

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5297

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

ABDUL RAZAK ALI,

Petitioner-Appellant,

v.

DONALD J. TRUMP, et al.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

**RESPONDENTS-APPELLEES' RESPONSE TO
PETITION FOR INITIAL HEARING EN BANC**

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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 appellant is Abdul Razak Ali, a Guantanamo Bay detainee also identified by Internment Serial Number (“ISN”) 685. The appellees are Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Rear Admiral John C. Ring, in his official capacity as Commander of the Joint Task Force Guantanamo (“JTF-GTMO”); and Colonel Steven Yamashita, in his official capacity as Commander of the Joint Detention Operations Group, JTF-GTMO.

Amici before the district court include: (1) Muslim Advocates, Asian Americans Advancing Justice, Asian American Legal Defense and Education Fund, American-Arab Anti-Discrimination Committee, Capital Area Muslim Bar Association, Council on American-Islamic Relations—National, Muslim Bar Association of New York, Muslim Justice League, Muslim Public Affairs Council, New Jersey Muslim Lawyers Association, Revolutionary Love Project, T’ruah: the Rabbinic Call for Human Rights; (2) Center for Victims of Torture; and (3) Professors Eric M. Freedman, Bernard E. Harcourt, Randy A. Hertz, Eric S. Janus, Jules Lobel, Kermit Roosevelt, Michael J. Wishnie, and Larry Yackle. No amici or intervenors are currently before this Court.

B. Rulings Under Review

Appellant seeks review of the district court's memorandum opinion and order denying his habeas corpus petition, both of which were entered on August 10, 2018. *Ali v. Obama*, Case No. 10-cv-1020 (D.D.C. Aug. 10, 2018) (Leon, J.), Dkt. Nos. 1540, 1541 (published at 317 F. Supp. 3d 480 (D.D.C. 2018)).

C. Related Cases

In *Ali v. Obama*, this Court affirmed the denial of appellant's habeas corpus petition because "the Government has satisfied its burden to prove that [appellant] more likely than not was part of Abu Zubaydah's force," meaning that appellant was lawfully detained "as an enemy combatant pursuant to the 2001 Authorization for Use of Military Force." 736 F.3d 542, 543, 550 (D.C. Cir. 2013).

In 2018, appellant and ten other Guantanamo detainees filed motions in district court challenging their detention. These motions were jointly captioned but individually filed in nine preexisting habeas cases previously filed by the detainees in the U.S. District Court for the District of Columbia. *See* Case Nos. 04-cv-1194; 05-cv-23; 05-cv-764; 05-cv-1607; 05-cv-2386; 08-cv-1360; 08-cv-1440; 09-cv-745; 10-cv-1020. This appeal, as noted, arises from the denial of the motion in Case No. 10-cv-1020. The other motions remain pending in district court. Counsel for appellees are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Counsel for appellees do not believe that *Qassim v. Trump*, Case No. 18-5148 (D.C. Cir.), is a related case within the meaning of D.C. Circuit Rule 28(a)(1)(C), because that case does not involve “substantially the same parties and the same or similar issues.” *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018), involved similar issues to this appeal, but did not involve substantially the same parties.

/s/ Michael Shib

MICHAEL SHIH

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

STATEMENT..... 3

ARGUMENT 7

A. This Court’s Holding That The Due Process Clause Does Not
Extend To Guantanamo Detainees Does Not Warrant Initial *En
Banc* Review. 7

