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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
this morning in Case 08-267, United States v. Denedo.

Mr. Shah.

ORAL ARGUMENT OF PRATIK A. SHAH

ON BEHALF OF THE PETITIONER

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

The Court of Appeals for the Armed Forces,
or CAAF, held that military appellate courts possess
open-ended jurisdiction under the All Writs Act to
entertain a coram nobis challenge to the merits of a
final court-martial conviction. This Court should
reverse that decision, both because the All Writs Act
cannot supply jurisdiction that Congress chose not to
confer and because Respondent is a civilian who may no
longer invoke the military court system.

As this Court explained in Clinton v.
Goldsmith, military courts, as Article I courts, are
strictly limited to the bases of jurisdiction conferred
upon them by the Uniform Code of Military Justice, or
UCMJ. Three related aspects of the UCMJ make clear that
it does not confer jurisdiction over Respondent's coram
nobis petition.

1 First, as noted in Goldsmith, the UCMJ
2 narrowly circumscribes military appellate jurisdiction
3 to the findings and sentences of a court-martial
4 conviction. That is a direct review jurisdiction. UCMJ
5 Articles 66 and 67, which define appellate jurisdiction,
6 do not contemplate any further review within the
7 military appellate courts.

8 Second, once direct appellate review is
9 complete and the military authority executes the
10 judgment, UCMJ Article 76 affirmatively forecloses any
11 further military court review. As this Court has
12 recognized on two prior occasions, UCMJ Article 76 marks
13 the terminal point of proceedings within the
14 court-martial system.

15 JUSTICE GINSBURG: Mr. Shah, how does that
16 differ from the general rule that a judgment becomes
17 final and has preclusive effect once the appellate route
18 has been exhausted or the time to pursue it has expired?
19 It seems to me that Article 76 simply codifies the rule
20 that applies ordinarily in criminal cases, in civil
21 cases, stating when a judgment becomes final for
22 preclusion purposes.

23 MR. SHAH: Your Honor, yes, Article 76 does
24 that, but it does more than that. As this Court
25 recognized in Gusik and in Councilman, it marks the end

1 of proceedings within the military court system.

2 Now, beyond the text, what this Court looked
3 at in *Gusik* -- in *Gusik*, it was a Petitioner seeking
4 habeas review. One of his alternative arguments in
5 *Gusik* was that Article 76 essentially violated the
6 Suspension Clause because it -- it marked the end of --
7 no further proceedings within the military court system
8 as well as within the Article III court system. The
9 Court agreed with the petitioner that Article 76 marked
10 the end of any further proceedings within the military
11 court system. It disagreed that it also effected a
12 repeal of Article III habeas jurisdiction, but there was
13 no disagreement between the petitioner, the government,
14 and this Court in *Gusik* that it did mark the end of
15 proceedings within the military court system.

16 JUSTICE SCALIA: Therefore, one can say that
17 that point wasn't decided in the case, right?

18 MR. SHAH: Well, Your Honor, one could say
19 that, but this Court again in *Councilman* ratified that
20 line, that the Court drew in *Gusik*. It -- it reiterated
21 the reasoning that Article 76 forecloses any further
22 proceedings within the military court system. So I
23 don't think it's just dicta. It was relevant to its
24 denial of the Suspension Clause claim, and the Court
25 reiterated that in *Councilman* 25 years later.

1 JUSTICE GINSBURG: Where, in your view, in
2 that the government is putting forward, can this -- can
3 Denedo go? He said, I was misinformed by my counsel. I
4 never would have entered a plea if I had known I would
5 be subject to deportation. And he said, I never found
6 out about it until, what, 8 years later, when the
7 government -- 8 years after his conviction, the
8 government said, you're subject to deportation. Where
9 can he go with that plea?

10 MR. SHAH: Your Honor, it appears that
11 Respondent no longer has any further remedies to -- to
12 pursue. But we think the important point is that in a
13 general -- in the general case, Petitioner is bringing
14 -- the exact same claim the Respondent is bringing is
15 normally going to have several avenues of remedy outside
16 --

17 JUSTICE GINSBURG: We're assuming now,
18 because we haven't gone any further than his plea, that
19 he was so misinformed and he didn't lack diligence in
20 failing to bring it earlier, that he was surprised by
21 the government's action, so he was unaware and,
22 therefore, unable to make this plea any earlier. You
23 have given us the answer that it's too bad, he's just
24 out of any court.

25 MR. SHAH: Well, Your Honor, I think it's

1 important to note that the UCMJ marks the high-water
2 mark of process within the military justice system.
3 What the UCMJ did is it took the prior system, which
4 didn't even allow for real direct review within the
5 military court system, and it made that direct review
6 system much more robust. It added an intermediate court
7 of review. It took administrative review that was
8 embodied within boards of tribunals that had typically
9 been under the Judge Advocate General. It moved that
10 out and gave it greater independence to provide more
11 robust intermediate appellate review. It added an
12 entire level of a new court, the Court of Appeals for
13 the Armed Forces, which provided additional -- a new
14 level of review. And then it said still --

15 JUSTICE KENNEDY: Well, part -- part of
16 independence is the assurance that the court has the
17 ability to do justice in the case before it, and I think
18 the purpose of coram nobis or coram vobis is to protect
19 the integrity of the court, and that's all this court is
20 asking. So that's quite consistent with what you've
21 just said.

22 MR. SHAH: Well -- well, Your Honor, in
23 enacting the UCMJ, Congress was balancing several
24 values. On the one hand, it was balancing the rights of
25 service members, but at the same time, it was balancing

1 the important value of maintaining good order and
2 discipline within the armed -- within the armed forces,
3 mindful of the military's primary mission in fighting
4 wars and defending the nation.

5 Now, given those competing values, it was --
6 it was reasonable for Congress to draw a line at some
7 point and say it, the conviction is final and to the
8 extent you want to seek further collateral review, you
9 have to go to the civilian system to seek that review.
10 That -- that line is reasonable not only from a
11 historical standpoint, but also from a practical
12 standpoint, given the institutional limitations --

13 JUSTICE STEVENS: But is there collateral
14 review available in the civilian system in your view?

15 MR. SHAH: Yes, as a general matter, there's
16 --

17 JUSTICE STEVENS: I mean in this case.

18 MR. SHAH: In this case, Respondent no
19 longer has any reviews because the time has passed.
20 2241 would --

21 JUSTICE STEVENS: So the answer is no in
22 this case?

23 MR. SHAH: No, there is no further review,
24 Your Honor, in this case. Now, as a general matter
25 there are ample avenues of -- of review within the

1 civilian court system. For the entire time that a
2 petitioner would be confined, he can seek 2241 habeas
3 relief in the Federal court system. Even after --

4 JUSTICE GINSBURG: Mr. Shah, you just said
5 something about -- you answered my question and Justice
6 Stevens's question: This person is out because it's too
7 late for him. He was convicted in what, was it --

8 MR. SHAH: 1998, Your Honor.

9 JUSTICE GINSBURG: Yes. And the government
10 never said anything about deportation until 2006? And
11 they went through -- he twice applied for
12 naturalization, is that correct?

13 MR. SHAH: That is correct, Your Honor.

14 JUSTICE GINSBURG: And he was turned down on
15 grounds that had nothing to do with deportation. The
16 government never alerted him to the possibility that he
17 would be deportable. They turned down his applications
18 with no hint of that, and you say that he is -- he's out
19 of time, but nothing counts against the government
20 because of that 8-year lapse?

21 MR. SHAH: Right. Your Honor, in the
22 denials I agree with you that they did not alert him to
23 deportation, but it based its denials on his military
24 court convictions. So to that extent, he was somewhat
25 on notice that the military court convictions were

1 posing a problem to his citizenship, potential
2 citizenship status.

