UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, et al., Appellants, v. GEORGE W. BUSH, et al., Appellee.	No. 05-5062, et al.
KHALED A.F. AL ODAH, et al., Appellants, v. UNITED STATES OF AMERICA, et al., Appellee.	No. 05-5064, et al.

Wednesday, March 22, 2006

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES SENTELLE, RANDOLPH, AND ROGERS

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

THOMAS WILNER, ESQ.
STEPHEN H. OLESKEY, ESQ.

ON BEHALF OF THE APPELLEE:

GREGORY G. KATSAS, ESQ.

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1 P R O C E E D I N G S

2 THE CLERK: Case number 05-5062, et al., Lakhdar
3 Boumediene, Detainee, Camp Delta, et al., Appellants v. George
4 W. Bush, President of the United States, et al.; case number
5 05-5064, et al., Khaled A.F. Al Odah, Next Friend of Fawzi
6 Khalid Abdullah Fahad Al Odah, et al., Appellants v. United
7 States of American, et al., Appellees. 05-62 and 05, et al.
8 (indiscernible) Appellant Al Odah, 05, et al. (indiscernible).
9 05-5062 et al.

10 THE COURT: Counsel, you may proceed.

11 ORAL ARGUMENT OF GREGORY G. KATSAS, ESQ.

12 ON BEHALF OF THE APPELLEES

13 MR. KATSAS: May it please the Court, the Detainee
14 Treatment Act comprehensively addresses judicial review of
15 detention claims of aliens held by the Department of Defense
16 at Guantanamo Bay, Cuba as enemy combatants. It does so in
17 two related ways. First, the Act ousts the courts of habeas
18 corpus jurisdiction over that set of claims, effective
19 immediately and without reservation for pending cases.

20 Second, the Act creates a replacement scheme of
21 review, exclusive by its terms and expressly applicable by its
22 terms to pending cases.

23 THE COURT: What’s the remedy?

24 MR. KATSAS: The remedy is an order declaring --
25 setting aside the validity of the combatant status review

1 tribunal determination, which is the basis for holding these
2 aliens as enemy combatants.
3 THE COURT: The statute doesn't say anything about
4 remedy, does it?
5 MR. KATSAS: Well, it says that the review is to
6 test the validity of the Combatant Status Review Tribunal
7 determination.
8 THE COURT: Will you concede that if it's determined
9 that there is no evidence to hold an individual that a court
10 could order the individual's release?
11 MR. KATSAS: I would concede that within the terms
12 of the statute there would be some form of very limited
13 sufficiency review under a sum evidence standard, and if the
14 Court concluded that there was quite literally no evidence of
15 enemy combatancy, the Court would set aside the CSRT as
16 invalid and the legal consequence of that, Judge Randolph,
17 would be that the Department of Defense could then no longer
18 hold that person as an enemy combatant pursuant to the CSRT
19 and consistent with the existing practice once the CSRT
20 determination, either administratively or --
21 THE COURT: That's a very long answer.
22 THE COURT: Yeah, a yes or a no would have been a
23 good thing to start that answer with. I've forgotten the
24 terms of the question by the time you got anywhere close to
25 giving us an answer.

1 MR. KATSAS: If there were --

2 THE COURT: Wait a minute. Hold on a minute.

3 THE COURT: Let me assume --

4 THE COURT: (Voices overlap) question. Start with a

5 yes or a no.

6 THE COURT: Let me assume for a moment that a Court

7 can order the release of a detainee. Habeas corpus, the two

8 essential elements with habeas corpus are number one, a

9 judicial determination of the legality of executive detention.

10 And number two, if upon a determination that the individual is

11 being held illegally, to order the individual released. Now

12 given that, I don't understand why you say that this statute

13 abolishes habeas corpus. All it does is just channel all of

14 the habeas corpus into the D.C. Circuit under standards for

15 reviewing the legality of the detention.

16 MR. KATSAS: I think whether you describe the effect

17 of the statute as ousting habeas corpus and then creating a

18 new scheme or alternatively transferring habeas actions into -

19 -

20 THE COURT: Habeas corpus can be issued by an

21 appellate judge.

