No. 20-

In the Supreme Court of the United States

ABDUL RAZAK ALI, PETITIONER
v.
DONALD J. TRUMP, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Constitution applies to the detentions of foreign nationals at Guantánamo.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Abdul Razak Ali, an individual currently detained at Guantánamo Bay Naval Station.

Respondents are Donald J. Trump, President of the United States; Christopher C. Miller, Acting Secretary of Defense; Rear Admiral Timothy C. Kuehhas, Commander, Joint Task Force – GTMO; and Col. William A. Rodgers, Commander, Joint Detention Operations Group, Joint Task Force – GTMO.

Pursuant to Rule 29.6, Petitioner states that none of the above parties is a corporation.

Three amicus briefs in support of Petitioner were filed on May 23, 2019 before the court of appeals by the following parties: (1) Human Rights First (represented by Rita Simeon and Patricia Stottlemyer of HRF and Brian E. Foster and Erin Thomas of Covington & Burling LLP) (Doc. # 1789097); (2) Eric Janus, Professor of Law and Dean of the Mitchell Hamline School of Law (represented by Anil Vassanji, Friedman Kaplan Seiler & Adelman LLP) (corrected brief, Doc. # 1789245); and (3) two Guantánamo detainees currently cleared for release, Tofiq Nasser Awad al Bihani (ISN 893) and Abdul Latif Nasser (ISN 244) (represented by George M. Clarke III of Baker & McKenzie LLP, and Thomas Anthony Durkin, Shelby Sullivan Bennis, and Durkin & Roberts) (Doc. # 1789088).

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Ali v. Trump, No. 10-cv-1020 (RJL) (Aug. 10, 2018)

United States Court of Appeals (D.C. Cir.):

Ali v. Trump, No. 18-5297 (May 15, 2020),
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JURISDICTION

The decision of the court of appeals was entered on May 15, 2020 and its denial of panel rehearing and rehearing *en banc* was entered on July 29, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Ali was held detainable pursuant to the Authorization for Use of Military Force of Sept. 18, 2001, Pub. L. 107-40, 115 Stat. 224 ("AUMF"), which states "[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* § 2.

The Due Process Clause of the Constitution states that "[n]o person shall ... be deprived of life, liberty, or

property, without due process of law." U.S. Const., Amend. V.

STATEMENT

This case presents squarely a question of exceptional importance left unresolved by this Court's prior opinions: whether the Due Process Clause of the Constitution applies to detentions of foreign nationals now entering their third decade at Guantánamo.

1. Guantánamo

Guantánamo Bay Naval Station is held under a perpetual lease executed with the government of Cuba shortly after the United States conquered the island in the Spanish-American War. The lease conveys "complete jurisdiction and control" over the base to the United States until such date as the parties mutually consent to terminate it. *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

In September 1991, a coup in the Republic of Haiti deposed President Jean-Bertrand Aristide, who was forced to flee the country. A reign of terror began against his political supporters, *see Doe v. Constant*, 354 Fed. Appx. 543, 545-46 (2d Cir. 2009), and thousands of them fled towards the United States by sea. In order to prevent an influx of refugees, some of whom were HIV-positive, the United States instituted a policy of interdiction at sea, repatriating some and bringing tens of thousands of others to a hastily assembled mass detention camp at Guantánamo. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 163-64 (1993). As foreign nationals detained outside of the fifty states, the jurisdiction of the federal courts over their legal claims remained uncertain by the time the camps were emptied in May 1995. *See*

Sale v. Haitian Ctrs. Council, 509 U.S. 918 (1993), *vacating as moot Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992). That uncertainty made Guantánamo an expedient site on which to detain foreign nationals outside the reach of the federal judiciary as the military and intelligence response to the 9/11 attacks began.[1]

The first such detainees were brought to Guantánamo on January 11, 2002. (Of that flight of twenty men, two remain detained at Guantánamo, one of whom has been cleared for release for a decade.) The first habeas corpus petition brought by relatives of detained men was filed on February 19, 2002. Their amended petition raised causes of action under the habeas statute, international law, and the Constitution, including the Suspension and Due Process Clauses.

After dismissals for want of jurisdiction in the District Court, the D.C. Circuit held that petitioners, as aliens "without property or presence in this country," "had no constitutional rights, under the due process clause or otherwise," and therefore, "no court in this country has jurisdiction to grant habeas relief" under 28 U.S.C. 2241. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). This Court granted certiorari and reversed, finding that the habeas statute conveyed jurisdiction over the claims of the detainees. *Rasul v. Bush*, 542 U.S. 466

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[1] *See* Jay S. Bybee, *President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002) at 27 (citing still-unreleased *Memorandum for William J. Haynes II, General Counsel, Department of Defense, Regarding Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* (Dec. 28, 2001) by John C. Yoo and Patrick F. Philbin, OLC); *Boumediene*, 553 U.S. at 828 (Scalia, J., dissenting) (quoting Dec. 28, 2001 memo: "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay]."

(2004). It added "Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without [charge]—unquestionably describe 'custody *in violation of the Constitution* or laws or treaties of the United States.'" *Id.* at 483 n.15 (emphasis added).

A large number of cases were coordinated before Judge Joyce Hens Green for common decision of various preliminary matters. Judge Richard Leon did not participate in this coordination, and dismissed on the basis that "petitioners possess no cognizable constitutional rights" under which they could challenge their detentions in habeas. *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005). Twelve days later, Judge Green came to the contrary conclusion: that "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply," including "the right not to be deprived of liberty without due process of law." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 453-64 (D.D.C. 2005). Her opinion went on to analyze "the specific process due" in the context of these detentions, *id.* at 465-78. However, in light of the split within the district, Judge Green stayed her decision pending appeals of both rulings to the D.C. Circuit.

While appeals from these decisions were pending, Congress twice moved to strip the habeas jurisdiction recognized by this Court in *Rasul*, first with the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2680, and subsequently with the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600. The Court of Appeals ultimately dismissed the detainees' claims, holding that Section 7(a) of the Military Commissions Act validly stripped the federal courts of jurisdiction over

their petitions, reasoning that the Suspension Clause did not extend to such detentions at the Founding and additionally that "the Constitution does not confer rights on aliens without property or presence within the United States." *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007). Though a dissent argued that the Suspension Clause applied because it was a "limitation on congressional power rather than a constitutional right," Judge Randolph's majority opinion noted that "the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, 'people,' 'person,' and 'the accused')… cannot be right." *Id.* at 993.

2. *Boumediene*

This Court reversed. In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that the Suspension Clause of the Constitution protects the right of detainees held at Guantánamo to challenge the legality of their detention. In reaching this conclusion, this Court explained that it was merely reaffirming its long-standing jurisprudence to determine what constitutional standards apply when the government acts with respect to non-citizens outside the territorial boundaries of the United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

The Court applied a functional test in determining that the Suspension Clause restrains the Executive's conduct as to Guantánamo detainees, and concluded that

it would not be "impracticable and anomalous" to grant detainees habeas review because "there are few practical barriers to the running of the writ" at Guantánamo. *See* 553 U.S. at 769-71; *id.* at 784-85 (addressing due process). The Court reasoned that "Guantánamo Bay ... is no transient possession. In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* at 768-69; *see also Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantánamo Bay is in every practical respect a United States territory" where our "unchallenged and indefinite control ... has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.").

Boumediene conclusively rejected the formalistic approach taken by the D.C. Circuit, which had relied entirely on the fact that the detainees were not physically held within the fifty states. In doing so, this Court interpreted its ruling in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) to sit within a long line of cases that applied a functional analysis to determine the constitution's extraterritorial reach. 553 U.S. at 762-70. As then-Judge Kavanaugh summarized the state of law in the wake of *Boumediene*, it is crystal-clear that "[d]etermining whether the Constitution applies to non-U.S. citizens in U.S. territories requires a 'functional' rather than 'formalistic' analysis of the particular constitutional provision and the particular territory at issue. ... In *Boumediene*, the Court determined that Guantánamo was a *de facto* U.S. territory—akin to Puerto Rico, for example, and not foreign territory." *Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (*en banc*) (Kavanaugh, J., concurring in part).

As recently as this term, this Court has reiterated that "under some circumstances, foreign citizens…in 'a territory' under the 'indefinite' and 'complete and total

control' and 'within the constant jurisdiction' of the United States—may possess certain constitutional rights." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020).

3. *Kiyemba*

Boumediene rejected the government's claim that executive review by Combatant Status Review Tribunals ("CSRTs") provided an adequate substitute for the habeas review guaranteed by the Suspension Clause, but even that deficient process had cleared a number of detainees for release, among them a group of Uighur refugees who had fled China. Upon determining that they were not lawfully held, the district court ordered the government to prepare to bring them to the United States for release given that all parties agreed that they could not safely be returned to China, and it appeared that no other country was willing to take them. The D.C. Circuit reversed, holding that the "exclusive power of the political branches" over entry into the United States rendered the district court powerless to order the Uighurs released here. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-28 (D.C. Cir. 2009) ("*Kiyemba*"), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).[2]

That holding—whether framed as one that the Uighur petitioners lacked a specific liberty interest (a "right") in release into the United States, or that their claims were non-justiciable because they implicated a political question consigned to the prerogative of the political branches—was all that was necessary to resolve

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[2] After this Court granted certiorari and scheduled argument, the government found countries to accept the last of the Uighur petitioners in *Kiyemba*, and this Court vacated and remanded.

the matter before the court of appeals in *Kiyemba*. However, Judge Randolph's opinion for the court also stated categorically that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." 555 F.3d at 1026.

That dictum—which is wrong on its own terms[3]—was unnecessary to resolve what was at heart a case about the robustness and reviewability of the political branches' immigration power. However, the *Kiyemba* dictum has over the subsequent decade dissuaded the courts of the district from considering whether detainees enjoyed *any* rights whatsoever under the Due Process Clause, whether substantive or procedural—including in this case, as noted below, *infra* part 5.

4. Petitioner's factual background

The factual background of Petitioner Abdul Razak Ali's case is set forth in the first round of opinions of the district court and court of appeals. *See Ali v. Obama*, 741 F. Supp. 2d 19, 21 (D.D.C. 2011), *aff'd*, 736 F.3d 542 (D.C. Cir. 2013). Ali, a 50-year old citizen of Algeria, was captured by Pakistani forces at a guesthouse in Faisalabad, Pakistan, in March 2002. He was turned over to U.S. forces and transferred to Guantánamo in June 2002, where he has remained for nearly 18 years without charge.

Ali filed a habeas petition in December 2005, challenging the legality of his initial capture and detention. The case proceeded to trial, and the district court concluded by a preponderance of the evidence that he was lawfully detained because he was a member of "Abu

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[3] *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113-16 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984).

Zubaydah's force," which the government claimed at the time was associated with Al Qaeda.[4] 714 F. Supp. 2d at 27. In reaching that conclusion, the court, relying on multiple layers of hearsay evidence, found that Ali was present at the same guesthouse as Zubaydah for about 18 days; another detainee recalled seeing him in Afghanistan prior to his arrival in Pakistan; a generic name the government associated with him was listed in a diary of obscure provenance allegedly propounded by another associate of Zubaydah; the same name was listed in a report of survivors of a fire in a different location in Afghanistan; and Ali supposedly made statements when he was first interrogated admitting that he had traveled to Afghanistan to fight the U.S. and its allies. Ali denied the allegations and the accuracy of the evidence offered in support of his detention. *Id.* at 26. After trial but before the court announced its decision, the government disclosed that it had withheld exculpatory evidence from the court and Ali's counsel, and withdrew reliance on the principal evidence it had offered to justify his detention. *Id.* at 23-24.

After the district court issued its decision denying his habeas petition, *id.*, Ali filed post-trial motions further challenging the reliability of evidence against him and requesting a new trial. *See* Mem. Order, *Ali v. Obama*, No. 10-cv-1020 (RJL), 2011 WL 1897393 (D.D.C. May 17, 2011) (Dkt. No. 1496) (re. challenge to withholding of exculpatory evidence regarding detainee who identified Ali and alleged his presence in Afghanistan);

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[4] Zubaydah's real name is Zayn al-Abidin Muhammad Husayn. Although the government once described him as "the third or fourth man in al Qaeda," the government now agrees he was never a member of al Qaeda. *See* Pet'n for Mandamus, *In re Husayn*, No. 19-5045 (D.C. Cir. Mar. 1, 2019) (Doc. # 1775566) at 5; Senate Select Committee on Intelligence, *Study of the* [*CIA*] *Detention and Interrogation Program*, Executive Summary 410-11.

Mem. Order, *Ali v. Obama*, No. 10-cv-1020 (RJL) (D.D.C. Jun. 11, 2012) (Dkt. No. 1500) (re. challenge to photographic evidence).[5] In response, the district court reiterated that Ali would be detainable in any event because his presence at the guesthouse was enough, *alone*, to find that he was more likely than not a member of Zubaydah's force. *See* Mem. Order, 2011 WL 1897393, at *1.

