

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LAKHDAR BOUMEDIENE, ET :

4 AL. :

5 Petitioners :

6 v. : No. 06-1195

7 GEORGE W. BUSH, PRESIDENT :

8 OF THE UNITED STATES, ET :

9 AL. ; :

10 and :

11 KHALED A. F. AL ODAH, NEXT :

12 FRIEND OF FAWZI KHALID :

13 ABDULLAH FAHAD AL ODAH, :

14 ET AL., :

15 Petitioners :

16 v. : No. 06-1196

17 UNITED STATES, ET AL. :

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19 Washington, D.C.

20 Wednesday, December 5, 2007

21

22 The above-entitled matter came on for oral

23 argument before the Supreme Court of the United States

24 at 10:01 a.m.

25

1 APPEARANCES:

2 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
3 the Petitioners.

4 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
5 Department of Justice, Washington, D.C.; on behalf of
6 the Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-1195, Boumediene v. Bush, and case 06-1196, Al Odah v. United States.

Mr. Waxman.

ORAL ARGUMENT OF SETH W. WAXMAN
ON BEHALF OF THE PETITIONERS

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

The Petitioners in these cases have three things in common. First, all have been confined at Guantanamo for almost six years, yet not one has ever had meaningful notice of the factual grounds of detention or a fair opportunity to dispute those grounds before a neutral decisionmaker.

Two, under the decision below, they have no prospect of getting that opportunity.

And three, each maintains, as this Court explained in Rasul, that he is quote "innocent of all wrongdoing." Now the government contends that these men are detainable, and the facts of these 37 cases differ, and it may well be that an adjudicatory process that preserves the core features of common law habeas would reveal perhaps that some of these Petitioners are

1 lawfully detainable. But limited DTA review of the
2 structurally flawed CSRT process cannot provide any
3 reliable examination of the Executive's asserted basis
4 for detaining these Petitioners, let alone an adequate
5 substitute for traditional habeas review.

6 CHIEF JUSTICE ROBERTS: I thought we ruled
7 in the Hamdi case that procedures quite similar to those
8 under the DTA were adequate for American citizens.

9 MR. WAXMAN: Well, with respect, Mr. Chief
10 Justice, what you ruled -- as I understand what the
11 plurality held in Hamdi was that, so long as there was a
12 process accompanying detention, that provided for
13 meaningful notice of the factual grounds for detention,
14 a meaningful opportunity to present evidence in response
15 to that before a neutral tribunal with the assistance of
16 counsel, that determination would certainly be entitled
17 to substantial deference by a habeas court; and we don't
18 dispute that.

19 CHIEF JUSTICE ROBERTS: So our judgment in
20 this --

21 MR. WAXMAN: But that's not what they got.

22 CHIEF JUSTICE ROBERTS: So our judgment in
23 this case depends upon whether we agree with you or the
24 government that the procedures available under the DTA
25 are meaningful under Hamdi?

1 MR. WAXMAN: It -- I think your decision in
2 this case, the question -- the principal question we
3 think is presented by the case is whether or not the DTA
4 review of the CSRT procedures that occurred in this case
5 adequately substitute for the writ of habeas corpus.

6 JUSTICE GINSBURG: Mr. Waxman, how could
7 that be, because the D.C. Circuit never got to that
8 question? The D.C. Circuit, as I understand it, ruled
9 that there was no access to habeas, end of case.

10 So the D.C. Circuit never examined the
11 procedure under the DTA, did it?

12 MR. WAXMAN: No. The district court -- the
13 two district judges sitting in habeas went to the merits
14 of the case, and Judge Green did evaluate the
15 procedures. The D.C. Circuit held that the
16 Constitution, neither the Suspension Clause nor the Due
17 Process Clause, applies to these people. And therefore
18 it didn't reach the merits. But --

19 JUSTICE GINSBURG: So shouldn't we, if we
20 agree with you, that there is authority in the
21 district -- in the D.C. Circuit, send it back to them to
22 make that determination whether habeas being required,
23 this is an adequate substitute?

24 MR. WAXMAN: Well, I'm not saying that the
25 court -- this Court couldn't do that. It certainly

1 could do that. But one of the principal -- the
2 principal guarantee of habeas corpus through the
3 centuries has been a speedy -- the remedy of speedy
4 release for somebody who is unlawfully being held in
5 executive detention.

6 These 37 men have been held in isolation for
7 six years, and it is manifest on the record in this case.
8 There's no doubt about how the CSRT has proceeded.
9 There is little doubt about the circumscribed nature of
10 the D.C. Circuit's review. The D.C. Circuit has already
11 held that the Constitution doesn't apply.

12 CHIEF JUSTICE ROBERTS: Your argument
13 wouldn't be any different with respect to the
14 availability of habeas if these people were held for one
15 day, would it? We don't look at the length of detention
16 in deciding whether habeas is available, do we?

17 MR. WAXMAN: Well, I want to give a
18 qualified disagreement with your hypothetical, because
19 it's entirely clear that -- as I think members of this
20 Court have indicated and that habeas traditionally
21 indicated -- that there may be military exigencies,
22 there may be a limited time period in which it is
23 inappropriate for a habeas court to rule. And moreover,
24 if there are --

25 CHIEF JUSTICE ROBERTS: Well, if I could

1 just stop you there. Do you want this Court to rule on
2 whether or not there are military exigencies that
3 require the holding and detention of these enemy
4 combatants?

5 MR. WAXMAN: No, what I was referring to
6 were sort of the hypothetical of battlefield -- somebody
7 is captured -- you know -- and the next day or the next
8 week from the battlefield, does he or she have the right
9 to -- does a habeas court have constitutional
10 jurisdiction. We're not contending that, but --

11 CHIEF JUSTICE ROBERTS: Putting aside the
12 battlefield hypothetical, we're talking about
13 Guantanamo. Your argument is that somebody held one day
14 in Guantanamo has the right to habeas. So the extent of
15 detention is irrelevant to your assertion.

16 MR. WAXMAN: I don't think so, with respect.
17 I think -- I don't think -- I think it is appropriate
18 for a habeas -- if the Executive says we have detained
19 this person, we believe this person is an enemy
20 combatant who may be lawfully detained under the AUMF,
21 we have an administrative process that is fair, that
22 will -- that will determine the facts. You should stay
23 your hand to allow that procedure to occur. Of course,
24 that is appropriate, so long as the procedure is
25 meaningful and speedy. That's what we do in immigration

1 cases.

2 JUSTICE GINSBURG: But your basic position
3 has to rest on Guantanamo Bay being just like if we had
4 the detainees in, say, the Everglades. But do you --
5 you concede that if these people had never been brought
6 to the United States, if the facility were in, say,
7 Germany, that these detainees would have no access to
8 habeas, no access to our courts?

9 MR. WAXMAN: I wouldn't agree with that for
10 two reasons. First of all, I think these people are in
11 a place that is even -- that is under even more complete
12 control and jurisdiction of our national Executive than
13 they would be in the Everglades, because there are no
14 Federalism constraints here. Our national government
15 supplies the only law.

16 If they were detained in Germany, the
17 question would be A, are they being detained by the
18 United States or by some multinational coalition force
19 as was the case, for example, in Hirota.

20 B, are there other laws, or can they invoke
21 the jurisdiction of another court? And the answer to
22 that question would depend upon the terms of our
23 status-of-forces agreement.

24 JUSTICE SCALIA: Who says that? Let's
25 consider first the basis on which the court of appeals

1 decided this case.

2 They decided it -- in Rasul, we had held
3 that the habeas statute extended to Guantanamo, and that
4 those people who had filed their suits before the
5 statute, at least, could bring a suit.

6 Congress acted and enacted a new habeas
7 statute which makes it very clear that the habeas
8 statute, at least, does not apply to these people in
9 Guantanamo.

10 Your assertion here is that there is a
11 common law constitutional right of habeas corpus that
12 does not depend upon any statute.

13 Do you have a single case in the 220 years
14 of our country or, for that matter, in the five
15 centuries of -- the English empire in which habeas was
16 granted to an alien in a territory that was not under
17 the sovereign control of either the United States or
18 England?

19 MR. WAXMAN: The answer to that is a
20 resounding yes.

21 JUSTICE SCALIA: What is -- what are they?

22 MR. WAXMAN: They are the cases that were
23 discussed and cited by the majority opinion in Rasul,
24 and we have -- we have added other ones to them, but in
25 short --

1 JUSTICE SCALIA: What cases -- what case in
2 particular do you think in Rasul --

3 MR. WAXMAN: I think the opinion of two of
4 the three law lords in the Earl of Crewe, which the
5 majority cited as In re Sekgome. It is certain -- the
6 government concedes it was the case In re Mwenya. It was
7 true in the Indian cases. And, in fact, as we point out
8 in a footnote --

9 JUSTICE SCALIA: Mwenya involved an English
10 -- an English subject, not an alien.

11 MR. WAXMAN: Indeed, it did.

12 JUSTICE SCALIA: The question here is an
13 alien.

14 MR. WAXMAN: Indeed, it did, and the
15 government --

16 JUSTICE SCALIA: So it's totally irrelevant.

17 MR. WAXMAN: Well, no -- let me take a shot
18 at convincing you that it's not totally irrelevant. The
19 Crown Counsel in that case, in his brief, stated
20 forthrightly that subjecthood or citizenship didn't
21 matter and, in fact, in the very minority opinion that
22 the government relies on in its brief here in Earl of
23 Crewe, Lord Justice Kennedy specifically said that the
24 citizenship is irrelevant. It isn't and wasn't --

25 JUSTICE SCALIA: In both of those cases, it

1 was a citizen, nonetheless. In 220 years of our
2 history, or five centuries of the -- do you have a
3 single case in which it was not a citizen of England or
4 a citizen of the United States in which a common law
5 writ of habeas corpus issued to a piece of land that was
6 not within the sovereign jurisdiction?

7 MR. WAXMAN: Well, the Court majority in
8 Rasul cites a case involving the Isle of Jersey, the
9 Channel Islands. None of those were within the
10 sovereign --

11 JUSTICE SCALIA: The -- courts, they were
12 not regarded as part of the Crown's dominion, but they
13 were part of the Crown's sovereign territory.

14 MR. WAXMAN: I'll take one more chance,
15 Justice Scalia, and then maybe we can --

16 JUSTICE SCALIA: Well, try them. I mean,
17 line them up.

18 (Laughter.)

