NOTE

ARE THERE RIGHTS IN GUANTÁNAMO BAY: THE GREAT WRIT RINGS HOLLOW

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> *"Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."*
>
> — Justice Anthony Kennedy[1]

INTRODUCTION

As the COVID-19 pandemic ravages the world, a group of forty men continue to sit in near isolation at a military prison in

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1 Boumediene v. Bush, 553 U.S. 723, 797 (2008).

Guantánamo Bay with limited medical resources[2] and little-to-no contact with their lawyers.[3] Since the attacks on September 11, 2001 and the opening of Guantánamo Bay naval base to military detentions in 2002,[4] the rights of Guantánamo Bay detainees have been in limbo.[5] In the case of *Qassim v. Trump*, initially decided in June 2019[6] and denied for rehearing en banc in September 2019,[7] the Court of Appeals for the District of Columbia threw another wrench into the conflicting jurisprudence of Guantánamo Bay detainee rights by holding that Guantánamo Bay detainees may be entitled to certain due process rights.[8] The D.C. Circuit Court of Appeals did not specify what these rights may be; however, the circuit remanded the case back to the district court to further develop the factual record and determine what rights Qassim—and other detainees like him—may be entitled to.[9] Following the decision in *Qassim*, the D.C. Circuit Court of Appeals heard the case of *Ali v. Trump*[10] in December 2019. In *Ali*, the detainee argued that the Fifth Amendment should apply "in full" to Guantánamo Bay detainees.[11] The D.C. Circuit decided *Ali* in May of 2020 without resolving these due process Clause questions.[12] Prior to *Qassim*, Guantánamo Bay detainees were not entitled to due process rights "outside the sovereign territory of the [United

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2 Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html [https://perma.cc/LGL9-U6VS].

3 *See* Carol Rosenberg, *Pressure Mounts over Calls for Guantánamo's Most Isolated Prisoners*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/us/politics/coronavirus-guantanamos-isolated-prisoners.html [https://perma.cc/NR7W-ZGV9] (discussing how lawyers for Guantánamo Bay detainees must figure out how to hold secure video conferences in order to communicate with their clients).

4 *See Guantánamo Bay Detention Camp*, ACLU, https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp [https://perma.cc/5B6D-5CYH] (last visited Feb. 3, 2019) (analyzing the opening of Guantánamo Bay to military detentions).

5 *See* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 561 (2013). *See generally id.* (analyzing changes in Guantánamo Bay detainee rights since 9/11).

6 Qassim v. Trump (*Qassim I*), 927 F.3d 522 (D.C. Cir. 2019).

7 Qassim v. Trump (*Qassim II*), 938 F.3d 375 (D.C. Cir. 2019) (en banc).

8 *Qassim I*, 927 F.3d at 524–25.

9 *Id.* at 532.

10 Ali v. Trump, 959 F.3d 364 (D.C. Cir. 2020).

11 *Id.* at 366.

12 *Id.* (explaining that "whether and which particular aspects of the Due Process Clause apply to detainees at Guantánamo Bay largely remain open questions in this circuit.").

States]."[13] Despite the Supreme Court consistently holding that Guantánamo Bay detainees have the right to the writ of habeas corpus,[14] the Court and other courts have not determined that Guantánamo Bay detainees are entitled to any other due process rights until now.[15]

Part I of this Note discusses the difference between criminal prosecution and habeas corpus, detailing the specifics of how each process operates and analyzing the burdens of proof applicable in both criminal prosecution and habeas corpus. Part II of this Note analyzes constitutional rights abroad for United States citizens and noncitizens. In particular, Part II demonstrates that United States citizens retain most constitutional rights while abroad and notes that Supreme Court jurisprudence has consistently held that noncitizens do not have constitutional rights abroad. Part III of this Note addresses the evolution of constitutional rights in Guantánamo Bay; particularly, it explains how these rights have ebbed and flowed since the opening of Guantánamo Bay in 2002. Part IV discusses the possible ramifications of the *Qassim* decision. Specifically, subpart IV(a) argues that the district court should decide that the Fifth Amendment applies to Guantánamo Bay detainees, and subpart IV(b) contends that the district court should institute procedures similar to the Classified Information Procedures Act[16] in Guantánamo Bay detainee habeas cases, and subpart IV(c) details the consequences of the *Ali* decision for Guantánamo Bay detainee rights. Finally, Part V addresses the possible implications of *Qassim*. Specifically, subpart V(a) discusses that the issue of Guantánamo Bay detainee due process rights is ripe for Supreme Court review, and subpart V(b) analyzes what may happen if the Supreme Court takes up the issue.

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13 Bernie Pazanowski, *Holding Guantanamo Detainee Has Due Process Rights Stands*, BLOOMBERG L. (Sept. 18, 2019, 9:06 AM), https://news.bloomberglaw.com/white-collar-and-criminal-law/holding-guantanamo-detainee-has-due-process-rights-stands [https://perma.cc/X8SQ-BQC4].

14 *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (holding that Guantánamo Bay detainees are entitled to the writ of habeas corpus); Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that foreign nationals held in the Guantánamo Bay detention camp could petition federal courts for writs of habeas corpus to review the legality of their detention).

15 *See Qassim I*, 927 F.3d 522, 524 (D.C. Cir. 2019); *see also* Alexander, *supra* note 5, at 553–55 (discussing the history of jurisprudence relating to Guantánamo Bay detainee rights).

16 Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980).

Overall, this Note argues that the district court should decide that the entirety of the Fifth Amendment applies to Guantánamo Bay detainees given previous jurisprudence, the nature of the War on Terror, and the protection of detainee rights. However, this Note also details that the possible ramifications of such a broad decision render it unlikely that the district court will decide that the Fifth Amendment applies in full in *Qassim*. Additionally, this Note argues that no matter what decision the district court makes regarding the Fifth Amendment, the court should also institute a CIPA-like review process that affords Guantánamo Bay detainees with meaningful habeas review.

I
HABEAS CORPUS VERSUS CRIMINAL PROSECUTION

Criminal prosecution is defined as "[a] criminal proceeding in which an accused person is tried."[17] The United States Constitution affords criminal defendants a variety of rights including: the rights to a jury trial and grand jury indictment proceedings, the right against self-incrimination, and the right to be free from cruel and unusual punishment. In criminal prosecution, the United States government has the burden of proving beyond a reasonable doubt that the defendant committed the alleged crime.[18]

Habeas corpus differs from criminal prosecution because habeas corpus is a civil remedy that protects individuals from illegal executive detention.[19] The Suspension Clause of the Constitution[20] and the federal habeas corpus statute[21] guarantee the writ of habeas corpus.[22] All United States citizens detained by the United States anywhere—and any noncitizen detained in the "sovereign territory" of the United States—have the constitutional right to a writ of habeas corpus.[23] Additionally, in habeas corpus cases the United States Government

17 *Prosecution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

18 JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 6 (2d ed. 2018).

19 *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20 U.S. CONST. art. I, § 9, cl. 2.

21 28 U.S.C. § 2241 (2012).

22 *See* Amanda McRae, Case Comment, Boumediene v. Bush: *Another Chapter in the Court's Jurisprudence on Civil Liberties at Guantanamo Bay*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 247, 251 (2009) (explaining that writs of habeas corpus are guaranteed in part by the Constitution and in part by federal statute).

23 *See id.* (quoting Rasul v. Bush, 542 U.S. 466, 481 (2004)) (explaining that all United States citizens in foreign nations and foreigners in the United States have a constitutional right to writs of habeas corpus).

carries the burden of proving by a preponderance of the evidence that a detention is lawful.[24]

II
CONSTITUTIONAL RIGHTS ABROAD

The bulk of the Constitution applies to United States citizens when they are outside the sovereign territory of the United States, with some exceptions. These exceptions include only extending the reasonableness, and not the warrant, requirement of the Fourth Amendment to searches of United States citizens abroad.[25] However, certain rights do apply extraterritorially, such as the right to a jury trial.[26] Specifically, the Supreme Court articulated that "the shield" of the Constitution "should not be stripped away just because [someone] happens to be in another land" when the "[g]overnment reaches out to punish a citizen who is abroad."[27] Therefore, the Supreme Court has recognized since the 1950s that citizenship carries constitutional protections even when citizens are outside the sovereign territory of the United States.[28]

The United States Supreme Court has consistently held that noncitizens are not afforded constitutional rights outside of the sovereign territory of the United States.[29] Beginning with *Johnson v. Eisentrager*, the Court held that noncitizens do not have access to United States courts during times of war, and therefore noncitizen enemy combatants were not afforded the right to a writ of habeas corpus.[30] The Supreme Court reaffirmed the territorial approach from *Eisentrager* that constitu-

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24 Ali v. Trump, 317 F. Supp. 3d 480, 484 (D.D.C. 2018), *aff'd*, 959 F.3d 364 (D.C. Cir. 2020).

25 *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 167 (2d Cir. 2008).

26 *See* Reid v. Covert, 354 U.S. 1, 5–9 (1957) (holding that the wife of a U.S. Air Force sergeant stationed abroad had the right to a jury trial); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d at 167 (holding that the reasonableness requirement of the Fourth Amendment governed extraterritorial searches of United States citizens).