On appeal, the D.C. Circuit, per Judge Kavanaugh, noted the uncertainty surrounding many of the allegations and items of evidence underlying them, ultimately relying heavily on the preponderance standard in affirming the district court's finding of detainability. *See*, *e.g.*, 736 F.3d at 550 ("Ali maintains that many of those facts [offered to support his detention], considered individually, could have innocent explanations. Maybe yes, maybe no."); *id.* at 551 ("Ali more likely than not was part of Abu Zubaydah's force. To be sure, as in any criminal or civil case, there remains a *possibility* that the contrary conclusion is true.... But the preponderance standard entails decisions based on the more likely conclusion.") (emphasis in original). All of the evidence against Ali discussed in the court of appeals' opinion consisted of multiple-level hearsay. *See, e.g.*, 736 F.3d at 546. Judge Edwards, concurring, noted "Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF …. Ali's principal sin is that he lived in a 'guest house' for 'about 18 days.'" *Id.* at 553. Judge Edwards noted that

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[5] In addition to the two orders cited in the text (Dkt. Nos. 1496 and 1500), an additional order, summarily rejecting Ali's post-hearing motion for sanctions and entry of the writ or a new hearing, was also issued by Judge Leon after the original published opinion (741 F. Supp. 2d 19) of January 11, 2011 denying the writ. *See* Order, *Ali v. Obama*, No. 10-cv-1020 (D.D.C. Mar. 11, 2011) (Dkt. No. 1474).

despite having "never been charged with … a criminal act and [having] never 'planned, authorized, committed or aided [any] terrorist attacks,'" Ali "is now marked with a life sentence." *Id.* (quoting AUMF).

5. Petitioner's due process motion

Several years after his prior appeal was denied, on January 11, 2018, Mr. Ali and ten other Guantánamo detainees filed a habeas corpus challenge to their continuing detention without charge or foreseeable end, arguing that it violates both substantive and procedural protections guaranteed by the Due Process Clause. The challenge, styled as a motion for an order granting the writ of habeas corpus, was jointly captioned and filed in the nine district court habeas cases previously filed by these eleven detainees. By order of the district court, eight of those detainees' cases were assigned to Senior District Judge Thomas F. Hogan for resolution of the detainees' duration of detention challenge. Two detainees' cases assigned to Judge Emmet G. Sullivan, and this case, assigned to Senior District Judge Richard J. Leon, were not coordinated before Judge Hogan.

Ali's motion sought to apply various procedural and substantive protections of the Due Process Clause to his continuing detention, including more rigorous scrutiny of hearsay, and a requirement (modeled on standards established by this Court's civil commitment precedents) that continuing noncriminal detention of this length cannot be justified solely by past conduct or association, but rather, requires the government to articulate a specific, present danger justifying continued detention, supported by clear and convincing evidence. Judge Leon—once again the first judge in the district to rule on the question—held that *Kiyemba* foreclosed all application of the

Due Process Clause to Guantánamo. *Ali v. Trump*, 317 F. Supp. 3d 480, 488 (D.D.C. 2018) (App. 45a-46a).[6]

Ali appealed, originally seeking initial hearing *en banc* to "clarify the obvious confusion" concerning whether the *Kiyemba* dictum foreclosed application of the Due Process Clause to Guantanamo. Pet'n for Initial Hrg. En Banc (Nov. 28, 2018) at 16-17. The court of appeals demurred, with a concurring opinion noting that the question of whether procedural due process applied at Guantanamo was "undoubtedly of exceptional importance," but "should be considered first by a panel." *Ali v. Trump*, No. 18-5297, 2019 WL 850757, at *1, *2 (D.C. Cir. Feb. 22, 2019) (Tatel, J.).

On appeal, Ali again argued that various aspects of substantive and procedural due process should guide the resolution of his case. However, as to relief, he sought clarity as to the fundamental legal question that has gone unanswered since the first petitions were filed nineteen years ago: whether the Due Process Clause applied to the detentions at Guantánamo. As to what measure of due process protections consequently applied—that is, what specific process was due, either substantively or procedurally—he sought, at minimum, remand to the district court for further consideration in light of his position that *Kiyemba* did not foreclose the application of the Clause. *See* Appellee's Br., *Ali v. Trump*, No. 18-5297 (D.C. Cir. May 15, 2019) (Doc. # 1788035) at 11-12 (requesting release or "remand….with instructions" regarding specific substantive and procedural due process analysis district court should engage in.)

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[6] The other ten detainees' parallel Due Process-based challenges to their detention, filed on the same date as Mr. Ali's, twenty-three months ago, have not yet been decided by Judges Hogan or Sullivan. Judge Hogan, who heard oral argument on the motions on July 11, 2018, repeatedly indicated during argument that he felt himself bound by the *Kiyemba* dictum.

The panel, however, affirmed. While noting that "which particular aspects of the Due Process Clause apply to detainees at Guantanamo Bay remain open questions," the court declined to state that the Due Process Clause extends to the prison in any respect,[7] finding fault with aspects of the framing of the substantive and procedural due process claims, *Ali v. Trump*, 959 F.3d 364, 366, 368-69 (D.C. Cir. 2020) (App. 2a, 7a-9a). However, the panel then went on to state that Ali's claims were futile no matter how narrowly they were read. First, it dismissed his substantive due process claims as a matter of law, holding that substantive due process did not limit the length of permissible detention so long as hostilities remained ongoing, *id.* at 369-70 (App. 9a-11a), and that, in any event, the executive branch's determination[8] not to recommend his transfer was conclusive proof of continuing danger posed by his release, *id.* at 370-71 (App. 11a-13a). The panel then went on to dismiss his procedural due process claims on the grounds that the Circuit's procedural precedents (all of which were decided solely under the ambit of the Suspension Clause) had already concluded that the hearsay, burden-of-proof, and other procedural rules passed "constitutional" muster under *Boumediene*'s "meaningful opportunity" standard. *Id.* at 372-73 (App. 14a-16a.)

Ali sought rehearing and rehearing *en banc*, noting among other points that the Circuit's precedents approv-

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[7] It did so over a concurrence in the judgment from Judge Randolph, defending the principle of the *Kiyemba* dictum: "that the protections of the Fifth Amendment's Due Process Clause 'do not extend to aliens outside the territorial boundaries' of the United States, including those held at Guantanamo Bay." *Id.* at 373.

[8] That entirely-discretionary determination was made by a Periodic Review Board. The PRB is the present-day successor to the Combatant Status Review Tribunals so roundly criticized in *Boumediene*, *see* 533 U.S. at 767. *See also infra* pp. 26-27.

ing of various procedures and the preponderance standard were not briefed, argued or decided on Due Process Clause grounds—largely because *Kiyemba* was assumed by the district courts to foreclose such inquiry. The court of appeals denied the petition for rehearing on July 29, 2020. App. 48a-50a.

6. The Circuit's opinion in *Al Hela* renders the *Kiyemba* dictum into binding precedent

One month after the denial of rehearing *en banc* in Ali's case, the court of appeals codified the *Kiyemba* dictum into law. In *Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020), a detainee had argued that the Due Process Clause reached Guantánamo, that its substantive protections placed limits on the duration of his detention, and that procedural due process should foreclose the district court's use of hearsay, *ex parte* evidence, and evidence he had not had the chance to review himself. On appeal, the panel majority decided that all of these specific claims were foreclosed because, as a categorical matter, "the protections of the Due Process Clause, whether labeled 'substantive' or 'procedural,' do not extend to aliens without property or presence in the sovereign territory of the United States." *Id. at* 147-48 (citing the *Kiyemba* dictum).

The *Al Hela* majority acknowledged that this Court had applied a functional test (rather than a formal sovereignty test) to determine the applicability of the Suspension Clause at Guantánamo. *Id.* at 141. But the majority argued that this "Court [had] explicitly disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause" in *Boumediene*. *Id.* (internal quotation omitted). In the majority's view, Al Hela "effectively ask[ed] us to expand *Boumediene* and abrogate

Eisentrager." *Id.* at 142. Notwithstanding *Boumediene*'s extensive discussion distinguishing *Eisentrager*, *see* 553 U.S. at 762-70, the majority refused to consider whether *Boumediene*'s logic would require application of the Due Process Clause to Guantánamo:

> [Because t]he Supreme Court has not revisited the extraterritorial application of the Due Process Clause … we have taken the Supreme Court at its word that *Boumediene* concerned only the availability of the writ of habeas corpus. … While we must enforce constitutional limits on the Executive Branch in this context as in any other, it would be well beyond our authority to extend or to create new constitutional limits on the conduct of wartime detention by the political branches.

Al Hela, 972 F.3d at 143.

Judge Griffith's partial concurrence noted that the majority's opinion "cut a wider path than necessary" to resolve the claims before it, instead electing to "make sweeping proclamations about the Constitution's application at Guantanamo," with potentially "vast scope" for other claims not before the court. *Id.* at 151, 154, 152.[9]

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[9] Al Hela filed a petition for rehearing *en banc* on October 26, 2020 (Doc. # 1868211, Case No. 19-5079); the court mandated a response, which the government filed on December 8, 2020, and the petition remains pending as of this date.

REASONS FOR GRANTING THE PETITION

Ali has been in U.S. custody for nearly eighteen years, almost all of that time spent in Guantánamo. He is detained because he was held "more likely than not" to be part of a force "associated" with an actual target of the AUMF based on inferences made primarily from his eighteen-day stay at a guesthouse prior to his arrest. The evidence used to meet that preponderance standard of proof was multiple-level hearsay, impossible to confront and challenge from a practical perspective. For this he faces the prospect of lifetime detention without charge, pursuant to a conflict that has already lasted longer than any in modern history and endures without foreseeable end. He may well die in Guantánamo absent judicially-enforced limitations on his continuing detention. This is entirely unprecedented in American law: never has a court upheld indefinite, potentially lifetime non-criminal detention under such circumstances. Such an outcome is incompatible with both the substantive and procedural guarantees of the Due Process Clause.

The legal question presented by this case is straightforward: does the Due Process Clause of the Constitution apply in any respect to the detentions of foreign nationals at Guantánamo? By answering this question in the negative, the court of appeals foreclosed any attempts to challenge the evidentiary rules and burden of proof that currently govern these cases. It is those rules, established through litigation in which only the minimal limits established by the Suspension Clause were argued and considered, that Ali and several other remaining detainees currently seek to challenge as a matter of procedural due process.

At this stage of the Guantánamo litigation, as we near the twentieth anniversary of the prison's opening, substantive due process also demands that this Court's

precedents governing civil commitment should guide the adjudication of the remaining habeas petitions. Applied to these cases, those precedents demand that noncriminal detention of this length can no longer be justified solely by past conduct or association. Rather, the government must justify detention by articulating a specific, present danger necessitating continued detention, supported by clear and convincing evidence. To hold otherwise would allow the government to impose life detention on no greater proof than would be required in a negligence case.

The vast scope of the court of appeals' ruling also threatens to predetermine many significant questions not before the courts—including challenges to conditions of confinement and disputes over admission of coerced evidence in the military commissions and habeas cases.

The D.C. Circuit[10] has all but invited this Court to clarify the question of whether the Due Process Clause applies at Guantánamo in *some* respect, or, as the Circuit would have it, does not apply in *any* respect.[11] This Court should accept the invitation and correct the central error below, which has afflicted the law of the Circuit for more than a decade: the misapplication of this Court's

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[10] For all practical purposes, no Circuit split is possible on the issues presented herein because this Court's precedents have channeled all Guantánamo habeas claims through the district court for the District of Columbia. *See Rumsfeld v. Padilla*, 542 U.S. 426, 442-51 (2004); *Gherebi v. Bush*, 542 U.S. 952 (2004) (vacating and remanding for further consideration in light of *Padilla*); *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004) (transferring habeas case to D.C.).

[11] *See Al Hela*, 972 F.3d at 143 (noting "we have taken the Supreme Court at its word that *Boumediene* concerned only the availability of the writ of habeas corpus," and refusing to "extend or to create new constitutional limits" on "wartime" detentions) (quoted *supra*, page 15).

longstanding approach to determining the extraterritorial application of constitutional provisions.

I. The law of the Circuit is inconsistent with *Boumediene*

Boumediene determined that the Suspension Clause applies at Guantánamo. It inescapably follows that at least some of the protections of the Due Process Clause must also reach Guantánamo. Just as there are no practical or structural barriers that make it impracticable or anomalous to adjudicate the factual or legal justification for detention under the Suspension Clause, there are no such barriers to preclude adjudicating substantive and procedural requirements imposed by the Due Process Clause that would protect against arbitrary detention. *See Boumediene*, 553 U.S. at 784-85 (addressing due process); *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) ("[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."); *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (statement of Justice Breyer respecting denial of certiorari) (Supreme Court has not yet decided if AUMF authorizes detention of individuals merely for being "part of" Al Qaeda or Taliban, or, if so, whether "either the AUMF or the Constitution limits the duration of detention").

Indeed, the rights are historically intertwined: as Justice Scalia summarized it, "[t]he two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due

Process and Suspension Clauses." *Hamdi*, 542 U.S. at 555-56 (Scalia, J., with Stevens, J., dissenting).[12]

Throughout this proceeding and the other cases recently before the D.C. Circuit in which Guantánamo detainees asserted due process claims,[13] the government has failed even to suggest any such barriers exist. Instead it has relied entirely on the extreme formulation, first advanced in *Kiyemba*, that the Circuit ultimately adopted in *Al Hela*: that as a categorical matter "the protections of the Due Process Clause, whether labeled 'substantive' or 'procedural,' do not extend to aliens without property or presence in the sovereign territory of the United States." This formalistic approach is precisely what this Court rejected in *Boumediene*, when it characterized the unique circumstances of Guantánamo—leased from Cuba under a treaty that conveys full "jurisdiction and control" to the United States in perpetuity—as rendering the base "[i]n every practical sense … not abroad" but rather "within the constant jurisdiction of the United States," a place where the United States is "answerable to no other sovereign for its acts," 553 U.S. at 768-70; *see also Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantánamo Bay is in every practical respect a United States territory" where our "unchallenged and indefinite control ... has

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[12] Both the government and the Circuit have relied heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), but the habeas petitioners in that case had been captured abroad (in China), convicted by military commission there, and were detained in Landsberg Prison in the newly-formed Federal Republic of Germany—none of which are places that are "[i]n every practical sense, ... not abroad," where the United States is "answerable to no other sovereign for its acts, Boumediene, 553 U.S. at 769-70. *Boumediene* itself distinguished *Eisentrager* at great length on precisely such practical circumstances. *See id.* at 762-770.

