[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDUL RAZAK ALI,
Petitioner-Appellant,

v.

DONALD J. TRUMP, et al.,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER-APPELLANT

H. Candace Gorman
Law Office of H. Candace Gorman
220 S. Halsted, Suite 200
Chicago, Illinois 60661
Tel: (312) 427-2313
hcgorman@igc.org

J. Wells Dixon
Shayana Kadidal
Pardiss Kebriaei
Baher Azmy
Center for Constitutional Rights
666 Broadway 7th Floor
New York, NY 10012
Tel: (212) 614-6438
kadidal@ccrjustice.org

Counsel for Petitioner-Appellant

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INTRODUCTION

Petitioner Ali argues that the Due Process Clause of the Constitution extends to Guantánamo and limits the duration of his detention. The district court rejected that argument on the ground that this Court's decision in *Kiyemba* bars detainees categorically from invoking constitutional due process protections. This Court's recent decision in *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019), directly and unequivocally rejects that interpretation of *Kiyemba*. That decision alone compels reversal of the district court's decision here. But this Court can and should go farther.

First, the Court should affirmatively hold that the Due Process Clause applies at Guantánamo. The government does not dispute in its opposition brief—and did not argue before the district court—that recognition of due process rights at Guantánamo would be impracticable or anomalous under the governing extraterritoriality test set forth by the Supreme Court. Rather, as if *Boumediene* had never been decided, the government attempts to resurrect *Eisentrager* and formalistic notions of territorial sovereignty to argue that Ali has no due process rights whatsoever because he has no presence or property in the United States. But *Boumediene* makes clear that whether the Constitution applies to non-U.S. citizens in territories over which the United States exercises constant jurisdiction and control requires a functional rather than a formalistic analysis. Just as there are no

practical or structural barriers to application of the Suspension Clause to Guantánamo, there are no such barriers to preclude the imposition of limits to detention under the Due Process Clause. The government has identified none.

Second, the Court should hold that Ali's seventeen-year detention violates substantive due process as a matter of law. Substantive due process imposes a limit on his detention, including a durational limit that compels relief regardless of the original basis for his detention. Because the Executive has determined—as a matter of policy and in practice—that no one will be transferred from Guantánamo regardless of individualized circumstance, which the government also does not seriously dispute, Ali's ongoing and potentially lifetime detention lacks the specific, non-punitive purpose that substantive due process requires. Indeed, the government does not seriously contest Ali's central claim that absent judicially-imposed due process limits to his detention, he will likely die at Guantánamo. The government's only response is to state that Ali's detention is not indefinite, but rather will end when hostilities end. That is no limit at all, given that the government does not dispute that the conflict in which Ali is purportedly detained is unlikely to end within his lifetime. The bottom line is the same in any event: absent judicial relief, Ali faces a life sentence for his "principal sin" of staying at a guesthouse for about eighteen days nearly two decades ago, based on the same legal standard applicable

to negligence claims. That shocks the conscience, is offensive to concepts of ordered liberty, and violates substantive due process.

In the alternative, this Court should hold that Ali's continuing detention violates procedural due process. This Court's decision in *Qassim* makes clear that nothing in Circuit precedent stands in the way of such a ruling, and implicitly suggests that detainees such as Ali are entitled at least to some procedural protections guaranteed by the Due Process Clause, by observing that *Boumediene* "pointed to both the [Suspension Clause's] guarantee of habeas corpus ... and the procedural protections of the Due Process Clause" in identifying procedural protections that would make habeas review "meaningful." *Qassim*, 927 F.3d at 529. Recognizing the force of these legal arguments, the government instead argues that Ali forfeited or waived his procedural due process arguments by failing to raise them below. That claim is demonstrably incorrect; Ali raised these claims both in his filings and at oral argument below. Ironically, the government raises this objection for the first time on appeal; the government argued below that the procedural due process issues were purely a matter of law. That is correct: a long line of Supreme Court cases establishes due process standards for indefinite non-criminal detention. Indeed, no court has ever upheld detention without charge that may last a lifetime based on less than clear and convincing evidence. This Court should not be the first to aban-

don that bulwark against unchecked executive power at the expense of individual liberty.

ARGUMENT

I. Petitioner's Specific Procedural Due Process Claims Are Fairly Presented to This Court

The government's central argument below, which the district court accepted as its primary rationale for "summarily dismiss[ing]" Ali's claims,[1] has been rejected by this Court: It is no longer possible to argue that the application of the Due Process Clause to Petitioner Ali's detention is foreclosed by *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009). In *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019), decided on June 21, several weeks after the filing of Ali's opening brief, this Court held that nothing in this Court's prior precedents forecloses application of the Due Process Clause to challenges to detentions at Guantánamo:

> In denying Qassim's motion in limine [challenging the government's use of classified information undisclosed to petitioner as a basis for his detention], the district court ruled that, as an alien Guantanamo detainee, Qassim has no rights under the Fifth Amendment's Due Process Clause. In so ruling, the district court relied on this court's 2009 decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131, *and judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).
>
> The district court's ruling that binding circuit precedent denies Qassim all rights to due process was in error. *Kiyemba* did not so hold. That decision ruled only that the Due Process Clause does not invest detainees who have already been granted habeas corpus with a substantive due process right to be released into the United States.

[1] *Ali v. Trump*, 317 F. Supp. 3d 480, 488 (D.D.C. 2018), App. 13-19.

> That decision did not decide, or have any occasion to address, what constitutional procedural protections apply to the litigation of a detainee's habeas corpus petition in the first instance. Nor has any other decision of this circuit adopted a categorical prohibition on affording detainees seeking habeas relief any constitutional procedural protections. The governing law, in fact, is that Qassim and other alien detainees must be afforded a habeas process that ensures "meaningful review" of their detention. *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

Qassim v. Trump, 927 F.3d 522, 524 (D.C. Cir. 2019).

The Court remanded *Qassim* to the district court to determine in the first instance whether the parties' dispute implicated the Due Process Clause because, unlike Ali's case, which was decided on an extensive record after a multi-day trial and is ripe for decision by this Court, Qassim stipulated to his detainability under existing precedent. Qassim had claimed below that he lacked proper "access to classified information underlying the government's [justification for detention] so that [he] c[ould] confront and challenge it," 927 F.3d at 530. When his initial motion seeking access to such information on due process grounds was rejected, he stipulated facts to facilitate an appeal on the applicability of the Due Process Clause to his detention.[2] This Court held that he should have first attempted to ar-

[2] Qassim filed a motion in limine that "asked the district court not to rely on any evidence 'that was not provided in advance and in writing to [him] [and] * * * that was not accompanied by the full disclosure of all information in the government's possession bearing on the weight, provenance, and accuracy of the evidence[.]'" *Qassim*, 927 F.3d at 527 (quoting Qassim's motion from joint appendix). The district court (per Hogan, J.) denied it, reading *Kiyemba* to foreclose any due process right of access to the material. *Id*. The parties then stipulated facts with

gue below that the existing case management order would allow him to "'receive[ ] ... all of the information to which he * * * claims due process entitles him,'" which might have obviated the need to reach the constitutional issues. *Id*. at 531 (quoting Gov't Br.). Accordingly, his case was remanded by this Court to decide that question, *id*., and only then, if need be, "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment (or any other constitutional source, *see, e.g.*, Suspension Clause, U.S. Const. Art. I, § 9, cl. 2) in adjudicating their habeas petitions," *id*. at 528, with the explicit admonition that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions, and where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or elsewhere)." *Id.* at 530.

