[ORAL ARGUMENT NOT YET SCHEDULED]
No. 18-5148

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALID AHMED QASSIM,
Petitioner-Appellant,

v.

DONALD J. TRUMP, *et al.*,
Respondents-Appellees.

On Appeal from the United States District Court for the District of Columbia, No. 1:04-cv-1194 (Hogan, J.)

PETITION TO HEAR AND DECIDE APPEAL *EN BANC*

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May 21, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioner-Appellant Khalid Ahmed Qassim hereby submits this certificate pursuant to D.C. Circuit Rule 28(a)(1).

A. PARTIES AND AMICI

This appeal arises from a civil proceeding involving the Petitioner-Appellant, Khalid Ahmed Qassim, and the Respondents-Appellees, President Donald J. Trump, et al. The parties on appeal are the same as those below. There are no intervenors or *amici*.

B. RULINGS UNDER REVIEW

This is an appeal from the May 8, 2018, order of the United States District Court for the District of Columbia (Honorable Thomas F. Hogan) denying Mr. Qassim's petition for a writ of habeas corpus. *Qassim v. Trump*, No. 1:04-cv-01194 (TFH) (D.D.C. May 8, 2018), Dkt. 1139. That order has not been published in a federal reporter.

Further, this case identifies four decisions from this Court that conflict with the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). Those decisions are: *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); and *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2011).

C. RELATED CASES

This case has not been on review before this or any other court apart from the district court. There are no cases pending before this Court that raise substantially similar issues. However, the outcome of this case will affect all detainees imprisoned at Guantánamo Bay who have not been charged before a military commission.

PETITION FOR *EN BANC* REVIEW

Under FED. R. APP. P. 35(b)(1)(A) and (B), Khalid Ahmed Qassim, Petitioner-Appellant, requests a hearing *en banc* because precedential panel decisions conflict with the Supreme Court decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and raise questions of exceptional importance. Specifically, (1) *Kiyemba v. Obama*[1] and *Al-Bihani v. Obama*[2] hold that Guantánamo detainees may be imprisoned indefinitely without due process; (2) *Al-Bihani v. Obama*, *Al-Adahi v. Obama*[3] and *Latif v. Obama*[4] establish conclusive evidentiary presumptions that allow indefinite detention based on unreliable, untested information; and (3) in combination, these rulings have eviscerated *Boumediene*'s holding that Guantánamo detainees are entitled to a "meaningful opportunity" to contest the basis for their detentions.

Mr. Qassim has been imprisoned at Guantánamo Bay without charge or trial for more than sixteen years. He filed a petition for habeas corpus on July 15, 2004, and has consistently maintained that he engaged in no wrongdoing or conduct that would justify his detention. Proceedings on his petition were stayed off and on for more than thirteen years as the courts decided the right of Guantánamo detainees to

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[1] 555 F.3d 1022 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).
[2] 590 F.3d 866 (D.C. Cir. 2010).
[3] 613 F.3d 1102 (D.C. Cir. 2010).
[4] 677 F.3d 1175 (D.C. Cir. 2011).

pursue habeas relief and the standards that should apply. Judge Hogan lifted the stay on November 16, 2017. Finding that he was bound by prior decisions of this Court, on April 10, 2018, Judge Hogan orally denied Mr. Qassim's motions to be accorded the due process rights necessary to rebut the government's allegations against him.

Finding that the current law of this Circuit precludes him from granting relief, on May 8, 2018, Judge Hogan entered an order denying Mr. Qassim's habeas petition. Judgment, *Qassim v. Trump*, No. 1:04-cv-01194 (TFH) (D.D.C. May 8, 2018), Dkt. 1139. Mr. Qassim filed his notice of appeal on May 16, 2018, and now files this petition requesting that the appeal proceed *en banc*. *En banc* review is essential to carry out the Supreme Court's mandate in *Boumediene* and prevent further delay and injustice to Mr. Qassim and the others detained at Guantánamo.