[13] *See Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020); *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019).

produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.").

The government has long conceded that another constitutional provision—the Ex Post Facto Clause—applies at Guantánamo. *See Al Bahlul v. United States*, 767 F.3d 1, 18 (D.C. Cir. 2014) (*en banc*) (noting that government concedes Ex Post Facto Clause applies at Guantánamo); *id.* at 65 n.3 (Kavanaugh, J., concurring in part) ("As the Government concedes, the *Boumediene* analysis leads inexorably to the conclusion that the ex post facto right applies at Guantánamo."). It is no answer to argue, as the government has below, that the Suspension and Ex Post Facto Clauses are distinct as structural limitations on the power of the political branches, for the Due Process Clause functions in that manner as well—here, limiting government's ability to aggregate power over non-criminal detention to the executive branch.[14] Accordingly, due process should "follow the flag" to at least a place so uniquely within the government's control as Guantánamo. *See Torres v. Puerto Rico*, 442 U.S. 465,

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[14] *See, e.g.*, *Murray's Lessee v. Hoboken Land Improvement Co.*, 59 U.S. 272, 276 (1855) (Due Process Clause "is a restraint on the legislative as well as the executive and judicial powers of the government"); *Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *see also New York v. United States*, 505 U.S. 144, 181 (1992) ("the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quotation marks and citations removed)). The fact that this Court has frequently recognized an individual's claims as a "Separation of Powers" cause of action is perhaps the surest sign that the distinction between structural limitations and individual rights is a false dichotomy. *See INS v. Chadha*, 462 U.S. 919, 935-36, 939-40 (1983); *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989).

469 (1979) (Due Process Clause applies in Puerto Rico); *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) (application of Fifth Amendment at Guantánamo would not be impracticable or anomalous), *vacated as moot*, *Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993).

II. Current standards for adjudicating detainee petitions fall far short of the process due

The logic of *Boumediene* mandates that, in some measure, the Due Process Clause must apply at Guantánamo. What particular process is due under the Clause presents a more complex question: as always with due process claims, the specific procedural and substantive protections that apply will be dependent on the context. Ali challenged a number of the established standards and procedures for adjudicating these cases on due process grounds, as described below.

A. Procedural due process

The vast majority of evidence introduced against Guantánamo detainees in their habeas cases consists of hearsay interrogation records and declarations, many of which are anonymously sourced. The Due Process Clause bars unreliable hearsay and requires that detainees be permitted to confront evidence where feasible. *See Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972). In the immigration, parole revocation, and sentencing contexts, the Federal Rules of Evidence do not apply, but reliability is nonetheless required because the Due Process

Clause applies.[15] The same should hold true in these cases.

Initially, it did. The coordinated 2008 Case Management Order issued by Judge Hogan in the immediate wake of *Boumediene*, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008), applied to nearly all the detainees' cases. It set forth hearsay admission requirements compliant with the Due Process Clause and paralleling the process that would apply under Fed. R. Evid. 807, by requiring the government to make a motion establishing the reliability of its hearsay submissions and demonstrating the burden of producing equivalent non-hearsay evidence. *Id.* at *3, Section II.C. A series of D.C. Circuit decisions—decided when *Kiyemba* appeared to have foreclosed the application of the Due Process Clause to Guantánamo—subsequently absolved the government of that burden, instead permitting liberal admission of hearsay in these cases.[16] *See Al-Bihani v. Obama*, 590 F.3d. 866, 879 (D.C. Cir. 2010) ("hearsay is always admissible" in these cases); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (burden of showing unreliability is on petitioner). Judge Leon's case management order, applied in Ali's case,

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[15] *See, e.g.*, *Saidaner v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) (immigration); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 & 782 n.5 (1973) (parole); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (sentencing).

[16] A plurality of justices in *Hamdi* suggested that there might need to be accommodations such as admission of hearsay or a presumption in favor of government evidence in litigating "enemy combatant" habeas petitions, 542 U.S. at 533-34, but that part of Justice O'Connor's opinion was expressly not joined by Justices Souter and Ginsburg, and only garnered four of nine votes. *Boumediene*, in contrast, sharply criticized the effects of unbridled use of hearsay by the government in the Combatant Status Review Tribunal ("CSRT") proceedings. 553 U.S. at 784.

imposed none of the requirements that due process would otherwise mandate.[17]

A number of other rules challenged by Ali below and on appeal cannot possibly comport with due process, despite the fact that decisions of the D.C. Circuit have accepted them as sufficient under the "meaningful review" Suspension Clause standard announced in *Boumediene*. *See, e.g., Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (affording "presumption of regularity" to government's evidence); *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010) (district courts must take into account "conditional probability" that otherwise unreliable evidence might be reliable if assessed in light of other, often itself unreliable evidence); *Al-Bihani*, 590 F.3d. at 873 n.2 (visiting Al Qaeda affiliated guesthouses "overwhelmingly, if not definitively" justifies detention).

Ali's case illustrates the dangers of uncritically accepting the accuracy of an accumulation of hearsay interrogation records without the corresponding information needed to test their reliability. The 2013 panel opinion affirming denial of the writ relied on Ali's guesthouse stay and inferences from a number of additional "facts," concluded that they reinforced each other's veracity in pushing the case over the preponderance threshold. *Ali*, 736 F.3d at 545-51. But the "facts" themselves were established by hearsay of dubious provenance and reliability: from a "diary" of unknown authorship and origin to the purported interrogation statements of other mentally-ill or tortured detainees, the reliability of nearly every source of the relevant facts was contested during his habeas hearing. *See* Unclassified Appellate Appx. at JA1-JA60, *Ali v. Obama*, No. 11-5102 (D.C. Cir. Jun. 11, 2013) (Doc. # 1443998). Ali, like

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[17] *See* Case Management Order, *Ali v. Obama*, Case No. 10-cv-1020 (D.D.C. Aug. 25, 2010) (Dkt. No. 1423), § II.D.

all detainees, was left unable to confront even the sourced hearsay introduced against him, all of which was presumed admissible, with each additional item of hearsay reinforcing the others. *See* 736 F.3d at 548, 550.

Taken together, these evidentiary rules, combined with the preponderance standard of proof the Circuit has applied, have rendered it impossible for detainees to prevail, regardless of how weak a case the government cobbles together against them.[18] Even detainees cleared for release by the unanimous consent of the military and intelligence agencies have lost their habeas cases; indeed, six detainees cleared for release now languish at Guantánamo. Ali's case demonstrates how paper-thin evidence can justify detention potentially lasting a lifetime under existing procedural standards, absent the application of the Due Process Clause.

The present set of rules governing these cases have long ago "move[d] the goalposts" and "call[ed] the game in the government's favor." *Latif*, 666 F.3d at 770 (Tatel, J., dissenting). The "meaningful opportunity" to develop and challenge evidence that *Boumediene* held the Suspension Clause mandates has proved so pliant a standard in the Circuit's hands that for all practical purposes no such opportunity exists today. An explicit ruling from this Court that the familiar standards of the Due Process Clause apply to these detentions would allow the lower courts to finally vindicate *Boumediene*'s promise. More-

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[18] *Cf.* 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*) ("requir[ing] courts to presume the accuracy, albeit not the truth, of documents 'produced in the fog of war by a clandestine method that we know almost nothing about' … unjustifiably shifts the burden of proof to the detainee.") (quoting *Latif v. Obama*, 677 F.3d 1175, 1208 (D.C. Cir. 2011) (Tatel, J., dissenting)).

over, application of procedural due process principles would almost certainly change the outcome in Ali's case.

* * *

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, nearly eighteen years later. Due process requires consideration of "the risk of an erroneous deprivation of [a liberty interest] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). With "the private interest" to be balanced under *Mathews* now measured in decades rather than years, and the prospect of lifelong detention at Guantánamo appearing realistic, the thin procedural protections that might arguably have passed constitutional muster earlier no longer suffice under *Mathews*.

B. Substantive due process

Due process is a concept that requires rationality and proportionality in government action; it is designed to limit excessive or arbitrary executive action. Accordingly, the Due Process Clause "contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

This Court's civil commitment jurisprudence mandates that noncriminal detention of this length cannot be justified solely by past conduct or association. Rather, the government must justify continuing detention by articulating a specific, present danger justifying continued detention, supported by clear and convincing evidence. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)

(requiring proof of past violent conduct coupled with an additional present condition to justify indefinite commitment); *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (detention under carefully limited circumstances, including proof by clear and convincing evidence that a person presents an "identified and articulable threat" and that "no conditions of release can reasonably assure" public safety, satisfies due process).

As applied to the context of Guantánamo, the minimum requirements imposed by such a substantive due process analysis are clear: the putative danger posed by releasing a detainee would have to be articulated by the government and individualized, not presumed (as in traditional law of war detentions in an international armed conflict); forward-looking rather than solely rooted in past conduct; and—while some deference to executive expertise and predictive judgments might be due—rebuttable by the detainee. Review must be periodic, *Foucha*, 504 U.S. at 77, and proof by clear and convincing evidence, *Salerno*, 481 U.S. at 750-51.

In order to satisfy substantive due process, any such process would need to be a judicial one, not an executive review. The Periodic Review Board process that began reviewing detainee cases in 2013 cannot serve this ongoing, forward-looking review function mandated by substantive due process for the simple reason that it is an *executive* process where recommendations for release are at the discretion of the board (which has cleared only one of the 26 review-eligible individuals in the last four years). The process itself is fraught with well-documented flaws—it is essentially the CSRT process so roundly criticized in *Boumediene*, but with counsel present to add a veneer of legitimacy[19]—and the Board

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[19] *See* Amicus Br. of Human Rights First, *Ali v. Trump*, No. 18-5297 (D.C. Cir. May 23, 2018) (Doc. # 1789097). Chief among these

lacks the power to order release, as evinced by the fact that two individuals cleared by the process over four years ago remain detained at Guantánamo.

"[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 737 (1972); *Seling v. Young*, 531 U.S. 250, 265 (2001). As these detentions enter their third decade, this Court should mandate application of these familiar, well-defined standards, which are clearly translatable to the Guantánamo context, and have been proven by long experience in the lower courts to be practicable.

III. The court of appeals' broad, categorical holding would have significant consequences for other issues beyond those presented in Ali's case

The D.C. Circuit's sweeping rule, purporting to foreclose any substantive or procedural due process claims brought by Guantánamo detainees, would extend to important issues not presented by Ali, such as whether the Clause prohibits the introduction of coerced and involuntary confessions in support of what may become lifelong preventive detention. It may predetermine important issues arising in the small handful of military commis-

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flaws is the fact that the board does not examine documentary evidence directly, but rather just prepared summaries thereof (typically summaries of habeas factual return exhibits). That gives the board even less ability to weed out torture evidence than a habeas court forced to admit all hearsay. Indeed, the amicus documents one public case of torture evidence being used against a specific detainee. Moreover, environmental factors entirely outside the detainee's control—for example, family support for reintegration—play an outsized role in approvals. In Ali's first review, the board sought more information from the Government of Algeria; by 2018 he refused to attend.

sions currently proceeding at Guantánamo. And it would also bar challenges to conditions of confinement at Guantánamo brought under the Due Process Clause.

A. Tortured and coerced evidence

Judge Walton has noted that the Due Process Clause's prohibitions on coerced confessions may well be far stronger than those imposed by the Suspension Clause:

> In a typical case, "confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological," may not be admitted under the Due Process Clause of the Fifth Amendment (or the Fourteenth Amendment in state criminal proceedings), "not because such confessions are unlikely to be true[,] but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system," *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961), and "because declarations procured by torture are not premises from which a civilized forum will infer guilt," *Lyons v. Okla.*, 322 U.S. 596, 605 (1944). …
>
> At the same time, "another legitimate reason to suppress [the fruits of torture] is the 'likelihood that the confession is untrue.' " … This second basis for excluding evidence obtained through coercive means resonates even in the context of these habeas corpus proceedings, as the Court is required by the Supreme Court's decision in *Boumediene* to "conduct a meaningful review" of "the cause for detention." … But whereas the former basis for exclusion invites a

> categorical prohibition of the kind required by the Due Process Clause, the latter basis does not, for it is at least conceivable that the government could establish either that a specific witness … consistently produced accurate information even when subjected to coercive tactics, or that certain techniques employed by the government, even if coercive, are generally successful in producing reliable information. This kind of factual inquiry would amount to a virtual trial over the efficacy of torture itself—a prospect the Court finds both distasteful and distracting.

Bostan v. Obama, 674 F. Supp. 2d 9, 29-30 (D.D.C. 2009). The extraordinary importance of this issue speaks for itself.

B. Military commissions

The D.C. Circuit's categorical ban on due process claims may also predetermine important issues arising in the small number of military commissions currently proceeding at Guantánamo. As an amicus brief in support of *en banc* review in *Al Hela* recently filed by a commission defense team put it:

> The application of the Due Process Clause at Guantanamo Bay may be determinative of whether the government can lawfully use the fruits of coercion as evidence in a capital trial. If the Due Process Clause governs Guantanamo military commissions, the fruit of coercion is inadmissible; if the Due Process Clause does not apply, only the fruit of torture and other cruel inhuman and degrading treatment is inadmissi-

> ble. [*See* Military Commission Act, 10 U.S.C. § 948r.]

Amicus Br. of Ammar al Baluchi in Sup't of Reh'g En Banc, *Al Hela v. Trump*, No. 19-5079 (D.C. Cir. Oct. 26, 2020), at 7; *see also id.* ("the Due Process Clause prohibits interrogation methods which shock the conscience as well as the use of statements made involuntarily.") "Up to this point, the Circuits have consistently applied Fifth Amendment protections against coerced statements by non-U.S. citizen defendants taken overseas," *id.* at 8, but that clear prohibition may be undermined by the court of appeals' current absolute ban on due process claims.