3 Now, it is true, you're absolutely right,
4 that the government did not begin deportation
5 proceedings until October 2006, and until that time he
6 was not on notice, but the fact that this particular
7 claimant -- that the time has run should not be
8 dispositive. For example --

9 JUSTICE SOUTER: Well, the time -- I mean,
10 the time may very well run in the civil system, and yet
11 I take it that under -- you accept Morgan, and in the --
12 in the Article III system this -- in comparable
13 circumstances, this Petitioner could seek coram nobis.

14 MR. SHAH: Right. There are two reasons,
15 Your Honor --

16 JUSTICE SOUTER: And I take it you also -- I
17 don't think there's any dispute that the All Writs Act
18 applies to the Article I court as well as to the Article
19 III court. And I take it -- and I'd like your response
20 to this. I take it you accept the fact that in
21 testimony before the House, at least, at the -- at the
22 time the present system went into effect, the general
23 counsel for the Department of Defense, Mr. Taft,
24 testified to a House committee that coram nobis would be
25 available in the -- in the Article I courts. And if

1 that is so, isn't the -- kind of the most reasonable way
2 to construe the statute, including Article 76, as
3 allowing for this?

4 MR. SHAH: No, Your Honor. Mr. Taft's
5 testimony that you're referring to was not given at the
6 time of enacting of the UCMJ.

7 JUSTICE SOUTER: What was the occasion for
8 it?

9 MR. SHAH: That was during a subsequent
10 amending process of the Act. The only testimony --

11 JUSTICE SOUTER: What were they amending at
12 the time?

13 MR. SHAH: It was I think in terms of the
14 1983 amendments to the UCMJ. There have been several --

15 JUSTICE SOUTER: You're way ahead of me
16 because I don't know what the '83 amendments would refer
17 to. What --

18 MR. SHAH: Okay.

19 JUSTICE SOUTER: What was the subject
20 matter?

21 MR. SHAH: Well, what Mr. Taft was
22 testifying to, we believe, are -- he was -- the specific
23 testimony that Mr. Taft was giving was related to the
24 boards of correction, I believe, and whether that the
25 boards of correction should retain jurisdiction review

1 of final court-martial judgments, so his testimony was
2 related to that distinct issue.

3 JUSTICE SOUTER: Now, with respect to the
4 boards of correction, I take it there's nothing
5 specifically in the statute that says there's coram
6 nobis jurisdiction?

7 MR. SHAH: Nothing specific in -- in the
8 UCMJ?

9 JUSTICE SOUTER: Yes.

10 MR. SHAH: Yes, there's nothing specific in
11 the UCMJ --

12 JUSTICE SOUTER: Now, if he was right about
13 that, that would undercut your -- your argument that,
14 with respect to a special court-martial and subsequent
15 proceedings, there could be no coram nobis, because
16 there's no specific reference in the statute in either
17 case?

18 MR. SHAH: No, Your Honor. What Mr. Taft
19 was testifying to was the state of the prevailing law in
20 1983 before the CAAF. The fact that Congress did not
21 amend the UCMJ in light of Mr. Taft's testimony -- this
22 Court has said on multiple occasions that we don't read
23 into congressional silence --

24 JUSTICE SOUTER: Oh, I quite agree. The
25 premise of my -- sort of my argument to you a second ago

1 was that if we accept the proposition that Mr. Taft was
2 making a correct statement of law --

3 MR. SHAH: Right.

4 JUSTICE SOUTER: -- then the logic would in
5 effect answer your argument that because there is no
6 specific grant of coram nobis jurisdiction with respect
7 to special court-martials and subsequent proceedings,
8 there couldn't be any. That's the only point that I was
9 trying to make.

10 MR. SHAH: Your Honor, I don't think we can
11 read that into the silence, and here is why: We have
12 much more precise legislative history on this very
13 point. At the time the provision was enacted, at the
14 time the UCMJ was enacted, there was Article 73 of the
15 UCMJ provides one means of collateral review within the
16 military justice system once a court-martial conviction
17 is final, and that's a new trial petition, which is
18 limited to certain subject matter and certain time
19 limits.

20 JUSTICE SOUTER: It is pretty limited. What
21 is it, it's limited to fact and fraud?

22 MR. SHAH: To fraud on the court and newly
23 discovered evidence.

24 The person who drafted that provision --

25 JUSTICE GINSBURG: Is it -- is it available

1 to someone who enters a guilty plea, if you know?

2 MR. SHAH: It does not appear it would be
3 available to someone who has entered a guilty plea. The
4 government is not aware of any cases where the military
5 has granted an Article 73 petition to someone who has
6 pled guilty.

7 But the important point is at the time that
8 provision was enacted, the person who drafted that
9 provision testified before Congress and said, we've
10 considered the universe of post-conviction remedies, and
11 specifically named coram nobis relief, and said that
12 we've looked at it and we think the only circumstances
13 that warrant appeal within the military court system
14 beyond coram nobis are those stated within -- or
15 including coram nobis are those stated within Article 73
16 specifically.

17 JUSTICE SOUTER: May -- may I ask you
18 just -- and I'm doing this from memory, so I -- my -- my
19 premise of the question may be wrong. But I do recall
20 the quotation of testimony in the brief, and I -- if I
21 recall it correctly, the person testifying said that --
22 that 73 was sort of a combination of coram nobis and new
23 -- and new trial motion practice. But my recollection
24 was that there was no statement, or at least it wasn't
25 quoted in the briefs, to the effect that this is all

1 there is.

2 Now, there -- it was explaining what 73 did,
3 but it was not an explanation to the effect that if you
4 didn't get under the -- the tent flap in 73, you were
5 out completely. Am I correct about that?

6 MR. SHAH: Well, I'll read -- read the
7 testimony to you --

8 JUSTICE SOUTER: Okay.

9 MR. SHAH: -- Justice Souter. And this
10 appears on pages 25 to 26 of the government's brief, and
11 it says: "What we did was to combine what amounts to a
12 writ of error coram nobis with a motion for a new trial
13 on newly discovered evidence. We have provided for both
14 of them and to our minds they are the only additional
15 circumstances over and above the appeal that need a
16 remedy."

17 JUSTICE SOUTER: Okay, I stand corrected.

18 MR. SHAH: So I think that's -- that's
19 conclusive on this point and provides a firm ground on
20 which to distinguish this Court's decision in Morgan,
21 which you referenced earlier, that -- that applies coram
22 nobis in the Article III system. Congress considered it
23 for the Article I system and rejected it in the military
24 courts.

25 JUSTICE ALITO: Does that mean that your --

1 your argument boils down to the proposition that the
2 relevant provisions of the UCMJ were intended to
3 eliminate coram nobis, or is there more to your argument
4 than that?

5 MR. SHAH: I don't think it's to eliminate
6 coram nobis. It was never available within the military
7 court system.

8 JUSTICE ALITO: All right. Well, that --
9 then I'm not quite sure I understand your argument.
10 Maybe you can explain why you -- you contend that if the
11 Respondent had been convicted in a Federal district
12 court and everything else was the same, he would be able
13 to petition for a writ of coram nobis, but he can't in
14 the military courts.

15 What is the basis for that? Both a Federal
16 district court -- a Federal district court is a creature
17 of statute. It has the jurisdiction that Congress gives
18 it and no greater jurisdiction. It has certain --
19 what's been termed inherent authority. The All Writs
20 Act applies to it. All of those things are true of the
21 military courts as well. So what is the basis for the
22 distinction?

23 MR. SHAH: There are two distinctions -- at
24 least two distinctions, Your Honor: The first is, in
25 the Federal court system, there is an independent basis

1 of jurisdiction when someone is bringing a Federal
2 constitutional challenge, collateral challenge to their
3 conviction. That separate independent basis of
4 jurisdiction is 1331. There's -- there's independent
5 basis of jurisdiction. The All Writs Act does not
6 confer jurisdiction. The Court made that very clear in
7 Goldsmith. What it requires is an independent basis of
8 jurisdiction. That exists in Article III courts. It
9 does not exist in the military court system. That's the
10 first distinction.