Judge Hogan was correct that panel decisions of this Court prevented him from granting relief to Mr. Qassim. Those decisions, binding on the district courts and on other panels of this Court, have established a legal regime that effectively precludes all Guantánamo detainees from obtaining habeas relief. Since those decisions were entered, no habeas petition contested by the government has been granted and every prior district court grant of habeas appealed by the government has been reversed. Those panel decisions have never been reviewed by this Court

en banc. They should be, for they are directly contrary to the Supreme Court's decisions in *Boumediene* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and raise crucial questions regarding the reach of our Constitution and what process is due to persons entitled to habeas review of executive detention without charge or trial.

BACKGROUND

On June 12, 2008, the Supreme Court in *Boumediene* rejected this Court's ruling 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). The Supreme Court expressly held that Guantánamo detainees are constitutionally entitled to pursue habeas relief in federal court. 553 U.S. at 771. It held that no further delay was warranted and that the Guantánamo detainees "are entitled to a prompt habeas corpus hearing," *id*. at 795, in which they must receive a "meaningful opportunity" to challenge their detentions before an independent Article III judge, *id*. at 779.

Following *Boumediene*, however, panels of this Court issued a series of decisions that each, and together as a whole, blocked that mandate and eviscerated any "meaningful opportunity" for habeas review.

- In 2009, the panel in *Kiyemba* held that, although Guantánamo detainees may have the right to file a habeas petition, they have no constitutionally protected right to due process of law because they are aliens "without property or presence in the sovereign territory of the United States." 555 F.3d at 1026.

- In 2010, the panel in *Al-Bihani* ruled that the detainees are entitled to less process in their habeas proceedings than convicted felons seeking to attack their prior convictions after trial in civilian courts. 590 F.3d at 876.

- In 2010, the panels in *Al-Bihani* and *Al-Adahi* ruled that certain government evidence must be treated as conclusive: "[E]vidence supporting the military's reasonable belief [that the detainee attended an Al Qaeda training camp or visited an Al Qaeda guest house] would seem to overwhelmingly . . . justify the government's detention of such a non-citizen." *Al-Bihani*, 590 F.3d at 873 n.2.; *see Al-Adahi*, 613 F.3d at 1111.

- And, in 2011, the panel in *Latif* added that government intelligence reports on the detainees, even if prepared in the fog of war pursuant to a secret process and based on unknown sources, are entitled to a presumption of regularity and accuracy. 677 F.3d at 1179-82.

These decisions effectively nullified *Boumediene*. The historic record makes this evident. After *Boumediene*, but before entry of the panel decisions, the D.C. district courts heard and decided 53 habeas petitions by detainees. They granted the writ in 38 of those cases—more than 70 percent of the time. By contrast, in the seven years since these decisions, not a single habeas petition contested by the government has been granted, and every previous district court grant of habeas appealed by the government has been reversed.[5]

These panel decisions have created a hollow habeas regime that leaches all substance out of the Supreme Court's governing precedents and effectively shuts

[5] Only one habeas petition has been granted since July 2010, with the government's consent, to allow an extremely ill and elderly detainee to be released. The government mooted three appeals by transferring the detainees.

down habeas corpus as a remedy for any Guantánamo detainee. It is time for them to be reviewed by this Court *en banc*.

ARGUMENT

A. Guantánamo Detainees Are Entitled To Due Process.

Following the Supreme Court decision in *Boumediene*, a panel of this Court held that detainees have no due process rights because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba*, 555 F.3d at 1026. The panel emphasized that "[t]he district court[s], no less than . . . panel[s] of this court, must follow" that holding. *Id*. at 1026-27. They have done so. *See, e.g.*, *Kiyemba v. Obama*, 561 F.3d at 518 n.4 (D.C. Cir. 2009) ("the detainees possess no constitutional due process rights.").