The instant case presents the first opportunity for this Court to resolve some of these open questions of law, which do not require remand and are properly before this Court. The district court in this case relied primarily on the same ground as Judge Hogan did in *Qassim*—"that *Kiyemba* had firmly closed the door on procedural due process claims for Guantanamo Bay detainees," *Qassim*, 927 F.3d at

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a reserved objection to the district court's position that *Kiyemba* foreclosed the application of procedural protections to Qassim under the Due Process Clause. *Id*.

528. But the district court went further, making it clear that resolution of the due process issues is necessary to Ali's case:

> Even assuming the due process clause extends to Guant[ána]mo Bay – which, under the law of our Circuit, it does not – these cases are inapposite because our Circuit Court previously endorsed the very procedures Ali now challenges. *See Al-Bihani*, 590 F.3d at 878 (rejecting argument that "the prospect of indefinite detention" requires a reasonable doubt or clear-and-convincing standard, and instead endorsing a preponderance-of-the-evidence standard in determining whether detainee was part of or substantially supported Al Qaeda, the Taliban, or associated forces); *see also id.* at 879 (permitting use of hearsay evidence); *Al Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010) ("It is now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF."); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) ("[A] preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo Bay, Cuba."); *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (affording presumption of regularity to government intelligence reports); *Ali*, 736 F.3d at 546 (affirming district court's inference that detainee captured at al Qaeda guesthouse was a member of al Qaeda). Thus, even were Ali eligible for the protections of the due process clause, these cases would foreclose his procedural arguments.

Ali v. Trump, 317 F. Supp. 3d 480, 488 n.9 (D.D.C. 2018), App. 18-19.

Notwithstanding this alternative holding, upholding "the very procedures Ali *now challenges*," *id*. (emphasis added), the government claims Petitioner failed to present the issue to the district court. Gov't Br. at 24 ("petitioner has failed to show that his preferred evidentiary standard would make any difference as to the lawfulness of his detention").

That claim is manifestly false. Ali's motion to the district court identified the rules he would have applied to his case, and presented domestic precedents supporting those standards. *See* Corrected Mot. for Order Granting Writ of Habeas Corpus at 22-26, *Ali v. Trump*, No. 10-cv-1020 (RJL) (D.D.C. Mar. 6, 2018) (Dkt. No. 1527) (hereinafter "Pet. Mot."); *cf*. Brief for Petitioner-Appellant at 22-30 (hereinafter "Pet. Br.") (describing application of procedural due process). The application of the legal standards Petitioner argues are mandated by the Due Process Clause to the facts of his own case was also discussed at oral argument below. After detailing the relevant substantive due process factors (Transcript of Oral Argument at 10-11, *Ali v. Trump*, No. 10-cv-1020 (RJL) (D.D.C. Mar. 23, 2018) (hereinafter "Tr.") (attached as Reply Appendix A), including whether continued detention still served its ostensible intended purpose of preventing return to the armed conflict (which would involve a broad-ranging analysis of factors "that would render ... his continuing detention unnecessary," such as age, infirmity, and the state of the conflict, Tr. at 22-23), counsel for Petitioner detailed some of the factual questions that would need to be litigated under a new standard, consistent with procedural due process, for continuing-detention challenges:

> [Petitioner] has been held too long, and that is without the procedural safeguards that I mentioned previously; and under a different standard, under the clear and convincing evidence standard.
>
> And that's an important issue in this case. I mean, as Your Honor knows—I mean, and the D.C. Circuit pointed out, this case in-

> volved a finding that he was part of an Al-Qaeda-associated force based on a series of inferences drawn from circumstantial evidence.
>
> So to take one example, there is, in the unclassified opinions, reference to the diary,[3] right? There are all kinds of questions about the providence, the accuracy, the reliability of the diary. And I respectfully submit, under a clear and convincing evidence standard, that would not—that would not result or should not result in a finding of continuing detainability, right, because ... there is... a higher standard. As we said, it is not a preponderance standard. That was the standard the D.C. Circuit has said is constitutionally permissible for concluding whether someone was part of Al-Qaeda, but … [t]he D.C. Circuit has not decided a case where continuing detention authority is challenged under the due-process clause.
>
> So Your Honor would have to examine the initial basis for detention under a higher standard [than had been applied previously. Due process demands that review of continuing detention of this length] is a much more searching inquiry. It's an inquiry that Mr. Ali has not had; and today, at Guantanamo, we respectfully submit that his detention violates due process and that Your Honor should grant the writ and issue [an order] to show cause why he shouldn't be released. Thank you.

Tr. at 23-25. As is clear from this last statement, Petitioner contemplated and proposed a mode of proceeding that would establish those rules in the first instance and then allow the government to defend its factual allegations and evidentiary submissions in a response to the court's order to show cause.

In short, the significance of application of the Due Process Clause to Ali's individual case was hardly raised "[o]nly on appeal," as the government would

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[3] *Ali v. Obama*, 736 F.3d 542, 547 (D.C. Cir. 2013) (citing *Barhoumi v. Obama*, 609 F.3d 416, 425-26 (D.C. Cir. 2010)), gives a brief reference to the contribution of "a diary kept by an Abu Zubaydah associate" to the government's case, but does not describe numerous concerns regarding the provenance and reliability of the diary. Some of those concerns are discussed at greater length in this Court's opinion in *Barhoumi*, 609 F.3d at 427-32.

have it, Gov't Br. at 24.[4] Nor is the "accuracy" of the relevant facts here "undisputed." *Id*. at 25. The provenance and reliability of almost every item of evidence in the original hearing (down to photographs purportedly of Petitioner and statements purported to be his own) was hotly contested. The very premise of Ali's motion, seeking application of procedural due process standards to his detention, is that application of such standards to the mass of hearsay "documents 'produced in the fog of war by a clandestine method that we know almost nothing about,'"[5] es-

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[4] The fact that the government *twice* qualifies its waiver claim by arguing that details regarding the specific application of the Due Process Clause to Ali's case were absent from Ali's "filings," Gov't Br. at 24, 26, is a red flag that its waiver argument is disingenuous—as is the fact that the government just last week took an inconsistent position in another case pending before this Court. In a detainee mandamus petition currently pending before a panel of this Court, seeking "prompt" district court attention to 19 pending motions including the collective Due Process motion at issue in the instant appeal, the government requested this Court hold the mandamus in abeyance pending the outcome of this appeal:

> But it would not be unreasonable for the district court to await a decision in *Ali*, as that decision may produce binding precedent that controls the outcome of the habeas motion and informs the nature of the habeas proceedings.
>
> … After this Court decides *Ali*, that decision will be a basis for the district court to resolve the identical habeas motion pending in this case.