19 MR. WAXMAN: Okay. Here they go. In the
20 Indian cases -- I mean, first of all, let's say that
21 citizenship was not a notion at common law. The
22 question was subjecthood, and "subjecthood" was a very
23 ill-defined term that had no fixed parameters, as our
24 reply brief points out.

25 Certainly many of the petitioners in the

1 Indian cases that we cited -- and in fact that Sir John
2 Chambers decided -- were not Englishmen or people who
3 would have been otherwise considered --

4 JUSTICE SCALIA: And the cases were decided
5 under a statute that applied in India, not under --
6 under the common law.

7 And the writ did not come from England; the
8 writ came from English courts in India under a statute.
9 And we decided that in Rasul. I mean, you want to do
10 that in Rasul, that's fine. But you are appealing to a
11 common law right that somehow found its way into our
12 Constitution without, as far as I can discern, a single
13 case in which the writ ever issued to a non-citizen.

14 MR. WAXMAN: Justice Scalia, as Lord
15 Mansfield explained in the King v. Cowle -- and both
16 sides are citing to it -- even if the writ -- even with
17 respect to the persons detained outside the English
18 realm, the relevant question was, is this person under
19 the subjection of the Crown? Not what is the
20 subjecthood or citizenship of this person? And in fact
21 --

22 CHIEF JUSTICE ROBERTS: What is the
23 relevance to your -- this line of reasoning to the
24 recent enactment by Congress of section 1005(g), which
25 says that the base at Guantanamo is not part of the

1 United States? There is a judgment by the political
2 branches that we don't exercise sovereignty over the
3 leasehold, and it seems to me that, if we're going to
4 adhere to our habeas corpus cases, we would have to
5 reject that determination.

6 MR. WAXMAN: Mr. Chief Justice, let me
7 answer that question directly and then if I may finish
8 my answer to Justice Scalia.

9 We don't contend that the United States
10 exercises sovereignty over Guantanamo Bay. Our
11 contention is that at common law, sovereignty (a) wasn't
12 the test, as Lord Mansfield explained, and (b) wasn't a
13 clear-cut determine -- there weren't clear-cut
14 sovereignty lines in those days. Our case doesn't
15 depend on sovereignty. It depends on the fact that,
16 among other things, the United States exercises --
17 quote -- "complete jurisdiction and control over this
18 base." No other law applies.

19 If our law doesn't apply, it is a law-free
20 zone. Now Justice Scalia --

21 JUSTICE ALITO: So in answer to
22 Justice Ginsburg's question, it wouldn't matter where
23 these detainees were held so long as they are under U.S.
24 control. If they were held on a U.S. military base
25 pursuant to a standard treaty with another country, if

1 they were in Afghanistan or in Iraq, the result would be
2 the same?

3 MR. WAXMAN: No, I think, Justice Alito, I
4 want to be as clear about this as I can be. This is a
5 particularly easy, straightforward case, but in another
6 place, jurisdiction would depend on the facts and
7 circumstances, including the nature of an agreement with
8 the resident sovereign over who exercises control. And
9 I want to come back to that with the Japan and German
10 example, because I have read the status-of-forces
11 agreements there.

12 Secondly, even if there technically were
13 jurisdiction, there might very well be justiciability
14 issues under the circumstances of the sort that
15 Justice Kennedy addressed in his concurrence in *Rasul*;
16 that is, there may be circumstances and temporal
17 conditions in which, under the separation of powers, it
18 would be -- a court would deem it inappropriate to
19 exercise that jurisdiction.

20 And finally, even if it were appropriate to
21 exercise the jurisdiction, the review of a habeas court
22 in the mine run of cases would be anything but plenary
23 because members of enemy armed forces and enemy aliens
24 within the meaning of the Alien Enemy Act are
25 detainable. Period. Now, with respect to --

1 JUSTICE ALITO: What if, in a future war,
2 many of the soldiers and the opposing army don't wear
3 uniforms? What if it's a war like Vietnam and thousands
4 of prisoners are taken into custody and they are brought
5 to prisoner-of-war camps in the United States as
6 occurred during World War II? Every one of them under
7 your theory could file a habeas petition. Is that
8 right?

9 MR. WAXMAN: Well, if they were in the
10 United States, I think it's clear that they could file
11 habeas petitions. And, you know, the question about how
12 Guantanamo relates to that is for this Court. What's
13 material is that -- I mean we cited to the Court the
14 Army directives and the Army procedures implementing
15 Article V of the Geneva Conventions that were used in
16 Vietnam, which is the only other war we engaged in that
17 had combatants who weren't in uniforms. They not only
18 had a hearing that was near the time and near the place
19 of capture and the right to call witnesses; there's no
20 evidence that classified information was withheld from
21 them. And they not only had a right to counsel; the
22 government provided them counsel, somebody who was their
23 advocate.

24 Now, once a determination like that is made,
25 they may -- if they're detained in the United States --

1 they may file a habeas petition and the response will be
2 there is absolutely no reason not to defer to the
3 adjudication of that tribunal. You had, as I started
4 with the Chief Justice, you had a fair notice of the
5 facts, a fair opportunity to challenge them with the
6 assistance of counsel before a neutral decisionmaker.

7 CHIEF JUSTICE ROBERTS: So to determine
8 whether there's jurisdiction, in every case we have to
9 go through a multifactor analysis to determine if the
10 United States exercises not sovereignty, which you've
11 rejected as the touchstone, but sufficient control over
12 a particular military base? Over the Philippines during
13 World War II, in Vietnam, and it is going to decide in
14 some cases whether the control is sufficient and others
15 whether it isn't?

16 MR. WAXMAN: Well, I don't --

17 CHIEF JUSTICE ROBERTS: And that is a
18 judgment we the Court would make, not the political
19 branches who have to deal with the competing
20 sovereignties in those situations?

21 MR. WAXMAN: You know, I think -- I don't
22 think it's -- both sides try to derive force from the
23 fact that such claims, such habeas petitions, haven't
24 come forward in floods in the past.

25 I think the reason is that, in the past, we

1 had combat in which -- you know -- I mean in a war of
2 the conventional sort, soldiers wear uniforms, and more
3 to the point, the interests of the captured soldier and
4 the command -- and the capturing officer are aligned.
5 The captured soldier wants to be treated as a prisoner
6 of war or released.

7 The commanding general wants to release
8 civilians who aren't in the Army or turn them over for
9 criminal prosecution. That's why, in the Gulf war,
10 there were 1200 -- roughly, just a few under 1200
11 Article V field tribunal hearings that were held, of
12 which almost 900 were released as civilian
13 non-combatants and the remaining were detained --

14 JUSTICE SCALIA: Counsel, we had 400,000
15 German prisoners in this country during World War II.
16 And not a -- you say it's clear in the Vietnam example
17 that the Chief Justice gave you, it's clear that habeas
18 would lie. 400,000 of these people. It never occurred
19 to them.

20 MR. WAXMAN: Well, first of all, there is
21 Colepaugh and Territo --

22 JUSTICE SCALIA: And many of them were
23 civilians, by the way, and not in uniform. Not a single
24 habeas petition filed.

25 MR. WAXMAN: There is -- there are

1 Colepaugh, the Tenth Circuit case and In re Territo,
2 both of which we discuss. But more to the point, as I
3 said, Justice Scalia, there is no doubt that a member of
4 the German army or somebody who is assisting the German
5 army -- it would be totally unavailing to file a cert
6 petition -- to file a habeas petition because they are
7 detainable. It would be like Mr. Ludecke in the United
8 States v. Ludecke saying --

9 JUSTICE SCALIA: He claims he wasn't
10 assisting the German army, just as these people here
11 claim that they were not attacking U.S. bases.

12 MR. WAXMAN: They were provided Article V
13 tribunals that gave them actual notice of the
14 government's facts and actual opportunity to controvert
15 it and a determination by military officers who had not
16 been told that both the commanding general of the
17 Southern Command and the Secretary of Defense had
18 personally reviewed the evidence and determined that
19 these were enemy combatants; and a habeas court would
20 simply dismiss.

21 And a habeas court could simply say whether
22 we do or don't technically have jurisdiction under
23 battlefield circumstances or circumstances involving
24 foreign detainees in a zone of occupation where active
25 hostilities occur, it is inappropriate under the

1 separation of powers for us to intervene. But these men
2 have been held, taken by the United States, thousands of
3 miles away -- in the case of my six individuals, plucked
4 from their homes, from their wives and children in
5 Sarajevo, detained for three months at the United States
6 request.

7 JUSTICE ALITO: Your primary position is
8 that we should order that they be released, is that
9 correct?

10 MR. WAXMAN: Well, we've asked that they be
11 granted habeas relief. We think that what that means is
12 that they should be -- the cases should be returned to
13 the district courts where their cases are proceeding.
14 The government has filed its factual returns to the
15 writ. Judge Green, in the cases pending before her, has
16 established procedures to protect the --

17 JUSTICE KENNEDY: Suppose there had not been
18 a six-year wait, would it be appropriate then for us
19 to -- if you prevail -- remand the case to the habeas
20 court and instruct the habeas court to defer until the
21 Court of Appeals for the District of Columbia has
22 finished the DTA review proceedings?

23 MR. WAXMAN: I would argue that the answer
24 is no for two reasons. One because there is no
25 prospect, no prospect that the DTA proceedings will be

1 conducted with alacrity or certainty; and second of
2 all, because unless --

3 JUSTICE KENNEDY: Why should I assume that
4 the district court in Washington would be any faster
5 than the court of appeals?

6 MR. WAXMAN: Here's -- the -- let's
7 take the cases in front of Judge Green. Judge Leon in
8 the cases of my client just granted the government's
9 motion to dismiss. But in all of the cases the
10 government has filed its factual return under the
11 procedures, under the long-established habeas procedures
12 under 2243. It is -- the burden is now on us. She has
13 already ruled that with respect to secret information or
14 classified information, here are the safeguards that
15 will govern, here's how we will work. And it is simply
16 on us now to adduce and present evidence to try and
17 over -- to try to shoulder the burden we have.

18 In the court of appeals, Justice Kennedy,
19 the government, after two years, has not produced the
20 record on review in a single case. It has now said --
21 two years. It has now said that it cannot do so, and
22 the court of appeals has suggested that what the
23 government ought to do is hold entirely new CSRT
24 proceedings.

