[ORAL ARGUMENT SCHEDULED FOR JANUARY 15, 2019]

No. 18-5148

IN THE 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

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The petitioner in this case is Khalid Ahmed Qassim, a Guantanamo Bay detainee also identified by Internment Serial Number 242. The respondents are Donald J. Trump, in his official capacity as President of the United States; James Mattis, in his official capacity as Secretary of Defense; John C. Ring, in his official capacity as Commander of the Joint Task Force Guantanamo (JTF-GTMO); and Steven Yamashita,[1] in his official capacity as Commander of the Joint Detention Group, JTF-GTMO. The Commonwealth Lawyers Association has filed a brief as amicus curiae in support of petitioner-appellant.

B. Rulings Under Review

The ruling under review is the district court's May 8, 2018 order denying Qassim's petition for a writ of habeas corpus (Hogan, J.). JA 437. The order is unpublished.

[1] Steven Yamashita replaced Stephen Gabavics as Commander of the Joint Detention Group, JTF-GTMO, on June 27, 2018, and is therefore automatically substituted as a respondent in this action by operation of Federal Rule of Appellate Procedure 43(c)(2).

C. Related Cases

This case has not previously been before this Court. Counsel for respondents are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Brad Hinshelwood
Brad Hinshelwood

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STATEMENT OF JURISDICTION

Petitioner Khalid Ahmed Qassim petitioned for a writ of habeas corpus, invoking the district court's jurisdiction under 28 U.S.C. § 2241. The district court entered judgment denying the petition on May 8, 2018. JA 437. Petitioner filed his notice of appeal on May 16, 2018. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court properly denied the petition for writ of habeas corpus.

STATEMENT OF THE CASE

Petitioner Khalid Ahmed Qassim was apprehended in Afghanistan by Afghan police in December of 2001. Class. JA 38. Shortly thereafter, Qassim was turned over to U.S. forces and transported to Guantanamo Bay, Cuba, where he is held as an unprivileged enemy combatant. Class. JA 22.

In July of 2004, Qassim filed a petition for writ of habeas corpus in the U.S. District Court for the District of Columbia, JA 259, followed by an amended petition in October 2004, Dkt. No. 22. The government filed an initial factual return in October 2004, Dkt. No. 34, then sought leave to file an amended return in September 2008, *see* JA 369, 377. The district court granted the government's motion for leave to file an amended return on November 7, 2008. Dkt. No. 287. Less than a week later—on November 13—the government and counsel for Qassim agreed to a stay.

JA 418-20. Under the stay, all of the parties' obligations under the district court's Case Management Order, *see* JA 408-17, were "suspended . . . unless and until the stay is lifted" by the district court, JA 419. On December 12, 2008, the district court approved this agreement, granting the parties' joint motion to indefinitely stay proceedings on Qassim's habeas petition. JA 418-20.

No further proceedings took place on Qassim's petition until February 2017, when Qassim moved for entry of final judgment, announcing his view that "under binding decisions of the District of Columbia Circuit, he cannot prevail on his habeas claims." Dkt. No. 1093, at 3. The parties then briefed whether the district court could enter judgment without making specific factual findings. *See* Dkt. Nos. 1094, 1095, 1096, 1097. After a hearing, the district court denied Qassim's motion for entry of final judgment and lifted the stay of proceedings. JA 421. Shortly thereafter, Qassim filed a traverse contesting the government's factual return. *See* Dkt. No. 1108, at 3. The parties also entered into discussions about a stipulated record for adjudicating the petition. These discussions culminated in the filing of a stipulated record on which the district court was asked to adjudicate the case. JA 435-36; Class. JA 26-40.