Gov't's Motion to Govern at 5-6, *In re Husayn*, No. 19-5045 (D.C. Cir. Aug. 15, 2019) (Doc. # 1802401); *id*. at 7 (this "Court [should] hold the petition in abeyance pending a decision in *Ali*").

[5] Order, *Qassim v. Trump*, No. 18-5148, 2018 WL 3905809, at *2 (D.C. Cir. Aug. 14, 2018) (Doc. # 1745386) (Tatel, J., concurring in denial of petition for initial hearing en banc) (quoting *Latif v. Obama*, 677 F.3d 1175, 1208 (D.C. Cir. 2011) (Tatel, J., dissenting)).

tablishing the short list of facts the government claims previously supported his detention, Gov't Br. at 25, would produce different results in the context of continuing detention. Inferences from contested facts pushed Petitioner's case over the preponderance standard in the judgment of his prior appellate panel, Pet. Br. 23-24 (citing *Ali*, 736 F.3d at 545-51), but the "facts" themselves were taken from hearsay of dubious provenance and reliability: from the "diary" to the purported interrogation statements of other mentally-ill or tortured detainees to Petitioner's own purported interrogation statements, the reliability of nearly every source of the relevant facts was contested during his habeas hearing. *See, e.g.*, [Unclassified Appellate] Appx. at JA1-JA60, *Ali v. Obama*, No. 11-5102 (D.C. Cir. Jun. 11, 2013) (Doc. # 1443998).

Indeed, in its district court opposition to the motion that is the subject of the instant appeal, the government did not protest that Petitioner's presentation was inadequate to detail the impact of Due Process Clause-compliant procedural and evidentiary standards on the outcome of this case. Instead, the government simply stated that the issue was settled by the caselaw of this Circuit. *See* Resp's Opp. to Pet'r's Mot. for Order Granting Writ of Habeas Corpus at 42-44, *Ali v. Trump*, Case No. 10-cv-1020 (D.D.C. Feb. 16, 2018) (Dkt. No. 1525); *id*. at 43 ("Petitioners now call into question the constitutionality of these and other unnamed decisions [establishing procedural standards], asserting that they collectively set the bar

too low to justify Petitioners' continued detention. … [T]his is the wrong forum for these arguments. Simply put, Petitioners again ask this Court to reverse or ignore binding Circuit precedent."); Tr. at 21 ("As for the procedural due-process claims they raise, we simply note to the Court that each is based on binding precedent from the Court of Appeals, and it should be left to the Court of Appeals to reverse it."). In the government's view, such a detailed analysis was pointless in light of circuit precedent; the district court agreed. This Court should, at minimum, enable the detailed analysis the government and the district court found foreclosed below by deciding in this appeal that the Due Process Clause applies to Ali's detention.

II. The Due Process Clause Applies to Petitioner's Detention

As Ali stated in his opening brief, there is no ground for distinguishing between the Due Process Clause and the Suspension Clause in terms of their applicability at Guantánamo. Pet. Br. at 12-14. It is not "impracticable and anomalous" to apply either at the base, "which in every practical sense … is not abroad" but rather "within the constant jurisdiction of the United States," *Boumediene*, 553 U.S. at 768-69.[6] (Indeed, the government does not even attempt to argue otherwise in its

[6] Remarkably, the government argues that *Johnson v. Eisentrager*, 339 U.S. 259 (1950), has already decided that the due process clause is inapplicable to all detentions outside the United States. Gov't Br. at 29-31. *Qassim* forecloses that argument, *see* 927 F.3d at 529 n.5 (distinguishing *Eisentrager* and *Verdugo-Urquidez* as irrelevant to the application of due process to the question at issue here), and the government's citation to *Eisentrager* simply serves to illustrate its

brief—nowhere addressing the "impracticable and anomalous" test.) In addition, while the government attempts to distinguish the Suspension Clause from the Due Process Clause by claiming only the former is uniquely "central[] to the separation of powers," and that the *Boumediene* "Court repeatedly emphasized that its holding turned on the unique role of the writ of habeas corpus in the separation of powers," Gov't Br. at 34-36, both clauses in fact function as structural limitations on the power of the political branches, *see* Pet. Br. at 13; *see also* Pet. Mot. at 8-9 & 9 n.11, which should "follow the flag" at least to places such as Guantánamo, much like the Ex Post Facto Clause that the government conceded applies there, Pet. Br. 16-17; *cf.* Gov't Br. at 36. Both this Court and the Court of Military Commissions Review have also recently issued opinions that appear to endorse the application of the Due Process Clause to the military commission system at Guantánamo.[7]

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refusal to engage with the modern Supreme Court's "impracticable and anomalous" test. Guantánamo is under our government's "complete jurisdiction and control," *Rasul v. Bush*, 542 U.S. 466, 471 (2004); *id*. at 475 (distinguishing Landsberg Prison in Germany, where Eisentrager was held), which makes all the difference under *Boumediene*'s application of the modern "impracticable and anomalous" test (which in turn derives from Justice Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1, 74 (1957), *see* Pet. Br. at 12-14).

The line the government quotes three times from *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) ("*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause."), *see* Gov't Br. at 3, 13, 35, is obviously dictum, as the very next paragraph of the *Myers* opinion makes perfectly clear: "it is on this [qualified immunity] ground we will rest our decision on remand." *Id*.

[7] *See In re Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019) (finding commission judge violated his duty to maintain the appearance and reality of impartiality, mak-

This Court's decision in *Qassim* wiped away any argument that circuit precedent forbade application of the Due Process Clause at Guantánamo, s*ee Qassim*, 927 F.3d at 528-29 (distinguishing *Kiyemba*); *id*. at 530 (distinguishing both *Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), and *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009)). But *Qassim* also held that the question whether the Constitution demanded more than the limited procedural protections that had been applied by the district courts to date had not been resolved by any of this Circuit's cases:

> Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions, and where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or elsewhere).

Qassim, 927 F.3d at 530. Indeed, the *Qassim* panel explicitly freed the district court on remand "to modify the procedures set out in the [district court's standard Guantánamo habeas] case management order as necessary to facilitate resolution of the constitutional questions raised in this case," *id*. at 531. Yet, in the instant case, Judge Leon held that "even were Ali eligible for the protections of the due process clause," various circuit opinions—citing *Bihani*, *Al Odah*, *Awad*, *Latif*, and

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ing reference to due process principles and caselaw, as well as the various recognized codes of judicial conduct and the relevant Military Commission regulations); *Hawsawi v. United States*, CMCR Nos. 18-004, 19-001, 2019 WL 3002854, at *7, *9 (U.S.C.M.C.R. May 14, 2019) ("we must … consider [this mandamus] petition [seeking recusal of military commission trial judge] under … the Due Process Clause").

