release did not constitute an admission into the United States, change the conditions of his release, or affect the removal order. *Id.*

Edwards v. Hogan, No. Civ. 1:CV 05 0808, 2005 WL 1458761, at *3 (M.D. Pa. June 20, 2005). A case like *Edwards* could provide a useful model for the court in this case.

In contrast to the individuals in *Zadvydas* and *Martinez*, Petitioners here are not being detained pursuant to a final order of removal or any statute authorizing their confinement for even a limited period of time. They have not been convicted of, let alone charged with, any crime. They did not seek to come to the United States but, instead, were brought to Guantanamo Bay by force by the United States after they were captured by bounty hunters, and paid rewards by our Government. Moreover, Petitioners have been detained almost 11 months after a Combatant Status Review Tribunal found that they are not enemy combatants. Certainly, Petitioners are entitled to an effective remedy.

CONCLUSION

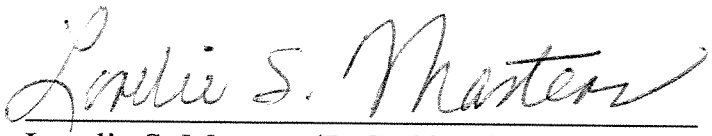
There can be no liberty in a society where the Executive can detain a person, of whatever nationality, indefinitely, without legal basis. The writ of habeas corpus exists precisely to right such a wrong by providing a meaningful remedy. As Justice Jackson observed, "It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting). Here, Petitioners remain imprisoned after four years, far from home, and in the

"commonest of common sense," subject to an unlawful and indefinite detention. The existence of a right is meaningless without a remedy.

Therefore, for the reasons set forth herein, we respectfully submit that this case should be remanded with instructions to the district court to fashion appropriate relief to remedy Petitioners' continued unlawful detention, and grant such other, further relief as this Court deems just and proper.

Dated: February 21, 2006

Respectfully submitted,



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Lorelie S. Masters

Dated: February 21, 2006

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I hereby certify that, this 21st day of February, 2006, two copies of the foregoing Brief of Amici Curiae, Hon. John J. Gibbons, Hon. Shirley M. Hufstedler, Hon. Timothy K. Lewis, Hon. William A. Norris, Hon. H. Lee Sarokin, and Hon. William S. Sessions, in Support of Petitioners-Appellants were served by First-Class Mail, postage paid, upon each of the following:

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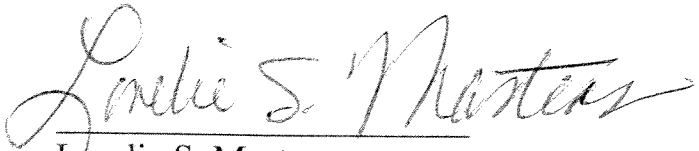

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ADDENDUM

INDEX

Briefs and Other Related Documents
Only the Westlaw citation is currently available.

United States District Court,M.D. Pennsylvania.
Dale EDWARDS, Petitioner
v.
Thomas HOGAN, et al., Respondents
No. Civ. 1:CV 05 0808.

June 20, 2005.

MEMORANDUM

RAMBO, J.

***1** Before the court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The parties have briefed the issues, and the matter is ripe for disposition. For the reasons that follow the court will grant Petitioner's Petition for a writ of habeas corpus. In accordance with this memorandum and order, the court will provide that the Government has thirty (30) days to remove Petitioner from the country. If the Government is unable to do so, the Government will be directed to grant Petitioner parole until the removal of Petitioner can be accomplished.

