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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD H. RUMSFELD, :  
SECRETARY OF DEFENSE :  
Petitioner :

v. : No. 03-1027

JOSE PADILLA AND DONNA R. :  
NEWMAN, AS NEXT FRIEND OF JOSE :  
PADILLA :  
Respondents. :

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Washington, D.C.  
Wednesday, April 28, 2004

The above-entitled matter came for oral  
argument before the Supreme Court of the United  
States at 11:20 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on  
behalf of the Petitioner

JENNIFER MARTINEZ, ESQ., Stanford, California; on  
behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JENNIFER MARTINEZ, ESQ.	
7	On behalf of the Respondents	28
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

[11:20 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 03-1027, Donald Rumsfeld versus Jose Padilla. Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT  
ON BEHALF OF PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Unlike the Hamdi case, which raised not only the question of the President's and the military's authority to detain, but also questions the process and access to counsel. This case raises only two relatively discrete questions, first, whether the habeas petition in this case, challenging Padilla's present physical confinement in South Carolina, was properly filed in Manhattan, rather than against the immediate custodian in South Carolina, and second, whether the President has the authority to detain a citizen who travels abroad, affiliates and associates with the enemy abroad, receives training in enemy camps in wiring and explosives and then returns to the United States at the direction of the enemy to commit hostile and warlike acts.

1                   Now, there are many aspects of this case  
2 that raise issues that are really extraordinary, but  
3 the habeas petition that was filed in this case was a  
4 standard, indeed ordinary, use of the writ to  
5 challenge the prisoner's present physical confinement  
6 and the habeas rules are settled that when the writ  
7 is used to challenge the present physical  
8 confinement, the proper custodian, the proper  
9 respondent, is the immediate custodian and the suit  
10 should be filed in the district where that custodian  
11 is present.

12                   In other words, in a case to your present  
13 physical confinement, the case should be filed in the  
14 district of confinement.

15                   QUESTION: May I ask you on that point,  
16 Mr. Clement, supposing this petition had been filed  
17 while he was still in New York, and then he was  
18 removed to South Carolina. Would the petition be  
19 okay, then?

20                   MR. CLEMENT: There would be jurisdiction  
21 in that case, Justice Stevens, under the Endo  
22 decision. Now, I think in that case, there would  
23 still be a question, especially if there was the, the  
24 habeas petition was filed and he was immediately  
25 removed, there would still be the question of venue

1 at that point and there is a Seventh Circuit case  
2 that's not in the briefs but Ross against Mebane that  
3 you may want to look at that says that in a case like  
4 that presumptively --

5 QUESTION: I'm not quite sure what your  
6 answer is to my question.

7 MR. CLEMENT: Oh, my answer is  
8 jurisdiction yes, under this Court's decision in  
9 Endo.

10 QUESTION: I see.

11 MR. CLEMENT: But then there would still  
12 be a subsidiary question that's not raised here about  
13 venue.

14 QUESTION: Which the government would  
15 presumably would be free to raise.

16 MR. CLEMENT: Exactly, and we would raise  
17 in the case where there was in fact jurisdiction.

18 QUESTION: Yes.

19 MR. CLEMENT: But in this case our  
20 position is there is no jurisdiction whatsoever, and  
21 I think that --

22 QUESTION: Jurisdiction under the Habeas  
23 Statutes has been a bit of a confusion because, for  
24 instance, on behalf of aliens, I think we have  
25 allowed jurisdiction to be obtained in the manner it

1 was here, have we not?

2 MR. CLEMENT: No, I don't think so, Justice  
3 O'Connor. I don't know which case have you in mind,  
4 but I'm aware of no case of this Court that takes the  
5 unprecedented step that the court below took, which  
6 is basically to allow a habeas petition to go forward  
7 in a case where neither the prisoner nor the  
8 custodian is in the jurisdiction where the habeas  
9 petition is filed.

10 QUESTION: What do you do with ex parte  
11 Endo?

12 MR. CLEMENT: Well, Mr. Chief Justice, as  
13 I was suggesting to Justice Stevens, that case  
14 involves a kind of unique situation where a habeas  
15 petition is filed, challenging a certain kind of  
16 confinement, and then after the petition is filed,  
17 and after jurisdiction attaches, the prisoner is  
18 moved. In that case, it was an individual moved from  
19 California to --

20 QUESTION: They never, they never named  
21 any custodian in that case, did they?

22 MR. CLEMENT: Well, I don't know for sure,  
23 Mr. Chief Justice, but I would say a couple of  
24 things. One is on the immediate custodian rule, I  
25 think that is a rule that perhaps the government

1 could waive in a case, and so if you have a situation  
2 - - -

3 In a way Hamdi is that case where when the  
4 habeas petition in Hamdi was filed, he was being  
5 detained in Norfolk, which was in the Eastern  
6 District of Virginia. It did not matter in that case  
7 whether the immediate custodian was Paulette, who is  
8 the brig, the commander of the brig, or Rumsfeld  
9 because in the government's view, they are both  
10 territorially present in the Eastern District of  
11 Virginia.

12 So the immediate custodian rule I think is  
13 something that government can waive. I don't think  
14 that the territorial jurisdiction limit on the  
15 courts, though, is something that the government is  
16 in a position to waive. I think that is a  
17 restriction on the power of the court to issue the  
18 writ of habeas, and again, as I was indicating --

19 QUESTION: Well, is there a circuit split  
20 on whether aliens can name the attorney general?

21 MR. CLEMENT: Yes, Justice O'Connor.  
22 There is a circuit split on that issue, and I think  
23 in some ways that issue is sort of tied up with this  
24 case, though even there as I understand most of those  
25 cases, there is a case from the Ninth Circuit called

1 Armentero, which in the government's view goes the  
2 wrong way. There is favorable precedent in the Sixth  
3 Circuit, the First Circuit, and the Seventh Circuit,  
4 but even the Ninth Circuit, I think, envisions a case  
5 where they view the attorney general as the proper  
6 custodian, but they, you know, it's not clear where  
7 they think that individual can be served.

8 Now, I suppose that the Ninth Circuit  
9 applying that rule might also take the unprecedented  
10 step here. It's also true if you want a sort of  
11 sense of the potential for abuse in these cases, I  
12 think you could point to the Ninth Circuit case where  
13 the Ninth Circuit held that the Central District of  
14 California had habeas jurisdiction over a claim filed  
15 by a petitioner in Guantanamo. I mean, obviously  
16 there is the issue that this Court has, but there is  
17 a question of if there were jurisdiction, I wouldn't  
18 have thought that it lay in the Central District of  
19 California.

20 And I think that happens when you relax  
21 these traditional rules. And I think particularly in  
22 a case like --

23 QUESTION: Where does jurisdiction lie for  
24 someone in Guantanamo, do you suppose?

25 MR. CLEMENT: Well, if, let me answer the



1 question this way, which is if you had a citizen in  
2 Guantanamo.

3 QUESTION: Yes.

4 MR. CLEMENT: And under this Court's cases  
5 like Toth against Quarles and Burns against Wilson,  
6 that citizen is unable to file a habeas petition.  
7 Our view is that the proper place to file that would  
8 be either in the Eastern District of Virginia, if you  
9 were naming the Secretary of Defense or if were you  
10 naming some official present in the district, you  
11 would sue in the District of Columbia.

12 But the important thing is even in that  
13 case, the court where you filed the petition would  
14 have jurisdiction, territorial jurisdiction over the  
15 Respondent and what is so anomalous here is in a  
16 sense, it doesn't, I mean it matters to us in the  
17 sense that we think the proper Respondent is  
18 Commander Marr, but even if you assume the proper  
19 Respondent here is secretary Rumsfeld, the case still  
20 shouldn't be brought in the Southern District of New  
21 York. It should be brought in the Eastern District of  
22 Virginia.