The stipulation stated that the government had evidence sufficient to "establish[] by a preponderance of the evidence" facts about Qassim's involvement with al Qaeda and the Taliban. Class. JA 29. The stipulation explains that the government has sufficient evidence to meet its burden to show that, after being

"recruited by a known Al-Qaida and Taliban recruiter working in Yemen," Qassim traveled to Afghanistan in approximately December 1999. Class. JA at 29, 30. Once there, he stayed in a Taliban guesthouse and "received military-style training" at al Qaeda's al-Farouq training camp, including training on multiple types of weaponry. *Id.* at 30, 31. After leaving al-Farouq, Qassim "traveled to a guesthouse in Kabul, Afghanistan, operated by an Al-Qaida facilitator," where he stayed before moving to the front lines to fight the Northern Alliance. *Id.* at 32. Subsequently, Qassim traveled to another al Qaeda- and Taliban-affiliated guesthouse and received further training at al-Farouq before returning to the front lines. *Id.* at 33-34. Qassim was present "on the front lines with the Taliban near Bagram, Afghanistan," when U.S. forces began attacks in the country. *Id.* at 35. He retreated to a guesthouse before joining numerous other Taliban and al Qaeda fighters in the Tora Bora region of Afghanistan. *Id.* at 35-36. While in this area, Qassim witnessed a speech by Osama bin Laden, who was then the leader of al Qaeda. *Id.* at 37. After Qassim was arrested, his name was found during raids of al Qaeda safehouses. *Id.* at 39. The district court observed that there was no evidence that Qassim was in Afghanistan for any other purpose besides joining al Qaeda. *Id.* at 23. For each of these factual findings, Qassim "disputes that he engaged in this conduct and asserts that he has evidence to support his position, but concedes that, under the binding law of this Circuit, Respondents' evidence is sufficient to establish this allegation by a preponderance of the evidence." *E.g.*, *id.* at 30.

Based on the stipulated record, the district court held that the government had met its burden to demonstrate, by a preponderance of the evidence, that Qassim was "part of al Qaeda or associated forces and was acting therein at the time of his arrest." Class. JA at 23. The court therefore denied the habeas petition. Class. JA 20-25; JA 437. Qassim appealed and petitioned for initial hearing en banc, again acknowledging that the district court correctly applied this Court's precedent in denying his petition. Pet. 2 (May 21, 2018). This Court denied initial hearing en banc, *see* Aug. 14, 2018 Order, and set the case for panel briefing.

SUMMARY OF ARGUMENT

Qassim concedes that his sole argument on appeal—that the Fifth Amendment's due process clause applies to unprivileged enemy combatants detained at Guantanamo Bay—is foreclosed by this Court's opinion in *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010) (per curiam), *reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011). Because a panel of this Court is bound to follow prior panel opinions, *see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc), this Court should affirm the judgment of the district court.

Even independent of this basic rule, however, this Court should reject Qassim's argument because *Kiyemba* has no bearing on his case. Qassim identifies no way in which he was denied due process in district court. Qassim declined to make use of the extensive procedures available to him—including procedures for obtaining access

to the information justifying his continued detention—instead electing to bypass the factfinding process and to stipulate to facts sufficient to justify his detention. His generalized assertion that he is unable to meet the evidence against him, *see*, *e.g.*, Br. 6, cannot be reconciled with his failure to take basic steps that would permit him to attempt to do so.

At a minimum, Qassim's choice to bypass the processes available in district court leaves this Court without a concrete record on which to evaluate his claim that those procedures do not comport with due process, even if he possessed due process rights. The Supreme Court has repeatedly recognized that habeas procedures for unprivileged enemy combatants must respect the government's interest in protecting national security information. *See Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (noting government's "legitimate interest in protecting sources and methods of intelligence gathering" and directing the district court to "use its discretion to accommodate this interest to the greatest extent possible" in Guantanamo habeas proceedings); *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.) (observing that the government's concerns about "intru[sion] on the sensitive secrets of national defense" are "properly taken into account in . . . due process analysis" applicable in a U.S. citizen habeas proceeding). In the government's view, the procedures developed by the district court provide Qassim the requisite "meaningful opportunity" to contest his detention in light of the government's strong interest in shielding national security information. *Boumediene*, 553 U.S. at 779. Any assertion to the contrary should be evaluated by

reference to the actual information provided to or withheld from Qassim under those procedures, rather than speculation about what would have occurred had Qassim made use of the available process.

