

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MOHAMMEDOU OULD SALAHI,

Plaintiff,

vs.

BARACK OBAMA, ET AL.,

Defendants.

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CA No. 05-569

Washington, DC  
November 24, 2015  
10:35 a.m.

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription

1 P R O C E E D I N G S

2 THE COURT: Your Honor, this morning this is  
3 In Re: Salahi versus Barack Obama, et al. This is Civil Action  
4 Number 05-569. I'd ask the parties to step forward and  
5 identify yourselves for the record, please.

6 MS. SHAMSI: Good morning, Your Honor. My name is  
7 Hina Shamsi and together with my co-counsel, Dror Ladin, Nancy  
8 Hollander and Art Spitzer. I represent Mohammadou Ould  
9 Salahi.

10 THE COURT: Thank you.

11 MR. FOLIO: Your Honor, Your Honor. Joseph Folio  
12 on behalf of the Government. I'm joined at counsel table by  
13 Rodney Patton and Terry Henry of the Department of Justice,  
14 and Jason Foster of the Department of Defense.

15 THE COURT: Okay. We're here on petitioner's  
16 motion, so you may proceed.

17 MS. SHAMSI: Thank you, Your Honor. And if I may,  
18 just what I hope is a brief housekeeping matter --

19 THE COURT: Sure.

20 MS. SHAMSI: -- which is that we had moved for  
21 admission pro hac vice of my colleague, Dror Ladin. We'd like  
22 him to do part of the argument, if that is acceptable to the  
23 Court.

24 THE COURT: That's agreeable. I didn't realize  
25 there is an outstanding motion. If I haven't granted it,

1 I will.

2 MS. SHAMSI: Thank you, Your Honor.

3 THE COURT: Okay.

4 MS. SHAMSI: Your Honor, the question we've asked  
5 you -- we've put before you today is a purely legal one, which  
6 is whether the Defense Department can subject Mr. Salahi to  
7 ongoing indefinitely executive detention under the AUMF  
8 without providing a timely review of whether that ongoing  
9 detention serves any lawful purpose.

10 And if it's all right with you, I'd like to begin  
11 by framing the issue for you and discussing Mr. Salahi's  
12 entitlement to a Periodic Review Board or PRB, as a matter of  
13 law. Mr. Ladin will then address this Court's habeas  
14 jurisdiction to determine that entitlement. And Ms. Hollander  
15 will address Mr. Salahi's conditions of confinement claims.

16 THE COURT: All right.

17 MS. SHAMSI: Thank you, Your Honor. As a threshold  
18 matter, Your Honor, we wouldn't be here before you today if at  
19 any point over the last four years the Defense Department had  
20 provided notice to Mr. Salahi of his PRB hearing. As soon as  
21 the Government provides that notice, this matter goes away.

22 Mr. Salahi has now been held at Guantanamo for  
23 14 years and he's repeatedly tried throughout that time to  
24 show that his detention is unlawful and that he should be  
25 released. He thought he would be released after Judge

1 Robertson granted his habeas petition, but the Government  
2 appealed and the case was remanded and it's been pending  
3 before this Court.

4 Mr. Salahi has pressed for a PRB hearing over and  
5 over again. As you know, Your Honor, President Obama mandated  
6 that process for Mr. Salahi and others like him back in March  
7 2011 for internal Defense Department delays that year came and  
8 went. And, finally, in July 2013, the Defense Department sent  
9 notice to all counsel informing them of the process, and  
10 virtually immediately my co-counsel wrote to the Defense  
11 Department, and said: Tell us -- tell us when Mr. Salahi will  
12 be scheduled for a hearing. Is he set for a hearing? We want  
13 to be prepared.

14 We got no answer. We were told that we would be  
15 informed, but no further answer in 2013 and in 2014. In 2015,  
16 my co-counsel wrote to the PRB secretariat, which is the body  
17 that administers the PRBs and we literally implored it to set  
18 a date. We said in April of this year that we would be forced  
19 to come to this Court if we had no notice of even when the  
20 hearing would be held. And we haven't had a response.

21 Your Honor, Mr. Salahi's --

22 THE COURT: Are there other hearings going  
23 forward --

24 MS. SHAMSI: There are.

25 THE COURT: -- with other detainees?

1 MS. SHAMSI: There are, Your Honor.

2 THE COURT: So there's no explanation for why not  
3 here?

4 MS. SHAMSI: No, Your Honor. And this, in essence,  
5 this in itself is arbitrary, it's a black box. We have no  
6 idea what criteria are being used to determine who gets  
7 scheduled when. When notice might happen. And this means an  
8 ongoing delay. And, Your Honor, the Defense Department said  
9 in its papers, it's essentially accusing us of a line jumping.  
10 Now, that might have some traction if they had told us that  
11 Mr. Salahi was Number 10 and we came to you and said to move  
12 him to Number One.

13 But, again, this is black box of a process. No  
14 criteria, no schedule. And after four years, no indication of  
15 whether Mr. Salahi will get a hearing next month, two months  
16 from now, a year from now or more than that. That's really  
17 what we want is a timely and prompt hearing.

18 THE COURT: What does the Executive Order say? It  
19 says annually?

20 MS. SHAMSI: It does. President Obama instructed  
21 the Defense Department to begin hearings, and it said no later  
22 than a year, and it established an entire process. And I  
23 think what is critical hear is that it established a process  
24 to determine whether ongoing detention is warranted because of  
25 the determination of whether the detainee presents a

1 significant security threat or not. Before you talk to that  
2 particular Executive Order, Your Honor, I think that there  
3 have been 18 PRB detainees scheduled, some of them have had  
4 their review twice. A number are still scheduled, but I  
5 believe it's four. But I think, Your Honor --

6 THE COURT: I'm sorry. A number of what?

7 MS. SHAMSI: Have been scheduled for hearing, I  
8 believe four of them. Your Honor, Mr. Salahi's case is rather  
9 unique, we believe. I just want to tell you why we think that  
10 is. He wasn't captured on a battlefield. He voluntarily  
11 turned himself in to authorities in Mauritania. He never  
12 fought against the United States. There's no allegation that  
13 he ever did.

14 He was subjected to one of the most brutal torture  
15 regimes at Guantanamo, but as his book shows that we submitted  
16 to you, he bears no animosity to the United States. He has  
17 had no disciplinary infractions in his 14 years. Former  
18 Guantanamo guards have contacted us asking to testify on his  
19 behalf at the PRB hearing. We know from senior officials in  
20 his home county, Mauritania, that they want him back.

21 There should be no security concerns about his  
22 release there. Just three weeks ago, the only other  
23 Mauritanian detainee at Guantanamo was released there. And so  
24 Mr. Salahi wants to put all of this and more before the PRB,  
25 and each day that he cannot do so -- each day he can't do so,

1 Your Honor, his despair grows.

2           With respect, Your Honor, to Executive Order 13567,  
3 as we've said, we think that that has the force of law because  
4 it is issued pursuant to the President's powers and in  
5 accordance with the Congressional statute, the AUMF. And it  
6 is, therefore, mandatory. It also -- and I'll come to this as  
7 well -- it also implements the suspension clause requirement of  
8 a meaningful review of Law of War detention, it creates a  
9 protected liberty interest, and it recognizes -- and I think  
10 this is critical -- it recognizes and implements a key legal  
11 requirement for ongoing detention under the AUMF as informed  
12 by the Laws of War.

13           Now, the defendants don't truly contest that the  
14 Executive Order has the force and effect of law, nor do they  
15 dispute that they haven't complied with it. What they contest  
16 is whether Mr. Salahi can ask you to enforce this mandatory  
17 process so that it is timely for him.

18           As Mr. Ladin will explain, the D.C. Circuit made  
19 clear in the Aamer case, Aamer versus Obama, that this Court  
20 has broad habeas jurisdiction over claims brought by  
21 Guantanamo detainees that some aspect of their detention is  
22 unlawful. So we don't think we need a Private Right of  
23 Action, that's entirely beside the point. Mr. Salahi has the  
24 ability, through this Court's habeas jurisdiction, to ask you  
25 to order the Government to do what President Obama has



1 mandated it to do. And, Your Honor, I think it's critically  
2 important that the Executive Order, I think, represents the  
3 President's recognition that he is complying with  
4 international law. It doesn't have to create a new source of  
5 rights or an underlying right because that underlying right  
6 already exists. So, if I may, I'd like to discuss why we  
7 think that underlying right exists under the AUMF as informed  
8 by Law of War authority.

9           Your Honor, the Supreme Court, just as a starting  
10 point, the Supreme Court has held over and over again that the  
11 AUMF has to be informed by the Laws of War, it said so in  
12 Hamdi 2004, it said so in Hamdan in 2006, it said so in  
13 Boumediene in 2008.

14           The Laws of War clearly require that for people who  
15 are not POWs, prisoners of war, there must be periodic review  
16 in order to ensure that ongoing detention for security  
17 purposes is warranted. And I think two points here. One is  
18 that critically in the Hamdi case, as far back as 2004, when  
19 the United States was unquestionably engaged in active  
20 hostilities in Afghanistan, Justice O'Connor warned, even  
21 then, that the traditional understandings of the Laws of War  
22 that inform detention authority under the AUMF could unravel  
23 if this war turned out to be unlike any other in duration.

24           We're now here 11 years later. This claimed war  
25 authority has lasted longer than World War II, it's lasted

1 longer than Vietnam, and that's why, in addition, we think  
2 that Mr. Salahi has a Law of War entitlement to a prompt  
3 hearing to make his case for release.

4 Now, there are a number of --

5 THE COURT: What in international law is the best  
6 authority for saying periodic review is required by  
7 international law?

8 MS. SHAMSI: Your Honor, there's both treaty  
9 authority and there's customary international law authority.  
10 Treaty authority under the Geneva Conventions relevant to  
11 civilian persons. There's also authority under customary  
12 international law interpretations of Common Article 3. And  
13 the weight of authority -- international authority, including  
14 from the authoritative ICRC, says that there is in fact a  
15 requirement for timely review to ensure that detention is  
16 warranted.

17 But I think in order to answer your question a  
18 little bit more fully, I'd like to clear away some of the  
19 underbrush that might have been created in the briefing.

20 We and the defendants agree that the law that  
21 applies here is the law of non-international armed conflict,  
22 meaning when a conflict is between a nation state and an armed  
23 group. We agree that the law in this area is not as  
24 well-developed. For the purposes of this motion, we agree  
25 with the Government, and now I'm quoting from their March 2009

1 Memorandum on Detention Authority to this Court.

2           For the purpose of this motion, we agree, quote:  
3 Principals derived from Law of War rules governing  
4 international armed conflicts must inform the interpretation  
5 of the detention authority that Congress has authorized. We  
6 also agree with the Government, for the purposes of this  
7 motion, that the AUMF is informed by the Laws of War, which  
8 include, and again I quote: A series of prohibitions and  
9 obligations that have developed over time and that have either  
10 been codified in the Geneva Conventions or are customary on  
11 international law.