22 MR. KATSAS: Sure.

23 THE COURT: Right. And so we're appellate judges.

24 MR. KATSAS: Right, but the divested --

25 THE COURT: Mr. Katsas, it makes an enormous

1 difference because if the characterization I just gave you is
2 correct, the Suspension Clause falls away.
3 MR. KATSAS: I think the suspension -- the
4 Suspension Clause falls away for two separate reasons. One of
5 which I think bears on your line of inquiry.
6 THE COURT: But could we go back to his basic, Judge
7 Randolph's basic point?
8 MR. KATSAS: Um-hmm.
9 THE COURT: I thought your brief said that the
10 detainee can be detained, and continue to be detained, even if
11 the CSRT determination is set aside, because the board could
12 decide to detain the detainee or the civilian authority. Have
13 I misread your brief?
14 MR. KATSAS: I believe you have. If the --
15 THE COURT: In other words, I want to be very clear
16 about this, the government's interpretation of the DTA is that
17 if the D.C. Circuit finds that the CSRT determination, that a
18 detainee is an enemy combatant, has to be set aside, and I'll
19 take it on your terms for a lack of evidence, then the Court
20 has the authority to order the detainee to be released from
21 detention?
22 MR. KATSAS: The order, by it's terms, is to set
23 aside the validity of the determination in --
24 THE COURT: The effect as a remedy is what?
25 MR. KATSAS: Yes. The effect of that, the short

1 answer to your question, Judge Rogers, is yes, but subject to
2 a few qualifications, if I may. First, if this Court sets
3 aside a CSRT, for instance, not because there is no evidence
4 but because you find there is a procedural defect in the
5 process. I think, under those circumstances, the Department
6 of Defense would have the option to do a new CSRT under
7 whatever processes this Court would mandate, consistent with
8 traditional habeas practice, which is not a release order,
9 it's a release or retry order.
10 THE COURT: So it's a harmless error approach to the
11 procedural defaults? Is that what you're urging?
12 MR. KATSAS: No. I'm simply making the point that
13 if you conclude that -- for instance, you have review on legal
14 -- you have review for constitutional and other legal
15 questions to test the adequacy of the procedures. We think
16 there are no constitutional rights, but if you disagree and
17 find that the procedures are defective in a particular way, my
18 point is simply that at that point your holding would
19 eliminate the legal basis for detention based on the past CSRT
20 but DOD could do another one.
21 THE COURT: And under traditional habeas law, a
22 prisoner could be rearrested and procedures begun again but a
23 detainer has to be issued.
24 MR. KATSAS: Under traditional habeas law, the
25 remedy, if you find that the trial was procedurally defected

1 it is always open to the state to retry. I'm just making the
2 point that we have that analog here. The second --
3 THE COURT: But let me just be clear on habeas. Is
4 it not then that the state, absent a detainer, has to quote
5 recapture the person? I mean, the person is actually released
6 from custody.
7 MR. KATSAS: I don't think that's right. I think
8 the typical habeas order is retry within x time or release.
9 THE COURT: It would vary with the circumstances
10 because the defect causes the grant of the habeas writ. When
11 I was a trial judge, an advantage that I have over my
12 colleagues, I had lots of petitions under 2254, 2255. If the
13 defect was simply procedural, you might well be able to order
14 -- in fact, most defects you can order retry or release.
15 MR. KATSAS: Right.
16 THE COURT: But if they were a fundamental
17 constitutional defect, you would have to order release. I
18 think I granted one in the whole five years of trial-hood
19 judging, but it's not -- there isn't just one answer to how
20 you handle it. What I think we're trying to get at is, if
21 this is a substitute for habeas, it has to have in it the
22 possibility that our order doesn't just declare CSRT invalid,
23 it also says turn him loose. Is that -- I think that's just
24 what we're trying to get at.
25 MR. KATSAS: The entire CSRT scheme,

