No. 10-775

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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REPLY

A. Appropriateness of *Certiorari* Review.

The constant in this case is the court of appeals' refusal to apply, or even acknowledge, the holding of *Boumediene v. Bush*, 553 U.S. 723, 787 (2008), a serious failure requiring prompt supervision and correction. The record changed while the case was last here, but it frames today the core question of the Court's judicial power just as sharply and urgently as it did when *certiorari* first was granted in 2009. The government focuses on unique facts, but the decision below was not confined to them. The government cannot explain why the Court should not now correct a decision written to control the entire Guantánamo docket, when Petitioners have suffered the same denial of judicial remedy that is now the lot of every *habeas* winner at Guantánamo.

1. The remedial question left open by *Boumediene* was not whether a judicial remedy is available when U.S. release is the only conceivable end to detention. The question left open was when it is "necessary" for a judicial officer to issue an order directing the prisoner's release. *Id.* at 787. While the subsequent flow of district court decisions might have developed a jurisprudence of "necessity," *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*") erected a dam, which was reinforced in *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) ("*Kiyemba III*").

When is it "necessary" for the judge to direct the prisoner's release? The law of the circuit is, "Never." That is one answer—although one impossible to rec-

oncile with the *Boumediene* holding, 553 U.S. at 787. The government lightly suggests a second: a release order is necessary only if there is no other place on earth where the detainee might volunteer to take himself to moot the case. *See* Opp.18-19 ("Even assuming that [a release order] could have been warranted at an earlier stage of this case . . . it is clear that such relief is not available now."). Petitioners have a third answer. A release order is necessary where (a) the home country is unavailable under the Convention Against Torture, (b) the Executive has not exercised its power of unilateral removal,[1] and (c) the parties have not settled the case. Only this answer limits the Court to its natural function (resolving a case or controversy before it), takes it out of diplomacy, and leaves to the political branches, operating under Title 8, the question of removing the undocumented alien after his release from detention.

Perhaps there are other answers. But an answer is urgently needed. In hundreds of pending cases, judges with jurisdiction may face the remedy question. The court of appeals, however, has stripped the central feature of their judicial power—the ability to require a remedy—and delegated it to the Executive.

2. The posture of this case changed in its fifth year, after the court of appeals denied relief and Petitioners first requested review here. A release order surely was necessary when no alternative would end the imprisonment. But that circumstance was not

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

the only framing of what constitutes "necessity" for judicial relief. The question when a release order is "necessary" remained unanswered when Petitioners declined to go to Palau.

Petitioners requested fact-finding after this Court's remand. Denial of that request left the record in dispute. The parties agree that Petitioners rejected an offer to be resettled in Palau, and that there is at present no country willing to resettle them. The "second offer" is in dispute. A country made an offer late in 2009, but after certain petitioners asked for clarification of its terms, it was withdrawn. In light of the country's foreign relations, Petitioners believe that a record would show that despite the State Department's good faith, there never was a reliable offer at all, *i.e.*, the foreign relations of the place are such that, as soon as an offer became public, Chinese pressure would have forced its withdrawal.

Had the court of appeals remanded for fact-finding and ruled narrowly, this Court in turn might—or might not— have concluded that a "necessity" ruling grounded in the record warranted review. But the panel majority ruled, as the concurring judge wrote, overbroadly. *See* Pet.App.6a. That ruling eliminated the necessity holding altogether, and with it, the judicial power this Court had acknowledged in *Boumediene*. *See infra* at 5-9.

It is not, as Circuit Judge Rogers observed, that the prisoners hold the keys in their hands. That metaphor might fit an alien who comes willingly to the border seeking admission and refuses an offer to

leave. But it ill fits the prisoner brought by the Executive against his will to a jurisdiction where the writ runs, for the writ is by definition the right to be brought to the courthouse and released. The government pointed to no law that lets the Executive substitute for that historic remedy a choice by which the prisoner must volunteer to be transported—perhaps for the rest of his life—to a place with which he has no affiliation, or lose his judicial remedy.

After his release from that indefinite detention, of course, the undocumented alien will be subject to the political branches, under Title 8. *See generally Clark v. Martinez*, 543 U.S. 371 (2005). The alien's "lack of cooperation" may well be considered by an immigration judge, along with other factors, but it does not automatically lead to incarceration, and there are significant constitutional limits on such incarceration. *See generally Clark*, 543 U.S. 371; *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Petitioners rejected a Palau offer that has since been withdrawn. What then? May the Executive imprison them for the rest of their lives, forever subject to Executive discretion that is entirely beyond judicial review? Those questions remain unanswered.

3. A further rationale for this Court's review arises from the separation of powers. *Habeas* is a sure judicial check upon the Executive. *Boumediene*, 553 U.S. at 745. Prompt release from detention is its hallmark. *See id.* at 779, 787-88; *Clark*, 543 U.S. at 386-87; *Zadvydas*, 533 U.S. at 702. If the "necessity" for a judicial order cannot be addressed until a "no

alternatives" case arises, then (a) all question of prompt remedy is gone, and (b) the Executive can—as it did here—preserve its conscription of the judicial power by focusing discretion on those cases that inch their way up the ladder of review.