12           We also agree with the Government, Your Honor, that  
13 it is invoking analogous rules to inform AUMF authorities to  
14 justify detention under the end of hostilities. And those  
15 analogous rules, Your Honor, come from Geneva Convention III,  
16 which applies for prisoners of war. But, of course, the  
17 government hasn't accorded prisoner of war authority to  
18 anyone, it's by analogy and that has been recognized by the  
19 courts.

20           What we're saying is that the same Law of War rules  
21 that inform the Government's authority to detain also contain  
22 safeguards against arbitrary ongoing detention. So, Your  
23 Honor, we're using "inform" in exactly the same way that the  
24 Government is. And, as I said, there are analogous Law of War  
25 rules that inform whether ongoing detention is warranted.

1 Geneva Convention IV, applicable to civilians --  
2 and I'll just footnote here, Your Honor, that the use of the  
3 term of art "civilian" or any other term shouldn't be a  
4 distraction. Geneva Convention IV applies to people who are  
5 held in security internment, which is the closest analogy that  
6 we have for Mr. Salahi here.

7 And Article 43 of the Fourth Geneva Convention says  
8 that people subject to security internment shall be entitled  
9 to have that action reconsidered as soon as possible by an  
10 appropriate court or an administrative board. And ongoing  
11 detention must be reviewed periodically and at least twice  
12 yearly. That requirement, Your Honor, is reflected in the  
13 Executive Order.

14 Under the Government's approach there is only  
15 cherry-picking. The Government seeks to apply only the most  
16 permissive aspects of the Geneva Conventions while seeking to  
17 ignore what it acknowledged earlier that there are also  
18 obligations. And that's problematic both because of the  
19 framework that is rendered illogical. But it's also  
20 problematic because it renders this entire framework scheme  
21 arbitrary in the Government's favor.

22 The Government, again, claims the authority to  
23 detain until the end of hostilities applicable to POWs, but  
24 disclaims that it has an obligation that is enforceable that  
25 requires ongoing review. But that obligation, I think, is

1 reflected in the Government's -- in the Department of  
2 Defense's own Law of War Manual in Section 8.142, which says  
3 that there must be prompt initial reviews as well as ongoing  
4 review.

5           And I think that it's also important to take into  
6 account the admonishment or the recognition or the concern  
7 that Justice O'Connor in plurality had that as detention goes  
8 on, there must be a way, consistent the Laws of War to account  
9 for whether it is legitimate and serves any lawful purpose  
10 whatsoever.

11           Your Honor, if you have questions about that --  
12 I think one thing that might -- the Government has cited  
13 various different cases in this circuit that it has said seek  
14 to limit this Court's jurisdiction. And I think in that  
15 context I would just say that a number of cases, including  
16 ones that you have yourself decided, Your Honor, such as  
17 Warafi, were older cases. And whatever might have been true  
18 in 2009 and 2010, surely must be very different now in 2015,  
19 otherwise, the Supreme Court's recognition that authority may  
20 unravel would never be tested or heard by any court.

21           Most recently, I think the D.C. Circuit said in  
22 Ali -- in the Ali case in 2014 -- again, that detention may  
23 last for duration and that the judiciary's role is not to  
24 devise a novel standard. But for that particular sentence or  
25 couple of sentences, the D.C. Circuit cited to Hamdi, and

1 Hamdi already said what I have conveyed to you, Your Honor,  
2 that the traditional understanding may unravel.

3 THE COURT: I take it the precise question before  
4 me has not yet been presented to any other judge; is that  
5 correct?

6 MS. SHAMSI: That's my understanding, Your Honor.  
7 We haven't seen any issue coming up before anyone else. So,  
8 Your Honor, I think, you know, just to be very, very clear, we  
9 think you have the authority with this jurisdiction to order  
10 this relief under the Executive Order under the AUMF as  
11 informed by the Laws of War. We also think you have the  
12 authority under the Constitution, under the suspension clause  
13 in the due process clause.

14 And I think, you know, at a very fundamental level,  
15 that's because in every single context in which the Executive  
16 seeks to hold people without charge, there's a key question,  
17 constitutional question, which is: Is that detention  
18 necessary? And I think that the PRB is set up to answer that  
19 question.

20 So if you rule for us, either under the Executive  
21 Order or under the AUMF as informed by the Laws of War, you  
22 don't need to reach the constitutional questions. But we  
23 still -- I just want to take a couple of minutes to talk about  
24 why they still matter and why we still have these  
25 constitutional rights.

1           And I think at the heart of the suspension clause  
2 analysis is what the Supreme Court said in Boumediene, which  
3 is that detainees have to have a meaningful opportunity to  
4 demonstrate that he is, quote, being held pursuant to  
5 erroneous application or interpretation of law. And we think  
6 that it would be erroneous interpretation of law to say that  
7 Mr. Salahi's detention can go on without any kind of review of  
8 whether it serves a lawful purpose, for the reasons that I've  
9 talked about with respect to both the AUMF and international  
10 law.

11           Hamdi, very importantly, to summarize it, the  
12 Supreme Court made clear that detention authority is not  
13 static. That, in fact, even for people captured on the  
14 battlefield it may at some point unravel. And, of course,  
15 Mr. Salahi is not in that position. Critically, Your Honor,  
16 Boumediene -- the Supreme Court in Boumediene, tied the length  
17 of detention to the scope and timing of meaningful review in a  
18 case in which the detainee had been held for less than half  
19 the time that Mr. Salahi has been held.

20           And the Court was concerned in that case that six  
21 years had passed without judicial oversight through habeas or  
22 an adequate substitute. And the Court rejected the  
23 Government's argument that it should follow the Defense  
24 Department's time line or a DTA process, and said ultimately  
25 that the costs of delay can no longer be borne by those who

1 are held in custody. And as time goes on, we think, the  
2 suspension clause imposes greater requirements, which is why  
3 again we're here before you today. We think that you can  
4 provide that hearing through the process that the Government  
5 has set up itself, a timely and prompt requirement. But,  
6 again, you don't need to reach that question if you provide it  
7 in another context.

8           Your Honor, do you have questions about my  
9 suspension clause argument or may I address the due process  
10 clause briefly?

11           THE COURT: No, but I'm curious as to the  
12 petitioner's position of -- if the Government is willing to do  
13 this with other detainees and the President has mandated it in  
14 the Executive Order, what is the petitioner's, I guess,  
15 expectation of why the Government is standing here before me  
16 today doing this?

17           MS. SHAMSI: Respectfully, Your Honor, I hope you  
18 will ask the Government --

19           THE COURT: I will.

20           MS. SHAMSI: -- that question. We've done  
21 everything we can. We've asked repeatedly. I think you have  
22 before you Ms. Hollander's declaration that sets forth the  
23 correspondence. I think part of the Government's argument is  
24 that this is a discretionary process. Mr. Salahi has no right  
25 to it. That this Court does not have habeas jurisdiction.



1 And we're answering all of those questions, but to us and to  
2 anyone else in Mr. Salahi's shoes, not here before you, but I  
3 don't think it should trouble you that there are people other  
4 people in his shoes, this is a black box. The Government  
5 hasn't provided any information, and it is now four years  
6 later.

7           And just on that point, Your Honor, I'm reminded of  
8 what Judge Hogan did back in 2008 after the Supreme Court  
9 ruled in Boumediene and he set a schedule once he had been  
10 assigned to coordinate all of the cases, and he set a schedule  
11 mandating 50 returns a month and so on. And the Government  
12 came to him after a period of -- on the eve of the deadline,  
13 and said, we can't do it, making arguments -- potentially very  
14 similar to arguments that they may make before you today.  
15 Difficult time constraining, you know, sensitive national  
16 security information, the range of arguments.

17           And Judge Hogan said, I'm going to give you that  
18 one extension. Right? And he did that. This was just a  
19 period of months. But the Supreme Court has instructed me, he  
20 said, that the detainees cannot bear the cost of delay. And  
21 he held the Government's feet to the fire and he set a  
22 schedule and he set regular status hearings. In that case it  
23 was a matter of months, involving many hundreds of men. In  
24 this case we're talking about four years.

25           Your Honor --

1 THE COURT: I did have one other question.

2 MS. SHAMSI: Sure.

3 THE COURT: I did not go back and read either the  
4 Court of Appeals opinion or see what happened after the  
5 remand, but I take it that I could, on remand, address the  
6 merits of the question and then all of this wouldn't matter?

7 MS. SHAMSI: It's true, you could.

8 THE COURT: But it may be to the petitioner's  
9 advantage, as I've seen in other cases, to not have the Court  
10 do that because that's a final way that may be harmful to the  
11 petitioner's interest in trying to get a transfer to another  
12 country if the Court makes certain findings. Am I off base  
13 there or --

14 MS. SHAMSI: Well, let me break that down a little  
15 bit, Your Honor, which is that you have pending before you a  
16 couple of motions, both from the Government and from us. And  
17 I'll talk about what I'm able to know about them because  
18 aspects of them are not public, so I can only talk about --  
19 and my security-cleared counsel, Ms. Hollander, might address  
20 the rest.

21 THE COURT: All right.

22 MS. SHAMSI: But essentially, Your Honor, the  
23 Government sought -- it filed a motion with you for expedited  
24 judgment essentially asking for two bites at the apple. That  
25 if we can show, they say to you, based on the limited amount

1 of information evidence, that Mr. Salahi is detainable, then  
2 that's what we'd to do, but if we lose, then we'll have a full  
3 merits hearing. And we had opposed that because we don't  
4 think it's fair. Fundamentally, we don't think it's fair for  
5 the Government to have two bites at the apple. And we also  
6 opposed it because it would be devastating to Mr. Salahi, who  
7 continues to suffer PTSD from his torture, to have to go  
8 through that again. And we also asked you for discovery  
9 related to his merits case and related to the Government's  
10 motions.

11           Your Honor, those motions have been pending for  
12 three years now, so if and when we get a ruling on those  
13 motions, and we hope, obviously, that you'll rule against the  
14 Government and allow for a full merits proceeding to go  
15 forward, then we think both the merits proceeding could go  
16 forward, so could this Executive Branch process. And we  
17 don't -- and I just want to make sure I'm distinguishing  
18 between the two for you so that I'm not creating any  
19 confusion. The issues before the Court in Mr. Salahi's  
20 separate proceeding is whether his initial detention was  
21 lawful.

22           THE COURT: Right.

23           MS. SHAMSI: And we've argued that it isn't. We  
24 think for the same reasons that Judge Robertson ruled for us  
25 in 2009, even under the Circuit Court's new standard, we think

1 and hope we will prevail. And we're ready for that case to go  
2 forward. But, separately, there is a process that the  
3 Executive has established to determine whether, even if that  
4 initial detention was justified, is this ongoing detention  
5 lawful? And that's the separate issue that we are here before  
6 you asking you to order.