25 Now, those proceedings are structurally

1 flawed. Perhaps this Court could say, look, here's how
2 it's going to be. First of all, the Constitution does
3 apply. Second of all, we have to have a hearing in
4 which the following things occur.

5 We -- either in the court of appeals under
6 the All Writs Act or under 28 U.S.C. section 2347(c) --
7 the Petitioners have to have the right to adduce and
8 present evidence to controvert the government's return
9 which was -- almost all of the government's evidence was
10 introduced ex parte, in camera, and with a -- to boot
11 with a presumption that it is accurate and genuine.

12 JUSTICE KENNEDY: Why can't that take place
13 in the CSRT review proceedings that are pending?

14 MR. WAXMAN: Well, I don't -- it could if
15 the military had different procedures to govern the
16 CSRTs. And our submission is that with respect to these
17 Petitioners, you've asked to hold aside the six years.
18 I would say with respect to future detainees, that this
19 Court could issue a ruling -- well, this Court should
20 issue a ruling saying for these people if the writ means
21 anything, the time for experimentation is over. We have
22 tried and true established procedures. We've got
23 experienced district judges including a judge who was
24 the chief judge of the FISA court, who's already
25 established the rules for maintaining confidentiality of

1 classified information.

2 But we are not as a Court saying that there
3 could not readily be an adequate substitute if the
4 administrative procedures generated by the Department of
5 Defense allowed for the process minimums that the Chief
6 Justice asked me about at the beginning and advocated a
7 standard that was authorized -- a substantive standard
8 authorized by the AUMF. DTA review may very well be an
9 adequate substitute.

10 JUSTICE SOUTER: Is that possible for
11 your -- let's say your six clients at this point or for
12 any of the Guantanamo detainees, I guess, because
13 wouldn't they all run into the problem of -- the
14 neutrality problem that you raised? The commanding
15 general, the Secretary of Defense, in effect, have
16 already said these people belong where they are.
17 Wouldn't that make it impossible, really, at this stage
18 of the game to substitute a military procedure?

19 MR. WAXMAN: I certainly think so. But at a
20 minimum, Justice Souter, you would have to have the kind
21 of tribunal that is called for under the Uniform Code of
22 Military Justice --

23 JUSTICE SOUTER: I understand that.

24 MR. WAXMAN: -- where you don't have the
25 convening authority exercising command control over the

1 tribunal officer.

2 JUSTICE SOUTER: I'm just wondering whether
3 assuming you win this case, that would be an appropriate
4 form of relief. And I'm not sure --

5 MR. WAXMAN: I don't think it is. I
6 certainly don't think it would be unless this Court
7 clarified that under the -- I don't know whether this
8 would fall under the guise of clarification -- but
9 specify that under the circumstances, the deferential
10 review of the D.C. Circuit in which it presumes accurate
11 and presumes sufficient -- adequate the evidence which
12 the tribunal itself presumed accurate would have to
13 fall; that is, a habeas court would never accord that
14 presumption.

15 JUSTICE BREYER: I have a quick question. I
16 don't want to interfere with his five minutes of
17 rebuttal.

18 CHIEF JUSTICE ROBERTS: We'll give you your
19 rebuttal time.

20 JUSTICE BREYER: Going back to
21 Justice Scalia's question on the precedent, suppose --
22 and I want to be -- I'd like my mind to be clear on
23 this. I thought that the question asked was for you to
24 find an instance where there was no sovereignty of the
25 country and they issued the writ, and it was turning on

1 a technical thing. Whether that was how the question
2 was met or not, what I read here in these different
3 briefs is in 1759, Lord Mansfield, the case can issue --
4 a writ of habeas corpus, no doubt the power could issue
5 it where the place is under the subjection of the crown
6 of England. Then Lord Sellers in Mwenya said subjection
7 is fully appropriate to the powers, that's habeas,
8 irrespective of territorial sovereignty or dominion, in
9 other words, non-technical.

10 In our case in Rasul, both the concurring
11 opinion and the majority opinion say things like the
12 reach of the writ depends not on formal notions of
13 territorial sovereignty, but on the practical questions.
14 Then they both list practical questions.

15 Now suppose we take that as the definition.
16 Now, can you find instances where the writ has been
17 issued by Britain in history to people who were not
18 citizens and who were not actually held in Britain?

19 MR. WAXMAN: Yes.

20 JUSTICE BREYER: They are --

21 MR. WAXMAN: I will cite two examples. I
22 knew that there was one other thing I wanted to try on
23 Justice Scalia. One is -- and it's referenced in our
24 footnote -- you know, in 1777 and 1783, Parliament
25 suspended the privilege of the writ of habeas corpus for

1 people on the high seas or out of the realm,
2 specifically directed at U.S. seamen, at American
3 seamen. And if the writ never extended to American
4 seamen on the high seas or out of the realm, there would
5 have been no point in suspending it.

6 Second of all, the common -- the high
7 court judges who were administering -- issuing the writ
8 for the benefit of detainees in India before it became a
9 sovereign possession were not exercising a statutory
10 authority, with all due respect to Justice Scalia.

11 There was a royal charter that granted
12 those judges the -- all of the common -- the
13 authority -- common law authorities of the Queen's
14 bench.

15 And as the Indian case law explicates,
16 and Sir John Chambers explains, one of those authorities
17 was the exercise of the writ of habeas corpus, not
18 mandamus outside -- to territories that were no part of
19 the Realm of England.

20 Those are the, I think -- I mean there
21 may be something in -- before the legal historians --

22 JUSTICE BREYER: The Spanish doctor, the
23 Swedish doctor, the Spanish sailors, the British spy,
24 they're all in this case.

25 MR. WAXMAN: Well, in this -- in this

1 country, In re Villato, which was decided only a few
2 years after the founding, not only was he an enemy
3 alien; he was granted release under the writ of habeas
4 corpus because, not being a citizen, he could not be
5 charged with treason, which was the basis for holding
6 him.

7 JUSTICE SCALIA: Where -- where was he held?

8 MR. WAXMAN: I think in Pennsylvania. Maybe
9 it was New Jersey --

10 JUSTICE SCALIA: Are these people being held
11 in Pennsylvania?

12 MR. WAXMAN: It's the mid-Atlantic. Excuse
13 me?

14 JUSTICE SCALIA: I mean, you're being held
15 within the jurisdiction of the United States. I am
16 still waiting for a single case, other than the Indian
17 case which you mentioned which was under a statute, a
18 single case in which an alien that -- in a -- in a
19 territory not within the Crown, was granted habeas
20 corpus.

21 And it's not enough to say there was a
22 statute that applied on the seas. That's fine. Just
23 give me one case. There's not a single one in all of
24 this lengthy history.

25 MR. WAXMAN: Well, Justice Scalia, you're

1 asking me to discard the Indian cases, and I've -- I've
2 mentioned to you the cases that the majority of opinion
3 in Rasul relied on, the Earl of Crewe and Mwenya. I've
4 given you the two statutes. I think at this point I
5 have to plead exhaustion of remedies.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: Mr. Waxman, this
8 determination, whether it's sovereignty or subjugation
9 or control of non-sovereign territory, would, I expect,
10 have diplomatic consequences. It is, I think, typically
11 an act of war for one country to assert authority and
12 control over another country's jurisdiction.

13 Here we have section 1005(g) where Congress
14 and the President have agreed that Guantanamo Bay is not
15 part of the United States, and, yet, you would have this
16 Court issue a ruling saying that it is subject to the
17 total, complete domination and control, or whatever the
18 factors are.

19 What is the reaction of the Cuban government
20 to be to that?

21 MR. WAXMAN: My understanding -- I don't
22 think it's in the record here, but what is in the record
23 are the terms of the lease. And I don't really take it
24 to be disputed that Guantanamo is under the complete,
25 utterly exclusive jurisdiction and control of the

1 national government of the United States.

2 That's in the lease, itself. The courts of
3 Cuba have so held. They have designated Guantanamo,
4 quote, "foreign territory" unless and until the United
5 States in its sole discretion chooses to vacate the
6 base. And --

7 CHIEF JUSTICE ROBERTS: We -- there are --
8 am I wrong that there are Cuban workers who come on to
9 the base and work?

10 MR. WAXMAN: I'm not sure whether there are,
11 or not, any longer. But unlike -- or if you take --
12 they are not subject -- and it has never been contended
13 that they are subject -- to Cuban control with respect
14 to conduct that is subject to any law of the United
15 States.

16 CHIEF JUSTICE ROBERTS: So if you have two
17 of those workers and they get into a fight over
18 something, one can't sue the other in Cuban courts?

19 MR. WAXMAN: Absolutely not, and this is the
20 key difference, I think, going to Justice Alito's
21 question. Under our status of --

22 CHIEF JUSTICE ROBERTS: What authority --
23 what authority do you have for that: That such a suit
24 would not lie in the Cuban court?

25 MR. WAXMAN: Well, first of all, the terms

1 of the lease, and, second of all, I -- I don't know that
2 we cited -- I mean, somebody has cited decisions of the
3 Cuban Government, the judiciary and its executive, that
4 they don't exercise any jurisdiction over --

5 JUSTICE STEVENS: The converse question is:
6 Could we prosecute a crime committed in Guantanamo by
7 Cubans? And the answer is yes.

8 MR. WAXMAN: The answer is certainly yes,
9 and if I can just make the point about bases elsewhere,
10 in Germany and Japan, for example, the status of -- this
11 is the only base, I believe, that -- you know, in
12 something other than an active war zone, that isn't the
13 subject of a status-of-forces agreement that very
14 specifically explicates both the judicial and executive
15 authority over acts that occur on the base.

16 And, for example, under our status-of-forces
17 agreement with Japan, it is entirely clear that if it is
18 a Japanese citizen or a Japanese national or conduct
19 that is subject to the laws of Japan, the Japanese
20 courts have jurisdiction.

21 JUSTICE KENNEDY: You're not heartened by
22 the prospect that the detainees could apply to the Cuban
23 courts, which would then hand process to the commanding
24 general of Guantanamo?

25 (Laughter.)

1 MR. WAXMAN: Not particularly. Let's put it
2 this way: It has not occurred to us yet.

3 (Laughter).

