IN THE SUPREME COURT OF THE UNITED STATES

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LAKHDAR BOUMEDIENE, ET AL. :

Petitioners :

v. : No. 06-1195

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.; :

and :

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., :

Petitioners :

v. : No. 06-1196

UNITED STATES, ET AL. :

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Washington, D.C.

Wednesday, December 5, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:
SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Petitioners.
GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

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

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

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

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

CHIEF JUSTICE ROBERTS: So our judgment in this --

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, if I could

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

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

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

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

cases.

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

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

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

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

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

decided this case.

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

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

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

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

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

JUSTICE SCALIA: What is -- what are they?

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

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

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

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

MR. WAXMAN: Indeed, it did.

JUSTICE SCALIA: The question here is an alien.

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

JUSTICE SCALIA: So it's totally irrelevant.

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

JUSTICE SCALIA: In both of those cases, it

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

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

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

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

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

(Laughter.)

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

Certainly many of the petitioners in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: There is -- there are

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, those proceedings are structurally

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

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

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

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

classified information.

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

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

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

JUSTICE SOUTER: I understand that.

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

tribunal officer.

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

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

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

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

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

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

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

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

MR. WAXMAN: Yes.

JUSTICE BREYER: They are --

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Where -- where was he held?

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

JUSTICE SCALIA: Are these people being held in Pennsylvania?

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

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

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

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

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

(Laughter.)

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

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

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

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

national government of the United States.

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

(Laughter).

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

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

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

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

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

Thank you.

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

General Clement.

ORAL ARGUMENT OF GENERAL PAUL D. CLEMENT,
ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

JUSTICE STEVENS: How is that personal representative chosen?

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

JUSTICE SOUTER: Isn't that personal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Yes, but doesn't --

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

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

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

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

GENERAL CLEMENT: "Uigars."

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

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

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

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

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

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

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

GENERAL CLEMENT: Well, again, Justice

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Exactly.

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

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

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

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

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

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

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

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

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

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

GENERAL CLEMENT: Not at all --

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

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

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

GENERAL CLEMENT: With respect, Justice

Souter --

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

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

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

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

GENERAL CLEMENT: No, it --

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

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

JUSTICE SOUTER: And the three Spanish

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

GENERAL CLEMENT: The writ was denied, Justice Souter.

JUSTICE SOUTER: The relief was denied.

GENERAL CLEMENT: No, the writ was denied.

JUSTICE SOUTER: That had a hearing under the writ.

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

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

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

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

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

return to the writ.

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

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

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

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

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

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

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

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

GENERAL CLEMENT: They were exercising habeas jurisdiction.

JUSTICE SOUTER: They were exercising habeas

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

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

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

But -- and this is a situation where --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL CLEMENT: They would not qualify for

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

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

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

JUSTICE STEVENS: I mean it is your theory.

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

JUSTICE STEVENS: Right.

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

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

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

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

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

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

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

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

And again I think the burden --

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

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

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

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

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

consistent with the Constitution --

GENERAL CLEMENT: Yes, Justice --

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

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

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

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

JUSTICE KENNEDY: But the statute --

JUSTICE BREYER: That's their argument.

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

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

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

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

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

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

combatant"?

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

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

And that is your position, I think.

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL CLEMENT: Well, I mean --

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

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

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

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

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

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

JUSTICE GINSBURG: General Clement --

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

JUSTICE GINSBURG: I think, to go back to

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

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

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

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

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

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

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

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

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

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

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

have a minute or two.

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

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

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

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

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

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

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

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

(Laughter.)

GENERAL CLEMENT: As to that opinion, the courts -- the lower courts should be instructed to with due cognizance for the fact these individuals have been detained six years

and this is the process that has been provided in order to decide whether or not that continuing custody is lawful, they should expedite this to the greatest extent possible.

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

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

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

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

(Laughter.)

JUSTICE SOUTER: We can't win without

reversing the court of appeals.

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

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

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

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

GENERAL CLEMENT: That's exactly right.

That's exactly right.

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

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

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

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

GENERAL CLEMENT: Well, Justice Souter, I'm

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

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

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

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

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

GENERAL CLEMENT: I'm sorry, Justice Souter,

I may have misspoke.

JUSTICE SOUTER: Maybe I misunderstood you.

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

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

GENERAL CLEMENT: I mean --

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

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

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

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

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

JUSTICE STEVENS: General Clement --

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

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

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

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

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

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

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

GENERAL CLEMENT: That is part of our point.

JUSTICE STEVENS: Yes.

GENERAL CLEMENT: And we would say, though --

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

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

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

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

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

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

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

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

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

If I could finish with just bringing the

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

CHIEF JUSTICE ROBERTS: Thank you, General Clement.

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

REBUTTAL ARGUMENT OF SETH W. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: What does that tell you

about the adequacy of the substitute?

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Waxman.

The case is submitted.

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

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