7 THE COURT: I understand.

8 MS. SHAMSI: So, Your Honor, very quickly, with  
9 respect to the due process clause, we think, at a very  
10 fundamental level, this follows from Boumediene. We think  
11 that the Boumediene test for extraterritorial application is  
12 met here because there are no additional economic or  
13 procedural burdens that the Defense Department would have to  
14 face beyond what it's already having to face, providing a  
15 hearing, attending these habeas proceedings. Nor would a  
16 timely and prompt PRB interfere with the military mission or  
17 cause any friction with any other government.

18 Now, the Government has said, and there are in fact  
19 D.C. Circuit cases in which there is language to the effect  
20 that the due process clause does not apply at Guantanamo, and  
21 I'm talking about Kiyemba and a couple of cases of yours, Your  
22 Honor, subsequently, that have followed Kiyemba. And I want,  
23 if I may, talk about why this case is different.

24 THE COURT: Okay.

25 MS. SHAMSI: First of all, Your Honor, I think

1 Kiyemba presents a different factual context as well as a  
2 different set a legal issues. In that case the issue was the  
3 detainees seeking an order compelling their entry into and  
4 release into the U.S, and as the Circuit Court put it, doing  
5 so outside the framework of immigration laws. That's not what  
6 Mr. Salahi seeks here.

7 I think what is also important is that the D.C.  
8 Circuit in Kiyemba never actually went through the Boumediene  
9 analysis, which obviously the Supreme Court requires. And, in  
10 our view, subsequent D.C. Circuit cases have narrowed Kiyemba  
11 to its fact. We think Aamer does that, a D.C. Circuit case  
12 back in 2014, which considered whether a challenge -- and I  
13 know you're familiar with this because you've dealt with a  
14 similar case, which contracted whether a challenge by  
15 petitioners, the right to be free from unwanted medical  
16 treatment could be heard in habeas.

17 The Court examined in detail, as you know, the  
18 Circuit Court examined in detail, as you know, whether the  
19 Government's force feeding of hunger striking detainees  
20 violated a liberty interest. And it is hard to see where that  
21 liberty interest would come from, if not from the due process  
22 clause.

23 And I think that if the Court in that case had  
24 agreed with the Government's reading of Kiyemba, the one that  
25 it's advancing before you here, it wouldn't have so carefully

1 analyzed the petitioner's claims. And it wouldn't have left  
2 to the District Court to determine whether force feeding  
3 procedures were necessary or warranted or not.

4           So we think that Kiyemba becomes limited to its  
5 fact. We also think that the D.C. Circuit's 2014 decision in  
6 Al-Bahlul points in the same way. I say that, Your Honor,  
7 because it was the most recent decision before the Circuit  
8 addressing the extension of constitutional protections to  
9 Guantanamo detainees. And it is telling there that in the  
10 en banc panel, Judge Henderson wrote separately to say that  
11 the Supreme Court's decision in Rasul barred extending the  
12 Fifth Amendment to Guantanamo detainees and, therefore, she  
13 reasoned, the ex post facto clause didn't apply to the  
14 military commissions.

15           But the majority of the en banc court disagreed  
16 with Judge Henderson. And I would point you, Your Honor, to  
17 Judge Kavanaugh's decision where he states that all of the  
18 seven judges on the en banc court for this case, five agree in  
19 light of Boumediene that the ex post facto clause applies at  
20 Guantanamo. And, respectfully, Your Honor, we think that that  
21 again also narrows Kiyemba, and that applies equally here,  
22 where there is no reason that the Boumediene test with respect  
23 to the application of the due process clause to Mr. Salahi, in  
24 this particular instance and broadly, that that test cannot be  
25 met -- that that test cannot be met here.

1           And I note, Your Honor, that in some of your cases,  
2 in Rabbani, for example, you've addressed these issues.  
3 You've withheld final decision. But I think here in this  
4 instance, for the reasons we've talked about, we do think --  
5 we strongly believe that Mr. Salahi has due process rights.  
6 But, again, I will end by saying that you don't have to find  
7 for us on the constitutional claims if you find for us on the  
8 others.

9           THE COURT: All right.

10          MS. SHAMSI: Your Honor, unless you have questions.

11          THE COURT: Now, there's an en banc hearing set on  
12 a commission case; is that right?

13          MS. SHAMSI: Al-Bahlul. But I believe it addresses  
14 a separate question going to Article 3 authority.

15          THE COURT: So it doesn't have any relevance here?

16          MS. SHAMSI: I don't believe so, no.

17          THE COURT: Thank you.

18          MS. SHAMSI: Thank you, Your Honor.

19          THE COURT: Good morning.

20          MR. LADEN: Good morning, Your Honor. I'd just  
21 like to briefly address the Government's jurisdictional  
22 objection. The Government basically argues that because the  
23 relief sought here is not necessarily an order that would  
24 immediately release or shorten Mr. Salahi's confinement, that  
25 it's beyond this Court's habeas jurisdiction.

1           Your Honor, the Government's argument is wrong.  
2 It's wrong for three reasons. First of all, Mr. Salahi, as  
3 Ms. Shamsi just explained, is arguing here about a lawful  
4 requirement for his detention, and as such, this is a core  
5 habeas claim, as I'll explain. But beyond that, Your Honor,  
6 the D.C. Circuit's decision in Aamer makes very clear that the  
7 Government's very limited view of this Court's habeas  
8 jurisdiction is incorrect.

9           And, finally, Your Honor, even if there were a  
10 narrow limit on what this Court could order in habeas, this  
11 Court's conditionable release authority would still cover the  
12 type of release sought here.

13           So, Your Honor, I think the reason that the  
14 Government might be confused about this Court's habeas  
15 authority is because it draws on a series of cases that arise  
16 in the criminal context. But this is the executive detention  
17 context. And as the Supreme Court and the D.C. Circuit have  
18 made clear over and over and over, habeas is broadest in cases  
19 of executive detention. The Supreme Court told us that in  
20 *INS v. St. Cyr*, they told us then in *Boumediene* and the D.C.  
21 Circuit told us then in *Aamer*.

22           THE COURT: Remind me what *Aamer* was again.

23           MR. LADEN: Sure. *Aamer v. Obama* was a case  
24 involving force feeding. In that case --

25           THE COURT: Okay. Okay.



1           MR. LADEN: And I'll get to that case. But I think  
2 perhaps the case that is most closely analogous here and most  
3 easily shows the flaw in the Government's argument is  
4 INS v. St. Cyr. So that's a case in the executive context.  
5 That is a case of immigration detainee. In INS v. St. Cyr,  
6 the relief sought by petitioner was extremely similar to the  
7 relief that Mr. Salahi seeks here, that the Government argues  
8 is not available.

9           The petitioner there was asking for access to a  
10 process. For the right to be considered, in that case, for  
11 discretionary release. It was under an immigration program  
12 called 212C, it's not relevant here, but the fundamental point  
13 was the petitioner did not come to the Court, and say, I need  
14 to be released.

15           THE COURT: Right.

16           MR. LADEN: What he said was, the Executive is  
17 failing to consider me for release and that is a violation of  
18 my rights. And the Government argues --

19           THE COURT: They're holding me in custody, so I can  
20 do it in habeas.

21           MR. LADEN: Exactly right. Exactly right. And the  
22 Government there, just as it does here, told the Court, well,  
23 that's not within the core of the Court's habeas authority.  
24 And that case, in fact, involved the real historical core of  
25 the Court's habeas authority. The Supreme Court was

1 evaluating the writ as it existed in 1789 because it was  
2 looking under the suspension clause. And as I'll explain in  
3 just a moment, here your authority is much broader than that.

4 But even under that very, very limited suspension  
5 clause authority, the Supreme Court said that there was no  
6 obstacle to the fact that both the petitioner and the  
7 Government agreed that there was lawful authority to hold the  
8 petitioner, and that both of them agreed that the Executive  
9 was refusing to exercise its discretionary authority.

10 What the Supreme Court said is that that failure to  
11 exercise discretionary authority was independently actionable  
12 under habeas and that it had been for decades. They cited an  
13 old case, *Accardi*, that showed that. And then the Supreme  
14 Court evaluated the petitioner's claim, and in fact ordered  
15 that he be provided with the process that he sought.

16 *St. Cyr* is still the law, Your Honor. And the  
17 thing that's really critical to realize is that the cases the  
18 Government cites instead in the criminal context, they don't  
19 purport to limit habeas in any way. So the Government cites a  
20 series of cases that arise in what's called the habeas  
21 channeling context those involve criminal detention where the  
22 scope of the writ is much narrower because you've already had  
23 a judicial sentence, you've already had a judicial finding of  
24 guilt. And then there's all these protections already set up  
25 in the system for you.

1           So for those particular people, there's still a  
2 question when they raise claims that lie at the very core of  
3 habeas, whether those claims must be brought in habeas or  
4 whether they may be brought permissively under a civil rights  
5 statute.

6           What the Government has repeatedly tried to do from  
7 those cases is discern a principle that says that habeas  
8 jurisdiction is limited in the same way that those habeas  
9 channeling cases limit civil rights cases -- limit civil  
10 rights actions. And on this point, they site a case called  
11 *Wilkinson v. Dotson*, a concurrence by Justice Scalia in that  
12 case. And then a separate Supreme Court case called *Skinner*,  
13 and the D.C. Circuit's case in *Davis v. Sentencing Commission*.

14           Your Honor, if there were any doubt raised by  
15 those habeas channeling cases as to whether a claim like  
16 Mr. Salahi's was available under habeas, the D.C. Circuit's  
17 decision in *Aamer* extinguished that doubt and it extinguished  
18 it in two ways. First of all, it emphasized the proper way in  
19 which to read those habeas channeling cases. The D.C. Circuit  
20 said over and over -- so in *Aamer*, Your Honor, which is a  
21 conditions of confinement case --

22           THE COURT: Uh-huh.

23           MR. LADEN: -- so the petitioner was held at  
24 Guantanamo, came through habeas to the Court, and said, the  
25 conditions of confinement that have been placed upon me

1 violate my rights, and I'd like the Court to evaluate that.  
2 The Government said the exact same thing it's saying here.  
3 It said: You cannot challenge in habeas any claim that is a  
4 part from either the fact or duration of confinement. They  
5 even cited the same passaging from Wilkinson v. Dotson in  
6 their briefing to the D.C. Circuit in Amer.

7           The D.C. Circuit conclusively rejected that, and it  
8 said two things. It said, first of all, you can't read those  
9 cases that way. None of those cases purport to set the limits  
10 of habeas. They are all civil rights cases. They all just  
11 check to see whether it's a core habeas claim and, therefore,  
12 must be brought in habeas. But none of them purport to limit  
13 habeas to those core claims.

14           So they rejected entirely a reading of the habeas  
15 cases that suggest that they place limits. And that's  
16 entirely in accord with the Supreme Court's own statement in  
17 those cases, all of which say, we're evaluating only the civil  
18 rights claim. All of which say they don't move the line on  
19 habeas in any way. But, second, and this is maybe even more  
20 critical, the D.C. Circuit said, it doesn't even matter if it  
21 is a core habeas claim, fundamentally, because we're not in  
22 the suspension clause universe here that we were in St. Cyr.