27 fcis]Reid, 354 U.S. at 5–6.; *see also* Alan Tauber, *Ninety Miles from Freedom? The Constitutional Rights of the Guantanamo Bay Detainees*, 18 ST. THOMAS L. REV. 77, 94 (2005) (analyzing the Supreme Court's holding in *Reid v. Covert*).

28 *See* Tauber, *supra* note 27, at 94 (discussing that the holding in *Reid v. Covert* determines that some constitutional protections apply to citizens even when they are outside the United States).

29 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment did not apply to a search of a noncitizen's residence located outside of the United States); Johnson v. Eisentrager, 339 U.S. 763, 785 (1950) (holding that noncitizen enemy combatants held outside the United States are not entitled to the writ of habeas corpus).

30 339 U.S. at 785.

tional rights do not extend beyond the territory of the United States to noncitizens[31] in the case of *United States v. Verdugo-Urquidez*.[32] In that case, the Supreme Court held that the Fourth Amendment does not apply to a search conducted by United States agents of property located in a foreign country and owned by a noncitizen.[33] The majority opinion relied on the language of the Fourth Amendment in determining that the use of the term "the people" constituted a "term of art employed in select parts of the Constitution," which differed from the terms "'person' and 'accused' used in the Fifth and Sixth Amendments."[34] The Supreme Court also noted that constitutional protections apply to noncitizens once "they have come within the territory of the United States and developed substantial connections."[35] Therefore, the majority opinion utilized the language of the Fourth Amendment to highlight that the purpose is to protect the people of the United States who are either citizens or have substantial contacts with the country, and thus the Fourth Amendment did not apply to the defendant.[36]

Additionally, Justice Anthony Kennedy offered a concurring opinion that relied on the "impracticable and anomalous" test from *Reid v. Covert*[37] to determine that application of the Fourth Amendment warrant requirement would be impracticable and anomalous while other constitutional rights—specifically Fifth Amendment trial rights—would apply to the defendant.[38] Thus, Supreme Court jurisprudence highlights that the Constitution follows United States citizens outside the sovereign territory of the United States, but the Constitution does not reach beyond the sovereign territory of the United States to apply to noncitizens.

III
THE EVOLUTION OF CONSTITUTIONAL RIGHTS FOR GUANTÁNAMO BAY DETAINEES

After the September 11, 2001 terrorist attacks in the United States, executive power over national security became expansive in order to find and punish those involved in the

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31 *See id.* at 768.
32 494 U.S. 259 (1990).
33 *Id.* at 261.
34 *Id.* at 265–66.
35 *Id.* at 271.
36 *See id.*
37 354 U.S. 1, 74 (1957) (Harlan, J., concurring).
38 *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

attacks.[39] This executive power has been expanded and constrained many times over since 9/11, and to this day it is still unclear what rights may apply to noncitizens being detained abroad, specifically at Guantánamo Bay.[40] In the immediate aftermath of 9/11, Congress passed the Authorization for the Use of Military Force (AUMF), which gave the executive authority

> 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.[41]

Additionally, the President declared that the Geneva Conventions did not apply to suspected terrorists because they "were not entitled" to Prisoner of War status.[42] Therefore, the President was able to use all force he deemed necessary to find those suspected of involvement in 9/11—and to detain them in any way he chose—because the Geneva Conventions did not apply.[43] This led to captured combatants being detained at Guantánamo Bay, Cuba because the government believed that habeas corpus review and other constitutional rights did not extend to "non-citizens outside the United States."[44]

However, as time passed, the Judicial Branch intervened to protect the rights of detainees being held there.[45] Specifically, the Supreme Court stepped in with their decisions in *Hamdi v. Rumsfeld*[46] and *Rasul v. Bush*[47] in 2004. In *Hamdi*, the Court held that detainees were entitled to "a meaningful opportunity to contest the factual basis for that detention before a neutral

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39 *See, e.g.*, Alexander, *supra* note 5, at 553 (discussing the George W. Bush administration's approach after 9/11 of asserting "sweeping executive power").

40 *See generally id.* at 556–615 (outlining the evolution of detainee policy in the War on Terror).

41 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2018)); *see also* Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 872 (2019) (discussing the implementation of the AUMF).

42 Alexander, *supra* note 5, at 557.

43 *See id.* at 557–58 (analyzing the Bush administration decisions in the immediate aftermath of 9/11); Kovarsky, *supra* note 41, at 871–73 (same).

44 Alexander, *supra* note 5, at 557.

45 *See id.* at 564 (discussing Supreme Court decisions in reaction to Bush administration policies).

46 542 U.S. 507 (2004) (plurality opinion).

47 542 U.S. 466 (2004).

decisionmaker."[48] Additionally, in *Rasul*, the Court held that Guantánamo Bay detainees had a right to habeas corpus review.[49] Thus, the Supreme Court attempted to grant certain rights to detainees.

However, the Bush administration responded by implementing the Detainee Treatment Act of 2005 (DTA), which stripped federal courts of jurisdiction over challenges by detainees and set up Combatant Status Review Tribunals (CSRTs) to review claims brought by detainees.[50] Therefore, the Bush administration adhered to the Supreme Court's ruling that detainees must have the right of review of their detention, while simultaneously circumventing the issue by creating military commissions that would afford this review rather than the federal courts.[51] The issue of right of review came before the Supreme Court again in *Hamdan v. Rumsfeld*. Here, the Court held that the military commissions created by the DTA were invalid because they did not comply with the Geneva Conventions and the Uniform Code of Military Justice (UCMJ).[52] The Bush administration responded by pushing Congress to pass the Military Commissions Act (MCA) of 2006, which stripped federal courts of jurisdiction over detainee challenges and authorized military commissions to hear these claims.[53]

Finally, the issue came to a head in *Boumediene v. Bush*, decided by the Supreme Court in 2008.[54] In *Boumediene*, the Court held that detainees have a constitutional right to habeas corpus review, that the DTA procedures were not an adequate substitute, and that the MCA violated the Suspension Clause; thus, it determined that federal courts had jurisdiction over detainee habeas claims.[55] *Boumediene* was a win for detainee

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48 *Hamdi*, 542 U.S. at 509 (plurality opinion); *see also* Alexander, *supra* note 5, at 564 (discussing the holding in *Hamdi v. Rumsfeld*).

49 *Rasul*, 542 U.S. at 484; *see also* Alexander, *supra* note 5, at 564 (discussing the holding in *Rasul v. Bush*).

50 Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(a), 119 Stat. 2739, 2740–41 (codified as amended at 10 U.S.C. § 801 note (2006)); *see also* Alexander, *supra* note 5, at 564 (discussing the implementation of the DTA).

51 *See* Alexander, *supra* note 5, at 564 (analyzing the effect of the DTA on detainee habeas review).

52 Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006); *see also* Alexander, *supra* note 5, at 567 (discussing the holding in *Hamdan v. Rumsfeld*).

53 Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, §§ 3, 7. 120 Stat. 2600 (codified as amended in scattered sections of titles 10, 18, 28, and 42 U.S.C.); *see also* Alexander, *supra* note 5, at 567 (discussing the implementation of the MCA).

54 553 U.S. 723 (2008).

55 *Id.* at 732; *see also* Alexander, *supra* note 5, at 568 (discussing the holding in *Boumediene v. Bush*).

rights to habeas privilege, but the Court made clear that the opinion did "not address the content of the law that governs petitioners' detention" and that the issue of what other constitutional rights must be afforded to Guantánamo Bay detainees was "a matter yet to be determined."[56]

The ruling in *Boumediene* was quickly narrowed to the point of mootness by the Court of Appeals for the District of Columbia in *Kiyemba v. Obama* (*Kiyemba I*).[57] There, the D.C. Circuit held that detainees do not have a constitutional right to be released into the United States from Guantánamo Bay, even if the court determined that they are unlawfully detained.[58] The *Kiyemba I* court went on to explain that decisions of the Supreme Court and the D.C. Circuit Court of Appeals have held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."[59] The court further noted that Guantánamo Bay, Cuba is not sovereign territory of the United States.[60] The Supreme Court granted certiorari in the *Kiyemba* case, but, because all but five of the petitioners accepted offers of resettlement elsewhere, the Supreme Court vacated the judgment and remanded the case back to the D.C. Circuit Court of Appeals to determine how to proceed with the remaining petitioners.[61] The D.C. Circuit Court of Appeals held, in line with *Kiyemba I*, that the remaining detainees—who all had offers of resettlement that they did not want to take—had no right to be released into the United States even if they had good reasons for refusing the offers.[62] Therefore, the D.C. Circuit essentially eliminated the *Boumediene* holding by sticking to the previous language used by the courts that noncitizens lacked due process rights if they were outside the United States.[63]

In the aftermath of *Kiyemba*, the D.C. Circuit Court of Appeals determined that Guantánamo Bay detainees "cannot assert any substantive rights through habeas" and that the only right afforded to detainees was simply the right to habeas review.[64] Additionally, the Obama administration codified "indef-

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56 *Boumediene*, 553 U.S. at 798.

57 555 F.3d 1022 (D.C. Cir. 2009).