I. *Background*

On April 21, 2005, Petitioner filed a Petition for writ of habeas corpus challenging his continued detention by the United States Immigration and Customs Enforcement ("ICE"). The following facts are incorporated into this memorandum through the Government's response to Petitioner's petition. (Doc. 8.) Petitioner is a citizen of Antigua, who first entered the United States in 1992. At some point Petitioner left the country. On or about December 8, 1997, Petitioner attempted to return to the United States. At that point, Petitioner was found to be attempting to gain entry into the United States through the use of counterfeit stamps in his passport. Petitioner was deemed to be inadmissable under § 212(a)(6)(c)(i) and 212(a)(7)(I)(1) of the Immigration and Nationality Act as an alien seeking to procure admission via fraud and as an immigrant not in possession of a valid visa. Petitioner was removed from the United States and barred from entering or attempting to enter for a period of five years.

At some unknown time and place, Petitioner re-entered the country without approval of the immigration service. As a result, on March 18, 2004, the immigration service reinstated Petitioner's December 1997 removal order and took Petitioner into custody.

Petitioner has been in post-order detention for a period exceeding fourteen months. On April 4, 2005, Petitioner received his most recent custody review and was denied release. (Gov't Resp., Ex. E.) The decision to continue detention was based on ICE's determination that Petitioner was a flight risk and a threat to the public. (*Id.*) In addition, ICE provided that a request for a travel document was submitted to the Consulate of Antigua and the process to verify Petitioner's identity was ongoing. (*Id.*)

As of the date of this memorandum and order, Antigua has not issued travel documents for Petitioner. Moreover, there is no indication that any alternate country is willing to accept Petitioner. Petitioner does not challenge his deportation. To the contrary, Petitioner appears more than willing to return to his country of citizenship.

II. *Discussion*

Petitioner asserts that his detention is indefinite. According to Petitioner, his detention is in violation of international law, his due process rights, and the Eighth Amendment prohibition against cruel and unusual punishment. The court finds Petitioner's argument based on the Fifth Amendment's Due Process Clause to be convincing.

***2** The Fifth Amendment's Due Process Clause "forbids the Government to 'depriv[e]' any 'person ... of ... liberty without due process of law." ' *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Under federal regulations, the INS is permitted to detain an alien for 90 days following a final order of removal. INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(4). In *Zadvydas*, the Supreme Court held that the 90 day detention period was lawful, and that six months was a presumably reasonable period of detention after the final order of removal is issued. *Zadvydas*, 533 U.S. at 701-02. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the

Government must respond with evidence sufficient to rebut that showing.

Id. at 701.

The Government contends that Petitioner has failed to show that there is no significant likelihood of his removal within the reasonably foreseeable future. In the alternative, the Government argues that even if Petitioner has met his burden, there is reason to believe that his removal is likely in the reasonably foreseeable future. FN1

> FN1. The Government also asserts that while in detention, Petitioner is receiving regular custody reviews and thus his due process rights are being protected. *Zadvydas* provided that "we believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinate and potentially permanent. Zadvydas, 533 U.S. at 696. The Court held that once removal is no longer reasonablely foreseeable, continued detention is unconstitutional. *Id* at 699. Accordingly, the court rejects this argument.

With respect to Petitioner's burden of showing that there is "good reason to believe there is no significant likelihood of his removal within the reasonable future," the court finds that he has met his burden. *Id.* Petitioner has been in custody since March 2004. This is well beyond the presumably reasonable period of six months provided by *Zadvydas*. *Id.* at 701-02. Petitioner states in a sworn affidavit that he applied for travel documents from the Antigua Consulate on two different occasions, the last time being February 14, 2005. (Exs. Supp. Pet.'s Writ of Habeas Corpus, Ex. A.) On both occasions, Petitioner asserts that he was told travel documents would not be issued. (*Id*). The court also considers that the Government need only secure a travel document based on proof of Petitioner's citizenship in Antigua, yet has failed to do so in over fourteen months. The court finds that Petitioner has met his burden of showing that there is no significant likelihood of removal within the reasonably foreseeable future.

The burden now shifts to the government to present evidence sufficient to rebut Petitioner's showing that there is no significant likelihood of removal within the reasonable future. As provided by *Zadvydas,* the fact that Petitioner has been in custody beyond the six month period does not mean that he must be released. *Id.* "To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonablely foreseeable future." *Id.* However, "for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink." *Id.* at 701.