1 administratively, is set up so that once -- if a CSRT
2 determination is made and it results in a non-enemy combatant
3 determination, that detainee is turned loose. Now --
4 THE COURT: All right, but let's press you just so I
5 understand. If the CSRT determination that a person is an
6 enemy combatant is made in January of this year, and then next
7 year the administrative board determines that there continues
8 to be reason to detain that person, if the D.C. Circuit
9 decides that the CSRT determination has to be set aside, that
10 board determination, what is the effect of that board
11 determination?
12 MR. KATSAS: The board determination would not be an
13 independent basis for continued detention if the CSRT were set
14 aside. One more qualification, Judge Rogers, because I don't
15 want to be misunderstood in any way, the simple answer to your
16 question is yes, this Court's determination ultimately would
17 produce a release. The other caveat on that is that there are
18 a set of about ten detainees in another case pending in this
19 Court who have been determined not to be enemy combatants.
20 They have not yet been released because of independent
21 problems related to repatriation. And so there could be a
22 period of continued detention, not as enemy combatants, but
23 simply while we work out the details of a transfer.
24 THE COURT: Thank you.
25 MR. KATSAS: Judge Randolph, to come back to the

1 Suspension Clause questions, I think the Suspension Clause
2 issues presented in this case are fairly straightforward,
3 because before one gets to any question about the adequacy of
4 this scheme as a possible substitute of habeas, there is a
5 threshold question, whether the Suspension Clause applies at
6 all to aliens held abroad. The Supreme Court in part two of
7 the Eisentrager opinion held that the clause does not apply
8 extraterritorially to aliens. That holding, that
9 constitutional holding, of Eisentrager on the Suspension
10 Clause was no more overruled by the statutory holding of Rasul
11 with respect to 2241 than was the Fifth Amendment holding of
12 Eisentrager.
13 If we are right about that point, then, as aliens
14 abroad, these detainees simply have no Suspension Clause
15 rights and that part of the analysis drops out.
16 THE COURT: Then we would have to reject their
17 position that any habeas rights they had at common law could
18 not be protected under the Suspension Clause absent a statute
19 providing habeas rights.
20 MR. KATSAS: Right. You would reject -- I mean,
21 that question was decided in Eisentrager.
22 THE COURT: On a common law basis?
23 MR. KATSAS: On Suspension Clause basis.
24 THE COURT: Right, but there, they were talking
25 about whether an alien had a constitutional right.

1 MR. KATSAS: A constitutional right to file a
2 petition for habeas corpus.
3 THE COURT: Right. (Voices overlap).
4 MR. KATSAS: In the context of a case where the
5 alleged basis of that right was the Suspension Clause in a
6 case where this Court below used the Suspension Clause to
7 grant relief to the petitioners. And later in Rasul, the
8 Supreme Court distinguished between what it perceived to be
9 the statutory holding of Eisentrager resting on [errands] and
10 the constitutional holding, which it perceived as resting on
11 the Suspension Clause. And in Rasul, the Supreme Court went
12 out of its way to say that the Suspension Clause aspect of
13 Eisentrager was not at issue in Rasul and the Court didn't
14 reach any constitutional question because it construed the
15 habeas statute to apply.
16 THE COURT: So you -- is it your point that the
17 petitioners' argument that the Suspension Clause is a
18 limitation on the power of Congress, that they have no
19 standing, as it were, to invoke that?
20 MR. KATSAS: They have no rights under the clause,
21 just as under Eisentrager, they have no Fifth Amendment
22 rights.
23 THE COURT: Here's my hypothetical, Mr. Katsas, is
24 suppose, as the petitioners have argued, that if at common law
25 an alien would have the right to file a habeas, and assume

1 they are outside the sovereignty of the king, is your position
2 that because the right of habeas is not itself included in the
3 Constitution that in order for there to be any suspension
4 Congress has to act and pass a statute, even if all the
5 statute says is we're following the common law on habeas?
6 MR. KATSAS: Our position is that what the
7 suspension -- the Suspension Clause does have an affirmative
8 protection for habeas rights, but it is only -- it's habeas
9 rights historically.
10 THE COURT: As defined by statute? That's what I'm
11 trying to get at.
12 MR. KATSAS: No. The Suspension Clause is not a
13 one-way ratchet that operates to constitutionalize every jot
14 and tittle of modern habeas practice.
15 THE COURT: All ratchets are one way, aren't they?
16 THE COURT: No, the one from Craftsman, you can flip
17 a switch and go the other way.
18 THE COURT: You don't agree --
19 THE COURT: Could he just finish, so I'm just clear
20 on the common law habeas?
21 MR. KATSAS: The test, in our view, the test, the
22 Suspension Clause test, as applied to aliens abroad, would be
23 whether aliens in outside the sovereign territory of a country
24 but within a controlled area, at historical common law, circa
25 1789, had a right to invoke the writ of habeas. That's the