58 *See id.* at 1031.

59 *Id.* at 1026.

60 *Id.* at 1026 n.9.

61 Kiyemba v. Obama (Kiyemba III), 605 F.3d 1046, 1047 (D.C. Cir. 2010).

62 *See id.* at 1047–48.

63 *See Kiyemba I*, 555 F.3d 1022, 1026 (D.C. Cir. 2009).

64 *See* Alexander, *supra* note 5, at 599–601 (emphasis omitted).

inite military detention without charge or trial into law"[65] by signing the National Defense Authorization Act of 2012.[66] However, the D.C. Circuit Court of Appeals changed course in the summer of 2019 in *Qassim v. Trump* (*Qassim I*).[67] In the *Qassim* case, decided in June 2019, the D.C. Circuit Court of Appeals held that the D.C. District Court erred in holding that Guantánamo Bay detainees have no due process rights.[68] The court did not determine Guantánamo Bay detainees' entitled rights, stating that this was an open question.[69] Instead, the court merely explained that the D.C. District Court read *Kiyemba* too broadly, and narrowed the ruling in *Kiyemba* to mean only that detainees lack a "substantive due process right to be released into the United States."[70] The D.C. Circuit Court of Appeals reinstated the holding of *Boumediene* by clarifying that "alien detainees must be afforded a habeas process that ensures 'meaningful review' of their detention."[71]

The holding in *Qassim I* was not the end of the road, though. Some D.C. Circuit judges petitioned for en banc review and, in September 2019, the D.C. Circuit Court of Appeals denied that rehearing.[72] In the opinion denying en banc review, Judge Karen Lecraft Henderson, joined by Judge Neomi Rao, wrote a scathing dissent against the panel holding in *Qassim I*.[73] Specifically, they urged that the panel should have followed *Kiyemba* by holding that due process rights do not apply to noncitizens outside of the sovereign territory of the United States, and that Guantánamo Bay, Cuba is not part of the sovereign territory of the United States.[74]

Following the *Qassim* decision—or lack of decision—the case of *Ali v. Trump* was argued in front of the D.C. Circuit Court of Appeals on December 11, 2019.[75] Ali claimed that his indefinite detention was unconstitutional, and sought relief

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65 *Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act*, ACLU, https://www.aclu.org/issues/national-security/detention/indefinite-detention-endless-worldwide-war-and-2012-national [https://perma.cc/RS2C-MV6Y] (last visited Jan. 26, 2021).

66 National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (2011).

67 *Qassim I*, 927 F.3d 522 (D.C. Cir. 2019).

68 *Id.* at 524.

69 *Id.* at 530. (quoting Boumediene v. Bush, 553 U.S. 723, 783 (2008)).

70 *Id.* at 524.

71 *Id.*

72 *Qassim II*, 938 F.3d 375, 376 (D.C. Cir. 2019) (en banc).

73 *See id.* at 376–79 (Henderson, J., dissenting).

74 *See id.* at 376 (Henderson, J., dissenting).

75 Ali v. Trump, 959 F.3d 364 (D.C. Cir. 2020).

under the Fifth Amendment Due Process Clause.[76] The district court initially dispensed with Ali's case in a similar fashion as *Qassim* by relying on *Kiyemba* to hold that the Due Process Clause does not apply to Guantánamo Bay detainees.[77] However, Ali's case differs because his case was not about access to classified evidence in order to dispute detention—it was specifically about indefinite detention being unconstitutional per the Due Process Clause.[78] Ali also relied on *Qassim* to argue that the Due Process Clause extends to Guantánamo Bay.[79] In May 2020, the D.C. Circuit Court of Appeals denied Ali's petition for a writ of habeas corpus because Ali's "broad arguments" that the Due Process Clause applies "in full" to Guantánamo Bay detainees were "foreclosed by circuit precedent."[80] However, in the opinion, the court noted that "whether and which particular aspects of the Due Process Clause apply to detainees at Guantanamo Bay largely remain open questions in this circuit."[81] Thus, the D.C. Circuit dispensed with Ali's habeas petition by noting that whether and to what extent the Fifth Amendment applies to Guantánamo Bay detainees remains an open question, which ultimately pushed the decision down the road.

Therefore, the D.C. Circuit Court of Appeals is still split internally over the entitled due process rights of Guantánamo Bay detainees, besides the right of habeas review. This Note goes on to explore the possible ramifications of the *Qassim v. Trump* decision. This Note argues that the ideal way to protect detainee rights is to decide that the full force of the Fifth Amendment Due Process Clause applies in Guantánamo Bay detainee habeas cases. Additionally, this Note contends that the district court should create a CIPA-like procedure that will afford Guantánamo Bay detainees regulated access to classified information being used to permit their detention in order to afford a meaningful habeas review as *Boumediene* requires.

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76 *Id.* at 366.
77 Ali v. Trump, 317 F. Supp. 3d 480, 488 (D.D.C. 2018).
78 Brief for Petitioner-Appellant at 8, *Ali*, 317 F. Supp. 3d 480 (No. 18-5297).
79 Reply Brief for Petitioner-Appellant at 1, *Ali*, 317 F. Supp. 3d 480 (No. 18-5297).
80 Ali v. Trump, 959 F.3d 364, 366 (D.C. Cir. 2020).
81 *Id.*

IV
DETAINEE RIGHTS AFTER *QASSIM*

A. Application of the Fifth Amendment at Guantánamo Bay

After *Qassim*, and until the D.C. Courts formally decide if the Fifth Amendment applies to Guantánamo Bay detainees, the rights of Guantánamo Bay detainees in habeas corpus proceedings remain undetermined. However, the district court should decide that the full breadth of the Fifth Amendment applies to Guantánamo Bay detainees' habeas petitions based on *Verdugo-Urquidez* and the nature of the War on Terror. Ultimately, this Note argues that the best route for preserving individual liberties and affording a meaningful review of habeas petitions is to afford Fifth Amendment rights to Guantánamo Bay detainees in habeas corpus review.

First, as explained previously, the Supreme Court in *Verdugo-Urquidez* noted the difference between the language in the Fourth Amendment in comparison to the Fifth Amendment.[82] Specifically, the Court stated that the use of the term "the people" in the Fourth Amendment was a term of art that was referring to the people with a substantial relation to the United States.[83] Alternatively, the Court contrasted the language of the Fourth Amendment with that of the Fifth Amendment where the Court noted that the use of the term "person" would have a different interpretation.[84] Although the Court did not specify exactly what that interpretation would mean, it is evident from the argument that the term "person" in the Fifth Amendment would have a broader scope than "the people" in the Fourth Amendment.[85]

In addition, the Court indicated that the Fifth Amendment operates differently from the Fourth Amendment because once an individual is on trial in the United States, they are entitled to the protections of the Fifth Amendment.[86] However, this would make it seem that the Fifth Amendment would not apply to Guantánamo Bay detainees because they are not on trial or even criminally indicted. That reasoning leads directly to the conundrum that Guantánamo Bay detainees face, which is

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82 United States v. Verdugo-Urquidez, 494 U.S. 259, 264–66 (1990).

83 *Id.* at 264–65.

84 *Id.* at 265–66.

85 *See id.* ("The language of [the First, Second, Fourth, Ninth, and Tenth] Amendments contrasts with the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases.").

86 *Id.* at 264.

that they are being held in executive detention without trial and without constitutional rights save the right to a writ of habeas corpus. This situation seems contrary to common sense because it is an oddity to say that an individual can be held in executive detention for years on end, such as the more than seventeen years Qassim had been held,[87] and have no due process rights unless the United States government decides to criminally adjudicate them. That approach allows the executive to indefinitely detain individuals without trial because the detainees are not entitled to any rights of the criminally accused. This is contrary to American values that an individual has the right to due process,[88] and it is contrary to the Supreme Court's decision in *Boumediene* that Guantánamo Bay detainees are entitled to a meaningful review of their habeas petitions.[89]

Furthermore, in *Verdugo-Urquidez*, the Supreme Court's reliance on the decision from *Eisentrager* that noncitizens are not entitled to Fifth Amendment rights[90] likewise fails in the context of Guantánamo Bay. Specifically, the Supreme Court in *Boumediene* highlighted that Guantánamo Bay detainee cases differ from *Eisentrager* because in *Eisentrager* the Landsberg Prison, where the enemy combatants were detained, was "under the jurisdiction of the combined Allied Forces" while Guantánamo Bay is under the de facto sovereignty of the United States.[91] The Court in *Boumediene* even went on to explicitly state that "[i]n every practical sense Guantánamo is not abroad," which highlights that detainees are entitled to a writ of habeas corpus because Guantánamo Bay is essentially United States territory and the Constitution has force.[92] Therefore, the Supreme Court has already spoken on the issue that Guantánamo Bay differs from Landsberg Prison and therefore, detainees are entitled to some constitutional rights because the United States maintains de facto sovereignty over the territory.

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87 *Qassim I*, 927 F.3d 522, 525 (D.C. Cir. 2019).