23           We're now looking at Guantanamo where the writ of  
24 habeas -- the statutory writ, 18 U.S.C. 2241, applies in its  
25 entirety. So there's no limitation to core claims. And the

1 Court said, sure, conditions of confinement claims, they  
2 wouldn't be actionable at the historical core of the writ.  
3 But that's irrelevant, they are available in full to  
4 Guantanamo detainees, and that's because the writ has, as the  
5 Court said in Rasul, statutory habeas has expanded over the  
6 past 200 years far beyond the writ as it existed in 1789.

7           So even if this were -- even if St. Cyr did not  
8 make it abundantly clear that a question about entitlement to  
9 a process for someone in executive detention was core habeas,  
10 this would still be well within the scope of writ as the Amer  
11 court recognized.

12           And the last thing on that point, Your Honor, is  
13 that it's very telling that the Government doesn't cite  
14 D.C. Circuit authority for restricting habeas, instead, it  
15 cites a Ninth Circuit case called Nettles. Your Honor, it's  
16 true that Nettles supports their view, but the Nettles  
17 majority itself acknowledged that it was incompatible with the  
18 D.C. Circuit authority. They cite Amer. They say that Amer  
19 got it wrong.

20           What Nettles said is conditions of confinement  
21 claims do not spell speedy release, so they are categorically  
22 unavailable in habeas. That position is 100 percent  
23 incompatible with the way the D.C. Circuit reads the habeas  
24 power, that that Amer is the one that is controlling here.

25           Finally, Your Honor, just very, very briefly.

1 The D.C. Circuit has been abundantly clear that it doesn't do  
2 formalistic line drawing with habeas. That habeas is a broad  
3 remedial power that's available to courts to do justice when  
4 someone is being held, particularly in executive detention.

5           That said, if this Court were to agree that there  
6 was some limit on its ability to order an injunction to force  
7 the Government to comply with its own legal obligations for  
8 holding Mr. Salahi, there's still, beyond an injunction, a  
9 very clear path for a remedy for this Court, and that's that  
10 this Court, as we explained in our brief, can order  
11 conditional release. Conditional release is not an immediate  
12 release, it just says that the Government must comply with the  
13 particular condition or else release will be ordered. And the  
14 Court has made clear that's appropriate in Aamer and  
15 Boumediene. And if this Court finds that there is a  
16 limitation on its remedial power, it should order it through  
17 that process.

18           THE COURT: Okay.

19           MR. LADEN: If there are no questions, Your Honor,  
20 thank you.

21           THE COURT: All right. Ms. Hollander.

22           MS. HOLLANDER: Good morning, Your Honor. Thank  
23 you for allowing us to break this up. I have the task of  
24 talking a little bit about the facts here, now that my  
25 co-counsel have explained the law.

1           And I want to explain -- I want to talk about the  
2 issues we've raised that Mr. Salahi still does not have all of  
3 his legal documents and why that is, and his other property.  
4 And I have to go back a little bit. I've represented  
5 Mr. Salahi since 2005. And for the past several years I've  
6 always visited with him in his cell where he lives. So  
7 although I can't describe all of it, I did describe it to the  
8 Court in the classified pleading declaration.

9           After they no longer tortured him, they started at  
10 GTMO to try to rehabilitate him. And one of the ways they did  
11 that was they left the computer that they had brought for  
12 interrogation purposes with him, and it was actually one of  
13 his interrogators who gave him his first programming book so  
14 that he could continue to use it. As the years went on, he  
15 recovered to some extent. He recovered psychologically. He  
16 recovered physically. He became friends with his guards.  
17 They would come and watch TV with him. Things in terms of his  
18 imprisonment got much easier.

19           Then all of a sudden, for reasons only known to  
20 Guantanamo and perhaps to the Government, in October they  
21 decided to move him. Now, of course, they can make that  
22 decision, but no one told him why. No one told him what was  
23 happening. They simply came in and moved him and terrorized  
24 him. He was absolutely terrified that this was because they  
25 thought he had done something wrong.

1           Because when they moved him they took everything  
2 away from him. All of his years of family photos. Years of  
3 letters from his family that he read over and over again.  
4 They took all of his books, many of which we had bought him  
5 over the years. Books that the guards had dedicated to him.  
6 They took the computer. They moved him to a different place.

7           Now, the other problem that happened at that time  
8 besides the fact that he was terrified and they didn't bother  
9 to tell him why, and we've heard different reasons why, it  
10 doesn't really matter, that's a prison decision. I've seen  
11 his new cell, it is somewhat smaller, but not that much  
12 smaller. But at the same time, it appears quite clearly that  
13 they took all of his legal documents which he had, and the  
14 nonlegal documents and some other documents that, through an  
15 agreement we have had with DOJ, the guards would hold and he  
16 could ask for and then take back but were not to be left with  
17 him, they just dumped them all together. It wasn't  
18 inadvertent, it was intentional, or at the very least  
19 negligent.

20           So then he kept asking for them and not getting  
21 anywhere. At the same time, a one point, they brought him  
22 three envelopes. And the three envelopes clearly read: Do  
23 not leave with the detainee. And he panicked again because he  
24 thought they were trying to set him up. And he kept asking  
25 that they take them back. We asked that they take them back,



1 for months.

2 Well, it wasn't until after we filed our reply that  
3 they brought him what they said were all of his legal  
4 documents. Now the problem then is that that was after  
5 Colonel Heath's declaration, which was just false, because his  
6 declaration says he has them all. After we showed that that  
7 was false, it's somewhat inconceivable to me that the  
8 Government is still relying on it, but they are, they then  
9 brought him the legal documents and gave him some time to look  
10 through them but he didn't have time to completely look  
11 through them.

12 So that's one problem. But that's how this all  
13 started. So let's go to now. And we have their status report  
14 that they filed --

15 THE COURT: That's one reason I set this for a  
16 hearing because it looked to me like there was a factual  
17 dispute and I was going to need to take testimony, but you  
18 can -- in light of the new filing by the Government, I don't  
19 know if that's now correct or not.

20 MS. HOLLANDER: Well, Your Honor, you are correct  
21 that there's a factual dispute, and it's actually between  
22 Colonel Health, Andrew Warden from DOJ and from me, because  
23 I'm the one who's been there. And some of it is in the  
24 classified pleading, but some of it we can talk about. The  
25 Government, in their status report, still relies on Heath's

1 declaration, the unclassified version, and relies on a  
2 September 2014 e-mail from Andrew Warden at DOJ, but they're  
3 completely inconsistent.

4           Mr. Warden says that Mr. Salahi would have two  
5 bins. And I brought a bin, and you probably don't want to  
6 make it an exhibit, but I did want to show it to Your Honor.  
7 They keep referring to these as 15-quart bins, and that is  
8 what it is. But it's not holding water, it's holding  
9 documents, and it doesn't hold very many. I just think it's  
10 important to visualize what it is they're talking about.

11           So Mr. Warden says in his e-mail, that the  
12 Government attaches as its Exhibit C -- I'm sorry --  
13 Exhibit B. Every detainee will get two 15-quart plastic bins  
14 and an unlimited number of additional ones. And no JTF  
15 personnel will have access to them, there will be some special  
16 people. And they will also get them, if they want, they can  
17 have two in their cell, and if they want more they will be  
18 replaced and it shouldn't take more than 48 hours.

19           Colonel Heath says they get one bin and a maximum  
20 of four. Well, he's the one in Guantanamo. Now, if they get  
21 a maximum -- if he has as a maximum of four of these bins,  
22 what have they done with the rest of his documents -- because  
23 we have 10 years' worth of litigation. Mr. Salahi writes all  
24 the time. He writes on the pleadings. He writes a couple  
25 pages of notes when we go to see him so he'll remember. He

1 writes notes when we leave.

2 I suspect his notes alone would fill a bin. But he  
3 also writes all over the documents. And we're concerned now  
4 because they still have not provided his notes. After  
5 September, when we still didn't have everything, Mr. Patton  
6 requested that when I go to Guantanamo, which I did  
7 October 13th and 14th, that I ask Mr. Salahi to make a  
8 specific request, that his requests were too general. I want  
9 my books, I want my legal pleadings. So we did. And I helped  
10 him write them.

11 He requested his notes. He requested two specific  
12 books, a programming book that we had bought him when he  
13 finished the one his interrogator gave him, and another book  
14 called Grace and Gravity, and that was a book that a guard had  
15 dedicated and written in for him. Now, he was told by the  
16 administration in Guantanamo that the books that were taken  
17 out of his cell were all in the library, that the new  
18 administration -- it used to be that we could give books to  
19 our clients, now you give them to the library, that he just  
20 had to ask for them.

21 When he asked for them, it was on October 14th.  
22 I have a letter here that I brought with me, that is  
23 unclassified, from November 5th, which just came into  
24 Washington a few days ago, saying he's had no response to  
25 either request. The Government says: Well, there are a few

1 notes missing. We're not talking about a few notes missing.  
2 And my other concern is where were they for 11 months and who  
3 was going through them? Because Colonel Heath says, well,  
4 it's now difficult to figure out what's privileged and what  
5 isn't because they lumped them all together. So somebody is  
6 going through them, and my concern about that is not just  
7 because I think it.

8           When they brought the documents in September,  
9 Mr. Salahi went through as many as he could, but he didn't get  
10 through all of them. They left them there for a long time but  
11 there are a lot of documents. He kept one to show me, and  
12 it's a binder, and I saw it in October. In the middle of this  
13 privileged binder was a piece of paper stuck in it. That  
14 piece of paper is a form, it's a police or government form for  
15 chain of custody. What is it doing in the middle of  
16 privileged documents? I didn't put it there. My client  
17 didn't put it there. Somebody put it there. Somebody who's  
18 going through these.

19           It's very distressing to him and to me that we can  
20 no longer count on the privilege. And he's frightened. He's  
21 afraid to have anything in his cell now. And so that's the  
22 concern about the legal documents. I don't think that the  
23 Government's status report is accurate, and I'm concerned that  
24 they have two exhibits that are contrary to each other and  
25 that they're still relying on Colonel Heath who was patently

1 lying when he told them earlier that Mohammedou had everything  
2 when he didn't. So that's the issue with the legal papers.  
3 Does that make sense to Your Honor?

4 THE COURT: Yes. No, it doesn't make sense, but I  
5 understand what you're saying.

6 MS. HOLLANDER: It doesn't make sense, right, and  
7 that dog won't hunt, but it is what the situation is. And the  
8 other issue is the issue of his other property. We believe,  
9 and my co-counsel has argued, that the prison cannot just be  
10 arbitrary and capricious in the way that it deals with  
11 Mr. Salahi. Colonel Heath says in his declaration, well, we  
12 had to take things because he's in a smaller space. He is in  
13 a smaller space, but it's not so small, believe me, that he  
14 can't have the little box of photographs and letters, all of  
15 which have been cleared for years.

16 And now Colonel Heath says, well, he can ask for  
17 them and we'll see if they are appropriate. That to me is  
18 completely arbitrary. The fact that a guard dedicated a book  
19 to him ought to be his. And the fact that they took the  
20 computer -- the problem is that the way they are treating him  
21 now, for years he at least had something to do all day. He  
22 had his computer, he had his books, he had his letters.