That holding cannot be sustained in light of the Supreme Court's decision in *Boumediene*. It is based on the premise that noncitizens detained in a place such as Guantánamo, which is outside the area of formal *de jure* U.S. sovereignty, lack constitutional rights. But the Supreme Court in *Boumediene* explicitly rejected the government's argument—and this Court's prior ruling—that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." 553 U.S. at 755. The Supreme Court acknowledged that the United States lacks *de jure* sovereignty over Guantánamo Bay but pointed out "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and

control over the base, maintains *de facto* sovereignty over this territory." *Id*. It found no basis in prior cases to limit the Constitution's reach to areas of *de jure* sovereignty. *Id*. at 756-64. It thus foreclosed any contention that the Guantánamo detainees lack constitutional rights.

As the Supreme Court explained in *Boumediene*, to limit the Constitution's reach to areas of *de jure* sovereignty would grant the political branches the authority to say where constitutional protections apply, and where they do not. That would violate the very structure of our constitutional system:

> [T]he Government's view is that the Constitution had no effect [in Guantánamo], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution."

553 U.S. at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

This analysis applies to the protections of the Fifth Amendment as well as to those of the Suspension Clause. There is no basis for distinguishing them, as this Court itself recognized in judging their applicability to the Guantánamo detainees. In its decision which was reversed by the Supreme Court in *Boumediene*, this

Court stated: "There is 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 . . . . That cannot be right." 476 F.3d at 993. The Supreme Court determined that the Suspension Clause of the Constitution applies to the detainees; so too, by this Court's own reasoning, must the Due Process Clause of the Fifth Amendment.

What is at issue in this case, however, is not only the rights of the Guantánamo detainees, but the process that must be followed by United States courts in conducting federal habeas proceedings. The Supreme Court made clear in *Boumediene* that the detainees have the constitutionally protected right to pursue their claims for habeas relief in the federal courts. They are therefore entitled to an independent inquiry by a federal judge into the legality of their detention. That judicial inquiry must itself comply with the requirements of due process of law. The habeas proceeding must be "constitutionally adequate" and, in conducting this inquiry, the courts must provide the detainees with a "meaningful opportunity" to contest the purported causes of their detentions, including the right to traverse the government's returns and to effectively rebut the factual bases for the government's assertions against them, which is "constitutionally required." *Boumediene*, 553 U.S. at 779, 783, 789.

Before the panel decisions by this Court, there has never been a decision that federal courts in conducting an inquiry compelled by habeas are not bound by the requirements of due process of law. To the contrary, as Justice O'Connor stated in *Hamdi*: "a court that receives a petition for writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved," with a "fair opportunity to rebut the Government's factual assertions before a neutral decision maker." 542 U.S. at 533, 538 (plurality opinion). "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id*. at 537. Justice O'Connor also reiterated that the place of detention—whether in Guantánamo or the United States—should not make a "determinative constitutional difference." *Id*. at 524.

The petitioner in that case was, of course, a United States citizen. But Justice O'Connor's statements speak not to the citizenship of the petitioner but to the integrity and fairness of the process that must be followed in a habeas proceeding in a federal court. Those proceedings must be conducted in accordance with due process of law.[6]

[6] *See, e.g.*, *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) ("Over the centuries [habeas corpus] has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free"); *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) ("the writ has

The *Kiyemba* panel's holding that the habeas inquiry, so central to liberty, may be conducted without regard to the fundamental notions of fair play demanded by due process is repugnant to the founding principles of our nation. It should be reviewed by this Court *en banc.*

B. Petitioner Is Entitled To More—Not Less—Process Than Convicts Challenging Their Convictions After A Full Trial.

The panel in *Al-Bihani* further diminished the process due to the Guantánamo detainees in these constitutionally mandated habeas proceedings:

> Habeas review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions. *Boumediene*'s holding explicitly stated that habeas procedures for detainees "need not resemble a criminal trial." It instead invited "innovation" of habeas procedure by lower courts . . . . The Suspension Clause protects only the fundamental character of habeas proceedings, and any argument equating that fundamental character with all the accoutrements of habeas for domestic criminal defendants is highly suspect.