23 QUESTION: But why? Why, what difference  
24 does it make to the government where they defend?

25 MR. CLEMENT: Well, I think there are a

1 number of --

2 QUESTION: I mean, there are offices all  
3 over the country.

4 MR. CLEMENT: I think that's right, Justice  
5 Stevens. I think it only makes sense to have the  
6 defense mounted in the place where the detention is  
7 taking place. And I think that's particularly true  
8 in this case, because this isn't a petition that only  
9 challenges the fact of confinement. If you look at  
10 the, the petition in this case, the amended petition,  
11 joint appendix page 56, the relief that's sought here  
12 also goes to the conditions of confinement in  
13 Commander Marr's brig. Now, in a case like that, it  
14 seems --

15 QUESTION: Yes, but I'm not sure that's,  
16 that's appropriate relief in a habeas petition,  
17 anyway.

18 MR. CLEMENT: Well, I think you can file a  
19 mixed petition and seek that kind of relief, but in  
20 any event, I think that what they are looking for is  
21 not just release from detention, but the stopping of  
22 the interrogations.

23 QUESTION: -- how this particular case was  
24 pleaded, which it wasn't, because we don't have any  
25 flushing out of this, but you keep talking about

1 jurisdiction and it seems to me, this is essentially  
2 a venue question. There is no question that Federal  
3 courts have habeas jurisdiction. They have that  
4 authority.

5 And you are talking about not the large  
6 question, what kind of case can a Federal court hear,  
7 you are talking about a where question, not a what  
8 question. So it's essentially a venue question.

9 MR. CLEMENT: I mean, unless the word  
10 essentially is going to bear a tremendous amount of  
11 weight, I disagree because I think that what you have  
12 here is not general venue principles. You have a  
13 situation where the relevant statute that gives  
14 courts habeas jurisdiction restricts their ability to  
15 issue the writ to their territorial jurisdiction.  
16 And this Court has been clear in cases like Carbo and  
17 this is even consistent in Justice Rutledge's dissent  
18 in the Ahrens case, that for that provision to have  
19 any meaning at an irreducible minimum, it has to mean  
20 that a writ that goes to the proper custodian has to  
21 be filed within the territorial jurisdiction of the  
22 District Court.

23 QUESTION: Although, if the prisoner is  
24 moved, so prisoner goes someplace else, they still  
25 have jurisdiction over the case, although the

1 original custodian no longer has the prisoner in his  
2 or her care.

3 MR. CLEMENT: That's right, Justice  
4 Ginsburg. And this Court decided that in Endo long  
5 before Ahrens when it reaffirmed an even stricter  
6 rule and there is nothing in the post-Ahrens cases  
7 that suggests that this Court has ever deviated from  
8 this understanding. And indeed I would point the  
9 Court to the decision in Schlanger against Seamans,  
10 because I think in some ways, it shows how, that that  
11 case really decided this issue, because what the  
12 court there had was an individual who was trying to  
13 get ROTC scholarship in Arizona, but he was assigned  
14 to a unit in Alabama, and he filed his habeas  
15 petition in Arizona, and he named as Respondents an  
16 individual in Arizona who had no custody over him  
17 whatsoever, so that individual was out. He also  
18 named the Secretary of the Air Force. The court did  
19 not rely on that, and the court said that his true  
20 custodian is his commanding officer in Georgia, and  
21 what this Court said is there was no jurisdiction in  
22 Arizona over that custodian in Georgia, and just to  
23 be clear about it, the Court noted and rejected an  
24 argument based on 28 U.S.C. 1391(e), which among  
25 other things provides nationwide service of process

1 against Federal officials.

2 Now, if that statute had applied, then it  
3 would have been perfectly appropriate to bring the  
4 case in Arizona against a Georgia Respondent who was  
5 a Federal officer. But the Court said no. 1391(e)  
6 does not trump the habeas statute. Now, if that is  
7 true of a Federal statute that provides for  
8 nationwide service of process, it seems like it would  
9 be true a fortiori for Federal Rule of Civil  
10 Procedure 4. But that's the theory under which the  
11 courts below exercised jurisdiction in this case.

12 QUESTION: Well, Mr. Clement, is Schlanger  
13 still good law after Strait and Braden?

14 MR. CLEMENT: Absolutely, Your Honor. And  
15 I think the best evidence of that, there is two  
16 things I'd like to point to. But maybe the simplest  
17 way is that both Strait and Braden cite Schlanger  
18 favorably and, indeed, if you look at the very end of  
19 the Braden opinion, when the court says that the  
20 proper Respondent there is within the court's service  
21 of process, it sites Schlanger for that proposition,  
22 which makes sense because in that case the petition  
23 was properly filed, challenging a Kentucky detainer  
24 in Kentucky, so the proper Respondent was within the  
25 territorial jurisdiction of the court in that case.

1                   The second reason I would say that  
2 Schlanger is very much good law as we pointed out in  
3 our reply brief, is that the court in Schlanger went  
4 out of its way, because at that point, Ahrens was  
5 sort of already teetering on the verge of  
6 obsolescence, to state that the rule would be exactly  
7 the same even under Justice Rutledge's view in  
8 Ahrens, so I think for those two reasons, Schlanger  
9 continues to be good law, and clearly would trump any  
10 service of process that would be provided by Rule 4.

11                   And I think, and this is consistent with  
12 what the unanimous three-judge court in the Fourth  
13 Circuit said in the Hamdi case, that particularly in  
14 cases that raise such sensitive issues as the cases  
15 that are involved on the merits in this case, it is  
16 particularly important that the court try to avoid  
17 unnecessarily reaching Constitutional issues by first  
18 ascertaining that it has jurisdiction. Now, if I --

19                   QUESTION: You recognize that it isn't a  
20 jurisdiction question like, can the Federal courts  
21 entertain this kind of suit. Can they entertain a  
22 fender bender between people from the same state?  
23 No. Can they entertain Federal habeas cases. So we  
24 have one Federal system, and there are classes of  
25 cases that can go into that system and then we have

1 an allocation of where, so this isn't jurisdiction  
2 writ large, it is where in this Federal system do you  
3 bring this case?

4 MR. CLEMENT: Justice Ginsburg, its  
5 statutory jurisdiction, but I agree. It is at some  
6 level it is a which District Court question, not  
7 whether District Courts are open to these claims at  
8 all.

9 QUESTION: All right. If it's a which  
10 District Court question, I mean, I don't know how  
11 long you want to spend on the procedural issue, but I  
12 take it if we follow your thing, never can you  
13 entertain a habeas petition unless the body is in  
14 this district, then immigration cases, military cases  
15 are going to be a nightmare. If we follow a venue  
16 principle, you are going to get just the right  
17 result, which is we bring the case where it's most  
18 convenient.

19 MR. CLEMENT: With respect, Justice  
20 Breyer, I would disagree. I think that this Court,  
21 it is true, in situations where it has relaxed the  
22 notion of custody, and has allowed habeas petitions  
23 to be brought in circumstances where they previously  
24 weren't available, Strait against Laird is an  
25 example. This Court's decision in Braden, basically

1 is an example because it was accommodating the  
2 overruling of McNally against Hill and Payton against  
3 Rowe. So in those contexts, where there is more than  
4 one custody or some kind of metaphysical custody,  
5 this Court has relaxed the rules in a way to  
6 accommodate those, but it has never deviated. Never,  
7 from the rule that you have to file the habeas  
8 petition where the custodian is, and equally  
9 important, it has never, there is no need to expand  
10 the notion of custody, because you have a classic  
11 habeas case where you are challenging your present  
12 physical confinement. The courts never relax the  
13 rules.