23 Now, for reasons that are totally unclear, we  
24 believe they've lost some of them because they're not  
25 responding. The programming book they simply told him they

1 didn't have. They never inventoried his property. They told  
2 us how many books there were in their classified pleading, but  
3 they didn't ever make a list of them. And they're not  
4 responding to him. The other problem is, they wouldn't  
5 respond to me.

6 I was in Guantanamo -- and always in the past the  
7 SJAs have been very accommodating. If I had a question and  
8 I'd go in and say, can I speak to somebody, they could come  
9 usually to the camp. We'd sit down and talk about whatever  
10 the issue was. This time I made a request in writing, they  
11 denied it, but they came at night and saw him and he felt very  
12 threatened by that. What does your lawyer want? It's very  
13 threatening.

14 They've left him now with very little to do. He  
15 doesn't have his computer, he doesn't have most of his books.  
16 All he can do is watch Russian TV, which they have  
17 conveniently for him to watch. They even took away some of  
18 the TV stations because they were expensive. But what we're  
19 asking from this Court, to be very clear, is we want them to  
20 bring him all of his legal documents, everything -- everything  
21 they have. Maybe they should just bring everything and give  
22 him time to go through them, so it's not the SJA going through  
23 them.

24 We also asked the a privilege review team to go  
25 through them, and they said, no, it's not their problem.

1 So we want him to do it so that he can designate them, he can  
2 put them into the binders. And we would like -- I would like  
3 some lawyer to state under oath what happened to these legal  
4 documents. Who has gone through them? Where they've been.  
5 What they've done with them. Because Mr. Salahi has no  
6 confidence in his privilege anymore. And every day that goes  
7 by now we're back to the fear he had in 2004 and 2005.

8 He's back to being extremely depressed as a result  
9 of this. And he actually was afraid for us to have this  
10 hearing. And one of the reasons we didn't complain for  
11 several months at the beginning of the year was that he kept  
12 hoping he would get them back because he is afraid now of  
13 repercussions from this hearing.

14 THE COURT: Thank you, Ms. Hollander.

15 MS. HOLLANDER: Thank you, sir.

16 MR. FOLIO: Good morning, Your Honor. Joseph Folio  
17 for the Government. And just to let Your Honor know how we  
18 were going to divide the arguments as well. I'm going to  
19 address the issues regarding petitioner's motion for Periodic  
20 Review Board hearing, and my colleague, Mr. Patton, is going  
21 to address any and all issues regarding legal documents or  
22 other documents that Mr. Salahi claims he's deprived of.

23 THE COURT: Okay.

24 MR. FOLIO: With regard to the request for a more  
25 timely PRB hearing, I'm going to follow the order that

1 petitioner's counsel presented in her argument, but I'm happy  
2 to address any specific issues the Court has along the way, in  
3 order or out of order.

4           What petitioner is asking the Court for is an order  
5 regarding the sequencing of PRB hearings. And he's  
6 effectively asking that he receive a PRB hearing before every  
7 other Guantanamo detainee who is set to receive one.

8           THE COURT: That's not what he -- he just asked me  
9 for a date. He doesn't have a date. He didn't say he has to  
10 be put before anybody else. But the Government won't even say  
11 when they're going to do it.

12           MR. FOLIO: Your Honor, I think he's asked for two  
13 different things. So in his motion --

14           THE COURT: So I took it from that, a list would  
15 satisfy what he just asked me for.

16           MR. FOLIO: Your Honor --

17           THE COURT: A list of when he's going to be up.  
18 It's been four years. He wants to know when it's his turn.  
19 I think that's all he asked me for.

20           MR. FOLIO: Your Honor, that's what they have asked  
21 for today at the hearing, it's not how they framed the issue  
22 in their briefing.

23           THE COURT: I understand, but I'm going on what  
24 they asked me.

25           MR. FOLIO: That's fine.



1 THE COURT: What's wrong with giving him a date?

2 MR. FOLIO: I think what they're asking for, Your  
3 Honor, first off, is they're asking for unprecedented judicial  
4 intervention to the --

5 THE COURT: Well, I can't even get to the point  
6 whether I have authority to do it. If I have authority, what  
7 would be wrong with it? The President said it in his  
8 Executive Order. You get it once a year. He hadn't done it  
9 in four years.

10 MR. FOLIO: Right.

11 THE COURT: Why hasn't the President done it?

12 MR. FOLIO: To be clear, Your Honor, I think the  
13 enforceability of what they're asking for is a significant  
14 hurdle. I think to find in their favor on the legal issues --

15 THE COURT: I understand. I understand. I'm  
16 assuming I have jurisdiction. Assuming I have jurisdiction,  
17 explain to me what the Court would -- what you would say to  
18 the Court that had jurisdiction.

19 MR. FOLIO: I think just to be clear, not only  
20 jurisdiction, but there was an enforceable right under the  
21 Executive Order that there was some sort of due process  
22 that --

23 THE COURT: So he has no rights. That's your  
24 position. He has nothing.

25 MR. FOLIO: No. Our argument is that he has the

1 right to bring his habeas corpus proceeding, he's done that.  
2 That's the vehicle he's driving in right now.

3 THE COURT: Okay. But you won't argue just  
4 jurisdiction and tell me I have no power to even ask the  
5 question? That's what you want to tell me, right?

6 MR. FOLIO: Your Honor can certainly ask the  
7 question and I'll tell you -- I'll describe more about the PRB  
8 process and why the PRB is where it is. But as a matter of  
9 law, we're saying that he does not have an enforceable right  
10 for this Court to issue an order addressing anything about  
11 scheduling, whether it's making him first or requiring the  
12 Executive to publish something. This is far from the habeas  
13 proceedings that Judge Hogan presided over in 2008 and 2009  
14 after the Boumediene decision, because that decision found  
15 that detainees had a right to petition this court for habeas.

16 THE COURT: Right.

17 MR. FOLIO: Here what petitioner is trying to  
18 enforce is something he claims he has a right for under the  
19 Executive Order or under these other panoply of legal  
20 authorities he cites. The problem is, throughout the argument  
21 they're conflating these distinct legal issues and mixing them  
22 up and trying to come up with some sort of legal right that is  
23 contrary to establish precedent both from the Supreme Court as  
24 well as the Court of Appeals and contrary to decisions that  
25 Your Honor has made regarding, for example, the applicability

1 of the due process clause.

2           So with regard to the PRB and where the process is  
3 right now, that Executive Order was issued in 2011 and the  
4 process did not begin until October 2013. And the Department  
5 of Defense has explained along the way --

6           THE COURT: Why was that?

7           MR. FOLIO: The Department of Defense explained  
8 along the way, and we cited to the October 9th, 2013,  
9 Department of Defense press release in our briefing papers,  
10 that explained that working through these processes required  
11 the Government to address a number of complex issues  
12 associated with building a comprehensive process.

13           So to understand what the Executive Order required,  
14 it required the Executive Branch to establish an interagency  
15 process for the review of all of the detainees and to  
16 determine whether or not the detainee posed a threat to U.S.  
17 national security interests. That's a very different  
18 question, as counsel acknowledged, and what we're addressing  
19 in the habeas proceeding.

20           So the first step was to establish the process to  
21 allow that interagency review to occur. I'm sorry. The  
22 initial step was setting up the PRB process itself, which was  
23 set up through a Department of Defense memorandum which  
24 established what the PRB would do and how it would do it.  
25 Then for the PRB to undertake its work, it had to --

1 THE COURT: This is all supplemental to the review  
2 that Matt Olson and his team did?

3 MR. FOLIO: Correct, Your Honor. Just to be clear,  
4 it --

5 THE COURT: It had nothing to do with this because  
6 this is just setting up PRB reviews?

7 MR. FOLIO: It's a follow-on review, Your Honor.  
8 Just to be clear, I think throughout petitioner's argument  
9 they made the mistake of implying as if he's not receiving any  
10 sort of meaningful review from the detention. That could not  
11 be further from the truth. He continues to have the right to  
12 pursue his habeas case in this court, to argue that he is  
13 unlawfully detained.

14 In fact, two of the three reasons he said he needs  
15 his PRB hearing more immediately are reasons that he can raise  
16 in the habeas case. He argues his place of detention should  
17 somehow be considered or there's no lawful basis for his  
18 decision. Those are all arguments that he could raise in  
19 pursuing the habeas case. The PRB is focused specifically on  
20 whether or not a detainees continues to pose a threat for  
21 detention.

22 I'll just let Your Honor know the decisions that  
23 have been made about petitioner over the years have been,  
24 first, the initial decision to detain him. Second, the  
25 decision in 2004 by the CSRT that he was in fact a member of

1 enemy forces and therefore lawfully detained.

2           After the CSERT there were three ARB hearings,  
3 Administrative Review Board hearings that were established by  
4 the Bush Administration, that were effectively similar these  
5 PRB hearings and that they evaluated whether or not ongoing  
6 detention was lawful. He received three of those, and each of  
7 them decided that he was someone that should be detained as a  
8 member of al-Qaeda.

9           Then the task force review that Your Honor referred  
10 to occurred at the beginning of President Obama's  
11 Administration, and it also determined not only that he was  
12 lawfully detained, but it referred him and I think 35 other  
13 detainees for prosecution.

14           So petitioner has received numerous reviews over  
15 the year, and he also retains his ongoing right to pursue all  
16 of these claims in habeas. So, just to be clear, it is not as  
17 if petitioner languishes in Guantanamo without any legal  
18 recourse about the lawfulness of his detention or whether or  
19 not he poses a threat -- Guantanamo without any right to  
20 review.

21           And as I've noted before, he remains in line, like  
22 dozens of other detainees at Guantanamo, to receive a PRB  
23 hearing. So I think that one of the first points Your Honor  
24 raised is that we must look at what the Executive Order says,  
25 and I think that's very important. There are certain parts of

1 the Executive Order that we should tease out before begin the  
2 legal analysis.

3           Most important is at the end of the Executive  
4 Order, in Section 10, it says that the order itself was not  
5 intended to and does not create any right or benefit  
6 substantive or procedural, enforceable law or in equity by any  
7 party against the United States. Petitioner does not breathe  
8 one word in their brief today about that provision in the  
9 Executive Order.

10           The Executive Order also says that it establishes  
11 as a discretionary matter a process to review on a periodic  
12 basis the Executive Branch's continued discretionary exercise  
13 of existing detention authority in individual cases.  
14 Section 8 of the order says: The process established under  
15 this order does not address the legality of any detainee's Law  
16 of War detention. Again, the focus of the PRB is to determine  
17 whether or not a detainee poses an ongoing threat to the  
18 United States.

19           And one of the other fundamental reasons it would  
20 be problematic for the judiciary to intervene and to start  
21 setting schedules for this internal executive review process,  
22 is the fact that the review process is the way the Executive  
23 is determining whether or not individual detainees pose a  
24 threat to U.S. national security interests. The Supreme  
25 Court, as far back as *Ludecke*, said that determining a

1 detainee's potency for mischief is not the role of the  
2 judiciary.