11 The second distinction, Your Honor, even if
12 this Court wasn't convinced by that jurisdictional
13 argument, is that Congress specifically considered
14 whether to -- to allow coram nobis petitions within the
15 military court system. The All Writs Act was designed
16 to be a residual source of authority to fill gaps within
17 the system. It is not --

18 JUSTICE ALITO: Well -- well, that, as I
19 understand, was the argument I started out with, that
20 the -- your argument is that the UCMJ was intended to
21 eliminate coram nobis if it had been previously
22 available. That's your -- that's the argument you're
23 making now?

24 MR. SHAH: Well, again, I would -- I would
25 quibble with the characterization to -- to -- that it

1 was previously available. As of the enactment of the
2 UCMJ in 1950, coram nobis relief had never been
3 available within the military justice system.

4 JUSTICE ALITO: Well, what is the difference
5 on the face -- on their face between the relevant
6 provisions of the UCMJ and the provisions that govern
7 the ability of a criminal defendant in Federal district
8 court to get relief after being convicted? The -- there
9 are limited avenues that are provided under the Rules of
10 Criminal Procedure and under the statutes --

11 MR. SHAH: Right. Right.

12 JUSTICE ALITO: -- just as there are in the
13 UCMJ. What -- what is the difference?

14 MR. SHAH: The difference is significant,
15 Your Honor. In the -- in the military court system
16 there is only one avenue for post-conviction relief.
17 That is, after your -- and I'm speaking after your
18 direct review -- appellate review process has been
19 complete, there's only one, and that is the Article 73
20 new trial petition. Of course, in -- in the Article III
21 system there are several independent grants of
22 jurisdiction, the habeas jurisdiction --

23 JUSTICE GINSBURG: But I thought the Morgan
24 case said that coram nobis was not dependent on any
25 independent basis of jurisdiction. Didn't the Court say

1 that a coram nobis application challenging a conviction
2 is a step in the criminal case and not like habeas,
3 where relief is sought in a separate case and record,
4 the beginning of a separate proceeding?

5 MR. SHAH: Right. In -- in Morgan, Your
6 Honor, the Court was refuting the argument that 2255,
7 section 2255, occupied the field and, therefore, there
8 wouldn't be a coram nobis petition. It rejected that
9 argument. But I don't think the rejection of that
10 argument means that coram nobis, which is still a
11 residual source of authority, is available when Congress
12 has specifically rejected its application within the
13 Article I system.

14 JUSTICE KENNEDY: Well, but -- but you're
15 shifting ground a little bit. The tenor of the
16 questions from Justice Alito and Justice Ginsburg really
17 is to the effect: Does coram nobis require an
18 independent source of -- of jurisdiction? And I should
19 think not.

20 MR. SHAH: Well, your --

21 JUSTICE KENNEDY: The whole idea of coram
22 nobis is to protect the integrity of the jurisdiction
23 the court already has.

24 MR. SHAH: Your Honor, this Court could not
25 have been clearer in Goldsmith. It says the All Writs

1 Act requires an independent basis, an existing
2 independent basis of jurisdiction.

3 JUSTICE KENNEDY: I -- I acknowledge that.
4 But there is a source of jurisdiction here. Coram nobis
5 is to ensure the accurate exercise of jurisdiction that
6 the court has earlier asserted.

7 MR. SHAH: With respect, Your Honor, I would
8 argue that the past jurisdiction in this case does not
9 constitute an existing basis of jurisdiction.

10 JUSTICE BREYER: But suppose -- suppose that
11 the problem was a professional soldier convicted a
12 certain number of years ago of a particular crime, a few
13 years later, through some amazing mistake, they wrote
14 the wrong number down. The clerk just wrote the wrong
15 number of the code provision. That's all.

16 MR. SHAH: Okay.

17 JUSTICE BREYER: And it made it a felony
18 instead. It was actually a misdemeanor. What's he
19 supposed to do? I mean, normally you go back to the
20 court and say: Judge, you know, they just made --
21 everyone admits it's a simple transcribing error. Would
22 you please correct it? Now, how -- how is that supposed
23 to work in the military?

24 MR. SHAH: If he is still within custody --

25 JUSTICE BREYER: Yes. No, he's -- he's

1 finished his sentence. This is several years ago. They
2 just now discovered it, and it could affect him in the
3 future that it happened in fact to be a misdemeanor he
4 was convicted of. But the -- the code section they
5 wrote down is a felony.

6 MR. SHAH: Well, if the military isn't
7 willing to correct that sort of error on its own as an
8 administrative matter and that he needs some judicial
9 forum to --

10 JUSTICE BREYER: Yes. Yes, that's right.

11 MR. SHAH: -- to get relief, he can go to
12 the Court of Federal Claims and bring a Tucker Act
13 action. There's a 6-year statute of limitations.

14 JUSTICE BREYER: No, this is 7 years.

15 (Laughter.)

16 MR. SHAH: Well -- well, then, Your Honor,
17 he probably wouldn't have a judicial forum.

18 JUSTICE BREYER: He can't even do that. So
19 nobody in the military, in fact, once their thing is
20 final -- then it has nothing to do with it, in your
21 view, that he has left the military?

22 MR. SHAH: Well --

23 JUSTICE BREYER: You're saying -- you're
24 saying, whether you're in the military, whether you're
25 out of the military, no matter how egregious, no matter

1 how obvious, there is no route for a military person, a
2 professional, to go and get an obvious error corrected.
3 If -- if he has missed the statute, that there was an --
4 the civil statute of limitations, it's hard for him to
5 go to the Tucker Act. He's been in the Philippines the
6 entire time.

7 MR. SHAH: Justice Breyer, to make your
8 hypothetical work he has to no longer be in custody. He
9 has had to have discovered this error 6 years after the
10 conviction has happened.

11 JUSTICE BREYER: Yes, it happened. It
12 really happened.

13 MR. SHAH: The military would have had to
14 deny this -- correcting his --

15 JUSTICE BREYER: What I'm trying to do is
16 suggest that I think you -- I can't quite decide what
17 stool you want to rest on. Part of this you say, well,
18 he's a civilian that has left the military. And then I
19 read that. It seems to have nothing to do with it. But
20 your other argument seems to be that doesn't matter.

21 MR. SHAH: Well --

22 JUSTICE BREYER: No military soldier can
23 correct an error, no matter how egregious, even a
24 technical -- you know, they just wrote the wrong thing
25 down -- because Congress didn't want them to. Now, I

1 doubt that Congress thought about that. I'm just not
2 sure they didn't want them to.

3 MR. SHAH: Well -- well, Your Honor, once
4 again, in your hypothetical, I think there would be an
5 administrative recourse there. And, of course, there's
6 always the fail-safe of a presidential pardon if the
7 obvious -- if the error is that obvious and that
8 egregious.

9 Now, you did refer to a second argument,
10 which is an independent argument, which is that the
11 military courts lack jurisdiction for the independent
12 reason that Respondent -- it's an independent reason,
13 Your Honor, that he lacks any remaining connection to
14 the armed forces and, therefore, cannot invoke the
15 military courts. This Court held in *Toth v. Quarles*
16 that Congress lacks power under Article I to extend
17 military court jurisdiction over a civilian, and that --

18 JUSTICE SOUTER: I know, but that's --
19 that's a different -- that's a different issue from --
20 from whether it -- it may retain some residual
21 jurisdiction to correct an error with respect to someone
22 over whom it has had jurisdiction.

23 MR. SHAH: Your Honor, once again, that
24 would be relying on the long-expired past jurisdiction.
25 It is --

1 JUSTICE SOUTER: Well, you -- you made that
2 point before. And I want to -- I want to follow up with
3 one question on that. As I recall, it was in response
4 to the -- to the Morgan argument. The -- the Morgan
5 analysis was, well, this isn't a -- a new ground or a
6 new assertion. It is jurisdiction as would be the case
7 in habeas. It, in effect, is -- is kind of a
8 metaphysical continuation of the -- the jurisdiction
9 that existed before.