Both the D.C. Circuit (prior to the *Al Hela* decision) 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 in the context of determining the propriety of behavior by the military judges. *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, making 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"). Eventually appeals of such issues might reach this Court, but reversal of the D.C. Circuit's categorical bar on due process claims would allow the court of appeals to correct them at an appropriately early stage without this Court's intervention.

C. Conditions of confinement claims

Over the course of the Guantánamo litigation, a number of challenges to abusive conditions of confinement at Guantánamo have proceeded as claims that a detainee's liberty interests under the Due Process Clause have been unlawfully violated. *See, e.g.*, *Aamer v. Obama*, 742 F.3d 1023, 1040 (D.C. Cir. 2014). The D.C. Circuit's categorical rejection of claims under the Due Process Clause would threaten the ability to bring such claims under the conventional Fifth Amendment standard, familiar to the district courts from cases such as *Bell v. Wolfish*, 441 U.S. 520 (1979), and its progeny. *See, e.g.*, *Brogsdale v. Barry*, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991) ("the threshold for establishing a constitutional violation is clearly lower for … pretrial detainees" than for those convicted of crime, who may bring conditions claims only under the Eighth Amendment). Foreclosing all claims under the Due Process Clause may reopen the door to past abuses (*e.g.* prolonged solitary confinement), and preempt claims regarding the adequacy of medical care that will be of increasing importance as the geriatric population of detainees increases, and the psychiatric burden of detention without any apparent end continues unabated.[20]

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[20] Moreover, the availability of independent medical examinations may well rise or fall based on the analysis applied in *Aamer*. An increasing number of the detainees who remain are men who are unlikely to win PRB clearance because of manifest mental illness or severe behavioral issues owing to their conditions of confinement and indefinite detention (for example, the handful of long-term hunger strikers). Their ability to seek independent psychiatric evaluation may prove critical to the ability to resolve their cases.

IV. Resolution of this question is long overdue

Twelve years have now passed since this Court conclusively mandated extension of both the writ and the Constitution to Guantánamo. Yet nearly two full decades into their detentions, Ali and the twenty-nine other remaining uncharged detainees have not enjoyed anything approaching appropriate process to determine whether they are justifiably held.

"[I]t is … unconvincing to assert that the entire court of appeals has faithfully administered the Supreme Court's commands in these cases." Stephen I. Vladeck, *The D.C. Circuit after* Boumediene, 41 Seton Hall L. Rev. 1451, 1455-56 (2011). The question of whether the Due Process Clause should apply to these cases has divided the lower courts since 2005.[21] The D.C. Circuit has all but invited this Court to examine the issue. This Court should do so.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[21] *See supra* pp. 4-5, 7-8.

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December 28, 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

[959 F.3d 364 (D.C. Cir. 2020)]

Argued December 11, 2019 Decided May 15, 2020

No. 18-5297

Abdul Razak ALI, Detainee, Appellant

v.

Donald J. TRUMP, President of the United States, et al., Appellees

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Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01020)

Shayana D. Kadidal argued the cause for appellant. With him on the briefs were J. Wells Dixon, Pardiss Kebriaei, Baher Azmy, and H. Candace Gorman.

Anil Vassanji was on the brief for amicus curiae Professor Eric Janus in support of petitioner-appellant.

Thomas Anthony Durkin and George M. Clarke III were on the brief for amici curiae Tofiq Nasser Awad Al

Bihani (ISN 893) and Abdul Latif Nasser (ISN 244) supporting appellant.

Brian E. Foster was on the brief for amicus curiae Human Rights First in support of petitioner-appellant.

Sharon Swingle, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Hashim M. Mooppan, Deputy Assistant Attorney General, and Michael Shih, Attorney. Sonia M. Carson, Attorney, entered an appearance.

Before: ROGERS and MILLETT, Circuit Judges, and RANDOLPH, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge MILLETT. Opinion concurring in the judgment filed by Senior Circuit Judge RANDOLPH.

MILLETT, *Circuit Judge*: [*366] The United States has detained appellant Abdul Razak Ali, an Algerian national, at the Guantanamo Bay Naval Base in Cuba since June 2002. In this appeal, Ali asks the court to hold that the Fifth Amendment's Due Process Clause categorically applies in full to detainees at Guantanamo Bay, and that his ongoing detention violates both the procedural and substantive aspects of the Due Process Clause. Those broad arguments are foreclosed by circuit precedent. To be sure, whether and which particular aspects of the Due Process Clause apply to detainees at Guantanamo Bay largely remain open questions in this circuit. So too does the question of what procedural protections the Suspension Clause requires. But Ali has eschewed any such calibrated or as-applied constitutional arguments in this case. For those reasons, the district court's

denial of Ali's petition for a writ of habeas corpus is affirmed.

I

A

Shortly after the September 11, 2001 terrorist attacks, Congress passed the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). That law empowers the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001[.]" *Id.* § 2(a), 115 Stat. at 224. This includes the detention of "those who are part of forces associated with Al Qaeda or the Taliban[.]" *Al-Madhwani v. Obama*, 642 F.3d 1071, 1073–1074 (D.C. Cir. 2011) (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010)); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 518–519, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion).

Congress subsequently passed the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011). That Act "affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons" until "the end of the hostilities authorized by the [AUMF]." *Id.* § 1021(a), (c)(1), 125 Stat. at 1562. The National Defense Authorization Act defines "covered persons" to include those "who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks," or who were "part of or substantially supported al-Qaeda, the Taliban, or associated

forces that are engaged in hostilities against the United States or its coalition partners[.]" *Id.* § 1021(b), 125 Stat. at 1562.

B

Ali is an Algerian citizen. He was captured by United States and Pakistani forces in March 2002 during a raid of a four-bedroom guesthouse in Faisalabad, Pakistan. *Ali v. Obama* (*Ali II*), 736 F.3d 542, 543 (D.C. Cir. 2013). Ali kept troubling company there. At the time of the raid, he was living with the al Qaeda facilitator Abu Zubaydah and several of Zubaydah's compatriots, including "four former trainers from a terrorist training camp in Afghanistan, multiple experts in explosives, and an individual who had fought alongside the Taliban." *Id.* The guesthouse also contained "a device typically used to assemble remote bombing devices" and "documents bearing the designation 'al Qaeda[.]' " *Id.*

In June 2002, the United States transferred Ali to the Naval Base at Guantanamo [*367] Bay. *Ali II*, 736 F.3d at 543. A few years later, Ali filed a petition for habeas corpus in the United States District Court for the District of Columbia challenging his designation and detention as an enemy combatant. *Ali v. Obama* (*Ali I*), 741 F. Supp. 2d 19, 21 (D.D.C. 2011). The district court denied the petition. *Id.* at 27. Applying a preponderance of the evidence standard, the district court concluded that Ali was a member of Zubaydah's forces, which the district court found was an "associated force" of al Qaeda and the Taliban within the meaning of the AUMF. *Id.* at 25, 27; *see also* Pub. L. No. 107-40, § 2(a), 115 Stat. at 224. The district court further found that Ali's capture in the same guesthouse as Zubaydah, combined with evidence that Ali was taking English lessons through one of Zubaydah's training programs while there, was enough to establish his membership in that force. *Ali I*, 741 F.

Supp. 2d at 25–26. The court also credited government evidence "placing [Ali] with Abu Zubaydah's force in various places in Afghanistan prior to his stay at the Faisalabad guesthouse." *Id.* at 26. And Ali's membership in Zubaydah's force was "corroborated further by [his] own admission—when he was first interrogated—that he had gone to Afghanistan to fight in the jihad against the U.S. and its Allied forces." *Id.*

This court affirmed, concluding that Ali's presence in the "terrorist guesthouse" alongside other terrorist combatants strongly supported the district court's finding that he was an enemy combatant. *Ali II*, 736 F.3d at 545–546. Among other things, Ali's presence in the company of senior leaders of Zubaydah's force, the duration of Ali's stay, his participation in English lessons while there, and the presence of documents and equipment associated with terrorist activity together provided weighty and substantial grounds for finding Ali to be an enemy combatant. *Id.* at 546.

On January 11, 2018, Ali joined several other Guantanamo detainees in filing renewed habeas petitions arguing that their continued detention violated the Due Process Clause and the AUMF. The district court subsequently denied Ali's habeas petition.

First, the district court held that detainees at Guantanamo Bay are not entitled to the protections of the Due Process Clause. The court also held that, even assuming the Due Process Clause applied, Ali's rights were not violated. The court reasoned that circuit precedent foreclosed Ali's procedural arguments that (1) the government must show by clear and convincing evidence that he remains a threat to national security, (2) government evidence is not entitled to a presumption of regularity, and (3) hearsay evidence should be inadmissible in AUMF detention proceedings. The court also rejected

Ali's substantive due process argument that his continuing detention no longer served its ostensible purpose.

Second, the district court rejected Ali's argument that his continuing detention exceeds the scope of the AUMF. The district court read the AUMF to authorize the detention of enemy combatants until the hostilities authorized by that statute cease and found that hostilities against al Qaeda and the Taliban were ongoing.

Ali appealed, seeking initial consideration en banc. This court denied initial en banc review. *Ali v. Trump*, No. 18-5297, 2019 WL 850757 (D.C. Cir. Feb. 22, 2019).

II

We review the district court's factual determinations for clear error and its ultimate decision to grant or deny habeas relief de novo. [*368] *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012); *see also Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010).

A

The district court's decision that the Due Process Clause is categorically inapplicable to detainees at Guantanamo Bay was misplaced. *See Qassim v. Trump*, 927 F.3d 522, 524 (D.C. Cir. 2019). The Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), unequivocally held that Guantanamo Bay detainees must be afforded those procedures necessary to ensure "meaningful review" of the lawfulness of their detention, id. at 783, 128 S.Ct. 2229. *See Qassim*, 927 F.3d at 524. In particular, detainees are constitutionally entitled to "those 'procedural protections'" that are "necessary (i) to 'rebut the factual basis for the Government's assertion that [the detainee] is an enemy combatant'; (ii) to give the prisoner 'a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or in-

terpretation of relevant law'; and (iii) to create a record that will support 'meaningful review' " by federal courts. *Id.* at 528–529 (formatting modified) (quoting *Boumediene*, 553 U.S. at 779, 783).[1]

In identifying those constitutional protections for detainees, the Supreme Court pointed both to the Constitution's guarantee of habeas corpus, U.S. Const. art. I, § 9, cl. 2 (commonly known as the Suspension Clause), and the Due Process Clause. *Boumediene*, 553 U.S. at 771–792, *see Qassim*, 927 F.3d at 529.

Circuit precedent has not yet comprehensively resolved which "constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions," and whether those "rights are housed" in the Due Process Clause, the Suspension Clause, or both. *Qassim*, 927 F.3d at 530.

In this case, Ali has chosen not to ground any of his claims for procedural protections in the Suspension Clause. So that issue is not before us. Instead, Ali's main argument puts all of his eggs in one constitutional basket. He argues that the Due Process Clause's procedural and substantive requirements apply wholesale, without any qualifications, to habeas corpus petitions filed by all Guantanamo detainees. Ali Br. 12 ("The Due Process Clause [a]pplies at Guantánamo[.]"); *id.* 13–14 ("After Boumediene, it inescapably follows that the Due Process Clause also applies—in the same measure as the Suspension Clause—at Guantánamo to constrain certain executive branch actions."); *see also* Ali Reply 12–13; Oral

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[1] This opinion's references to detainees at Guantanamo Bay and the constitutional protections they enjoy speaks only to foreign national detainees, who compose the Naval Base's current population in detention. We do not address what protections would apply to United States citizens or those with similar legal ties to the United States were they to be detained at Guantanamo Bay.

Arg. Tr. 4:6–12, 7:11–15, 13:5–7 (in seeking new procedural protections, counsel is "absolutely" "asking for a broader rule" than one that just resolves Ali's case); *id.* 20:2–21:6.[2]

That argument sweeps too far.

[*369] For starters, the argument is in substantial tension with the Supreme Court's more calibrated approach in *Boumediene*, which tied the constitutional protections afforded to Guantanamo Bay detainees' habeas corpus proceedings to their role in vindicating the constitutional right to the Great Writ and the judicial role in checking Executive Branch overreach. *See* 553 U.S. at 798 ("[P]etitioners may invoke the fundamental procedural protections of habeas corpus."); *id.* at 779–783, 793–795. The court stressed that the scope of constitutional protections must "turn on objective factors and practical concerns, not formalism." *Id.* at 764. Yet Ali argues for only a formal and unyielding line.

Ali's argument that the Due Process Clause's substantive protections apply with full force to all detainees at Guantanamo Bay also runs crosswise with this court's decision in *Kiyemba v. Obama*, which held that, for Guantanamo Bay detainees, the claimed substantive due process right to release into the United States had no purchase because a noncitizen who seeks admission to the United States generally "may not do so under any claim of right." 555 F.3d 1022, 1027 (D.C. Cir. 2009), *va-*

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[2] Ali at one point briefly states that "at least some of the protections of the Due Process Clause must also reach Guantánamo because there are no practical barriers that would apply[.]" Ali Br. 13. He does not develop this argument, though, and we will not make new constitutional arguments for counsel. *See Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) ("A party forfeits an argument by mentioning it only in the most skeletal way[.]") (formatting modified).

cated and remanded, 559 U.S. 131, *reinstated in relevant part*, 605 F.3d 1046, 1047–1048 (D.C. Cir. 2010). That case refutes Ali's claim that the substantive protections of the Due Process Clause apply across the board to all Guantanamo Bay detainees. And Ali has abstained from pressing any more gradated or as-applied Due Process Clause argument here.