Ali—"endorsed the very procedures Ali now challenges," and "would foreclose his procedural arguments." *Ali v. Trump*, 317 F. Supp. 3d 480, 488 n.9 (D.D.C. 2018), App. 18-19. That holding does not survive *Qassim*.

* * *

Those procedural due process arguments are appropriate for resolution by this Court on the present appeal. Ali's opening brief set forth an array of procedural due process precedents of the Supreme Court that establish substantive and procedural protections when the government attempts to impose prolonged noncriminal detention. Pet. Br. at 21-23, 25-30. The government's only response on the merits is to argue that the "enemy combatant" context renders every such substantive and procedural due process precedent, including the entire *Mathews v. Eldridge* mode of analysis, inapplicable. Gov't Br. at 18-19 (substantive due process); *id*. at 22-23 (preponderance standard); *id*. at 25-27 (other procedural precedents in detainee habeas cases).

Of course, the *Hamdi* plurality rejected the notion that the *Mathews* analysis was entirely displaced by "the circumstances of war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004); *see also id*. at 531 ("our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated").

But more importantly for present purposes, the government's argument ignores the fact that the very opinion that has served as the original authority for exceptional military detention during the "war on terror"—again, Justice O'Connor's plurality opinion in *Hamdi*—expressly premised that authority on the *temporary* nature of military detention, including the fact that "the conflicts that informed the development of the law of war"—the Hague and Geneva Conventions in particular—were largely interstate conflicts in which there was the prospect of a "conclusion of peace" between definable (state) parties. *Hamdi*, 542 U.S. at 519-21.[8] Ali's motion is predicated on the notion that "continuing" detention—detention that has lasted long enough to no longer be "temporary" but has become arbitrary, prolonged and potentially unending—is no longer justifiable by the constricted process contemplated by the *Hamdi* plurality. As Ali noted in his opening brief, Pet. Br. at 22, the Supreme Court anticipated this development in *Boumediene*:

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war pow-

[8] Even a cursory reading of the lengthy discussion in *Hamdi*, 521 U.S. at 519-21, will dispel the government's claim that the *Hamdi* plurality's concern about indefinite detention is solely confined to "'indefinite detention *for the purpose of interrogation*.'" Gov't Br. at 21.

Equally frivolous is the argument that somehow the existence of the Periodic Review Board process renders Ali's detention "not indefinite," Gov't Br. at 21-22. Among other criticisms of that process, *see generally* Amicus Br. of Human Rights First, *Ali v. Trump*, No. 18-5297 (D.C. Cir. May 23, 2018) (Doc. # 1789097); Pet. Br. at 7, the Board has no power to order release, as demonstrated by the fact that two individuals cleared by the Board remain detained at Guantánamo.

> ers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.

Boumediene v. Bush, 553 U.S. 723, 797-98 (2008); *id*. at 783 ("The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry."). Indeed, this Court's own 2013 decision in Ali's prior appeal took pains to note that the thin burden of proof it accepted was premised on the temporary nature of the detentions. *See* Pet. Br. at 25 (quoting *Ali v. Obama*, 736 F.3d 542, 545, 552 (D.C. Cir. 2013)).

Even within the framework of a Due Process Clause analysis, and even assuming *arguendo* that it might reasonably be the case that diminished process might have been acceptable in the direct aftermath of capture, it does not follow that such diminished process is acceptable now, seventeen years later. That is implicit in the very nature of the analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. As Ali noted in his opening brief, Pet. Br. at 27, it is precisely because the harms to the detainees now, in year seventeen, are far more severe than in the

first years of their detention that the thin procedural protections that might arguably have passed constitutional muster previously no longer suffice under *Mathews*.

In short, while the government would argue that the enemy combatant framework allows detention so long as any hostilities authorized under the AUMF remain ongoing, "[t]hat construct has long since dissipated." Pet. Br. at 25.

III. The Government's Remaining Due Process Arguments Are Without Merit

A. Ali's Substantive Due Process Claims Are Justiciable

The government complains that Ali's substantive due process claim would impose an "unspecified limit on the length of law-of-war detention" that applies "whenever a court determines that the duration of ... detention 'shocks the conscience.'" Gov't Br. at 18. The same charge might equally be levelled against the phrase "cruel, inhuman and degrading treatment" or any number of other baseline minimum standards for humane military detention practices utilized by governments of civilized nations. The fundamental nature of the prohibition does not render it judicially unadministrable.

Moreover, the Supreme Court's substantive due process precedents dealing with indefinite noncriminal detention set forth far more specific standards. Ali set forth those standards in his opening brief, arguing that due process "prevent[s] perpetual non-criminal detention based on a detention standard focused solely on past

conduct or association, rather than one grounded in present conditions that connect continuing detention to its ostensible purpose of allaying a specific and articulable danger posed by release." Pet. Br. at 29 (citing *Salerno*, *Hendricks* and *Foucha*). The government argues that future dangerousness is non-justiciable because only the executive can evaluate "military conditions and national-security risks," Gov't Br. at 27, but not every claim regarding present danger will implicate such sensitive issues, and the Supreme Court has rejected such categorical assumptions regarding justiciability. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances [conducting independent habeas review of indefinite military detention].... We have long since made clear that a state of war is not a blank check for the President").

B. The Suspension Clause Does Not Impose a Limit on the Scope of Ali's Due Process Claims

The final argument raised by the government is that "even if the Fifth Amendment applied to Guantanamo detainees such as petitioner, he would not be entitled to raise the full panoply of due-process rights possessed by domestic detainees, but at most only those fundamental rights recognized at the time of the Founding as part of the common and statutory law redressable through a habeas petition." Gov't Br. at 37 (arguing that statutory habeas jurisdiction was eliminated

by Congress in 28 U.S.C. § 2241(e)(1) and not restored by the Supreme Court in *Boumediene*). This argument fails for three reasons.

First, it is foreclosed by this Court's precedent. The government "acknowledges" that its argument has been rejected by this Court, which has held that *Boumediene* "'necessarily restored the status quo ante'" prior to the Military Commissions Act of 2006 and permitted a wide array of claims to be asserted through the habeas statute. Gov't Br. at 38 (quoting *Kiyemba v. Obama*, 561 F.3d 509, 512 n.2 (D.C. Cir. 2009)).

Second, the argument is waived. To the extent the government merely seeks to "preserve[]" this argument for further appeal, Gov't Br. at 39, we note that it failed to raise it below, *see* Resp's Opp. to Pet'r's Mot. for Order Granting Writ of Habeas Corpus, *Ali v. Trump*, Case No. 10-cv-1020 (D.D.C. Feb. 16, 2018) (Dkt. No. 1525); Tr. at 18-21, an additional reason that this Court need not address it.