1 question. Now we think Eisentrager answers that question with
2 a constitutional holding that the Suspension Clause doesn't
3 apply to aliens abroad period.
4 THE COURT: Eisentrager has been -- go ahead. I'm
5 sorry.
6 MR. KATSAS: I'm sorry. But even putting
7 Eisentrager to the side, there is an argument asserted against
8 us that Rasul's discussion of common law precedence cuts
9 against us on this point. Even though Rasul was construing
10 the statute, they say, well, but the Court recognized a
11 historic tradition. In fact, Justice Stephens was very
12 careful in discussing the history to say that at common law
13 habeas protected number one, citizens; I'm sorry, number one,
14 aliens within the sovereign territory, citing a series of
15 cases in footnote 11 of his opinion; and number two, persons
16 within controlled jurisdictions, citing another series of
17 cases in footnotes 12 and 13 of the opinions.
18 It turns out that all of the cases, the latter class
19 of cases in notes 12 and 13, involve citizens and that's why
20 that part of Rasul requires the Court to say that one critical
21 element of its analysis is that the habeas statute makes no
22 distinction between aliens and citizens. So if you have a
23 tradition extending habeas rights to citizens in controlled
24 areas and a statute that makes no distinction between citizens
25 and aliens that gets him to where he ends up in Rasul. But

1 the statute is a crucial part of that.

2 THE COURT: You don't really -- I think I understand

3 what you're saying, but I want some clarification. You are

4 not maintaining that today there is a common law right to a

5 writ of habeas corpus, are you? I thought that was settled in

6 about 1807.

7 MR. KATSAS: No, no --

8 THE COURT: And the Chief Justice Marshall said it

9 has to be in writing.

10 MR. KATSAS: Right, involvement.

11 THE COURT: It has to be a statute.

12 MR. KATSAS: Right.

13 THE COURT: What you're -- I take it what you're

14 saying is that the first judiciary act providing for a writ of

15 habeas corpus, in order to understand what that is you have to

16 look at the practices of the states and the practices of

17 English common law to construe that. That's what you're

18 saying.

19 MR. KATSAS: What I'm saying is number one, the fact

20 that Rasul construed the habeas statute to encompass these

21 detainees does not answer the question whether the Suspension

22 Clause itself encompasses these detainees.

23 THE COURT: Yeah, I want to make sure -- I'm sorry,

24 go ahead.

25 MR. KATSAS: And that question, Judge Randolph,

1 turns on an analysis of historic habeas standards around the
2 time of the framing because the Suspension Clause incorporates
3 the scope of the writ, not as it exists today but as it exists
4 then.
5 THE COURT: Because of the line in St. Cyr? Yeah,
6 is that --
7 MR. KATSAS: But on the -- I mean what St. Cyr says
8 is the clause protects at least the rights that exist in 1789.
9 We don't quarrel with that proposition because we have both
10 the holding of Eisentrager on aliens abroad and the absence of
11 any tradition, at least as reflected in Rasul of a historic
12 extension of habeas to aliens in controlled territories.
13 THE COURT: Okay.
14 THE COURT: What do you say changed in Rasul as far
15 as what remedy would be available to persons situated like
16 these petitioners from the Eisentrager holding to the Rasul
17 holding?
18 MR. KATSAS: Under Eisentrager, the detainees would
19 have neither a statutory nor a constitutional right to habeas.
20 Under Rasul, they have a traditional -- a statutory habeas
21 right, and prior to enactment of the Detainee Treatment Act,
22 under Rasul, these detainees could file a habeas petition.
23 THE COURT: If they established in their habeas
24 petition -- what would they have to establish to get released
25 based on their habeas petition? Or could be released.

1 MR. KATSAS: Under old law? Pre-DTA?

2 THE COURT: Yeah, pre the statute. Rasul was

3 decided on day.

