No. 20-888

In the Supreme Court of the United States

ABDUL RAZAK ALI, PETITIONER
v.
JOSEPH R. BIDEN, JR., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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Habeas and due process—the right to petition a court for review, and the right to have one's liberty be adjudicated by a fair process—are fundamentally intertwined concepts. While the process due in any particular context will vary, the basic conclusion to be drawn from their close relationship is uncontroversial: "due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon,"[1] should follow each other hand in hand to Guantánamo.

Petitioner believes that certain elementary guarantees of fairness must at minimum accompany the Due Process Clause to Guantánamo. Procedurally, the government must establish the reliability of its hearsay evidence and demonstrate the burden of producing equivalent non-hearsay evidence, and detainees must be permitted to confront evidence where feasible. Pet. 21-22. Various presumptions applied by the courts to date would also need to be subject to more rigorous proof. Pet. 23. Finally, in line with this Court's civil commitment jurisprudence, substantive due process requires an individualized assessment of the specific, prospective threat posed by release, made by judicial review on a clear and convincing evidence standard. Pet. 26. None of these requirements are poorly-defined or infeasible; indeed, they are required by due process in a multitude of other contexts familiar to the federal courts. But they are matters of vital significance to Petitioner, as nearly every item of evidence introduced against him consisted of hearsay, and the threat the government claims he poses is one of return to a force that no longer exists.

Nonetheless, for the last decade the court of appeals has refused to even consider whether the Due Process Clause might have something to say about the adequacy

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[1] *See Hamdi v. Rumsfeld*, 542 U.S. 542, 555-56 (2004) (Scalia, J., dissenting) (quoted at Pet. 19).

of the process accorded to detainees soon to conclude their twentieth year in detention. That refusal began with the *Kiymeba* decision,[2] in which the court of appeals, just eight months after *Boumediene* extended the Suspension Clause to the prison, purported to foreclose the application of all other constitutional rights there. It continued with the opinion below in this case, which held that "the specific constitutional claims that Ali presses have already been considered and rejected by circuit precedent," Pet App. 17a. A panel of the circuit subsequently held that "the protections of the Due Process Clause" simply "do not extend" to Guantánamo, although that decision was vacated three days ago, and is now pending rehearing *en banc* on this very question. *See Al Hela v. Trump*, 972 F.3d 120, 147-48 (D.C. Cir. 2020), *vacated*, *reh'g en banc pending*, Pet. Reply App. 1a-3a.

The long war in Afghanistan will, apparently, end during this Court's next term,[3] but the forty remaining detainees will remain—twelve to face charges or serve out sentences, the other twenty-eight to endure until the government decides to release them. Petitioner Ali will remain as part of this latter group, held with the others at a nominal cost of a half billion dollars a year (with far higher intangible costs), based on a series of inferences from multiple-level hearsay rendered impossible to confront under the court of appeals' precedents. The record makes it obvious that application of the Due Process Clause would alter the outcome of his case. Pet. 9-10, 22-

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[2] *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (described at Pet. 7-8; *see also* Pet. 14).

[3] *See Remarks by President Biden on the Way Forward in Afghanistan* (Apr. 14, 2021), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/14/remarks-by-president-biden-on-the-way-forward-in-afghanistan/

23. Without it, he remains "marked with a life sentence"[4] in a forever prison that has proven (and will prove) to be impossible to close absent judicial intervention.

1. The court of appeals rejected Petitioner's due process claims

In contesting whether this case is an appropriate vehicle for finally taking up the question of whether the Due Process Clause applies at Guantánamo, the government claims that the panel "assumed that the Due Process Clause *does* apply," and thus the question presented "was not the basis for the judgment below." Brief in Opp. 13, 14. In fact, the panel majority concluded the opposite: that all of Ali's substantive and procedural due process claims "have already been considered and rejected by circuit precedent," Pet App. 17a;[5] *see also* Pet. App. 9a ("Ali argues that his continued detention for more than seventeen years violates substantive due process. [However], under binding circuit precedent the Due Process Clause's substantive protections would offer him no help."); Pet. App. 14a (as to Petitioner's enumerated procedural due process challenges to hearsay, burden-of-proof, and other procedural rules, "[c]ircuit precedent forecloses each of those arguments. … The bottom line is that we are not at liberty to rewrite circuit precedent in the way Ali desires.").[6]

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[4] *Ali v. Obama*, 736 F.3d 542, 553 (D.C. Cir. 2013) (Edwards, J., concurring).