Finally, on the merits this argument is wrong. The government's attempt to distinguish the scope of habeas review at the time of the Founding is misplaced for the simple reason that common law habeas judges had as much power to conduct a robust factual inquiry into the cause of detention and order release as federal judges exercising habeas review pursuant to the federal habeas statute and the Due Process Clause. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise appli-

cation and scope changed depending upon the circumstances."); *see also* Paul D. Halliday, Habeas Corpus: From England to Empire 39-62 (2010) (addressing the evolution and scope of common law habeas review). Moreover, it bears noting that the current Supreme Court seems less than convinced that at the Founding even aliens detained during wartime lacked any rights under the Due Process Clause. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229-30 (2018) (Gorsuch, J., concurring in part) (the "Alien Friends Act," the portion of the Alien and Sedition Acts allowing president to imprison or deport aliens considered dangerous to the peace and safety of the United States at any time, "was understood as a temporary war measure" yet nonetheless "even then … was widely condemned as unconstitutional by Madison and many others").

IV. This Court May Fairly Avoid Constitutional Issues by Narrowly Interpreting the AUMF's Implied Detention Authority

The 2001 AUMF says nothing expressly about detention.[9] Petitioner's opening brief argued that the AUMF's detention authority should be read narrowly "in a manner that avoids the substantive and procedural due process issues" that would otherwise require resolution. Pet. Br. at 31-34. The government, oddly, chose to address this pure avoidance argument first, arguing that the AUMF is "not suscep-

[9] *Cf.* National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1297, 1562, § 1021 (Dec. 31, 2011) (stating that nothing in the 2012 Act is intended to either limit or expand the scope of the 2001 AUMF).

tible of more than one construction," Gov't Br. at 11, and "[e]ven if [it] were," "petitioner has failed to demonstrate that the detention authority conferred by the AUMF raises any serious constitutional concerns," *id*. at 17. The first argument is self-evidently incorrect, given that there is literally no text to interpret here (detention authority being *implied* under the AUMF); the second is predicated on the government's view that Guantánamo detainees lack any due process rights, which is the central disputed issue in the present appeal.

A final point bears emphasis. The government has long contended that the AUMF authorizes the indefinite detention not only of non-citizens detained at Guantánamo, but also of citizens held inside the United States. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). If the government were correct that lifetime detention without charge under the AUMF is constitutionally permissible, then under established canons of statutory construction that would mean that the Executive could detain a U.S. citizen captured in New York City, who, based only on a preponderance of the evidence, was determined to be part of Al Qaeda, the Taliban, or an associated force, for the remainder of his or her life without charge or trial. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (holding that "[t]o give these same words a different meaning for each category [of detainable aliens] would be to invent a statute rather than interpret one"). Congress could not possibly have intended such a result.

CONCLUSION

This appeal fully presents the question of whether the Due Process Clause applies at Guantánamo, a question of law which has remained undecided for far too long given the unfortunate dictum in *Kiyemba*, and which this Court should conclusively decide now. This Court should hold that the Due Process Clause applies at Guantánamo and limits the duration of Ali's detention as a matter of substantive and procedural due process. If this Court remands the case to the district court to determine in the first instance the scope of Ali's procedural due process rights, it should, consistent with Supreme Court precedent governing noncriminal detention, do so with the instructions set forth in his opening brief, Pet. Br. at 11-12, 34-35.

Dated: New York, New York
August 23, 2019

Respectfully submitted,

/s/*Shayana Kadidal*
J. Wells Dixon [Bar No. 51138]
Shayana Kadidal [Bar No. 49512]
Pardiss Kebriaei [Bar No. 51395]
Baher Azmy [Bar No. 50479]
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6438
Fax: (212) 614-6451

wdixon@ccrjustice.org
kadidal@ccrjustice.org
pkebriaei@ccrjustice.org
bazmy@ccrjustice.org

H. Candace Gorman [Bar No. 50901]
LAW OFFICE OF H. CANDACE GORMAN
220 S. Halsted, Suite 200
Chicago, Illinois 60661
Tel: (312) 427-2313
hcgorman@igc.org

Attorneys for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 6,064 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2010.

/s/*Shayana Kadidal*
Shayana Kadidal
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on August 23, 2019.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/*Shayana Kadidal*
Shayana Kadidal
Attorney for Petitioner-Appellant

REPLY APPENDIX A

Transcript of Oral Argument,
Ali v. Trump, No. 10-cv-1020 (D.D.C. Mar. 23, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDUL RAZAK ALI,	)	
	)	
Petitioner,	)	CV No. 10-1020-RJL
	)	
	)	Washington, D.C.
vs.	)	March 23, 2018
	)	3:40 p.m.
DONALD J. TRUMP, ET AL.,	)	
	)	
Respondents.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Petitioner:

H. Candace Gorman
LAW OFFICE
OF H. CANDACE GORMAN
220 South Halsted
Suite 200
Chicago, IL 60661
(312) 427-2313
hcgorman@igc.org

J. Wells Dixon
Shayana Devendra Kadidal
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway
7th Floor
New York, NY 10012
(212) 614-6423
wdixon@ccrjustice.org

APPEARANCES CONTINUED

For the Respondents: Ronald J. Wiltsie
Terry M. Henry
Andrew I. Warden
U.S. DEPARTMENT OF JUSTICE
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530-0001
(202) 307-1401
ronald.wiltsie@usdoj.gov

Court Reporter: William P. Zaremba
Registered Merit Reporter
Certified Realtime Reporter
Official Court Reporter
U.S. Courthouse
333 Constitution Avenue, NW
Room 6511
Washington, D.C. 20001
(202) 354-3249

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Good afternoon, Your Honor. This afternoon, we have Civil Action No. 10-CV-1020, Abdul Razak Ali versus Donald J. Trump, et al.

Will counsel for the parties please approach the lectern and identify yourself for the record.

MS. GORMAN: Good afternoon, Your Honor. Candace Gorman for the Petitioner.

THE COURT: Welcome back.

MS. GORMAN: Thank you.

And at the table with me is Attorney Dixon, who is going to be doing the argument today, and Attorney Kadidal.

THE COURT: Welcome.

MS. GORMAN: Thank you.

MR. WILTSIE: Good afternoon, Your Honor. Ron Wiltsie for the Respondent.

With me at counsel table are Andrew Warden and Terry Henry.

THE COURT: Welcome.

All right, Counsel. We'll hear argument today in

the motion pending before the Court. 20 minutes per side. The moving party can reserve five minutes of the 20 for rebuttal, if they wish.

I don't need to hear oral argument on the AUMF issue because I've already ruled on it, it's on appeal, it was argued this week in the D.C. Circuit. I don't know what they're going to decide, obviously, but it's an issue that I have ruled on, and I don't feel I need to hear any argument on that.

So you can focus on the due-process issues, if you like, and I'll hear argument on that and see where we go.