Review would give needed guidance to the lower courts regarding the "necessity" of release orders. Even *vacatur* with instructions that the court of appeals remand to the district court to make a record and consider whether that record meets this Court's "necessity" holding, would help address this important question.

B. The Government Fails to Address the Core Problem: *Kiyemba*'s Strip of the Judicial Power.

The Opposition does not explain how the trial judge constitutionally may be deprived of the judicial power.

1. "The writ of habeas corpus is effective at Guantánamo Bay," the government writes here. Opp.11. But below it argues that, after *Kiyemba*, the *habeas* judge can do nothing meaningful. *See* Respondents' Mem. in Support of a Stay of Proceedings Involving Pet'rs Who Were Previously Approved for Transfer at 5 [dkt. no. 1058], *Al Sanani v. Obama*, No. 05-02386-RBW, (D.D.C. Mar. 9, 2009). Although the *habeas* petitioner remains imprisoned, the government tells district judges that "the Executive's decision approving a detainee for transfer may render the detainee's request for *habeas* relief, *i.e.* release,

moot." *Id.* As recently as January, the government renewed this theme.[2]

The government cites the exercise of its own discretion, neither enforced nor checked by the court. That is not a judicial remedy. The Uighur cases illustrate. Since 2006, seventeen Uighurs have been released, but none by judicial order. The law of the Uighur cases at the time of each Uighur release—from the first five (2006, Albania) to the last two (2010, Switzerland)—was that the prisoner had no judicial remedy. The government lost its merits case against the Uighurs in 2008, but no judicial order has ever directed release for any winner—be he Uighur or any other prisoner who prevailed.[3]

2. *Kiyemba*'s delegation of the judicial power to the Executive receives a late and light touch. *See* Opp.25. The government never addresses how a court with jurisdiction in a case involving aliens held offshore, can constitutionally delegate remedy en-

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[2] *See* Letter Supplement to Reply, lodged with the Court under seal on February 18, 2011.

[3] The government says, Opp.25, that "the habeas courts have ordered the release of prevailing habeas petitioners *from detention as enemy combatants*" (emphasis added)—evidently a reference to changes in *status*—and "have further ordered the government to repatriate or resettle them," *id.* 25-26. It cites to orders that the government engage in diplomacy, not orders that the government *achieve* either "repatriation or resettlement," which the Court is powerless to direct. The examples given, Opp.14-15, are all of Executive diplomacy unreviewable by the Court.

tirely to the Executive.[4] The problem is acute because the case involves a judicial writ that is supposed to check Executive power, *Boumediene*, 553 U.S. at 765-66 (*habeas corpus* "designed to restrain" the political branches and is "an indispensable mechanism for monitoring the separation of powers"). In cases of indefinite Executive detention, the judicial power is at its strongest. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). After *Kiyemba* there is neither check nor judicial power. The government does not dwell on (its argument section never mentions) the precise holding of *Kiyemba*—rendered in 2009 (when the government conceded there was no appropriate alternative), which now controls every detention case:

> The government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more.

Pet. 32a. In 2010, the court of appeals reinstated this holding. Pet.App.5a. Thus trial judges in the only circuit with jurisdiction have no power beyond

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[4] *Chessman v. Teets*, 354 U.S. 156 (1957), is irrelevant—it involves *habeas* relief granted to a criminal defendant who may be re-prosecuted. So too is *Munaf*, where this Court determined that an order protecting the prisoner from a lawful prosecution was unavailable on the facts of the case. *Munaf v. Geren*, 553 U.S. 674 (2008); *see also id.* at 706-07 (Souter, J., concurring) (emphasizing that particular facts informed conclusion that *Munaf* petitioners were not entitled to relief).

requiring "representations" of the jailer that it is attempting diplomacy. The government cites no authority that requiring such a representation is a *habeas* remedy, or a judicial remedy at all. It does not explain how an order could be enforced. The effect of this is that where the prisoner is an alien (as all Guantánamo prisoners are), there is jurisdiction (*Boumediene*), but no power to issue an enforceable order (*Kiyemba*). And thus, checkmate: the court that *Boumediene* reversed has now effectively overruled it.[5]

The argument that Executive discretion is working is further undercut by a recent, remarkable change in the law. The court of appeals created a new standard of *de novo* review in Guantánamo cases. *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, — S. Ct. — (2011). The evidence was conflicting and the prisoner testified. The trial judge assessed credibility and decided the case. Reaching a different factual conclusion, the court of appeals reversed, jettisoning the "clearly erroneous" standard, substituting its factual determination, and dressing that exercise in quasi-mathematical robes of "conditional probability." To say, after *Adahi*, that all prisoners with a final judgment have gone from

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[5] *See* The Guantánamo Mess (Oct. 20, 2010), http://www.heritage.org/Events/2010/10/Guantánamo-Mess (author of *Kiyemba I* and other leading circuit decisions describes *Boumediene* majority, by reference to F. Scott Fitzgerald's THE GREAT GATSBY (1925): "They were careless people, Tom & Daisy—they smashed up things and creatures . . . and let other people clean up the mess they had made;" describing majority's "blunders" and "fallacies").

