



Due Process Rights for Guantanamo Detainees

November 2, 2021

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) [granted](#) a petition for rehearing *en banc* in *Al Hela v. Biden*, vacating a three-judge panel [opinion](#) holding that law-of-war prisoners detained at the U.S. Naval Station at Guantanamo Bay, Cuba, are not entitled to [due process](#) under the U.S. Constitution. The decision to rehear the case may not necessarily portend good news for the detainee because the D.C. Circuit has [in multiple cases](#) declined to decide the question, at one point [overturning](#) a district court ruling denying that Guantanamo detainees are entitled to constitutional due process, expressly leaving the question undecided. The D.C. Circuit has preferred instead to [avoid the constitutional question](#) by [assuming without deciding](#) that detainees are entitled to such rights but that typically petitioners have received all of the process that is due. Consequently, it seems likely that the D.C. Circuit on rehearing *Al Hela* will be voting on deciding whether Guantanamo detainees have due process rights, but may not necessarily decide the issue. If the D.C. Circuit determines *Al Hela* is the proper vehicle for deciding the due process question, the answer will likely turn on which Supreme Court precedent the court deems controlling.

Supreme Court Precedent

Johnson v. Eisentrager

[Johnson v. Eisentrager](#) involved a group of German enemy aliens held by U.S. forces in Germany after their conviction by a military commission. The Supreme Court framed the question as follows:

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption, we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

The Court answered this question in the negative, explaining that “these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their

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capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” The petitioners were thus not entitled to bring a habeas petition in U.S. court.

During the course of its review of the decision below, the Court described the opinion below as resting on the false notion that the “Right to the writ ... is a subsidiary procedural right that follows from possession of substantive constitutional rights,” including a general right to liberty. The Court interpreted the Fifth Amendment’s application to “any person” to exclude aliens outside of U.S. territory.

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that, during military occupation irreconcilable enemy elements, guerrilla fighters, and “were-wolves” could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against “unreasonable” searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it (internal citation omitted).

Subsequent Supreme Court holdings appear to confirm that the *Eisentrager* opinion extends outside wartime circumstances involving enemy aliens to cover any alien outside U.S. territory. In *United States v. Verdugo-Urquidez*, the Court [relied on](#) its “emphatic” holding in *Eisentrager* to deny Fourth Amendment rights to aliens in a case not involving a wartime context. In *Zadvydas v. Davis*, the Court applied *Eisentrager* in the immigration context to [conclude](#) that the Due Process Clause does not apply to aliens who have not yet entered U.S. territory. In 2020, the Court in *USAID v. Alliance for Open Society International*, cited *Eisentrager* (among other cases) to [state](#) that “it is long settled as a matter of American Constitutional law that foreign citizens outside U. S. territory do not possess rights under the U.S. Constitution.”

Boumediene v. Bush

In *Boumediene*, the Court departed from the holding in *Eisentrager* and its progeny that foreign citizens outside U.S. territory do not enjoy constitutional rights. The government [argued](#) that *Eisentrager* established conclusively that the Constitution’s [Suspension Clause](#) does not apply to enemy combatants held outside of sovereign U.S. territory and that therefore, Congress acted constitutionally in [revoking](#) their statutory right to petition for habeas corpus. Although the Supreme Court did not overrule *Eisentrager*, it [disagreed](#) with the formalistic application of the holding and did not apply it to the instant case. The Court [disputed](#) the idea that *de jure* sovereignty over territory controls the extraterritorial application of the Suspension Clause. (Cuba [maintains](#) “ultimate sovereignty” over Guantanamo but ceded “complete jurisdiction and control” over it to the United States by treaty in 1903). Rather, the Court read *Eisentrager* together with other Court [precedent](#) regarding the extraterritorial application of the Constitution (otherwise known as the *Insular Cases*) to [conclude](#) “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”

Comparing the factors outlined above in the *Eisentrager* case to the situation of detainees at Guantanamo Bay, the Court [found](#) some distinctions. Perhaps most important among these is the [degree of control](#) the United States exercises over the territory where the naval station is situated. “Unlike its present control over the naval station,” the Court [explained](#), “the United States’ control over the prison in Germany [where the *Eisentrager* prisoners were held] was neither absolute nor indefinite.” The Court also distinguished among the types of procedural protections applied in determining the status of the detainees in each case. In assessing the inconvenience that further protections would pose to the military, the Court

stated, “The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”

The *Boumediene* Court limited its holding to availability of the writ of habeas corpus, stating, “[o]ur decision today holds only that the petitioners before us are entitled to seek the writ” and clarifying that their “opinion does not address the content of the law that governs petitioners’ detention.” Accordingly, the Court did not decide the question of what due process rights apply in Guantanamo detainee cases. At the same time, the Court did identify a connection between the necessary scope of habeas review and the Court’s test for procedural adequacy in the due process context.

It has been more than a decade since the Supreme Court has decided a case involving a Guantanamo detainee, and the Court has not squarely addressed whether Guantanamo detainees are entitled to due process under the Fifth Amendment, having declined to take up the issue as presented in *Ali v. Trump*. In *Ali*, a panel of the D.C. Circuit declared a district court’s holding erroneous to the extent that the court held that the Due Process Clause does not apply at all to Guantanamo detainees, but affirmed the lower court’s decision to deny the detainee’s habeas petition on the basis that the petitioner’s due process claims were unavailing.