B. This Case Is Not An Appropriate Vehicle For Reconsidering The
Court’s Due-Process Holding..... 10

C. The Court’s Due-Process Holding Is Correct. 13

CONCLUSION 16

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Al Bahlul v. United States</i> , 767 F.3d 1 (D.C. Cir. 2014).....	15, 16
<i>Al-Alwi v. Trump</i> , 901 F.3d 294 (D.C. Cir. 2018).....	10
<i>Al-Bihani v. Obama</i> , 590 F.3d 866 (D.C. Cir. 2010).....	11, 13
<i>Al-Madhwani v. Obama</i> , 642 F.3d 1071 (D.C. Cir. 2011).....	8
<i>Ali v. Obama</i> , 736 F.3d 542, 543 (D.C. Cir. 2013)	1, 4, 5, 11, 12
<i>Bartlett ex rel. Neuman v. Bowen</i> , 824 F.2d 1240 (D.C. Cir. 1987).....	9
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	3, 4, 13, 14, 15
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	10, 12
<i>Jifry v. FAA</i> , 370 F.3d 1174 (D.C. Cir. 2004).....	13
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950)	13
<i>Kiyemba v. Obama</i> , 555 F.3d 1022 (D.C. Cir. 2009), <i>vacated</i> , 559 U.S. 131, <i>reinstated in relevant part</i> , 605 F.3d 1046 (D.C. Cir. 2010), <i>cert. denied</i> , 563 U.S. 954 (2011).....	2, 7, 8, 13
<i>Rasul v. Myers</i> , 563 F.3d 527 (D.C. Cir. 2009).....	8, 15

Rodriguez de Quijas v. Shearson/ Am. Express, Inc.,
490 U.S. 477 (1989) 15

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 13

Zadvydas v. Davis,
533 U.S. 678 (2001) 13

Statutes:

Authorization for Use of Military Force,
Pub. L. No. 107-40, 115 Stat. 224 (2001) 3

28 U.S.C. § 2241(e) 13

Rules:

Fed. R. App. P. 35(a) 7

Fed. R. App. P. 35(a)(1) 2

Fed. R. App. P. 35(a)(2) 2

Other Authorities:

74 Fed. Reg. 4897 (Jan. 27, 2009) 5

76 Fed. Reg. 13,277 (Mar. 10, 2011) 6, 11

Periodic Review Secretariat, U.S. Dep't of Def., <https://www.prs.mil/> 6

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Abdul Razak Ali is detained at Guantanamo Bay as an unprivileged enemy combatant. In 2005, he filed a habeas petition challenging the legality of his detention. After a three-day evidentiary hearing, the district court found that petitioner had traveled to Afghanistan after September 11, 2001, to fight against U.S. and Coalition forces; that petitioner was captured while living in a safehouse in Pakistan with terrorist leader Abu Zubaydah and senior leaders of Abu Zubaydah's force; that the safehouse contained documents and equipment associated with terrorist operations; that petitioner had participated in Abu Zubaydah's terrorist-training program at the safehouse; and that, after his capture, petitioner had lied to the government about his identity for two years. The court therefore ruled that the government had demonstrated its authority to detain petitioner, and this Court affirmed that ruling. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

This appeal arises from a motion seeking release filed by petitioner in his previously adjudicated habeas case. Petitioner argues that he must be released because the Due Process Clause of the Constitution independently limits the duration of his law-of-war detention even while hostilities continue. He also suggests that, to the extent his detention is indefinite, the Due Process Clause might require the government to prove its authority to detain him by clear and convincing evidence. As the district court recognized in denying the motion, these arguments are foreclosed by controlling Circuit precedent holding that the Due Process Clause does not extend to

Guantanamo detainees without property or presence in U.S. sovereign territory. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated*, 559 U.S. 131, *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 954 (2011). Petitioner seeks initial hearing *en banc* to overturn that precedent.

This Court should not take that extraordinary step. *En banc* review is unnecessary to “secure or maintain uniformity of the court’s decisions,” Fed. R. App. P. 35(a)(1), because the Court’s decisions are entirely consistent with *Kiyemba* despite repeated efforts by Guantanamo detainees to assert due-process claims. Nor does the petition “involve[] a question of exceptional importance” warranting *en banc* review. Fed. R. App. P. 35(a)(2). Petitioner’s only argument on this score is that *Kiyemba* was wrong. But given that *Kiyemba* has been on the books for nearly a decade, and given that this Court and the Supreme Court have already declined invitations to revisit it, this Court should leave to the Supreme Court whether *Kiyemba* should be overruled despite the lack of any material change in circumstances. And even if petitioner could satisfy the demanding standard for rehearing *en banc*, *initial hearing en banc* would remain inappropriate because the full Court would benefit from a panel’s views on whether his claims either lack merit or have been forfeited.

