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

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| GHANIM AL-HARBI, *et al.*, Petitioners, | ) | |
| RAVIL MINGAZOV, Petitioner-Appellee, | ) | No. 10-5217 |
| v. | ) | |
| BARACK H. OBAMA, *et al.*, Respondents-Appellants. | ) | |

**PETITION TO HEAR AND DECIDE APPEAL *EN BANC***

Under Fed. R. App. 35(b)(1), Ravil Mingazov, Petitioner-Appellee, requests a hearing *en banc* because precedential panel decisions conflict with *Boumediene v. Bush*, 553 U.S. 723 (2008), and raise questions of exceptional importance. Specifically, (1) *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), and *al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), hold that Guantanamo detainees may be imprisoned indefinitely without due process; (2) *al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), and *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) allow indefinite detention based on unreliable, untested information; and (3) in combination, these rulings have eviscerated *Boumediene's* holding that Guantánamo detainees are entitled to a "meaningful opportunity" to contest the basis for their detentions.

Mr. Mingazov has been imprisoned at Guantánamo Bay without charge or trial for almost fourteen years. Following the Supreme Court's decision in *Rasul v.*

*Bush*, 542 U.S. 466 (2004), confirming his right to judicial review of his detention through federal habeas corpus proceedings, Mr. Mingazov filed a habeas petition in the U.S. district court. In 2008, after the Supreme Court confirmed in *Boumediene* that his right to "meaningful" habeas review is constitutionally guaranteed, the parties exchanged court-managed discovery. The government filed its factual return, Mr. Mingazov filed his traverse, and the government then amended its factual return five times. After a four-day evidentiary hearing, on March 13, 2010, the district court ruled in Mr. Mingazov's favor, concluding: "Upon consideration of the motions and the evidence presented at the merits hearing, the Court concludes that the respondents have not demonstrated that the detention of Mingazov is lawful. Therefore, Mingazov's petition shall be granted. "

The government appealed and moved for a stay, contending that a subsequent decision by a panel of this Court had changed the applicable legal standard. The district court agreed and granted the stay. In its opening brief, the government expanded on this argument, relying on several additional subsequent panel decisions which it contended required reversal.

After briefing but before argument, the government moved in the district court for a remand to present new evidence and for an "indicative ruling" from that court. The district court issued an indicative statement to this Court

acknowledging that the government's motion raised a "substantial issue" because, among other things, intervening D.C. Circuit precedent, had "render[ed] obsolete" the district court's prior decision. Following receipt of that statement, this Court granted the government's motion for a remand to present new evidence, while explicitly retaining jurisdiction of the case. Petitioner immediately filed a motion with the district court to Govern Further Proceedings.

That was more than three and a half years ago. Since then, the district court has never ruled on the motion to govern; the government has presented no new evidence; and no remand proceedings have been conducted. Mr. Mingazov, who won his habeas case almost six years ago, remains imprisoned without charge or trial. No further delay is warranted. The appeal must proceed. But it must proceed *en banc*.

The government is correct that, since the district court's decision in this case, panels of this Court have entered a series of decisions establishing a legal regime that effectively precludes not only this petitioner but all Guantánamo detainees from obtaining habeas relief. Those decisions have resulted in the reversal of every grant of habeas relief by the district court appealed by the government. But they have never been reviewed by this Court *en banc*. They must be, for they are directly contrary to the Supreme Court's decisions in *Boumediene v. Bush* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). And, they are of overwhelming

importance, raising critical questions regarding the reach of our Constitution and the process properly due persons constitutionally entitled to challenge their imprisonment by the executive without charge or trial through the Great Writ of Habeas Corpus.

## BACKGROUND

On June 12, 2008, the Supreme Court held in *Boumediene* that the Guantánamo detainees are protected by the Suspension Clause of the United States Constitution and are therefore constitutionally entitled to pursue habeas relief in federal courts. 553 U.S. at 771. The Court held that detainees must receive a "meaningful opportunity" to challenge their detentions before an independent Article III judge, *id*. at 779, concluding that the government's administrative review procedures failed as an adequate substitute for habeas. *Id*. at 795.

Following *Boumediene*, panels of this Court entered a series of four major decisions that each, and together as a whole, eviscerate any such "meaningful opportunity."

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

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

- In 2010, the panel in *al-Adahi* adopted a "conditional probability analysis" and held that items of evidence presented by the government, even if unreliable when viewed individually, must be viewed cumulatively and considered probative as a whole. 613 F.3d 1105-06.

- And in 2011, the panel in *Latif* added that government intelligence reports on the detainees, even if prepared in the fog of war pursuant to a secret process and based on unknown sources, are entitled to a presumption of regularity, accuracy, and validity. 666 F.3d at 748-50.