590 F.3d at 876.

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evolved into an instrument that now demands . . . application of basic constitutional doctrines of fairness"); *Blackledge v. Allison*, 431 U.S. 63, 72-73 (1977) ("arrayed against the interest in finality is the very purpose of the writ of habeas corpus to safeguard a person's freedom from detention in violation of constitutional guarantees."). *See also Smith v. Yeager*, 393 U.S. 122, 126 (1968) (even in the postconviction context, the Supreme Court applies the constitutional waiver standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), to the right to an evidentiary federal habeas hearing); *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (even in a state habeas proceeding, a viable federal claim "made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are").

It is impossible to reconcile these sentences with the Supreme Court's decision in *Boumediene*. The Supreme Court did state that the habeas proceedings for Guantánamo detainees need not contain all the protections of a full criminal trial. It made abundantly clear, however, that the process provided to those detainees, who are imprisoned by the Executive without charge or prior trial, must be ***more*** robust than the process provided to those challenging their prior convictions after trial in a court of record. As the Court stated:

> [T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings . . . . Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record . . . considerable deference is owed to the court that ordered confinement . . . . The present cases fall outside these categories, however; for here the detention is by executive order. . . . Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. . . . In this context the need for habeas corpus is more urgent.

553 U.S. at 781-83.

The *Al-Bihani* panel ruling is contrary not only to *Boumediene*, but to a long line of prior decisions by the Supreme Court, which has consistently emphasized that executive detention without trial—like that imposed on the petitioner here—is where the protections of habeas must be at their strongest, not their weakest.[7]

[7] *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"); *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (traditionally the

The *Al-Bihani* panel's ruling is flatly wrong and should be reviewed by this Court *en banc*.

C. Evidentiary Rules Established By Panels Of This Court Have Further Deprived The Guantánamo Detainees Of The "Meaningful Opportunity" For Habeas Review Guaranteed By *Boumediene*.

In addition to denying detainees due process, panel decisions have established presumptions that have stripped the district courts of their ability to judge the facts and have created impossible evidentiary hurdles for detainees. In *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009), after a thorough examination, the district court found the government's evidence unreliable and granted the writ. A panel of this Court reversed, finding that the district court had improperly reviewed each piece of evidence individually rather than viewing the government's evidence as a whole. *Al-Adahi*, 613 F.3d at 1105-06. The panel examined the evidence itself and found the government's allegations, when "properly considered" as a whole, satisfied the government's obligation to show by a preponderance of the evidence that it was "more likely than not" that the petitioner was a part of Al Qaeda or the Taliban. *Id.* "And," the Court concluded, "that is all the government had to show." *Id*.

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writ was used "to inquire into the cause of commitment not pursuant to judicial process"); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

In reaching its conclusion, the panel followed *Al-Bihani*'s ruling that certain government evidence should be given decisive weight: "[E]vidence supporting the military's reasonable belief [that the detainee attended an Al Qaeda training camp or visited an Al Qaeda guest house] would seem to overwhelmingly . . . justify the government's detention of such a non-citizen." *Al-Bihani*, 590 F.3d at 873 n.2; *Al-Adahi*, 613 F.3d at 1109.

In *Latif*, the district court also conducted a full hearing, carefully and thoroughly reviewed the government's evidence, found it unreliable and granted the writ. *Abdah v. Obama*, No. 04-1254, 2010 WL 3270761 (D.D.C. Aug. 16, 2010). Again, a panel of this Court reversed, finding that the district court had erred by not according the government's evidence, much of which consisted of field intelligence reports, a presumption of regularity and accuracy. *Latif*, 677 F.3d at 1176, 1178-79. And although the panel majority nominally remanded the case for further proceedings, it reviewed the evidence itself and, after applying a presumption of accuracy to the government reports, made no effort to conceal its view that the district court had no choice on remand but to deny the writ. *Id*. at 1185-93. The opinion also shrugs off *Boumediene*'s mandate, saying that its "airy suppositions have caused great difficulty for the Executive and the courts." *Id.* at 1199.

These decisions are troubling when viewed on their own. The rulings that certain allegations are decisive—that they "overwhelmingly" justify the detainees' continued detention—strip the district courts of their traditional role in reviewing the evidence and finding the facts. That is a role, as the Supreme Court recognized in *Boumediene*, that the district courts have "the institutional capacity" to perform and that the appellate courts do not. 553 U.S. at 778.