En banc review is also unwarranted because petitioner is not entitled to habeas relief even assuming that the Due Process Clause applies to him. Petitioner has cited no case holding that due process entitles an unprivileged enemy combatant to release from law-of-war detention during ongoing hostilities, when this Nation’s enemies

lengthen the duration of hostilities by continuing to fight. Due process likewise does not compel the government to satisfy a clear-and-convincing-evidence standard in a habeas proceeding initiated by a Guantanamo detainee, simply because his detention may have exceeded some unspecified temporal limit. And even if such an evidentiary standard were constitutionally required, petitioner has forfeited any argument that the standard would make a difference in assessing the government's authority to detain him.

Finally, *en banc* review is unwarranted because *Kiyemba* was correctly decided. The Supreme Court has consistently held that the Due Process Clause does not apply to aliens without property or presence in the sovereign territory of the United States. The Court did not alter that well-settled principle in *Boumediene v. Bush*, 553 U.S. 723 (2008), which extended the privilege of habeas corpus to Guantanamo detainees. That *sui generis* decision turned on the Suspension Clause's unique role in the separation of powers. *Id.* at 746 (“The broad historical narrative of the writ and its function is central to our analysis.”). For these reasons, the petition for initial hearing *en banc* should be denied.

STATEMENT

1. After the attacks of September 11, 2001, Congress authorized the President to “use all necessary and appropriate force” against al Qaeda, the Taliban, and their associated forces. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (“2001 AUMF”). As part of those ongoing

hostilities, petitioner Abdul Razak Ali, also identified by Internment Serial Number (“ISN”) 685, traveled to Afghanistan from his native Algeria to fight against U.S. and Coalition forces. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

In 2002, petitioner was captured at a four-bedroom safehouse in Pakistan. He was apprehended along with “an al Qaeda-associated terrorist leader named Abu Zubaydah,” “four former trainers from a terrorist training camp in Afghanistan, multiple experts in explosives, and an individual who had fought alongside the Taliban.” *Ali*, 736 F.3d at 543. The safehouse’s living quarters contained a “device typically used to assemble remote bombing devices,” “electrical components,” and al Qaeda-designated documents. *Id.* Petitioner had lived in the safehouse for eighteen days, and while there had “participated in Abu Zubaydah’s terrorist training program.” *Id.* Petitioner falsely identified himself to an FBI investigator, and maintained that lie for two years. *Id.*

Since June 2002, petitioner has been detained as an unprivileged enemy combatant at Guantanamo Bay. *Ali*, 736 F.3d at 543. In 2005, petitioner sought habeas relief from his detention. *Id.* at 544-45. After the Supreme Court decided *Boumediene v. Bush*, 553 U.S. 723 (2008), the district court held a three-day hearing and ruled that petitioner’s detention was lawful. *Ali*, 736 F.3d at 545. Petitioner appealed, arguing that he was not an a member of Abu Zubaydah’s force and had “mist[aken] the Abu Zubaydah guesthouse for a public guesthouse.” *Id.* This Court rejected that argument because “[i]t strain[ed] credulity.” *Id.* at 547. The Court held that

petitioner's "presence at an al Qaeda . . . terrorist guesthouse" would alone "constitute[] 'overwhelming' evidence that [he] was part of the enemy force." *Id.* at 545. Petitioner's affiliation with the enemy force was further confirmed by the district court's other findings. *Id.* at 546.

The Court declined to credit petitioner's account, which "pile[d] coincidence upon coincidence": that petitioner "ended up in the guesthouse by accident and failed to realize his error for more than two weeks"; that Abu Zubaydah and his senior leaders "tolerated an outsider living within their ranks"; that a different person with the same biographical information happened to travel to Afghanistan to fight against U.S. and Coalition forces; and that, "despite knowing that he was an innocent man, [petitioner] lied about his true name and nationality for two years." *Ali*, 736 F.3d at 550. The Court concluded that the government had "prove[n]" petitioner's "status by a preponderance of the evidence." *Id.* at 543-44.