These decisions effectively overruled *Boumediene*, leaving it a hollow directive from the Supreme Court. The historic record makes this evident. After *Boumediene* but before entry of those panel decisions, the D.C. district courts heard and decided 53 habeas petitions by detainees. They granted the writ in 38 of those cases (including Mingazov's) – more than 70 percent of the time. By contrast, since those decisions, not a single habeas petition contested by the government has been granted, and every previous district court grant of habeas appealed by the government has been reversed.[1]

These decisions have created a hollow habeas regime that leaches all substance out of the Supreme Court's decision and effectively shuts down habeas corpus as a remedy for the Guantánamo detainees. Mr. Mingazov has been

[1] Only one habeas petition has been granted since July 2010, with the government's consent, to allow the release of an extremely ill and elderly detainee. The government mooted two appeals by transferring the detainees, whereas Mingazov's appeal remains pending.

imprisoned now for more than 14 years without charge, and the concept of revisiting his habeas case – which he *won* in 2010 – could not be more of a meaningless opportunity for him. As shown below, it is time for these panel decisions to be reviewed by this Court *en banc*.

## ARGUMENT

### A. Guantanamo Detainees Are Entitled to Due Process

Following the Supreme Court decision in *Boumediene*, a panel of this Court held that the detainees have no constitutionally protected due process rights because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba*, 555 F.3d at 1026. The panel emphasized that "the district court[s], no less than panel[s] of this court must follow" that holding. *Id*. They have done so. *See Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 518 n. 4 (D.C. Cir. 2009) ("the detainees possess no constitutional due process rights").

That holding cannot be sustained in light of the Supreme Court's decision in *Boumediene*. It is based on the premise that noncitizens detained in a place such as Guantánamo, which is outside the area of formal *de jure* U.S. sovereignty, lack constitutional rights. But the Supreme Court in *Boumediene* explicitly rejected the government's argument that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." 553 U.S. at 755. The Supreme

Court acknowledged that the United States lacks *de jure* sovereignty over Guantánamo Bay but pointed out "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory." *Id*. It found no basis in prior cases to limit *the Constitution's* reach to areas of *de jure* sovereignty. *Id*. at 756-764.

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

> [T]he Government's view is that the Constitution had no effect [in Guantanamo] at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." 553 U.S. at 765, quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

This analysis applies to the protections of the Fifth Amendment as well as to those of the Suspension Clause. This Court itself recognized that those

constitutional provisions cannot be distinguished in judging their applicability to the Guantánamo detainees. In its decision, which was reversed by the Supreme Court in *Boumediene*, this Court stated: "There is the notion that the Suspension Clause is different from the Fourth, Fifth and Sixth Amendments because it does not mention individuals and those amendments do.... That cannot be right." *Boumediene v. Bush*, 476 F.3d 981, 993 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008). The Supreme Court determined that the Suspension Clause of the Constitution applies to the detainees; so too, by this Court's reasoning, must the Due Process Clause of the Fifth Amendment.

What is at issue in this case, however, is not only the rights of the Guantánamo detainees, but perhaps even more importantly, the process that must be followed by United States courts in conducting federal habeas proceedings. The Supreme Court made clear in *Boumediene* that the detainees have the constitutionally protected right to pursue their claims for habeas relief in the federal courts. They are therefore entitled to an independent inquiry by a federal judge into the legality of their detention. That judicial inquiry must itself comply with the requirements of due process of law. As the Supreme Court emphasized, the habeas proceeding must be "constitutionally adequate" and, in conducting this inquiry, the courts must provide the detainees with a "meaningful opportunity" to contest the purported causes of their detentions, including the right to traverse the

government's returns and to present exculpatory evidence of their own, which is "constitutionally required." *Boumediene*, 553 U.S. at 779, 783, 789.

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

The petitioner in that case was, of course, a U.S. citizen. But Justice O'Connor's statements speak not to the citizenship of the petitioner but to the integrity and fairness of the process that must be followed in a habeas proceeding

in a federal court. Those proceedings must be conducted in accordance with due process of law.[2]

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

### B. Petitioner Is Entitled to More – Not Less – Process than Convicts Challenging Their Convictions After A Full Court Trial

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

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

[2] *See, e.g., Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) ("Over the centuries [habeas corpus] . . . has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free"); *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) ("the writ has evolved into an instrument that now demands…application of basic constitutional doctrines of fairness"); *Blackledge v. Allison*, 431 U.S. 63, 72-73 (1977) ("arrayed against the interest in finality is the very purpose of the writ of habeas corpus to safeguard a person's freedom from detention in violation of constitutional guarantees").

> any agreement equating that fundamental character with all the accoutrements of habeas for domestic criminal defendants is highly suspect. 590 F.3d at 876.

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

> [T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings.... Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record ... considerable deference is owed to the court that ordered confinement.... The present cases fall outside these categories, however, for here the detention is by executive order.... Where a person is detained by Executive Order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.... In this context the need for habeas corpus is more urgent. 553 U.S. at 781-783.