14 QUESTION: Let me ask you a question to  
15 get you to the merits, if I can.

16 MR. CLEMENT: That would be fine.

17 QUESTION: Suppose, suppose that you're  
18 right about your basic claim that the uniform, what  
19 is it called, the Use of Force Act is in fact a  
20 statute of the kind contemplated in 4001. Still, the  
21 words in that act are, they can use necessary and  
22 appropriate force. So why would it be necessary and  
23 appropriate in a country that has its courts open,  
24 that has regular criminal proceedings, that has all  
25 the possibility of adjudicating a claim that I'm the



1 wrong person? Why is it a necessary and appropriate  
2 thing to do once you have such a person who is a  
3 citizen in this country to proceed by other than a  
4 normal court procedure?

5 MR. CLEMENT: Justice Breyer, I will  
6 answer the question. I would preface it by saying  
7 that I certainly wouldn't read the authorization of  
8 force's use of the term necessary and appropriate as  
9 an invitation for sort of judicial management of the  
10 executive's war-making power. I would have viewed it  
11 as a delegation to the executive to use its  
12 traditional authority to make discretionary judgments  
13 in finding what is the necessary appropriate force.  
14 And the Prize cases, I think, stand for that  
15 proposition.

16 Now, if I can address the specifics,  
17 though, why it might be necessary and appropriate  
18 and, indeed, why is the Government asserting this  
19 authority? It is precisely because, in this war on  
20 terrorism, the Government can confront an individual  
21 who is not only guilty of past war crimes, but  
22 also --

23 QUESTION: Can I ask you just one last  
24 question on the jurisdictional issue? If you assume  
25 it's a question of venue rather than jurisdiction --

1 I know you're arguing in the alternative, but if you  
2 assume it was venue rather than jurisdiction, would  
3 New York not have been the proper venue since he was  
4 held there as a material witness and he had a lawyer  
5 appointed in that case?

6 MR. CLEMENT: Even if, contrary to our  
7 position, it was a venue question, we would still say  
8 no. And I think that you have to understand -- I  
9 mean, the fact that he was in New York in the first  
10 place is a bit of a happenstance. He tries to fly to  
11 Chicago. He is seized in Chicago --

12 QUESTION: No, but the Government is  
13 responsible for him being in New York, which it seems  
14 to me, that they should not be complaining about  
15 litigating there.

16 MR. CLEMENT: Well, with respect, Justice  
17 Stevens, I don't think anybody would think that if  
18 you filed a habeas petition to challenge Padilla's  
19 detention as a material witness while he was being  
20 detained in New York, that that should be filed in  
21 Chicago.

22 And I think by the same logic, it doesn't  
23 make any sense from what the gravamen of the -- the  
24 gravamen of the challenge is to the conditions and  
25 legality of the detention in South Carolina, why that

1 ought to be filed in New York just because he was  
2 there under a different authority.

3 QUESTION: He had a lawyer appointed,  
4 didn't he, there?

5 MR. CLEMENT: He did have a lawyer  
6 appointed there. But again, I don't think -- I mean,  
7 I think Mr. Dunham or his equivalent in South  
8 Carolina would be available to provide whatever role  
9 is necessary and appropriate under the circumstances.  
10 I don't think there are only lawyers in New York.

11 QUESTION: I suppose it's a little easier  
12 for the Government to find a lawyer wherever it needs  
13 it than it would be for a prisoner being moved from  
14 district to district.

15 MR. CLEMENT: In none of these cases have  
16 we seen a problem with the detainees finding legal  
17 representation.

18 QUESTION: Getting back to the merits,  
19 merits part --

20 QUESTION: Could I hear the end of his answer  
21 to the  
22 previous question? You were in the middle of an  
23 answer and I was waiting for the end of it.

24 MR. CLEMENT: Well, I hate to disappoint  
25 you. I'm not sure that I had anything in particular

1 left other than to say that we would still -- I mean,  
2 I think all I would say, and maybe I can reference  
3 that there are Court of Appeals cases, the Seventh  
4 Circuit has decided this Ross against Mebane case  
5 that basically say that even if you're in a venue  
6 situation, even if you're within the rule of Ex parte  
7 Endo, there is still a strong, strong presumption  
8 that a habeas petition belongs in the district court  
9 where the individual is being detained.

10 Now, maybe if you had a situation where  
11 the habeas petition was up and running and close to a  
12 final judgment or whatever. And then the individual  
13 is detained, it makes sense to keep the proceeding in  
14 the first venue. But in a case like -- if you had a  
15 case where the day after the first petition is filed,  
16 he's moved for independent and good reasons, I think  
17 you would also say that the case belongs in the place  
18 of detention.

19 QUESTION: What rights does Padilla have,  
20 if any, in your view, that a belligerent who is  
21 apprehended on the battlefield does not have? Is  
22 Padilla just the same as somebody you catch in  
23 Afghanistan?

24 MR. CLEMENT: I think for purposes of the  
25 question before this Court, the authority question,

1 he is just the same. It may be that in an  
2 appropriate juncture when the Court has before it the  
3 question of what procedure should be applied, that  
4 you would want to apply different procedures in a  
5 case like this.

6 QUESTION: Can we punish him?

7 MR. CLEMENT: Could we punish him?  
8 Certainly we could punish him if we decided to change  
9 the nature of our processing of him. As this Court  
10 made clear in Quirin --

11 QUESTION: Would you shoot him when he got  
12 off the plane?

13 MR. CLEMENT: No, I don't think we could  
14 for good and sufficient reasons --

15 QUESTION: I assume that you could shoot  
16 someone that you had captured on the field of battle.

17 MR. CLEMENT: Not after we captured them  
18 and brought them to safety. And I think in every  
19 case, there are rules of engagement, there are rules  
20 for the appropriate force that should be used. And I  
21 don't know that there are any --

22 QUESTION: If they're an unlawful  
23 belligerent?

24 MR. CLEMENT: Yes, even if they're an  
25 unlawful belligerent. Once they're -- I mean, we

1     couldn't take somebody like Hamdi, for example, now  
2     that he's been removed from the battlefield and is  
3     completely -- poses no threat unless he's released  
4     and use that kind of force on him.

5                   QUESTION:  But if the law is what the  
6     executive says it is, whatever is necessary and  
7     appropriate in the executive's judgment, that's the  
8     resolution you gave us that Congress passed, and it  
9     leads you up to the executive, unchecked by the  
10    judiciary.  So what is it that would be a check  
11    against torture?

12                   MR. CLEMENT:  Well, first of all, there  
13    are treaty obligations.  But the primary check is  
14    that just as in every other war, if a U.S. military  
15    person commits a war crime by creating some atrocity  
16    on a harmless, you know, detained enemy combatant or  
17    a prisoner of war, that violates our own conception  
18    of what's a war crime.  And we'll put that U.S.  
19    military officer on trial in a court marshal.  So I  
20    think there are plenty of internal reasons --

21                   QUESTION:  Suppose the executive says mild  
22    torture we think will help get this information.  
23    It's not a soldier who does something against the  
24    Code of Military Justice, but it's an executive  
25    command.  Some systems do that to get information.

1           MR. CLEMENT: Well, our executive doesn't  
2 and I think -- I mean --

3           QUESTION: What's constraining? That's  
4 the point. Is it just up to the good will of the  
5 executive? Is there any judicial check?

6           MR. CLEMENT: This is a situation where  
7 there is jurisdiction in the habeas courts. So if  
8 necessary, they remain open. But I think it's very  
9 important -- I mean, the court in Ludecke against  
10 Watkins made clear that the fact that executive  
11 discretion in a war situation can be abused is not a  
12 good and sufficient reason for judicial  
13 micromanagement and overseeing of that authority.

14           You have to recognize that in situations  
15 where there is a war -- where the Government is on a  
16 war footing, that you have to trust the executive to  
17 make the kind of quintessential military judgments  
18 that are involved in things like that.

19           QUESTION: So what is it that military --  
20 go back to Justice Kennedy's question. I'm trying to  
21 push you down the road a bit. And maybe we don't  
22 have to decide this now. But I want to understand  
23 your vision of it. I mean, a person has come to the  
24 United States. He has, according to the Government,  
25 committed a serious crime and is dangerous.

