No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Following his win in this Court a year ago in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Saber Lahmar won his *habeas* case. District Judge Richard Leon ordered the government "to take all necessary and appropriate diplomatic steps to facilitate the release of [Lahmar] forthwith." *Boumediene v. Bush*, 579 F. Supp. 2d 191, 199 (D.D.C. 2008). Judge Leon soon granted Mohammed El Gharani the same relief. *El Gharani v. Bush*, Civ. No. 05-429 (Dkt. 202) (D.D.C. Jan. 14, 2009). In April 2009, Alla Ali Ben Ali Ahmed won similar relief from District Judge Gladys Kessler. *Ahmed v. Obama*, Civ. No. 05-1678, 2009 WL 1307954 (D.D.C. May 11, 2009) (unclassified order). The seventeen Uighur Petitioners "won" their case eight months ago. Pet. App. 50a (finding Petitioners' imprisonment "unlawful"[1]).

All are prisoners at Guantánamo today. As we approach *Boumediene's* anniversary, many prisoners have "won" their *habeas* cases, but few have been released. The Judicial Branch may hold hearings; it may even issue vague and unenforceable exhortations to diplomacy. But that is all. It has become the hortatory branch.

Something has gone awry.

In *habeas* the Judicial Branch exerts a real check over the Executive Branch. The decision below held, and the Executive now argues that, by locating its prison offshore, the Executive deprived the judiciary of

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[1] The court of appeals did not disturb this finding.

any check at all, and that a prisoner within the court's jurisdiction and unlawfully held by the Executive may be released only by diplomatic order of the Executive.

This argument misreads the judicial function, of which cheerleading for diplomacy forms no part. Petitioners know of no previous *habeas* decision insulating from judicial remedy the indefinite and unlawful executive imprisonment of a prisoner within the court's jurisdiction. To the contrary, the Great Writ was mortared into the Constitution as a constraint upon the power of the political branches. *Boumediene*, 128 S. Ct. at 2259 (*habeas corpus* was "designed to restrain" the political branches and is "an indispensable mechanism for monitoring the separation of powers"). At issue now is whether that constraint may unilaterally be dislodged by the Executive.

A. The Conflict Between The Executive's Position And *Boumediene* Makes This A Singularly Important Case Warranting *Certiorari* Review.

Under this Court's decision in *Boumediene*, each Petitioner here[2] has the right to the Great Writ, a writ that must include the right of conditional release.[3] 128 S. Ct. at 2266. The decision below held, and the Executive argues here that no Petitioner can obtain the judicial remedy *Boumediene* promised. In the decision

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[2] At the time the Petition was filed, Khalid Ali, Abdul Sabour, and Sabir Osman, all of whom were petitioners below, were not represented by counsel. They subsequently retained *pro bono* counsel who, pursuant to their instructions and Supreme Court Rule 12.6, confirmed that the men wish to remain petitioners in this Court.

[3] Petitioners also are entitled to release as a matter of statutory *habeas*. Pet. 30-31.

below, the *Kiyemba* majority never confronted this problem. Nor does the Executive here.[4]

Instead, the Executive recasts the case as a peculiarity—a demand for immigration relief by presumptuous aliens "housed" by the United States—and cites authorities for the familiar proposition that when aliens come to our border, the political branches have the power to say whether they may be admitted. Opp. 12-15. But these aliens neither came to our border nor sought immigration status. They were captured—so far as the record shows, illegally[5]—brought to our border by the Executive, and there have been held by the Executive for over seven years.

This Court knew that the *Boumediene* petitioners were aliens held offshore; when it spoke of conditional release, *see* 128 S. Ct. at 2266, it knew that a *habeas* judge could never order foreign governments to effect that release. It had to know that the conditional release power it described as essential to the district court's *habeas* jurisdiction could not be used to direct a release anywhere but here.[6] Yet this Court made plain that the release power is inherent and fundamental to

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[4] The Executive posits that "simple release" is different from "an entirely distinct order" that Petitioners be transferred here. Opp. 19. It never explains how Petitioners can obtain "simple release."