3           So, in essence, they're asking you to intervene  
4 into the administrative processes and issue these orders and  
5 make these scheduling requirements in an area of law the  
6 Supreme Court has been quite clear, and I think the Court of  
7 Appeals in *Awad* has agreed, should be left to the discretion  
8 of the Executive.

9           Turning to the Executive Order itself, which  
10 petitioner's counsel has argued, provides a Private Right of  
11 Action. They argue that not only does it provide a Private  
12 Right of Action, but somehow it also implements the suspension  
13 clause. It creates some sort of liberty interest, which is  
14 going to due process, and it also implements requirements  
15 under the AUMF and international law.

16           Now, this is the perfect example of how their  
17 argument conflates very different legal concepts. Each of  
18 those needs to be broken out and dealt with separately. The  
19 Executive Order implements none of those. As I noted before  
20 when we were walking through the important sections of the  
21 Executive Order, it says: As a discretionary matter, it is  
22 establishing the periodic review. It said: As a  
23 discretionary matter, it is establishing the periodic review.

24           So the Executive Order itself did not say that it  
25 was doing it as a matter of law, but as a discretionary

1 matter. And the first question you have to ask, under the  
2 Executive Order, whether or not the Executive Order itself  
3 creates a privately enforceable right. There are two  
4 questions.

5           The first question was whether or not it's issued  
6 under statutory authority. We did not agree with petitioner's  
7 counsel that they had met that prong. Rather, in our brief we  
8 simply said, even assuming that first step had been met, we  
9 focused on the second step whether or not there was a  
10 privately enforceable right. And the important part of the  
11 Executive Order that says it creates no such rights, the part  
12 that was not mentioned by petitioner's counsel, has been  
13 dispositive.

14           And the Court of Appeals held in the Meyer case  
15 that an Executive Order that does not create any prior right  
16 is not subject to judicial review. The Court of Appeals also  
17 reaffirmed a similar decision in Women's Equity Action League,  
18 which we said it in our briefs, saying even indulging without  
19 approving the notion that the Executive can create a Right of  
20 Action, we find no evidence of an intent to create the one  
21 plaintiffs describe. In that instance the Executive Order did  
22 not contain the express disavowal of a Right of Private  
23 Action. Here, however, we have that.

24           And I think that if you look at a number of Court  
25 of Appeals cases that have -- and I think one case from the



1 District Court that have looked at Executive Orders that  
2 contain that express language, they each have upheld there's  
3 no Private Right of Action created under the Executive Order.  
4 So, bottom line, the petitioner cites to no case in which a  
5 court has ignored the express provisions of the Executive  
6 Order saying, there's no Private Right of Action here, to find  
7 that one does exist.

8           So I think breaking up the arguments, the next we  
9 should look at is the suspension clause argument. So in the  
10 suspension clause argument, a notable part of the Executive  
11 Order is Section 1.B in which it states that the detainees at  
12 Guantanamo have the constitutional privilege of the right of  
13 habeas corporate, and nothing in the Executive Order is  
14 intended to affect the jurisdiction of Federal Courts to  
15 determine the legality of their detention. The Executive  
16 Order suspends nothing.

17           And as the Court of Appeals found in Kiyemba,  
18 although it was a different challenge, the petitioner made a  
19 suspension clause argument, so long as the petitioner has the  
20 right to come to this court and pursue his habeas corpus case,  
21 there is no suspension of anything, let alone a suspension  
22 clause violation that justifies intervention into the internal  
23 review of the Executive and the PRB.

24           Turning to the due process argument made by  
25 petitioner. Again, petitioner faces an uphill battle. The

1 Court of Appeals in Kiyemba held that the due process clause  
2 does not apply to aliens detained at Guantanamo who have no  
3 property or presence in the sovereign territory of the United  
4 States.

5 That decision has been followed by a number of  
6 judges on this court, including Your Honor most recently in  
7 the Rabbani decision. And you described it in the Rabbani  
8 decision as wishful thinking on the part of the petitioner,  
9 that because this Circuit placed no such limiting  
10 qualifications on its assertion, that the due process clause  
11 does not apply to aliens like him. That's exactly the --

12 THE COURT: So how do you explain Aamer?

13 MR. FOLIO: Excuse me.

14 THE COURT: How do you explain Aamer then?

15 MR. FOLIO: How do we explain Aamer?

16 THE COURT: Right.

17 MR. FOLIO: When Aamer addressed this issue, Aamer  
18 assumed, without deciding anything, and that language couldn't  
19 be more important, again, it wasn't mentioned at all by  
20 petitioner's counsel. What petitioner's counsel is asking to  
21 do is to somehow look to Aamer and other cases, they point to  
22 Al-Bahlul, as implicitly overruling the direct clear guidance  
23 from the Court of Appeals, and that's not something this Court  
24 should engage in.

25 Again, the law cannot be more clear from Kiyemba,

1 and several members of this court have followed it in the  
2 Al-Rabanni decision, as well as the Al-Wirghi decision. Judge  
3 Huvelle in the Ameziane decision, and Judge Walton in the  
4 Boston decision.

5 And I think that the argument that somehow  
6 Boumediene, and this is their argument from Bahlul, somehow  
7 Boumediene addressed the extraterritoriality of more than the  
8 suspension clause. It is also something that has been  
9 squarely addressed by the D.C. Circuit in the Meyers decision.  
10 Not to mention --

11 THE COURT: In Boumediene, Judge Kennedy just said,  
12 we'll leave it all to the District Court, they can figure it  
13 out. They didn't do anything. Very helpful.

14 MR. FOLIO: He certainly did, Your Honor. But I  
15 think Boumediene itself was very focused like a laser on the  
16 suspension clause. So that decision should not be read to do  
17 anything more than it did there, and that's exactly what the  
18 Court of Appeals said in Myers, that it only addressed the  
19 suspension clause. So, again, the argument petitioner is  
20 asking you to accept is simply too much.

21 So turning to their final argument that they think  
22 is a source of rights for you to issue an order regarding the  
23 administrative procedures of the PRB, they point to the AUMF  
24 and international law. They effectively argue that because  
25 the Executive detention authority informed by the Law of War

1 principles, periodic review is required. But, again, they're  
2 asking you to do way too much and reading way too much into  
3 the law.

4           By their own terms, the third and the fourth Geneva  
5 Convention, only Common Article 3 applies to the armed  
6 conflict against the Taliban, al-Qaeda and their associated  
7 forces. What petitioner does is construct a false dichotomy  
8 between Geneva Convention -- the Third Geneva Convention,  
9 which addresses POWs, and the Fourth Geneva Convention, which  
10 addresses civilians. And they argue that, well, if he's not a  
11 POW, he must be a civilian. It's the same argument this Court  
12 considered in 2009 and rejected on the Government's detention  
13 authority briefing.

14           I think it was in the Hamiliy case that Judge  
15 Bates said, the Geneva Conventions do not award civilian  
16 status by default. And in Gherebi, Judge Walton said that  
17 such a result would cripple the states' ability to fight enemy  
18 forces in a non-international armed conflict.

19           As the Government pointed out in its March 13th,  
20 2009, detention authority brief, it's well-settled that  
21 individuals who are part of a private armed force but do not  
22 otherwise qualify for POW status because they failed to adhere  
23 to the Laws of War, should not qualify civilians by default.  
24 That simply makes no sense. It would undermine the  
25 fundamental purpose of the Geneva Conventions, which is to

1 afford privileges to combatants who follow the Laws of War.

2           So rather than this artificial distinction  
3 between the Third Geneva Convention and the Fourth Geneva  
4 Convention, and leaving no room in between, the key  
5 distinction is between combatants and civilians. And members  
6 of al-Qaeda certainly were combatants.

7           Petitioner's next argument was that Common  
8 Article 3 somehow requires periodic review. Again, this  
9 simply reads too much into Common Article 3, and it  
10 effectively makes Common Article 3 a backdoor for the Fourth  
11 Geneva Convention and all these other international law  
12 principles. Your Honor asked what the best international law  
13 authority they had, and they mentioned treaties, but the  
14 treaties directly on point, as I just explained, the Geneva  
15 Conventions tell you exactly what should be provided.

16           And each time petitioner, in their brief, cites  
17 to law that should apply to the interment of people, that's  
18 law that applies to civilians under the Fourth Geneva  
19 Convention. And when they talk the periodic review, that was  
20 a review that was provided again to civilians who were  
21 detained for security purposes, which might otherwise  
22 evaporate, given the passage of time, as opposed to enemy  
23 forces who can be detained, as the Court of Appeals has held,  
24 for the duration of act of hostilities.

25           And the last argument, I think, they made on the

1 international law front, Your Honor, was that somehow the  
2 circumstances the Supreme Court referenced in Hamdi of  
3 detention authority unraveling have been met. But I think,  
4 simply, Your Honor's recent decision in Al-Warafi, which was  
5 from July 2015, as well as Judge Kollar-Kotelly's decision in  
6 Kandari, rejected those arguments, and said, those conditions  
7 just haven't been met today. The U.S. continues to be  
8 engaged in acts of hostilities. And if there is a time of  
9 unravel, it certainly is not today.

10 Unless Your Honor has any questions on the  
11 Executive Order, I was going to turn briefly to the  
12 jurisdiction argument and then turn the podium over to my  
13 colleague, Mr. Patton.

14 THE COURT: I will ask you to same question I asked  
15 the petitioner. Why is it that the President has not done  
16 anything about setting this for a determination? All you want  
17 to say is "national security"?

18 MR. FOLIO: I'm sorry. Setting --

19 THE COURT: Well, I asked them: Why do they think  
20 the President hasn't done anything to ensure that his  
21 Executive Order is carried out? Why hasn't DoD done anything  
22 to get this scheduled? And they said they can't figure it  
23 out; ask the Government. So I'm asking the Government.

24 MR. FOLIO: I think it would be an unfair  
25 characterization to say the Executive is not doing anything to

1 make sure the --

2 THE COURT: Well, in four years he hadn't scheduled  
3 a PRB.

4 MR. FOLIO: Well, that's only for petitioner.

5 THE COURT: I understand. He scheduled 18 out of  
6 all of them down there?

7 MR. FOLIO: The statistics that I have, which I  
8 believe are current as of today, is that there have been 28  
9 total PRB hearings. There have been 19 initial reviews --  
10 initial full reviews. Six file reviews. And three post file  
11 full reviews with hearings. And the results of those have  
12 been 15 reviews resulted in transfer determinations. And to  
13 date, four of those detainees have been transferred. We have  
14 two PRB hearings scheduled for December, next month. So  
15 that's all to tell you that process is working and the process  
16 is moving forward.

17 THE COURT: Slowly.

18 MR. FOLIO: The petitioner is in line. Yes, Your  
19 Honor. And I think, as I hinted before, the reason why the  
20 process moved slowly is because the Executive had to establish  
21 the process in the first place.