The *al-Bihani* panel ruling is contrary not only to *Boumediene*, but to a long line of prior Supreme Court decisions.[3] The Supreme Court has consistently

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

emphasized that executive detention without trial – like that imposed on the petitioner here – is where the protections of habeas must be at their strongest, not their weakest.

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

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

The *Kiyemba* and *al-Bihani* decisions were quickly followed by other panel decisions that created impossible evidentiary burdens for detainees. In *Al-Adahi*, after a full hearing and thorough examination of the evidence, the district court found the government's evidence unreliable and granted the writ. A panel of this Court reversed, finding that the district court had improperly reviewed each piece of evidence individually rather than viewing the government's evidence and the "patterns" it set out as a whole. Rather than remanding to the district court, the panel examined the evidence itself and found the government's allegations, when "properly considered" as a whole, satisfied the government's obligation to show by a preponderance of the evidence that it was more likely than not that the petitioner

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

was a part of Al-Qaida or the Taliban. "And that is all the government had to show," the Court concluded. 613 F.3d at 1106. [4]

In *Latif*, the district court also conducted a full hearing, carefully and thoroughly reviewed the government's evidence, found it unreliable and granted the writ. Again, panel of this Court reversed, finding that the district court had erred by not according the government's evidence, much of which consisted of field intelligence reports, a presumption of regularity, accuracy and validity. And although the panel majority nominally remanded the case for further proceedings, it reviewed the evidence itself and, after viewing the government allegations as a whole, as required by *Al-Adahi*, and applying a presumption of accuracy to the government reports, made no effort to conceal its view that on remand the district court would have no choice but to deny the writ. The opinion also shrugs off *Boumediene's* mandate, saying that its "airy suppositions have caused great difficulty for the Executive and the courts."

These decisions are troubling when viewed on their own. It makes sense, as the Court in *Al-Adahi* said, for courts to look at the evidence as a whole and not just at individual pieces of it. But it is also dangerous to disregard careful district

[4] The panel even suggested that Justice O'Connor's was wrong in *Hamdi* to reject the lower "some evidence" standard in Guantanamo habeas cases. *Id.* at 1105. Similarly, another opinion criticized *Boumediene* as a "defiant….assertion of judicial supremacy." *Esmail*, (D.C. Cir. 2011) (per curium) (Silberman, concurring).

court findings that certain evidence is unreliable by combining it with other unreliable evidence. Unreliable evidence does not become reliable just because there is more of it.

The *Latif* ruling is also troubling for the heavy hand it places on the government's side of the scale. As Judge Tatel pointed out in his dissent, interrogation reports prepared in secret under unknown circumstances with unknown sources based on translations of conversations by translators of unknown competence, can hardly be compared to normal government records prepared in the ordinary course of business. 666 F.3d at 772-773. In fact, these field intelligence reports are well recognized within the intelligence community to be of doubtful reliability.[5] According them a presumption of accuracy, as Judge Tatel pointed out, "comes perilously close to suggesting that whatever the government says must be treated as true."

Moreover, that presumption is directly contrary to long established habeas procedure. Habeas courts since the nineteenth century have consistently rejected the argument that they should defer to the executive's and, in particular, to the

[5] *See* Declaration of Colonel Stephen Abraham www.scotusblog.com/movabletype/archives/Al%20Odah%20reply206-22-07.pdf; Brief of Former Intelligence Professionals and Scholars of Evidence and Criminal Procedure in Support of the Petition for Certiorari in *Latif v Obama* at 11-18.

military's version of the facts. *See* Jared Goldstein, *Habeas Without Rights*, 2007 Wisc. L. Rev. 1165 (2007) at 1218-1222, nn. 240-252.

But, again, these cases cannot be viewed in isolation. They must be viewed in combination with the earlier decisions by panels of this Court denying the Guantánamo detainees proper process. The combination of these four decisions has created a legal regime that is contrary to *Boumediene* by denying Guantánamo detainees "a meaningful opportunity" to contest the legality of their detentions. The proof is in the pudding. Since those decisions were entered, no habeas petition contested by the government has been granted, and every prior district court grant of habeas appealed by the government has been reversed. These panel decisions have shut down habeas as a legal remedy at Guantánamo.

## CONCLUSION

Petitioner Ravil Mingazov pursued his habeas petition before the district court and – after a four-day evidentiary hearing – won. Almost six years later, he remains and will continue to remain imprisoned in Guantánamo Bay because panels of this Court subsequently entered a series of decisions that effectively eviscerated the Supreme Court's holding in *Boumediene* guaranteeing him and all other detainees the right under our Constitution to meaningful habeas review of their detentions before an independent Article III court. Those panel decisions are wrong, and the *en banc* Court should not allow them to stand as its legacy.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

*/s/ Gary S. Thompson*
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