One circuit judge in *Ali* concurred in the judgment only, arguing that *Eisentrager* forecloses the detainees’ assertion of due process claims under the Fifth Amendment. The now vacated decision in *Al Hela* rested on a similar reasoning as the concurrence.

It appears that D.C. Circuit judges who have grappled with the question of due process rights for detainees fall into two camps—they would either keep the due process question open based on the functionalist approach of *Boumediene* or would use a more formalistic approach applying *Eisentrager* to find that the Guantanamo detainees, as aliens outside the sovereign territory of the United States, are not entitled to invoke the Fifth Amendment.

D.C. Circuit Precedent

In 2009, the D.C. Circuit held in *Kiyemba v. Obama* (*Kiyemba I*) that Guantanamo detainees who were determined not to be enemy combatants but who could not be returned to their home country (China) due to the likelihood of torture did not have a right to be released into the United States. The majority held that habeas courts lack authority to compel the transfer of a non-citizen detainee into the United States, even if that detainee is found to be unlawfully held and the government has been unable to effect his release to a foreign county. The *Kiyemba I* decision was primarily based on long-standing jurisprudence in the immigration context which recognizes that the political branches have plenary authority over whether arriving aliens may enter the United States. The majority, however, also found that Guantanamo detainees do not enjoy protections under the Due Process Clause of the Constitution, as they are non-citizens held outside the United States and lack significant ties to the country. The Supreme Court vacated and remanded the opinion due to changed circumstances because some of the detainees had received offers to be resettled elsewhere. On remand, the D.C. Circuit in *Kiyemba III* reinstated its earlier opinion with updated factual content. The Supreme Court declined certiorari.

In 2019, the D.C. Circuit cabined the *Kiyemba* due process holding by limiting that decision to its facts. In *Qassim v. Trump*, the court construed *Kiyemba* as addressing only the substantive due process question (i.e., the right to be released in the United States) of the appropriate remedy for petitioners whose right to liberty was not at issue as their habeas petition had been granted. *Kiyemba* did not address, the court explained, what procedural protections applied in habeas cases contesting the government’s right to detain in the first instance. The court remanded the case to the district court to determine what constitutional rights, if any, the detainee could assert. The full court denied a request to rehear the case en banc *sua sponte*, with two judges dissenting, asserting that the panel’s opinion created an “irreconcilable conflict”

with *Kiyemba* and Supreme Court precedent. Arguing that *Qassim* created an intra-circuit conflict, the dissenters urged subsequent panels to follow their reading of *Kiyemba* as categorically foreclosing any due process protections (substantive and procedural) for aliens abroad.

Al Hela v. Biden

Against this backdrop, the D.C. Circuit in *Al Hela* determined that the issue of what due process protections should be afforded to aliens at Guantanamo had been adequately litigated (unlike in *Qassim*), making the issue ripe for resolution. The court held that *Eisentrager* and its progeny dictated that “the protections of the Due Process Clause, whether labeled ‘substantive’ or ‘procedural,’ do not extend to aliens without property or presence in the sovereign territory of the United States.” *Al Hela*, in his requests for a rehearing *en banc*, argued among other things that the panel’s categorical rejection of due process rights for aliens outside U.S. territory conflicts with circuit and Supreme Court precedent. The D.C. Circuit granted the petition for rehearing *en banc* and heard oral arguments September 30, 2021. The court has not yet issued a decision.

In his brief on the merits, *Al Hela* argued that the functional approach in *Boumediene* applies equally to the Due Process Clause. He contended that substantive due process provides that his continued detention after nearly two decades requires the government to prove he poses a threat. He further claimed that he was denied procedural due process by the district court’s reliance on *ex parte* secret evidence, multiple layers of hearsay, a presumption of regularity with respect to government evidence, and the use of preponderance of the evidence as a standard of review. Taken together, *Al Hela* maintained that these defects denied him the opportunity for meaningful review as promised by *Boumediene*.

The government urged the appellate court to avoid deciding whether Guantanamo detainees are ever entitled to assert due process rights. The government acknowledged it previously took the position that the Fifth Amendment does not apply to Guantanamo detainees, explaining that it no longer takes a position on this complicated question. The government argued that even if *Al Hela* is entitled to constitutional due process rights, these protections would not entitle him to release. With respect to *Al Hela*’s substantive due process claim that the government must prove a person poses a threat in order to continue to detain him, the government responded that enemy combatants may always be held until the cessation of hostilities to prevent their return to the battlefield.

With respect to *Al Hela*’s procedural due process claims, the government asserted that the Supreme Court’s opinion in *Hamdi v. Rumsfeld*, which dealt with a U.S. citizen detained as an enemy combatant in the United States, is the basis for determining what process is due and what procedures courts should follow. The government pointed out that the D.C. Circuit has relied on *Hamdi* to find that hearsay evidence is permissible; that the government may withhold sensitive evidence from Guantanamo detainees in habeas cases; that the courts may accord a presumption of accuracy to government evidence; and that a preponderance-of-the-evidence standard suffices. Accordingly, the government contended that *Al Hela*’s habeas proceeding provided all of the process that was due in order to secure a meaningful opportunity to review his detention.

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