22 THE COURT: That was by 2013.

23 MR. FOLIO: I'm sorry.

24 THE COURT: That was done by 2013.

25 MR. FOLIO: Correct, Your Honor.

1 THE COURT: Now we're in 2015.

2 MR. FOLIO: Correct, Your Honor. And I think that  
3 that process --

4 THE COURT: 28 instead of 18.

5 MR. FOLIO: I'm sorry, Your Honor.

6 THE COURT: So we've done 28 instead of 18 out of  
7 150 or whatever?

8 MR. FOLIO: So I believe there are 107 detainees  
9 left at Guantanamo. I think that the 28 total --

10 THE COURT: How many?

11 MR. FOLIO: 107.

12 THE COURT: Seven -- okay.

13 MR. FOLIO: 107.

14 THE COURT: So at this rate, how many years is it  
15 going to take to finish the PRBs -- the first PRB for each  
16 person?

17 MR. FOLIO: I'm not sure, Your Honor. I think that  
18 the difficult part to assess is that each detainee's case is  
19 different and the PRB process itself requires a lot of -- has  
20 a lot of moving parts. So the initial --

21 THE COURT: You're talking about several more years  
22 at this rate?

23 MR. FOLIO: Your Honor, I'm not sure. I think that  
24 would probably be a fair assessment, but I'm not sure. I  
25 can't speak to that. What I can speak to is that after the



1 initial time period it took to establish the PRB process, then  
2 we now can look at this process, see what it involves, and see  
3 why it's taking more time than perhaps originally anticipated.

4 I think that what the Government needs to do is,  
5 across agencies, it needs to collect information on a  
6 detainee, and again, that information is not like we address  
7 here in habeas, was that person lawfully detained, but the  
8 information goes to whether or not that person continues to  
9 present a threat to U.S. national security interests. And  
10 then that information must be presented to the detainee, the  
11 detainee's personal representative, and if appropriate, the  
12 detainee's counsel for the PRB process.

13 And the Government has learned that it needs to  
14 give the detainee an ample opportunity to review the  
15 information, to prepare a response, a written response,  
16 perhaps consider calling witnesses, and to then schedule  
17 hearings, which have to be scheduled across the interagency  
18 since personnel from different executive departments  
19 participate in them and have reviews, and in conducting that,  
20 all at the same time staff is still working to present the  
21 information on other detainees who are sort of percolating up  
22 through the queue.

23 The Government does continue to work on multiple  
24 cases at one time. It's not as if the Government focuses just  
25 on one detainee and slowly pushes that person through. The

1 Government works on multiple cases. And the key point is that  
2 once the Government is able to present the unclassified  
3 information presented to the PRB to the detainee, that's when  
4 things can start moving forward.

5 Bottom line, again, petitioner is in line like  
6 dozens of other detainees, and at this point it's just a  
7 matter of time.

8 THE COURT: Well, we're not going to tell you where  
9 you are in line?

10 MR. FOLIO: That's right, Your Honor. I don't  
11 think there is any clear line. To use the line -- we use the  
12 word "line" colloquial, but I think it sort of just depends on  
13 a lot of different moving parts and factors.

14 THE COURT: All right.

15 MR. FOLIO: On the jurisdiction argument, Your  
16 Honor, I just want to address this briefly to say that  
17 petitioner misconstrues the jurisdiction argument. This is  
18 not an Amer argument about core or non-core habeas. This  
19 argument is, he has presented a claim that does not sound in  
20 habeas. And Amer tells you if the claim doesn't sound in  
21 habeas, there's no jurisdiction because 2241(e)(2) is viable.

22 So the reason why petitioner's claim doesn't sound  
23 in habeas is because he is asking you to issue an order  
24 regarding an administrative executive process, namely,  
25 sequencing. Whether it is to put him at the head of the line

1 or to oversee scheduling, and that could not be further from  
2 the purpose of habeas, which is to effect release from  
3 detention.

4           As courts have summed it up, what habeas addresses  
5 is the fact, the duration or the quantum of detention. So  
6 quantum would cover conditions of confinement. This is  
7 neither of them. I think the most on point Supreme Court case  
8 is the Muhammad against Close case from 2004. And in that  
9 case a prisoner challenged an alleged procedural defect in a  
10 prison's administrative process regarding good time credits.  
11 And because the petitioner challenged only administrative  
12 determinations, he raised -- the Court held -- he raised no  
13 claim on which habeas relief could have been granted on any  
14 recognized theory.

15           Now, petitioner's counsel is quick to disparage the  
16 Supreme Court's holding in Skinner and Dotson, and while  
17 admittedly they do occur in a different context, namely, the  
18 interplay between habeas and 1983 lawsuits. They provide very  
19 important guidance about what cases are habeas and what may  
20 not be habeas. So the quote from the Supreme Court's decision  
21 in Skinner, the Supreme Court said it is aware of no case in  
22 which the Court has recognized habeas as the sole remedy,  
23 importantly, or even in available one, where the relief sought  
24 would neither terminate custody, accelerate the future date of  
25 release from custody nor reduce the level of custody.

1           And the majority opinion went on to state that, in  
2 Dotson, declared that in no uncertain terms that when a  
3 prisoner's claim would not necessarily spell speedier release,  
4 the claim does not lie at the core of habeas and may be  
5 brought, if at all, under Section 1983.

6           So those lawsuits did not hold firmly like Muhammad  
7 did, that these tangential challenges are not habeas, but  
8 Muhammad did hold that. And the D.C. Circuit has recognized  
9 the sea change. And this is important, as matter of  
10 jurisdiction, Your Honor, because this is a court of limited  
11 jurisdiction. And I think what petitioner is asking is for  
12 effectively turning habeas into a vehicle where any and all  
13 legal claims can be brought, and it simply would make the writ  
14 unmanageable.

15           The last point I'll make on the jurisdiction  
16 argument, Your Honor. I think that when looking for  
17 analogies, I think Muhammad is the best case, but I think  
18 Dotson is an interesting case as well. So what Dotson was  
19 challenging was eligibility for a parole hearing. So insofar  
20 as one is willing to draw a analogy between a PRB hearing is  
21 like a parole hearing. This question is one step further  
22 removed from that. Here the Executive has already determined  
23 that petitioner is eligible and will receive a PRB hearing.  
24 So, in effect, what he's trying to challenge then is the  
25 sequencing procedures as to how that will happen.

1           I think that demonstrates, again, the removal  
2 from -- like the Dodson-type challenge to what he's challenged  
3 and why this is even a more clear case, that this is a case  
4 that simply does not sound in habeas.

5           Finally, Your Honor, petitioner's counsel  
6 acknowledged that the Ninth Circuit's decision in Nettles is  
7 on our side, but noted it was only the Ninth Circuit. I think  
8 my first response to that is to point to the Court of Appeals'  
9 decision in the D.C. Circuit in Davis in which it acknowledged  
10 the Skinner decision -- the importance of the Skinner  
11 decision. And based on Skinner it suggested that habeas might  
12 not even be available for probabilistic claims, such as parole  
13 hearings.

14           Also, Nettles did not acknowledge that there was  
15 a problem with Aamer. All Nettles, the Ninth Circuit's  
16 decision stated, was that Aamer went to the circuit split  
17 about whether or not conditions of confinement can be brought  
18 in habeas, and there continues to be that circuit split.  
19 Notably, Nettles said that Aamer was decided and it didn't  
20 even mention Skinner.

21           We're talking about a different area of law.  
22 We're talking about Skinner and Muhammad, and those are cases  
23 that have to do with administrative determinations and  
24 procedures and nothing do with the even the possibility of  
25 release, simply don't sound in habeas. If Your Honor has no

1 further questions, I'll --

2 THE COURT: Thank you, Mr. Folio.

3 MR. FOLIO: -- turn the podium over to Mr. Patton.

4 Thank you.

5 MS. PATTON: May it please the Court. Rodney  
6 Patton on behalf of the respondents. I'll be addressing,  
7 briefly, the legal materials issues and the conditions of  
8 confinement issue. To be honest, I'm a little baffled, I  
9 thought we had put the legal materials issue to rest. From  
10 respondent's perspective, petitioner is in full control of  
11 access to all of his legal materials. He understands, as  
12 petitioner's counsel has told us, the process. The one for  
13 one bin exchange that we've explained to Your Honor before.  
14 He keeps a one 15-quart container in his cell and the rest of  
15 the materials are kept in bins in storage for him and he can  
16 request them any time he wants. And Ms. Hollander mentioned  
17 the four containers --

18 THE COURT: And currently he -- the limit of four  
19 is wrong?

20 MS. PATTON: Right. Mr. Hollander mentioned that  
21 Colonel Heath -- and, certainly, that is very, very typical.  
22 Mr. Salahi has a lot of legal materials. In fact, he has a  
23 lot of property down there or a lot of items that he's  
24 accumulated over the years. He has nine. He has a lot of  
25 this.

1           So the answer to the question of: Where are they?  
2 Well, they are in legal bins that he has gone through and put  
3 them in subsequently numbered. Ms. Hollander said, after a  
4 long discussion about legal materials, what we want is for  
5 them to bring petitioner all of his legal materials so he can  
6 go through them. Done. That was done on September 17th.

7           Why it wasn't done before was, well, we didn't hear  
8 about there being a legal materials issue at all until  
9 May 2nd. And then we provided response that he had access to  
10 all of his legal materials. The day of or the day before the  
11 motion was filed, we were asked for our Rule 7M conference,  
12 and we said, well, what do you mean he doesn't have his legal  
13 materials, we've already gone through this. They didn't want  
14 to wait, so they filed the motion.

15           We provided Colonel Heath's declaration, believing  
16 at that point in good faith that this had been a communication  
17 problem, then believing -- why hasn't he got all of his legal  
18 materials in the cell, and our position being, well, he has  
19 access to all of his legal materials and there's this process.  
20 It became clear on September 14th when petitioner filed their  
21 response, and a few days before that, that there was still a  
22 problem, the parties appeared to be talking past each other.

23           So we moved promptly, the same day, to try and  
24 resolve this. Three days later all of his legal materials  
25 were brought to him, as the best solution to his. To just

1 say, look through, find what you want to keep in your bin and  
2 in your cell, and if you want other legal materials you can  
3 exchange them out. That's what petitioner did. What we then  
4 did was facilitate a phone call and find out -- making sure  
5 everyone was on the same page.

6 We have no interest, obviously, in keeping him from  
7 his legal materials. What we have an interest in is not  
8 unnecessary motions practice. So we want to resolve this  
9 issue, and believe that we have. He's reviewed all his legal  
10 materials. He understands the process of how to request them.  
11 They're there for him. So Ms. Hollander said that it wasn't  
12 just the missing notes from 2009. In my conversations with  
13 opposing counsel, that's all that was mentioned before.

14 Obviously, he, again, is in control of how to  
15 access his legal materials. If he believes that he doesn't  
16 have the legal materials that he wants. He can ask for a one  
17 for one exchange. He can go through and sort through that.  
18 He can do that nine times and go through all the materials.  
19 I'm not aware of anything else missing.