2. In 2009, President Obama convened a task force to determine "whether it is possible to transfer or release" individuals detained at Guantanamo "consistent with the national security and foreign policy interests of the United States." 74 Fed. Reg. 4897, 4898-99 (Jan. 27, 2009). After reviewing petitioner's case, the task force approved petitioner's continued detention because, if transferred from U.S. custody, petitioner posed a national-security threat that could not be adequately mitigated. *See In re Guantanamo Bay Detainee Litig.*, No. 1:10-cv-1411, Dkt. No. 36-1, at 2 (D.D.C. July 8, 2013) (discussing review of ISN 685).

In 2011, President Obama established a Periodic Review Board to determine whether continued custody of individual Guantanamo detainees remains necessary to protect against a continuing significant threat to national security. 76 Fed. Reg. 13,277 (Mar. 10, 2011). Each time the Board has considered petitioner, it has recommended that petitioner remain detained.¹ Petitioner's next review is currently scheduled for January 29, 2019.

3. In 2018, petitioner filed a motion that effectively constituted a renewed habeas petition in district court. The motion argued that petitioner's continued detention violates both the 2001 AUMF and due process, which allegedly imposes a substantive limit on the duration of law-of-war detention. The motion also argued that, to the extent petitioner's detention is indefinite, due process requires the government to prove the lawfulness of his detention with clear and convincing evidence. Petitioner did not explain how that standard would have altered his first habeas petition's outcome, any challenge to which petitioner expressly waived. App. 4, 9 n.6. Nor did petitioner address this Court's decision upholding his detention's legality under the 2001 AUMF. Petitioner instead discussed, in general terms, the purported unconstitutionality of the preponderance-of-the-evidence standard. Indeed, his filings were identical to those filed on behalf of ten other Guantanamo

¹ These determinations can be viewed at <https://www.prs.mil/> by accessing the categories beneath the "Review Information" tab and searching for "ISN 685."

detainees, notwithstanding the different facts underlying each of those detainees' enemy-combatant status.

The district court denied the motion. As to petitioner's statutory argument, the court ruled that the detention authority embodied in the 2001 AUMF must be informed by the laws of war—which indisputably allow enemy combatants to be detained until the end of hostilities, even if hostilities are protracted. App. 9. As to petitioner's constitutional arguments, the court ruled—consistent with controlling precedent—that the “due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.” App. 13.

ARGUMENT

A. This Court's Holding That The Due Process Clause Does Not Extend To Guantanamo Detainees Does Not Warrant Initial *En Banc* Review.

En banc review will not be ordered unless “necessary to secure or maintain uniformity of the court's decisions” or to resolve “a question of exceptional importance.” Fed. R. App. P. 35(a). This petition falls well short of that standard.

Although the question whether the Due Process Clause extends to Guantanamo detainees is an important one, this Court has clearly and repeatedly answered it by holding that the Clause does not apply to alien enemy combatants detained at Guantanamo who lack “property or presence in the sovereign territory of the United States.” *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated*, 559 U.S. 131, *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010) (per

curiam), *cert. denied*, 563 U.S. 954 (2011); *see, e.g., 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). Moreover, this Court has declined to reconsider the question *en banc*. Order, *Kiyemba v. Obama*, No. 08-5424 (D.C. Cir. Sept. 9, 2010) (denying *en banc* petition because only two eligible Judges voted in favor of rehearing). And the Supreme Court has declined to grant certiorari to address the question despite being presented with the same arguments petitioner makes now. *E.g., Cert. Pet., Al-Madhwani v. Obama*, No. 11-7020, 2011 WL 8002285 (U.S. Oct. 24, 2011), *denied*, 567 U.S. 907 (2012); *Cert. Pet., Al-Alwi v. Obama*, No. 11-7700, 2011 WL 8002286 (U.S. Dec. 5, 2011), *denied*, 567 U.S. 907 (2012).