In *Zadvydas,* the Court addressed the claims of two separate petitioners. First, the court addressed the claims of *Zadvydas,* and overruled the Fifth Circuit's holding that detention was lawful "as long as 'good faith efforts to effectuate ... deportation continue' and [Petitioner] failed to show that deportation will prove 'impossible." ' *Id.* at 702 (citing *Zadvydas v. Underdown,* 185 F.3d 279, 294, 297 (5th Cir.1999)). The Court indicated that such a standard wold require a alien seeking release to show that there was no possibility of his release, "no matter how unlikely or unforeseeable." Zadvydas, 533 U.S. at 702. The court found that such a standard would violate an individual's due process rights. Second, the court addressed *Kim Ho Ma v. Reno,* 208 F.3d 815 (9th Cir.2000). In *Ma,* the Ninth Circuit provided that the petitioner should be granted release because there was no reasonable likelihood of his removal in the foreseeable future. *Id* . at 831. The Court remanded *Ma* on the basis that the Ninth Circuit's conclusion "rested solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations." Zadvydas, 533 U.S. at 702 (quoting *Kim Ho Ma,* 208 F.3d at 831). Thus, while the existence of good faith efforts of the part of the Government will not suffice to show the likelihood of removal in the reasonablely foreseeable future, the court will consider the likelihood of successful future negotiations in securing Petitioner's removal.

*3 The Government asserts that efforts to remove Petitioner are proceeding and involve the highest levels of official

action. According to the Government, both the Antiguan Ambassador to the United States and the Antiguan Embassy's Consular Official have been contacted within the past thirty days and they indicated that they would review the matter as soon as possible. (Govt's Resp., Ex. D.) The Government asserts that this evidence of ongoing action indicates that there is likelihood of Petitioner's removal from this country within the reasonablely foreseeable future. However, while the Antiguan Ambassador indicated that Antigua intends to cooperate with deportations, it is hampered by a lack of resources to conduct the checks necessary to confirm nationality. (*Id.*) These appear to be two contradictory statements from the Antiguan government. On the one hand, they assert that they will look into the matter as soon as possible, and on the other hand, they asset that they lack the basic resources to conduct what would appear to be a relatively simple investigation into Petitioner's status as an Antiguan national.

Neither the United States Government nor the Antiguan Government provide any indication of when such resources will become available. While the statements of the Antiguan Government indicate a good faith effort on the part of the United States to remove Petitioner, this, in and of itself, will not suffice. Petitioner has been in custody for over fourteen months awaiting a confirmation of his Antiguan nationality status and the issuance of his travel documents. Put simply, the court is perplexed by the Antiguan Government's lack of sufficient funds to conduct the checks necessary to confirm Petitioner's nationality. If in the course of fourteen months the Government of Antigua has been unable to secure the funding, is it likely that it will be able to do so in the reasonablely foreseeable future? Because Petitioner's removal has already been pending for over fourteen months, the court concludes that it is not. The court finds that the Government fails to rebut Petitioner's showing that there is no reasonable likelihood of his removal in the foreseeable future.

III. *Conclusion*

Based on the discussion above, the court finds that there is no reasonable likelihood of his removal in the foreseeable future. However, in light of the Government's assertion that it has been in contact with the Antiguan Government, and that the Government of Antigua will act on the matter as soon as possible, the court will give the Government 30 days to secure the necessary documents for Petitioner's removal from the United States. At the conclusion of these 30 days, if the Government has not received the needed travel documents, Petitioner will be released on parole pending the resolution of his removal from the United States. An appropriate order will issue.