20 As for who is going through these legal materials,  
21 I'm not aware of anyone. We provided both to the petitioner  
22 and to the Court, that neither the guard force nor the Staff  
23 Judge Advocates go through and review all these legal  
24 materials. They're kept in storage as identified in  
25 Mr. Warden's e-mail from 2014, which we attached to our status



1 report. So the issue with regard to legal materials is done.  
2 We're happy to work with petitioner's counsel, if they believe  
3 there are any other outstanding issues. But from our  
4 perspective, we believe that that issue is completely put to  
5 rest.

6           With regard to the conditions of confinement,  
7 neither in their briefs nor here today do petitioners explain  
8 to you what authority you would have to start to micromanage  
9 what items the petitioner can have in his cell, what items he  
10 can't have. That's the Commander's responsibility. That's  
11 the administrators at Guantanamo. The law is very clear on  
12 this.

13           What items we can have and what items he cannot  
14 have. They must show, first, that he has a constitution right  
15 not to be deprived of the item, and that the constitutional  
16 right was infringed. And if they've proven those two, that  
17 respondent's decisions are unreasonable, and the burden is on  
18 the petitioner here, it's not on respondents, as set out in  
19 the Hatim case on Page 60 of that opinion.

20           They ignore the law as far as those two  
21 requirements, but they're absolute prerequisites. They cite,  
22 again, as they do often, to Aamer, the D.C. Circuit case, and  
23 Hatim. But they said, as my co-counsel mentioned, they assume  
24 without deciding the constitutional right. In Aamer it was  
25 the constitutional right to be free from unwanted medical

1 treatment. We shall, for purposes of this case, assume  
2 without deciding, they said on Page 1,039.

3           In Hatim, it was the detainee's right to habeas.  
4 The question was whether there was a right to representation  
5 by counsel. We assume, without deciding, the D.C. Circuit  
6 said, on Page 59 of Hatim. This case is much more like Dhiab,  
7 which was Judge Kessler's decision, and Your Honor's decision  
8 in Rabbani versus Obama, which was 76 F.Supp 3d, Page 21, the  
9 pinpoint cite at Page 25, where the Court specifically  
10 discusses the constitutional prerequisites that must exist  
11 before we get into Turner versus Safley analysis.

12           In their briefs --

13           THE COURT: I recall Rabbani well. I understand  
14 that.

15           MS. PATTON: Right. In their briefs they go  
16 straight to the Turner analysis. Here they dispense with any  
17 law whatsoever and discuss only the facts. But to follow what  
18 petitioners are asking you to do would give this Court and  
19 every other judge on this bench a free-floating reasonableness  
20 task to decide, not only the overlying policy that a Commander  
21 has a right to decide what's contraband and what's not  
22 contraband, but that you would have to decide each one,  
23 whether this particular item is contraband, whether that  
24 particular item is contraband. That is not what the law says  
25 at all.

1           And just to put factual context on it, petitioner  
2 himself has moved from a larger cell to a smaller cell. Not  
3 everything that he has can fit in there. He has five foot  
4 lockers full of items that are in storage. What he has in his  
5 cell is laid out in the declaration -- I'm sorry -- in the  
6 Exhibit B to Colonel Heath's declaration. That is a  
7 classified exhibit, but it lists all the things that he has in  
8 his cell.

9           However you want to describe it, it certainly  
10 couldn't be described as spartan. But he has five foot  
11 lockers worth of material. He can request those items back so  
12 long as they are not contraband. Same process. And as is  
13 described in the classified declaration how that occurs.

14           These items, Ms. Hollander said, are vital to him.  
15 I would note that it was eight months before this brief was  
16 filed after the move occurred. So whether or not they're  
17 vital to him, he can get these items back so long as they're  
18 not contraband. A determination of whether they're contraband  
19 or not is for the Commander, not for this Court.

20           If Your Honor has any other questions?

21           THE COURT: Thank you, Mr. Patton.

22           MS. PATTON: Thank you, Your Honor.

23           THE COURT: Petitioner gets the last word.

24           MS. SHAMSI: Thank you, Your Honor. I'm going to  
25 very briefly address just a few of the points and not all of

1 them, which I think were addressed in our previous arguments  
2 or our papers.

3 First of all, Mr. Folio recited the alphabet soup  
4 of agency reviews that Mr. Salahi has obtained. I just wanted  
5 to emphasize that Judge Robertson was the only independent  
6 person who reviewed all of the evidence in this case, and he  
7 came to a decision that Mr. Salahi was not detainable. We  
8 understand it's been overruled in the "part of" factor, but  
9 Judge Robertson is the only independent person.

10 With respect to the task force review. Your Honor,  
11 I think one thing that's important to emphasize is the task  
12 for review was mandated by the President to be done within a  
13 year and it was done within a year. And here that is very  
14 much not the case. And with respect to the --

15 THE COURT: Obviously, if the President cared, he  
16 could get this done in a year.

17 MS. SHAMSI: I think the President has said -- I  
18 won't speak for the President, but I will take the President  
19 at his word that he is concerned about closing Guantanamo.  
20 That he is --

21 THE COURT: This isn't any way of showing it, is  
22 it?

23 MS. SHAMSI: But I think, Your Honor, blaming only  
24 the President is to disregard the accounts that have come out  
25 about delay -- admitted delay by the Defense Department by

1 itself, an admission of delay by the Defense Department, and  
2 bureaucratic bumbling in some sense. All of which, Your  
3 Honor, the critical point is you --

4 THE COURT: All of which the President should  
5 straighten out, shouldn't he?

6 MS. SHAMSI: He could but --

7 THE COURT: You're asking the Court to do it.

8 MS. SHAMSI: That's because the courts have a role,  
9 and a critically important role, that is what the Supreme  
10 Court has said, and that's why we're here before you today.  
11 We think we are entitled to this process. We think that  
12 entitlement requires it to be timely. We think that that is a  
13 legal entitlement.

14 We don't think that the Executive Order, as the  
15 Government says -- we're not arguing for a Private Right of  
16 Action, we've explicitly told you that. We've said that we  
17 don't need one because there is a habeas jurisdiction that  
18 exists. Your Honor, whatever the Executive Branches do, the  
19 courts have said over and over again that they have a critical  
20 role to play as a co-equal branch to ensure that the detainees  
21 do not bear the cost of delay. And that, I think, is  
22 critically important.

23 Just a couple of other points, Your Honor. The  
24 Government, very dramatically, pointed out with respect to the  
25 suspension clause, you know, that it suspends nothing. We're

1 not asking -- we're not saying that it suspends anything. We  
2 are in fact saying that the failure to provide a process, and  
3 again, it's mandated by the President, but it's the Defense  
4 Department that carries out the President's order, and that  
5 that process is a violation of the suspension clause.

6           With respect to the Government's arguments about  
7 Kiyemba, Bahlul and Aamer, we are not asking you to overrule  
8 Kiyemba, we obviously know you can't do that. We're asking  
9 you to follow two other panels that have narrowly read  
10 Kiyemba. And in Al-Bahlul, as I said, where Judge Kavanaugh  
11 said that majority of the court would apply Boumediene, just  
12 as we're asking you to do.

13           And, Your Honor, under the Government's reading of  
14 Aamer, the case finding conditions of confinement claims in  
15 habeas. Under their reading, the D.C. Circuit engaged in a  
16 purely advisory exercise, which surely would come to a  
17 surprise -- as a surprise to the panel. And we don't think  
18 you should take their extreme reading of Aamer to heart.

19           Very quickly, in Boumediene, with respect to a  
20 focus on the suspension clause analysis by the Supreme Court,  
21 absolutely. But I think it's important to recognize that in  
22 arriving at its conclusions about the extraterritorial  
23 application of the suspension clause, the Supreme Court also  
24 looked to the extraterritorial application of other  
25 constitutional provisions, including the due process clause,

1 and certainly did not exclude them.

2           And couple of very quick points. I don't think  
3 anyone should get bogged down in the issue of civilians under  
4 the Laws of War, that is a term of art. Under the Geneva  
5 Conventions you have prisoners of war and civilians can  
6 include alleged enemy combatants, that we all understand in  
7 accord. So using the word civilians is a pejorative word, I  
8 think makes very little sense, and I just want to be very  
9 clear that we are arguing from recognized Law of War authority  
10 that exists under the Geneva Conventions, under the ICRC and  
11 other authoritative guidance.

12           Your Honor, with respect to the view of habeas  
13 jurisdiction under Aamer, they are two competing views. The  
14 one that you heard from today, again from the Government, was  
15 the view of the Ninth Circuit in Nettles, and it was the view  
16 of Justice Scalia, a particular footnote in Skinner, as my  
17 co-counsel pointed out. Aamer rejects that view. So I think  
18 that there, the direction of where you need to go with respect  
19 to your habeas jurisdiction is very, very clear. I can  
20 elaborate on that in a bit, but I think the point is very  
21 simple. Their view is rejected. Aamer is the law.

22           I wanted to clarify a factual issue. I think you  
23 might have been left with the impression that when counsel  
24 said that there have been 28 people or 28 file reviews,  
25 that's 28 individuals, I don't think that that's the case.

1 I think there are 19 individuals.

2 THE COURT: Oh, okay.

3 MS. SHAMSI: Who have gone through PRB review, some  
4 have gone through it twice through a file review and some have  
5 gone through otherwise.

6 THE COURT: Some people get two before he gets one.

7 MS. SHAMSI: Exactly. And, at bottom, Your Honor,  
8 that's where we're left. You asked the Government to provide  
9 information and they still essentially came back to you with a  
10 black box.

11 THE COURT: None of my business.

12 MS. SHAMSI: Right. But it's very much your  
13 business, Your Honor. It is very much your business under  
14 this Court's habeas jurisdiction. And it's very much your  
15 business because we're asking you to apply the law. We're not  
16 asking you to read in new frameworks or new sources of  
17 authority. We're asking you to do what the Supreme Court has  
18 said you can do and what the D.C. Circuit leaves you with the  
19 room to do.

20 And, Your Honor, we adamantly think that you can  
21 rule for us, that you've got the habeas jurisdiction to rule  
22 for us, Executive Order, AUMF. What we're asking you to do,  
23 it seems to us, is at a minimum, to enforce what the  
24 Government has said itself it will do, to call them in for  
25 status hearings, as Judge Hogan did. Judge Hogan put their



1 feet to the fire. And it cannot be that a process that should  
2 have been started within one year, the Government now stands  
3 before you today and says, we don't know, might take years.  
4 Because Mr. Salahi has a right not to have that take years,  
5 otherwise, his detention is unlawful.

6 THE COURT: Thank you very much. The motion is  
7 submitted. I'll rule as promptly as I can.

8 END OF PROCEEDINGS AT 12:15 P.M.

9

10 C E R T I F I C A T E

11 I, Lisa M. Foradori, RPR, FCRR, certify that  
12 the foregoing is a correct transcript from the record of  
13 proceedings in the above-titled matter.

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17 Date: \_\_\_\_\_

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Lisa M. Foradori, RPR, FCRR

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