No intervening events have occurred that would warrant the full Court's revisiting *Kiyemba* after nearly a decade. To the contrary, overruling *Kiyemba* would unsettle the framework used to adjudicate Guantanamo habeas petitions for nearly a decade by inviting constitutional challenges to decisions not only of this Court but of the U.S. District Court for the District of Columbia. Petitioner has failed to identify any reason why this Court should take that extraordinary step.

Petitioner suggests (Pet. 2-3) that this Court has “expressed divergent views concerning whether or to what extent Guantanamo detainees” are entitled to due-process rights. But the decisions he cites actually reaffirm *Kiyemba's* due-process holding before deciding the questions presented on other grounds. *Id.* (citing *Al-Madhwani*, 642 F.3d at 1077; *Rasul*, 563 F.3d at 529). And the separate opinions

relied upon by petitioner confirm that *Kiyemba*'s holding is the "settled" "law of this circuit." Pet. 3. Petitioner also argues (Pet. 3-4) that *en banc* review is necessary because one district judge has twice characterized *Kiyemba*'s holding as dictum. But those outlier statements, which are themselves dicta, do not undermine *this* Court's consistent treatment of *Kiyemba*'s holding as controlling.

Petitioner is left to argue (Pet. 11-16) that initial hearing *en banc* is necessary because *Kiyemba* was wrong. That argument, in addition to being incorrect, is contrary to the principle that *en banc* review should not be granted simply because "a majority of the judges disagree with a panel decision," even on important legal questions. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denials of rehearing *en banc*). In these circumstances, whether or not a current majority of this Court might disagree with the holding established by the *Kiyemba* panel and repeatedly reaffirmed since then, it should leave to the Supreme Court the decision whether or not to revisit *Kiyemba*.

Finally, even assuming that petitioner could satisfy the demanding standard for *en banc* rehearing, *initial* hearing *en banc* remains inappropriate because petitioner's due-process arguments either lack merit or have been forfeited (as explained below). The full Court would benefit from a panel's views on those arguments.

B. This Case Is Not An Appropriate Vehicle For Reconsidering The Court's Due-Process Holding.

Initial hearing *en banc* should be denied for the independent reason that petitioner has failed to show how extending the Due Process Clause to Guantanamo detainees would entitle him to habeas relief.

The *en banc* petition does not dispute that the detention authority conferred by the 2001 AUMF is informed by the laws of war, which allow detention while hostilities continue. *See Al-Alwi v. Trump*, 901 F.3d 294, 298 (D.C. Cir. 2018) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (plurality op.); *id.* at 579, 587 (Thomas, J., dissenting)). The petition also does not contest that hostilities remain ongoing—as this Court reiterated less than five months ago. *Id.* The petition merely asserts (Pet. 2, 5-6), without citation, that due process imposes a substantive limit on the length of law-of-war detention that the government has transgressed.

This argument lacks merit. The purpose of law-of-war detention is to “prevent captured individuals from returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518. Detention authority does not dissipate simply because hostilities are protracted, *Al-Alwi*, 901 F.3d at 297-98, and petitioner has failed to cite any case holding that due process limits the law-of-war principle that detention may continue until hostilities end. Nor has petitioner identified any basis by which a court could order his release, while hostilities continue, except the duration of his detention. Pet. 5-6. But this Court has already held—in the context of a habeas

petition filed by *this* petitioner—that “it is not the Judiciary’s proper role to devise a novel detention standard that varies with the length of detention.” *Ali v. Obama*, 736 F.3d 542, 552 (D.C. Cir. 2013). Such a standard would effectively reward the Nation’s enemies for stretching a conflict to historic lengths by continuing to fight.

Given the circumstances of this ongoing conflict, the Executive periodically reviews whether certain detainees’ continued confinement is “necessary to protect against a continuing significant threat to security.” 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011). Moreover, the Executive has exercised its discretion to transfer most of the individuals previously detained at Guantanamo. In petitioner’s case, however, the Executive has determined that petitioner should not be transferred, and each subsequent periodic review has concluded that petitioner poses a continuing significant threat to the security of the United States.