4 MR. WAXMAN: I mean, this is in -- this is
5 in many respects a uniquely straightforward case. I
6 really didn't mean to be facetious when I said our
7 national control over Guantanamo is greater than it is
8 over a place in Kentucky, because there we have -- under
9 our system of federalism the Federal government has
10 limited controls.

11 JUSTICE GINSBURG: I thought this was
12 decided in Rasul. That's why I am so puzzled by the
13 government's position. I think Justice Kennedy said it
14 most clearly when he said that, well, in every practical
15 respect, Guantanamo Bay is U.S. territory; and whatever
16 Congress recently passed, they can't, as you pointed
17 out, change the terms of the lease.

18 MR. WAXMAN: Yes. I think that's right, and
19 I also think that, although it is correct, as
20 Justice Scalia pointed out at the outset, that the
21 decision in Rasul was a decision about the scope of
22 2241, which has now been amended, and the majority, at
23 least, rendered a decision on the basis of the statute,
24 nonetheless, the Court was construing 2241(c)(1), which
25 is in haec verba with section 14 of the 1789 Act.

1 There are other provisions of the habeas
2 statute like the civil war provisions that -- under
3 which this Court reviews State-court convictions and
4 detentions. But the statute that this Court was
5 construing in Rasul was identical in language to the one
6 promulgated in the -- the very first Judiciary Act of
7 1789, which this Court has said in Bollman was an
8 instantiation, a positive enactment of the writ, that
9 was protected by the Constitution.

10 And so, while technically, the majority was
11 issuing a statutory ruling -- and we don't contend
12 otherwise -- inferentially, its conclusion must extend
13 to the -- the extent of the writ at common law.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Waxman. We will give you five minutes for rebuttal.

17 General Clement.

18 ORAL ARGUMENT OF GENERAL PAUL D. CLEMENT,

19 ON BEHALF OF THE RESPONDENTS

20 GENERAL CLEMENT: Mr. Chief Justice, and may
21 it please the Court:

22 Since this Court's decision in Rasul,
23 Petitioners' status has been reviewed by a tribunal
24 modeled on Army Regulation 190-8, and Congress has
25 passed two statutes addressing Petitioners' rights.

1 Petitioners now have access to the Article
2 III courts and have a right to judicial review in the
3 D.C. Circuit.

4 That review encompasses preponderance
5 claims, claims that the military did not follow their
6 own regulations, and statutory and constitutional
7 claims.

8 JUSTICE STEVENS: General Clement, you said
9 it was modeled after 190-8. Is it identical to 190-8?

10 GENERAL CLEMENT: Justice Stevens, it is
11 virtually identical. If you look at pages 50 and 51 of
12 our brief, you'll see kind of a side-by-side comparison;
13 and the deviations are ones that, we would submit,
14 enhance the rights of the detainees in this particular
15 circumstance.

16 So they are given a right to a personal
17 representative, which is not something that Army
18 Regulation 190-8 provides. They are specifically
19 provided for the ability to submit documentary evidence.

20 JUSTICE STEVENS: How is that personal
21 representative chosen?

22 GENERAL CLEMENT: The personal
23 representative is assigned to the individual by the
24 military.

25 JUSTICE SOUTER: Isn't that personal

1 representative also under an obligation to report back
2 to the military anything that might be unfavorable to
3 the person he is supposedly representing?

4 GENERAL CLEMENT: Well, I don't know about
5 "unfavorable," but I think if there's -- certainly, if
6 there is material intelligence information, he is to
7 provide that information.

8 JUSTICE SOUTER: So he's not -- he is not in
9 the position of counsel, as we understand the term.

10 GENERAL CLEMENT: No. We are not trying to
11 make the point that the personal representative is a
12 counsel. We're just saying it is something that is
13 provided above and beyond 190-8 in terms of the
14 procedure; and there are other particulars as well, like
15 there is the notice of the charges in the unclassified
16 summaries that are provided.

17 Now, there's the complaint on the other side
18 that the unclassified summaries aren't particular
19 enough, but it is worth noting that that's something
20 that is provided here that's not specified by 190-8.

21 JUSTICE STEVENS: Under 190-8, does the
22 defendant have a right to counsel?

23 GENERAL CLEMENT: No, they do not, not under
24 the basic regulations of that. Now, Mr. Waxman
25 correctly indicated that in a particular instance in

1 Vietnam, counsel was provided in 190-8 proceedings, but
2 they are not provided by the basic 190-8 procedures.
3 And, I think it is worth --

4 CHIEF JUSTICE ROBERTS: Counsel, does the
5 DTA -- see, is unclear to me, anyway, on this question.
6 You agree that there is the authority under the DTA, and
7 I assume under the Court of Appeals for the D.C. Circuit
8 in reviewing those determinations, to order a release?

9 GENERAL CLEMENT: Well, I -- the way I would
10 answer that, Mr. Chief Justice, is this: In terms, the
11 DTA does not provide for an order of release. And we
12 would certainly have taken the position that, as a first
13 order, if the D.C. Circuit finds a defect in the CSRT,
14 we think the proper remedy would be to order a remand
15 for a new CSRT.

16 But, certainly, if this Court thinks that
17 the constitutional line is -- essentially necessitates
18 that the D.C. Circuit have the authority to order a
19 release, there is no obstacle to that.

20 CHIEF JUSTICE ROBERTS: 2243 doesn't specify
21 the availability of release, either, but it has
22 certainly been interpreted to authorize that by habeas
23 courts in this country.

24 GENERAL CLEMENT: No. And the D.C. Circuit
25 would have available to it the All Writs Act, and the

1 D.C. Circuit, in fact, in its Bismullah decision, which
2 is the decision where the government has filed an en
3 banc petition -- that protective order that was issued
4 there was done pursuant to the All Writs Act.

5 JUSTICE SOUTER: Yes, but doesn't --

6 GENERAL CLEMENT: The D.C. Circuit hasn't
7 been shy about asserting that authority. And, again, if
8 that's what was required here, they could use that
9 authority to order release.

10 JUSTICE SOUTER: But doesn't the resort to
11 the All Writs Act beg the question?

12 And that is -- I mean the All Writs Act is
13 there to protect jurisdiction, and the question is
14 whether there is jurisdiction to release.

15 And you say there is no textual impediment
16 to it; and, yet, we know -- I forget which brief it was
17 in -- from one of the briefs the -- the instance of the
18 prisoner Ali, one of the Chinese -- is it "Uigars"? Is
19 that how it is pronounced?

20 GENERAL CLEMENT: "Uigars."

21 JUSTICE SOUTER: Who was one of what, 12 or
22 13, who was found not to be an enemy combatant, and the
23 government's position there was: Go back and do it
24 again in front of another tribunal, another panel,
25 which, in fact, conveniently found that he was.

1 So the practice of -- of the government, it
2 seems to me, has clearly been to deny the right to
3 release.

4 GENERAL CLEMENT: Well, I would disagree,
5 Justice Souter. Let me say a couple of things to that.

6 One is that I think with respect to the
7 Uigars, in particular, there was a problem with ordering
8 release outright. And it is interesting that when Judge
9 Robertson, the same judge, district court judge, who
10 decided the Hamdan case, had before him one of the
11 Uigars in a habeas petition, he recognized that under
12 habeas he couldn't order release.

13 And the problem wasn't any kind of inherent
14 limitation on what he could order in his jurisdiction.
15 There was just a practical problem, which was --

16 JUSTICE SOUTER: Okay. There was a
17 practical problem. But the fact is that the
18 effectiveness of habeas jurisdiction, for example, in
19 requiring new trials, and so on, depends upon the
20 ultimate sanction, which is the authority of the court
21 to let somebody go if the government does not comply
22 with a condition.

23 And the -- the government practice so far
24 under the DTA seems quite contrary to that.

25 GENERAL CLEMENT: Well, again, Justice

1 Souter, what I would say is simply this: that if what
2 the Constitution requires to make the DTA to be an
3 adequate substitute is the power to order release, there
4 is no obstacle in the text of the DTA to that. And the
5 All Writs Act is available to allow them to order
6 release to protect their jurisdiction under the DTA.
7 And I think that would be a solution to that problem.

8 Now, I think, more broadly, let me -- let me
9 say about the DTA and the MCA, it really does represent
10 the best efforts of the political branches, both
11 political branches, to try to balance the interest in
12 providing the detainees in this admittedly unique
13 situation additional process with the imperative to
14 successfully prosecute the global war on terror.

15 JUSTICE BREYER: They get additional
16 process. The question, I guess, is whether it is an
17 adequate substitute for having withdrawn the writ of
18 habeas corpus.

19 On that question, suppose that you are from
20 Bosnia, and you are held for six years in Guantanamo,
21 and the charge is that you helped Al-Qaeda, and you've
22 had your hearing before the CSRT.

23 And now you go to the D.C. Circuit, and here
24 is what you say: The CSRT is all wrong. Their
25 procedures are terrible. But judge, for purposes of

1 argument, I concede their procedures are wonderful, and
2 I also conclude it reached a perfectly good result.

3 Okay? So you concede it for argument's
4 sake. But what you want to say is: Judge, I don't care
5 how good those procedures are. I'm from Bosnia. I've
6 been here six years. The Constitution of the United
7 States does not give anyone the right to hold me six
8 years in Guantanamo without either charging me or
9 releasing me, in the absence of some special procedure
10 in Congress for preventive detention.

11 That's the argument I want to make. I don't
12 see anything in this CSRT provision that permits me to
13 make that argument. So I'm asking you: Where can you
14 make that argument?

15 GENERAL CLEMENT: I'm not sure that he could
16 make that argument, Justice Breyer.

17 JUSTICE BREYER: Exactly.

18 GENERAL CLEMENT: I'm not sure he can make
19 --

20 JUSTICE BREYER: If he cannot make that
21 argument, how does this become an equivalent to habeas,
22 since that happens to be the argument that a large
23 number of these 305 people would like to make?

24 GENERAL CLEMENT: Well, Justice Breyer, let
25 me take it this way, which is, of course, you're getting

1 to the gravamen of their claim, which is that the DTA
2 and the review provided in the D.C. Circuit is not an
3 adequate substitute for habeas review.

4 And I'll start with the assumption for a
5 second, which I hope is right, because it seems that
6 Judge Friendly reached this conclusion -- and it seems
7 to me the right conclusion -- which is that the base
8 line is 1789.