In sum, *Boumediene* and *Qassim* teach that the determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis, applying *Boumediene*'s functional approach. The type of sweeping and global application asserted by Ali fails to account for the unique context and balancing of interests that *Boumediene* requires when reviewing the detention of foreign nationals captured during ongoing hostilities.

B

To the extent that Ali focuses on particular categories of constitutional objections, the Due Process Clause is of no help to him. *See Association of American R.Rs. v. United States Dep't of Transp.*, 896 F.3d 539, 544 (D.C. Cir. 2018) ("[C]ourts must choose the narrowest constitutional path to decision.").

1

Ali argues that his continued detention for more than seventeen years violates substantive due process. While Ali's detention has been quite lengthy, under binding circuit precedent the Due Process Clause's substantive protections would offer him no help.

Among other things, the substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions regardless of the fairness of the

procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). But only government action that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" qualifies as arbitrary for the purposes of substantive due process. *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006) (quoting [*370] *County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8, (1998)).

Ali contends that his ongoing detention violates substantive due process in two ways. First, he argues that his continued detention is driven by a new blanket and punitive policy against releasing detainees and, as such, is "untethered to any ongoing, individualized purpose to detain him." Ali Br. 20–21. Second, Ali argues that his "[p]erpetual detention" based on an "eighteen-day stay in a guest-house" shocks the conscience. Ali Br. 23. Neither argument succeeds.

First, Ali's detention is long because the armed conflict out of which it arises has been long, continuing to the present day. See Letter to Congressional Leaders on the Global Deployment of United States Combat-Equipped Armed Forces, 2018 Daily Comp. Pres. DOC. No. 00416, at 2 (June 8, 2018) ("The United States remains in an armed conflict, including in Afghanistan and against the Taliban, and active hostilities remain ongoing."). Given that, Ali's detention still serves the established law-of-war purpose of "prevent[ing] captured individuals from returning to the field of battle and taking up arms once again." *See Hamdi*, 542 U.S. at 518, 521 (plurality opinion) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on

longstanding law-of-war principles."); *see also Al-Alwi v. Trump*, 901 F.3d 294, 297–298 (D.C. Cir. 2018).

Ali does not dispute that hostilities authorized by the AUMF are ongoing. Oral Arg. Tr. 22:19–23. And although the AUMF was initially enacted in 2001, Congress reaffirmed the government's interest in detaining enemy combatants by passing the National Defense Authorization Act in 2011. Pub. L. No. 112-81, § 1021(a), (c)(1), 125 Stat. at 1562 (affirming "that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons" until the end of the hostilities). Whatever subjective motivations Ali might impute to the government, its original and legitimate purpose for detaining him—recognized by the law of war and Supreme Court precedent—persists.

On top of that, Ali has little ground to stand on in claiming that time has dissipated the threat he poses. The Guantanamo Bay Periodic Review Board has specifically reviewed Ali's detention no less than eight times to determine whether his continued detention remains necessary to protect against a significant security threat to the United States. *See generally* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (March 7, 2011) (establishing the Periodic Review Board). And each time the Periodic Review Board has recommended continued detention because of the threat his release would pose.[3]

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[3] *See* Periodic Review Board, Unclassified Summary of Final Determination for ISN 685 (July 6, 2016), https://www.prs.mil/Portals/60/Documents/ISN685/20160706_U_ISN_685_FINAL_DETERMINATION.pdf (initial full review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Feb. 3, 2017), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview/170104_U_ISN685_FINAL_DETERMINATION_PUBLIC_V1.pdf (first file review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Aug. 2, 2017),

[*371] In its most recent full review of Ali's detention, the Periodic Review Board "determined that continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States." See Periodic Review Board, Unclassified Summary of Final Determination for ISN 685 (Feb. 28, 2019), https://www.prs.mil/Portals/60/Documents/ISN685/SubsequentReview1/20190228_U_ISN_685_FINAL_DETERMINATION_PUBLIC.pdf (second full review). In reaching this conclusion, the Board "considered the detainee's elevated threat profile as evidenced by his prior roles in Afghanistan and prior association[,] [t]he Board's inability to assess the detainee's current threat level due to the detainee's refusal to participate in meetings with his representative, the lack of submission of any new materials

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https://www.prs.mil/Portals/60/Documents/ISN685/FileReview2/20170802_U_ISN_685_FINAL_DETERMINATION_MFR_PUBLIC.pdf (second file review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (March. 18, 2018), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview3/20180216_U_ISN_685_FINAL_DETERMINATION _MFR_PUBLIC.pdf (third file review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Aug. 13, 2018), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview4/20180717_U_FOUO_ISN685_MFR_PRB_U_PR.pdf (fourth file review); Periodic Review Board, Unclassified Summary of Final Determination for ISN 685 (Feb. 28, 2019), https://www.prs.mil/Portals/60/Documents/ISN685/SubsequentReview1/20190228_U_ISN_685_FINAL_DETERMINATION_PUBLIC.pdf (second full review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Sept. 13, 2019), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview5/20190719_U_ISN_685_UNCLASSIFIED_MFR.pdf (fifth file review); Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Feb. 20, 2020), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview6/200116_U_FOUO_ISN685_MFR_re_Sixth_File_Review_UPR.pdf (sixth file review).

by the detainee and the detainee's decision not to attend the hearing." *Id.*

And in its most recent review of Ali's case file in January 2020, the Periodic Review Board determined "by consensus" that "no significant question [was] raised as to whether [Ali's] continued detention [was] warranted." Periodic Review Board, File Review—Said bin Brahim bin Umran Bakush (AG-685) (Feb. 20, 2020), https://www.prs.mil/Portals/60/Documents/ISN685/FileReview6/200116_U_FOUO_ISN685_MFR_re_Sixth_File_Review_UPR.pdf (sixth file review).[4]

Second, the fact that hostilities have endured for a long time, without more, does not render the government's continued detention of Ali a shock to the conscience, in light of the dangers the Periodic Review Board has found to be associated with his release.

Ali attempts to downplay his connection to Zubaydah's force by characterizing it as an "eighteen-day stay in a guesthouse." Ali Br. 23. But that is a long time to be in the company of senior terrorist leaders. Nor does Ali dispute that he was actively studying in their English program while there, acquiring a skill that would have equipped him to harm the United States. See *Ali II*, 736 F.3d at 548 ("[T]he record included evidence that leaders of Abu Zubaydah's force provided English language training to help prepare their members to better infiltrate English-speaking areas and launch successful terrorist attacks."). Finally, Ali has provided no sound basis for concluding that either his ability or his desire to rejoin opposing forces has diminished.

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[4] Because Ali has repeatedly been found to be unsuitable for relief, this case does not present the question of what protections might apply to a detainee whom the Board has determined to be suitable for release, yet who continues to be detained.

[*372]

2

Ali also argues that, as a matter of procedural due process, the extended duration of the government's detention of detainees at Guantanamo Bay requires the government to show, by clear and convincing evidence, that continued detention is necessary to avoid specific, articulable dangers. He further contends that the Due Process Clause precludes the use of hearsay evidence and bars the presumption of regularity with respect to the government's evidence. Circuit precedent forecloses each of those arguments.

To begin with, we have repeatedly held that, to uphold an order of detention, the individual's status as an enemy combatant need only be proved by a preponderance of the evidence. *See, e.g.*, *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011) ("Our cases have stated that the preponderance of the evidence standard is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution's requirements for wartime detention."); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Lest there be any further misunderstandings, let us be absolutely clear. A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF."); *see also Al-Bihani*, 590 F.3d at 878.

The same holds true for the use of hearsay evidence during habeas corpus and other detention proceedings. *See Al-Bihani*, 590 F.3d at 879.

As for the presumption of regularity, it is not at all clear that the presumption has even been used in Ali's case. *See Ali I*, 741 F. Supp. 2d at 25–27 (setting forth the district court's factual findings and its conclusion

that Ali was a member of Zubaydah's force); *see also Barhoumi*, 609 F.3d at 423 ("We review the district court's findings of fact for clear error[.]"). In any event, this court's cases have also expressly granted a presumption of regularity to certain government evidence. *See Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011).

The bottom line is that we are not at liberty to rewrite circuit precedent in the way Ali desires. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel *** does not have the authority to overrule another three-judge panel of the court.").

Ali responds that, despite these precedents, a new balancing under *Mathews v. Eldridge*, 424 U.S. 319 (1976), is necessary because, as his detention drags on, the government's asserted security interest in his continued detention grows weaker while his liberty interest grows stronger. *See Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."). In other words, according to Ali, a new balancing analysis is in order because any assumption that wartime detention will be temporary "has long since dissipated" given the prolonged hostilities. Ali Br. 25.

That argument does not extract Ali from the force of binding circuit precedent. In developing the procedures applicable to AUMF challenges, this court contemplated that detentions could last for the duration of hostilities. *See Uthman*, 637 F.3d at 402 ("The AUMF, among other things, authorizes the Executive Branch to detain for the duration of hostilities those individuals who are part of al Qaeda or the Taliban."); *Awad*, 608 F.3d at 11 (explaining that the government's "authority to detain an enemy combatant is not dependent on

whether an individual would pose a threat to the [*373] United States or its allies if released but rather upon the continuation of hostilities"). The length for which hostilities might continue was uncertain then and continues to be uncertain now. And this court's ruling on Ali's initial habeas petition expressly recognized that Ali may be detained for an extended, and uncertain, period of time:

> We are of course aware that this is a long war with no end in sight. We understand Ali's concern that his membership in Zubaydah's force, even if it justified detention as an enemy combatant for some period of time, does not justify a "lifetime detention." But the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities.

Ali II, 736 F.3d at 552 (emphasis added) (citation omitted).

Indeed, Ali agrees that, if the hostilities covered by the AUMF were a more traditional type of war that continued for this same length of time, there would be no substantive due process objection to continued detention. Oral Arg. Tr. 21:15–19. Yet Ali cites no authority suggesting that the form of hostilities that enemy combatants undertake changes the law of war's authorization of their continued detention, especially when, as here, the government has found that the threat Ali poses continues.

C

Finally, Ali argues that this court may avoid the substantive and procedural due process issues altogether by applying the canon of constitutional avoidance and construing the AUMF to limit the duration of detentions. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)

("[I]t is a cardinal principle of statutory interpretation *** that when an Act of Congress raises a serious doubt as to its constitutionality," courts must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (formatting modified). But because the specific constitutional claims that Ali presses have already been considered and rejected by circuit precedent, there are no constitutional rulings to be avoided.

III

For all of those reasons, the district court's denial of Ali's petition for a writ of habeas corpus is affirmed.

So ordered.

RANDOLPH, *Senior Circuit Judge*: I concur only in the judgment. I do so because *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019), on which the majority relies, cannot be reconciled with the law of this circuit or with the Supreme Court's interpretation of the Constitution.

Qassim announced that "Circuit precedent leaves open and unresolved" the question whether detainees at the Guantanamo Bay Naval Station in Cuba are entitled to the "procedural" due process protections of the Fifth Amendment even though circuit precedent foreclosed "substantive" due process claims. 927 F.3d at 530. That depiction of circuit precedent was not accurate and, more important, it contradicted decisions of the Supreme Court. Rather than "open and unresolved," it is "well established" that the protections of the Fifth Amendment's Due Process Clause "do not extend to aliens outside the territorial boundaries" of the United States, including those held at Guantanamo Bay. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

[*374] To explain my position I begin where Qassim and today's majority opinion should have begun – with the Supreme Court's interpretation of the Due Process Clause. I follow a well-marked path. *See Qassim v. Trump*, 938 F.3d 375, 376 (D.C. Cir. 2019) (Henderson and Rao, JJ. dissenting from denial of en banc review); *see also Hernandez v. United States*, 785 F.3d 117, 125-28 (5th Cir. 2015) (Jones, J. concurring).[1]

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

The Supreme Court's seminal decision in *Eisentrager*, rendered in the twilight of World War II, interpreted the Due Process Clause of the Fifth Amendment to the Constitution. That well known Clause states: "nor shall any person ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V (emphasis added).

The lower court in *Eisentrager* – which happened to be the D.C. Circuit – ruled that "any person" in the Due Process Clause included "an enemy alien deprived of his liberty" by the United States "anywhere in the world." 339 U.S. at 767, 782.[2] The Supreme Court in *Eisentrager*

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[1] The Fifth Circuit's *en banc* decision in *Hernandez* was vacated on other grounds by the Supreme Court. *See Hernandez v. Mesa*, —– U.S. ——, 137 S.Ct. 2003, 198 L.Ed.2d 625 (2017). On remand, the Fifth Circuit (*en banc*) largely reiterated the relevant portions of Judge Jones's 2015 concurring opinion. *See, e.g.*, 885 F.3d 811, 817 (5th Cir. 2018) (noting that "no federal circuit has extended the holding of *Boumediene* [*v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008)] ... to other constitutional provisions). This most recent *Hernandez* Fifth Circuit decision was affirmed by the Supreme Court." *See Hernandez v. Mesa*, —– U.S. ——, 140 S.Ct. 735, 206 L.Ed.2d 29 (2020).

[2] *See Eisentrager v. Forrestal*, 174 F. 2d 961, 963-65 (D.C. Cir. 1949).

firmly rejected that interpretation. *Eisentrager*'s holding was clear, it was precise, and it was contrary to *Qassim*: a nonresident alien enemy detained by the United States outside of our sovereign territory was, the Court decided, not "any person" within the meaning of the Fifth Amendment and therefore not entitled to the protections of the Due Process Clause. *Id.* at 782-85.