88 U.S. CONST. amend. V.

89 *See* Sarah Lorr, Note, *Reconciling Classified Evidence and a Petitioner's Right to a "Meaningful Review" at Guantánamo Bay: A Legislative Solution*, 77 FORDHAM L. REV. 2669, 2723 (2009) (arguing that lack of access to evidence used to justify detention contravenes *Boumediene* and constitutional rights of the accused).

90 *Verdugo-Urquidez*, 494 U.S. at 269.

91 Boumediene v. Bush, 553 U.S. 723, 768–69 (2008).

92 *Id.* at 769.

Scholars have even noted that extending the Suspension Clause to Guantánamo Bay detainees and viewing "Guantanamo as effectively U.S. territory for constitutional purposes" likely entails that the Fifth Amendment and Eighth Amendment would apply as well.[93] Furthermore, prior to *Kiyemba*, the writ of habeas corpus and due process were viewed to "stand or fall together" by scholars.[94] Therefore, since the D.C. Circuit Court of Appeals has already decided that *Kiyemba* is not a categorical bar to constitutional rights for Guantánamo Bay detainees, the court should return to the "prevailing assumption" that these rights come as a pair.[95] Overall, the extension of the Suspension Clause and the view that Guantánamo Bay is essentially U.S. territory leads to the invocation that *Eisentrager* is not the controlling precedent regarding whether the Fifth Amendment should apply in Guantánamo Bay.

Additionally, the district court should not rely on *Eisentrager* to determine that the Fifth Amendment does not apply to enemy aliens outside the sovereign territory of the United States both because Guantánamo Bay is essentially United States territory and because of the nature of the War on Terror. First, as stated previously, the Supreme Court already determined that Guantánamo Bay is not viewed as sovereign territory outside the United States for the application of the Suspension Clause.[96] Therefore, the district court should decide as the Supreme Court and the D.C. Circuit Court of Appeals have even stated, that "Guantanamo [is] de facto U.S. territory—akin to Puerto Rico . . . and not foreign territory."[97] Once the district court has determined that Guantánamo Bay is essentially U.S. territory, the court should then utilize the impracticable and anomalous test employed by Justice Harlan in his concurrence in *Reid*,[98] Justice Kennedy in his concur-

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93 Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 286 (2009).

94 Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 748 (2012).

95 *Id.*

96 *Boumediene*, 553 U.S. at 769.

97 Al Bahlul v. United States, 767 F.3d 1, 66 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part); *see also Boumediene*, 553 U.S. at 769 (explaining that Guantánamo Bay is "within the constant jurisdiction of the United States").

98 Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

rence in *Verdugo-Urquidez*,[99] and by the Supreme Court in *Boumediene*.[100]

Under the impracticable and anomalous test, the court must determine whether application of the Constitution in certain situations would be impracticable and anomalous.[101] In the case of the Fifth Amendment, the court should determine that applying the due process Clause to Guantánamo Bay detainees would not be impracticable and anomalous because the Suspension Clause and the Due Process Clause are closely related, and if there are "no practical barriers" to applying the Suspension Clause to Guantánamo Bay then there would likewise be no issues with applying the due process Clause.[102] Specifically, the government would not have to expend extra resources by granting Guantánamo Bay detainees Due Process Clause rights because detainees already have access to the courts through habeas. Therefore Due Process rights would only alter the treatment of detainees, such as treating them "more like pre-trial civilian detainees."[103] Additionally, since *Boumediene* requires a meaningful review of detainee habeas petitions, not extending due process rights would be more impracticable and anomalous because there must be "some form of due process" in order for a detainee to have a meaningful substantive habeas review.[104] Thus, the court should determine under the impracticable and anomalous test that the Fifth Amendment applies at Guantánamo Bay.

Finally, the nature of the War on Terror makes *Eisentrager* a difficult fit for determining what constitutional rights detainees should be afforded. The War on Terror is different than other wars the United States has fought in because it is "indefinite" in nature,[105] which is evident from the fact that many detainees at Guantánamo Bay have been held for an upward of seventeen years.[106] Thus, the reasoning in *Eisentrager* does not clearly fit in the War on Terror context because, in *Eisentrager* the detainees had been tried in military commissions

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99 United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

100 *Boumediene*, 553 U.S. at 759–61, 770.

101 *See Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (explaining the impracticable and anomalous test).

102 Brief for Petitioner-Appellant, *supra* note 78, at 13.

103 Geltzer, *supra* note 94, at 776.

104 *Id.*

105 McRae, *supra* note 22, at 264.

106 *See, e.g.*, *Qassim I*, 927 F.3d 522, 524 (D.C. Cir. 2019) (noting that petitioner has been detained for seventeen years); Ali v. Trump, 959 F.3d 364, 366 (D.C. Cir. 2020) (stating that the petitioner has been detained since June 2002).

and the war had ended.[107] Conversely, detainees in the War on Terror are facing indefinite detention in a never-ending war because since 2001 the United States has been engaged in conflict with numerous terrorist organizations in many different countries.[108] In addition, the War on Terror and the detentions at Guantánamo Bay do not seem to be coming to an end anytime soon as former President Donald Trump issued an executive order in 2018 stating that the War on Terror was ongoing, that detentions at Guantánamo Bay are lawful, and that new detainees may be transferred to Guantánamo Bay.[109] In sum, *Eisentrager* precedent does not work in the new War on Terror context, and with the possibility that new individuals will be detained at Guantánamo Bay, the district court needs to step in and grant detainees due process rights now more than ever.

B. A Narrower View: CIPA-Like Procedures at Guantánamo Bay

Since this is a politically sensitive issue, it is unlikely that the district court would issue a decision any broader than absolutely necessary to deal with the specific case at hand. Therefore, a possible compromise is for the court to issue a decision that institutes Classified Information Procedures Act (CIPA)-like procedures that apply to habeas petitions by Guantánamo Bay detainees. CIPA is a statute that outlines procedures that grant the criminally accused access to classified information.[110] These procedures include disclosure of classified information to cleared counsel[111] and disclosure of a summary of that information to the accused.[112] CIPA, as written,

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107 *See* Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

108 *See* Jean Galbraith ed., *U.S. Supreme Court Denies Certiorari in Habeas Case Brought by Guantánamo Bay Detainee Challenging His Continuing Detention*, 113 AM. J. INT'L L. 849, 852–53 (2019) (discussing the length of the War on Terror and the expansion of the fighting beyond the Taliban and Al Qaeda).

109 Exec. Order No. 13,823, 3 C.F.R. § 13,823 (2018) (Jan. 30, 2018).

110 Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980).

111 *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 122 (2d Cir. 2008) (holding that, under certain conditions, CIPA authorizes federal courts to limit disclosure of classified information to defense counsel with security clearance if the defendant lacks such clearance).

112 CIPA §§ 4, 6(c)(1)(B).

only applies in criminal adjudications,[113] so it does not apply to Guantánamo Bay detainee habeas petitions.[114]

In *Qassim*, the petitioner sought access to classified information being used to detain him at Guantánamo Bay in order to challenge the legality of his detention.[115] The D.C. Circuit Court of Appeals noted that the case management order and protective order in Qassim's case set forth procedures for exchanging classified information.[116] These procedures included requiring the government to turn over "reasonably available exculpatory evidence" to Qassim's counsel.[117] The court noted that while Qassim's counsel had a security clearance that permitted access to this information,[118] the parties did not attempt to utilize these discovery procedures prior to the district court decision.[119] The government claimed that if Qassim had used these procedures to obtain the information he was seeking, that he would likely have been granted access to most of that information.[120] However, the court said it "would have expected the government to have told Qassim and the district court" about its willingness to hand over this evidence before allowing an appeal to move forward on an incomplete record.[121] The court also stated that although the government "claim[ed]" the classified evidence was not relied on to justify detention, the court will not "blindly hold that the government's failure to disclose [the evidence] was harmless."[122] Therefore, the factual background of *Qassim* supports the view that generally applicable CIPA-like procedures should be in place in all Guantánamo Bay detainee habeas petitions because this would increase judicial efficiency, protect individual detainee rights, and provide consistency across habeas cases.

Qassim's case is a clear example of the judicial efficiency issues caused by not having clear and consistent procedural processes in place for the disclosure of classified evidence to detainees. The D.C. Circuit Court of Appeals had to review Qassim's case based on an incomplete record, which resulted

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113 *Id.* §§ 4, 8.

114 *See* Lorr, *supra* note 89, at 2723–24 (arguing that a CIPA-like statute should be implemented to ensure detainees have regulated access to classified information).

115 *Qassim I*, 927 F.3d 522, 527 (D.C. Cir. 2019).

116 *Id.* at 530–31.

117 *Id.* at 531.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at n.6.

in the case being remanded to the district court to further develop the record.[123] Additionally, during this time, Qassim continued to sit in detention at Guantánamo Bay.[124] Therefore, if a CIPA-like process had been in place and applicable to all Guantánamo Bay detainee habeas petitions, then the D.C. Circuit Court of Appeals would not have hindered judicial efficiency by wasting time and resources on a case that was not ready to be heard.