[5] The panel rejected a narrow interpretation of AUMF detention authority proposed as a matter of constitutional avoidance by Petitioner, concluding that "there are no constitutional rulings to be avoided." Pet. App. 17a.

[6] While the panel majority noted that "[c]ircuit precedent has not yet comprehensively resolved which 'constitutional procedural protections apply to the adjudication of detainee habeas corpus peti-

Later in its brief the government claims that the court of appeals "assumed … that the Due Process Clause does apply [at Guantánamo] *in at least a limited form*…." Brief in Opp. at 15. But the government fails to positively identify *any* respect in which the court of appeals panel in this case (or any other) actually acknowledged that any due process protection reaches the prison. The most that can be said is that other panels of the court of appeals have *assumed* that due process *might* govern claims relating to conditions of confinement and judicial conduct in the military commissions at Guantánamo, *see* Pet. 30-31 (citing *Aamer* and *In re Nashiri*). But for almost the entirety of the twelve years since this Court decided *Boumediene*, the court of appeals has foreclosed the development of any argument that due process applies at the base.

2. Petitioner's specific claims were well-presented below

Given that the panel found Petitioner's due process claims foreclosed under the law of the circuit, it should be unsurprising that the claims were presented and argued largely as a matter of law. The government attempts to suggest that this case is a poor vehicle for review because Petitioner made "boilerplate filings in district court … identical to those filed" by several other detainees, without addressing specific items of evidence.

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tions,' and whether those 'rights are housed' in the Due Process Clause, the Suspension Clause, or both," Pet App. 7a (citing *Qassim v. Trump*, 927 F.3d 522, 530 (D.C. Cir. 2019)), it did so in the context of the specific procedural question posed in *Qassim* (whether and to what extent a detainee could have access to classified government evidence), which was unresolved as a matter of the Suspension Clause-based entitlement to "meaningful review" established in *Boumediene* (but is at issue in the pending *Al Hela* rehearing).

Brief in Opp. 16 (procedural claims "depend on fact-specific determinations … that were not developed or considered below."). In point of fact, Petitioner's procedural due process claims were developed before the district court, and elaborated upon at length in the briefs and 82-minute oral argument before the court of appeals. But because both lower courts determined that the Due Process Clause was inapplicable to these procedural claims, neither opinion delved further.

As the petition makes clear, procedural flaws were ubiquitous at Petitioner's hearing, and the record provides ample examples of how the rules suggested by Petitioner—the bare minima required by due process—might have altered the outcome below. Pet. 23-24. These procedural claims were implicated at nearly every point during his hearing. Very nearly every item of evidence introduced against Petitioner was hearsay "of dubious provenance," with the "reliability of nearly every source of … relevant facts … contested during his habeas hearing," Pet. 23. No "fact specific determination" (Brief in Opp. 16) is required to see that the "unknown authorship and origin" of the crucial diary here, or information regarding abusive interrogation conditions of other detainees whose hearsay statements were used against Petitioner, Pet. 23, would need to be provided to make an assessment of the reliability of such hearsay that could render its introduction consistent with due process. What the government dubs "'overwhelming' evidence" against Petitioner, Brief in Opp. 16 (quoting *Ali*, 736 F.3d at 545-46, was in fact neither overwhelming, nor actually evidence, and it beggars belief for the government to argue that the record as described in the petition "offers nothing to suggest that this Court's consideration of his due-process arguments would in any way affect the outcome of his own case," Brief in Opp. 17.

As to the substantive due process claims, Petitioner presented both lower courts with a detailed legal analysis, as well as dedicating several pages of the motion to a discussion of factors that could be used to evaluate whether detention remained purposeful or not (such as age and infirmity), and proposed that once the district court had outlined the legal framework for due process claims, an order to show cause could issue creating a process for further, fact-bound inquiry, *see* Reply Br., *Ali v. Trump*, Doc. # 1803531, Case No. 18-5297 (D.C. Cir. Aug. 23, 2019) at 7-11—albeit with appropriate "deference to executive expertise and predictive judgments," *see* Pet. 26; *cf.* Brief in Opp. at 23. The legal standards that should apply are already well-developed, having been elaborated in detail by this Court's own civil commitment precedents. *See* Pet. 25-27.