1                   Well, those are people we deal with all  
2 the time in the criminal process. So if you're even  
3 assuming this resolution authorizes some kind of  
4 force, why isn't the appropriate force, where he's in  
5 the United States and the courts are open, what we  
6 would call ordinary criminal process? I mean, that  
7 harmonizes everything.

8                   Now, maybe there is an answer to that in  
9 your vision. I want to find out your vision of  
10 what's supposed to happen here and why.

11                  MR. CLEMENT: Well, Justice Breyer, let me  
12 give you a practical reason answer and the legal  
13 reason. You may prefer the former. But I think that  
14 the practical reason is if you capture somebody who  
15 is not just somebody who is guilty of a war crime or  
16 a violation of some provision of Title 18, but also  
17 has a wealth of information that could be used to  
18 prevent future terrorist attacks, then it seems to me  
19 that the military ought to have the option of  
20 proceeding with him in a way that allows him to get  
21 actionable intelligence to prevent future terrorist  
22 attacks, and should not be forced into a choice where  
23 the only way they can proceed is to proceed  
24 retrospectively to try to punish him for past acts.

25                  In doing so, whether it's a military



1 commission or an Article III, requires you to give  
2 him a counsel who likely is going to say that you  
3 shouldn't talk to the Government about any of these  
4 things.

5 QUESTION: Would you have that authority  
6 in the absence of the authorizing resolution? Would  
7 the President have that authority?

8 MR. CLEMENT: I think he might well,  
9 Justice Souter, and you in fact suggested that  
10 yourself, which is if there was actionable  
11 information --

12 QUESTION: No, I suggested that he might  
13 have on September 12th. I don't think my suggestion  
14 went much further. But I'll grant you that's an  
15 argument, but do you believe he would have that  
16 authority today in the absence of the authorizing  
17 resolution?

18 MR. CLEMENT: Well, I think he would  
19 certainly today, which is to say September 12th or  
20 April 28th.

21 QUESTION: Two and a half months later.  
22 But I mean, based on the rationale that there is a  
23 need to bar him from what would be the normal process  
24 that Justice Breyer is describing because of the need  
25 to interrogate effectively. Your answer, I take it,

1 is he would have that authority even without the  
2 authorizing resolution?

3 MR. CLEMENT: That would be my answer. I  
4 would say the President had that authority on  
5 September 10th, but I guess I would --

6 QUESTION: How does he get that from just  
7 being commander-in-chief? I mean, I understand the  
8 commander-in-chief power to be a power over the  
9 military forces, when they're being used as military  
10 forces, the General Washington power, you know, to  
11 command the forces tactically and everything else.

12 It doesn't mean that he has power to do  
13 whatever it takes to win the war. I mean, the Steel  
14 Seizure case demonstrates that well enough. How does  
15 this come within George Washington's  
16 commander-in-chief power, which is what I read this  
17 congressional resolution to be directed at? It  
18 doesn't say you can do whatever it takes to win the  
19 war.

20 MR. CLEMENT: No, but Justice Scalia,  
21 presumably the authorization of force is read against  
22 prior history and this Court's precedents. And those  
23 precedents include the Quirin case where it is  
24 absolutely clear that in fighting a war, you have the  
25 authority to detain individuals, even if they're not

1 formal military officers who are affiliated with the  
2 enemy and come into the United States intent on  
3 committing hostile and warlike acts.

4 QUESTION: But Quirin rested on the fact  
5 that there was congressional authorization for a  
6 military commission to try on such charges.

7 MR. CLEMENT: Well, two things, Justice  
8 Souter. First of all, I mean, you asked me a  
9 hypothetical but we do have the authorization of  
10 force here. Second of all, I don't think Quirin can  
11 stand for the kind of clear statement rule that  
12 others want to attribute to it for two reasons.

13 One, to the extent it applied any clear  
14 statement rule, it runs in the opposite direction.  
15 The Court said they would not strike down the  
16 detention and try the individuals there absent a  
17 clear conviction that it violated an act of Congress.

18 QUESTION: I guess I would settle, as a  
19 rhetorical point, for the fact that it's not a clear  
20 statement for you either.

21 MR. CLEMENT: Well, it actually -- it  
22 purported to be. It said absent a clear conviction,  
23 it wouldn't strike down the authority. But what I  
24 would -- just to be clear, I think as we point out in  
25 our reply brief, if you applied a clear statement

1 rule to Quirin, it would have to come out the other  
2 way because Article II of the articles of war that  
3 were in force at the time were restricted to members  
4 of the United States military.

5 Article 15, which the Court relied on,  
6 didn't expressly authorize military commissions  
7 expressly. It did so by negative implication. So  
8 it's simply not the case that you need an express  
9 statutory authorization. If I could reserve my time  
10 for rebuttal.

11 QUESTION: Very well, Mr. Clement.  
12 Ms. Martinez, we'll hear from you.

13 ORAL ARGUMENT OF JENNIFER MARTINEZ

14 ON BEHALF OF THE RESPONDENTS

15 MS. MARTINEZ: Mr. Chief Justice, and may  
16 it please the Court:

17 Even in wartime, America has always been a  
18 nation governed by the rule of law. Today the  
19 Government asks this Court for a broad ruling that  
20 would allow the President unlimited power to imprison  
21 any American anywhere at any time without trial  
22 simply by labeling him an enemy combatant.

23 We ask this Court for a narrow ruling that  
24 leaves for another day the grave constitutional  
25 question of whether our system would permit the

1 indefinite imprisonment without trial of American  
2 citizens on American soil based on suspicion that  
3 they have associated with terrorists.

4 We simply ask this Court to hold that at a  
5 minimum Congress would have to clearly and  
6 unequivocally authorize such a departure from our  
7 nation's traditions. And since Congress has not done  
8 so, Mr. Padilla is entitled to be charged with a  
9 crime and to have his day in court.

10 The detention at issue in this case is  
11 exactly the type of detention that our Founding  
12 Fathers were concerned about based on their  
13 experience with the British Crown, where the king had  
14 locked up citizens based on --

15 QUESTION: Ms. Martinez, the authorization  
16 passed by Congress is quite broad and it talks about  
17 force against individuals.

18 MS. MARTINEZ: Yes, Your Honor, but there  
19 is no reference in the text of that authorization to  
20 any power to detain American citizens on American  
21 soil based on suspicion. And there is no indication  
22 whatsoever in the debates that Congress contemplated  
23 that it might be used in such a way.

24 QUESTION: Well, you surely don't think  
25 that it excluded American citizens. I mean,

1 certainly it gave the President authority to wage war  
2 against American citizens if they're on the other  
3 side, didn't it?

4 MS. MARTINEZ: Certainly, Your Honor,  
5 as --

6 QUESTION: So whatever authority it gave  
7 him, there is no indication that it's limited to  
8 non-citizens.

9 MS. MARTINEZ: No, but what is limited to  
10 citizens is Section 4001 in which Congress  
11 specifically provided that no citizen shall be  
12 imprisoned or otherwise detained by the United States  
13 except pursuant to an act of Congress.

14 QUESTION: And you would say that 4001  
15 prevents the President from detaining on the  
16 battlefield?

17 MS. MARTINEZ: No, Your Honor.

18 QUESTION: Well, then it doesn't mean what  
19 you just said it meant.

20 MS. MARTINEZ: What we are talking  
21 about -- first of all, there is a general presumption  
22 against extraterritorial application of statutes.  
23 And so in the absence of an indication that Congress  
24 intended 4001 to apply overseas, that general  
25 presumption would limit it to this country.