Petitioner also speculates (Pet. 7) that, if the Due Process Clause were to apply to Guantanamo detainees, the allegedly indefinite length of his detention might require the government to prove the legality of his detention in habeas proceedings with “clear and convincing evidence”—and not with a preponderance of the evidence, the standard that this Court has deemed constitutionally adequate, *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). This issue is not properly before the Court because petitioner did not seek *en banc* review of the Court’s decisions establishing the appropriate evidentiary standard. And even if it were, due process does not impose a clear-and-convincing standard on habeas proceedings brought by

alien unprivileged enemy combatants detained at Guantanamo Bay. A majority of the Supreme Court has agreed that, even in the context of a *U.S.-citizen* enemy combatant detained *in the United States*, requiring the government merely to put forward “credible evidence” of the lawfulness of detention is consistent with due process. *Hamdi*, 542 U.S. at 533-34 (plurality); *id.* at 590 (Thomas, J., dissenting) (reasoning that no process beyond “good-faith executive determination” is required). The framework deemed constitutionally permissible for U.S. citizens detained within U.S. sovereign territory is *a fortiori* sufficient for noncitizens detained at Guantanamo Bay.

En banc review is unwarranted for the additional reason that the government’s evidence would likely satisfy a clear-and-convincing standard. The *en banc* petition does not challenge, and indeed embraces, the “robust record” the district court considered in evaluating the merits of his previous habeas petition. Pet. 4. That record, this Court held, supplies “overwhelming” evidence of the legality of petitioner’s detention. *Ali*, 736 F.3d at 545-46. Petitioner’s filings in district court, which were identical to those filed on behalf of ten other Guantanamo detainees, did not specifically address this Court’s analysis of the circumstances of his capture and subsequent two-year deception of investigators. And in this Court, petitioner has not attempted to explain how his combatant-by-coincidence theory could overcome the government’s evidence under *any* standard, beyond asserting in conclusory fashion that the question of his status is a “close” one. Pet. 6.

Finally, even assuming that the Due Process Clause applies to Guantanamo detainees, petitioner's due-process claims would not be available. Guantanamo detainees would not be entitled to raise the full panoply of due-process rights possessed by domestic detainees, but at most only those rights that the Suspension Clause guarantees them a right to assert. That is because Guantanamo detainees are entitled to seek habeas relief asserting constitutional rights only insofar as the Suspension Clause invalidates Congress's elimination of jurisdiction. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *see* 28 U.S.C. § 2241(e). And "[t]he Suspension Clause protects only the fundamental character of habeas proceedings," not "all the accoutrements of habeas for domestic criminal defendants." *Al-Bihani*, 590 F.3d at 876. Here, at a minimum, Petitioner has failed to demonstrate that any of his due-process claims fall within the writ's constitutional core.

C. The Court's Due-Process Holding Is Correct.

Initial hearing *en banc* should be denied for the additional reason that *Kiyemba's* due-process holding is correct. The conclusion that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States" flows inevitably from controlling decisions of the Supreme Court and of this Court. *Kiyemba*, 555 F.3d at 1026-27 (listing cases); *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 781-85 (1950); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

Petitioner argues (Pet. 13-14) that *Kiyemba*'s holding cannot be reconciled with *Boumediene*. But *Boumediene* held only that “Art. I, § 9, cl. 2 [the Suspension Clause] of the Constitution has full effect at Guantanamo Bay” in the specific context of law-of-war detainees who had been detained there for years. 553 U.S. at 771. The Court repeatedly emphasized that its *sui generis* holding turned on the writ’s unique role in the separation of powers. *E.g., id.* at 739 (“In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause.”); *id.* at 746 (“The broad historical narrative of the writ and its function is central to our analysis.”); *id.* at 743 (“[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.”); *id.* at 755 (“[The] premise that *de jure* sovereignty is the touchstone of habeas . . . [is] contrary to fundamental separation-of-powers principles.”).