STANDARD OF REVIEW

In addressing a denial of a habeas petition, this Court reviews the ultimate habeas determination and the legal rulings underlying it de novo. *See Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010).

ARGUMENT

CIRCUIT PRECEDENT FORECLOSES QASSIM'S ARGUMENT, AND QASSIM IDENTIFIES NO WAY IN WHICH HE WAS DENIED DUE PROCESS

A. In this appeal, Qassim concedes—as he did in the district court and in his petition for initial hearing en banc—that circuit precedent forecloses his argument that the Fifth Amendment's due process clause applies to unprivileged enemy combatants detained at Guantanamo Bay. Br. 4-5. In *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010) (per curiam), *reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011), this Court reaffirmed the principle—drawn from Supreme Court decisions and decisions of this Court—that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Id.* at 1026. Subsequent decisions of this Court have recognized that holding. *See Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527,

529 (D.C. Cir. 2009) (per curiam). Qassim also concedes that a panel of this Court is not empowered to overrule a prior opinion. *See* Br. 4-5; *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). Under binding precedent, this Court is therefore bound to reject Qassim's argument. As Qassim advances no other challenges to the district court's ruling, this Court should affirm the judgment below.

B. Even independent of the law-of-the-circuit rule, this Court should affirm because Qassim has not sufficiently identified any way in which, even if he had due process rights, he was denied due process by the procedures employed in district court. Qassim declined to make use of the extensive procedures available to him—including procedures designed to facilitate his access to information justifying his continued detention—instead electing to bypass the factfinding process and to stipulate to facts sufficient to justify his detention. Qassim's repeated assertion that *Kiyemba* "prevent[s]" him "from seeing, confronting and rebutting the purported evidence against him," Br. 6; *see* Br. 7, 10, 19-20, 29, 30, cannot be squared with his failure to take any of the procedural steps that might have enabled him to view that evidence or to mount any appropriate challenge.

The procedures for litigating petitions like Qassim's provide for the disclosure of factual information on which the government relies to justify detention to a petitioner or, at a minimum, the petitioner's counsel. Those procedures were established by the district court's Case Management Order (Order), *see* JA 408-17; *see also Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010) (discussing development of

the Order), and subsequent district court orders. Under the Order, the government is required to file a factual return "containing the factual basis upon which it is detaining the petitioner." Order § I.A, JA 409. Since November 2008, Qassim's counsel has had access to all of the information that the government relies on to justify Qassim's detention, including classified and other sensitive material. In a normal case, the government would also file an unclassified version of the return. Order § I.C, JA 409, 415. The government would also be obligated to disclose "all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner," including "any information reviewed by attorneys preparing factual returns for all detainees" and "any other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay." Order § I.D.1, JA 415. The amended factual return filed by the government in this case included exculpatory information reviewed in developing the return. No unclassified return was filed in district court in this case, however, nor were other post-factual-return affirmative disclosure procedures followed, because the stay provided that all such obligations were "suspended." JA 419. Once the stay was lifted, Qassim negotiated the stipulation entered into by the parties.

The Order also outlines procedures for discovery. At petitioner's request, "the government shall disclose" "(1) any documents or objects in the government's possession that the government relies on to justify detention; (2) all statements, in

whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted." Order § I.E.1, JA 415-16. A petitioner may also, on a showing of "good cause," seek additional discovery. Order § I.E.2, JA 410; *see Al-Madhwani*, 642 F.3d at 1077; *Bensayah v. Obama*, 610 F.3d 718, 724 (D.C. Cir. 2010). In light of the stay and stipulation, the parties did not engage in discovery under these procedures.