ORDER

In accordance with the accompanying memorandum of law, IT IS HEREBY ORDERED THAT:

***4** 1) Petitioner's petition for a writ of habeas corpus is GRANTED as follows.

2) The Government shall have until July 21, 2005 to secure the necessary travel documents to effect the removal of Petitioner. If on July 21, 2005, the Government has failed to do so, Petitioner shall be released from the custody of the Immigration and Customs Enforcement on parole pending the resolution of Petitioner's removal from the United States.

3) The Government shall provide the court with a status report by July 28, 2005, indicating if Petitioner has been granted parole or removed from the United States.

M.D.Pa.,2005.
Edwards v. Hogan
Slip Copy, 2005 WL 1458761 (M.D.Pa.)

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This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL

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United States Court of Appeals,
Third Circuit.
Ivan SANCHEZ, Appellant,
v.
*ATTORNEY GENERAL, UNITED STATES; James W. Ziglar, Immigration and
Naturalization Service Commissioner; A.J. Quarantillo, Ins District Director;
Jose C. Simao *(Amended per Clerk's Order of 4/26/05).
No. 04-2740.

Submitted Under Third Circuit LAR 34.1(a) July 7, 2005.
Decided July 13, 2005.

Background: Inadmissible alien, being detained pending his removal to Cuba, petitioned for writ of habeas corpus. The United States District Court for the District of New Jersey, Jose L. Linares, J., denied relief, and alien appealed.

Holding: The Court of Appeals held that alien's release from immigration custody, on ground that there was no significant likelihood of removal in reasonably foreseeable future, rendered petition moot.
Dismissed.

West Headnotes

[1] **Aliens ⇐53.9**
24k53.9 Most Cited Cases
Inadmissible alien from Cuba could not be detained beyond statutory 90-day removal period where there was no significant likelihood of removal in reasonably foreseeable future. Immigration and Nationality Act, § 241(a)(1), as amended, 8 U.S.C.A. § 1231(a)(1).

[2] **Habeas Corpus ⇐235**
197k235 Most Cited Cases
Release of inadmissible alien from immigration custody, on ground that there was no significant likelihood of removal in reasonably foreseeable future, rendered his pending habeas corpus petition moot.

***547** On Appeal From the United States District Court for the District of New Jersey. (D.C.Civ. No. 03-cv-01848). District Judge: Honorable Jose L. Linares.

Ivan Sanchez, Freehold, NJ, pro se.

Donna A. Krappa, Office of United States Attorney, Newark, NJ, for Attorney General, United States.

Before SLOVITER, BARRY and FISHER, Circuit Judges.

OPINION

PER CURIAM

Appellant Ivan Sanchez, a native and citizen of Cuba, came to the United States as part of the Mariel Boatlift, and was paroled into the United States in May 1980. In 1995, Sanchez pleaded guilty to aggravated manslaughter in New Jersey state court. He was sentenced to a term of imprisonment of 17 years, and his immigration parole was revoked. In August 2002, Sanchez was served with a Notice To Appear, which charged him with removal under Immigration & Nationality Act § 212(a)(2)(A)(i)(I) (alien convicted of crime of moral turpitude), and § 212(a)(7)(A)(i)(I) (failure to possess valid entry document at time of application for admission). In October 2002, New Jersey released Sanchez on parole, and he then was taken into immigration custody. In November 2002, an Immigration Judge sustained the charges and ordered Sanchez removed to Cuba. The Immigration & Naturalization Service, now the Department of Homeland Security, subsequently ***548** considered but declined to release him on parole pursuant to the Cuban Review Plan, 8 C.F.R. § 212.12.

In April 2003, Sanchez filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in United States

District Court for the District of New Jersey, in which he claimed that his ongoing detention pursuant to 8 U.S.C. § 1231(a)(6) violated due process because there was no likelihood that he would be removed to Cuba in the foreseeable future. Relying upon *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), Sanchez requested release from detention. In an order entered on May 25, 2004, the District Court denied the petition, concluding that Sanchez' continued detention was authorized by our decision in *Sierra v. Romaine*, 347 F.3d 559, 576 (3d Cir.2003) ("the Attorney General has the authority under [8 U.S.C. §] 1231(a)(6) to detain [an inadmissible alien] indefinitely and *Zadvydas'* s six-month presumption of reasonableness is not applicable to him.").