Guantánamo is simply to say that at the current moment, no prisoner has successfully completed the second of the two factual trials he must win.[6]

3. The *Kiyemba* panel never referred to this Court's holding that the *habeas* judge "must have adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Boumediene*, 553 U.S. at 787. The Opposition does not explain how the two cases can be reconciled,[7] and they cannot. *See* Opening Br.18-20. *Habeas* cases show that the writ gave power to Judge Urbina to order the prisoners brought to his courthouse for the fashioning of release conditions. *Id.* at 15-16. The government's response is that those cases are "early," Opp.17, but the Suspension Clause was early too. It secures an "early" writ, not a late one: at the very least, the writ as it existed in 1789. *St. Cyr*, 533 U.S. at 301.

4. The government says that it has diligently pursued diplomacy. That is true in the Uighur cases, but irrelevant to the question presented. A *habeas* petition is not a request for diplomacy. The writ does not direct that the Executive work hard; it requires the Executive either to justify detention or release

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[6] This week the court summarily vacated a granted writ, citing *Adahi* and noting "no useful purpose in reciting the evidence." *Hatim v. Gates*, No. 05-01429, slip op. (D.C. Cir. Feb. 15, 2011).

[7] "Conditional release," *see* Opp.16, refers to defective prosecutions where the government may retry.

the prisoner.[8] The government next asserts that "an order of release into the United States could interfere with the United States' resettlement efforts generally." Opp.21. Even if this were relevant, it is not what the government actually believes. "In cable after cable sent to the State Department in Washington, American diplomats make it clear that the unwillingness of the United States to resettle a single detainee in the country—even from among 17 ethnic Muslim Uighurs . . . made other countries reluctant to take in detainees." Carol Rosenberg, *How Congress Helped Thwart Obama's Plan to Close Guantánamo*, THE MIAMI HERALD, Jan. 22, 2010, http://www.miamiherald.com/2011/01/22/2029364/how-congress-thwarted-obamas-closing.html (quoting State Department cables).

5. Congress did not eliminate the judicial power to bring the prisoner before the court and there release him. Opp.18. Nothing in 28 U.S.C. § 2243 does this. Section 2255 is concerned only with post-sentencing review in criminal cases. It has nothing to say in Executive detention cases like this one.

6. The government argues that a series of statutes bars United States release to these Petitioners, noting that control of the border is a power of the political branches. Opp.19-23. None of that material is germane. One of the political branches brought Petitioners, against their will, to the jurisdiction of the Court. The Court is not ordering the crossing of the

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[8] A prisoner does not win his case by changing his "status." *See* Opp.2, 15. "Change in status" is *not* what Petitioners requested in their *habeas* petitions.

border. In law, the Executive already crossed it, at least for the narrow purpose of fashioning *habeas* relief.

Turning to the NIMBY bills themselves, the government does not argue that no logistical path to U.S. release survives the appropriations maze, but only that "[t]his legislation lends additional support to the decision of the court of appeals." *Id.* at 25. Many textual difficulties infect the legislative argument, should the government advance it in merits briefing. For example, most of the statutes apply only to "detainees" and persons "detained," *see* Opp.23-24, and the government argues that Petitioners are not detained, but merely housed. Opp.4.

If any of this legislation reaches Petitioners, it violates the Suspension Clause. Each bill was enacted after Judge Urbina ruled; each would deprive the prevailing petitioner of *habeas*. The government's only answer to this problem is to say *habeas* confers no right of U.S. release in the first place. Opp. 25. If that were true, it would be unnecessary to reach the bills. And if it is necessary to reach the bills (because *habeas* does confer a U.S. release right, *see Boumediene*, 553 U.S. at 787), then the government has not explained why they do not violate the clause.

It is also clear that the bills are legislative punishments, intended to incarcerate at Guantánamo persons who had won their *habeas* case. As applied to these petitioners, they are unlawful bills of attainder. Opening Br.25 n.14. The evidence of punitive intent was manifest. Hysteria surrounded the near-

release of Uighurs in the spring of 2009, when Senator Thune denounced them as "bent on the destruction of the United States," other politicians uttered similarly-antic falsehoods in Congress, and the Executive lost its nerve. *See id.* at 25.[9]

The government makes a passing reference to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Opp.28. *Mezei* did not authorize the judicial branch to delegate remedy to the Executive, nor authorize the Executive to transport aliens to our threshold and imprison them there. 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 211, 213, 215. *Mezei* provides no precedent for arrest abroad, transportation to, and long imprisonment at the threshold.

CONCLUSION

The Court should grant *certiorari* review.

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[9] The State Department has advised allies since 2004 that the Uighurs were innocent, and suitable for release into the community. In 2009, ex-Guantánamo Uighurs had been living peacefully in Albania and Sweden for three years.

Respectfully submitted,

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