In short, Petitioners' specific due process claims were well-presented below and are suitable for resolution by this Court.[7]

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[7] While the court of appeals panel would apparently have preferred to see the procedural claims made as a challenge to whether Petitioner was provided a "meaningful review" as *Boumediene*'s Suspension Clause analysis mandated, *see* Tr. 50 (Judge Millett: "I don't know why nobody will address the question the Supreme Court teed up"); *cf.* Pet. App. 6a-8a, it is impossible to argue that that would have made a difference to the outcome given that the panel ultimately concluded that "the specific constitutional claims that Ali presses have already been considered and rejected by circuit precedent," Pet App. 17a. While narrow claims such as those made in *Qassim* have yet to be settled by court of appeals precedent, *see supra* note 6, the panel believed that the broader Due Process Clause claims raised by Petitioner were foreclosed.

The government prominently cites the panel opinion for the notion that Petitioner's "counsel [wa]s 'absolutely' asking for a broader rule than one that just resolves [Petitioner's] case." Brief in Opp. 14 (citing Pet App. 8a (quoting Tr. 13)). Both the government and the panel obviously distort that passage. In context, counsel's "absolutely" is clearly signaling agreement with the statement "Mr. Ali's

3. This Court has never resolved the due process claims at issue here

The government spends nearly half its argument claiming that the "past statements" of a plurality of Justices in *Hamdi v. Rumsfeld* resolve the substantive and procedural due process issues on their merits. Brief in Opp. 17-21. But the *Hamdi* plurality's speculations—that the "practical difficulties" and "burdens" of providing conventional process "at a time of ongoing military conflict" to a detainee captured with a weapon upon an active battlefield might require acceptance of hearsay and presumptions in favor of government evidence—were all premised on the exigencies of combat. Petitioner Ali was captured without the involvement of our military in a residential neighborhood far from any battlefield, with much of the proof against him provided by interrogations of fellow detainees. For him to demand the right to confront their hearsay statements produced against him, or challenge the provenance of the mysterious diary supposedly implicating him, simply would not raise the same practical concerns.[8]

The government argues that neither the length of detention nor an evaluation of the specific threat posed by release is relevant because the *Hamdi* plurality accepted the notion that the AUMF authorized detention until the "end of hostilities." But in fact *Hamdi* expressly

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illustrative of a problem," Tr. 13:5-6, as the remainder of the answer details the specific impact of the dubious hearsay admissions and preponderance standard on the outcome of his initial habeas hearing.

[8] *Boumediene*, in contrast, pointedly criticized the effects of unbridled use of hearsay in the Combatant Status Review Tribunal ("CSRT") proceedings. *See* Pet. 22 n.16 (citing *Boumediene*, 553 U.S. at 784).

premised that authority on the *temporary* nature of military detention, including the fact that "the conflicts that informed the development of the law of war"—the Hague and Geneva Conventions in particular—were largely interstate conflicts in which there was the prospect of a "conclusion of peace" between definable (state) parties. *Hamdi*, 542 U.S. at 519-21. Petitioner's substantive due process claims, in contrast, are predicated on the notion that "continuing" detention—detention that has lasted long enough to no longer be "temporary" but has become arbitrary, prolonged and potentially unending—is no longer justifiable by the constricted process contemplated by the *Hamdi* plurality and the presumption of threat posed by release (that is, the threat of return to the battlefield) that applies in a conventional inter-state war. This Court anticipated this development in *Boumediene*:

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.

Boumediene v. Bush, 553 U.S. 723, 797-98 (2008); *id.* at 783 ("The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry."); *cf.* Brief in Opp. 23 ("petitioner 'cites no authority suggesting that the form of hostilities that enemy combatants undertake changes the law of war's authorization of their continued detention.'" (quoting court of appeals, Pet. App. 16a)).

Finally, it bears repeating that the Periodic Review Board process alluded to at the end of the government's brief, Brief in Opp. 23-24, is not capable of providing the

sort of individualized assessment of the prospective threat posed by release that substantive due process requires. The PRBs are not prospective, demanding confession to allegations supported only by evidence derived from torture; they clear individuals based entirely on their discretion, rather than by clear and convincing evidence; and they lack the power of release that is the hallmark of judicial review of the legality of detention.[9]

4. This Court should hold this petition pending rehearing *en banc* in *Al Hela*

Three days before the filing of this reply brief, the court of appeals for the D.C. Circuit, sitting *en banc*, vacated the panel opinion in *Al Hela v. Trump*, 972 F.3d 120, 147-48 (D.C. Cir. 2020), which had held that "the protections of the Due Process Clause … do not extend" to Guantánamo. (The order granting rehearing *en banc* is attached to this brief, Pet. Reply App. 1a-3a.) That case is now scheduled for rehearing *en banc* on the sole question of "whether petitioner-appellant [al Hela] is entitled to relief on his claims under the Due Process Clause." *See* Pet. Reply App. 3a. Al Hela had raised both substantive and procedural due process claims; both sets of claims were similar to those raised by Petitioner Ali. *See Al Hela*, 972 F.3d at 140-50 (detailing claims).