Because much of the information justifying detention in any given case is classified, both the Case Management Order and a subsequent protective order set forth procedures for handling classified information. Where the Case Management Order would otherwise require responsive classified information be disclosed to the petitioner, the government is required to "provide the petitioner's [security-cleared] counsel with the classified information." Order § I.F, JA 416. To the extent the government believes it necessary to withhold such classified information from a petitioner's counsel, it must seek an exception from the district court. *Id.* Under this Court's decision in *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (per curiam), a district court evaluating a request for an exception considers whether the particular classified information at issue is "material" to the case, whether "counsel's access to it is necessary to facilitate meaningful [habeas] review," and whether "alternatives to access," such as a summary of the information or a factual stipulation by the government, would ensure a meaningful opportunity to contest the facts. *Id.* at

547-48. These procedures are analogous to those provided in criminal cases under the Classified Information Procedures Act, 18 U.S.C. app. 3, at 860. *Al Odah*, 559 F.3d at 544, 547.

Disclosures of classified information to petitioners themselves are on different footing. The protective order dictates that, as a general matter, "[p]etitioners' counsel shall not disclose to a petitioner-detainee classified information not provided by that petitioner-detainee." JA 386. The protective order also provides mechanisms for permitting such disclosures. Counsel may identify classified information that they wish to convey to their client, and the government will conduct a declassification review of those materials for possible disclosure to the petitioner. *Id.* at 386-87. Even if the information cannot be fully declassified, the protective order provides that counsel may disclose classified or otherwise protected information to a petitioner with "prior concurrence of government counsel or express permission of the Court." *Id.* at 388. For example, at the request of counsel in other habeas petitions, the government has prepared a detainee-specific version of the factual return narrative, some or all of its exhibits, or both narrative and exhibits, that discloses more information to the detainee than the version of the return the government prepares for public release. This detainee-specific version of the return is designed to reveal as much information to the detainee as possible consistent with the Government's national security obligations, and may include classified or other sensitive information. Counsel may review and discuss this version of the return with the detainee during in-person visits

with their client. Here, a classified version of the narrative of the stipulation was created for use in meetings between Qassim and his counsel. *See* Br. 11. In addition, in the past the government has provided detainees with access to a reading room for reviewing such materials on their own if needed to assist in the adjudication of their cases.

As this summary of relevant procedures demonstrates, Qassim's repeated assertion that he is "prevent[ed] . . . from seeing, confronting and rebutting the purported evidence against him," Br. 6; *see* Br. 7, 10, 19-20, 29, 30, rests on a distorted picture of the procedures available to him, and speculation about how those procedures would have applied in his case had he made use of them. Qassim asserts, for example, that he is "not permitted to see the classified Amended Factual Return or any of the supporting exhibits containing the evidence upon which the government relies to detain him." Br. 8-9. Yet at no point before negotiating the stipulated record did his counsel request declassification of the factual return or any of the exhibits to share with Qassim. *See* JA 386-87. Nor did his counsel request the preparation of a detainee-specific version of the factual return and exhibits, *see id.* at 388, prior to asking for a version of the stipulation to share with Qassim.

The three examples Qassim identifies illustrate the point. First, Qassim asserts that he is unable to review classified exhibits that record his own statements. Br. 9. Yet as a general matter, under the protective order "a petitioner [may] view his statements, even if they are classified." *In re Guantanamo Bay Detainee Litig.*, 634 F.

Supp. 2d 17, 22 (D.D.C. 2009); *see* JA 386 (prohibiting counsel from disclosing "to a petitioner-detainee classified information *not provided by that petitioner-detainee*" (emphasis added)). If the government seeks to withhold any such statements or to provide them in alternative form, the parties can litigate the question before the district judge, following the *Al Odah* framework. *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d at 24-26. Qassim's assertion that he would have been denied access to these exhibits is thus wholly speculative.