1 Moreover, the history of 4001 --

2 QUESTION: So the clear statement rule  
3 doesn't apply to 4001?

4 MS. MARTINEZ: Which clear statement rule,  
5 Your Honor?

6 QUESTION: Well, I thought you were  
7 arguing for the clear statement rule.

8 MS. MARTINEZ: Yes, Your Honor, we are and  
9 our argument is limited to detentions within this  
10 country --

11 QUESTION: But your qualification is only  
12 implied from the statute.

13 MS. MARTINEZ: Our argument is that what  
14 there needs to be a clear statement of is of the  
15 authority to detain an American citizen on American  
16 soil. And the reason for that is given, one, by the  
17 history of section 4001 in which Congress looked at  
18 the Emergency Detention Act that had been passed  
19 during the Cold War which would have allowed the  
20 President, in case of an internal security emergency  
21 or war, to imprison individuals based on suspicion  
22 that they were associated with a foreign power and  
23 were going to engage in acts of sabotage.

24 QUESTION: What about hijackers? The  
25 resolution has to do with 9/11. And the people were

1 hijackers and a lot of the hijackers are up in the  
2 airplane and then they land. Do you think that the  
3 resolution wasn't aimed at them in part?

4 MS. MARTINEZ: Your Honor, our position is  
5 that certainly the President would have inherent  
6 authority with or without this resolution to seize an  
7 individual who is engaged in an act like that that  
8 took place on 9/11. But after that individual had  
9 been seized, in order for that person to be held  
10 in detention in this country, if they are a citizen,  
11 in particular, there must be some express statutory  
12 authorization that provides a framework for that  
13 ongoing detention. And that comes not only from  
14 4001, but also from the Due Process Clause, and --

15 QUESTION: And if they are captured on the  
16 battlefield and then brought here, 4001 clicks into  
17 operation, in your view?

18 MS. MARTINEZ: Our position is that 4001  
19 applies within the United States and its text means  
20 what it says, that no, no person --

21 QUESTION: Well, then your answer to my  
22 question is yes?

23 MS. MARTINEZ: Yes, Your Honor.

24 QUESTION: So if you were --

25 QUESTION: So if we found American



1 citizens in Iraq who were firing on our forces and  
2 brought them back here, they would have to be given  
3 an Article III trial?

4 MS. MARTINEZ: Your Honor, our position is  
5 that Congress could provide for some alternative  
6 legislative scheme for dealing with such individuals.

7 QUESTION: What about my question on Iraq?

8 MS. MARTINEZ: At this time, our position  
9 would be that such persons would have to be given an  
10 Article III trial, unless Congress came in with some  
11 other provision. Yes, Your Honor.

12 QUESTION: Why do you distinguish citizen, if  
13 we are talking about someone like Padilla, who is in  
14 the United States, the Due Process Clause refers to  
15 person, not citizen? So I can see a distinction  
16 between brought into the United States, but within  
17 the United States, if it's someone who is, is an  
18 alien, but is here with permission, a resident alien,  
19 say --

20 MS. MARTINEZ: Yes, Your Honor. We would  
21 agree that such persons are protected by the Due  
22 Process Clause. 4001 refers only to citizens. But  
23 we would agree that aliens within this country might  
24 certainly be protected as well. This case simply  
25 does not present that question, but we would not

1 disagree with that. I think what is important --

2 QUESTION: Well, let's get to that  
3 question. Let's assume that we disagree with you  
4 about 4001, and we think the authorization for use of  
5 military force supersedes that. Then what, then what  
6 is your position with respect to the rights of your  
7 client?

8 MS. MARTINEZ: If Your Honors believe that  
9 4000 -- that the authorization was meant to  
10 specifically authorize the detention of American  
11 citizens on American soil, we would contend first  
12 that there is no limiting principle within that  
13 authorization for who may be detained. The  
14 Government claims that anyone who is associated with  
15 Al Qaeda falls within this definition.

16 QUESTION: So the principle would be that  
17 if somebody is like a missile sent over here, you  
18 know, he is actually one of the hijackers or the  
19 equivalent thereof, that's an obvious limiting  
20 principle, that people who are sent offshore, sent  
21 right over here and we catch them in mid-air.

22 MS. MARTINEZ: I think when you start  
23 trying to draw those lines on a case-by-case basis  
24 where this individual because they are actually in  
25 the midst of a hijacking is close enough whereas some

1 other individual who is merely in the early stages of  
2 a plot might not be enough, the difficulty of drawing  
3 those lines shows the need for clear Congressional  
4 action here.

5 This is primarily a job for Congress to  
6 create, if there is a need in this country for  
7 preventive detention of terrorists, that's a  
8 legislative job for our legislature to undertake.

9 QUESTION: Declarations of war are just  
10 not written this way. The Iraq declaration is not.  
11 The recent declarations of war, formal declarations  
12 are not, and AMUF is not.

13 MS. MARTINEZ: That's correct.

14 QUESTION: That's just not the tradition.  
15 The President is given the authority.

16 MS. MARTINEZ: That's correct, Your Honor.  
17 But broad authorizations for use of force in wartime  
18 have also not traditionally been interpreted to allow  
19 the executive unlimited power over citizens. So in  
20 cases like Duncan and Endo, this Court has said that  
21 a wartime authorization for action by the executive  
22 should not be construed broadly, but should be  
23 construed narrowly to give only the power that it  
24 clearly and unequivocally indicates.

25 QUESTION: Well, Endo was concededly

1 loyal, and Duncan were civil crimes, a stockbroker  
2 who was embezzling, right?

3 MS. MARTINEZ: That's correct, Your Honor.  
4 But what 4001 was intended to prevent was a claim by  
5 the executive that his broad inherent powers in  
6 wartime, which was specifically what 4001 addressed,  
7 would be enough to allow the detention of American  
8 citizens.

9 QUESTION: Right. Can you give me a  
10 minute or so on the, or as long as you want or short,  
11 but suppose you get to the similar place by saying  
12 that this resolution, suppose hypothetically, I'm not  
13 saying what my view is, but hypothetically, suppose  
14 you get to the same place by saying, yes, that  
15 wartime resolution still doesn't authorize departing  
16 from use of the criminal system, the ordinary  
17 criminal system for somebody in the United States,  
18 but for an unusually good reason.

19 Now, we have two possible reasons  
20 advanced, one orally that we need to question him,  
21 and one in the briefs, a suggestion that this man is  
22 a ticking time bomb, and we can't reveal the evidence  
23 without destroying intelligence. Now, I'd like your  
24 vision of how this is supposed to play out under an  
25 ordinary criminal system in response perhaps to what

1 those claims are.

2 MS. MARTINEZ: Our view would be that  
3 because of the difficulty of the question of  
4 determining, for example, as I believe Justice  
5 Kennedy asked earlier, how long would such  
6 interrogation be necessary? Would the district court  
7 be required to take evidence on those sorts of  
8 issues?

9 In the event that there were no other  
10 alternatives, we believe that would be appropriate,  
11 but we also believe that's quintessentially a  
12 question for Congress, which could hold legislative  
13 hearings. And after due deliberation, come to some  
14 conclusion about what was required in this context.

15 And that is in fact what our democratic  
16 allies, United Kingdom and Israel, have done in  
17 passing specific legislation about the preventive  
18 detention of suspected terrorists based on a  
19 legislative finding about what periods of time --

20 QUESTION: Well, that would be, of course,  
21 perhaps, desirable, but we are faced with a situation  
22 of the here and now, and what do we do?

23 MS. MARTINEZ: Your Honor --

24 QUESTION: We just turn loose a ticking  
25 time bomb?

1 MS. MARTINEZ: No, Your Honor. I believe  
2 that, first of all, were this Court to rule that it  
3 was -- that Congressional action was required, I have  
4 no doubt that Congress would step into the breach  
5 very quickly to provide whatever authorization the  
6 executive branch deemed necessary. And so I think  
7 there is no doubt that Congress would fill that  
8 measure.