In light of the fact that the question presented to this Court by Petitioner is effectively identical to the question now pending rehearing *en banc* in the court of appeals, this Court may appropriately hold the petition for certiorari, deferring consideration of it until a resolution of *Al Hela* by the D.C. Circuit.[10] *See* Stephen M.

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[9] *See* Pet. 26-27 n.19 (citing Amicus Br. of Human Rights First, *Ali v. Trump*, No. 18-5297 (D.C. Cir. May 23, 2019) (Doc. 1789097)).

[10] For reasons noted at Pet. 17 n.10, only the D.C. Circuit hears Guantánamo habeas cases.

Shapiro, *et al.*, Supreme Court Practice, § 5.9 (11th Ed. 2019) (citing cases). Petitioner urges this Court to do so.

CONCLUSION

Petitioner has spent 18 of his 50 years in Guantánamo. He deserves a chance to challenge the multiple-level, unsourced hearsay used against him, to have the circumstantial case against him proven by clear and convincing evidence, indeed to have the government articulate and prove why he cannot be released safely home to Algeria regardless of what he is said to have done in the past.

The President has decreed that the Afghan war will shortly come to an end. But the forever war ordained by the courts in the wake of 9/11 has no natural stopping point. And Guantánamo shows every sign of continuing indefinitely in its service, as successive administrations annually cast enough treasure to build scores of schools and hospitals into the sea along with the lives of the small handful of men who remain imprisoned there.

What the court of appeals dubbed Petitioner's "quite lengthy" detention, Pet. App. 9a, will begin its third decade during this Court's next term. It is well past time for the federal courts to correct the original sin of these cases and mandate the application of the Due Process Clause to Guantánamo.

For the reasons set forth above, the petition for a writ of certiorari should be granted following the resolution of the rehearing *en banc* in *Al Hela*.

Respectfully submitted,

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April 26, 2021

PETITION REPLY APPENDIX

[Order granting rehearing *en banc*,
Al Hela v. Trump, No. 19-5079
(D.C. Cir. Apr. 23, 2021) (*en banc*)]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5079 **September Term, 2020**

1:05-cv-01048-UNA

Filed On: April 23, 2021

Abdulsalam Ali Abdulrahman Al-Hela,
Detainee Camp Delta, also known as Abd
Al-Salam Ali Al-Hila and Abdulwahab Ali
Abdulrahman Al-Hela, As Next Friend of
Abdulsalam Ali Abdulrahman Al-Hela,

Appellants

v.

Joseph R. Biden, President of the United
States, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas*, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of petitioner-appellant Abdulsalam Ali Abdulrahman Al-Hela's petition for rehearing en banc, the response thereto, and the vote in favor of the petition by a majority of judges eligible to participate, it is

ORDERED that the petition for rehearing en banc be granted. It is

FURTHER ORDERED that the judgment filed August 28, 2020, be vacated. It is

FURTHER ORDERED that this case be scheduled for oral argument before the en banc court on Thursday, September 30, 2021, at 9:30 a.m. It is

FURTHER ORDERED that, in addition to filing briefs electronically, the parties file 30 paper copies of each of their briefs and appendix, in accordance with the following schedule:

Brief for Petitioner-Appellant	June 2, 2021
Appendix	June 2, 2021
Brief(s) for Amici Curiae, if any in support of Petitioner-Appellant	June 9, 2021
Brief for Respondents	July 9, 2021
Brief(s) for Amici Curiae, if any in support of Respondents	July 16, 2021
Reply Brief for Petitioner-Appellant	August 6, 2021

The parties are directed to limit briefing to the question of whether petitioner-appellant is entitled to relief on his claims under the Due Process Clause.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. *See* D.C. Circuit Handbook of Practice and Internal Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Because the briefing schedule is keyed to the date of oral argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons. The briefs and appendix must contain the date the case is scheduled for oral argument at the top of the cover. *See* D.C. Cir. Rule 28(a)(8).

A separate order will issue allocating oral argument time.

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.