Second, Qassim asserts that his counsel was "prevented . . . from seeing certain key evidence" because of redactions in Exhibits 17 and 18 to the stipulation. Br. 13; *see* Br. 11 ("Two of the exhibits are almost completely redacted and cannot be seen even by Mr. Qassim's counsel."); Class. JA 126-43, 145-58 (Exhibits 17 and 18). Those exhibits were redacted to withhold immaterial but sensitive national security information consistent with the Case Management Order. The government does not rely on anything contained in the redacted material to justify Qassim's detention. To the extent Qassim's counsel believes that those redactions are improper, the proper procedure would have been to seek disclosure from the district court under the *Al Odah* framework, with subsequent review by this Court. *See*, *e.g.*, *Obaydullah v. Obama*, 688 F.3d 784, 795-96 (D.C. Cir. 2012) (per curiam) (assessing "whether the government has met its obligations under the [Case Management Order]" in withholding classified information from counsel). Counsel did not move in district

court to compel disclosure of any redacted information, including the information redacted from Exhibits 17 and 18.

Third, Qassim suggests that *Kiyemba* has permitted the development of "rules for the adjudication of Guantanamo habeas cases that would not be permissible in any proceeding governed by due process." Br. 3-4 (citing *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)); *accord* Br. 10 (suggesting that these cases create "certain presumptions and preferences in favor of the government" that he "cannot rebut without access to the information on which those presumptions and preferences are based"). Yet Qassim does not identify any aspects of these decisions that are inconsistent with due process, nor does he explain how those decisions affected his own case.

Latif, for example, recognized that certain intelligence reports recounting interrogations are entitled to a presumption that the reports accurately recorded the statements contained therein. 677 F.3d at 1178-82. Yet determining what information Qassim would have received about documents potentially subject to that presumption is impossible, because Qassim opted not to litigate his petition in the normal course in the district court. In addition, the district court never had occasion to consider whether the presumption recognized in *Latif* was relevant to Qassim's petition at all. Indeed, had the district court "assess[ed] the record as a whole in the first instance," it could have concluded on the basis of other corroborating evidence

"that some of those documents 'are reliable,' regardless of any presumption." Aug. 14, 2018 Order 4 (Tatel, J., concurring in the denial of initial hearing en banc) (quoting *Latif*, 677 F.3d at 1209 (Tatel, J., dissenting)).

In sum, had Qassim used the process available to him in district court, he might have received most or all of the information to which he incorrectly claims due process entitles him. And at a minimum, Qassim's choice to bypass that process leaves this Court without a concrete record on which to evaluate his claim that those procedures do not comport with due process. This point is particularly important given that the Supreme Court has repeatedly recognized that habeas procedures for unprivileged enemy combatants must balance the detainee's interest in contesting the basis for his detention against the government's interest in protecting national security information.

In addressing what due process is required in the context of a U.S. citizen detained on U.S. soil under the law of war, a plurality of the Supreme Court stated that the government's concerns about "intru[sion] on the sensitive secrets of national defense" are "properly taken into account in . . . due process analysis," and set forth no specific rules about how such sensitive information should be handled. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.). Similarly, the Supreme Court observed in *Boumediene v. Bush* that the government has a "legitimate interest in protecting sources and methods of intelligence gathering," and directed the district court to "use its discretion to accommodate this interest to the greatest extent

possible" while permitting a "meaningful opportunity" to contest the basis for detention. 553 U.S. 723, 779, 796 (2008). The procedures developed by the district court are consistent with due process principles and provide Qassim the requisite "meaningful opportunity" to contest his detention. Any assertion to the contrary should be measured against the actual effect of those procedures, rather than speculation about what would have occurred had Qassim made use of the process available to him.

In any event, Qassim provides no substantive reason to revisit *Kiyemba*. As *Kiyemba* observed, a host of decisions from the Supreme Court and this Court "hold 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. Thus, the Supreme Court has long observed "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). This includes the due process right embodied in the Fifth Amendment. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770, 784 (1950)). And nothing in *Boumediene* purported to disturb this longstanding rule; to the contrary, *Boumediene* emphasized that it did "not address the content of the law that governs petitioners' detention." 553 U.S. at 798; *see Rasul*, 563 F.3d at 529 (observing that *Boumediene* "disclaimed any intention to disturb existing

law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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November 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,884 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brad Hinshelwood
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