Furthermore, having CIPA-like procedures in place for all Guantánamo Bay detainee habeas petitions would protect detainee rights. A primary issue with detainee rights is it seems inapposite to say that an individual has the right to challenge their detention through a writ of habeas corpus, yet that individual has no access to the evidence being used to justify their detention. It is a fundamental aspect of United States criminal and constitutional law that the accused has the right to confront evidence against them,[125] but it is illogical to say that a detainee lacks this ability because they are not being criminally adjudicated. In particular, it is near impossible to reconcile the idea of a meaningful review of a habeas petition, on the one hand, and the idea that a detainee cannot challenge their detention with any specificity due to an inability to view the exculpatory evidence against them, on the other.[126] However, critics of due process rights for detainees consistently note that a defendant's Sixth Amendment right to confront the evidence against them is specific to "criminal prosecutions,"[127] and thus, would not apply to habeas corpus proceedings because it is civil litigation.[128] But, the view that detainees have the right to confront the evidence being used to detain them stems from the right to a "meaningful review" granted in *Boumediene*,[129] not the Sixth Amendment. Additionally, if a detainee does not have access to the evidence being used to detain them, then the detainee will not be able to assist their counsel in contending

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123 *Id.* at 532.

124 *Id.* at 525.

125 U.S. CONST. amend. VI.

126 *See* Lorr, *supra* note 89, at 2723 (arguing that access to classified evidence is "essential" to a meaningful habeas review).

127 U.S. CONST. amend. VI.

128 For a discussion of the application of the Sixth Amendment at Guantánamo Bay see generally Tauber, *supra* note 27, at 111–15.

129 Boumediene v. Bush, 553 U.S. 723, 783 (2008); *see also* Lorr, *supra* note 89, at 2723 ("An individual's right to see and confront the evidence against him comes out of a tradition of criminal law and constitutional rights, however it is relevant to any context where a fundamentally fair and meaningful review of facts and law has been guaranteed." (footnote omitted)).

that their detention is unlawful because they will not be able to offer any specific facts to counter the evidence being used against them.[130] Overall, the indefinite detentions at Guantánamo Bay and the right to a meaningful habeas review from *Boumediene* require a procedure for the exchange of classified information between the government and the detainee to promote detainee rights and preserve the constitutional system upon which the United States was founded.

Finally, instituting CIPA-like procedures applicable to all Guantánamo Bay detainee habeas petitions would increase consistency across cases. Currently, there are many different processes and standards in case management orders for Guantánamo Bay detainee habeas cases, which makes properly implementing the procedures more difficult for all involved.[131] The government, the counsel for detainees, and the court have to determine what procedures are being used in each case because there are already a "multiplicity of standards."[132] Furthermore, the definitions of what evidence is "exculpatory" or "material[ ]" vary greatly at the district court level.[133] For example, the issues of classified information exchange present in *Qassim* may not have occurred if there was a consistent process across Guantánamo Bay detainee habeas petitions because the government, detainee counsel, and district court would have begun the inquiry by determining what evidence was relevant and material to the case. Additionally, the best way to increase consistency across cases and in turn to promote judicial efficiency would be for Congress to institute a CIPA-like statute specific to Guantánamo Bay detainee habeas petitions. However, Congress has not chosen to take up the issue even after the 2008 decision in *Boumediene*, so it is unlikely Congress would be willing to take up the issue now. Therefore, even though Congress is the governmental body that should deal with instituting this type of process, Guantánamo Bay detainees have waited long enough; it is time for the courts to properly address the issue of classified evidence exchange.

To promote judicial efficiency, protect detainee rights, and ensure consistency, the court should institute the CIPA-like procedures set forth in *Al Odah v. United States*.[134] In *Al Odah*,

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130 *See* Lorr, *supra* note 89, at 2723 (arguing that lack of access to evidence hinders a detainee's ability to assist in preparing their defense).

131 *See id.* at 2723–24 (discussing the plethora of evidence-exchange processes that the courts use across Guantánamo Bay detainee habeas petitions).

132 *Id.*

133 *See id.* at 2691 n.166, 2723–24.

134 559 F.3d 539, 544–48 (D.C. Cir. 2009).

the D.C. Circuit Court of Appeals set forth procedures to deal with the exchange of classified information between the government and the detainee.[135] The first step in these procedures is that if the government determines that certain evidence is classified, then the court will conduct an ex parte in camera review of this evidence.[136] Following this review, the court will determine if the classified information is "material" and if it is necessary that detainee counsel have access to this evidence for a "meaningful review."[137] In addition to determining if access to the evidence is material for a meaningful review, the court may also decide if there are any unclassified alternatives that would "suffice to provide the detainee" a meaningful review under *Boumediene*.[138] Furthermore, the D.C. Circuit Court of Appeals explained that habeas proceedings of this nature are analogous to criminal proceedings, and therefore, procedures similar to CIPA should be available.[139] The court also stated in *Al Odah* that determining that the evidence is material means that the evidence "is at least helpful to the [detainee's] habeas case."[140] Finally, it is worth noting that during oral argument in *Qassim*, the panel of D.C. Circuit Judges "made clear that if the district court adopted a process like that provided under [CIPA], this would likely be constitutionally adequate."[141] Therefore, the court should decide in *Qassim* that CIPA-like procedures, similar to the procedure used in *Al Odah*, apply in all Guantánamo Bay detainee habeas petitions because CIPA-like procedures adequately balance national security concerns and individual detainee rights.

In June of 2008, the Supreme Court decided in *Boumediene* that Guantánamo Bay detainees are entitled to a meaningful habeas corpus review,[142] but over a decade later, the lower courts still do not know what constitutes a meaningful habeas review. Guantánamo Bay detainee habeas corpus petitions have been in limbo since 2004 with the *Hamdi*[143] and

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135 *Id.*

136 *Id.* at 547.

137 *Id.* at 548.

138 *Id.*

139 *Id.* at 547.

140 *Id.* at 544.

141 Robert Loeb, *Due Process for Guantanamo Detainees: The D.C. Circuit Rules in* Qassim, LAWFARE (June 25, 2019, 4:09 PM), https://www.lawfareblog.com/due-process-guantanamo-detainees-dc-circuit-rules-qassim [https://perma.cc/823R-Z6CX].

142 *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008).

143 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).

Rasul[144]decisions. The branches of the United States government have continued to fight over what rights detainees may be afforded and what constitutes a meaningful habeas review.[145] Ideally, the issue of applying a CIPA-like procedure to all Guantánamo Bay detainee habeas cases would be decided by Congress[146] in order to limit judicial legislating. However, more than eighteen years have passed since 9/11, sixteen years have passed since *Hamdi* and *Rasul*, and twelve years have passed since *Boumediene*; yet, the government has not decided how to handle Guantánamo Bay detainee habeas cases and detainees, like Qassim, continue to sit for upward of seventeen years.[147] Because the previous administration issued an Executive Order to continue detentions at Guantánamo Bay and to permit new transfers to Guantánamo Bay,[148] and the new Biden administration has not revealed any plans for Guantánamo Bay,[149] the time has passed for these decisions to lie in wait for Congress to deal with them. As Justice Stephen Breyer aptly put it, "in light of the 'unconventional nature' of the 'war on terror,' there [is] a 'substantial prospect' that detention for the 'duration of the relevant conflict' could amount to 'perpetual detention'"; therefore, "it is past time to confront [this] difficult question."[150] Overall, the D.C. District Court should institute CIPA-like procedures from *Al Odah* across all Guantánamo Bay detainee habeas petitions in order to increase judicial efficiency, protect detainee rights, and promote consistency across judicial decision making.

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144 Rasul v. Bush, 542 U.S. 466 (2004).

145 *See* Stevie Moreno Haire, Comment, *No Way Out: The Current Military Commissions Mess at Guantanamo*, 50 SETON HALL L. REV. 855, 855 (2020) (noting that changes in the law during the Obama administration undermined the judiciary's attempt to strike a balance between the need to safeguard detainees' rights while "holding accountable those who have committed atrocities").

146 *See* Lorr, *supra* note 89, at 2723–24 (arguing that Congress should implement a statute).

147 *See, e.g.*, *Qassim I*, 927 F.3d 522, 524 (D.C. Cir. 2019) (noting that Qassim had been detained for seventeen years at the time of the decision).

148 Exec. Order No. 13,823, 3 C.F.R. § 13,823 (2018).

149 Carol Rosenberg, Charlie Savage, & Eric Schmitt, *'In Bad Shape and Getting Worse,' Guantánamo Poses Headaches for Biden*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/12/15/us/politics/guantanamo-biden.html [https://perma.cc/5NAJ-JLZR].

150 Al-Alwi v. Trump, 139 S. Ct. 1893, 1894 (2019) (Breyer, J., statement on denial of certiorari) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (plurality opinion)).