Petitioner concedes (Pet. 12) that *Boumediene*, which “decided only that the Suspension Clause applies” at Guantanamo, did not itself confer due-process rights on Guantanamo detainees. However, petitioner argues (Pet. 11-13) that *Boumediene*’s “functional” standard—which the Court created to determine the Suspension Clause’s extraterritorial scope beyond the sovereign territory of the United States—should govern the extraterritorial scope of other constitutional provisions. But as *Boumediene* itself acknowledged, *Boumediene* is the *only* case extending a constitutional right to “noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty.” 553 U.S. at 770. And as this Court has recognized,

“*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause.” *Rasul*, 563 F.3d at 529. Indeed, *Boumediene* admonished that “our opinion does not address the content of the law that governs petitioners’ detention.” 553 U.S. at 798. This caveat reflects the reality that the Suspension Clause secures “the common-law writ” of habeas corpus, given that the Clause was enacted “in a Constitution that, at the outset, had no Bill of Rights” or even a Due Process Clause. *Id.* at 739. *Boumediene*’s extension of the Suspension Clause to Guantanamo detainees must therefore be understood in light of that Clause’s centrality to the separation of powers. Given *Boumediene*’s express refusal to decide the extraterritorial scope of the substantive law governing detention, and given pre-*Boumediene* law holding that the Due Process Clause does not extend to aliens without property or presence in the sovereign territory of the United States, this Court must follow the latter body of case law even assuming it is in tension with *Boumediene*’s reasoning—leaving to the Supreme Court the prerogative of overruling its own decisions. *See Rasul*, 563 F.3d at 529 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

Petitioner suggests (Pet. 15-16) that, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), the government conceded that *Boumediene*’s functional standard governs the extraterritorial scope of all constitutional rights. But the government’s brief made no such concession. U.S. Br., *Al Bahlul v. United States*, No.

11-1324, 2013 WL 3479237, at *64 (D.C. Cir. July 10, 2013) (“*Al Bahlul* Brief”).² And the Court’s controlling *en banc* opinion assumed without deciding that the Ex Post Facto Clause would apply, noting that “we are not to be understood as remotely intimating in any degree an opinion on the question.” 767 F.3d at 18 (quotation marks omitted). Thus, *Al Bahlul*’s treatment of the Ex Post Facto Clause is consistent with *Kiyemba*’s holding and does not justify initial hearing *en banc*.

CONCLUSION

For these reasons, the petition for initial hearing *en banc* should be denied.

Respectfully submitted,

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JANUARY 2019

² The brief stated that the “Ex Post Facto Clause applies in military commission prosecutions” of certain Guantanamo detainees due to a “unique combination of circumstances” not present here. *Al Bahlul* Brief, at *64. Most significantly, *Al Bahlul* involved Congress’s authority to punish certain conduct criminally in light of the structural substantive constraints of the Ex Post Facto Clause. *Id.*

CERTIFICATE OF COMPLIANCE

This response complies with this Court's order of December 3, 2018, because it contains 3,872 words. This response 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 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Michael Shih

MICHAEL SHIH

CERTIFICATE OF SERVICE

I hereby certify that, on January 17, 2019, 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/ Michael Shih

MICHAEL SHIH

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Abdul Razak Ali,)	
)	
Petitioner,)	
)	
v.)	Civil Case No. 10-cv-1020 (RJL)
)	
Donald J. Trump, <i>et al.</i> ,)	
)	
Respondents.)	
)	
)	

FILED
AUG 10 2018

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

MEMORANDUM OPINION

August 10, 2018 [Dkt. # 1529]

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 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 Guantánamo 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." *Id.* at 24 n.2.¹ These procedures had already

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)).

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 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.

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. 05-02479, 2010 WL 2398883, at *14 (D.D.C. May 13, 2010).

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 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 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 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

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.

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

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.”).

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 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

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.

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 “indefinite” 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

In 2004, a plurality of the Supreme Court observed in *Hamdi v. Rumsfeld* 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

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 this initial determination. *See* 3/23/18 Hr’g Tr. 4:25-5:5 [Dkt. # 1535]; *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.

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.

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 determination 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 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

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. 13–14. 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.

foreign organizations constitute threats to the United States ‘are political judgments, decisions of a kind for which the Judiciary 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.

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 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

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.



RICHARD J. LEON
United States District Judge

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 Guantánamo 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.