9 And if you compare what these detainees have
10 under the DTA in terms of judicial review to what would
11 have been available to them at common law in 1789, it is
12 not even close.

13 This is a remarkable liberalization of the
14 writ, not some retrenchment or suspension of the writ.
15 These detainees at common law would face not one, but
16 three obstacles, to getting into court to make these
17 claims. The first, of course, is the geographical
18 limits on the reach of the writ. The second, but
19 equally important, is the line of authority that says
20 that the writ was simply unavailable to prisoners of
21 war. And the third problem would be the
22 well-established common law rule that you can't
23 controvert the facts as set forth in the return.

24 So at common law, somebody who took the
25 incredibly, I think, poor strategic call to concede all

1 of their legal arguments away and say only: I have a
2 constitutional claim here to be brought, I don't think
3 they would have gotten into court with that.

4 JUSTICE SOUTER: But aren't you simply
5 rearguing Rasul?

6 GENERAL CLEMENT: Not at all --

7 JUSTICE SOUTER: We have passed that point;
8 haven't we?

9 GENERAL CLEMENT: Not at all,
10 Justice Souter. And, first of all -- I mean, I take it
11 your -- your principal objection goes to the
12 geographical writ point, because I think that the issues
13 about controverting the facts of the return and the
14 availability of the writs to prisoners of war is
15 something that really wasn't -- had any reason to be
16 before this Court in Rasul.

17 JUSTICE SOUTER: It -- it wasn't, and
18 I didn't want to get into the prisoner-of-war point.
19 But if you want to get into it, the problem with your
20 prisoner-of-war point is the United States is not
21 treating them as prisoners of war. They have not been
22 adjudicated prisoners of war, or otherwise, under the
23 Third Geneva Convention, and that argument on the
24 government's part is entirely circular.

25 GENERAL CLEMENT: With respect, Justice

1 Souter --

2 JUSTICE GINSBURG: General Clement, I
3 remember in a prior hearing about Guantanamo that the
4 government was taking the position firmly that these
5 detainees were not prisoners of war and, therefore, were
6 not entitled to the protection of the Geneva
7 Conventions.

8 So if the government is maintaining that
9 position, these people are not prisoners of war, then
10 the treatment of a prisoner of war is not relevant.

11 GENERAL CLEMENT: Well, with respect,
12 Justice Ginsburg and Justice Souter -- because I think
13 it gets to the same point -- we are using "prisoner of
14 war" the way that the common law courts use the term
15 "prisoner of war." Hundreds of years --

16 JUSTICE SCALIA: Is the Geneva Convention
17 modeled after the Constitution of the United States?

18 GENERAL CLEMENT: No, it --

19 JUSTICE SCALIA: What it means by "prisoner
20 of war" is the same thing that the Constitution means?

21 GENERAL CLEMENT: Well, and -- and with
22 respect, the Framers in 1789 had the benefit of the
23 three Spanish soldiers and the Schiever case. They
24 didn't have the benefit of the Geneva Convention.

25 JUSTICE SOUTER: And the three Spanish

1 soldiers were -- were ultimately found to be prisoners
2 of war. And, yet, they had process to get into court.
3 There was no question of the jurisdiction of an English
4 court to entertain their claim.

5 GENERAL CLEMENT: The writ was denied,
6 Justice Souter.

7 JUSTICE SOUTER: The relief was denied.

8 GENERAL CLEMENT: No, the writ was denied.

9 JUSTICE SOUTER: That had a hearing under
10 the writ.

11 GENERAL CLEMENT: They did not have a
12 hearing. The writ was --

13 JUSTICE SOUTER: Then how did the court ever
14 come to the conclusion that, in fact, they were
15 prisoners of war?

16 GENERAL CLEMENT: Because it said that -- it
17 looked at the pleading in the petition. There was no
18 hearing. It looked at the petition and it said: on
19 their own showing, they are prisoners of war. They are
20 denied the writ.

21 JUSTICE SOUTER: Right. On their -- on
22 their own showing, but, in fact, the proceeding did not
23 end until the court had come to that conclusion.

24 It was not a conclusion that the court
25 assumed simply on the basis of a government claim in the

1 return to the writ.

2 GENERAL CLEMENT: They didn't even ask for a
3 return, Justice Souter. I mean -- you know, they
4 decided the case --

5 JUSTICE SOUTER: On the basis of a
6 government claim formally or informally proffered to the
7 court. They -- they came to that conclusion, as you
8 said, based on the -- on the prisoners' own showing.
9 But the court certainly -- there is no authority in the
10 prisoner-of-war case for saying that if the government
11 makes a claim that one is a prisoner of war -- contrary
12 to the government's prior position, incidentally -- that
13 that forecloses the possibility of consideration under
14 the writ -- the petition as filed.

15 GENERAL CLEMENT: There is authority for
16 that proposition, Justice Souter. It comes along later
17 in the World War II cases in Britain. The reason
18 there's not authority contemporaneous with the 1759
19 cases is because these courts are operating with the
20 common law rule that you can't controvert the facts as
21 set forth in a return. So the petitioners in these
22 cases wisely didn't make a factual dispute; they made a
23 legal dispute. And the courts rejected it time and time
24 again. In Spanish sailors and the Schiever -- if -- I'd
25 like to just offer you though the 1941 authority,

1 because this question of course, over time, by 1941, the
2 British courts have relaxed the rule against
3 controverting the facts of the return, and they
4 addressed this question about what kind of factual
5 inquiry is necessary when the government comes back and
6 says that somebody is an enemy combatant, a prisoner of
7 war, or, under the Emergency Detention Act of 1939, a
8 threat to the realm.

9 And in two cases, *Liversidge against*
10 *Anderson and Green against Anderson*, the law lords, in
11 1941, say that they are not going to look beyond what
12 the government has provided in the return. They're not
13 even, in the *Green* case, going to ask for an affidavit.
14 So if you're looking --

15 JUSTICE SOUTER: Well, was that because they
16 were reflecting 1789 practice, or because they were
17 reflecting the *Defense of the Realm Act*? I don't know
18 the answer to that.

19 GENERAL CLEMENT: I think it is a pretty
20 good snapshot of where things were as of 1941.

21 JUSTICE SOUTER: Unless you can answer my
22 question, we don't know what the snapshot proves.

23 GENERAL CLEMENT: They were exercising
24 habeas jurisdiction.

25 JUSTICE SOUTER: They were exercising habeas

1 jurisdiction in a court -- in a polity in which
2 Parliament is supreme and Parliament had already passed
3 the Defense of the Realm Act, and I don't -- I mean it.
4 I don't know the answer to the question I asked you.
5 But I think unless we have an answer to that, we don't
6 have a reliable clue as to the understanding of the
7 English courts at a time that's relevant to our inquiry.

8 GENERAL CLEMENT: I think we do have an
9 answer, Justice Souter. It is in the Liversidge case,
10 because there there's a question of interpreting the
11 Emergency Detention Act. And they basically have a
12 choice. They can interpret it to allow the detention to
13 turn exclusively on the subjective belief of the Home
14 Secretary, or they can interpret it to reflect an
15 objective standard. And they choose, over the dissent
16 of Lord Atkins, they choose a purely subjective
17 standard. So in interpreting an act of Parliament that
18 could have gone either way they interpreted under the
19 common law writ to involve no factual inquiry
20 whatsoever. And the case at common law in 1789 is a
21 fortiori from that because they would not go beyond the
22 facts as set forth in the return. And the only response
23 the Petitioners have to that common law rule is they can
24 point to a couple of cases where the courts were tempted
25 and did accede to the temptation to peek beyond the

1 return in the context of a child custody case or their
2 private custody cases.

3 But -- and this is a situation where --

4 JUSTICE BREYER: I thought we were here
5 talking about -- I see that you have a strong argument
6 and they'll have a strong argument in reply. I think
7 both are pretty good, how you interpret these cases. I
8 thought we were talking about what the availability of a
9 forum in which you can make your argument and they can
10 make their argument, and that's why I'm back to the
11 question of, is this remedy that's given in the statute
12 sufficient to allow you to make your argument and them
13 to make their argument? And what you said was, when I
14 thought I produced an example of an instance they wanted
15 to argue quite strongly, and you said no, they couldn't.

16 Then you said well, neither could they in
17 England. Well, that I wonder. That's where I'm back
18 to. After all, England doesn't have a written
19 constitution. So it is hardly surprising if they
20 concede everything away in England, they're not going to
21 be able to make any argument. There's nothing left.
22 But let's imagine in England you had a statute and that
23 statute said the government cannot hold an alien in
24 Beckawannaland for six years without either charging
25 them or releasing them. Or except for -- and now we

1 have some very detailed preventive detention. Suppose
2 there was a statute like that. And then our friends in
3 England in whatever year conceded every argument but
4 that one.

5 Now, are you going to tell me now that the
6 habeas courts would have said we won't even listen to
7 your argument?

8 GENERAL CLEMENT: As Justice Souter pointed
9 out -- I mean, if you assume that the statute also said
10 any review for that claim should be in the court of
11 appeals, not in a traditional --

12 JUSTICE BREYER: Correct. And you told me
13 that in this statute, the Court of Appeals will not
14 listen to that argument. And as I read the statute, I
15 agree with you. Because I can find no place where they
16 could make that argument since it does not concern how
17 well this tribunal did, nor does it concern the
18 constitutionality of the procedures of the tribunal.

19 GENERAL CLEMENT: Well, Justice Breyer, as I
20 say, I think that if you accept that there would be some
21 deference to the ability to bring statutory claims, I
22 don't know why that deference would be limited to the
23 substance and not to the forum.

24 And Congress here has spoken. It has
25 spoken. The political branches have spoken. They have

1 struck a balance. They've given these detainees better
2 rights and access to administrative and judicial review.
3 Anyone --

4 JUSTICE ALITO: If the Court holds that the
5 DTA is not an adequate substitute for habeas, what will
6 happen? Will these Petitioners then have access to all
7 of the procedures that normally apply in a habeas
8 proceeding under 2241? The same right to discovery,
9 subpoena witnesses, access to classified information,
10 presence in court?

11 GENERAL CLEMENT: The government will
12 certainly take the position that they are not entitled
13 to those things. Presumably the Petitioners will be
14 arguing that they are entitled to those things.