C. The Inability to Decide: The Decision in *Ali v. Trump*

The decision in *Ali* was essentially not a decision at all but a choice to punt the applicability of the Fifth Amendment to Guantánamo Bay detainees to another case. Utilizing the language from *Qassim*, the court noted that "[c]ircuit precedent has not yet comprehensively resolved which 'constitutional procedural protections apply'" to detainees' habeas petitions.[151] However, the confusion of this opinion lies in the fact that the D.C. Circuit Court states that it does not have any circuit precedent resolving what constitutional protections apply to Guantánamo Bay detainees when the D.C. Circuit is the court with the ability to determine which protections should apply. The only decision the D.C. Circuit makes in this opinion is that review of Guantánamo Bay habeas petitions "should be analyzed on an issue-by-issue basis."[152] The court then proceeds to analyze Ali's arguments one by one and decides that the district court's denial of Ali's habeas petition should be affirmed because the Guantánamo Bay Periodic Review Board determined based on a preponderance of the evidence that continued detention remains necessary.[153] However, it is worth noting that the evidence being used to detain Ali is that Ali stayed at a guesthouse for eighteen days in Faisalabad, Pakistan with Abu Zubaydah.[154] Thus, Ali has been detained for eighteen years and will continue to be detained based on eighteen days out of his entire life.[155]

This case bolsters the view that the never-ending aspect of the War on Terror calls for instituting new procedural safeguards because the government is now able to detain enemy combatants for decades, which differs from previous wars, and strengthens the argument that these individuals need a meaningful remedy for their habeas review. Yet, the D.C. Circuit Court of Appeals continues to push back the decision of which due process rights should apply to Guantánamo Bay detainees, while these detainees remain imprisoned for what is likely the rest of their lives.

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151 Ali v. Trump, 959 F.3d 364, 368 (D.C. Cir. 2020) (quoting *Qassim I*, 927 F.3d at 530).

152 *Id.* at 369.

153 *Id.* at 371.

154 Brief for Petitioner-Appellant, *supra* note 78, at 2.

155 Ali v. Obama, 736 F.3d 542, 553 (D.C. Cir. 2013) (Edwards, J., concurring) (noting that "Ali's principal sin is that he lived in a 'guest house' for 'about 18 days.'").

V
IMPLICATIONS OF *Qassim*

A. Ripe for Review

The D.C. Circuit Court of Appeals decision in *Qassim* was not unanimous on whether Fifth Amendment or certain evidentiary rights do, and should, apply in all Guantánamo Bay detainee habeas petitions. In particular, the petition for review en banc in *Qassim* was joined by a vehement dissent opposing the recognition of Fifth Amendment due process rights for Guantánamo Bay detainees.[156] Judge Henderson, joined by Judge Rao, continued to utilize the language from *Eisentrager* that was used by the D.C. District Court in *Qassim* to argue that detainees are not afforded any Fifth Amendment rights.[157] Furthermore, the dissent argues that Guantánamo Bay "is not a part of the sovereign territory of the United States"[158] even though the Supreme Court explicitly stated in *Boumediene* that Guantánamo Bay was under the de facto sovereignty of the United States, which is why the Suspension Clause is extended there.[159] The dissent attempts to dispense with *Boumediene* by stating that in the decision, the Supreme Court did not determine if due process rights extended to Guantánamo Bay.[160] However, in doing so, the dissent completely neglects the finding in *Boumediene* that the extension of the Suspension Clause was based on the fact that the United States has de facto sovereignty or ultimate control over the territory.[161] Therefore, this "intra-Circuit conflict"[162] and the fact that the D.C. District Court is the judicial forum for deciding Guantánamo Bay detainee habeas petitions highlights that the issue of due process rights at Guantánamo Bay is ripe for Supreme Court review.

In addition, the issue of rights in Guantánamo Bay is exacerbated by President Trump's Executive Order 13,823 rescinding President Barack Obama's Executive Order 13,492, which required closure of Guantánamo Bay.[163] This new executive order permits Guantánamo Bay to continue to be used for military detentions with no end in sight.[164] Furthermore, this

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156 *Qassim II*, 938 F.3d 375, 376 (D.C. Cir. 2019) (en banc) (Henderson, J., dissenting).
157 *Id.*
158 *Id.* (quoting *Kiyemba I*, 555 F.3d 1022, 1026 n.9 (D.C. Cir. 2009)).
159 Boumediene v. Bush, 553 U.S. 723, 769 (2008).
160 *Qassim II*, 938 F.3d at 378 (en banc) (Henderson, J., dissenting).
161 *See Boumediene*, 553 U.S. at 764–65.
162 *Qassim II*, 938 F.3d at 379 (en banc) (Henderson, J., dissenting).
163 Exec. Order No. 13,823, 3 C.F.R. § 13,823 (2018).
164 *Id.*

order allows the military to transfer new detainees to Guantánamo Bay.[165] At this point in time, no new detainees have been transferred to Guantánamo Bay. While five detainees were cleared for release by the relevant agencies, "no one [was] transferred out of Guantanamo under the [Trump] administration."[166] In addition, Executive Order 13,823 gives the Secretary of Defense the ability to transfer prisoners when appropriate, but the office historically in charge of dealing with the steps necessary for transfer, the State Department Office of Special Envoy for Guantánamo Closure, has been shut down.[167] Finally, while the Executive Order required the Defense Secretary to recommend a plan to deal with the current detainees within ninety days, no such plan has been released.[168] Therefore, based on Executive Order 13,823 and the former administration's actions with regard to Guantánamo Bay detainees, the judiciary needs to step in to protect detainee rights and to ensure a meaningful review of habeas petitions.

The recent election of Joseph R. Biden Jr. and Kamala Harris as President and Vice President, respectively, of the United States may not bring closure to the Guantánamo story.[169] President Biden has stated that he "continues to support closing the detention center," but he has not set forth a plan for closure and consistently avoided the issue during the campaign.[170] Furthermore, President Biden explained during

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165 *Id.*

166 Brief for Petitioner-Appellant, *supra* note 78, at 5; *see also* Rosenberg et al., *supra* note 149 (discussing how no prisoner was cleared for transfer by the Trump administration until December 2020). However, one detainee, Ahmed Muhammed Haza al-Darbi, has been transferred out of Guantánamo to Saudi Arabia to serve his sentence due to the terms of a plea bargain before a military commission. Charlie Savage, *U.S. Transfers First Guantánamo Detainee Under Trump, Who Vowed to Fill It*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2018/05/02/us/politics/guantanamo-detainee-transferred-trump-al-darbi.html [https://perma.cc/BU2D-DSSK] ("This is the first prisoner transfer under Trump, but it may also be the last unless the courts meaningfully check the president's claimed power to imprison men without charge for as long as he pleases." (quoting Ramzi Kassem, Darbi's counsel)).

167 Brief for Petitioner-Appellant, *supra* note 78, at 6.

168 *Id.* at 6–7.

169 Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/us/politics/biden-election.html [https://perma.cc/T8G2-J2BW].

170 Carol Rosenberg, *Biden Still Wants to Close Guantánamo Prison*, N.Y. TIMES (June 27, 2020) (internal quotation marks omitted), https://www.nytimes.com/2020/06/27/us/politics/biden-guantanamo-prison.html [https://perma.cc/ZF7L-FVSK] ("But Mr. Biden rarely, if ever, brings up the topic, evidence of how politically toxic it remains after intense Republican efforts to cast Mr. Obama's initiative as endangering Americans . . . .").

his campaign that closing Guantánamo Bay detention center would require congressional consent.[171] Thus, as the Biden administration will face many difficult problems[172] in their first term, the administration has yet to develop a concrete plan for Guantánamo; three presidencies later the fate of Guantánamo Bay detainees is unresolved and likely will remain so for at least some time without judicial intervention.[173]

B. A Look at the Supreme Court

Since *Boumediene*, the Supreme Court has had a number of opportunities to define what rights Guantánamo Bay detainees are entitled to; however, the Supreme Court has refused to do so.[174] Based on the language used by Justice Kennedy in the *Boumediene* opinion, it is unlikely the Supreme Court would decide a Guantánamo Bay detainee case on grounds any broader than absolutely necessary.[175] In particular, the Supreme Court had the opportunity in *Boumediene* to outline what rights detainees were entitled to in habeas corpus review and the process that habeas review would take, yet the Court

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171 Rosenberg et al., *supra* note 149.

172 *See generally* Katica Roy, *In Tackling the Country's Biggest Problems, Biden and Harris Need to Prioritize Gender and Racial Equity*, FORTUNE (Dec. 17, 2020, 5:00 PM), https://fortune.com/2020/12/17/joe-biden-kamala-harris-gender-equity-racial-equity-equal-pay-covid-climate-change/ [https://perma.cc/FS2R-8YRN] (discussing the pressing issues facing the Biden-Harris administration, including "COVID-19, economic recovery, racial equity, and climate change").

173 Rosenberg et al., *supra* note 149 ("Of the 40 prisoners currently at Guantánamo, nine have been charged with or convicted of war crimes, six have been recommended for transfer with security conditions in the receiving country, and the rest remain in indefinite detention, uncharged but deemed too dangerous to release.").