The *Qassim* court paid no attention to the Supreme Court's interpretation of "any person" in the Fifth Amendment. There is no good explanation for this omission. The Supreme Court's ruling made it irrelevant whether the alien's claim was one of "procedural" due process or "substantive" due process. Under *Eisentrager*, it was the status of the individual as an alien enemy held outside the United States, not the nature of his claims, that barred application of the Due Process Clause. As I will discuss in a moment, when the Supreme Court years later considered *Eisentrager* again, it put the case on precisely that footing.

In light of *Eisentrager*, whether an alien enemy held at Guantanamo Bay[3] may invoke [*375] the Due Process

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[3] Guantanamo is not part of the sovereign territory of the United States. The Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680 (2005), so provides: " 'United States,' when used in a geographic sense ... does not include the United States Naval Station, Guantanamo Bay, Cuba." Also, Guantanamo is not part of the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(38).

Even if there were some doubt about Guantanamo Bay's status, "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges." *Jones v. United States*, 137 U.S. 202, 212 (1890), *quoted in Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015). Thus, "determination of [American] sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown Co. v.*

Clause is not – to use *Qassim*'s words – "open and unresolved." Even so, the *Qassim* panel insisted that its opinion "explains in detail its consistency with" *Eisentrager*.[4] It did nothing of the sort.

Qassim relegated *Eisentrager* to a footnote. The footnote gave the case citation and appended a brief parenthetical. The parenthetical was misleading. It described *Eisentrager* as having decided "that enemy aliens engaged in hostile action against the United States have no immunity from military trial." 927 F.3d at 529 n.5. There is not a word about the Supreme Court's interpretation of "any person" in the Due Process Clause. In today's opinion, the majority does not even cite *Eisentrager*, let alone explain how it can possibly be squared with *Qassim*.

To sum up, *Eisentrager*'s holding gives the lie to *Qassim*'s assertion that it was an open question whether Guantanamo detainees were entitled to due process, procedural or otherwise.[5]

Neither the *Qassim* opinion nor the majority opinion in this case can be rationalized on the basis that *Boumediene v. Bush*, 553 U.S. 723 (2008), rendered *Ei-*

Connell, 335 U.S. 377, 380 (1948).

[4] *Qassim v. Trump*, 938 F.3d 375, 376 (D.C. Cir. 2019) (Millett, Pillard, and Edwards, JJ., concurring in denial of *en banc* review).

[5] The executive branch has, since at least 2009, articulated the procedures to be used for the review and disposition of Guantanamo detainees. These Executive Orders appear to recognize that the Fifth Amendment does not apply to the non-resident aliens held at the naval station. *See, e.g.*, Exec. Order 13492, 74 Fed. Reg. 4897-99 (no mention of constitutional due process, but noting that individuals held at Guantanamo "have the constitutional privilege of the writ of habeas corpus"); Exec. Order 13567, 76 Fed. Reg. 13277 (establishing, "*as a discretionary matter*, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases") (emphasis added).

sentrager's Fifth Amendment holding a dead letter. First of all, before *Qassim* we had already decided that *Boumediene* did not "disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam). That is, *Boumediene* was " 'explicitly confined' " to the Suspension Clause and did not disturb "*Eisentrager* and its progeny." *Id.* at 529. *See also United States v. Bahlul*, 840 F.3d 757, 796 (D.C. Cir. 2016) (Millett, J., concurring) (quoting *Rasul*).[6]

Perhaps the *Qassim* court believed that *Boumediene* eroded *Eisentrager*'s precedential value because *Boumediene* stated that "there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008." 553 U.S. at 768. *Boumediene* added that Guantanamo Bay "is no transient possession" and is in "every practical sense" "within the constant jurisdiction of the United States." 553 U.S. at 768-69.

But *Qassim* made no attempt to distinguish *Eisentrager* on this basis. More, Guantanamo Bay is not within the sovereign [*376] territory of the United States, and its legal status is not for the courts to decide. *See* note 5, *supra*. More still, immediately after declaring that the naval station "is no transient possession," *Boumediene* once again made clear that the scope of its opinion concerned only the Suspension Clause. *See* 553 U.S. at 769 (acknowledging that "there are costs to holding the Suspension Clause applicable in a case of military detention abroad" but distinguishing Eisentrager nonetheless).

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[6] The Ninth Circuit agrees. *See Thuraissigiam v. U.S. Dep't of Homeland Security*, 917 F.3d 1097, 1111-12 (9th Cir. 2019) ("*Boumediene* itself clearly recognized the distinction between the Fifth Amendment's due process rights and the Suspension Clause").

Guantanamo's status thus cannot be used as a basis for expanding, *sua sponte*, the reach of the Fifth Amendment.

Second, even if *Boumediene* somehow put *Eisentrager* into doubt, the *Qassim* court failed to heed the Supreme Court's warning that its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). When a Supreme Court decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also id.* at 486 (Stevens, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also id.* at 258 (Ginsburg, J., dissenting); *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20 (1997); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) (per curiam).[7]

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[7] *Qassim* and today's majority opinion quote *Boumediene's* statement that the Suspension Clause requires that a record be made to allow for "meaningful review." *See Qassim*, 924 F.3d at 524 (quoting *Boumediene*, 553 U.S. at 783). This phrase did not confer upon the lower federal courts a free-wheeling authority to disregard Supreme Court precedent. The Court was not overruling any of its cases outside the Suspension Clause. As then-Judge Kavanaugh put it for our court, "[m]eaningful review in this context requires that a court have 'some authority to assess the sufficiency of the Government's evidence against the detainee' and to 'admit and consider relevant exculpatory evidence' that may be added to the record by petitioners during review." *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010), quoting *Boumediene,* 553 U.S. at 786.

2. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)

The ultimate issue in *Verdugo-Urquidez* was "whether the Fourth Amendment applies to the search and seizure by the United States of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. *Qassim* was not directly concerned with the Fourth Amendment and neither are we in this case. But *Qassim* should have been concerned with the reasoning the Supreme Court used to decide that the Fourth Amendment did not apply.

Verdugo-Urquidez discussed *Eisentrager* not in a parenthetical in a footnote but in the text of the opinion. *Eisentrager*, the Supreme Court wrote, "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. To the Supreme Court, "our rejection of the extraterritorial application of the Fifth Amendment was emphatic," 494 U.S. at 269. After quoting the *Eisentrager* opinion,[8] the [*377] *Verdugo-Urquidez* Court wrote this: "If such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies to 'the people.' " *Id.*

This portion of the *Verdugo-Urquidez* opinion was not dicta. It was instead an intermediate step in the

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[8] The Court quoted this language from *Eisentrager*: "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes v. Bidwell*, 182 U.S. 244. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it." *Eisentrager*, 339 U.S. at 784.

Court's reasoning. There was nothing extraneous about the Court's comparing the Fourth Amendment with *Eisentrager*'s interpretation of the Fifth Amendment. This is why the Court in a later case treated *Verdugo-Urquidez* as having "established" that Fifth Amendment protections "are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).[9] Even if one were to consider the Court's Fifth Amendment discussion as dicta,[10] which it is not, *Qassim* cannot be harmonized with *Verdugo-Urquidez*. Did *Qassim* even try to distinguish *Verdugo-Urquidez*? It did not.

Qassim again relegated the Supreme Court's opinion to a footnote, giving the official case citation and attaching a parenthetical stating: "Fourth Amendment protections do not apply extraterritorially to a search conducted within a foreign country of property belonging to a foreign citizen with no voluntary connection to the United States." 927 F.3d at 529 n. 5. And that was that. *Qassim* said not a word about the Supreme Court's analysis of the Due Process Clause or the Court's discussion of *Eisentrager*, even though both directly impacted the issue before the *Qassim* court. The majority opinion in this case follows suit.

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[9] *See* pp. 377-78 *infra*.

[10] *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), held that even if the Fifth Amendment discussion in *Verdugo-Urquidez* was "dicta," "it is firm and considered dicta that binds this court." The court therefore ruled that the Due Process Clause did not apply to "foreign nationals living abroad." 233 F.3d at 602. As to the binding force of *Verdugo-Urquidez's* analysis of the Fifth Amendment, *see also People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

3. *Zadvydas v. Davis*, 533 U.S. 678 (2001)

In *Zadvydas*, the Supreme Court stated that: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." 533 U.S. at 693. In support of this statement of constitutional law the Court (*id.*) cited two cases: "*See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (same)."

How did *Qassim* respond to the Supreme Court's recital of this "well established" Fifth Amendment law? Once again the answer is that the opinion did not respond. Instead, as it did with *Eisentrager* and *Verdugo-Urquidez*, the *Qassim* court tried to hide the ball. It reduced *Zadvydas* to a footnote citation with a parenthetical reading: "addresses the immigration power to exclude aliens from [*378] entering the United States." *Qassim*, 927 F.3d at 529 n. 5. This conveyed the impression that *Zadvydas* had nothing pertinent to say about the issue before the *Qassim* court, which of course was not true. Once again this portion of *Zadvydas* is ignored in today's majority opinion.

4. Precedent of the D.C. Circuit Pre-*Kiyemba*

Qassim's team of attorneys candidly admitted that the law of this circuit was against them.[11] On behalf of their client in the district court, they "entered into a

[11] While they deserve credit for their honest evaluation of circuit precedent, they failed to address or even mention the most important Supreme Court decisions – *Eisentrager*, *Verdugo-Urquidez* and *Zadvydas*, opinions repeatedly cited in the decisions of our court and in the government's brief in *Qassim*.

stipulation with the government disputing the allegations against him but conceding that, under the existing legal standards which denied him due process and the ability to see and confront the evidence against him, he could not prevail." *Qassim v. Trump*, Dkt. No. 18-5148, Appellant's Br. 10. On appeal, Qassim's attorneys conceded that circuit precedent foreclosed his sole argument "that the Fifth Amendment's due process clause applies to unprivileged enemy combatants detained at Guantanamo Bay." *Qassim v. Trump*, Dkt. No. 18-5148, Appellees' Br. 4.[12]

Despite these concessions, the *Qassim* panel reached out and decided the very issue the parties had conceded, and decided it – obviously without any briefing – in a way that was the opposite of what the parties had stipulated.

The *Qassim* opinion devoted most of its attention to one circuit case – *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131, *and reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010). *Kiyemba*, relying on the Supreme Court's opinions in *Eisentrager*, *Verdugo-Urquidez* and *Zadvydas*, held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." 555 F.3d at 1026. According to *Qassim*, however, this meant only that the Guantanamo detainees had no substantive due process rights, which left open the question whether they had procedural due process rights. After all, *Qassim* reasoned, only a substantive due process right was involved in *Kiyemba*.

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[12] Qassim's attorneys recognized that the panel of our court assigned to his case could not "overrule or disregard prior panel holdings," but could "request[ ] proceedings *en banc* to reconsider" circuit precedent. *Qassim v. Trump*, Dkt. No. 18-5148, Appellant's Br. 5.

That distinction is too clever by half.[13] It once again tries to divert attention from the essential points of the Supreme Court [*379] opinions in *Eisentrager*, *Verdugo-Urquidez* and *Zadvydas*, opinions on which *Kiyemba* and other cases from this circuit relied. As I have explained, those Supreme Court opinions render Qassim's substantive-procedural dichotomy irrelevant as a matter of constitutional law. The reason the Due Process Clause did not apply in *Kiyemba* was not that the detainees had raised a "substantive" due process claim.[14] The phrase "substantive due process" does not appear in the *Kiyemba* opinion. The detainees were not entitled to the protection of the Due Process Clause because the Supreme Court has decided that aliens outside of the United States do not qualify as "any person" within the meaning of the Fifth Amendment.

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[13] A separate statement issued in an earlier stage of this case put the substantive-procedural bee in *Qassim's* bonnet. *See Qassim*, 927 F.3d at 528 (citing and quoting *Ali v. Trump*, 2019 WL 850757 at *2 (D.C. Cir. 2019) (Tatel, J. concurring in denial of *en banc* review)). That statement did not confront, indeed did not even mention, any of the Supreme Court's opinions. My colleague may perhaps be excused because the en banc petitioner failed to mention any of those cases. *See* note 11, *infra*.

Even so, the statement to which I refer confirms my longstanding objection to the practice of individual judges issuing opinions on denials of rehearing *en banc*. I thought then and think now that the practice "rubs against the grain of Article III's ban on advisory opinions. The manner in which these *en banc* 'bulletins' are formulated does not simulate the process of the court when it is actually deciding a case. If recurring issues are addressed, *en banc* statements may be tantamount to prejudgments," and – as we see in this case – often are. *Independent Insurance Agents of America, Inc. v. Clarke*, 965 F. 2d 1077,1080 (D.C. Cir. 1992).

[14] *Eisentrager* itself cannot be distinguished on any such basis. The habeas petitioners in *Eisentrager* raised procedural due process claims. *See Eisentrager v. Forrestal*, 174 F.2d at 963.

In addition to the opinions of the Supreme Court, *Kiyemba* relied upon five opinions of this circuit: *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam); *People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *Harbury*, 233 F.3d at 603; *32 County Sovereignty Committee v. U.S. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). Each of these cases supported *Kiyemba*'s holding that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." 555 F.3d at 1026.

Qassim, although purporting to recite the law of our circuit, completely neglected these cases upon which *Kiyemba* relied. This omission is all the more egregious because of the five circuit precedents, four denied procedural due process rights to aliens without property or presence in the United States – the very issue *Qassim* asserted was an open question in our court. *See People's Mojahedin*, 182 F.3d at 22, 25; *Harbury*, 233 F.3d at 598, 604; *32 County Sovereignty*, 292 F.3d at 798; and *Jifry*, 370 F.3d at 1176, 1183.

5. Precedent of the D.C. Circuit Post-*Kiyemba*

Qassim did cite four post-*Kiyemba* opinions of this court. Its treatment of those cases is of a piece with the rest of the *Qassim* opinion.