9 Here in this particular case, the  
10 Government has already said that Mr. Padilla no  
11 longer possesses any intelligence value, and so his  
12 interrogation is at an end. And at this point, after  
13 two years in detention, without any sort of hearing,  
14 without any access to counsel, it's more than  
15 appropriate that he be charged with a crime unless  
16 Congress comes forward with some alternative scheme.

17 Now, if I may turn for a moment to the  
18 issue of jurisdiction. Contrary to Mr. Clement's  
19 suggestions, this case does primarily involve issues  
20 of venue and not jurisdiction. This Court has never  
21 held that there is a hard and fast rule requiring an  
22 immediate custodian, and this Court has also not  
23 applied rigid territorial requirements about the  
24 location of a suit.

25 And in particular, in the Strait case,

1 this Court made clear that the type of jurisdiction  
2 that was necessary was jurisdiction making the  
3 Respondent amenable to service of process under the  
4 long arm provisions by citing International Shoe and  
5 McGee, which are provisions applying normal rules of  
6 personal jurisdiction.

7           Given the particular circumstances of this  
8 case, the extensive personal involvement of Secretary  
9 Rumsfeld in this matter, makes him an appropriate  
10 Respondent and New York is an appropriate venue for  
11 this suit. The Government brought Mr. Padilla to New  
12 York. They placed him in court proceedings there.  
13 Counsel was appointed and litigation had begun. It  
14 was the Government's choice to remove him from that  
15 forum, but that does not change the fundamental fact  
16 that jurisdiction was proper in New York.

17           QUESTION: Are you -- are you suggesting  
18 then that this case might be an exception to some  
19 more general rule because of the peculiar facts that  
20 you have just recited?

21           MS. MARTINEZ: Yes, Your Honor. I think  
22 that -- I think there is no hard and fast general  
23 rule as the Government states it. There are numerous  
24 exceptions already to the rule that the Government  
25 articulates that can be found in prior cases.

1                   QUESTION: Well, maybe there should be  
2 some more definite rule. Supposing we were to say  
3 that generally it's the Secretary of Defense and his  
4 venue is in the Eastern District of Virginia.

5                   MS. MARTINEZ: This Court might very well  
6 decide to make such a venue rule, but I would note  
7 that the Government at this point in the case has  
8 waived their objection to venue by not pursuing it on  
9 appeal. They challenged venue in the district court,  
10 and they did not appeal that.

11                   QUESTION: Well, but they have certainly  
12 challenged the proper custodian here.

13                   MS. MARTINEZ: Yes, Your Honor. They have  
14 challenged the proper custodian, but as this  
15 court's decisions in cases like Endo, like  
16 Eisentrager make clear, that the identity of the  
17 proper Respondent is not a hard and fast or absolute  
18 jurisdictional rule.

19                   QUESTION: That doesn't change it from  
20 jurisdiction to venue. I mean, venue is venue and  
21 jurisdiction is jurisdiction. You may say that the  
22 jurisdictional rule has been so haphazard that  
23 effectively it amounts to the same thing. And that  
24 argument will stand and fall on the basis of the  
25 cases that you and Mr. Clement have discussed.



1                   But to say that this is, this is venue is  
2 simply wrong. I mean, it is a matter of the  
3 jurisdiction of the Court, and it's always been  
4 treated by that way in our opinions. We have not  
5 discussed it as a venue rule.

6                   MR. MARTINEZ: Well, Your Honor, I do agree  
7 that there is a jurisdictional question, and we  
8 agreed that -- we argued that jurisdiction is proper.  
9 But what Braden says is that the rule that Ahrens had  
10 announced as a hard and fast jurisdictional rule  
11 reflected nothing more than traditional venue  
12 concerns.

13                   And so Braden specifically says that  
14 that -- that which was discussed in Ahrens went to  
15 venue and not to jurisdiction. Returning --

16                   QUESTION: Where you had conceivably  
17 proper jurisdiction in several places.

18                   MS. MARTINEZ: Yes, Your Honor. And we  
19 would argue that jurisdiction was proper in New York  
20 in this case because --

21                   QUESTION: We are talking if we are using  
22 the jurisdictional label, it's personal jurisdiction,  
23 and not subject matter jurisdiction.

24                   MS. MARTINEZ: That's correct, Your Honor,  
25 and under this Court's decision in Strait, there was

1 personal jurisdiction over Secretary Rumsfeld in New  
2 York because of his contacts with that forum.

3           Returning to the merits of this case, what  
4 I think is important for this Court to realize is  
5 that the war on terror presents many difficult  
6 questions about the proper balance between civil  
7 liberties and national security. Congress is the  
8 body of our government that has been -- that was  
9 entrusted by the Founders for making law to deal with  
10 new situations. And Congress is fully capable of  
11 considering the various parameters of any sort of  
12 scheme of detention that might be necessary.

13           And certainly this Court would have the  
14 power to review, to determine whether that system  
15 established by Congress were constitutional, but what  
16 we have here is a claim by the executive to a  
17 virtually unlimited system, where any person that the  
18 President deems an enemy combatant --

19           QUESTION: But on the basis of the, of the  
20 Congressional authorization. He is not claiming it  
21 just by virtue of executive power.

22           MS. MARTINEZ: Well, he claims them both  
23 on the basis of inherent executive power and on the  
24 basis of the authorization.

25           QUESTION: Well, but since they are, since

1 they are both the weakest -- weakest claim is  
2 probably solely the executive. But I think you have  
3 to deal with the claim that it's Congressional  
4 authorization.

5 MS. MARTINEZ: Yes, Your Honor. There is  
6 simply no indication that when Congress passed the  
7 Authorization for Use of Military Force which enabled  
8 us to deploy our troops overseas, the Congress also  
9 thought that they were authorizing the indefinite  
10 military detention without trial of American citizens  
11 on American soil. There was no debate of such a  
12 dramatic departure from our constitutional  
13 traditions. And just a few weeks later when Congress  
14 passed the Patriot Act, it extensively debated a  
15 provision that allowed the detention of aliens for  
16 seven days.

17 QUESTION: The trouble is, I don't see how  
18 you can -- I mean, I think I can understand your  
19 saying it doesn't give him any power except a  
20 battlefield power. I can understand that. You might  
21 read it that way. But I can't understand reading it  
22 to say it applies to everybody, but not to United  
23 States citizens. That line is just not there in the  
24 resolution.

25 MS. MARTINEZ: We would say it does not

1 apply off the battlefield, certainly to U.S. citizens  
2 on U.S. soil. And this Court --

3 QUESTION: But it does apply to aliens.  
4 We -- the President could use force against aliens  
5 under that resolution.

6 MS. MARTINEZ: This Court need not decide  
7 that in this case, and I certainly don't --

8 QUESTION: I understand, but you are  
9 proposing to us an interpretation of the resolution,  
10 which I suggest makes no sense, unless you are  
11 willing to say that it also doesn't apply to aliens  
12 that are being brought -- that are committing these  
13 acts within the country.

14 MS. MARTINEZ: I would agree that it does  
15 not -- the authorization does not clearly indicate  
16 that it's applicable to aliens either.

17 QUESTION: He might have the power to take  
18 up the aliens and arrest them any way because 4001  
19 doesn't prohibit it?

20 MS. MARTINEZ: Correct, Your Honor.

21 QUESTION: Is that your point?

22 MS. MARTINEZ: Correct, Your Honor. That  
23 is our point, which is that the degree of specificity  
24 that would need to be required to authorize this kind  
25 of extraordinary detention of citizens would be

1 greater, and in particular with aliens, there has  
2 always been a greater power of the executive because  
3 they have no right to be here.

4 QUESTION: Then I take it then you have  
5 no, assuming -- assuming that 4001 has been  
6 superseded by the authorization. I assume you have  
7 no principal basis for distinguishing between  
8 citizens and aliens insofar as detaining an enemy  
9 belligerent?