174 *See, e.g.*, Robert Chesney, *Justice Breyer's Question in* al-Alwi*: Is Detention Still Justified?*, LAWFARE (June 10, 2019, 3:47 PM), https://www.lawfareblog.com/justice-breyers-question-al-alwi-detention-still-justified [https://perma.cc/3UDH-XY27] (explaining Justice Stephen Breyer's statement in the Supreme Court's denial of certiorari in *al-Alwi v. Trump*, which argued that the issue of whether detention is still justified will need to be decided in "an appropriate case" (quoting Al-Alwi v. Trump, 139 S. Ct. 1893, 1894 (2019)) (Breyer, J., statement on denial of certiorari)); S.M., *The Supreme Court Refuses to Hear a Guantánamo Detainee's Appeal*, ECONOMIST (June 12, 2019), https://www.economist.com/democracy-in-america/2019/06/12/the-supreme-court-refuses-to-hear-a-guantanamo-detainees-appeal [https://perma.cc/WJP5-R5EM] (discussing the Supreme Court's denial of certiorari in *al-Alwi v. Trump* and Justice Breyer's growing impatience with the Supreme Court's refusal to decide if detention is still justified).

175 The Supreme Court declined to "address the content of the law that governs [Guantánamo Bay detainees'] detention" and instead decided the case more narrowly, only holding that Guantánamo Bay detainees were entitled to the writ of habeas corpus. Boumediene v. Bush, 553 U.S. 723, 798 (2008).

left these issues open.[176] This opening and the lack of Supreme Court review in Guantánamo Bay detainee cases has left the decision of what rights detainees are entitled to and how habeas corpus cases should proceed up to the D.C. Circuit Court.[177] Therefore, the Supreme Court decision in *Boumediene* and the Court's refusal to grant certiorari on the issue of due process rights for Guantánamo Bay detainees suggest that the Court is not interested in reviewing the issue.

Up until June 2019, the Supreme Court did not seem to speak on the issue of continuing detentions at Guantánamo Bay.[178] In *al-Alwi v. Trump*, the Supreme Court denied certiorari, but Justice Breyer offered a statement that accompanied the denial.[179] In this statement, Justice Breyer said the Court needs to address the question of how much longer the President may use the AUMF to authorize detention of Guantánamo Bay detainees.[180] Justice Breyer went on to note that "in an appropriate case" he would agree to grant certiorari "to address whether . . . Congress has authorized and the Constitution permits continued detention."[181] Thus, Justice Breyer at least believed it was necessary to review the authority of the executive to continue to imprison individuals under the authority granted in the AUMF.

If the Supreme Court decided to address the issue, there are a few important factors to consider, including the current Supreme Court makeup, the separation of powers issues involved, and the former presidential administration's actions. First, the current Supreme Court makeup makes it unlikely that the Court would find in favor of granting due process rights to Guantánamo Bay detainees based on each Justices' historical decision making. In particular, with the retirement of Justice Kennedy and the confirmation of Justice Brett Kavanaugh, Guantánamo Bay jurisprudence is uncertain. Justice Kennedy played a role in pushing back against the Executive and the Legislative Branches in his concurrence in *Rasul*[182]

176 *See id.* ("That is a matter yet to be determined.").

177 *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. 2010) ("The Supreme Court has provided scant guidance on [who the President can lawfully detain and what procedure detainees are entitled to], consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion.").

178 *See* Al-Alwi v. Trump, 139 S. Ct. 1893, 1894 (2019) (Breyer J., statement on denial of certiorari).

179 *Id.* at 1893–94.

180 *Id.*

181 *Id.*

182 *See* Rasul v. Bush, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring).

and his majority opinion in *Boumediene*,[183] amongst others.[184] Due to Justice Kennedy's retirement, President Trump nominated Justice Kavanaugh to take his place, and Justice Kavanaugh's previous jurisprudence on the D.C. Circuit Court of Appeals in Guantánamo Bay detainee habeas cases differs greatly from Justice Kennedy's jurisprudence.[185] Justice Kavanaugh signed on to several opinions, including *al-Bihani v. Obama*,[186] and *Ali v. Obama*[187] "that left the promise of the *Boumediene* decision an empty one."[188]

Furthermore, the passing of Justice Ruth Bader Ginsburg[189] and subsequent confirmation of Justice Amy Coney Barrett[190] make it more unlikely that the Supreme Court would grant due process rights to Guantánamo Bay detainees. Although Justice Barrett served on the Seventh Circuit Court of Appeals and thus has never heard a Guantánamo Bay case, her previous writings and statements she made during her 2017 confirmation hearing for her Seventh Circuit nomination shed light on her views.[191] In particular, when asked by Senator Chris Coons about her writings that state that the *Boumediene* decision was wrong, Justice Barrett "replied by citing 'the history of the suspension clause,' 'prudential concerns,' and 'the precedent, Johnson v. Eisentrager.'"[192] There-

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183 *See* Boumediene v. Bush, 553 U.S. 723, 764–66, 797 (2008).

184 *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 638–41, 653 (2006) (Kennedy, J., concurring in part); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion, joined by Justice Kennedy).

185 *See* Linda Greenhouse, *What Guantánamo Says About Kavanaugh*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/editorials/guantnamo-kavanaugh.html [https://perma.cc/88BN-3HCY].

186 590 F.3d 866, 868, 881 (D.C. Cir. 2010) (affirming the D.C. District Court's denial of petitioners' habeas petition because detention of petitioner is authorized and "there was no constitutional defect in the district court's habeas procedure").

187 736 F.3d 542, 551–52 (D.C. Cir. 2013) (holding that detention was lawful because the detainee was "more likely than not" a part of an associated force under the AUMF).

188 Greenhouse, *supra* note 185.

189 Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/PD2P-XY95].

190 Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/LH4U-ZLJ7].

191 Siobhan Hughes, *Amy Coney Barrett's 2017 Responses Offer Preview of Supreme Court Hearing*, WALL ST. J. (Oct. 4, 2020, 10:00 AM), https://www.wsj.com/articles/amy-coney-barretts-2017-responses-offer-preview-of-supreme-court-hearing-11601820000 [https://perma.cc/MS59-9GW8].

192 *Id.*

fore, with a 6-3 conservative majority on the Supreme Court, Guantánamo Bay detainee rights continue to hang in the balance.

In addition, the separation of powers issues presented by extending due process rights to Guantánamo Bay detainees make the Court unlikely to decide the issue. If the Court extended Due Process Clause rights to Guantánamo Bay detainees, then detainees would be able to press Due Process Clause claims that continued detention at Guantánamo Bay is unlawful.[193] For example, if the Court granted due process rights to Guantánamo Bay detainees, then cases like *al-Alwi*[194] and *Ali v. Trump*[195] may force the Court to decide questions typically reserved for the political branches. In particular, when the detainees in *al-Alwi* and *Ali* contended that perpetual detention violates the Due Process Clause, the argument asked the Court to determine whether continued detention is permitted under the AUMF.[196] That determination forces the Supreme Court to decide if the Court has the authority to conclude that "a previously recognized state of armed conflict has come to an end," which is a question typically reserved for the political branches.[197] For example, in *al-Alwi* the detainee asked the Court to decide that detentions under the AUMF were no longer authorized. Answering that question in the affirmative would essentially allow the Court to state that armed conflict in the War on Terror has ended.[198] Therefore, the Supreme Court faces important separation of powers issues when deciding whether to extend rights to Guantánamo Bay detainees.

Finally, the Trump administration policies regarding Guantánamo Bay and the War on Terror lend support to the view that the Court likely will not decide the issue. First, Executive Order 13,823,[199] which reopens Guantánamo Bay to new detainees and permits the naval base to continue detention of current detainees, shows that the former Trump administra-

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193 *See* Chesney, *supra* note 174.

194 139 S. Ct. 1893 (2019).

195 317 F. Supp. 3d 480, 488 (D.D.C. 2018) (holding that the petitioner's continued detention is lawful and denying the petition for a writ of habeas corpus).

196 *Al-Alwi*, 139 S. Ct. at 1894 (Breyer, J., statement on denial of certiorari); *Ali*, 317 F. Supp. 3d at 488 n.9.

197 Chesney, *supra* note 174.

198 *See al-Alwi*, 139 S. Ct. at 1894 (Breyer, J., statement on denial of certiorari).

199 Exec. Order No. 13,823, 3 C.F.R. § 13,823 (2018).

tion was not interested in closing Guantánamo Bay.[200] While the Biden administration will have the ability to rescind Executive Order 13,823, the administration has not concretely outlined a plan for Guantánamo Bay and has not said whether it would rescind President Trump's executive order.[201] Additionally, the continued fighting in the War on Terror and the new escalations with Iran[202] make granting due process rights to Guantánamo Bay detainees a delicate topic for the judiciary. In particular, the judiciary would be stepping into the Executive Branch's authority under the AUMF to use all necessary force to find and detain individuals involved in 9/11.[203] Former Attorney General William P. Barr spoke out against the Supreme Court decisions in Guantánamo Bay detainee cases at the Federalist Society's 2019 National Lawyer's Convention.[204] In his speech, Barr exalted that these decisions by the Court "set [the Court] up as the ultimate arbiter and superintendent of military decisions inherent in prosecuting a military conflict."[205] Barr went on to contend that the *Boumediene* decision "overturned hundreds of years of American, and earlier British, law and practice," and that in penning this opinion, the Court usurped the President's power as Commander in Chief.[206] However, since 9/11 the United States government

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200 *See* Julian Borger, *Donald Trump Signs Executive Order to Keep Guantánamo Bay Open*, GUARDIAN (Jan. 30, 2018, 10:35 PM), https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open [https://perma.cc/L39M-ATCD] (discussing President Donald Trump's 2018 State of the Union Address statements regarding the decision to keep Guantánamo Bay open).