MR. DIXON: Good afternoon, Your honor. I'm Wells Dixon from the Center for Constitutional Rights. And with the Court's permission, I would like to reserve five minutes of my time for reply.

THE COURT: All right.

MS. GORMAN: Your Honor referenced your prior decision in the *Al-Alwi* case. I believe you're referring to the unraveling argument concerning detention authority under the statute.

I will get right to the point and start out by reminding the Court that Mr. Ali is almost 48 years old and he's been detained for about 16 years without charge.

THE COURT: Yeah.

MR. DIXON: Your Honor did decide that he was

lawfully detained because he had spent approximately two weeks at a guest house back in 2002. And on that basis, that it was more likely than not that he was part of an Al-Qaeda-associated force. That decision was upheld on appeal, and we're not challenging that decision today.

The Petitioner's argument here today is that his continuing detention violates due process. To be clear, it is a challenge to the ongoing duration of his detention.

His argument is straightforward, and that is that he has been detained for too long, on too little evidence, and he now faces the very real prospect of lifetime detention at Guantanamo, which is a due-process violation.

To be perfectly clear, in our view, absent a court order, this individual will very likely die at Guantanamo. I mean, he's already been detained, as I said, for about 16 years, longer than he would have been detained if he had been convicted of providing material support for terrorism by a jury based on proof beyond a reasonable doubt.

And there's no foreseeable end to his detention. You know. You know, as Judge Edwards commented in his concurring opinion affirming Your Honor's denial of the writ, this individual is marked for a life sentence, even though he never engaged in hostilities, never engaged in armed conflict, was never involved in any sort of terrorist attack.

But the government, I'm sure, will argue today he is properly detained for the duration of hostilities. What they mean is lifetime detention.

But I think the parties here agree that the conflict that exists now, to the extent that one exists at all, will not end within the Petitioner's lifetime.

And the government offers no real limiting principle in terms of detention without charge for life based on a preponderance of the evidence.

THE COURT: Well, how about the question they raise about what is the basis for him to have any due-process rights?

He's an enemy combatant being held outside the United States. The Supreme Court, in *Boumediene*, extended the right of habeas to challenge the lawfulness of his detention, but they didn't extend it beyond that, to any other due-process rights. So there's kind of a preliminary fundamental question here that neither the Supreme Court nor the D.C. Circuit, or Congress, for that matter, has addressed.

MR. DIXON: Your Honor, I think -- you're asking the question: Does the due-process clause apply, and I want to be clear about what our argument is.

Our argument is that the due-process clause applies at Guantanamo at least to the extent that it poses a

limit to the duration of his detention.

THE COURT: Has any court said that?

MR. DIXON: Pardon?

THE COURT: Has any court ever said that?

MR. DIXON: No.

What the Supreme Court said in *Boumediene* was that the test for whether a constitutional provision applies outside the United States, and to what extent it might apply, is a functional test.

And we respectfully submit to you that there are no practical barriers that would apply differently to the due-process clause or to the suspension clause, at least, as I said, in terms of imposing a limit on duration of detention.

The government doesn't dispute, they don't argue either that it would be impracticable or anomalous to enforce such a due-process limit at Guantanamo. I mean, that is the test that the Supreme Court used.

We also respectfully submit that Your Honor shouldn't reach a different conclusion and find that it's impracticable or anomalous to impose such a limitation, given what the Supreme Court said in *Boumediene*, which is that Guantanamo is no transient possession. In every practical sense, it's not abroad, and it's within the constant jurisdiction of the United States.

That's very similar to what Justice Kennedy said in *Rasul*, when he said that at every practical respect, Guantanamo is a U.S. territory.

Or you can look at it -- put it in terms that Judge Kavanaugh did in the *Al-Bilal* case en banc in 2014, when he said, Guantanamo is essentially like Puerto Rico, where the due-process clause, of course, applies.

And since *Boumediene*, the government has not disputed the application of the ex post facto clause to Guantanamo, and the Circuit has accepted that.

And I just want to emphasize: That is not an insignificant concession by the government, because when the government made that concession in the *Al-Bilal* case, that undid a number of military-commission convictions. You know, there were -- I think about half of the individuals who were convicted by military commission at Guantanamo were convicted of providing material support for terrorism, and that concession undid all of those convictions. So it's not an insignificant concession.

I also want to emphasize that the *Kiyemba* case doesn't alter our argument here today. I mean, the Court, in *Kiyemba*, did speak, in the few sentences where it addressed the due-process clause, it did speak, admittedly, in broad terms.

But the holding of that case was very narrow, and

that was that the detainees at Guantanamo don't have a due-process right of entry into the United States.

It was really a case and a holding about executive control of immigration at the border, where, of course, the Executive's power is maximal.

That limited scope of the *Kiyemba* holding, I think is clear from the statement respecting the denial of cert in that case that happened in 2011, where Justice Breyer and three other of the Justices framed the issue as an immigration-related issue. They didn't use that term, but that's the clear import of what they were referring to.

And, indeed, I think that's the only way to read *Kiyemba* consistently, both with *Boumediene* and with some subsequent panel decisions of the D.C. Circuit.

I just don't think there's any way that the government could make a concession, for example, in the *Bilal* case about the ex post facto clause, or any way that the Circuit would accept such a concession if the Constitution really didn't apply at all outside the United States.

But I don't think that's the law. I mean, Justice Kennedy wrote, in *Verdugo* -- in his concurring opinion in *Verdugo*, that the principle, of course, is not that the Constitution doesn't apply, but that there may be some rights that don't apply in some instances in some

places.

So, again, to go back to *Boumediene* is a functional inquiry, and we respectfully submit to Your Honor that there is no distinction between the due-process clause and the suspension clause, and there's certainly no decision from any higher court that would bar Your Honor from concluding that due process applies, at least to the extent necessary to limit the Petitioner's detention.

Now, if Your Honor were to conclude, as we believe you should, that the due-process clause applies, I want to emphasize sort of why it would be -- why the Petitioner's continuing detention would be unconstitutional, why it would violate due process.

And for that, I think you have to go back to the Supreme Court in its *Zadvydas* case, where the Court said that a statute that authorizes the indefinite detention of a non-citizen would raise serious due-process concerns. That was a principle and a caution that was expressed both in the majority opinion in that case and in dissent in that case.

So, again, our argument here today is really twofold; one, 16 years of indefinite detention at Guantanamo is simply too long; that that is a, in and of itself, a violation of due process.

But to get really more to particular facts of this case, we believe that Mr. Ali's detention violates due

process.

THE COURT: When do you think it becomes too long?

MR. DIXON: Well, Your Honor, with respect -- I don't think Your Honor needs to decide that question.

We're not asking you to say that ten years is too long or 12 years is too long. All we're asking you to decide is --

THE COURT: Well, you talk about limiting principles. What limiting principle would I apply as to when something becomes too long?