Sanchez appealed, and the appellees, which include the Attorney General, moved for summary affirmance. A motions panel of this Court referred the motion to a merits panel, and our Clerk stayed briefing pending the United States Supreme Court's decision in *Benitez v. Wallis*, 540 U.S. 1147, 124 S.Ct. 1143, 157 L.Ed.2d 966 (U.S.2004). That case has been decided, briefs have been filed, and the appeal is ripe for decision.

We will dismiss the appeal as moot. In *Zadvydas v. Davis*, 533 U.S. at 689, 121 S.Ct. 2491, the Supreme Court interpreted 8 U.S.C. § 1231(a)(6) to authorize the continued detention of legal permanent resident aliens beyond the mandated 90-day removal period, but only for as long as "reasonably necessary" to effectuate their removal from the country. The Supreme Court explained that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Id.* at 699, 121 S.Ct. 2491. The Court construed section 1231(a)(6) to limit post-removal order detention to a period reasonably necessary to bring about the alien's removal, generally no more than six months. After six months, the alien is eligible for conditional release if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701, 121 S.Ct. 2491.

[1] In *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716, 160 L.Ed.2d 734 (U.S.2005), a companion case to *Benitez*, the Supreme Court extended its interpretation of section 1231(a)(6) to inadmissible aliens, such as Sanchez. The Court also vacated and remanded for reconsideration our decision in *Sierra*, --- U.S. ----, 125 S.Ct. 962, 160 L.Ed.2d 897 (U.S.2005). Under *Clark*, an inadmissible alien can no longer be detained beyond the statutory 90-day removal period of 8 U.S.C. § 1231(a)(1), where there is no significant likelihood of removal in the reasonably foreseeable future. *Clark* effectively ends this case. The Supreme Court itself observed that conditions in Cuba have not changed such that removal of the Mariel Cubans is reasonably foreseeable; therefore, *Clark* dictates that Sanchez is entitled to be released and paroled into the country. 125 S.Ct. at 727 (because government brought forward nothing to indicate that substantial likelihood of removal exists despite passage of six months, and conceded that "it is no longer even involved in repatriation negotiations with Cuba," petitions for habeas corpus should have been granted).

[2] In his brief on appeal, the Attorney General asserted that, on March 25, 2005, he requested that a repatriation review, 8 *C.F.R.* § 241.13, be completed in Sanchez' case as soon as possible. He stated: "Upon completion of the review, ... [i]f ***549** the [Department of Homeland Security] determines there is no likelihood of removal and that petitioner is not a special category alien, the petitioner will be released on an order of supervision." (Appellees' Brief, at 7.) Three weeks later, Sanchez was released from immigration custody pending his removal from the United States, according to a letter submitted to this Court by the U.S. Attorney after the appellees' brief was filed. The Release Notification states that Sanchez' release does not affect the removal order and does not constitute an admission to the United States, and that Sanchez is subject to certain conditions of supervision. *See Clark*, 125 S.Ct. at 727-28 (O'Connor, J., concurring) (any alien released under *Clark* is subject to conditions of supervised release, 8 U.S.C. § 1231(a)(3), and if he fails to comply with conditions of release, he is subject to criminal penalties, including further detention, 8 U.S.C. § 1253(b)).

In view of this development we conclude that the appeal is moot. In his habeas petition, Sanchez sought release from detention. He has achieved that result. There is no need for a remand to the District Court insofar as Sanchez has already

been released. The action of the Department of Homeland Security has forestalled any occasion for this Court to provide meaningful relief. *See Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1246 (3d Cir.1996).

We will dismiss the appeal as moot. The Attorney General's motion for summary affirmance is denied.

146 Fed.Appx. 547

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