4 MR. KATSAS: Right.

5 THE COURT: Eisentrager had been decided 30 years,

6 more than that, 50 years before that, 50 years. What was

7 different after Rasul was decided?

8 MR. KATSAS: What's different after Rasul is that

9 they can invoke habeas jurisdiction in order to make claims

10 challenging the lawfulness of their custody. For instance,

11 because the processes of the CSRT, they say fail to satisfy

12 Fifth Amendment standards. Another argument they make is that

13 the detentions are not authorized by the authorization of

14 military force.

15 THE COURT: You would say that the Fifth Amendment

16 does not protect them though, would you not?

17 MR. KATSAS: Correct.

18 THE COURT: So are you not speaking inconsistently

19 when I ask you what they could challenge in habeas after

20 Rasul, to say they could challenge the Fifth Amendment

21 validity of their confinement, and then you admit that you

22 have already argued that they don't have any Fifth Amendment

23 rights to be protected.

24 MR. KATSAS: I don't think it's any more

25 inconsistent than any other typical habeas case in which a

1 petitioner raises a Fifth Amendment claim that for one legal
2 reason or another is without merit.
3 THE COURT: It's not even close to the same thing.
4 In a typical case, you have a case-specific determination as
5 to whether or not the Fifth Amendment right has been violated.
6 You are telling me, and you may be correct, I'm not saying you
7 are right or wrong, but I understand you correctly, you're
8 saying they don't have Fifth Amendment rights at all.
9 MR. KATSAS: We emphatically --
10 THE COURT: Somebody is in prison in Hazelwood
11 Prison Unit, where I used to get writs from, he may or may not
12 have a valid claim that he's emphatically held, but I had to
13 look at the facts and decide. You're saying that all we would
14 have to say is you don't have a Fifth Amendment right, you get
15 to file this writ, we don't have to look and see whether your
16 rights have been violated. Is that not what you're saying?
17 MR. KATSAS: We are saying that. The Fifth
18 Amendment -- I mean, a Fifth Amendment -- a claim, a legal
19 claim, can fail on broader or narrower grounds.
20 THE COURT: But you are saying every single one of
21 their claims is going to fail.
22 THE COURT: Yes. It's a matter of law.
23 THE COURT: And you are saying as a matter of law
24 they can file this writ and our Clerk's office has to file it
25 but they cannot get any remedy. Is that --

1 MR. KATSAS: I'm saying they can raise Fifth
2 Amendment claims, and given the Fifth Amendment holding in
3 Eisentrager, reaffirmed in Verdugo, reaffirmed in a line of
4 more recent cases from this Court, that claim would fail on
5 the merits.
6 THE COURT: No, you claim that they would fail at
7 the threshold. You're saying we don't have to reach the
8 merits. You are saying we have to let them come in here and
9 explain their Fifth Amendment claim, hear evidence in whether
10 it's violated [or not], and say that's all very interesting,
11 we have to throw you out, you don't have any Fifth Amendment
12 rights.
13 MR. KATSAS: I'm saying --
14 THE COURT: When would we ever adjudicate the merits
15 of a Fifth Amendment claim in the period between Rasul [and
16 applies it to the Act]?
17 MR. KATSAS: You can think of -- I'm not sure
18 anything turns on whether the proposition that the Fifth
19 Amendment doesn't apply extraterritorially to aliens is
20 treated as a merits proposition, as I am, or treating it or a
21 threshold --
22 THE COURT: Counsel, are you saying that they don't
23 have any such rights and every one of their cases under that
24 Act has failed?
25 MR. KATSAS: Yes, sir.

1 THE COURT: That's what I thought you were saying.

2 MR. KATSAS: Yes, emphatically.

3 THE COURT: All the Supreme Court did in Rasul, in

4 your view, was give them a right to file a piece of paper

5 which cannot possibly grant relief?

6 MR. KATSAS: Was construe the habeas statute in the

7 context of a case where they expressly and repeatedly disavow

8 any constitutional holding, any merit holding, in a case where

9 the detainees petitioned for cert --

10 THE COURT: I'm taking that as a yes. That's what

11 you're saying, is the Supreme Court only gave them a right to

12 file an empty piece of paper.