He's being held, in theory anyway, he's being held to keep him off the battlefield until hostilities are over.

Hostilities are not over. The Court has held that, and I will continue to hold that, based on my understanding of the situation that exists and the threat of war over there.

So what would be the limiting principle you would have me apply to when being held becomes too long?

It certainly can't be like pornography: You know it when you see it. That's way too vague.

I mean, what would you propose the Court adopt in that regard, since no other court's ever made such an analysis?

MR. DIXON: Right.

THE COURT: The Supreme Court, Court of Appeals,

no one has ever made such an analysis. You're asking me to go way out on a limb here, way out.

MR. DIXON: Your Honor, what I would respectfully suggest Your Honor do is go back to the long line of Supreme Court cases dealing with non-criminal detention; in particular, non-criminal detention in instances where the Petitioner is not attacking collaterally a prior judgment of the Court.

The Supreme Court, in the *Hamdi* case, looked to domestic authority, after concluding that there may be some power to detain. In terms of what process was due to Mr. *Hamdi*, the Court looked -- the plurality looked to domestic law.

And in the domestic context, the Supreme Court has said, I guess in *Boumediene* and the domestic context, the writ of habeas corpus is the strongest in instances of non-criminal detention, which is what this is.

And if you look to domestic authority concerning non-criminal detention, the continued detention has to serve some legitimate purpose, right?

THE COURT: Well, the legitimate purpose here is he's off the field of battle.

MR. DIXON: Right.

THE COURT: He can't come against -- go against our troops.

MR. DIXON: And it -- there are additional requirements.

One of those additional requirements is that of strict procedural safeguards, not the least of which is proof by clear and convincing evidence.

And it's not just --

THE COURT: He gets a review board proceeding every year, right, twice a year? Is it once or twice a year?

MR. DIXON: Your Honor is referring to the Periodic Review Boards, and let me say something about that.

The Periodic Review Boards don't make the Petitioner's detention constitutional, they don't comport with due process for several reasons. And they certainly don't obviate the role and, indeed, the obligation of this Court to decide whether the individual is --

THE COURT: That's -- well, that's your opinion.

Look, they're getting more due process than any enemy combatant in U.S. history ever got, you'd have to concede that.

We have never, never provided the kind of due process, so to speak, to enemy combatants that we have in this situation here as a result of *Boumediene* and as a result of the military system that's been put in place to review periodically these detainees.

MR. DIXON: Your Honor, there has never been an armed conflict like the current conflict. There has never been, in the history of the United States, nor, to my knowledge --

THE COURT: What, duration?

MR. DIXON: In terms of duration.

THE COURT: How long did the Vietnam War go?

MR. DIXON: Well, if you measure the Vietnam War from the Gulf of Tonkin in 1964, to the Fall of Saigon in --

THE COURT: Oh, it started way before then.

MR. DIXON: If you measure it from 1960 to the Fall of Saigon in 1975, it is still not as long as this conflict.

And I think it's important also to go back to where I started, which is, there doesn't really seem to be any disagreement among the parties that this conflict will continue and will last longer than this Petitioner will remain alive.

THE COURT: Why do you say that?

How old is he?

MR. DIXON: He is almost 48 years old, Your Honor.

THE COURT: He's 48 years old.

What's the basis for you to believe he's going to die before the conflict ends?

MR. DIXON: Because, as the Supreme Court

recognized, this conflict may last a generation or more.

I mean, the government -- the only hint of a limiting principle that the government points to in terms of when this individual's detention might end is when Al-Qaeda surrenders.

I don't think there's anybody in this courtroom today that thinks that Al-Qaeda is going to surrender in the next 10 or 20 or 30 years. I mean, as long as there are individuals somewhere in the world claiming allegiance to or inspiration from Al-Qaeda, this conflict is not going to end.

I mean, Judge Edwards said it best: This individual is marked for a life sentence.

THE COURT: Yeah, but he wasn't reaching a conclusion based upon knowledge of the classified information that is at the disposal of the Periodic Review Board.

The Period Review Board has access to classified information to do a periodic assessment of the dangerous this individual poses to our troops, correct?

MS. GORMAN: Correct.

THE COURT: Right.

Judge Edwards did not have that evidence; he didn't have any of that information.

The Periodic Review Board is reviewing the

classified information available that is the basis to determine whether or not this man continues to pose a threat to our troops.

MR. DIXON: Your Honor, may I say a few words about the Periodic Review Board process? Because I think there is, perhaps, a misunderstanding about how the process actually works.

THE COURT: You've got one minute until you start eating into your five-minute rebuttal.

MR. DIXON: Thank you, Your Honor. I'll be brief.

The way the Periodic Review Board process works is this. The detainee is presented with allegations. He is not able to challenge those allegations. There's nothing he can say to change those allegations or to eliminate those allegations.

He also has no access, nor does his counsel, to the documents that purport to underlie those allegations.

This is like the equivalent of Your Honor or counsel receiving a factual return without the exhibits; it's just a narrative.

And Your Honor may decide, in a habeas case, as you have in this case, that certain evidence won't be relied on.

Periodic Review Process is not bound by that; they will consider evidence that Your Honor might exclude.

But I think there's even two more fundamental problems with the Periodic Review Board process which make it constitutionally inadequate. One is, there's no neutral decision-maker. That is a hallmark of what is required for non-criminal detention that may last a lifetime.

The other is, there's no meaningful relief. I mean, there are individuals in Guantanamo who have been approved by the Periodic Review Process to be transferred and they're not being transferred, and that is because if a Periodic Review Process makes a decision to transfer someone, the Secretary of Defense is not bound by that determination. So Mr. Ali, if he were to go through the Periodic Review Board and be cleared, that would not mean he gets released from Guantanamo, that would not end his ongoing, indefinite detention.

So it is not a substitute for the process that we believe he's due, looking to domestic authority, including proof beyond a reasonable doubt.

And if all the Periodic -- all that Mr. Ali has is the Periodic Review Board, then he will die at Guantanamo, that is clear, and we respectfully submit that violates due process.

THE COURT: All right. You've got three minutes left.

MR. DIXON: Thank you.

MR. WILTSIE: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WILTSIE: Your Honor, if I could start with a comment my colleague made several times. The government does not agree that this conflict will last necessarily for the lifetime of their client.

There's no way he can know that, there's no way they can know that.

The United States fervently hopes that the conflict will not last that long.

But the length of the conflict is not left up to us. We are still engaged in Afghanistan with Al-Qaeda, the Taliban, and their associated forces, the compatriots of Petitioner.

Accordingly, this is really just another aspect of the duration argument that this Court rejected just last year when it noted: Duration of the conflict does not somehow excuse a conflict from the law-of-war principles.

THE COURT: Right.

MR. WILTSIE: And those law-of-war principles, Your Honor, as you know, are the detaining power is entitled to detain an enemy combatant for the duration of the conflict, and, as importantly, the rationale for that principle, which is to prevent them from returning to the battlefield.