15 The answers to those questions will be
16 unclear because the review provided by the DTA and the
17 habeas statute, if it is applied in this context, either
18 way, whatever the vehicle for that judicial review, it
19 will be unprecedented. And there will be difficult
20 questions that will need to be worked out, and I don't
21 understand why --

22 JUSTICE SCALIA: General Clement, if we had
23 to either charge or release these people, what would
24 they be charged with? Waging war against the United
25 States? Is there a statute that prevents non-citizens

1 from waging war against the United States and provides
2 criminal penalties?

3 GENERAL CLEMENT: Not as such,
4 Justice Scalia. Now, of course, we might have an
5 argument as to some of these individuals, that they
6 engaged in unlawful --

7 JUSTICE STEVENS: Mr. Clement, as I
8 understand the government's position, these people are
9 not in uniform, so they're not an under the law of war.
10 They have all committed murder, not just fighting a war.
11 That's your theory, I think. They have all committed
12 war crimes. Those that were caught on the battlefield,
13 I mean. I'm talking about those.

14 GENERAL CLEMENT: Right, and the ones that
15 actually killed somebody would have committed murder.

16 JUSTICE STEVENS: That's right. And they
17 are not prisoners of war under the law of war, because
18 they were not in uniform.

19 GENERAL CLEMENT: They don't qualify for
20 prisoner-of-war status, but just to be clear I think
21 certainly when the British cases are talking about --

22 JUSTICE STEVENS: I'm talking about common
23 law. I mean under the law of war, the common law of
24 war. They were not prisoners of war.

25 GENERAL CLEMENT: They would not qualify for

1 prisoner-of-war status. They're enemy combatants --

2 JUSTICE STEVENS: And so, therefore, their
3 engaging in war-like acts would be the crime of murder
4 or the crime of assault and so forth and so on. That's
5 how I understand your theory in one of these
6 prosecutions is that not --

7 GENERAL CLEMENT: That would be our theory
8 in those cases --

9 JUSTICE STEVENS: I mean it is your theory.

10 GENERAL CLEMENT: That would be our theory
11 in those cases -- and it is our theory in those cases
12 we've chosen to prosecute --

13 JUSTICE STEVENS: Right.

14 GENERAL CLEMENT: -- in the military
15 commissions, but there are other individuals with
16 respect to whom we don't have the right kind of evidence
17 in order to go with a full-blown military commission
18 trial, but we still have the option that this Court
19 recognized in Kirin and in Hamdi and most particularly
20 in Kirin, not just to try people who are unlawful
21 combatants for their unlawful combatancy, but also to
22 hold them as we would hold anybody else who was captured
23 as preventative detention.

24 JUSTICE STEVENS: For the duration of
25 hostilities, if you can show that they are enemies.

1 GENERAL CLEMENT: Well, I think if we can
2 show that they were enemy combatants, that's exactly
3 right.

4 JUSTICE SOUTER: And you are operating today
5 under a broader concept, as I understand it, of "enemy
6 combatant"?

7 GENERAL CLEMENT: Than? I'm sorry? Broader
8 than what?

9 JUSTICE SOUTER: Than was indeed the case
10 for example in our earlier litigation, let alone at the
11 time of Kirin.

12 GENERAL CLEMENT: Well two things,
13 Justice Souter. One thing is that with respect to the
14 definition that the military commissions -- I'm sorry --
15 the CSRT 7 apply -- that is a broader definition, I
16 would quickly add though that with respect to the
17 majority of the individuals -- I mean you have the
18 Petitioners from Bosnia that Mr. Waxman represents, but
19 most of these people were seized in Pakistan and
20 Afghanistan, and so the situation is not that different.
21 And obviously we would take the position that to the
22 extent you have some concerns about the breadth of the
23 definition, what this Court -- what the plurality said
24 in Hamdi in footnote 1 gets it exactly right. The way
25 to deal with those concerns is in the adjudication of

1 particular cases which can take place under the DTA or
2 can take place in habeas.

3 And again I think the burden --

4 JUSTICE SOUTER: But how can -- and this
5 again, maybe I should know the answer to this, but I
6 don't. How could that be litigated under the DTA?
7 Doesn't any proceeding under the DTA simply have to
8 accept the statutory definition?

9 GENERAL CLEMENT: No, it does not. I mean
10 it's a regulatory --

11 JUSTICE SOUTER: You mean -- you're saying
12 if it gets to the court of appeals, they can raise the
13 constitutional claim that the definition is broader than
14 constitutionally could be enforced. Is that what you're
15 saying?

16 GENERAL CLEMENT: That would be my point,
17 Justice Souter. So I think that --

18 JUSTICE KENNEDY: I didn't understand that
19 point when you were having your colloquy with
20 Justice Breyer, either. I thought you were going to
21 answer to Justice Breyer, that the court of appeals does
22 have the right to determine whether to the extent the
23 Constitution and the laws of the United States are
24 applicable, whether such standards and procedures, such
25 as CSRT, are -- to make the determination -- are

1 consistent with the Constitution --

2 GENERAL CLEMENT: Yes, Justice --

3 JUSTICE KENNEDY: -- that's provided in the
4 MCA.

5 GENERAL CLEMENT: It absolutely is. I think
6 Justice Breyer's hypothetical was cleverly crafted,
7 though, to take that off the table.

8 JUSTICE BREYER: It wasn't cleverly
9 crafted. I wanted to say that the people I'm thinking
10 of are not challenging those procedures. What they say
11 is you could have the best procedure in the world, and
12 they're totally constitutional -- we'll assume that --
13 they're assuming it. They're not going to concede it.
14 They're assuming it.

15 On that assumption, we still think that
16 Congress, the President, the Supreme Court under the
17 law, cannot hold us for six years without either trying
18 us, releasing us, or maybe confining us under some
19 special statute involving preventive detention and
20 danger which has not yet been enacted.

21 JUSTICE KENNEDY: But the statute --

22 JUSTICE BREYER: That's their argument.

23 JUSTICE KENNEDY: But the statute talks
24 about standards. Why can't that question that
25 Justice Breyer raised be reached by the court of appeals

1 under the CSRT review hearings when it determines the
2 constitutional adequacy of the standards, or am I
3 missing something?

4 GENERAL CLEMENT: Well, I think, again, that
5 Justice Breyer's hypothetical, as I understood it, sort
6 of assumed away the adequacy of all of the standards and
7 just said: Putting all of that to one side, I have some
8 other constitutional claim.

9 And I'm just not so sure that habeas ever
10 allowed you to sort of bring every claim that you
11 possibly wanted to; and I think the -- what I -- the way
12 I read this Court's Hamdi decision is what was
13 envisioned on a habeas case in a case where Army
14 Regulation 190-8, which, of course, the plurality cited,
15 was complied with. It was in that case: The habeas
16 petition in court would take that as a starting point,
17 and that you wouldn't necessarily be able to say: Look,
18 that was nice that we had that proceeding, but put that
19 to one side. I have another claim.

20 I don't think the court, even in habeas,
21 would have envisioned that that would go forward.

22 JUSTICE KENNEDY: Just one more question on
23 that point: Would the court of appeals in -- under the
24 MCA have the authority to question the constitutionality
25 of the definition of noncombatant -- of "unlawful

1 combatant"?

2 GENERAL CLEMENT: Absolutely,
3 Justice Kennedy. That would be available to them in the
4 D.C. Circuit.

5 JUSTICE STEVENS: General Clement, I thought
6 your answer to Justice Breyer -- and maybe I'm missing
7 something -- would be that there is a third alternative
8 which he didn't consider, namely: That these are
9 combatants picked up on the battlefield, and they may be
10 detained indefinitely without proving they committed a
11 crime.

12 And that is your position, I think.

13 GENERAL CLEMENT: That is our position. I
14 mean I want to give Justice Breyer's hypothetical its
15 due. I mean there might be claims that you could have
16 brought, hypothetical claims that you could have brought
17 at some level, and that the DTA does narrow review some
18 more.

19 JUSTICE STEVENS: It's not a hypothetical
20 claim if a particular prisoner says: I was kidnapped by
21 people who were not in the United States Army and sold
22 for a bounty. And I am -- I just happened to be there
23 when I got kidnapped.

24 And then there is a genuine question of fact
25 as to whether the fact that they may have been sold in

1 that manner justifies detention, which is a different
2 question entirely from whether they committed a
3 violation of the law of war.

4 GENERAL CLEMENT: Absolutely,
5 Justice Stevens. But that question, of course, can be
6 considered by the D.C. Circuit on review, because
7 they're specifically entitled to a preponderance review
8 in the D.C. Circuit. So that's a claim that they
9 clearly could bring.

10 They can also bring the statutory and
11 constitutional claims to the standards and procedures,
12 and they can make claims that the procedures that are
13 set forth in the CSRTs are not provided. And I think,
14 again, if you compare that to what they would have had
15 at the common law, and you ask the question --

16 JUSTICE STEVENS: Let me just interrupt
17 again, and I know your argument. But with respect to
18 those claims, do you make the argument in your brief
19 that some evidence is enough to refute that claim, or
20 do you say it is a preponderance standard?

21 GENERAL CLEMENT: It's a preponderance
22 standard, and that's what is set forth in the statute.
23 And, again, that's something where Congress specifically
24 got involved in the CSRTs in a way that I think is
25 different from the Hamdan case and Congress's

1 involvement with the Military Commissions. In the
2 Military Commissions --

3 CHIEF JUSTICE ROBERTS: I suppose any
4 challenges to the adequacy of the standards, or
5 whatever, are the sort of things that would be raised in
6 the D.C. Circuit. And we don't know what that's going
7 to look like yet, because the D.C. Circuit hasn't had an
8 opportunity to rule on those.

9 GENERAL CLEMENT: That's exactly right,
10 Mr. Chief Justice. And that's why, as we say in the
11 brief -- I mean there's a sense in which this is really
12 a facial challenge.

13 I mean, in order for them to prevail with
14 the argument that DTA review is an inadequate
15 substitute, they really have to say that it is
16 inherently an inadequate substitute. That no matter
17 kind of how many times the D.C. Circuit cuts the
18 Petitioner a break --

19 JUSTICE STEVENS: Isn't it on that issue the
20 fact that it has taken six years to have the issue
21 resolved -- "relevant" --

22 GENERAL CLEMENT: Well, I mean --

23 JUSTICE STEVENS: They say they have
24 been unlawfully detained for six years from the
25 beginning. And isn't that delay relevant to the

1 question of whether they have been provided such a
2 wonderful set of procedures?