201 *See* Rosenberg, et al., *supra* note 149; *see also* Joshua Keating, *Will Biden Finally Close Guantanamo?*, SLATE (Dec. 15, 2020, 5:45 AM), https://slate.com/news-and-politics/2020/12/will-biden-close-guantanamo-bay.html [https://perma.cc/3UP8-HYMT] ("If Obama, who made Guantanamo one of his signature issues, wouldn't expend the political capital needed to shut it down, it's hard to imagine that Biden will accomplish it at a time when many Americans seem to have forgotten about the prison entirely.").

202 Farnaz Fassihi, *In Iran, Rejoicing Over Retaliation, Then Relief at No U.S. Counterstrike*, N.Y. TIMES (Jan. 8, 2020), https://www.nytimes.com/2020/01/08/world/middleeast/iranians-retaliation.html [https://perma.cc/38WX-TUJU] (discussing the United States drone strike killing Qassim Suleimani, the Iranian missile strikes on United States military bases in Iraq, and the lack of a counterstrike by the United States at that point in time).

203 Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note (2006)).

204 William P. Barr, U.S. Att'y Gen., 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention (Nov. 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture [https://perma.cc/K236-TLXH].

205 *Id.*

206 *Id.*

has continued to use the AUMF to justify the United States' involvement in the War on Terror and the detentions stemming from it without alteration by the Executive or the Legislative Branches, implying that the only way to change the never-ending detentions in the War on Terror is for the Court to step in and protect detainee rights.[207] Therefore, in order to grant due process rights to Guantánamo Bay detainees, the judiciary would lean into Executive authority to limit the President's powers over how suspected enemy combatants are detained and treated.

Even though the Supreme Court does not seem inclined to decide the issue of rights in Guantánamo Bay, the Court did recently decide the issue of constitutional rights granted to noncitizens outside the territory of the United States when United States actors infringe on those rights. The case of *Hernandez v. Mesa*, argued in front of the Supreme Court in November 2019, asked the Supreme Court to decide if private individuals can seek damages against federal officers alleging violations of their Fourth and Fifth Amendment rights.[208] In 2010, Sergio Adrian Hernandez Guereca was playing with his friends at a cement culvert on the border between Ciudad Juarez, Mexico and El Paso, Texas.[209] While playing, Sergio and his friends were running up and touching the border fence between Mexico and the United States.[210] A Border Patrol Agent, Jesus Mesa, Jr., arrived and caught one of Sergio's friends.[211] Sergio retreated back by the Mexican side of the culvert and hid from Mesa.[212] While standing on the United States side of the border, Mesa fired two shots at Sergio, one of which fatally struck him.[213]

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207 *See, e.g.*, Alexander, *supra* note 5, at 620 ("The Supreme Court has approved indefinite detention of 'enemy combatants' under the AUMF, and both the Bush and Obama administrations have adopted a broader definition than the Supreme Court of those who may be detained without prompting the Court to intervene.").

208 Amy Howe, *Argument Preview: Justices to Tackle Cross-Border Shooting Case Again*, SCOTUSBLOG (Nov. 5, 2019, 2:47 PM), https://www.scotusblog.com/2019/11/argument-preview-justices-to-tackle-cross-border-shooting-case-again/ [https://perma.cc/VF5N-CUP9].

209 Hernandez v. Mesa (*Hernandez II*), 885 F.3d 811, 814 (5th Cir. 2018).

210 Hernandez v. United States (*Hernandez I*), 757 F.3d 249, 255 (5th Cir. 2014).

211 *Id.*

212 *Id.*

213 *Id.*

After Sergio's death, his parents brought a *Bivens*[214] claim against Agent Mesa.[215] The case moved back and forth between the District Court, Court of Appeals, and the Supreme Court several times since 2010.[216] In 2019, the case reached the Supreme Court for the second time and the Justices decided the case on February 25, 2020.[217] In a 5-4 decision, the Supreme Court held that *Bivens* does not extend to this context.[218] Writing for the majority, Justice Samuel Alito based his opinion on national security and separation of powers concerns.[219] Decided differently, the outcome of *Hernandez* could potentially have become the backbone for the due process claims of Guantánamo Bay detainees. The decision to not extend *Bivens* in this context furthers the Supreme Court view that extraterritorial acts against noncitizens do not extend constitutional rights outside the sovereign territory of the United States.

Despite the decision by the Supreme Court against extending *Bivens*, there are a few noteworthy aspects of the decision. First, the opinion does not cite to *Verdugo-Urquidez* or *Eisentrager*, which is notable because the Supreme Court could have stuck to these two decisions and stated that based on precedent constitutional rights do not extend abroad.[220] Second, the decision was 5-4, which demonstrates that the Supreme Court is very divided on this issue. However, the speed of the decision is concerning because the Court typically does not release 5-4 decisions until late summer, and the quick turnaround "suggests that each justice took a hard line from the start."[221] In prior years, and in particular when Justice Kennedy was on the Court, Justice Kennedy would try to reconcile with the more liberal justices in an attempt to "build bridges."[222] Finally, Justice Ginsburg penned a dissent centered around the fact that the *Bivens* remedy is intended to

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214 Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that an individual is entitled to damages for injuries suffered due to a federal agent's violation of the individual's Fourth Amendment rights).

215 *Hernandez I*, 757 F.3d at 255.

216 *Hernandez II*, 885 F.3d 811, 814–15 (5th Cir. 2018).

217 Hernandez v. Mesa, 140 S. Ct. 735, 739–40 (2020).

218 *Id.* at 739.

219 *Id.*

220 *See generally id.* (lacking citations to *Verdugo-Urquidez* or *Eisentrager*).

221 Mark Joseph Stern, *The Supreme Court Is at Its Most Divided*, SLATE (Mar. 4, 2020, 9:47 AM), https://slate.com/news-and-politics/2020/03/kansas-v-garcia-scotus-ideological-splits.html [https://perma.cc/JV6J-ABZG].

222 *Id.*

deter excessive force by United States officers, and thus the location of where the bullet hit Hernandez should not have been the decisive factor in this case.[223] Justice Ginsburg's dissent echoes the argument Attorney Lee Gelernt for the American Civil Liberties Union made to the Supreme Court in November that "[t]he Constitution does not stop at the border."[224] Thus, although the *Hernandez* opinion did not become the hook upon which Guantánamo Bay detainees could hang their due process rights, the opinion is perhaps not as bleak as it could have been. It does not reiterate prior Supreme Court precedent by holding that the Constitution does not apply to extraterritorial noncitizens, and the fact that the decision was close suggests that this issue is far from closed.

CONCLUSION

The Supreme Court in *Boumediene* determined that the government cannot turn the Constitution on and off at will to suit its needs at the time.[225] Guantánamo Bay detainees like Qassim and Ali have spent more than seventeen years in detention without charge or trial.[226] Although the War on Terror continues, the United States government has done little to decide how to handle the indefinite detentions at places like Guantánamo Bay. As Professor Stephen Vladeck explains, the United States is "[n]early 18 years in[to]" the War on Terror and yet "we still don't know if the Guantánamo detainees even have due process rights."[227] The time has come for Guantánamo Bay detainees to know which rights they are entitled to and for the holding in *Boumediene* to finally have full force. Therefore, the D.C. District Court should decide that the Fifth Amendment Due Process Clause extends to Guantánamo Bay detainees and bring to fruition *Boumediene's* meaningful review. Additionally, the D.C. District Court should institute CIPA-like procedures that are applicable in every Guantánamo Bay detainee habeas petition in order to protect detainee rights while

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223 *Hernandez*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

224 Vanessa Romo, *Supreme Court Rules Border Patrol Agents Who Shoot Foreign Nationals Can't Be Sued*, NPR (Feb. 25, 2020, 6:21 PM), https://www.npr.org/2020/02/25/809401334/supreme-court-rules-border-patrol-agents-who-shoot-foreign-nationals-cant-be-sue [https://perma.cc/Q4SA-VP77].

225 Boumediene v. Bush, 553 U.S. 723, 765 (2008).

226 *See Qassim I*, 927 F.3d 522, 525 (D.C. Cir. 2019) (stating that Qassim has been detained at Guantánamo Bay since May 1, 2002); Brief for Petitioner-Appellant, *supra* note 78, at 2 (stating that Ali was transferred to Guantánamo Bay in June of 2002).

227 S.M., *supra* note 174.

balancing national security interests. The ultimate question that must be asked is: how much longer do individuals like Qassim have to wait for their meaningful review? Hopefully, it is not another seventeen years.[228]

228 In 2019, it was reported that the Pentagon had begun preparing Guantánamo Bay for hospice care as the population of detainees age, which indicates that the Pentagon has no intention of closing Guantánamo Bay anytime soon. Rosenberg, *supra* note 2. Rear Admiral John C. Ring even stated that "[u]nless America's policy changes, at some point we'll be doing some sort of end of life care here." *Id.* Thus, the future for Guantánamo Bay detainees remains grim.