One of the four cases was *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009). *Rasul* relied on the Supreme Court opinions in *Eisentrager* and *Verdugo-Urquidez* and concluded that "the law of this circuit also holds that the Fifth Amendment does not extend to aliens or foreign entities without presence or property in the United States." 563 F.3d at 531. *Rasul* was a procedural due

process case. In order to fit the case into its narrative, *Qassim* asserted that *Rasul* – and the other post-*Kiyemba* cases – had each "reserved such Due Process questions," "such" being procedural due process. 927 F.3d at 530. That assertion was not true with respect to *Rasul*, and it was not true of the three other cases. *Rasul* did not refuse to decide whether the detainees at Guantanamo were entitled to procedural due process. *Rasul* decided that question and plainly held they were not so entitled. *See* 563 F.3d at 531. What the *Qassim* opinion is referring to something quite different. It is *Rasul*'s statement that whether "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny ... is not for us to determine; the Court has reminded the lower federal courts that it alone retains the authority to overrule its precedents." 563 F.3d at 529.

[*380] The second post-*Kiyemba* case is *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011). *Al-Madwhani* held that Guantanamo detainees could not rely on procedural due process, stating flatly "that the detainees at Guantanamo Bay possess no constitutional due process rights." 642 F.3d at 1077 (citing *Kiyemba*) (alterations omitted). The *Al-Madwhani* court then wrote this: "Even assuming *Madhwani* had a constitutional right to due process and assuming the district court violated it by relying on evidence outside the record—**premises we do not accept**—such error would be 'harmless beyond a reasonable doubt ....' *Id.* (emphasis added). The *Qassim* opinion omitted the highlighted language and by doing so, gave the false impression that *Al-Madhwani* left open the question whether procedural due process applied at Guantanamo."

Qassim cited two other Guantanamo cases in support of its claim that post-*Kiyemba* decisions of this court had reserved the question whether "constitutional

procedural protections" applied to the detainees. 927 F.3d at 530. As to one of them – *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014) – *Qassim* correctly states that the opinion assumed "without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo." 927 F.3d at 530. The reason why this use of *Aamer* is so misleading should be apparent: whether a detainee may refuse medical treatment concerns substantive not procedural rights. The *Aamer* court confirmed as much, noting that the detainees "advance two separate substantive claims regarding the legality of force-feeding." 742 F.3d at 1038.

The same objection pertains to the fourth case *Qassim* cited – *Kiyemba v. Obama*, 561 F.3d 509, 518 n.4 (D.C. Cir. 2009) ("*Kiyemba II*"). As in *Aamer*, *Kiyemba II* dealt explicitly and only with substantive due process rights. The detainees there asserted an "interest in avoiding torture or mistreatment by a foreign nation" to challenge the government's decision to transfer them from Guantanamo Bay to another country. 561 F.3d at 518.

* * *

"Inconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that 'we must act alike in all cases of like nature.' " *LaShawn A v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*). The law-of-the-circuit doctrine implements that principle: the same issue presented in a later case in the same court should lead to the same result. *Id.* That doctrine, together with the Supreme Court's admonition that the lower courts must adhere to the Court's precedents without anticipating their overruling, were blatantly disregarded in *Qassim*. "When a decision of one panel is inconsistent with the decision of a prior panel, the

norm is that the later decision, being a violation of fixed law, cannot prevail." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). And "it is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." *Breakefield v. District of Columbia*, 442 F.2d 1227, 1230 (D.C. Cir. 1970). For these reasons, I would affirm the district court's denial of Ali's petition based on a straightforward application of *Eisentrager*, *Verdugo-Urquidez*, *Zadvydas*, and the litany of circuit cases since *Eisentrager* confirming that the Fifth Amendment does not apply to aliens without property or presence in the United States.

APPENDIX B

OPINION OF THE DISTRICT COURT

[317 F.Supp.3d 480]

United States District Court,
District of Columbia.

Abdul Razak ALI, Petitioner,
v.
Donald J. TRUMP, et al., Respondents.

Civil Case No. 10-cv-1020 (RJL)

Signed 08/10/2018

[*481] H. Candace Gorman, Law Office of H. Candace Gorman, Chicago, IL, J. Wells Dixon, Shayana Devendra Kadidal, Center for Constitutional Rights, New York, NY, for Petitioner.

Alexander Kenneth Haas, Blanche L. Bruce, Charlotte A. Abel, U.S. Department of Justice U.S. Attorney's Office, Dalin Riley Holyoak, U.S. Department of Justice Office of Immigration, Andrew I. Warden, Carolyn Gail Mark, David Hugh White, James J. Gilligan, James J. Schwartz, John P. Lohrer, John Edward Wallace, Joseph Charles Folio, III, Kathryn Celia Davis, Keith Simmons, Kristina Ann Wolfe, Mary Elizabeth Carney, Norman Christopher Hardee, Olivia R. Hussey Scott, Paul A. Dean, Rachelle C. Williams, Robert J. Prince, Ronald James Wiltsie, Sarah Maloney, Sean W. O'Donnell, Jr., Stephen McCoy Elliott, Terry Marcus Henry, Timothy Allen Bass, Julia A. Berman, U.S. Department of Justice, Washington, DC, for Respondents.

MEMORANDUM OPINION

RICHARD J. LEON, United States District Judge

Petitioner Abdul Razak Ali ("Ali" or "petitioner") challenges his continued detention at the United States Naval Station at Guantanamo Bay, Cuba, where he has been held since June 2002. Although this Court, *Ali v. Obama*, 741 F.Supp.2d 19 (D.D.C. 2011), and our Court of Appeals, *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), previously determined that Ali could lawfully be detained as an enemy combatant under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107–40 § 2(a), 115 Stat. 224 (2002), Ali now argues that the amount of time that has passed since his apprehension renders his [*482] continued detention unlawful under the AUMF and the due process clause of the Fifth Amendment to the U.S. Constitution, U.S. Const. amend. V.

Currently before the Court is Ali's Corrected Motion for Order Granting Writ of Habeas Corpus [Dkt. # 1529] ("Corrected Mot."). Upon consideration of the pleadings, the law, the record, and for the reasons stated below, I find that Ali's detention remains lawful, and DENY his Corrected Motion for Order Granting Writ of Habeas Corpus [Dkt. # 1529].

BACKGROUND

Petitioner Abdul Razak Ali is an Algerian national. *See Ali*, 741 F.Supp.2d at 21. In March 2002, he was captured by Pakistani forces in a four-bedroom house in Faisalabad, Pakistan along with a well-known al Qaeda facilitator, Abu Zubaydah. *Id.* Indeed, Abu Zubaydah was at that very time assembling a force to attack U.S. and Allied forces. *Id.* Captured along with petitioner and Abu

Zubaydah were a bevy of Abu Zubaydah's senior leadership, including instructors in engineering, small arms, English language (with an American accent), and various electrical circuitry specialists. *See id.* Also found at the guesthouse were pro-al Qaeda literature, electrical components, and at least one device typically used to assemble remote bombing devices (*i.e.*, improvised explosive devices or "IEDs"). *See id.* Following his capture, and before his transfer to Guantanamo, Ali was transported to Bagram Air Force Base for questioning. See id. Since June 2002, he has been held at the U.S. Naval Base at Guantanámo Bay.

Ali filed his first petition for writ of habeas corpus in this Court on December 21, 2005. *See* Pet. for a Writ of Habeas Corpus, Ali v. Bush, Civ. No. 5-2386 (D.D.C. Dec. 21, 2005) [Dkt. # 1]. The case was initially assigned to Judge Walton. As with the hundreds of other habeas petitions filed around the same time, Ali's case was stayed pending the U.S. Supreme Court decision in Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that Guantanamo detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention").

Following the Boumediene decision, for reasons of judicial economy, Judge Walton transferred this case to then-Chief Judge Royce Lamberth. Order, *Ali v. Obama*, Civ. No. 5-2386 (D.D.C. Apr. 21, 2009) [Dkt. # 1153]. On June 6, 2010, while the discovery process was pending, and after denying Petitioner's Motion to Expedite, Judge Lamberth recused himself on Petitioner's Motion. Order, *Ali v. Obama*, Civ. No. 5-2386 (D.D.C. June 6, 2010) [Dkt. # 1418]. On June 16, 2010, Ali's case was randomly reassigned to this Court. See Reassignment of Civil Case, *Ali v. Obama*, Civ. No. 9-745 (D.D.C. June 16, 2010) [Dkt. # 1419].

On August 25, 2010, I issued a Case Management Order ("CMO"). *See* Case Management Order, *Ali v. Obama*, Civ. No. 10-1020 (D.D.C. Aug. 25, 2010) [Dkt. # 1423]. This order was virtually identical to those issued in the eight habeas petitions that had been previously litigated before this Court. *See Ali*, 741 F.Supp.2d at 22. The CMO placed the burden of proof on the Government, set the standard of proof as preponderance of the evidence, provided discovery rights for detainees (including a right to "exculpatory" materials), formulated the procedural processes that would guide the hearings in Court, and set forth the definition of "enemy combatant." [*483] *Id.* at 24 n.2.[1] These procedures had already been blessed by our Court of Appeals. *See Al-Bihani v. Obama*, 590 F.3d 866, 869–70, 875–881 (D.C. Cir. 2010).

In December 2010, I conducted three days of hearings on the merits of Ali's petition. Unfortunately for Mr. Ali, following those hearings, I concluded that he was being lawfully detained as an "enemy combatant." *Ali*, 741 F.Supp.2d at 27. I based this determination on (i) the undisputed fact that Ali was captured at a guesthouse in Faisalabad, Pakistan, with a well-known al Qaeda facilitator, Abu Zubaydah;[2] (ii) credible testimony from other

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[1] The definition of enemy combatant is as follows:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Ali v. Obama, 741 F.Supp.2d 19, 24 (D.D.C. 2011) (quoting *Boumediene v. Bush*, 583 F.Supp.2d 133, 135 (D.D.C. 2008)).

[2] Other courts in this district have concluded that Abu Zubaydah and his band of followers had well established ties to al Qaeda and the Taliban, and were thus an "associated force" under the 2001 Authorization for the Use of Military Force. *See Barhoumi v. Obama*, 609 F.3d 416, 420, 432 (D.C. Cir. 2010); *Al Harbi v. Obama*, No. 05-

individuals at the guesthouse that Ali participated in Abu Zubaydah's "training programs" while in their company at the guesthouse; and (iii) credible evidence placing Ali in various locations in Afghanistan with Abu Zubaydah and his band of followers. *See id.* at 25–27. Our Circuit affirmed my decision on December 3, 2013. *See Ali*, 736 F.3d at 543. And at oral argument in this case, Ali's counsel confirmed that the present habeas petition does not challenge my earlier ruling as to the legality of Ali's apprehension and detention. *See* 3/23/18 Hr'g Tr. 4:25-5:5 [Dkt. # 1535].

PETITIONER'S CURRENT STATUS

In January 2009, President Obama established the Guantanamo Bay Review Task Force. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). The Task Force was charged with evaluating whether each detainee's "continued detention is in the national security and foreign policy interests of the United States." *Id.* § 2(d), 74 Fed. Reg. 4897–99. The Task Force reviewed the status of each Guantanamo detainee, and made a recommendation whether to (i) transfer the detainee, (ii) continue his detention, or (iii) prosecute him. Final Report: Guantanamo Rev. Task Force at 1 (Jan. 22, 2010) ("GTMO Task Force Report"), https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

A separate Executive Order requires periodic status reviews of detainees, like Ali. whom the Task Force decided to continue to detain. *See* Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011); *see also* Exec. Order 13,823, 83 Fed. Reg. 4831, 4831–32 (Jan. 30. 2018) (continuing these procedures for periodic reviews). The Periodic Review Board ("PRB" or "Board") conducts these

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02479, 2010 WL 2398883, at *14 (D.D.C. May 13, 2010).

reviews. This process assesses whether continued custody of a detainee is necessary to protect against a significant threat to the security of the United States. Exec. Order 13,567, § 2. It is not intended as an assessment of the legality of continued detention. *Id.* § 8.

After the initial PRB review, each detainee is eligible for a "full" review every three years. Id. § 3(b). In addition, each [*484] detainee is eligible for a "file review" every six months. *Id.* § 3(c). If the file review reveals that a "significant question" has arisen concerning the detainee's continued detention, then a full PRB review is promptly convened. *Id.*

In its February 16, 2018 submission, the Government represented that Ali had his initial Periodic Review Board hearing on July 6, 2016. See Respondents' Opposition to Petitioners' Mot. for Order Granting Writ of Habeas Corpus, *Ali v. Trump*, Civ. No. 10-1020, at 7 (Feb. 16, 2018) [Dkt. # 1525] ("Opp'n"). The PRB designated Ali For continued detention. *Id.* Ali's PRB file was reviewed on February 3, 2017 and again on September 1, 2017. *Id.* As of February 14, 2018, Ali has a third PRB file review ongoing. *Id.*

Notwithstanding his pending PRB review, Ali and ten other detainees jointly filed a Motion for Petition for Habeas Corpus on January 11, 2018. Mot. for Order Granting Writ of Habeas Corpus, Civ. No. 10-1020 [Dkt. # 1512]. An identical motion was filed in all nine separate cases.[3] On January 22, 2018, I set a briefing schedule, ordering that the Government file its Opposition by Friday, February 16, 2018, and that Petitioner file his Reply

[3] This Court retained Civ. No. 10-1020. Judge Sullivan similarly retained jurisdiction over Civ. Nos. 8-1360 and 5-23. Judge Kollar-Kotelly, Judge Lamberth, and Judge Walton agreed to transfer the cases assigned to them to Judge Hogan. These transfers were made on January 18, 2018.

by Friday, March 9, 2018.[4] Following the March 5, 2018 status conference, Ali filed a Corrected Motion for Order Granting Writ of Habeas Corpus in the case at bar in order to address a clerical error in the case caption. [Dkt. # 1529]. The briefing is complete and the motion is ripe for review.