13 MR. KATSAS: The Supreme Court held that there was

14 habeas jurisdiction and did not address the separate question,

15 whether there are Fifth Amendment rights.

16 THE COURT: Mr. Katsas, before you sit down --

17 MR. KATSAS: Explicitly took that question out of

18 the case in a limited cert grant.

19 THE COURT: This statute only applies to Guantanamo

20 Bay.

21 MR. KATSAS: Right.

22 THE COURT: Right? Do you read Rasul as applying to

23 the -- as depending upon the prisoner being held in Guantanamo

24 Bay? What about Iraq and Afghanistan?

25 MR. KATSAS: I think Rasul is not entirely clear on

1 that point. We read it as limited to Guantanamo Bay.
2 Congress certainly read it as limited to Guantanamo Bay, which
3 is precisely why this scheme is specific to Guantanamo.
4 THE COURT: Well, I don't know about that, because
5 the only petitions we have are from Guantanamo. I don't know
6 if we have any from -- you would know. Are any prisoners in
7 Afghanistan or Iraq filing for writs? Because during World
8 War II, the German prisoners, held in Germany, filed more than
9 200 petitions for writs of habeas corpus directly in the
10 Supreme Court. So it's been done. They weren't granted.
11 MR. KATSAS: It might have been done. I think -- I
12 mean, Eisentrager emphatically rejected those petitions on
13 constitutional and statutory grounds.
14 THE COURT: But it would be really quite odd,
15 wouldn't it? To the extent that this statute narrows the
16 scope of habeas corpus, let's assume it does, narrows it, that
17 prisoners in Iraq and Afghanistan have greater rights than
18 those held at Guantanamo?
19 MR. KATSAS: That's certainly not our position. I
20 think --
21 THE COURT: Wouldn't it be your position under --
22 that Eisentrager still applies?
23 MR. KATSAS: Yes. Rasul extends the habeas statute,
24 not worldwide but only to an exclusively controlled area, like
25 Guantanamo, with the distinctive --

1 THE COURT: Justice Kennedy separate, concurrent
2 certainly would have said that, but does the majority in Rasul
3 say that?
4 MR. KATSAS: I think, in full candor, Judge
5 Sentelle, the majority opinion is a little bit ambiguous on
6 that point.
7 THE COURT: I think that, perhaps, is a modest
8 description.
9 MR. KATSAS: It has a section of the opinion in
10 Ahrens and Braden that seems in no way Guantanamo-specific.
11 It has a separate section of the opinion that is entirely
12 Guantanamo-specific. I think it's an open question whether
13 Rasul should be extended worldwide. Our position is certainly
14 not. Unless and until the Supreme Court undertakes that next
15 step, Eisentrager controls both the statutory and the
16 constitutional question with regard to places like Iraq and
17 Afghanistan.
18 THE COURT: Thank you. Any other questions? If
19 not, we'll finally let you sit down and look forward to seeing
20 you again.
21 MR. KATSAS: Thank you. Thank you very much.
22 THE COURT: Mr. Wilner?
23 ORAL ARGUMENT OF THOMAS WILNER, ESQ.
24 ON BEHALF OF THE APPELLANTS
25 MR. WILNER: Thank you, Your Honor. I'm reserving

1 two minutes. May it please the Court --

2 THE COURT: Wait a minute.

3 MR. WILNER: I'm sorry.

4 THE COURT: We don't have the calendar set up for

5 you to reserve anything.

6 MR. WILNER: Before we start, they asked me when we

7 came in whether we wanted to, so I thought, well --

8 THE COURT: Okay, we'll let you. However, we'll

9 probably use it up, so -- but go ahead.

10 MR. WILNER: Oh, Your Honor, please. May it please

11 the Court, let me just say the way that we decided to split

12 our argument, I was going to talk about statutory

13 interpretation and Mr. Oleskey about the Suspension Clause,

14 but I do want to start out because I think -- let me just say

15 --

16 THE COURT: Well, start out on the other subject.

17 You know, you may never get back to the one you want to talk

18 about.