10 And your response to that was, in effect, a
11 Goldsmith response. And -- and you said past
12 jurisdiction doesn't mean present jurisdiction. The
13 past jurisdiction is over, and that's under -- under the
14 statute and under Goldsmith. That's -- that's the end
15 of it.

16 Couldn't that same argument simply have been
17 made, however, in -- in Morgan? In other words, Morgan
18 was a case in which the point of finality had been
19 reached. There was no specific statute in Morgan saying
20 there's coram nobis jurisdiction, and yet the Court's
21 analysis -- I -- I called it "metaphysical" a second ago
22 -- was that this really was simply a continuation of the
23 past jurisdiction. If that was a sound argument in
24 Morgan, why isn't it a sound argument with respect to
25 the -- the military code here?

1 MR. SHAH: Well, because the military --
2 Congress specifically contemplated that possibility, and
3 now I'm going back to my Article 73 argument, Your
4 Honor, and to the legislative history which shows what
5 Congress was trying to do in Article 73. That is to
6 encapsulate -- whatever post-conviction remedy it's
7 intended to be available within the military court
8 system appears in Article 73 that considered coram
9 nobis.

10 JUSTICE SOUTER: It -- it did do that, and
11 there's -- there's no question that it certainly made
12 finality provisions in Article 76. But in the civilian
13 system, so far as express provision is concerned, there
14 are limits. There are statutes of limitations, and it
15 seems to me that the same argument could be made there
16 that was made here --

17 MR. SHAH: Well, I think this --

18 JUSTICE SOUTER: -- that was made there.

19 MR. SHAH: Your Honor, I think the structure
20 of the military court system is different than the
21 civilian system, and -- and that goes back to --

22 JUSTICE SOUTER: Outside of 1531, is there
23 any structural difference?

24 MR. SHAH: Yes, Your Honor. In the military
25 court system, Article 76, even though it was first

1 enacted in 19 -- in 1950, there were other provisions
2 analogous to it. It's always been understood within the
3 military system that, once a conviction was final and
4 the military authority executed the judgment, that was
5 it in terms of review within the military justice
6 system, save for a presidential pardon. Any further
7 relief to be obtained was through an Article III habeas
8 petition in the Federal courts. That's the
9 understanding that Congress had when it enacted the
10 UCMJ, and that's the understanding --

11 JUSTICE SOUTER: Yes, but you could say the
12 same thing, that when the statute of limitations is past
13 in a habeas case or, indeed, after habeas has been
14 followed, that so far as the statutes governing Article
15 III courts are concerned, that's the end. And yet
16 Morgan says, no, it isn't the end. There's this coram
17 nobis jurisdiction.

18 MR. SHAH: Well, the difference is, in
19 Morgan, the Court specifically said that Congress did
20 not intend to occupy the field when it passed 2255
21 governing habeas relief for Federal prisoners. That's
22 not the situation here. We know that Congress intended
23 to occupy the field when it passed Article 73.

24 So regardless of the jurisdictional
25 arguments, Your Honor, there's no right of action,

1 there's no right of coram nobis relief within the
2 military courts.

3 Your Honor, if there are no further
4 questions, I'd like to reserve the remainder of my time
5 for rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. SHAH: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Freedus.

9 ORAL ARGUMENT OF MATTHEW S. FREEDUS

10 ON BEHALF OF THE RESPONDENT

11 MR. FREEDUS: Mr. Chief Justice, and may it
12 please the Court:

13 Because there are courts, appellate military
14 courts must have coram nobis power to protect the
15 integrity of their judgments. The court of appeals
16 correctly asserted the same coram nobis power that
17 Article III courts have.

18 JUSTICE SCALIA: What do you mean, "they
19 must"? Do you think it's unconstitutional to deprive
20 them of that?

21 MR. FREEDUS: No, Your Honor. We believe
22 that they were given the All Writs Act authority as a
23 birth right in 1950, and that includes all prerogative
24 writs, including coram nobis.

25 JUSTICE SCALIA: That's what you mean by

1 "they must have"?

2 MR. FREEDUS: And also, Your Honor, they
3 must have the ability to protect the integrity of their
4 judgments just like other Federal courts have. The
5 Superior Court in D.C. has the power to issue coram
6 nobis to protect its judgments.

7 JUSTICE SCALIA: That's fine, but -- but is
8 it unconstitutional for Congress to say military courts
9 are different, they've always been different, the need
10 for finality is greater there, and we're conducting a
11 different rule for there?

12 MR. FREEDUS: I think Congress has the
13 authority to legislate very broadly in the area of
14 collateral remedies, and Congress could take away the
15 writ of coram nobis if it left in its place an adequate
16 and effective substitute, like it did in 2255.

17 JUSTICE SCALIA: Oh, oh, oh, so it would be
18 unconstitutional if they did not leave in its place an
19 adequate and effective substitute --

20 MR. FREEDUS: Our view is that if --

21 JUSTICE SCALIA: -- which would cover every
22 situation no matter how fanciful, right?

23 MR. FREEDUS: No, Your Honor. We believe
24 there has to be reasonable opportunity to bring a
25 colorable constitutional claim for which there is no

1 other avenue of relief, which we believe is the case
2 here.

3 CHIEF JUSTICE ROBERTS: What -- which case
4 of ours establishes the proposition that there always
5 has to be an available avenue of relief?

6 MR. FREEDUS: The best authority we have for
7 that, Your Honor, is Webster v. Doe, which we believe
8 stands for the proposition that courts should read
9 statutes so as not to preclude judicial review of a
10 constitutional claim absent an express congressional
11 intent to do so --

12 CHIEF JUSTICE ROBERTS: Well, that's
13 different than saying there always has to be available
14 relief. That's saying you think Congress usually
15 intends there to be available relief. And that would be
16 a doubtful assumption here, given the rather clear
17 expressions of finality that -- that are -- that are in
18 the UCMJ statutes.

19 MR. FREEDUS: I think -- well, if I could
20 make two points, Your Honor. On the first, we don't
21 believe that there is square authority for the bedrock
22 constitutional proposition that Congress can wipe away
23 all avenues of relief for a claim. We believe that we
24 were --

25 CHIEF JUSTICE ROBERTS: You don't -- you

1 don't think there's authority for the proposition they
2 can do it?

3 MR. FREEDUS: Correct.

4 CHIEF JUSTICE ROBERTS: I'm looking for
5 authority that says they can't do it.

6 MR. FREEDUS: I'm not aware of any, Your
7 Honor. We would -- I think we are --

8 JUSTICE SCALIA: Did -- did coram nobis
9 relief -- you say it has to be there. Was it ever used
10 before in the military courts?

11 MR. FREEDUS: Yes. I would like to -- yes,
12 Your Honor, it has been used since 1966. I assume you
13 may be asking about before 1950.

14 JUSTICE SCALIA: Indeed, yes.

15 MR. FREEDUS: Yes. Well, the reason it
16 hasn't happened before 1950 is that the UCMJ was created
17 in 1950, and that was the first time there were military
18 courts. There were no courts, so therefore no All Writs
19 Act authority prior to 1950.

20 JUSTICE SCALIA: Worse still. My goodness.
21 So you were --

22 MR. FREEDUS: Absolutely.

23 JUSTICE SCALIA: -- convicted by a
24 court-martial and had no basis for -- for getting that
25 revised, and that -- that lasted for a couple of hundred

1 years, right? And that was okay or it wasn't okay?

2 MR. FREEDUS: That was -- I think that's the
3 impetus behind the UCMJ, Your Honor.

4 JUSTICE SCALIA: Well, that's fine. I mean,
5 you can patch it up and say that they thought it wasn't
6 a good idea to have just military courts. But it's very
7 hard to make the constitutional argument you're making
8 when for a couple hundred years in military, in military
9 courts, which are different, there -- there was no
10 relief at all.

11 JUSTICE STEVENS: Could you clarify
12 something for me? Are you contending that the result
13 you seek is constitutionally compelled? I didn't think
14 you were.

15 MR. FREEDUS: Not -- no, not -- we aren't,
16 Your Honor. I was more responding to the Chief
17 Justice's --

18 JUSTICE SCALIA: And you were saying it is.
19 Just say, no, it's not constitutionally compelled, and
20 I'll be happy.

21 (Laughter.)

22 MR. FREEDUS: No, Your Honor.

23 CHIEF JUSTICE ROBERTS: I'm sorry --

24 JUSTICE KENNEDY: Well, you might -- you
25 might say that there is a lurking constitutional

1 question and that we ought to interpret the statute to
2 avoid a constitutional concern.

3 MR. FREEDUS: I think, Your Honor, that's
4 the best answer that I should have given.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: I don't like it very
7 much.

8 But what is -- your argument is that the
9 Constitution does not require that this person have,
10 right now, an available avenue of relief, your position?

11 MR. FREEDUS: We don't have square authority
12 from this Court to support that proposition.

13 CHIEF JUSTICE ROBERTS: So then it becomes,
14 as Justice Kennedy suggested, a question of whether or
15 not we should read the statutes here in a particular way
16 to avoid confronting that question?

17 MR. FREEDUS: Yes, Your Honor, I think
18 that's where -- we're comfortably in that neck of the
19 woods, and we really don't need to get closer to the
20 scarier question that was alluded to. So we --

21 JUSTICE SOUTER: When you say it's lurking,
22 you're -- you're invoking the doctrine of constitutional
23 avoidance?

24 MR. FREEDUS: Yes, Your Honor, we are.

25 JUSTICE SOUTER: Okay.

1 JUSTICE SCALIA: I don't think it's much of
2 a lurk if, for 200 years, this was going on without ever
3 -- it's not lurking to my mind.

4 JUSTICE GINSBURG: But you are making -- I
5 thought that the core of your argument is that the All
6 Writs Act applies to all courts established by Congress,
7 the military courts are included in that definition, and
8 there is nothing in the All Writs Act that says it
9 doesn't apply to the military. But the All Writs Act
10 requires that the writ be in aid of the court's
11 jurisdiction. So if you would spell out how the writ
12 here is in aid of the military court's jurisdiction.

13 MR. FREEDUS: Yes, Your Honor. We believe
14 it does it in a very similar way that this Court
15 explained in the United States v. Morgan, and that is
16 the writ of coram nobis aids the past appellate
17 jurisdiction that the Navy court had when it affirmed
18 and reviewed Mr. Denedo's conviction. It had
19 jurisdiction there.

20 And the coram nobis writ by its very nature
21 allows a court to correct an error in a case that was
22 before it, but it failed to perceive that error while it
23 had the case before it. And had it known the facts we
24 now know after all of the remedies are no longer
25 available, the court would not have issued the judgment

1 that it issued.

2 That's the -- in that sense, that's how the
3 writ aids the jurisdiction the court had in the past.

4 JUSTICE BREYER: Well, if that's so, then I
5 guess you can have courts reviewing the civilians. They
6 will review after the event the court-martial
7 jurisdiction -- the court-martials of people while they
8 were in the military. That will become a matter of
9 course anytime. I mean, there are many, many errors.
10 We have approximately 5,000 petitions a year claiming
11 some kind of constitutional error, and sometime they're
12 right.

13 MR. FREEDUS: Yes, Your Honor.

14 JUSTICE BREYER: So that's what you foresee?

15 MR. FREEDUS: I would -- yes and no.

16 JUSTICE BREYER: What way is it no?

17 MR. FREEDUS: No is when the individual is
18 not in custody and the 6-year statute of limitations has
19 expired for all the types of claims that are available
20 for a collateral attack of a court-martial conviction, a
21 declaratory judgment attack, a mandamus attack, Court of
22 Federal Claims attack, all those --

23 JUSTICE BREYER: Why -- in other words, in
24 the case I posed, he would -- he -- in your view, he
25 wouldn't have any remedy. You would agree with the

1 government about that, if it's 7 years later you find a
2 clerical error?

3 MR. FREEDUS: We agree. But we don't think
4 it's necessary, actually, to decide the issue here. The
5 issue here really is whether coram nobis is available --

6 JUSTICE BREYER: Well, if, in fact, you're
7 waiting until the -- the civil courts have lost all
8 jurisdiction because the statute of limitations has
9 expired, why do you need this? Why can't they just go
10 -- I mean, why do you need this special thing that
11 hasn't existed for 200 years? Why don't they just go to
12 a civil case? And moreover, why doesn't your client
13 fall within that situation?

14 You're claiming that if all the statutes
15 have run and everything, there is no coram nobis
16 jurisdiction, I thought in your case they had all run.

17 MR. FREEDUS: This gets to the other piece
18 of the answer I was trying to give, and that is a
19 petitioner from the military system could not file a
20 coram nobis petition in the Article III courts or the
21 Court of Federal Claims because there's no authority
22 that supports the proposition that you can take a coram
23 nobis petition and attack a judgment from a different
24 jurisdiction. Coram nobis has to allow the court that
25 issued -- that -- that --

1 JUSTICE BREYER: Then you're saying that
2 what you're foreseeing is through coram nobis,
3 indefinitely, a person outside the military who once was
4 in it can bring constitutional challenges?

5 MR. FREEDUS: Yes, Your Honor, in the
6 military justice system.

7 JUSTICE BREYER: Yes, okay, and we see those
8 every day, don't we? But there is one difference. The
9 difference is that often, though not always, a person in
10 habeas who challenges a prior normal, civil system
11 conviction, the State can retry him. And I guess, in
12 the instance that we're talking about, he can never be
13 retried. So in fact the difference would be, in your
14 view, the civilians who bring this would never be
15 retried if they're right.

16 MR. FREEDUS: That's correct, Your Honor.

17 JUSTICE BREYER: And so they would have in
18 that sense greater protection in the military system
19 than in the ordinary criminal courts a person has in
20 habeas, because the option of retrial is often but not
21 always there. Now, why would Congress have intended
22 that?

23 MR. FREEDUS: I think it's the very nature
24 of the coram nobis petition, Your Honor, and that is
25 coram nobis petitioners have already served their entire

1 sentence, so the societal interest to seek a retrial is
2 much lesser than in the habeas case where there's a
3 lengthy sentence less -- left, and if someone gets out
4 of jail --

5 CHIEF JUSTICE ROBERTS: Well, but the
6 collateral consequences of the conviction are pretty
7 dramatic. In this case, they decide whether this guy
8 stays in the country or is deported.

9 MR. FREEDUS: Yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: Well, so I think
11 Justice Breyer's question is still on the table. Why
12 would Congress intend to afford greater relief and
13 remedies to somebody who's outside -- was within the
14 military system and is now outside, than to an ordinary
15 civilian under Article III jurisdiction?

16 MR. FREEDUS: I think there is a classic
17 distinction between the habeas and the coram nobis
18 petitioner. In a coram nobis petitioner under 2255, if
19 they were to file a successful petition long after a
20 statute of limitations had expired, they would be in no
21 different position than a coram nobis -- a successful
22 coram nobis petitioner in the military.

23 We would say, we do believe there's a -- a
24 colorable argument for -- for the ability to retry Mr.
25 Denedo, but it's not pivotal to our case. Our view is

1 that the inability --

2 JUSTICE GINSBURG: Where? Colorable --

3 JUSTICE KENNEDY: In the civilian courts or
4 the military courts?

5 MR. FREEDUS: The military courts, Your
6 Honor.

7 JUSTICE BREYER: I think you have a good
8 answer to what my question was. I thought that was a
9 good answer. It's helping me. And -- but where I'm --
10 where I'm slightly -- and maybe this is just not
11 relevant to this case or maybe it's for the future.
12 Coram nobis, I thought, was a writ that means really
13 like technical clerical errors or something really
14 unusual. Is this -- I mean, it's hardly ever there.
15 I've not really seen more than a handful of cases.

16 So -- so is this writ supposed to be
17 available for what you're claiming is what I call a
18 typical error of inadequate representation? And I don't
19 know the answer to that question, but I think it's --
20 maybe you could say that's not presented. Maybe that's
21 for a later case. I don't know how to treat it. That's
22 why I'm asking.

23 MR. FREEDUS: I think Morgan is helpful on
24 that, Your Honor. Morgan is a violation of the right to
25 counsel, and it's this Court's --

1 JUSTICE GINSBURG: But was -- that question
2 wasn't resolved, was it? I thought we were just talking
3 about the authority of the military courts to issue this
4 writ, and the question that Justice Breyer has raised,
5 well, is this ineffective assistance of counsel adequate
6 grounds to issue the writ? I thought that question was
7 certainly not raised before this Court.

8 MR. FREEDUS: Well, the government hasn't
9 urged that there's no ineffective assistance of counsel.
10 It's not in their opening --

11 JUSTICE KENNEDY: Well, let's assume it
12 raised because Justice Breyer asked a question --

13 MR. FREEDUS: Yes.

14 JUSTICE KENNEDY: -- and I would be
15 interested in the answer.

16 JUSTICE BREYER: I knew it wasn't.

17 MR. FREEDUS: Yes, Your Honor.

18 JUSTICE BREYER: I thought it might be your
19 answer: Well, that isn't raised. And that would be a
20 perfectly good answer.

21 MR. FREEDUS: That's -- that's why --

22 JUSTICE BREYER: I'm telling you my honest
23 problem which I'm trying to think through: Where are we
24 going with this?

25 MR. FREEDUS: I think --

1 JUSTICE BREYER: What's going to happen one
2 way or the other way? That's why I asked the question.
3 So all I'm asking is your best thought on it.

4 MR. FREEDUS: Yes, Your Honor. I think
5 United States v. Kwan and United States v. Castro are
6 two court -- two cases that give the answer to your
7 question and both of those indicate that ineffective
8 assistance of counsel, in very similar factual
9 circumstances to this, is a basis for coram nobis relief
10 after -- after the ineffective assistance is discovered.
11 We recognize this Court has granted in --

12 JUSTICE GINSBURG: Military courts now,
13 since 1950, have quite a record of saying coram nobis is
14 available in these courts. However, they have routinely
15 thrown out the cases on the merits. Is there any case
16 within the military where the military has said anything
17 like inadequate assistance of counsel qualifies as a
18 reason to grant the writ?

19 MR. FREEDUS: Aside from this -- this case
20 below, Your Honor, I don't know of a case that raised
21 ineffective assistance of counsel. And you are correct
22 that the vast majority of these cases are thrown out of
23 court in the most -- in the briefest of orders. There
24 are cases where relief has been granted. They are few
25 and far between. Del Prado is one. It involved a

1 compositional jurisdictional error to the -- to the
2 court. An individual failed to elect a military judge
3 alone in writing and waived the right to have a -- a
4 member's jury trial, and that was deemed a
5 jurisdictional defect. And long after the case was
6 final, the -- the conviction was set aside. And I would
7 note the court in that case observed that personal
8 jurisdiction was no obstacle to granting the coram nobis
9 relief.

10 JUSTICE SCALIA: Was that person retried, do
11 you know?

12 MR. FREEDUS: I do not know, Your Honor.

13 JUSTICE SCALIA: Was he still in the
14 military?

15 MR. FREEDUS: I do not know. He was -- the
16 relief -- the decretal paragraph of the -- of the
17 decision indicates that he was restored all rights and
18 benefits, but it stops shy of saying, you know, here's
19 your uniform back.

20 JUSTICE GINSBURG: Do I understand correctly
21 that since 1989 there were a total of 30 coram nobis
22 petitions filed, and of those only 4 were granted?

23 MR. FREEDUS: The statistics that we cited
24 in our brief, Your Honor, were 10 coram nobis petitions
25 at the court of appeals within the last 10 years --

1 JUSTICE GINSBURG: Yes.

2 MR. FREEDUS: -- and 176 writ appeals from
3 the lower courts up to the court of appeals that don't
4 break out the category of writs. They could be habeas,
5 they could be coram nobis, mandamus. So we don't know
6 what percentage of the 176. But even if it was a -- a
7 significant percentage, it's still a tiny percentage of
8 the court's overall docket.

9 But they are rarer than hen's teeth, Your
10 Honor. These cases, one a year maybe is -- would be the
11 average of a coram nobis --

12 JUSTICE BREYER: What is the theory of the
13 jurisdiction of the military court in the circumstance
14 where the individual is still in the military, he's been
15 convicted, and he is in custody? So he wants to get out
16 of custody. Now, what's the theory of that? He can --
17 I take it it's accepted, is it, that they can -- that
18 such a person can ask the military justice system -- I
19 don't know which court -- for release on the ground that
20 he didn't -- wasn't adequately represented or some other
21 ground?

22 MR. FREEDUS: That would be a habeas case,
23 Your Honor.

24 JUSTICE BREYER: All right. It's a habeas
25 case. Now, do you have -- can you do that in the

1 military?

2 MR. FREEDUS: Yes. There are --

3 JUSTICE BREYER: And what's the theory of
4 the jurisdiction that the military courts have over
5 that?

6 MR. FREEDUS: It's similar in that it's All
7 Writs Act authority aiding the --

8 JUSTICE BREYER: Aiding what jurisdiction?

9 MR. FREEDUS: A direct review authority of
10 the military --

11 JUSTICE BREYER: But they've already
12 directly reviewed it.

13 MR. FREEDUS: Correct. And that's --

14 JUSTICE BREYER: So there is no more direct
15 review to be had.

16 MR. FREEDUS: That's correct, Your Honor.

17 JUSTICE BREYER: So how does this aid the
18 direct review that is to be had, since there is none?

19 MR. FREEDUS: It aids it in the same way
20 this Court recognized it can do so in Goldsmith, where
21 it acknowledged that a mandamus writ could issue after
22 finality --

23 JUSTICE BREYER: I see.

24 MR. FREEDUS: -- to compel adherence to the
25 court's own judgment, so that --

1 CHIEF JUSTICE ROBERTS: Within -- within the
2 military system?

3 MR. FREEDUS: Yes, Your Honor, within the
4 military justice system. In that -- in Goldsmith, it
5 was a situation where Goldsmith was out of the -- you
6 know, out of the military. He had a final -- well, I
7 guess he was in custody. But he had a final
8 court-martial conviction, and this Court indicated that
9 a writ of mandamus could issue to aid past appellate
10 jurisdiction to compel adherence to the --

11 CHIEF JUSTICE ROBERTS: All within the
12 system. I mean, the difference with this case is that
13 you're talking about somebody who is -- I guess that's
14 the issue -- out of the military system.

15 The problem with your position is that it
16 would dramatically expand the jurisdiction of the
17 military system. It would sort of follow everybody
18 they've dealt with around for their life, right?

19 MR. FREEDUS: The fact --

20 CHIEF JUSTICE ROBERTS: At any time somebody
21 who is out of the military system, whose judgment is
22 supposedly final under the provisions that Congress has
23 established, he could come back and knock on the door 20
24 years later and say, I want to review my conviction.

25 MR. FREEDUS: That's correct, Your Honor.

1 CHIEF JUSTICE ROBERTS: And he would be
2 within the military system.

3 MR. FREEDUS: He would be a civilian, former
4 service member --

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. FREEDUS: -- filing a coram nobis
7 petition, and the coram nobis --

8 CHIEF JUSTICE ROBERTS: And he's back in the
9 military system, 20 years later?

10 MR. FREEDUS: For purposes of the coram
11 nobis petition.

12 JUSTICE KENNEDY: In -- in coram nobis cases
13 in the civil system, do courts appoint special masters
14 when they're an appellate court and they have to find
15 out if coram nobis was --

16 MR. FREEDUS: Yes, Your Honor.

17 JUSTICE KENNEDY: Or do they use district
18 courts as special masters?

19 MR. FREEDUS: They --

20 JUSTICE KENNEDY: In this case, you had --
21 the court had to invent a procedural device. There's
22 going to be a new court-martial, which is a little odd
23 because it's a new court-martial sitting in judgment on
24 somebody who isn't even in the military anymore.

25 MR. FREEDUS: It's not a court-martial, Your

1 Honor. It's what's called a DuBay proceeding, and what
2 happens is -- and this in the decretal paragraph of the
3 -- the decision below. A remand is for further factual
4 development, and if the case can be disposed of on
5 declarations, if the government came forth -- it didn't
6 do so below -- but if it did so on remand and provided
7 affidavits that blew our affidavits out of the water,
8 the court could dismiss the petition out of hand.

9 If they couldn't do that or if there was a
10 credibility contest that needed to be resolved, what
11 would happen is the court would order what's called a
12 DuBay hearing, where a judge is appointed. And it's
13 just like an evidentiary hearing. Witnesses are
14 presented and they're cross-examined, and then findings
15 of fact are made, conclusions of law are drawn. And
16 then that is put into a record, added to the record of
17 trial, and reviewed in the coram nobis petition.

18 JUSTICE KENNEDY: But all of that is
19 extra-statutory in your -- this instance?

20 MR. FREEDUS: We don't believe so. We
21 believe the court -- the Navy court here has decisional
22 authority under Article 66 to do factfinding. It's a
23 very unique court. Congress created these courts with
24 factfinding power, which is different than I think
25 virtually all appellate courts, save maybe one or two

1 unusual situations. But these courts have factfinding
2 power, so it's right in Article 66. And these courts
3 also have rulemaking authority. And so does the court
4 of appeals, and it has exercised that to provide for
5 these procedures. So we don't believe --

6 JUSTICE SOUTER: Where are -- where are the
7 procedures set out for -- for military habeas?

8 MR. FREEDUS: They're not, and actually that
9 -- that -- this Court pointed that out in *Noyd v. Bond*.
10 It said that military appellate courts have habeas
11 power, but the court of appeals hadn't provided rules,
12 and Congress could facilitate with rules but hadn't, but
13 that didn't stop this Court from saying habeas power
14 existed. The absence of the procedure --

15 JUSTICE SOUTER: Are you -- are you arguing
16 then that if it has habeas power without a -- a textual
17 basis, there's no reason to argue that it lacks *coram*
18 *nobis* power because there's no textual basis?

19 MR. FREEDUS: I think the answer to that is
20 yes. The negative in there caught me. But, yes, I
21 think that's what we're saying, Your Honor.

22 JUSTICE GINSBURG: But this Court has never
23 held that the military courts have habeas jurisdiction?

24 MR. FREEDUS: Yes, it has, Your Honor.

25 JUSTICE GINSBURG: In what case?

1 MR. FREEDUS: In *Noyd v. Bond*, this Court
2 squarely held that military -- the court of appeals at
3 the time has habeas authority.

4 CHIEF JUSTICE ROBERTS: For someone still
5 within the military system?

6 MR. FREEDUS: That was the case where the
7 individual was pending appeal, I believe.

8 CHIEF JUSTICE ROBERTS: So the answer --

9 JUSTICE GINSBURG: But that was --

10 CHIEF JUSTICE ROBERTS: -- to Justice
11 Ginsburg is that we have never held that with respect to
12 a situation like the facts here, where you're dealing
13 with somebody who is outside -- long departed from the
14 military system?

15 MR. FREEDUS: Well, I would -- I would
16 direct the Court's attention, if I could, to footnote 11
17 of *Goldsmith*, where this Court says: "And of course,
18 once a criminal conviction has been finally reviewed
19 within the military system, and a servicemember in
20 custody has exhausted other avenues provided under the
21 UCMJ to seek relief from his conviction" -- citing *Noyd*,
22 the six pages therein which refers to the military
23 court's habeas power. This Court in *Goldsmith* put
24 habeas power in the context of a -- a final case, so
25 habeas authority after final relief.

1 JUSTICE SCALIA: It's talking about somebody
2 still within the military, if I -- if I heard the quote
3 correctly, right?

4 MR. FREEDUS: An individual is out of the
5 military if they -- if their dismissal has been executed
6 -- or their discharge has been executed and they're in
7 Leavenworth. They could even be moved to another
8 Federal penitentiary and still in custody.

9 JUSTICE GINSBURG: The --

10 MR. FREEDUS: So they're not really in the
11 military.

12 JUSTICE GINSBURG: The quote you referred to
13 from Goldsmith says: "And a servicemember in custody."
14 So I think Goldsmith, in that footnote that you're
15 citing, is presenting a service member still in custody,
16 having exhausted all other areas, can come to a Federal
17 district court and seek habeas. It's not talking about
18 someone who is out of the military.

19 MR. FREEDUS: I read it differently, Your
20 Honor. I read it -- the next clause in that sentence is
21 referring to habeas outside. I read this sentence as
22 clearly saying that there's direct review. There's
23 habeas after direct review within the military. And
24 then there's of course collateral review in the Article
25 III courts, if -- if everything misfires within the

1 military justice system.

2 JUSTICE GINSBURG: Well, what am I missing?
3 I thought that the footnote reads once a criminal
4 conviction has been finally reviewed within the military
5 system a service member, having exhausted all other
6 areas, can petition in a Federal district court for a
7 writ of habeas corpus. I don't see anything that talks
8 about someone who is no longer a service member.

9 MR. FREEDUS: Right. I -- I see the
10 in-custody and exhausted avenues provided in the UCMJ as
11 referring to a phase before you get to the Article III
12 courts. Obviously, if I'm reading it wrong, the Court
13 will let me know, but I read that as prior to Article
14 III review.

15 If I could talk briefly about the 1983
16 legislation -- it came up in opposing counsel's opening.
17 I think it sheds a lot of light on the availability of
18 coram nobis relief. When Mr. Taft testified, he wasn't
19 simply giving his -- he wasn't simply stating the state
20 of the law. He was providing the state of the law as a
21 premise for legislative action, in particular stripping
22 collateral review authority from the correction boards,
23 which used to be able to review collaterally, after
24 final judgment, military convictions. And that existed
25 before the UCMJ was enacted.

1 CHIEF JUSTICE ROBERTS: This is -- this is
2 at a hearing. This isn't a Member of Congress,
3 obviously, that we're talking about. It's not even a
4 single Member of Congress?

5 MR. FREEDUS: This is the chief counsel for
6 the Department of Defense proposing the legislation and
7 offering the only premise there was for the particular
8 legislative change that I'm referring to, which is
9 stripping the -- the correction boards of this
10 collateral review power and saying, when we do that,
11 don't worry, Congress, because it will channel these
12 collateral -- post-final collateral attacks into the
13 military courts, and -- and they can have habeas. He
14 says habeas -- I'm sorry --

15 CHIEF JUSTICE ROBERTS: Under the specific
16 --

17 MR. FREEDUS: -- coram nobis.

18 CHIEF JUSTICE ROBERTS: Under the specific
19 provision that was at issue, which is accompanied by
20 very strict finality provisions.

21 There's no suggestion in his testimony that
22 the availability of the relief that he's talking about
23 continues after the individual is outside the military
24 system. He's channeling -- he says these are channeled
25 through a specific provision applicable only within the

1 military system.

2 MR. FREEDUS: I don't read it that way, Your
3 Honor. I read it as channeling apt post-final attacks
4 within the military -- within the courts in the military
5 justice system, even though the person is -- is -- a
6 final judgment typically happens before an individual is
7 no longer in the service. A final judgment is final
8 because the discharge has been executed. So what he's
9 referring to is, once you have a final judgment, you
10 then can seek collateral relief in the military the way
11 you used to be able to do it in the correction boards in
12 the military courts. And he was saying, now that we're
13 getting rid of this one collateral remedy in the
14 correction boards, we're giving you this other one.
15 We're not giving -- we're just channeling all of them
16 into the military appellate courts, which is a more
17 appropriate judicial forum. And he says clearly it
18 would denigrate the courts to have administrative bodies
19 overturning their judgments, once again showing that
20 these are final judgments that we're talking about. And
21 the only -- that was the only premise he offered to make
22 the change.

23 So stripping away one remedy while leaving
24 another intact was the single premise, which is
25 reflected in the House -- the Senate report on page 52

1 of our brief, where Congress adopts the exact language
2 out of his sworn testimony with, you know, a tiny
3 variation, but that's the premise for the change in the
4 legislation.

5 I'd also note that, in that legislation,
6 this is the Department of Defense proposing to open the
7 door to this Court's jurisdiction for the first time in
8 -- in 28 U.S.C. 1259. And when it did that -- it had to
9 survey the whole landscape of military justice
10 jurisdiction, and when it did that, it saw there were
11 direct review cases, which are reflected in 1259
12 paragraphs 1, 2, and 3, and then his other category that
13 is defined by what's not in paragraphs 1, 2, and 3, and
14 that's the All Writs Act cases. The government
15 acknowledges --

16 CHIEF JUSTICE ROBERTS: I'm sorry. I've had
17 the chance to go back and look at the Senate report, and
18 like Mr. Taft's testimony, there's no suggestion in
19 there that the relief he's talking about continues after
20 someone is out of the service.

21 MR. FREEDUS: I think that's implicit in
22 final judgment, Your Honor. If there's a final
23 judgment.

24 CHIEF JUSTICE ROBERTS: Well, a final
25 judgment is subject to review in the appellate courts

1 within -- in the military system, just like you have --
2 a final court of appeals judgment is subject to review
3 in our system.

4 MR. FREEDUS: Your Honor, the -- the key
5 difference is that -- two things: He's referring to
6 post-finality, which means that the discharge or the --
7 you know, the sentence has been executed. The person is
8 out. They're a civilian at that point. And coram
9 nobis, by its very nature, is someone who is not in
10 custody. So I don't think it's too much of an inference
11 to read that what he is saying here is --

12 CHIEF JUSTICE ROBERTS: When you have review
13 in the appellate system -- someone is -- the judgment is
14 they're to be discharged, and they seek review. Are
15 they discharged while the review is going on?

16 MR. FREEDUS: No, on direct review, you're
17 right, Your Honor. They're -- they remain within the
18 service, and it's interesting that the government cites
19 Mr. Taft's testimony as authoritative on that point.
20 And that -- that makes good sense. Keep the person in
21 for a direct review so that if their sentence is set
22 aside, we can retry.

23 But there has been decades of military
24 justice authority that says even if someone is
25 discharged before their conviction is set aside -- so

1 they're on direct review, their conviction is set aside,
2 after they're already out in their civilian world, you
3 know, doing whatever they're doing -- if the government
4 wants to retry them, they do. And the government is --
5 is the party that asserts continuing jurisdiction to
6 re-prosecute.

7 And that's why this case is so
8 distinguishable from *Toth v. Quarles*, because in *Toth*
9 there was no conviction while the individual was on
10 active duty. And that's why there couldn't have been a
11 retrial. Here there was conviction on active duty,
12 which is where jurisdiction attaches. It cements in.
13 And if the government wants to invoke that to retry Mr.
14 Denedo, it can try that.

15 I would say, though, that if -- if there
16 were a personal jurisdiction loophole here, like there
17 was for the MEJA, the Military Extraterritorial
18 Jurisdiction Act, Congress could fix it in a heartbeat.
19 But we're talking about, you know, 10 cases in 10 years.
20 So even if someone, you know, got away without retrial
21 --

22 CHIEF JUSTICE ROBERTS: You -- you don't
23 think that if you prevail in this case, we're going to
24 see a lot more *coram nobis* petitions than we did before?

25 MR. FREEDUS: I -- I think there would be an

1 uptick, and there may actually have been an uptick while
2 this case has been up here at this level, because it's
3 -- it has gotten a lot of visibility in the military,
4 just like there was an uptick after *Noyd v. Bond* when
5 this Court declared for the first time that military
6 courts had All Writs Act power.

7 So I think there could be an uptick. But
8 once the novelty of it wears off, I think you will see
9 that level off, and you'll see the same trend that we've
10 seen since 66 when it was available the first time. I
11 mean, this isn't new. The only thing new here is the
12 government's interpretation of Article 76.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. FREEDUS: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Mr. Shah, you have 3
16 minutes remaining.

17 JUSTICE SCALIA: Mr. Shah, could you tell us
18 what the government's position is on whether, when
19 somebody has been discharged from the service and then a
20 conviction which he -- which he suffered while he was in
21 the service is set aside, can he be retried in military
22 courts?

23 REBUTTAL ARGUMENT OF PRATIK A. SHAH

24 ON BEHALF OF THE PETITIONER

25 MR. SHAH: Not if he is past his enlistment

1 period, no, Your Honor. The government's view is they
2 would not be able to retry him.

3 I'd just like to make four quick points in
4 response: First, to the Chief Justice's question, could
5 someone be in custody after finality? Of course, yes,
6 that -- that could be the case. The military doesn't
7 have to issue a bad conduct discharge as part of its
8 sentence. He could still be in confinement within the
9 military during the post-finality period.

10 The second point I would like to make is
11 that *Noyd v. Bond* is clearly distinguishable. That
12 dealt with habeas review within the military while the
13 person was still pursuing his direct appeal. So there
14 was a clear, independent basis of jurisdiction in the
15 *Noyd v. Bond* type situation, and that's the Article 66
16 and 67 direct review jurisdiction, and that --

17 JUSTICE SOUTER: What has direct review got
18 to do with habeas?

19 MR. SHAH: Well -- well, Your Honor, the --
20 the habeas would be in aid of the direct review
21 jurisdiction. In -- in *Noyd* -- in the *Noyd v. Bond* --

22 JUSTICE SOUTER: In the civil system, we
23 regard it as -- as entirely a separate proceeding.

24 MR. SHAH: Well, what was going on in *Noyd*
25 *v. Bond*, Your Honor, is he was pursuing a habeas

1 petition for release pending the -- the resolution of
2 his direct appeal. So the military courts just referred
3 the petition to the same court reviewing his direct
4 appeal on the merits, and it became part and parcel of
5 that jurisdiction.

6 The third point I would like to -- to make
7 is in response to Justice Kennedy's question, which
8 shows the incompatibility of coram nobis relief within
9 the military justice system. That they've had to create
10 this DuBay procedure where -- where a new court-martial
11 -- and DuBay sets this out. The new court-martial does
12 have to be convened, and then they would have a
13 factfinding tribunal in which new -- a new military
14 judge would have to be assigned to govern it.

15 None of that is specified within Congress's
16 scheme. That has all been created. It shows the
17 incompatibility of the practical burdens that this
18 procedure places on the military. And nothing in
19 Article 66(c) which governs the jurisdiction of the
20 military appellate courts, the intermediate courts,
21 references any independent factfinding power. It says
22 in a case referred to it, the court of criminal appeals
23 may act only with respect to the findings and sentence
24 as approved by the convening authority. It may affirm
25 only such findings of guilty and the sentence or such

1 part or amount of the sentence as it finds correct in
2 law and fact and determines on the basis of the entire
3 record.

4 CHIEF JUSTICE ROBERTS: Why don't you
5 briefly make your fourth point.

6 MR. SHAH: The fourth -- fourth point is in
7 response to Justice Breyer. My military colleagues
8 inform me that in the situation of a true clerical
9 error, they could go to the Board of Correction of
10 Military Review and seek correction of that error.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.

13 (Whereupon, at 11:08 a.m., the case in the
14 above-entitled matter was submitted.)

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