3 GENERAL CLEMENT: Well, Justice Stevens, I
4 think the delay is going to be relevant to whether or
5 not courts should expedite hearings, and the like. But
6 I don't think it should cloud the basic constitutional
7 question before this Court.

8 CHIEF JUSTICE ROBERTS: The procedures that
9 are before us under the DTA and the MCA, of course,
10 weren't available for the whole six-year period, were
11 they?

12 GENERAL CLEMENT: No, of course not. And I
13 think it is worth recognizing that Congress legislated
14 in this area not in year one, and then six years have
15 gone by. Congress legislated with these particular
16 procedures and this level of review in years four and
17 five.

18 And the fact that they didn't immediately
19 take effect, I think, is not an accident. It is a
20 product of the fact that Congress in this area was
21 providing unprecedented review.

22 JUSTICE GINSBURG: General Clement --

23 GENERAL CLEMENT: And, of course, when you
24 do something unprecedented, new questions will arise.

25 JUSTICE GINSBURG: I think, to go back to

1 the beginning, my notion of your position was you never
2 get to that question: Is the review of these procedures
3 adequate in the D.C. Circuit, because there is no
4 authority, period, for the D.C. Circuit to engage -- to
5 grant what was before us is if -- our applications for a
6 writ of habeas corpus.

7 You say that's out the door. They might
8 bring some other proceedings. I thought that was your
9 position.

10 GENERAL CLEMENT: I think that is our
11 position, Justice Ginsburg. But our position is they
12 want -- they styled something -- they filed something
13 called a habeas petition. Congress subsequently has
14 come in and said: The way we are going to deal with
15 this is we are going to remove jurisdiction for that
16 habeas petition, and we're going to allow you to file a
17 DTA review provision -- a DTA review petition.

18 Now, their argument is that Congress can't
19 force that choice on them because this is an inadequate
20 substitute for habeas. The Suspension Clause applies in
21 Guantanamo; and therefore, the DTA is effectively
22 unconstitutional to the extent it prevents us with
23 proceeding with our habeas petition.

24 Now, there are a variety of ways this Court
25 could reject that claim. It seems to me that the most

1 straightforward way, though, is to simply ask the
2 question: If the level of review provided by the DTA in
3 the DTA petition were provided by statute in 1789 or
4 even 1941, for that matter, would it have been seen as a
5 liberalization of the writ, or a contraction and
6 suspension of the writ?

7 And I think it is very, very clear that if
8 this statute had passed, if this kind of review was
9 provided in 1789 or in 1941, it would have been greeted
10 as a remarkable -- remarkable liberalization of the writ
11 as it had then been understood.

12 And I think we are in the situation where
13 these individuals, for the first time, are really
14 allowed this kind of access to the court system.

15 And when that happens, there are going to be
16 difficult questions. We have difficult questions about
17 what the record on review is. We have difficult
18 questions about the extent to which classified
19 information should come in.

20 But all of those difficult questions are
21 going to be waiting for us if we go back to the habeas
22 courts, because the same kind of issues --

23 JUSTICE BREYER: Well, on that -- and you
24 just mentioned remedy. Suppose, contrary to what you
25 hope for, that the Court were to say that this is -- we

1 have a minute or two.

2 Suppose they were to say that this is an
3 unconstitutional suspension of the writ, and that the
4 remedy here written in the statute is not adequate in
5 respect to many claims that might be made.

6 On that assumption, the habeas would lie.
7 Now, it has been six years, and habeas is supposed to be
8 speedy.

9 And, yet, people have serious arguments,
10 anyway, that they are being held for six years without
11 even having those arguments heard.

12 Is there anything in your opinion that this
13 Court could say by way of remedy that could get the
14 D.C. Circuit or the others to decide this and the CSRT
15 claims, there are 305 people to do this quickly within a
16 period of months rather than six more years? And if so,
17 what?

18 GENERAL CLEMENT: I mean, obviously lower
19 courts take anything this Court says very, very
20 seriously. So, if this Court makes it clear --

21 JUSTICE BREYER: Are we faced with this
22 problem, and I don't want to put you right on the spot,
23 what approximately would you say in respect to this?
24 Because it is a serious problem.

25 GENERAL CLEMENT: Well, I mean -- let me --

1 if I could, I would answer it as to what this Court
2 should say about what the D.C. Circuit should do on DTA
3 review. I prefer to discuss the opinion where we win
4 than the opinion where we lose.

5 (Laughter.)

6 GENERAL CLEMENT: As to that opinion, the
7 courts -- the lower courts should be instructed to with
8 due cognizance for the fact these individuals have been
9 detained six years
10 and this is the process that has been provided in order
11 to decide whether or not that continuing custody is
12 lawful, they should expedite this to the greatest extent
13 possible.

14 JUSTICE KENNEDY: How can we say that? Your
15 position is we have no jurisdiction here?

16 JUSTICE SOUTER: If you win, we never get to
17 these issues.

18 GENERAL CLEMENT: With respect if you win --
19 if we win, you still write an opinion saying that we
20 win, and that opinion can still say everything that I've
21 just --

22 JUSTICE KENNEDY: Our opinion says have a
23 nice day, everybody.

24 (Laughter.)

25 JUSTICE SOUTER: We can't win without

1 reversing the court of appeals.

2 GENERAL CLEMENT: You can certainly affirm
3 on alternative grounds, Justice Souter. And in the
4 process, you'd write an opinion --

5 JUSTICE SOUTER: If we affirmed on
6 alternative grounds, leaving the court of appeals'
7 reasoning as it stands, these interesting questions that
8 you referred to will never arise.

9 GENERAL CLEMENT: I don't think that's
10 right, Justice Souter. There is active litigation going
11 on in the D.C. Circuit over basically these questions
12 and how this litigation is going to take place. And if
13 this Court in affirming on -- begrudgingly affirming and
14 directing the D.C. Circuit to move with all appropriate
15 dispatch, that's going to be read just as carefully and
16 taken just as seriously if it's an affirmance than if
17 it's a vacatur or a reversal.

18 CHIEF JUSTICE ROBERTS: Is that because the
19 withdrawal of jurisdiction does not apply to review of
20 the proceedings in the D.C. Circuit that's provided
21 under the statute? In other words, your argument that
22 the habeas jurisdiction doesn't extend doesn't reach the
23 review of the adequacy of the DTA proceedings, before
24 the D.C. Circuit?

25 GENERAL CLEMENT: That's exactly right.

1 That's exactly right.

2 JUSTICE SOUTER: Why would they litigate
3 that adequacy if they have determined in advance that
4 substantively the individuals who are petitioning have
5 absolutely no rights?

6 GENERAL CLEMENT: They haven't decided that,
7 Justice Souter. That might have been a problem back in
8 Rasul. But now whatever the answer to the question of
9 whether the Constitution provides rights in Guantanamo,
10 they have rights. They have a statutory right to
11 preponderance review. They have a statutory right to
12 have the military follow its own procedures. And they
13 have lots of arguments in the lower courts trying to
14 take advantage of those rights that they have.

15 So there will be a meaningful procedure in
16 the D.C. Circuit --

17 JUSTICE SOUTER: At the end of the day, the
18 only thing, as I understand it, that could possibly be
19 adjudicated would be the question of formal adherence to
20 procedure or not. There would never be an adjudication
21 that ever went to the merits because the merits issue,
22 as I understand it, is already -- I mean merits of
23 relief -- have already been prior admitted by the
24 existing determination of the circuit in this case.

25 GENERAL CLEMENT: Well, Justice Souter, I'm

1 not sure that this Court -- I understand your question,
2 I believe, which is that the D.C. Circuit, I think,
3 almost unavoidably reading this Court's Rasul decision
4 and reading it as a statutory rather than a
5 constitutional holding, has stuck with its circuit
6 precedent and said that there aren't constitutional
7 rights here. That is going to be true unless this Court
8 reverses it in habeas or in the DTA review.

9 It would seem particularly strange that if
10 that's the real problem that this Court would somehow
11 decide, well, you know, we really think the DTA is an
12 adequate substitute, but the only way we can correct
13 this other mistake, in our view, that the D.C. Circuit
14 is laboring under is to rule against the government.

15 JUSTICE SOUTER: You were arguing that the
16 question of the adequacy of the substitution should, in
17 fact, be litigated in a plenary fashion in the court of
18 appeals or the district court for that matter?

19 GENERAL CLEMENT: No. I think that's the
20 issue before this Court now. And this Court, for
21 example --

22 JUSTICE SOUTER: I thought you said a moment
23 ago that there were all of these interesting questions
24 that could be explored if there was a remand?

25 GENERAL CLEMENT: I'm sorry, Justice Souter,

1 I may have misspoke.

2 JUSTICE SOUTER: Maybe I misunderstood you.

3 GENERAL CLEMENT: The interesting questions
4 that I think are left on the remand, no matter what, are
5 issues about whether or not based on the Abraham
6 declaration that the military followed their own
7 procedures for assembling the record below, or whether
8 the military followed its own procedures for providing
9 exculpatory evidence. Those are all questions that
10 aren't questions that require the answer to the question
11 of whether Eisentrager is still good law --

12 JUSTICE SOUTER: You are talking about in
13 effect about evidentiary procedural questions?

14 GENERAL CLEMENT: I mean --

15 JUSTICE GINSBURG: You're talking about
16 taking the statute, Congress's statute that set up this
17 system with limited review in the D.C. Circuit and
18 saying that's it. The D.C. Circuit never got to that
19 question because it said the action that these people
20 are trying to bring -- habeas -- doesn't exist. The
21 only thing that they have, the only remedy they have is
22 the one that Congress provided. And it seems to me the
23 only question before us is whether there is jurisdiction
24 in the court of appeals to decide that threshold issue.
25 They tossed it out and didn't reach -- didn't say one

1 word about the adequacy of the procedures, all of the
2 things that you're talking about.