19 MR. WILNER: Well, let me try with a quick thing

20 because I think it's important. If the government concedes

21 that the Court of Appeals can do what a common law judge can

22 do in habeas, that's review the sufficiency of the factual

23 evidence and order release if it's not sufficient. And I

24 don't mean just a sum evidence standard. Then that would be

25 fine. But we don't read the statute that way and we really

1 don't read the statute as allowing the Circuit Court to do
2 that. And I think really --
3 THE COURT: The statute doesn't say one way or the
4 other.
5 MR. WILNER: I'm sorry?
6 THE COURT: The statute doesn't say one way or the
7 other.
8 MR. WILNER: The statute says --
9 THE COURT: It is completely devoid of anything
10 about remedy.
11 MR. WILNER: It's two things though, Your Honor.
12 You're right, totally devoid about remedy. So if it allowed
13 it that would be great. It does say that the standard or
14 review is whether you violate the Constitution, if you have
15 constitutional rights, and they'll say you don't, and
16 secondly, did the CSRTs follow their procedures? That's not
17 the habeas standard. The habeas standard, as we talked about
18 last time, in habeas, the question is whether somebody is held
19 with lawful authority, which is a legal question, what's the
20 lawful authority, and do these people fit within it. That's a
21 factual review. This standard does not appear to allow that.
22 So it's not just a transfer --
23 THE COURT: Well, it did -- it says --
24 MR. WILNER: If it did, we'd say that's great.
25 THE COURT: It says in (e)(2)(i) that we review for

1 -- to see whether there was a preponderance of the evidence.
2 MR. WILNER: Preponderance of -- it's whether --
3 well, if you would interpret this statute to allow the Circuit
4 Court to conduct a habeas review in accordance with common law
5 and to order release, that would be fine, but we don't --
6 THE COURT: What is a habeas review, according to
7 common law?
8 MR. WILNER: A habeas review, according to common
9 law, as it was set out in the briefs of the habeas scholars,
10 really allows a searching review. It's what Justice Marshall
11 did in the Bollman case. You review --
12 THE COURT: But that -- you know, Mr. Wilner, I've
13 looked. There is Supreme Court precedent, and I forgot the
14 name of the case, take the analogous circumstance, somebody is
15 being held that hasn't been tried, there is no judgment of
16 conviction by a state or federal court. They are being held,
17 they file a petition for a writ of habeas corpus, the question
18 is whether there is probable cause to hold them, right?
19 MR. WILNER: Yes, Your Honor.
20 THE COURT: In that situation, the Supreme Court
21 precedent that says the Court doesn't hold an evidentiary
22 hearing, it just looks at the evidence that was presented to
23 the magistrate to justify the writ. And if that provides
24 probable cause then that's it. My analogy, when you talk
25 about searching factual review, I think you have in mind an

1 evidentiary hearing, whereas, in fact, the hearing is on the
2 record here, according to the statute. And I don't see that
3 that's any different than the usual habeas corpus for probable
4 cause.
5 MR. WILNER: Well, my question is what does this
6 statute allow a Circuit Court to do? Does it allow the
7 Circuit Court to review the evidence, the factual return put
8 in by the government. And under habeas, the petitioner is
9 allowed to put in his own evidence. Certainly at habeas and
10 common law, he was allowed to identify whether evidence was
11 obtained through torture. Does it allow that? We don't read
12 it that way and I don't think the government does. If they
13 would concede that you could do this, that you could test the
14 evidence against you, that they would need to come forward and
15 you, Your Honors, would look at it and say is it probable
16 cause, does the other person have some evidence to put in,
17 that would be one thing. And if you could order release, that
18 would be one thing, but we think that's -- and I know the
19 government doesn't concede that.
20 If we were just transferring habeas cases from the
21 District Court to the Court of Appeals, hey, that would be
22 great, but we don't read it that way and that's what worries
23 us.
24 THE COURT: The cases, are you familiar with this,
25 United States ex rel. Kassin v. Mulligan? It's 295 US 396.

1 MR. WILNER: I am not, Your Honor.

2 THE COURT: Well, that a pretrial habeas petition

3 seeking release and the Supreme Court holds that the job of a

4 habeas court is not to hold an evidentiary hearing, it's to

5 examine the evidence that was presented to hold the person,

6 not a separate -- you know, we try it.