[5] The *habeas* judge did not decide whether Petitioners' original capture, detention, and transportation to Guantánamo were unlawful, *see* Pet. App. 44a, but nothing in the record suggests that those actions were authorized by law.

[6] Such a release would not bar immigration authorities from initiating lawful removal proceedings.

habeas itself. 128 S. Ct. at 2267-68, 2271.[7] The decision below held, and the Executive now contends, that the *habeas* judge—having the power *Boumediene* recognized, obliged to act promptly, as this Court ordered, and having no remedial alternative before him, as everyone concedes—in fact has no judicial power at all.[8]

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[7] The Executive notes this Court's reservation that an order of release "'need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.'" Opp. 20 (quoting *Boumediene*, 128 S. Ct. at 2266). But this phrase is explained by the Court's direction that "the *habeas* court must have the power to order the conditional release of an individual unlawfully detained." 128 S. Ct. at 2266. "Conditional release" permits the jailer to return the prisoner to a lawful criminal process where relevant. Pet. 23-24. No such process is relevant here. The Executive also notes that *Munaf v. Geren*, 128 S. Ct. 2207 (2008), holds that a *habeas* court should not grant release in a manner that offends the right of a foreign government to prosecute crimes in its jurisdiction. Opp. 20. But no such prosecution or foreign interest is present here either. The *Munaf* petitioners were held in lawful pre-trial detention and thus failed to state a *habeas* claim. Here, by contrast, both the Executive and the court of appeals concede the merits of Petitioners' *habeas* claims: "[T]here is no dispute that [these] 'petitioners should be released.'" Opp. 8-9 (quoting *Kiyemba*, Pet. App. 15a). Like Ignatz Mezei and unlike these Petitioners, the *Munaf* petitioners were volunteers—no one captured them and brought them to Iraq. 128 S. Ct. at 2223. *Munaf* simply does not illuminate—much less govern—the problem presented here.

[8] The decision below and the Executive's argument drive toward a rule that would condition relief in *habeas* on citizenship. But the writ extends equally to citizens and aliens. *Boumediene*, 128 S. Ct. at 2248 ("[A]t common law a petitioner's status as an alien was not a categorical bar to *habeas corpus* relief."); *see Clark v. Martinez*, 543 U.S. 371, 378 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

And not only this *habeas* judge. The Executive's construction would strip Article III power from *every* judge carrying out *Boumediene*'s directive. Even as to detainees who wish to go home, the *habeas* judge might order only that the Executive engage in unreviewable diplomacy—as the court of appeals put it, that he receive the jailer's assurances. Pet. App. 15a. Lahmar, Gharani, and Ahmed have had many months to reflect on the emptiness of such decrees.[9] Their cases show that the Uighur cases are not anomalies. Absent reversal of the decision below, the mandate of *Boumediene*—and the centuries-old law of *habeas*—will have been fundamentally altered by the Executive's decision to transport captured alien civilians to an offshore prison colony.

The Executive says that it is "now in the process of attempting to resettle petitioners." Opp. 11. It said the same thing five years ago, JA 1173, and has been telling courts this since August 2005, *id.* at 1254-55. These efforts failed, as the *habeas* judge recognized. Pet. App. 49a. By imprisoning Petitioners among alleged criminals and enemies, and imbuing the prison with rhetorical resonance, our government has stained Petitioners with a Guantánamo taint that, years later, appears indelible.

The Executive implies that Petitioners are the problem. They "do not wish to return to their home

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[9] Counsel understand that El Gharani wants to return to his home in Chad, and that Chad wants his return. Yet El Gharani remains a prisoner. For him, as for Petitioners, remedy depends not on judicial decree, but on the discretion of the same Executive Branch that could not justify his imprisonment.

country," Opp. (I)—too fastidious, evidently, for the torture that awaits them in Communist China. But *they* did not make release outside the fifty states impossible. The United States—and the Convention Against Torture to which the Executive concedes fidelity—did. The political and diplomatic power of the Communist Chinese government Petitioners fled, seasoned with the taint of Guantánamo and more recently, public opposition to receiving Guantánamo detainees in the United States, *see* Opp. 26-27, has made release elsewhere impossible.[10] Thus the Executive's assurances that diplomatic efforts continue are like assurances that efforts to cure the common cold continue. No one doubts them. But the imprisonment continues too, and that is what matters in *habeas*.