LEGAL STANDARD

The Government bears the burden of proving by a preponderance of the evidence that Ali is lawfully detained. If the Government fails to meet that burden, the Court must grant the petition and order Ali's release. This is the standard that governed the Court's review of Ali's original habeas petition. *See* Case Management Order, *Ali v. Obama*, Civ. No. 10-1020, at 3 (D.D.C. Aug. 25, 2010) [Dkt. # 1423] ("The Government must establish, by a preponderance of the evidence, the lawfulness of the petitioner's detention. The Government bears the ultimate burden of persuasion that the petitioner's detention is lawful."). Our Circuit has repeatedly affirmed that a preponderance standard is constitutionally appropriate when reviewing Guantanamo detainee habeas petitions. *See Al Odah v. United States*, 611 F.3d 8, 13–14 (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.").

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[4] Judges Hogan and Sullivan ordered the same briefing schedule in their cases. Petitioners and Government have filed identical pleadings in all cases.

DISCUSSION

Ali advances two arguments: that (i) the Government lacks the authority under the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107–40, § 2(a), 115 Stat. 224 (Sept. 18, 2001), to continue to detain him, see Corrected Mot. at 29–37; Petitioners' Reply in Support of Mot. for Order Granting Writ of Habeas Corpus [*485] 15–25 [Dkt. # 1528] ("Reply"); and (ii) Ali's continuing detention deprives him of both substantive and procedural due process, *see* Corrected Mot. at 15–29; Reply at 7–15.[5] Although repackaged under different authority, these arguments flow from the same premise: that the duration of Ali's detention erodes the legal basis for his continued detention. Ali, in effect, asks this Court to use its "broad, equitable common law habeas authority" to order the issuance of a writ of habeas corpus. *Id.* at 37. For the following reasons, I cannot do so!

I. The Government's Detention Authority Pursuant to the AUMF

Ali first argues that the Executive Branch lacks the authority to continue to detain him. He contends that he is effectively subject to "indefinite" detention, since the campaign against al Qaeda, Taliban, and associated forces continues to persist. Corrected Mot. at 1. Such "indef-

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[5] Ali's brief contains a third line of argument—that "the continuing detention of petitioners approved for transfer from Guantanamo violates substantive due process because their detention no longer serves its ostensible purpose." Corrected Mot. at 26 (alteration in original). This line of argument does not apply to Ali, who has not been deemed eligible for transfer. Opp'n at 7. Instead, this argument applies only to Tofiq Nasser Awad Al-Bihani and Abdul Latif Nassar, two petitioners who have been cleared for transfer and whose habeas motions are pending before Judge Hogan. *See* Corrected Mot. at 26. Ali, Al-Bihani, and Nassar, along with eight other detainees, all filed identical briefs, despite the different factual circumstances surrounding their detention.

inite" detention, the argument goes, exceeds the scope of the Government's detention authority under the AUMF. *Id.* Second, Ali contends that the sheer length of the conflict has "unraveled" the Government's authority pursuant to the AUMF, since "the practical circumstances of the conflict with al Qaeda have long ceased to resemble any of the conflicts that informed the development of the law of war." *Id.* at 3 (alteration in original). Unfortunately for the petitioner, both arguments are without merit.

Shortly after the September 11, 2001 terrorist attacks, Congress passed the Authorization for Use of Military Force ("AUMF"), which provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. 107–40, § 2(a), 115 Stat. 224 (Sept. 18, 2001). The AUMF gives the President authority to detain enemy combatants—i.e., individuals who were "part of" or provided support to al Qaeda and Taliban forces in Afghanistan. Al-Bihani, 590 F.3d at 872 ("[An individual] is lawfully detained [under the AUMF if he] is ... an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners" (quotations omitted)).[6]

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[6] This Court has already determined that Ali is an enemy combatant who can be lawfully detained under the AUMF. *See Ali*, 741 F.Supp.2d at 27, *aff'd, Ali*, 736 F.3d at 550. Ali does not challenge

In 2004, a plurality of the Supreme Court observed in *Hamdi v. Rumsfeld* [*486] that it was a "clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. 507, 520–21 (2004) (plurality opinion) (citing Geneva Convention (III) Relative to the Treatment of Prisoners art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364); see also Al-Alwi v. Trump, No. 17-5067, slip op. at 8 (D.C. Cir. Aug. 7, 2018) (observing that "the laws of war are open-ended and unqualified" in permitting detention of enemy combatants for the duration of active hostilities). Informed by the principles of the law of war, the Court held that the AUMF's grant of authority to use "necessary and appropriate force" included within it "the authority to detain [enemy combatants] for the duration of the relevant conflict." *Id.* at 521; *see also Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (same). Because Ali does not challenge this Court's initial determination that he was "part of Al Qaeda, the Taliban, or associated forces," and because "hostilities are ongoing," the Government may continue to detain him. *Aamer*, 742 F.3d at 1041; *see also Al-Alwi v. Trump*, No. 17-5067, slip op. at 8 (D.C. Cir. Aug. 7, 2018) ("Although hostilities have been ongoing for a considerable amount of time, they have not ended."). Ali's detention, far from open-ended and "indefinite," is tied to this ongoing conflict against al Qaeda, the Taliban, and associated forces. As such, Ali's first argument, that he is subject to "indefinite" detention that exceeds the Government's authority under the AUMF, is wholly without merit.

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this initial determination. *See* 3/23/1 8 Hr'g Tr. 4:25-5:5 [Dkt. # 1 535]; *cf.* Corrected Mot. at 23. Instead, Ali's motion presents the question whether the Government's detention authority has lapsed in the sixteen years since his capture.

As for Ali's second argument, that the war against al Qaeda and the Taliban has ended, our Circuit Court has already made short shrift of this argument. In essence, Ali invites this Court to undertake a wide ranging factual inquiry into whether active hostilities persist. To say the least, it would not be proper for this Court to do so. In *Al-Bihani v. Obama*, our Circuit Court rejected a Guantanamo detainee's argument that the United States' war against the Taliban had ended and that he must therefore be released. 590 F.3d at 874. The Circuit Court noted that release was required after the cessation of active hostilities, but held that the "determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Id.*

Just days ago, our Circuit Court reaffirmed *Al-Bihani*'s holding. *See Al-Alwi*, slip op. at 8. In *Al-Alwi*, the panel held that the AUMF continues to supply authority to detain an enemy combatant captured in 2001 after having "stayed in Taliban guesthouses, traveled to a Taliban-linked training camp to learn how to fire rifles and grenade launchers and joined a combat unit led by an al Qaeda official that fought alongside the Taliban." *Id.* at 3. Instead, our Circuit Court specifically rejected the notion that "the nature of hostilities has changed such that the particular conflict in which [the detainee was] captured is not the same conflict that remains ongoing today." *Id.* at 10. To the contrary, the Court explained, "the Executive Branch represents, with ample support from record evidence, that the hostilities described in the AUMF continue." *Id.* That Executive Branch judgment and representation, in the absence of a "contrary Congressional command," ends the judicial inquiry. *Id.*; *see also Ludecke v. Watkins*, 335 U.S. 160, 168–70 (1948) (deferring to Executive Branch determi-

nation that "war with Germany" persisted despite the fact that Germany had "surrender[ed]" and "Nazi Reich" had "disintegrate[ed]."). Simply put, the AUMF continues to supply the [*487] Government with the authority to detain Ali.[7]

Not surprisingly, this is not the first time that Ali has challenged the Executive's authority to detain him based on the passage of time. In 2013, our Circuit Court rejected this very argument, observing that the war against al Qaeda, the Taliban, and associated forces "obviously continues," and that the AUMF "does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities." *Ali*, 736 F.3d at 552. Indeed it emphasized that, absent a differently-drawn statute, "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Id.*; *see also Al-Alwi*, slip op. at 5 (noting that the AUMF does not "place[ ] limits on the length of detention in an ongoing conflict"); *cf. El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) ("[W]hether the terrorist activities of foreign organizations constitute threats to the United States 'are political judgments, decisions of a kind for which the Ju-

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[7] Ali argues that, in order to avoid a "serious constitutional problem" – namely, the denial of due process rights – I must apply the canon of constitutional avoidance in order to construe the AUMF not to authorize his continued detention. Corrected Mot. at 33–34. That canon is inapplicable for two reasons. First, the AUMF is not "susceptible of two constructions," such that the canon would assist the Court in choosing one interpretation over another. *See Jones v. United States*, 529 U.S. 848, 857 (2000). As described above at length, the AUMF plainly and unmistakably applies here, and authorizes Ali's continued detention. Second, and as discussed below, the protections of the due process clause do not extend to Guantanamo Bay. *See infra* pp. 487–89. Thus, Ali cannot point to a "grave and doubtful constitutional question[ ]" of the kind required to trigger the avoidance canon. *Jones*, 529 U.S. at 857.

diciary has neither aptitude, facilities[,] nor responsibility, and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' " (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999))).

Presidents Trump and Obama have reported on a regular basis, including most recently in June 2018, that "[t]he United States remains in an armed conflict, including in Afghanistan and against the Taliban, and active hostilities remain ongoing." Notice of Supp. Auth. Ex., Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 8, 2018) [Dkt. # 1537-1]. And Congress has not only refrained from repealing or amending the AUMF, but explicitly clarified in the National Defense Authorization Act of 2012 ("NDAA") that the AUMF gives the President authority to detain combatants "under the law of war without trial until the end of hostilities." NDAA, Pub. L. No. 112–81, §§ 1021(c), (b)(2), 125 Stat. 1298, 1562 (2011).[8] As such, the record amply demonstrates here that it is the political judgment of both branches that active hostilities indeed persist pursuant to the AUMF. As such, Ali's time-based arguments are wholly without merit. *See Ali*, 736 F.3d at 552.

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[8] The conclusions of the political branches are consistent with the facts on the ground. The United States maintains a substantial military presence in Afghanistan, and U.S. troops continue to engage in a counterterrorism mission against al Qaeda, the Taliban, and associated forces in that region. *See* Dep't of Defense Report on Enhancing Security and Stability in Afghanistan at 3, 5–6 (Dec. 2017) [Dkt. # 1525-9], This campaign involves traditional uses of military force, such as air strikes, ground operations, and combat enabler support. *See id.* at 3–7, 22–29,

II. Ali's Due Process Arguments

Undaunted, Ali makes two additional due process arguments, one sounding [*488] in "substantive" and the other in "procedural" due process. In order to prevail under either theory, however, Ali must first establish that the protections of the due process clause extend to Guantanamo Bay detainees. Unfortunately for Ali, our Circuit Court has already held that the due process clause does not apply in Guantanamo. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) ("*Kiyemba I*"), vacated and remanded, 559 U.S. 131, *reinstated in relevant part*, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) ("*Kiyemba II*"), cert. denied, 563 U.S. 954 (2011).

In *Kiyemba I*, our Circuit Court recited a string of Supreme Court cases for the proposition that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba I*, 555 F.3d at 1026 (collecting cases). Although the Supreme Court vacated *Kiyemba I* in order to afford our Circuit the opportunity to pass on factual circumstances that had changed while the petition for certiorari was pending, see 559 U.S. at 131, our Circuit promptly reinstated *Kiyemba I*'s judgment and opinion in pertinent part in *Kiyemba II*, 605 F.3d at 1048. In subsequent cases, our Circuit has confirmed that *Kiyemba II* reinstated *Kiyemba I*'s holding on the extension of the due process clause to Guantanamo. *See Al Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011); see also Bahlul v. United States, 840 F.3d 757, 796 (D.C. Cir. 2016) (Millet, J., concurring); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (Henderson, J., concurring). Applying *Kiyemba II*, district courts in this Circuit have uniformly refused to recognize due process claims by Guantanamo Bay detainees. *See Salahi v. Obama*, Civ. No. 05-0569 (RCL), 2015 WL

9216557, *5 (D.D.C. Dec. 17, 2015) ("[T]he Due Process Clause of the Fifth Amendment, does not apply to Guantanamo detainees."); *Rabbani v. Obama*, 76 F.Supp.3d 21, 25 (D.D.C. 2014) (same); *Ameziane v. Obama*, 58 F.Supp.3d 99, 103 n.2 (D.D.C. 2014) (same); *Bostan v. Obama*, 674 F.Supp.2d 9, 29 (D.D.C. 2009) (same). As such, Ali's due process arguments are unavailing and must be summarily dismissed.[9]

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[9] Petitioners contend that procedural due process mandates that they cannot continue to be detained (i) under a preponderance of the evidence standard or (ii) based on factual determinations made some time ago. Corrected Mot. at 3, 22–29. Once again, Ali supports this theory with various cases from outside the national security context. *See id.* at 23. Even assuming the due process clause extends to Guantanámo 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.

[*489] **CONCLUSION**

For all of the foregoing reasons, the Court DENIES Ali's Corrected Motion for Order Granting Writ of Habeas Corpus [Dkt. # 1529]. A separate order consistent with this opinion will be issued this day.

APPENDIX C

ORDERS ON REHEARING

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5297 **September Term, 2019**

1:10-cv-01020-RJL

Filed On: July 29, 2020

Abdul Razak Ali, Detainee,

Appellant

v.

Donald J. Trump, President of the United States, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas*, and Rao, Circuit Judges; and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judge Katsas did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5297 **September Term, 2019**

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Filed On: July 29, 2020

Abdul Razak Ali, Detainee,

Appellant

v.

Donald J. Trump, President of the United States, et al.,

Appellees

BEFORE: Rogers and Millett, Circuit Judges; Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on July 13, 2020, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk