

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	FRANK W. DUNHAM, JR.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PAUL D. CLEMENT	
7	On behalf of the Respondents	26
8	REBUTTAL ARGUMENT OF	
9	FRANK W. DUNHAM, JR.	
10	On behalf of the Petitioners	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in number 03-6696, Yaser Esam Hamdi vs. Donald Rumsfeld. Mr. Dunham.

ORAL ARGUMENT OF FRANK W. DUNHAM, JR.

ON BEHALF OF PEITIONERS

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

Petitioner Hamdi is a citizen who has been held over two years in the United States with no opportunity to be heard as to the facts on which his detention is based. Mr. Hamdi makes two claims. First, the Fourth Circuit wrongly prevented Hamdi in this habeas proceeding from being heard as to the facts of the case on grounds that allowing him to be heard would interfere with executive power.

Second, that the Fourth Circuit erred in finding even on the one-sided record that's before this Court that his detention is authorized by law. The historical core of habeas corpus is to challenge extrajudicial executive detention. It cannot be a violation of the separation of powers for an Article III court to perform its judicial function of inquiry into long-term, indefinite detention of a citizen in a habeas corpus proceeding.

1 Quoting from INS v. St. Cyr, at its
2 historical core, the writ of habeas corpus has served
3 as a means of reviewing the legality of executive
4 detention and it is in that context that its
5 protections have been strongest.

6 QUESTION: Do we have precedents for
7 applying the writ in wartime situations to enemy
8 combatants?

9 MR. DUNHAM: For aliens, yes. And in
10 Quirin --

11 QUESTION: But for a citizen who turns out
12 to be an enemy combatant?

13 MR. DUNHAM: There are two --

14 QUESTION: What precedents do we look to?

15 MR. DUNHAM: There are only two precedents
16 that I'm aware of, Justice O'Connor. The first is
17 the treatment of the American citizen saboteur spy in
18 Ex parte Quirin, and the other is Mr. Territo, in In
19 re Territo, which was a Ninth Circuit case. It is
20 not a case coming out of this Court.

21 In our view, first off, in Territo, the ,
22 -- he was not an enemy combatant. He was called a
23 prisoner of war in that case, but in Territo, there
24 was a full hearing by the district judge. Territo
25 was claiming that he was not a prisoner of war, that

1 he was forced to serve. That he was an American
2 citizen. That he had a right to have it determined
3 that he was not a voluntary combatant.

4 QUESTION: That's not the complaint, or
5 the allegation here, is it?

6 MR. DUNHAM: The allegation here is that,
7 as I understand it, is that Mr. Hamdi is an enemy
8 combatant, whatever that means. We don't find it
9 defined in any case. We don't find it defined in any
10 statute, and it hasn't been defined by regulation or
11 by anything that's been filed in this case.

12 QUESTION: Well, it's an English word. It
13 means somebody who is combatting.

14 MR. DUNHAM: That's correct.

15 QUESTION: I assume it means someone who
16 is -- has taken up arms against the armed forces of
17 the United States. Isn't that -- really, do we have
18 to quibble about that word?

19 MR. DUNHAM: No. I mean, in its ordinary
20 sense, Your Honor, you're absolutely right. And
21 that's what we would take it to mean. We would give
22 it --

23 QUESTION: Well, if the Government's
24 right, he is an unlawful belligerent, I take it, if
25 the Government's right.

1 MR. DUNHAM: Well, the Government hasn't
2 claimed in this, on the record in this case, which is
3 limited to the Mobbs Declaration, it doesn't say
4 anywhere in the Mobbs Declaration that Mr. Hamdi is
5 an unlawful combatant. The Fourth Circuit in this
6 case limited the district court's consideration to
7 that, to that affidavit, and said he could consider
8 nothing else.

9 Now, there is nothing in that declaration
10 that says that Mr. Hamdi was an unlawful combatant.
11 And getting back to Justice Scalia's point, we do
12 accord the words enemy combatant their ordinary
13 English meaning because we have nothing else to tie
14 ourselves to, and those words mean an enemy is -- an
15 enemy is a member of a hostile power or force. And a
16 combatant is one taking part in combat.

17 QUESTION: Well, it certainly is possible
18 that a U.S. citizen could end up fighting for the
19 enemy in a war against our country. That's possible.

20 MR. DUNHAM: That's happened.

21 QUESTION: Yes.

22 QUESTION: Happening.

23 QUESTION: And so when that individual is
24 captured then, by our country, the question is, to
25 what extent does the habeas statute apply, and if it

1 does, are the proceedings limited in some way?
2 Because of that status of being an enemy combatant?

3 MR. DUNHAM: Well, Your Honor, I believe
4 that the -- his status is the thing that is the
5 subject of the habeas proceeding. I mean, if you
6 start from the premise that he is fighting against
7 our country, that's one thing. But what we are
8 saying here is that that fact is in dispute, and that
9 we ought to --

10 QUESTION: But you could say the same
11 thing about, about noncitizen combatants. I mean,
12 anyone captured in a war could say, you got the wrong
13 man. I, in fact, was not taking up arms against the
14 United States, and I insist upon a judicial
15 proceeding to let me make that point.

16 Now, you surely wouldn't allow every
17 captured enemy in a war to go through a habeas
18 proceeding because he wants to challenge the fact,
19 would you?

20 MR. DUNHAM: Your Honor --

21 QUESTION: Or would you? I don't know.

22 MR. DUNHAM: No. I wouldn't allow every
23 person captured to go through a habeas proceeding,
24 but there is a different legal status of a U.S.
25 citizen from an enemy alien captured on a

1 battlefield. They have a different status.

2 QUESTION: Well, I'm still not clear what
3 you do with Justice O'Connor's question and it's
4 basically the Quirin case. You are a citizen but you
5 are an enemy combatant and you are captured. Are
6 your rights any different from that of a noncitizen
7 in the same status? You haven't answered that.

8 MR. DUNHAM: Well, yes. First off, in
9 Quirin, we have to start with the premise that the
10 Quirin proceeding was authorized by Congress. They
11 were proceeding --

12 QUESTION: I'm asking you to distinguish
13 between citizen and noncitizen in the hypothetical
14 case where each are combatants against the United
15 States and are captured. Any difference?

16 MR. DUNHAM: Not in the Quirin case. No,
17 Your Honor.

18 QUESTION: Any difference in your view and
19 under your theory of the case that you're presenting
20 here?

21 MR. DUNHAM: Yes.

22 QUESTION: And what is that difference?

23 MR. DUNHAM: That difference is that
24 Mr. Hamdi is a citizen. He is not entitled to
25 belligerent immunity. He is subject to prosecution

1 under our laws if he was, in fact, participating in
2 taking up arms against our forces. But that begs the
3 question.

4 QUESTION: You mentioned, you mentioned in
5 connection with Quirin that there was a statute, and
6 I think one -- one of the defendants was alleged to
7 be a U.S. citizen. So I thought you were making what
8 -- were there regimes in prior wars for entertaining
9 the claims of people who said, I was an innocent
10 bystander, I was indeed captured by the enemy. In
11 Vietnam and World War II, were there means to
12 entertain the claims of people who said, I wasn't an
13 enemy?

14 MR. DUNHAM: There were regimes then and
15 there are regimes now, but they haven't been used by
16 the military here. There are outstanding military
17 regulations that provide for a hearing for someone
18 captured on the battlefield to determine their status
19 if there is any doubt as to their status.

20 QUESTION: Would those military
21 proceedings satisfy your claim? Your point is that
22 Hamdi has not had a chance to be heard on his claim
23 that this was a dreadful mistake, I wasn't an enemy.

24 MR. DUNHAM: Those proceedings would go a
25 long way towards satisfying the process part of our

1 claim, Your Honor, but they don't really address the
2 authorization part of our claim, which we have two
3 claims here really.

4 The first is that he has never been -- had
5 an opportunity to give, to assert a claim of
6 innocence. And those regulations, if they had been
7 followed in this case, would certainly have given him
8 that opportunity. And then if he filed a habeas
9 corpus petition which would be his right, the
10 district judge would have had a record of a hearing
11 like he does on a -- on reviewing a state criminal
12 conviction.

13 QUESTION: But I don't think any
14 proceeding, Mr. Dunham, conducted by the military at
15 this stage, is going to reveal much that's factual.
16 How are you going to get people, you know, if he was
17 seized on the battlefield, what evidence are you
18 going to get now from the, from those people who
19 probably don't even remember it? If the military
20 accorded some process at that time, as I understand
21 they said they did, surely that is more reliable than
22 anything that would come up now two years later.

23 MR. DUNHAM: Your Honor, they did not
24 provide any process as contemplated by their
25 regulations. In fact, the district judge offered to

1 let the military take this man and give him one of
2 those hearings. The very hearings their own
3 regulations specify.

4 QUESTION: What would you expect the
5 military to do? As I understand it, he wasn't even
6 captured by our own forces. He was captured by
7 allied forces and turned over to our forces.

8 MR. DUNHAM: Well, that's certainly,
9 certainly part of the problem, Your Honor. We have a
10 strong --

11 QUESTION: Well, you want them to run down
12 the members of the Afghan allies who captured this
13 man and get them to testify in a proceeding? It's
14 just putting unreasonable demands upon, upon a war
15 situation. I just --

16 MR. DUNHAM: Your Honor, I don't -- my
17 view is that it can never be an unreasonable demand
18 to comply with habeas corpus and the Fifth Amendment.

19 QUESTION: That is the question --

20 QUESTION: Are you claiming --

21 QUESTION: -- is what it means. And the
22 Chief Justice and Justice Scalia both indicated and
23 it concerns me, too. What do you want to happen at
24 this hearing? You get your hearing. Are we supposed
25 to send a Gulfstream over with 10 people who

1 witnessed the capture? How does this work?

2 MR. DUNHAM: Well, the military's own
3 regulations provide a good guide for how this hearing
4 would work. They allow testimony by affidavit when
5 it can't, when it's not convenient to obtain it in
6 any other way. And we are living in an age where we
7 have -- we are not living in the World War II age.
8 We have fax machines. We have phones that have
9 pictures. You can get depositions.

10 QUESTION: What if they get a deposition
11 from an American colonel who says this prisoner was
12 turned over to me by allied forces, our Afghan allies
13 in this combat, and I was assured by them that they
14 had captured him in a firefight? Now, is that going
15 to satisfy our habeas corpus review?

16 MR. DUNHAM: Your Honor, that would be a
17 lot more than what we have now.

18 QUESTION: Oh, it certainly would, but you
19 wouldn't accept that, would you?

20 MR. DUNHAM: Well, I wouldn't accept it
21 without Mr. Hamdi --

22 QUESTION: Of course you wouldn't.

23 MR. DUNHAM: -- having an opportunity to be
24 heard. Fundamental to --

25 QUESTION: So your objection is not the

1 hearsay rule, your objection is the right to make
2 some kind of response. That's your basic process
3 claim?

4 MR. DUNHAM: That's correct, Your Honor.
5 That we have, we have never authorized detention of a
6 citizen in this country without giving him an
7 opportunity to be heard, to say, hey, I am an
8 innocent person. We don't -- he hasn't even been
9 able to say that yet. He hasn't been able to look at
10 the facts that have been alleged against him and give
11 any kind of an explanation as to his side of the
12 story, which may well turn out to be true and may
13 well clear up some of the deficiencies in the Mobbs
14 Declaration.

15 QUESTION: But if this -- I'm sorry. Go
16 on.

17 QUESTION: At this stage of the game, I
18 take it, you have no per se objection to some form of
19 military process, so long as he could be heard?

20 MR. DUNHAM: The only problem I would have
21 with that, Your Honor, and it's a small one, is that
22 the military has refused to give this process to him.

23 QUESTION: No, I realize that. But
24 that's what you're -- you're asking us for something.
25 And my suggestion is, if I understand your argument,

1 that if ultimately you were found, your client was
2 found to be entitled to some process, it might be,
3 consistently with your position, that military
4 process with an opportunity to be heard in response
5 would satisfy your demand.

6 MR. DUNHAM: Yes. That's correct, Your
7 Honor.

8 QUESTION: All right.

9 MR. DUNHAM: The military procedure
10 requires the military to call witnesses and allows
11 the detainee an opportunity to give his own side of
12 the story and call his own witnesses.

13 QUESTION: Do you still think that habeas
14 is necessary in order to determine that that process
15 has been afforded him?

16 MR. DUNHAM: Well, right now, habeas is
17 necessary to even get him that process.

18 QUESTION: Let's assume the regime that
19 Justice Souter suggested, it's in place. You are
20 entitled to habeas in order to ensure that that has
21 taken place and have, have the Article III court
22 supervise that, or would affidavits that this, from
23 the Government that this procedure has been afforded
24 be satisfactory?

25 MR. DUNHAM: That would be a separate

1 habeas proceeding, Your Honor, which might be filed
2 after the hearing was held by the military, and --

3 QUESTION: I'm asking if you are entitled
4 to file that as a matter of right.

5 MR. DUNHAM: I believe that any U.S.
6 citizen has a right to file a habeas corpus petition
7 at any time he is detained by the government. But I
8 don't know that the Article III court would need to
9 supervise the military hearing if that's what he got.
10 He would certainly have the right, when that hearing
11 was over, just like anybody does, to file a habeas
12 petition saying that I'm detained by the government.

13 And then the district judge could look at
14 the hearing, if there was a hearing by the military,
15 he could review it for fundamental fairness, if
16 that's what the detainee decided to do at that point.
17 But it wouldn't be --

18 QUESTION: But it is reviewable on habeas?
19 You are not saying that it would be an adequate
20 defense in a subsequent habeas position simply to say
21 there was a hearing of the kind prescribed in the
22 military regulations, and after that hearing, he was
23 found to be an enemy combatant. That would not
24 satisfy you? You would allow the habeas court to
25 re-examine the facts brought up in that hearing?

1 MR. DUNHAM: I believe that the habeas
2 court could always review the process to see that it
3 was fair. That's a habeas court's function.

4 QUESTION: Right.

5 MR. DUNHAM: But it wouldn't be anything
6 extensive. If there was a record from the military
7 proceeding, the district judge would simply --

8 QUESTION: Well, it depends on what you
9 mean by fair, of course, and what, you know, what
10 common law courts usually mean by fair, for example,
11 is no hearsay testimony. And you apply that rule to
12 a wartime situation and everybody will get off.

13 MR. DUNHAM: Well, Your Honor, the
14 regulations, the military's own regulations say how
15 the hearing is to be held. The district judge would
16 be basically looking to see whether those regulations
17 were complied with.

18 QUESTION: Oh, that's different. I
19 thought you said that he would look to see whether
20 those regulations were fair.

21 MR. DUNHAM: Oh, no, not the regulation --
22 whether the proceeding was fair, whether it complied
23 with fundamental due process. And that would --

24 QUESTION: That's something quite
25 different from saying they followed the regulations.

1 The regulations might be something that a common law
2 judge thinks does not comply with due process. In
3 that case, you would override the military judgment,
4 right?

5 MR. DUNHAM: Well, I believe the district
6 court has that power, Your Honor. The Article III
7 court has that power in a habeas proceeding.

8 QUESTION: But I didn't understand your
9 basic answer. The basic question is, in the ordinary
10 case, not some unusual case, but in the ordinary
11 case, if they set up an ordinary military tribunal
12 according to Article I(6) and it worked and so forth,
13 then isn't that due process? I thought Justice
14 Scalia -- in response to Justice Scalia's question,
15 you said that wouldn't satisfy you, but my impression
16 was you were saying in the ordinary case, that would
17 satisfy you.

18 MR. DUNHAM: That's correct.

19 QUESTION: All right, it would satisfy
20 you. Fine.

21 MR. DUNHAM: All I wanted to say was that
22 you haven't had that hearing.

23 QUESTION: No, I understand that. That's
24 the second half of my question. They could satisfy
25 you, I take it, in one of two ways. A, that they

1 have the military tribunal that they've given in
2 every war and so forth, the ordinary procedure there,
3 a neutral decision maker and an opportunity to
4 present proofs and arguments, or B, they don't do
5 that.

6 Now, if they refuse to do that, then what,
7 in your opinion, should the habeas court do?

8 MR. DUNHAM: Then the habeas court should
9 hold a hearing that would be very similar to what the
10 military should have done. Judge Doumar here tried
11 to send the case back to the military to have them
12 hold the very hearing we're talking about, using
13 their own officers to do it just as the military
14 regulations require it.

15 QUESTION: But that would be a different
16 approach. I mean, it might be not that the habeas
17 court has to hold the hearing that the military would
18 have held, but that the habeas court has to say to
19 the military, hold the hearing or let him go. You
20 would be satisfied, I take it, if the habeas court,
21 on Justice Breyer's hypothesis, said, hold the
22 hearing.

23 MR. DUNHAM: That would be satisfactory,
24 Your Honor, but the question is what interferes with
25 the military more, for the district judge to hold a

1 hearing that the military has previously refused to
2 do, or to order the military to follow their own
3 rules?

4 QUESTION: Was there a reason given --
5 when the district judge suggested that solution, why
6 did the Government say, we don't want to use the
7 procedure that we used, say, in Vietnam?

8 MR. DUNHAM: As I recall, the answer was
9 we're not required to and we don't choose to do so.

10 QUESTION: Is that procedure -- does that
11 have -- did Congress have a part in that, the
12 military regulations that provided for how you treat
13 people in wartime situations who say, I'm innocent
14 essentially?

15 MR. DUNHAM: No, Congress has not passed
16 these rules.

17 QUESTION: Well, Congress did pass
18 something called the Authorization for Use of
19 Military Force, did it not?

20 MR. DUNHAM: Yes, it did, Your Honor.

21 QUESTION: And it affects this very
22 conflict.

23 MR. DUNHAM: Yes, it does, Your Honor.

24 QUESTION: Now, what application does that
25 have here? It appears to allow detention of people

1 captured.

2 MR. DUNHAM: The Authorization for Use of
3 Military Force does not have the word detention
4 anywhere in it. It talks about use of force and it
5 is the equivalent, in our view, of a declaration of
6 war. Although it is not a formal declaration of war,
7 it would have that same operative effect. And in our
8 history, we have never had any substantive rights
9 conveyed to the commander-in-chief by the mere act of
10 a declaration of war.

11 QUESTION: He has them inherently. I mean,
12 certainly,
13 you know, when there is a declaration of war or a
14 resolution such as this, surely the President has the
15 right to kill foreign combatants, no?

16 MR. DUNHAM: He certainly has the right to
17 kill them and if they're aliens --

18 QUESTION: Now, is it conceivable that he
19 has to kill them but not to detain them?

20 MR. DUNHAM: He has the right to detain
21 alien combatants, no question about it. But when it
22 comes to U.S. citizens, you don't simply detain them.
23 You prosecute them, like they did with John Walker
24 Lindh.

25 QUESTION: You're saying that AMUF is

1 insufficient in this case to detain, because
2 declarations of war and the AMUF historically have
3 simply authorized the President to use his judgment
4 and his force and his capacities and his power
5 without having an extensive list of the different
6 things that he can do. And you're asking for
7 something quite different, it seems to me.

8 MR. DUNHAM: Well, in the War of 1812,
9 there was a general declaration of war but Congress
10 still passed a list of specific things the President
11 could do. Obviously a declaration of war doesn't
12 give the President the power to appropriate funds to
13 fight the war.

14 QUESTION: No, but look, it does say in
15 this authorization, the President is authorized to
16 use all necessary and appropriate force against
17 persons he determines planned, authorized, committed
18 or aided the terrorist attacks.

19 MR. DUNHAM: If that is interpreted to
20 mean that he can impose indefinite executive
21 detention on anybody that he thinks is necessary in
22 order to fulfill that command, we could have people
23 locked up all over the country tomorrow without any
24 due process, without any opportunity to be heard,
25 because we know that this war that we're talking

1 about here is going on worldwide and it's going on
2 within our own borders.

3 Congress didn't intend to -- when it
4 passed this Authorization for Use of Military Force
5 to authorize widespread detentions of people with no
6 opportunity to be heard, indefinite, solitary
7 confinement for as long as they might live. Congress
8 -- there is no indication that Congress intended any
9 such thing.

10 QUESTION: Did Congress intend that the
11 President has the authority and the right to use
12 whatever powers are necessary to suppress the
13 terrorists and to prevent future attacks, consistent
14 with the traditions and the powers of that office?

15 MR. DUNHAM: I believe they authorize it
16 consistent with our laws. I don't think Congress
17 repealed any laws when they wrote the Authorization
18 for Use of Military Force.

19 QUESTION: Mr. Dunham, can I ask you sort
20 of a preliminary question. We're talking about way
21 down the road now, but do you contest any of the
22 facts in the Mobbs Declaration?

23 MR. DUNHAM: Well, I've only recently been
24 allowed to talk to my client, Your Honor, and
25 everything he has told me they tell me is classified,

1 so I'm not allowed to convey it to the Court this
2 morning. But the best I can say is in an overall
3 general way, there is a substantial dispute.

4 QUESTION: There is a substantial dispute,
5 and have you had an opportunity, on behalf of the
6 client, to supplement or to contradict or supplement
7 the information in the Mobbs Declaration?

8 MR. DUNHAM: No, because it's -- it's
9 while the matter has been pending before this Court
10 and there is no way to go before the Court at this
11 point, absent a remand, in order to do that. If the
12 Court remanded, I would be able to do that provided
13 that we had appropriate protective orders in place so
14 that I could convey classified information to the
15 Court.

16 QUESTION: Mr. Dunham, one of the judges
17 on the Fourth Circuit in the en banc denial, Judge
18 Motz, had a proposal that was similar to the one that
19 Judge Mukasey proposed in New York. And that is,
20 initially, the Mobbs affidavit is taken as true but
21 that you have an opportunity to rebut it. Would that
22 be a satisfactory -- would that comport with due
23 process? In your view?

24 MR. DUNHAM: Your Honor, that is the way
25 the statutory habeas proceeding is supposed to

1 unfold. The Government doesn't deny that we have a
2 right to have a habeas proceeding. They've conceded
3 it at three different points in their brief. So once
4 we're before the court on a petition for habeas
5 corpus, the question is what does that proceeding
6 look like. And I suggest it's spelled out in the
7 U.S. code.

8 When Congress passed the Authorization for
9 Use of Military Force, it did not say we suspend
10 habeas. Habeas corpus statutes are still on the
11 books and exactly what Your Honor is talking about is
12 what should happen.

13 QUESTION: So every United States citizen,
14 even if captured on the field of combat, is
15 entitled to a habeas hearing?

16 MR. DUNHAM: That of course assumes he's
17 captured on the field of combat, Your Honor, which we
18 don't concede.

19 QUESTION: Well, that's right. He's
20 entitled to a habeas hearing to determine whether in
21 fact he was captured on the field of combat opposing
22 the United States, right?

23 MR. DUNHAM: Well, if he files a petition
24 for habeas corpus, yes.

25 QUESTION: And I presume that anybody who

1 claims to be an American citizen would be entitled to
2 a habeas hearing on the question of whether he is in
3 fact an American citizen, and then the subsequent
4 question of whether he was captured on the field of
5 combat while taking up arms against the
6 United States, right?

7 MR. DUNHAM: Well, the military --

8 QUESTION: So every foreigner captured, if
9 he claims to be an American citizen, would be
10 entitled to the kind of habeas hearing you're talking
11 about?

12 MR. DUNHAM: Not necessarily on a mere
13 claim, Your Honor. The military is required to take
14 a long list of biographical data from anybody they
15 capture. And in this particular case, there is no
16 dispute about the man's citizenship. There is a
17 birth certificate in the record. The military has
18 not -- they're the ones that determined he was a
19 citizen.

20 QUESTION: I'm not talking about this
21 case. I'm talking about the principle that you're
22 asking us to adopt and how it would apply. I mean,
23 if there is a habeas corpus right for an American
24 citizen, there has to be, it seems to me, a habeas
25 corpus right for everyone who claims he is an

1 American citizen.

2 MR. DUNHAM: Your Honor, that may be the
3 case but that doesn't justify taking away the habeas
4 corpus right from a citizen. That is a right that
5 has been there since this country was founded and it
6 doesn't justify taking away a citizen's right because
7 some sham claim might be made.

8 QUESTION: Whether it's been there since
9 the country was founded when he is captured on the
10 field of battle is the very controverted question
11 that's up here. You can't say that with that
12 assurance. I mean, that's why we have a case here.

13 MR. DUNHAM: If it please the Court, I
14 would like to save the balance of my time for
15 rebuttal.

16 QUESTION: Very well, Mr. Dunham.
17 Mr. Clement, we'll hear from you.

18 ORAL ARGUMENT BY PAUL D. CLEMENT

19 ON BEHALF OF RESPONDENTS

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

22 Petitioners contend that the Government
23 categorically lacks the authority to hold Hamdi as an
24 enemy combatant. But it has been well established
25 and long established that the Government has the

1 authority to hold both unlawful enemy combatants and
2 lawful prisoners of war captured on the battlefield
3 in order to prevent them from returning to the
4 battle.

5 Over 10,000 United States troops remain on
6 the field of battle in Afghanistan. No principle of
7 law or logic requires the United States to release an
8 individual from detention so that he can rejoin the
9 battle against the United States.

10 QUESTION: But the question of whether
11 it's a criminal procedure or this detention without
12 -- does the Government have any rhyme or rationale as
13 to why some of these people -- I think Mr. Dunham
14 mentioned Lindh, there is also Moussaoui, there is
15 this John -- they are also being kept away from
16 returning any place because there are criminal
17 charges against them.

18 And then there is Hamdi and Padilla and
19 al-Marri who are in this detention state with no
20 charges. What does the Government -- how does the
21 Government justify some going through the criminal
22 process and others just being held indefinitely?

23 MR. CLEMENT: Justice Ginsburg, I think
24 that reflects a sound exercise of prosecutorial and
25 executive discretion. There are some individuals who

1 may be captured in a situation where they do not
2 have any particular intelligence value, they have
3 been handled in a way where there are no difficult
4 evidentiary questions that would be raised in a
5 criminal prosecution and those individuals can be
6 dealt with in the Article III system.

7 But there are plenty of individuals who
8 either have a paramount intelligence value that
9 putting them into the Article III system immediately
10 and providing them with counsel whose first advice
11 would certainly be to not talk to the Government is a
12 counterproductive way to proceed in these cases.

13 QUESTION: At the moment, nobody --

14 QUESTION: I'm trying to find whether
15 there is any literature or commentary on how long the
16 detention is required before the intelligence value,
17 the interrogation value of the custody serves no
18 further purpose. Can you give me any ideas of the
19 outer bounds of how long the detention would take in
20 order to get the value from the interrogation that
21 you want?

22 MR. CLEMENT: Well, Justice Kennedy, I'm
23 not sure I can give you the outer bounds, but what I
24 can say is that the case here before you today in
25 Hamdi, and the case in Padilla, suggests that the

1 amount of time that is necessary to allow for
2 interrogation without access to counsel in order to
3 get intelligence is not an indefinite period of time.

4 Both these individuals now have access to
5 counsel because the military intelligence experts who
6 make these judgments have made the judgment that
7 access to counsel at this point does not interfere
8 with the intelligence gathering process.

9 QUESTION: Would it be --

10 QUESTION: Mr. Clement, how can you
11 assume --

12 QUESTION: Would it be a helpful line of
13 inquiry for a district court, assuming that there is
14 some jurisdiction in the district court, which you
15 would contest, to have testimony as to how effective
16 interrogations are and how long it takes. And then
17 we could begin to get some understanding of this
18 process?

19 MR. CLEMENT: I suppose you could. One
20 thing I would point you to, Justice Kennedy, is the
21 declaration of Vice Admiral Jacoby, who is the director
22 of the Defense Intelligence Agency. That's at page 75 of
23
24 the Joint Appendix in the Padilla case.

25 And I think that -- there obviously are

1 various ways the courts could approach this. A court
2 in one proceeding could take evidence of the question
3 generally. I suppose if there were a situation in
4 which there was a habeas petition filed and there was
5 an initial period where there was no access to
6 counsel, if a judge for some reason thought that that
7 had taken too long, I suppose that judge could make
8 an inquiry of the Government, and in an ex parte
9 proceeding, they could make some kind of filing
10 explaining to the judge why it is that further
11 interrogation without counsel is necessary.

12 I think the important thing is twofold.
13 One, to recognize that there is a unique interest,
14 especially in the course of this conflict, where
15 intelligence is at unprecedented value, to have some
16 ability with some detainees to deal with them in a
17 way that allows us to get intelligence to prevent
18 future terrorist attacks, and not be limited just to
19 going after them retrospectively for past terrorist
20 attacks.

21 QUESTION: We can accept that, but what do
22 you, what do you make of Section 4001. I take it
23 it's the Government's position that it has absolutely
24 no application to the situation. That it simply
25 refers to the normal circumstances of the criminal

1 law. Is that right?

2 MR. CLEMENT: That's right, Justice
3 Souter, but I would be quick to add that we -- I
4 mean, all 4001(a) says is that an individual must be
5 detained pursuant to an act of Congress.

6 QUESTION: Right.

7 MR. DUNHAM: If one needs an act of
8 Congress, and we question whether this really has
9 anything to do with the detention of enemy combatants
10 by the military, but to the extent an act of Congress
11 is necessary, as I think Justice O'Connor's questions
12 indicated, the Authorization of Force provides more
13 than ample statutory --

14 QUESTION: It certainly did -- may I just
15 ask one more question? I will concede certainly at
16 least for the sake of argument that it did in the, in
17 the early stages of the period starting with
18 September 11th. I will assume for the sake of
19 argument that it did when it was passed.

20 It doesn't follow, however, that it is
21 adequate for all time. The fact is, I will assume
22 that on September 12th, without any authorization
23 from Congress at all, the President could have taken
24 action in relation to this individual, I mean, if he
25 had been fighting on a battlefield that the President

1 took.

2 But it doesn't follow that the President's
3 authority to do that is indefinite for all time. And
4 I guess the question I would be interested in and
5 your response to is this. Is it reasonable to think
6 that the, that the authorization was sufficient at
7 the time that it was passed, but that at some point,
8 it is a Congressional responsibility, and ultimately
9 a constitutional right on this person's part, for
10 Congress to assess the situation and either pass a
11 more specific continuing authorization or at least to
12 come up with the conclusion that its prior
13 authorization was good enough. Doesn't Congress at
14 some point have a responsibility to do more than pass
15 that resolution?

16 MR. CLEMENT: Well, Justice Souter, I
17 would say a couple of things. One is there may be
18 some difficult questions down the road, but if there
19 is emphasis that 10,000 United States troops remain
20 on the battlefield in Afghanistan --

21 QUESTION: Well, there are 10,000 troops
22 there, but it's two and a half years later. And it
23 may very well be that the, that the constitutional
24 obligation and the constitutional demand that his
25 client can make is that the political branch take

1 a -- make a further assessment and a more specific
2 one. I'm not denying that there is a lot going on,
3 but there has also been time.

4 MR. CLEMENT: I realize that, Justice
5 Souter. Let me say one other thing. And then if I
6 have time, I'd come back to the 10,000 troops still
7 on the ground. What I would say is Congress has been
8 open with whatever appropriate recesses every day
9 since September 18th, 2001 when they passed the joint
10 resolution.

11 If they were to pass some specific statute
12 that either provided for more finely reticulated
13 procedures for dealing with enemy combatants or tried
14 to preclude the detention of certain individuals,
15 then I think one of two things would happen, either
16 the executive branch would follow those more
17 reticulated provisions, or I suppose if there was a
18 judgment by Congress that this authority was denied
19 all together and the President thought that that
20 authority was absolutely necessary to the fighting of
21 the battle in Afghanistan, then you might have a
22 situation where we came to this Court in a situation
23 that Justice Jackson would say the executive's power
24 is at its lowest ebb.

25 But here we come to the Court with that

1 authorization that the President relied on.

2 QUESTION: You come with an authorization
3 that the President relied on and which I will assume
4 he quite rightly relied on at the time it was passed.
5 But my question is a timing question. Is it not
6 reasonable to at least consider whether that
7 resolution needs, at this point, to be supplemented
8 and made more specific to authorize what you are
9 doing?

10 MR. CLEMENT: Well, again, Justice Souter,
11 I can't imagine that the rule is that the executive
12 somehow suffers if Congress doesn't fill the breach.
13 Because the last word from Congress is that -- that
14 all necessary and appropriate force is authorized.

15 QUESTION: Yes, but when you say the
16 executive suffers, I think your response is assuming that
17 the
18 executive has the power. And it may very well be
19 that the executive has power in the early exigencies
20 of an emergency. But that at some point in the
21 indefinite future, the other political branch has got
22 to act if that, if power is to continue.

23 MR. CLEMENT: But Justice Souter, they
24 have authorized the use of force. They recognize, if
25 you took --

1 QUESTION: Without any specific reference
2 to this situation, without any specific reference to
3 keeping American citizens detained indefinitely. I
4 mean, that's the problem.

5 QUESTION: Mr. Clement, this Section 4001
6 doesn't relate to a hearing, it relates to the
7 President's power to detain, doesn't it?

8 MR. CLEMENT: Well, absolutely.

9 QUESTION: So if it expires after two and
10 a half years, it would just not mean you have to give
11 them counsel after two and a half years or give them
12 a hearing after two and a half years. It means you
13 would have to let them go back to Afghanistan after
14 two and a half years, wouldn't it?

15 MR. CLEMENT: It would, Justice Scalia --

16 QUESTION: It would, but it uses --

17 MR. CLEMENT: And that's why I find it so
18 remarkable that we have to confront this question
19 when our troops are still on the ground in
20 Afghanistan.

21 QUESTION: Wait. You're also -- the words
22 are necessary and appropriate. And also the words in
23 the Constitution are due process of law. And also
24 the words in the Magna Carta were according to law.
25 And whatever form of words in any of those documents

1 there are, it seemed to refer to one basic idea
2 that's minimum. That a person who contests something
3 of importance is entitled to a neutral decision maker
4 and an opportunity to present proofs and arguments.

5 You have heard, in the last hour, people
6 talking about the military itself recognizing that
7 basic principle with tribunals in what is called Army
8 Reg 190.8. Now, is there any reason why, when a
9 person says I am not a combatant, I was a relief
10 worker, I wasn't even there, I was sold into this by
11 people who wanted a bounty, is there any reason why
12 you could not have that kind of proceeding, the kind
13 of proceeding that was given in the Gulf War on the
14 battlefield in hundreds of instances, that was given
15 in Iraq in hundreds of instances, the kind of
16 proceeding that the military itself has given over
17 and over and over.

18 Now, is there any reason why that isn't
19 necessary and appropriate, or why that isn't in
20 accordance with law or due process of law?

21 MR. CLEMENT: Justice Breyer, let me say
22 several things. One is that the regulations that are
23 being bandied about are the regulations that the Army
24 uses to comply with their obligations under Article V
25 of the Geneva Convention.

1 Now, Article V of the Geneva Convention
2 does not apply here, and let me address why in a
3 minute, but let me say very clearly that these
4 individuals have gotten military process. It might
5 not have been the exact process --

6 QUESTION: That wasn't the question I
7 asked. The question I asked, is there any reason why
8 the Army itself could not give a comparable basic
9 proceeding where you have a neutral decision maker,
10 and a practical, but fair opportunity to present
11 proofs and arguments? Not some kind of thing on the
12 battlefield, something two years later, not some kind
13 of thing where you haul in witnesses, but something
14 that's practical insofar as you get evidence that's
15 reasonably available.

16 MR. CLEMENT: Well, Justice Breyer --

17 QUESTION: I want a practical answer. I
18 don't want a -- yes.

19 MR. CLEMENT: I understand that. But the
20 practical answer that you are looking for assumes a
21 process that's never been provided. There has never
22 been a process that's removed from the battlefield.
23 What Article V provides and what the military
24 regulations provide is immediately adjunct to the
25 battlefield, you have three military officers who do

1 a very quick hearing, the purpose of which primarily
2 is to figure out not whether somebody is completely
3 innocent, but to figure out whether they are properly
4 classified as a prisoner of war, as opposed to an
5 unlawful enemy combatant.

6 QUESTION: So you say the regulations in
7 place provide for that battlefield type review?

8 MR. CLEMENT: They do, Justice O'Connor --

9 QUESTION: Did this Petitioner have that
10 type of review?

11 MR. CLEMENT: This Petitioner, Justice
12 O'Connor, did not get that precise type of review,
13 and the reason is because, based on a Presidential
14 determination, the military officers understood that
15 Article V of the Geneva Convention has no application
16 here. Again, that provision, and I think it's worth
17 --

18 QUESTION: Well, perhaps not, but we are
19 here on habeas. Do you agree that, that he is
20 entitled to bring a habeas action?

21 MR. CLEMENT: We do agree that he is
22 entitled to bring a --

23 QUESTION: Okay.

24 MR. CLEMENT: -- habeas action.

25 QUESTION: So then we have to decide then

1 to what is he entitled, and even that minimal review
2 by the military, you think, is not required?

3 MR. CLEMENT: Well, I don't think it's
4 required, especially in a situation like this, where
5 although Hamdi did not receive an Article V hearing
6 because it was inapplicable, he did receive military
7 process. When he was originally turned over to the
8 United States forces by the Northern Alliance, our
9 military allies, there was a screening process on the
10 ground in Afghanistan. Now, that process screened
11 out 10,000 individuals out of U.S. custody. So he
12 received that process.

13 Now, to be sure, it's a military process,
14 but it is the kind of process that prisoners of war
15 and enemy combatants have always gotten. Now,
16 because of the nature of this war, Hamdi got
17 additional process. And it's important to point out
18 that this Article V process that other prisoners of
19 war traditionally get is a one-shot deal. It's done
20 off the battlefield and that's it. You are under
21 detention for the remainder of the battle. And
22 there's no reason for Congress to have to go in with
23 a new resolution. You are there for the remainder of
24 the war.

25 Now, in this context, because we recognize

1 that there are some unusual aspects of this war, and
2 also because the United States military has no
3 interest in detaining any individual who is not an
4 enemy combatant or who does not present a continuing
5 threat, when Hamdi got to Guantanamo, he was given
6 additional screening processes. That screened him in
7 as well. Did not screen him out.

8 Then it may not seem what you think of as
9 traditional due process in an Article III sense, but
10 the interrogation process itself provides an
11 opportunity for an individual to explain that this
12 has all been a mistake. And as the affidavit that's
13 in the record here shows --

14 QUESTION: Do you say he had that
15 opportunity?

16 MR. CLEMENT: Absolutely, Justice
17 O'Connor. And the affidavit that's filed here
18 represents, by Mr. Mobbs, that the interrogation
19 process, in that process, his story confirmed that he
20 was on the battlefield and surrendered with the
21 Taliban military unit while armed.

22 QUESTION: Do you concede that you have
23 the obligation to make the representation that you
24 have just made to the habeas court?

25 MR. CLEMENT: Justice Kennedy, I'm not

1 positive what the ultimate minimum that the habeas
2 statutes would require in this context, but we do
3 think that an appropriate balance of individual
4 rights, the traditional role of habeas, that the
5 overwhelming military imperatives of this situation
6 are that the habeas corpus writ is available, first
7 to make legal challenges to the detention along the
8 lines of 4001(a) categorically precludes this, and
9 those challenges have been open.

10 We also think it appropriate for the
11 United States to come in with a declaration that
12 explains the basis for the military's decision. And
13 particularly, I think what it does is it provides an
14 explanation that if believed, provides a basis for a
15 court to police the line that separates Quirin on the
16 one hand from Milligan on the other.

17 And obviously, a situation like this with
18 a battlefield detainee who surrendered while armed on
19 the battlefield is a classic case of an enemy
20 combatant.

21 QUESTION: Is there any --

22 QUESTION: In Quirin, in Quirin, the
23 defendants were heard, and that's -- the Mobbs
24 affidavit is, I take it your position is, yes,
25 habeas, and yes, the Government has to come forward

1 with something. And the something they came forward
2 with is the Mobbs affidavit, which is hearsay,
3 because Mobbs doesn't know what happened on the
4 battlefield either. And that there is no statement
5 at any point from Hamdi, although the claim before us
6 is that he would dispute what's in the Mobbs
7 affidavit, but he doesn't have an opportunity to do
8 that.

9 MR. CLEMENT: Well, Justice Ginsburg, I
10 mean, there actually is, I mean, it would be
11 something like double hearsay, but there is a
12 statement in the Mobbs declaration itself where Mobbs
13 is summarizing that Hamdi himself --

14 QUESTION: Yes, but that certainly is
15 double hearsay.

16 MR. CLEMENT: It certainly is, but this
17 is --

18 QUESTION: The person who is locked up,
19 doesn't he have a right to bring before some tribunal
20 himself his own words, rather than have a Government
21 agent say what was told to him that somebody else
22 said.

23 MR. CLEMENT: With respect, Justice
24 Ginsburg, he has an opportunity to explain it in his
25 own words. Now, it may not --

1 QUESTION: During interrogation?

2 MR. CLEMENT: During interrogation.

3 QUESTION: I mean, is that your point?

4 MR. CLEMENT: During interrogation.

5 During the initial screening. During the screening
6 in Guantanamo.

7 QUESTION: How about to a neutral decision
8 maker of some kind, perhaps in the military? Is that
9 so extreme that it should not be required?

10 MR. CLEMENT: No, Justice O'Connor. And
11 let me say two things. One is when the initial
12 screening criteria are applied in the field, for all
13 intents and purposes, that is a neutral decision
14 maker.

15 I mean, as I said before, the Army is not
16 interested in holding people as enemy combatants that
17 don't qualify for that and don't pose a threat. The
18 second thing I would say, though, is that as I
19 understand it, the plan on a going-forward basis
20 reflecting the unique situation of this battle is to
21 provide individuals like Hamdi, like Padilla, with
22 the equivalent of the annual review process that's
23 laid out in the briefs --

24 QUESTION: Well, let's talk about that for
25 just a moment. What is it that the Government is

1 saying will be provided?

2 MR. CLEMENT: Well, Justice O'Connor,
3 those regulations are still in draft form.

4 QUESTION: So we don't know?

5 MR. CLEMENT: We don't know for sure. I
6 think what's envisioned is an opportunity to go
7 before a neutral tribunal, some opportunity to
8 present --

9 QUESTION: Yes, but Mr. Clement, you're
10 assuming he has no right to counsel, aren't you?

11 MR. CLEMENT: Justice Stevens, what we're
12 assuming is that he has no right to counsel that is
13 automatic and as of right --

14 QUESTION: If he could get his own
15 counsel, would he be entitled to consult with his
16 counsel during the preliminary stages of his
17 detention?

18 MR. CLEMENT: Not at the preliminary
19 stages if the Government has made a determination
20 that access to counsel would interfere with the
21 intelligence gathering process.

22 QUESTION: Are there any cases -- it
23 sounds from your argument that the principle
24 interests that the Government wants to advance is the
25 ability to interrogate the person for a sufficient

1 length of time to determine whether they get valuable
2 information out of them or not.

3 And to deny him counsel during that
4 period, because he may not be as willing to talk.
5 Now, it seems to me there are two things about that I
6 wanted to ask you about. One, have you considered
7 the possibility that perhaps a lawyer would have
8 explained to this man that if you do give some
9 information, you won't have to stay here
10 incommunicado for two or three years? That might be
11 a motivation to talk. That's one possibility.

12 And the second thing I want to ask you
13 about, are there any cases in the international field
14 or the law anywhere, explaining that the interest in
15 detaining a person incommunicado for a long period of
16 time for the purpose of obtaining information from
17 them is a legitimate justification?

18 I understand for arresting on the
19 battlefield, that's perfectly clear. But is this
20 prolonged detention for that purpose the subject of
21 judicial writing anywhere that you know about?

22 MR. CLEMENT: Let me answer both parts of
23 your question, Justice Stevens. Certainly it has
24 occurred to us and we have considered the possibility
25 that in some circumstances with some individuals, the

1 best way to get them to cooperate and provide
2 information is to give them a lawyer who will tell
3 them, boy, you know, it's in your best interest to
4 plead to this relatively minor material support
5 charge or whatever and provide the Government with
6 everything that you have.

7 And that is part of the answer to
8 Justice Ginsburg's earlier question, is why is it
9 that there is this pattern that you look at and some
10 people are used in the Article III system and other
11 people are prosecuted or dealt with in preventative
12 detention in the military system.

13 And it reflects a judgment by people whose
14 job it is to make these judgments that certain
15 people, the best way to get them to cooperate, or
16 maybe with certain individuals after you've gotten a
17 certain amount of information from them, but you feel
18 there is one other area you're not going to get
19 unless the dynamic fundamentally changes, those
20 people may be best dealt with in the way that you
21 envisioned. Whereas other individuals, the only way
22 that the judgment of the intelligence experts had to
23 deal with them is to provide them without counsel and
24 to use an interrogation.

25 I think to get to your second part of the

1 question, I don't know that there are any authorities
2 that I'm aware of that address exactly what you're
3 talking about, but I think there are two types of
4 authority that we would point to as being very
5 important. First of all, it's long been recognized
6 that one of the major justifications for the
7 detention of enemy combatants or prisoners of war is
8 to gather intelligence. And we cite some sources to
9 that effect in the brief.

10 The second thing, and I think this is
11 important, is that it has never been the case that
12 prisoners of war are entitled to counsel to challenge
13 their capture or their detention. What has happened
14 historically, and what the Geneva Convention
15 provides, is that if one of those enemy combatants is
16 charged with a specific war crime, then at that point
17 they're entitled to counsel. But if they are just
18 being held in a preventative detention, then in that
19 circumstance, they are not entitled to counsel.

20 QUESTION: But have we ever had a
21 situation like this where presumably this status --
22 war-like status could last for 25 years, 50 years,
23 whatever it is.

24 MR. CLEMENT: A couple of responses,
25 Justice O'Connor. First of all, in the midst of any

1 war, the detention may seem like it's indefinite
2 because if you talk about a detainee in 1942, they're
3 not going to know how long World War II is going to
4 last. And their detention may seem indefinite but
5 those detentions have always been approved under the
6 law of war.

7 Second, with respect to Al Qaeda and
8 individuals who are hard core Al Qaeda operatives,
9 the end of the war is a very difficult thing to
10 perceive. But with respect to somebody who is
11 captured on the battlefield with the Taliban, this
12 war may eventually -- the executive may make the
13 judgment or Congress may help us make the judgment
14 that the war in Afghanistan is effectively over.

15 And individuals who only really posed a
16 danger of rejoining the battle in Afghanistan would
17 be released. Now, there may be a few individuals
18 who, as I say, are hard core Al Qaeda operatives and
19 they're going to join the battle against the
20 United States wherever it's waged. They're just in
21 Afghanistan because that's where the action is.

22 QUESTION: May I ask just one other
23 question, I think it's just relevant. But do you
24 think there is anything in the law that curtails the
25 method of interrogation that may be employed?

1 MR. CLEMENT: Well, I think there is,
2 Justice Stevens. I mean --

3 QUESTION: And what is that?

4 MR. CLEMENT: Well, just to give one
5 example, I think that the United States is signatory
6 to conventions that prohibit torture and that sort of
7 thing. And the United States is going to honor its
8 treaty obligations. The other thing that's worth
9 mentioning of course --

10 QUESTION: But you said something about
11 self-executing. In connection with the Geneva
12 Convention, you said, well, it's not self-executing.
13 Would you say the same thing about the torture
14 convention?

15 MR. CLEMENT: Justice Ginsburg, I actually
16 have the sense that the torture victims -- you have
17 the Torture Victim Protection Act, of course, which I
18 think doesn't actually apply to the United States.
19 So I'm not sure that there would be any other basis
20 for bringing a private cause of action against the
21 United States.

22 But as this Court noted in footnote 14 of
23 the Eisentrager opinion, the idea that a treaty is
24 going to be enforced through means other than a
25 private cause of action doesn't mean that it's not a

1 binding treaty, doesn't mean that it's not going to
2 constrain the actions of the executive branch.

3 Just to finish up my answer to Justice
4 Stevens' question, I wouldn't want there to be any
5 misunderstanding about this. It's also the judgment
6 of those involved in this process that the last thing
7 you want to do is torture somebody or try to do
8 something along those lines.

9 I mean, if there were an artificial -- if
10 you did that, you might get information more quickly,
11 but you would really wonder about the reliability of
12 the information you were getting. So the judgment of
13 the people who do this as their responsibility is
14 that the way you would get the best information from
15 individuals is that you interrogate them, you try to
16 develop a relationship of trust.

17 QUESTION: But doesn't the Court have some
18 business intervening at some point, if it's the
19 Hundred Years War or something?

20 MR. CLEMENT: Well, Justice Breyer, I
21 mean, there may be a point where, depending on the
22 nature of the war -- I mean, I'm not quite sure what
23 you have in mind that they would intervene on.

24 QUESTION: At some point, if you're
25 holding people without a lawyer, with the only

1 neutral decision maker being an interrogator, with no
2 opportunity to present proofs and evidence, with no
3 opportunity to hear the other side, in your opinion,
4 if that goes on and on, let's say it's the Hundred
5 Years War, is there no opportunity for a court, in
6 your view, to say that this violates, for an American
7 citizen, the elementary due process that the
8 Constitution guarantees?

9 MR. CLEMENT: Well, as I indicated
10 earlier, Justice Breyer, the courts remain open. We
11 recognize the viability of the writ of habeas corpus.
12 There certainly is a challenge that can be brought to
13 the length of the detention at some point. And the
14 courts would be open to hear claims --

15 QUESTION: But your answer to Justice
16 O'Connor, I thought, was, we don't have to worry or a
17 court should not be worrying about the indefiniteness
18 of the time because it may well be that the President
19 or Congress will at some point say the war in
20 Afghanistan is no longer a matter of concern and,
21 therefore, we don't have to hold the Hamdis.

22 I think that's the only answer that you
23 have given so far to Justice Breyer's question and
24 Justice O'Connor's question. Am I wrong?

25 MR. CLEMENT: Justice Souter, a couple of

1 points. One is, I don't think there is any
2 contradiction with that and my answer to Justice
3 Breyer's question. I mean, you can imagine a
4 situation where the evidence in the Government's own
5 affidavit shows that somebody is only detained with
6 regard to war in Afghanistan. And then you can
7 imagine that that has been signed, sealed and
8 delivered, it's over, the President says so, Congress
9 says so and there is an effort to continue to detain
10 that individual.

11 QUESTION: I can imagine it and I can also
12 imagine that the concern about Afghanistan will go on
13 as long as there is concern about Al Qaeda, and there
14 is no endpoint that we can see at this point to that.
15 So that it seems to me your answer boils down to
16 saying, don't worry about the timing question, we'll
17 tell you when it's over.

18 MR. CLEMENT: With respect, Justice
19 Souter, I continue to think that there may be a role
20 for the courts in dealing with the timing question at
21 some point. I think that would be --

22 QUESTION: I'm taking away from the
23 argument the impression, and please correct me if I'm
24 wrong, that you think there is a continuing role for
25 the courts to examine the reasonableness of the

1 period of detention.

2 MR. CLEMENT: Well, I wouldn't take that
3 away, Justice Kennedy. What I'm saying is there is a
4 continuing but modest role for the courts. The
5 habeas courts will remain open. I mean, the import
6 of one of Justice Souter's questions is that it's
7 already too long and if somebody raised that claim,
8 if there is another petition filed, a direct petition
9 now that Hamdi has counsel that's filed in this
10 claim, and that claim is raised, we would be in court
11 vehemently saying there is no role for the habeas
12 court there. There are troops still on the ground in
13 Afghanistan. It makes no sense whatsoever to release
14 an individual detained as an enemy combatant in
15 Afghanistan while the troops are still on the ground
16 in Afghanistan.

17 QUESTION: But it may make every bit of
18 sense to have an opportunity on the part of that
19 individual, before someone other than an
20 interrogator, to say, I am not the kind of person
21 that they claim I am on the basis of which they are
22 holding me.

23 MR. CLEMENT: Well, again --

24 QUESTION: The alternative is not give him
25 some kind of a hearing or release him.

1 MR. CLEMENT: No, but the alternative is
2 to provide a means of allowing for a military process
3 to go forward. It's not just the interrogator. It's
4 the original screening team on the ground in
5 Afghanistan that, as I said before, released 10,000
6 individuals out of U.S. custody. It's the screening
7 team in Guantanamo and then it is this annual review
8 process that will go forward. Now that is a
9 tremendous amount of process that the executive
10 branch is providing.

11 QUESTION: That we don't have yet. It's
12 still on the drawing board, the annual review.

13 MR. CLEMENT: That's quite correct,
14 Justice Ginsburg, but I would say that for the time
15 being, everything provided to date is more than
16 sufficient.

17 QUESTION: Thank you, Mr. Clement.
18 Mr. Dunham, you have four minutes remaining.

19 REBUTTAL ARGUMENT OF FRANK W. DUNHAM, JR.

20 ON BEHALF OF PETITIONERS

21 MR. DUNHAM: May it please the Court.
22 Mr. Clement is a worthy advocate and he can stand up
23 here and make the unreasonable sound reasonable. But
24 when you take his argument at core, it is, "Trust
25 us." And who is saying trust us? The executive

1 branch. And why do we have the great writ? We have
2 the great writ because we didn't trust the executive
3 branch when we founded this Government. That's why
4 the Government is saying trust us is no excuse for
5 taking away and driving a truck through the right of
6 habeas corpus and the Fifth Amendment that no man
7 shall be deprived of liberty except upon due process
8 of law.

9 We have a small problem here. One
10 citizen. We're not talking about thousands. One
11 citizen caught up in a problem in Afghanistan. Is it
12 better to give him rights or is it better to start a
13 new dawn of saying there are circumstances where you
14 can't file a writ of habeas corpus and there are
15 circumstances where you can't get due process. I
16 think not.

17 I would urge the Court not to go down that
18 road. I would urge the Court to find that citizens
19 can only be detained by law. And here there is no
20 law. If there is any law at all, it is the
21 executive's own secret definition of whatever enemy
22 combatant is. And don't fool yourselves into
23 thinking that that means somebody coming off a
24 battlefield because they've used it in Chicago,
25 they've used it in New York and they've used it in

1 Indiana.

2 The Congress needs to act here. Justice
3 Souter was on point when he was talking about the
4 fact that we're two years into this thing and
5 Congress leaves all the laws on the books that relate
6 to habeas corpus and how a habeas corpus proceeding
7 is supposed to go. They leave the 4001(a) on the
8 books that says no executive detention. But we
9 ignore those laws, we don't enforce them. We don't
10 require Congress to fill a gap.

11 Congress tomorrow could take these
12 military regs and they could say, this is the law, we
13 authorize the executive to detain people and to give
14 them hearings the way the military says, and then it
15 would be lawful.

16 But Congress hasn't done that and I
17 respectfully submit, Your Honors, that until Congress
18 does act, these detentions are not lawful. And I
19 would respectfully ask this Court to step up to the
20 plate and say so.

21 QUESTION: Thank you, Mr. Dunham. The
22 case is submitted.

23 (Whereupon, at 11:19 a.m., the case in the
24 above-entitled matter was submitted.)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25