10 MS. MARTINEZ: No, Your Honor. As to  
11 individuals within the United States, if 4001 is not  
12 at issue because of its specific reference to  
13 citizens, we would say aliens within the United  
14 States would have the same, would be in exactly the  
15 same position. Correct.

16 QUESTION: So you would make no  
17 distinction between the two.

18 MS. MARTINEZ: Correct, Your Honor, were  
19 it not for 4001. But we think 4001 calls for not  
20 just for broad authorization of executive power, but  
21 specific authorization, because 4001 was concerned  
22 with the situation where there was a general  
23 declaration of war, or where there was some type of  
24 internal emergency.

25 And the concern was that the executive

1 should not be able to rely on that general  
2 declaration of war or that general situation to lock  
3 up citizens. That was precisely the situation with  
4 the Japanese internment camps, the President --  
5 President Roosevelt had been authorized the broadest  
6 possible force you can have to fight a war. There  
7 was a declaration of complete war against Germany and  
8 Japan.

9 Congress looked back on that and did not  
10 want a future President to be able to find in such a  
11 declaration of war the power to imprison American  
12 citizens. They wanted it to come from specific  
13 legislation.

14 QUESTION: So you say that has no  
15 application on the battlefield because of the  
16 principle of no extraterritorial effect of  
17 United States statutes?

18 MS. MARTINEZ: Your Honor, certainly as to  
19 an overseas battlefield, 4001, because of the  
20 presumption against extraterritoriality, would not  
21 apply.

22 QUESTION: Now, what if you capture an  
23 American combatant and bring him back to the  
24 United States, then 4001 --

25 MS. MARTINEZ: 4001 would apply upon his

1 return.

2 QUESTION: It would apply?

3 MS. MARTINEZ: Correct. And let me say  
4 also, in respect to the Japanese internment camps,  
5 Congress was very specific in passing 4001 that what  
6 it wanted was democratic deliberation by our  
7 lawmakers about the necessity of this kind of extreme  
8 measure, where American citizens might be detained  
9 without trial.

10 It didn't want that to slip under the  
11 radar, under the umbrella of a general declaration of  
12 war or general use of force. It wanted to ensure  
13 that there was specific debate by Congress on those  
14 very different constitutional questions presented in  
15 those situations by the power of detaining citizens.

16 QUESTION: Did Congress at the time of  
17 4001 consider other systems that do allow for  
18 preventative detention, but then require the person  
19 periodically to be brought before a judge to make  
20 certain that the conditions still exist, like, as is  
21 alleged in this case, the need to get evidence?

22 MS. MARTINEZ: Your Honor, there certainly  
23 are many other systems that provide for that sort of  
24 judicial review. In the United Kingdom and Israel,  
25 for example, people detained under preventive

1 detention schemes are entitled to access to counsel,  
2 they are entitled to prompt and periodic judicial  
3 review under legislative standards to determine  
4 whether those detentions can be continued.

5           And certainly there are many comparative  
6 examples out there where legislatures have made those  
7 kind of fact-findings about what's appropriate. And  
8 there is no reason why our legislature could not  
9 undertake such --

10           QUESTION: The reason -- and this is why  
11 I've been harping on this thing of necessary and  
12 appropriate. It seems to me if you take into account  
13 the traditions of the United States ordinary criminal  
14 processes, and you say, well, the forces act, the use  
15 of force act, doesn't apply at all, then there is no  
16 way to take care of the real emergency, the real  
17 emergency, the real ticking time bomb, et cetera,  
18 except to go back to Congress, which may or may not  
19 act.

20           But if you get to the same result by  
21 reading the necessary and appropriate thing to take  
22 into account our traditions, you do leave the opening  
23 there for the possibility of a real emergency which  
24 would warrant an extraordinary proceeding. I'm just  
25 exposing my thought on this so that I can get your



1 reaction.

2 MS. MARTINEZ: Yes, Your Honor. I think  
3 that's absolutely correct. You could certainly read  
4 the necessary and appropriate language that way. And  
5 let me also make clear that we are not arguing that  
6 the President would have no power either under the  
7 AUMF or under his inherent powers to seize an  
8 individual in the case of imminent violent activity.

9 We are simply talking about his power to  
10 continue to detain that individual over many months  
11 prior to that initial seizure. And so regardless of  
12 how you read the AUMF, that's simply not what they're  
13 arguing about. We're arguing about, once the  
14 individual has been prevented from carrying out the  
15 harmful attack, and once they're in Government  
16 custody, can they simply be held forever without  
17 trial until the end of the war on terror, or instead,  
18 once they're taken into custody, must they be treated  
19 in accordance with our positive laws.

20 QUESTION: So I take it you would say that  
21 the resolution was inadequate to continue to hold  
22 your client in the manner in which he is being held,  
23 even on the day in which it was passed? This is not  
24 a two and a half years later argument, it would be an  
25 argument on the day it was passed?

1 MS. MARTINEZ: Yes, Your Honor,  
2 particularly --

3 QUESTION: I just want to make sure I  
4 understand you. But you would not necessarily have  
5 objected, let's say, a week after September 11th,  
6 even though there was no resolution?

7 MS. MARTINEZ: If there were a situation  
8 where an individual, not like my client, but an  
9 individual that were on the verge of engaging in  
10 imminent violent conduct, certainly the President  
11 would have the power, even under the Fourth  
12 Amendment, to seize that individual without a warrant  
13 and bring him into custody on the basis that they  
14 were about to engage in a violent act.

15 But that's a far different situation from  
16 seizing someone like my client who is not alleged to  
17 be on the verge of imminent lawless activity, was not  
18 in the process of hijacking an aircraft but was  
19 simply alleged to be part of a plot --

20 QUESTION: Let me interrupt. When you say  
21 it is clear he could do it if the defendant was about  
22 to engage in that kind of conduct, by what standard  
23 would you decide that he was about to? Probable  
24 cause, proof beyond a reasonable doubt or just  
25 suspicion?

1 MS. MARTINEZ: For the initial seizure, we  
2 would say probable cause.

3 QUESTION: Reasonable suspicion based on  
4 confidential intelligence would not be sufficient?

5 MS. MARTINEZ: We would submit no, but  
6 it's possible that when that question came up, the  
7 quantum of evidence might be weighed against the  
8 danger that the executive perceived. If the  
9 executive had some amount of suspicion that there was  
10 about to be a very violent activity, it could be  
11 possible that some lesser amount might be required  
12 for the initial seizure. But we're not talking --

13 QUESTION: That's really a reasonable  
14 suspicion standard, then, isn't it?

15 MS. MARTINEZ: Yes, Your Honor. But we're  
16 not talking about that question of initial seizure  
17 here. In this case we're talking about the ongoing  
18 detention for two years of someone after there has  
19 been --

20 QUESTION: You wouldn't just say two  
21 years. You would certainly say that as soon as the  
22 President prevented the act that he feared by taking  
23 the person into custody, he immediately had no more  
24 authority to detain him, wouldn't you? I mean --

25 MS. MARTINEZ: Yes.

1                   QUESTION: That's the way the statute  
2 you're relying on reads, that he shall not be  
3 detained. So two years has nothing to do with it.

4                   MS. MARTINEZ: Yes, Your Honor.

5                   QUESTION: The next day he should, I  
6 suppose, you know, hand him over to civil prosecution  
7 authorities.

8                   MS. MARTINEZ: Yes, Your Honor, we would  
9 say at 48 hours under this Court's decisions. If  
10 Congress thinks that a longer period of time is  
11 appropriate in terrorism cases, it can do as other  
12 countries have done and provide for a longer period  
13 of time.

14                   In the United Kingdom, there is a 48 hours  
15 plus a maximum of 7 days without charge for suspected  
16 terrorists. In the United Kingdom, up to 14 days.  
17 Congress might come in and provide some legislative  
18 extension. But in the absence of that, our normal rule  
19 of 48 hours under County of Riverside would be  
20 appropriate.