3 GENERAL CLEMENT: I think that's right,
4 Justice Ginsburg. I want to be clear that my position
5 is that an alternative ground for affirmance, which
6 would allow this Court to address some of those
7 questions, is that the D.C. Circuit was right to say
8 that the DTA review, that the habeas petition should be
9 dismissed. The reason they were right is because the
10 DTA is an adequate substitute for habeas.

11 JUSTICE GINSBURG: That would be -- we would
12 be deciding that as a court of first view because they
13 didn't decide that? They said you don't need an
14 adequate substitute for habeas because you have no right
15 to habeas.

16 GENERAL CLEMENT: I think that's a fair
17 observation, but obviously this Court --

18 JUSTICE STEVENS: General Clement --

19 GENERAL CLEMENT: In the context -- I mean
20 this has been fully briefed and in the context of cases
21 where the Court uses an alternative ground for
22 affirmance, it would not be a novel situation, I don't
23 think.

24 JUSTICE STEVENS: General Clement, your
25 suggested reason why they're right is quite different

1 from the reason they actually gave. They did not reach
2 the question of the adequacy of these procedures.

3 GENERAL CLEMENT: I think that's a fair
4 point, Justice Stevens, though I would say that really
5 their reasoning encapsulates one of the three reasons
6 why at common law they were right.

7 JUSTICE STEVENS: Yes, but they did not
8 reach this very important part of this whole case. And,
9 of course, the substitute procedures here are not nearly
10 the same as those in our prior cases of where we
11 sustained the 2255 and district here.

12 GENERAL CLEMENT: Oh, that's right,
13 Justice Stevens, but in fairness, in those situations
14 you were dealing with sort of substitutes for core
15 habeas under situations where there was no dispute that
16 there was a robust right to habeas at common law, and so
17 here you first deal with the situation of -- all right,
18 the baseline is, as Judge Friendly suggests, 1789, is
19 this an adequate substitute? And that even if
20 somehow -- and I don't know how you get past that --
21 then you I think still might ask the question that this
22 Court asked in the Felker case, which is, you know,
23 giving some deference to Congress's ability to shape the
24 scope of the writ, is there a problem here? I think we
25 would point the Court to Felker.

1 JUSTICE STEVENS: And you say those later
2 cases are not relevant because habeas corpus in the
3 modern world is much broader than it was in 1789.
4 That's part of your point?

5 GENERAL CLEMENT: That is part of our point.

6 JUSTICE STEVENS: Yes.

7 GENERAL CLEMENT: And we would say, though

8 --

9 JUSTICE STEVENS: And the comparison you ask
10 us to make is between what the habeas writ was in 1789,
11 not what the comparison with what the habeas writ would
12 be today?

13 GENERAL CLEMENT: We would start with that
14 proposition, but I think this isn't a case where it's
15 just 1789 versus today because as I read this --

16 JUSTICE STEVENS: I don't think you would
17 seriously contend that the procedures set forth in the
18 statute are equivalent to those afforded under the
19 habeas writ under today's jurisdiction.

20 GENERAL CLEMENT: It's a hard question for
21 me to answer --

22 JUSTICE STEVENS: At least you haven't
23 argued that.

24 GENERAL CLEMENT: Well, no, but I mean the
25 question is, you know, in a different case, sure, there

1 would be a different habeas. But we don't know sort of
2 the answer as to what habeas looks like in the context
3 of enemy combatants detained in a place like Guantanamo,
4 and we would suggest, based on our best reading of Hamdi
5 that, if there was habeas jurisdiction now, that the
6 proceeding that would unfold would not be the plenary
7 habeas that is envisioned by Petitioners but would be a
8 much more narrowly circumscribed habeas. I would also
9 point out that, again, it's not just --

10 JUSTICE STEVENS: On the point I made, I
11 think that's critical to your argument that the
12 substitute is adequate.

13 GENERAL CLEMENT: I think that's right. I
14 would say, though, that our only baseline is not 1789
15 because, as we read this Court's decision in Rasul,
16 Rasul is based on the predicate that until 1973 and
17 Braden's overruling of Ahrens, that the habeas statute
18 would not have gone to Guantanamo. And unless this
19 Court is willing to say that there was an inchoate
20 Suspension Clause violation until 1973 when Braden comes
21 along, it seems like the tradition in this country too,
22 based on the immediate custodian rule and the
23 territorial jurisdiction of the courts, was that habeas
24 in Guantanamo is a novelty. It's -- 1973 at best.

25 If I could finish with just bringing the

1 Court's attention to one thing. This is in an amicus
2 brief that is in support of us, the Criminal Justice
3 Legal Foundation brief. But there's sufficiently little
4 precedent for the Court to rely on, and I want the
5 Court to have this: The Schiever case, which is one of
6 the prisoner-of-war cases. There's not -- in the Rasul
7 case, Justice Stevens, and the parties, we both cited to
8 volume 97 of English Reporter and the report of the case
9 by Burrow -- there is in the English Reports an
10 alternative report of that case, from Kenyon. And the
11 report of that case which is 96 English Reports 1249 is
12 actually longer on the law, shorter on the facts, but
13 longer on the law than the report by Lord Burrow. So I
14 just wanted the Court to have that available to them.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General Clement.

17 Mr. Waxman, we'll give you five minutes.

18 REBUTTAL ARGUMENT OF SETH W. WAXMAN

19 ON BEHALF OF THE PETITIONERS

20 MR. WAXMAN: Thank you, Your Honor.

21 I want to speak mostly about the adequacy of
22 the substitute and particularly the question that you
23 and Justice Kennedy asked about adjudication of the
24 standard on remand, but just to take first things first,
25 I don't -- I don't believe I've ever seen the

1 government's -- the case *Liversidge* or *Green* cases cited
2 by the government before. And I don't know what they
3 say. But it is absolutely incorrect that DTA review of
4 the CSRTs is a liberalization of the traditional writ.
5 As this Court made -- or the King's Bench made clear in
6 *Bushell's* case and all of the commentators including
7 *Sharpe*, who both sides are citing as authoritative, here
8 agree in cases of executive detention, where there
9 wasn't a trial occurring, the court absolutely could --
10 the prisoner could controvert the facts of the return in
11 *Schiever* and *Spanish Citizens* -- *Spanish Prisoners*,
12 there wasn't an original hearing because the court
13 issued -- sat as nisi prius court and considered
14 affidavits of the prisoners and third parties and
15 determined on the basis of the affidavits that they were
16 prisoners of war.

17 But it is absolutely clear that the writ did
18 extend to the question of I am not a combatant. I am
19 not a warrior, number one. And number two, it did go in
20 non-criminal detentions to the underlying facts of the
21 detention, and that goes to the point about the standard
22 that Justice Kennedy asked and the Chief Justice asked.

23 We agree that, if and when the D.C. Circuit
24 ever addresses the merits of these cases, and not only
25 is there no CSR -- complete record on return in any

1 case, but the government has suggested they proceed five
2 at a time, and we're now two years running without a
3 single one -- but there's no doubt that the argument
4 we're making in Roman numeral 2 of our brief, that the
5 CSR, the Wolfowitz definition is not authorized
6 detention under the AUMF, which as this Court in Hamdi
7 said, incorporates long-established law-of-war
8 principles and American traditions.

9 We can raise that claim because they have to
10 establish that the procedures and standards were
11 consistent not only with the Constitution but also with
12 the laws of the United States. And the problem is
13 this --

14 CHIEF JUSTICE ROBERTS: That is an argument
15 that, I gather, both sides agree is available to you
16 under the DTA before the D.C. Circuit.

17 MR. WAXMAN: That is absolutely correct.
18 But what -- what habeas at its core was -- and we're
19 talking -- I'm happy to live in the world of 1789 now --
20 is executive detention and not the more modern
21 innovations where, well, certain procedures weren't
22 constitutional or whatever, but you have no right to
23 hold me. The facts won't allow you to hold me. The
24 D.C. Circuit cannot --

25 JUSTICE KENNEDY: What does that tell you

1 about the adequacy of the substitute?

2 MR. WAXMAN: Because the D.C. Circuit --
3 because the D.C. Circuit is reviewing a record that was
4 adduced ex parte, in camera, with a presumption to boot
5 that it is -- that the evidence is both accurate and
6 complete, and the D.C. Circuit is -- has already said it
7 will not hear any new evidence and it must apply that
8 same presumption that that evidence that was heard ex
9 parte in camera with its own presumption is correct.
10 And here's -- let me just give you an example of what
11 difference this makes. You have the unredacted version
12 of Judge Green's district court opinion. I don't. She
13 discusses -- she does address the adequacy of the
14 substitute. And she addresses the case of two
15 individuals. One is Mr. Ait-Idir, who is my client, and
16 you have both in her opinion and our brief this truly
17 Kafka-esque colloquy at his hearing in which he is
18 accused of associating with a known Al-Qaeda operative,
19 which he denies, but he can't be told the name.

20 Mr. Kurnaz is the other Petitioner who is
21 discussed in her brief. He was a Petitioner in this
22 Court, but he has since been released by the government
23 because of the fact that he had what the CSRTs won't
24 give him, which is a lawyer. He was told, two years
25 after he was detained -- he's a German permanent

1 resident -- he was told at his CSRT, as many of these
2 individuals were not, that he was being held because he
3 associated with a known terrorist. And he was told the
4 name.

5 He was told that he associated with somebody
6 called Selcook Bilgen who, the government contended, was
7 (a) a terrorist, who was -- had blown himself up while
8 Mr. Kurnaz was in detention -- may I simply finish this
9 account -- while he was in detention and in a suicide
10 bombing; and all that Mr. Kurnaz could say at his CSRT
11 where he had no lawyer and had no access to information
12 was, I never had any reason to suspect he was a
13 terrorist.

14 Well, when the government, in the habeas
15 proceedings, filed its factual return in Judge Green's
16 court, it filed as its factual return the CSRT record.
17 His counsel saw that accusation. Within 24 hours, his
18 counsel had affidavits not only from the German
19 prosecutor but from the supposedly deceased Mr. Bilgen,
20 who is a resident of Dresden never involved in terrorism
21 and fully getting on with his life.

22 That's what -- and that evidence would not
23 have been allowed in under DTA review. It wouldn't have
24 been in the CSRT, and it won't come in under DTA review.
25 And that's why it is inadequate.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Waxman.

3 The case is submitted.

4 (Whereupon, at 11:24 a.m., the case in the
5 above-entitled matter was submitted.)

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