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[10] Foreign governments have declined to accept prisoners the United States will not accept itself. *See, e.g.*, Craig Whitlock & Karen DeYoung, *Europe Objects Anew to Detainees*, WASH. POST, May 29, 2009; *Europe Wants US to Take ex-Guantanamo Inmates: Diplomats*, ASSOCIATED FOREIGN PRESS, May 27, 2009, *available at* http://www.google.com/hostednews/afp/article/ALeqM5j7nWGy9Fdo6XbvFTXFYok5Geitlg; Katja Gloger & Miels Kruse, *Prisoners in Guantanamo: An Uyghur's Story*, DER STERN, May 20, 2009, *available at* http://www.stern.de/politik/ausland/701389.html; *German Foreign Minister Opposes Taking Uighur Guantanamo Inmates*, SPIEGEL ONLINE, May 18, 2009, *available at* http://www.spiegel.de/international/germany/0,1518,625453,00.html.

B. If The Immigration Laws Purported To Bar A Remedy, Then The Clash Between The Immigration Regime And *Boumediene*'s Mandate Would Itself Demonstrate The Singular Importance Of This Case And The Necessity Of *Certiorari* Review.

The Executive rests on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Opp. 15-16. *Mezei* did not authorize the Executive to transport aliens to our threshold and imprison them there. Just the contrary: the majority strove to frame the case as presenting no question of executive detention at all. *See* 345 U.S. at 207-08, 213, 215. Mezei, the Court determined, had been stopped at the border by an actual immigration order and several times had left and returned. *Id.* at 211. The majority went to semantic pains—calling Ellis Island a haven, a refuge, a harborage, anything but a prison—to frame the case as *not* involving executive detention. *See, e.g., id.* at 213, 215. The historian's eyebrow (like the dissent's, *see id.* at 220) may rise at these characterizations, but the jurist concerned with precedent is constrained by them.

To claim *Mezei*'s authority, the Executive must characterize what has happened here as something other than arrest and imprisonment. For *Mezei* provides no precedent for arrest abroad, transportation to, and long imprisonment at the threshold. This explains the color in the Executive's brief—why the Guantánamo prison becomes a sort of Chautauqua village that abounds with picnic tables and television sets. Opp. 5. A secure military prison is transformed into a "house," *see* Opp. 5; Petitioners' imprisonment becomes "harborage" (just as Mezei's was characterized),

id., 12, 25; and prisoners surrounded by razor wire, armed soldiers, and guard towers are said to be "free to leave," *id.*, 2.

The purpose of this verbal joinery is to push *Kiyemba*'s square peg into *Mezei*'s round hole. But it will not fit. For this case *does* involve imprisonment. The small, dusty prison camp at issue here is surrounded by impenetrable wire and patrolled by armed guards. No spouse, child, friend or other visitor comes to it; no employment and little life of the mind are available in it. Communication with the world is strictly limited and monitored. An ocean may be in view, but Petitioners cannot touch it. Day and night they are watched, as they have been for over seven years. These conditions may worsen tomorrow. For over a year, most Petitioners were held in the excruciating isolation of Camp Six. *See* JA 1118-19. If their imprisonment survives the Petition, they may be returned there whenever a new MP unit arrives, as happens frequently.

Mezei does not support these imprisonments. But the asserted clash between immigration powers and *habeas* rights does demonstrate the need for and importance of this Court's immediate intervention.