21                   QUESTION: But we are not just talking  
22 about terrorists here. We're talking about  
23 terrorists associated with foreign forces.

24                   MS. MARTINEZ: Yes, Your Honor. And let  
25 me say that those are exactly the sort of individuals

1 that the passage of 4001 was designed to address.  
2 The Emergency Detention Act, which 4001 repealed,  
3 specifically talked about the possibility of  
4 saboteurs in this country who are under the direction  
5 and control of the communist empire.

6 And so there was a specific concern with  
7 individuals who might be under that kind of power in  
8 4001. And Congress wanted to make very clear that  
9 such individuals could not simply be detained at  
10 executive discretion, but could only be detained  
11 pursuant to positive law. Positive law that is  
12 simply nonexistent in this case.

13 The type of association with a terrorist  
14 organization is also unclear based on the  
15 Government's allegations in this case. Surely the  
16 Government cannot claim that anyone who associated  
17 with any member of Al Qaeda at any time would be  
18 subject to indefinite military detention without  
19 trial.

20 Mr. Padilla's mother, because she is  
21 associated with her son, may be argued to have  
22 associated with Al Qaeda, and clearly that's not what  
23 Congress had in mind, to allow that person to be  
24 locked up with no right to a lawyer, no right to a  
25 hearing for as long as the war on terror lasts.

1 That's simply not consistent with our nation's  
2 constitutional traditions, it's a limitless power and  
3 there is no call for it in this case.

4 QUESTION: So you say that Judge Mukasey's  
5 solution for this case was not adequate, then?

6 MS. MARTINEZ: Yes, Your Honor. We do not  
7 believe that Judge Mukasey's solution was adequate.  
8 We believe that in the first instance, clear  
9 authorization and parameters for such detention must  
10 come from Congress, defining who ought to be detained  
11 and what procedures ought to accompany those  
12 detentions.

13 And at that point, this Court could review  
14 them for consistency with the Constitution. But no,  
15 while certainly Judge Mukasey's order was better than  
16 what the Government offered, which was no process at  
17 all, no opportunity to be heard and no access to  
18 counsel, certainly Judge Mukasey's order was better  
19 than that.

20 But when the indefinite deprivation of a  
21 citizen's liberty is at stake, we would argue that  
22 the Government must come forward with more than some  
23 evidence consisting of any evidence in the record  
24 that might support the Government's position that  
25 he's associated with terrorists. When this type of

1 extreme deprivation of liberty is at issue, something  
2 more than that is required by the Due Process Clause  
3 and by our Constitution.

4           So certainly what we would say is that  
5 this Court needs not to decide those issues today, of  
6 what precise standard of proof ought to be given,  
7 exactly when an individual ought to be allowed access  
8 to counsel and what the limits are on how long such  
9 an individual could be held, et cetera, because those  
10 are primarily questions for Congress.

11           And this Court ought to wait until  
12 Congress has come in and provided that kind of  
13 guidance before it passes on these grave  
14 constitutional questions, which really go to the core  
15 of what our democracy is about, which is that the  
16 Government cannot take citizens in this country off  
17 the street and lock them up in jail forever without a  
18 trial. That's never the way our country has operated  
19 and it's fundamentally inconsistent with our  
20 traditions. And so I would submit today is not the  
21 day for this Court to decide whether that's  
22 permissible.

23           The Government asks in this case for  
24 basically limitless power and however grave the  
25 circumstances of the war on terror may be, this

1 nation has faced other grave threats. We've had war  
2 on our soil before and never before in the nation's  
3 history has this Court granted the President a blank  
4 check to do whatever he wants to American citizens.

5           So the fact that we're at war does not  
6 mean that our normal constitutional rules do not  
7 apply. Even in wartime, especially in wartime, the  
8 Founders wanted to place limits on the ability of the  
9 executive to deprive citizens of liberty. And they  
10 were concerned, based on the history of the British  
11 Crown, of the possibility that an unchecked executive  
12 using excuses based on national security, using the  
13 military power to render that superior to civilian  
14 authorities, could exercise the exact type of power  
15 that's at issue in this case. Thank you, Your Honor.

16           QUESTION: Thank you, Ms. Martinez. And  
17 Mr. Clement, you have four minutes remaining.

18           REBUTTAL ARGUMENT OF PAUL D. CLEMENT

19           ON BEHALF OF RESPONDENTS

20           MR. CLEMENT: Thank you, Mr. Chief  
21 Justice. I would like to make just three points.  
22 First, on jurisdiction, it is true that the immediate  
23 custodian rule is not a hard and fast rule and it has  
24 been -- exceptions have been made. But the  
25 territorial jurisdiction rule, as statutorily



1 prescribed, limits the Court's jurisdiction and is a  
2 hard and fast rule.

3           And the best evidence of the relationship  
4 between the two is in those cases where you had to  
5 relax one or the other, when you had a citizen  
6 detained abroad where the immediate custodian was  
7 abroad outside the territorial jurisdiction of any  
8 district court, rather than relax the rule of  
9 territorial jurisdiction, the Court said you could  
10 sue the Secretary of Defense in a district where  
11 there is territorial jurisdiction over the  
12 individual.

13           It is true there are situations like  
14 Strait against Laird that don't involve normal  
15 physical confinement, where the Court has had to come  
16 up with some rule to deal with the fact that you only  
17 have a metaphysical custodian. But in the case of a  
18 physical detention of an individual, the Court has  
19 never relaxed the rule that you file it in the  
20 district where the immediate custodian is located.

21           And if you look at this Court's decision  
22 in Carbo and Justice Rutledge's dissent in Ahrens,  
23 you'll see that if you don't respect the rule in a  
24 situation like this, there is nothing left to the  
25 statutory language and nothing left of the intent of

1 the Congress that passed it.

2 The second point I would like to make is  
3 that in looking at this case and the authority that's  
4 asserted and the role of 4001(a), it's important to  
5 recognize that there is a significant difference  
6 between civilian authority and the military authority  
7 over enemy combatants.

8 This Court, when it decided Endo and  
9 addressed the situation of the detention of the  
10 Japanese, specifically carved out the situation of  
11 the military detention of enemy combatants and said  
12 that that is not involved here. It stands to reason  
13 that if Congress, in passing 4001(a) to effectively  
14 prevent another Japanese internment camp of  
15 concededly loyal citizens also probably wanted to put  
16 to one side the issue of military detention of enemy  
17 combatants.

18 In any event, the Court need not  
19 ultimately decide whether 4001(a) has any application  
20 because the authorization of force clearly provides  
21 the necessary act of Congress. It authorizes not  
22 Article III courts for these individuals. It  
23 authorizes military force.

24 And the relevant line here is provided by  
25 this Court's case in Quirin, when somebody goes

1     abroad, associates with the enemy, takes weapons  
2     training or explosives training with the enemy, and  
3     then returns to the United States with the intent to  
4     commit hostile and warlike acts at the direction of  
5     the enemy, that classically falls within the Quirin  
6     side of the line.

7                     It's much different than a Landon Milligan  
8     who never left the State of Indiana. And the  
9     military has authority over that individual.

10                    Lastly, let me just address the argument  
11     that somehow you can constrain the authorization of  
12     force and read it only to apply in a battlefield  
13     setting. With respect, I think that ignores the  
14     context in which it was passed. It was passed seven  
15     days after September 11th. The resolution itself  
16     recognizes that we face continuing threats at home  
17     and abroad.

18                    It was not passed as a matter of  
19     retribution for those attacks, but to prevent future  
20     attacks. To read it to deny the Government the  
21     authority to detain a latter day citizen version of  
22     Mohammed Atta is to simply ignore the will of  
23     Congress. Thank you, Your Honor.

24                    QUESTION: Thank you, Mr. Clement. The  
25     case is submitted.

1                   (Whereupon, at 12:20 p.m., the case in the  
2 above-entitled matter was submitted.)

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