Turning now, Your Honor, to the due-process argument, we agree with the Court's question anyway that any claim rooted in the due-process clause is barred here by binding precedent.

The language in *Kiyemba* was extraordinarily broad. It was reiterated shortly thereafter in *Rasul*, which was remanded from the Supreme Court with express instructions to reconsider its decision, and the Court rejected the functional test to -- rejected applying the functional test to the due-process clause and reiterated that *Kiyemba* was still good law.

Two years later, the D.C. Circuit again reiterated it was good law.

And the Judges of this District have routinely applied *Kiyemba* in denying claims rooted in the due-process clause over the last four years.

Accordingly, it's our contention that the detainees at Guantanamo, including Petitioner, do not have the privilege to assert the due-process clause here.

But even if they could do so, Your Honor, Petitioner's continuing detention under the laws of war is fully consistent with the due-process clause.

First, Petitioner's error, as the Court noted, is to essentially argue this is perpetual detention. It's not even indefinite, Your Honor. There is a determinant end to

his detention, which is the end of active hostilities, an objective fact.

Moreover, Your Honor, the law of war is sui generis. As the Court of Appeals noted in this very case, law-of-war-detention is not punishment, it is merely to keep the enemy combatant from returning to the battlefield, and there are no time limits.

Moreover, Your Honor, the issue in law-of-war detention is not dangerousness. It is not a question of whether the enemy combatant would return to the battlefield if released, but whether the enemy combatant could return to the battlefield if released. And that, Your Honor, predicates solely on the status as an enemy combatant, status this Court affirmed and the D.C. Circuit affirmed also.

Moreover, the Court of Appeals has specifically stated that the threat a detainee may pose if released is simply irrelevant to his ongoing detention under the authorization for use of military force.

Lastly, Your Honor, his detention is not arbitrary. It clearly fulfills the purpose for law-of-war detention, which is to keep him from possibly returning to the battlefield.

It is self-evident, as long as we keep him at Guantanamo, he cannot return to the battlefield.

As for the procedural due-process claims they raise, we simply note to the Court that each is based on binding precedent from the Court of Appeals, and it should be left to the Court of Appeals to reverse it.

So in summary, Your Honor, we'll close by saying, in *Al-Alwi*, the Court of Appeals stated that it was not the Judiciary's proper role to devise a normal detention standard that would vary with the length of detention.

And rightly so, Your Honor. For doing so would turn the longstanding law-of-war principles on their head, where essentially an enemy could run out the clock on us and compel us to release their compatriots back into the field.

The government respectfully asks the Court to adhere to its ruling in *Al-Alwi* and to deny such a catch-and-release rule.

THE COURT: Thank you.

You can have three minutes.

MR. DIXON: Thank you, Your Honor.

Before I respond to opposing counsel, I do want to make one point of clarification regarding the Periodic Review Boards.

The Petitioner here has had exactly one Periodic Review Board, and he is not entitled to another one for another, I believe, two years. It's every three years. And so he's had, at this point, only one.

Opposing counsel characterized our argument as foreclosed by *Al-Alwi*. Mr. Al-Alwi did not raise the issues that we're addressing here. He did not argue that continuing detention authority violated the due-process clause. So I just want to be clear: We make a different argument.

We're also not asking Your Honor to make a dangerousness finding. That's not the inquiry that we seek. What we are arguing is that there is a limit that constrains how long an individual may be held and whether that individual may be held for life.

It is a --

THE COURT: But it's your position, isn't it, that if that limit is reached, the Court has no other choice but to order his release, right?

MR. DIXON: Yes. If his continuing detention no longer serves its intended purpose of preventing return to the battlefield, by clear and convincing evidence, then, yes, he must be released.

THE COURT: Say that again.

MR. DIXON: If his continuing detention no longer serves its ostensible purpose of preventing return to the battlefield, then he must be released. That's not a dangerousness finding.

So in a case like this, for example, right, the

Court may look to factors like his age, his infirmity, issues like this that would render his detention, his continuing detention unnecessary, right?

THE COURT: So you're saying if the Court were to conclude -- if I understand you correctly, if the Court were to conclude that he's been held too long, it violates the due-process clause for him to have been held this long, then the Court has to determine to what extent his release would, in some way, result in him returning to the battlefield; and if it concludes that it wouldn't, then it has to order his immediate release?

MR. DIXON: Yeah, that is part of the inquiry, Your Honor.

He has been held too long, and that is without the procedural safeguards that I mentioned previously; and under a different standard, under the clear and convincing evidence standard.

And that's an important issue in this case. I mean, as Your Honor knows -- I mean, and the D.C. Circuit pointed out, this case involved a finding that he was part of an Al-Qaeda-associated force based on a series of inferences drawn from circumstantial evidence.

So to take one example, there is, in the unclassified opinions, reference to the diary, right? There are all kinds of questions about the providence, the

accuracy, the reliability of the diary. And I respectfully submit, under a clear and convincing evidence standard, that would not -- that would not result or should not result in a finding of continuing detainability, right, because it's a -- there is --

THE COURT: Do you want this Court to re-litigate the issue of the basis for him being held as an enemy combatant?

MR. DIXON: No, we're not -- we are saying that the Court has to examine whether his continuing detention continues to serve that ostensible purpose.

There is -- and it is a higher standard. As we said, it is not a preponderance standard. That was the standard the D.C. Circuit has said is constitutionally permissible for concluding whether someone was part of Al-Qaeda, but it has not been decided. The D.C. Circuit has not decided a case where continuing detention authority is challenged under the due-process clause.

So Your Honor would have to examine the initial basis for detention under a higher standard.

But it's more than that. You have to make an evaluation about whether his continuing detention today, whether his detention today, 16 years in, at almost age 48, is necessary to serve that ostensible purpose, right?

Your Honor could consider his age, like I said,

medical condition.

Your Honor could consider factors such as whether the Government of Algeria will put in place necessary measures to, I don't know, for example, prevent recruitment or something like this.

It is a much more searching inquiry. It's an inquiry that Mr. Ali has not had; and today, at Guantanamo, we respectfully submit that his detention violates due process and that Your Honor should grant the writ and issue to show cause why he shouldn't be released. Thank you.

THE COURT: All right.

All right, Counsel. Thank you for your arguments. I have your briefs. I can't promise you when you'll get an opinion. I'm in the middle of a six- to eight-week trial right now that's time-sensitive and I'm going to have to issue a very lengthy opinion in response to that trial.

So I'll do my best to get you an opinion in this case as soon as I can, but it will probably be a while. So I wanted to have the benefit of your argument before I started working on it.

So unless you have any other issues or concerns, we'll stand in recess.

DEPUTY CLERK: All rise.

This Honorable Court will stand in recess until the return of court.

(Proceedings concluded at 4:09 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: May 6, 2018_____ /S/__William P. Zaremba_____

William P. Zaremba, RMR, CRR