C. The Executive Apparently Concedes Two Dispositive Points.

Petitioners showed that release is an indispensable element of the writ. Pet. 22-24. The Executive evidently agrees. While framing the relief Petitioners seek as release *plus* transfer, the Executive does not contest that release is an element. Yet it never explains how its construction would permit the judiciary to order that release. If its position is that the court cannot not do

so, it has conceded that its position strips a core element from *habeas*.[11]

The "release plus transfer" trope is wrong in any event. Release *is* transfer—but only because of the nature and locus of the prison to which the Executive brought Petitioners. Because the writ works on the jailer, not the prisoner, *see* Pet. 18-22 (another point undisputed by the Executive), a granted writ in a Guantánamo case should simply order that jailer—the Executive that caused both the fact and the locus of the imprisonment in the first place—to cause its end. In most cases, the Executive can do this by means of a safe and lawful release home or elsewhere (*i.e.*, through its unique diplomatic competence). If the Executive cannot or will not (courts need not inquire), then it must cause release wherever it lawfully can do so. But the Executive is not free to withhold release altogether.

Here the *habeas* judge ordered the locus of release, but only because in this unique case it is undisputed that there were no alternatives. The pattern in the usual case should simply be a release order within thirty days, or some similarly limited time.

D. The Recent Activities Of The Political Branches Do Not Mandate Denial Of The Petition.

The Executive alludes to a political fracas that has erupted over Petitioners. Executive Order 13,492 directed the closure of the Guantánamo prison "no later than 1 year from" January 22, 2009. Opp. 26. On news

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[11] The Executive also failed to contest that immigration laws, if construed to bar a remedy here, would constitute an unlawful suspension of the writ. Pet. 24-26.

that some Petitioners might at last be released, both the House and the Senate passed riders to a bill forbidding the use of government funds to effectuate the release during the current fiscal year. *Id.*, 27-28.

These developments do not counsel against review, for *habeas* courts have never been concerned with the political hysterias of the moment. *See, e.g., Moore v. Dempsey*, 261 U.S. 86, 91 (1923). The Chief Justice has rightly reminded us that "the Framers insulated the federal judiciary from popular pressure in order that the courts would be able to discharge their responsibility of interpreting the law *and enforcing the limits the Constitution places on the political branches*." Roberts, C.J., Responses to Senate Judiciary Committee Questionnaire, August 1, 2005 at 66 (emphasis supplied).[12] Should Congress actually enact, and the President actually sign, a bill of attainder or yet another plain suspension of *habeas*, the matter can be addressed at the merits stage.

It is no answer to unlawful executive detention to say that the President has issued an order to himself, which he may take up at some point in future. *Habeas* is a judicial check, not an executive one, *see Boumediene*, 128 S. Ct. at 2247, and what the President said in January 2009, he may unsay in January 2010. Besides, if the President has already decided that some Guantánamo prisoners may ultimately cross into the

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[12] Chief Justice Roberts' Responses to Senate Judiciary Committee Questionnaire, August 1, 2005, *available at* http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/supreme_court_watch/roberts-judiciary-questionnaire.htm.

fifty states if necessary to close the prison, why must Petitioners abide an eighth year of unlawful detention before doing so? The answer does not appear.

What does appear from these political developments is the urgency of *certiorari* review. Both the President's Executive Order and recent legislative activities demonstrate the singular importance of this case to the political branches.

But it is the Third Branch, confined by the decision below to exhortations, whose historic role most urgently needs this Court's review. The significance of *Boumediene*—of which both the majority and the dissenting Justices were well aware—lies in its reaffirmation that the historic role of the Judicial Branch is to demand the release of prisoners precisely when the political branches find release inconvenient. For this reason the decision was welcomed at home and abroad as a vindication of the Great Writ. Yet the decision below holds, and the Executive now argues, that the prisoners' position on the day the Court announced its decision was no different than it had been for six years before. They would remain jailed until the Executive chose to release them. This Court might wonder today why every Justice thought so much was at stake in *Boumediene*.

At bottom, the decision below posits a hollow writ and a hobbled judiciary. Should this petition for *certiorari* fail, the federal courts will have sanctioned, within their jurisdiction, unlawful executive imprisonment that may yet extend the indefinite to the infinite.

CONCLUSION

The Court should grant *certiorari* review.

Respectfully submitted,

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