The *Latif* ruling is also troubling for the heavy hand it places on the government's side of the scale. As Judge Tatel pointed out in dissent, interrogation reports prepared in secret under unknown circumstances with unknown sources based on translations of conversations by translators of unknown competence, can hardly be compared to normal government records prepared in the ordinary course of business. 677 F.3d at 1208-10. In fact, these field intelligence reports are well recognized within the intelligence community to be of doubtful reliability.[8] According them a presumption of accuracy, as Judge Tatel pointed out, "comes perilously close to suggesting that whatever the government says must be treated as true." *Id.* at 1215.

Moreover, that presumption is directly contrary to long-established habeas procedure. Habeas courts since the nineteenth century have consistently rejected

[8] *See* Decl. of Colonel Stephen Abraham at ¶¶ 11-18, Reply to Opposition to Petition for Rehearing, *Al Odah v. United States*, 553 U.S. 723 (2008).

the argument that they should defer to the Executive's and, in particular, to the military's version of the facts. *See* Jared Goldstein, *Habeas Without Rights*, Wisc. L. Rev. 1165 (2007) at 1218-22, nn.240-52.

But these cases cannot be viewed in isolation. They must be viewed in combination with the earlier decisions denying the Guantánamo detainees proper process. The combination has created a regime that denies Guantánamo detainees *Boumediene*'s "meaningful opportunity" to contest the legality of their detentions.

It is instructive to see how effectively these cases work together to undermine the habeas remedy. Under *Al-Bihani* and *Al-Adahi*, the government's "reasonable belief" that a detainee visited a guest house frequented by Al Qaeda or the Taliban, or attended a training camp, is sufficient by itself to justify continued detention. *Supra* pp. 6, 14. No further inquiry by the district court is necessary or permitted. The government's reasonable belief can then be supported by a government report of an interview with someone purportedly saying that the detainee had been seen at such a guest house or training camp. Under *Latif*, that report is accorded a presumption of accuracy. *Supra* pp. 6 & 15-16. The detainee cannot rebut the presumption because, denied due process rights, he is not allowed to see the report to challenge whether the recitations in it are accurate, even if they purport to record his own statements.

The combination of these decisions has foreclosed the possibility of relief in the courts. Again, since they were handed down, no habeas petition contested by the government has been granted, and every prior district court grant of habeas appealed by the government has been reversed.

CONCLUSION

Mr. Qassim and the others at Guantánamo are caught in a trap from which they cannot escape based on rules set by panels of this Court that are directly contrary to the Supreme Court's ruling in *Boumediene*. It is of no use for them to appeal to another panel of this Court because, as Judge Randolph emphasized more than nine years ago in denying them due process, "panel[s] of this court, must follow" those rules. *Kiyemba*, 555 F.3d at 1026-27. Only the *en banc* Court has the authority to review and modify those rules.

It should do so now. Any further delay would be wasteful of the Court's resources and brutally unfair to Mr. Qassim and the other detainees who have been imprisoned at Guantánamo for more than sixteen years without any "meaningful opportunity" to contest the basis for their detentions. In confirming the detainees' constitutional right to that opportunity, the *Boumediene* Court declined to remand the case because "a remand simply would delay ultimate resolution of the issue . . . ." 553 U.S. at 772-73. As the Court emphasized:

> The cases before us . . . do not involve detainees who have been held for a short period of time . . . . In some of these cases six years have elapsed

> without the judicial oversight that habeas corpus . . . demands. . . . [T]he costs of delay can no longer be borne by those who are held in custody.

Id. at 794-95.

For Mr. Qassim and the others at Guantánamo, those six years have now turned into sixteen. This Court should grant *en banc* review now.

Respectfully submitted,

Dated: May 21, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

/s/ Neil H. Koslowe

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limit of D.C. Cir. Rule. 35(b)(2) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 3,886 words.

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Dated: May 21, 2018

/s/ Neil H. Koslowe