7 MR. WILNER: Your Honor, I don't disagree.

8 THE COURT: I don't see how this statute does

9 anything but what seems totally consistent with it.

10 MR. WILNER: Well, this -- we're really on dangerous

11 ground here, I think. The government is going to come in and

12 say all you can do under that statute is see whether a CSRT

13 has met its procedures, even if those procedures were

14 deficient. They are not going to say you can examine the

15 evidence to see whether there is sufficient evidence. That's

16 what scared me. If this statute allows, whether you call it

17 searching or a probable cause hearing or makes the government

18 put forward their evidence for independent examination by a

19 Court and gives the petitioner the opportunity to rebut that

20 evidence and to identify whether any evidence is obtained

21 through torture, that would -- and allows you to order

22 release, if it's not, but that's a big stretch of this

23 statute. I don't see it anywhere in there.

24 THE COURT: Will you tell me how you read this

25 section though. It says "the scope of review by the D.C.

1 Circuit shall be," etc., etc., "including the requirement that
2 the conclusion of the tribunal be supported by a preponderance
3 of the evidence."
4 MR. WILNER: Your Honor, that is what is in the CSR
5 -- prior CSRT procedures. It says, "preponderance of the
6 evidence."
7 THE COURT: Well, I know, it's number 12.
8 MR. WILNER: Yeah. Well, Your Honor, I'm very
9 afraid, honestly, that this allows you to do a real review of
10 the evidence. I real review of the evidence. I mean, I -- if
11 it does and it allows you to -- and we've got to remember,
12 these people are not being held prior to trial.
13 THE COURT: Let's suppose that we read that as kind
14 of administrative law, not substantial evidence, there has to
15 be a preponderance of the evidence showing the individual is
16 an enemy combatant. And let's suppose as well that in order
17 to avoid a constitutional question under the suspension of the
18 writ of habeas corpus clause that we think, in proper
19 circumstances, this Court can order release, all right? Then
20 what's your complaint then?
21 MR. WILNER: Well, my complaint would be --
22 THE COURT: Assuming those two things.
23 MR. WILNER: The first one is that you can really
24 look at this efficiency of the evidence.
25 THE COURT: Right.

1 MR. WILNER: Look at this efficiency of -- would you
2 also allow, as you could at habeas, the petitioner to present
3 concrete evidence?
4 THE COURT: No.
5 MR. WILNER: No?
6 THE COURT: You would not. In the case I just read
7 to you does not allow that.
8 MR. WILNER: Well, Your Honor, I'm sorry, I haven't
9 read that case, but every habeas case I've read --
10 THE COURT: The best argument on that case may be
11 that it is specific to a certain circumstance in which the
12 commissioner, now replaced by magistrate judges, had found
13 that there was probable cause in a removable warrant. And you
14 might argue that it doesn't apply beyond the limited context
15 of its natural background.
16 MR. WILNER: Thank you, Your Honor. I must say I'm
17 really ignorant because I haven't read the case, but every
18 case --
19 THE COURT: There are lots of people who are not
20 ignorant at all that haven't read that case.
21 MR. WILNER: Thank you. But let me say -- but I
22 want to say why I think it's clear that this statute just --
23 THE COURT: We hadn't read it until recently.
24 THE COURT: I feel badly we didn't show it to you.
25 THE COURT: I understand your point about you're

1 concerned about how the statute would be read or interpreted
2 and what the argument the government would make in the sense
3 that Mr. Katsas this morning said, "Well, if there is some
4 evidence, the Court would have to, basically, affirm." But I
5 guess what I understood Judge Randolph to be trying to get at
6 is aren't those open issues under this statute?
7 MR. WILNER: Your Honor, I honestly think what's
8 happening here is we're all rewriting a statute. This statute
9 isn't the clearest thing in the world. I think there are few
10 things clear about it. I think if Congress had really wanted
11 to revoke habeas jurisdiction over pending cases, it wouldn't
12 ride on basic architecture, structures from other sections, it
13 would have said so. It would have said so plain and simple.
14 That's what it did in the real idea. That's what Senator
15 Graham's original bill did.
16 THE COURT: But you're argument, and maybe I'm
17 wrong, but -- about, basically, that this statute is
18 unconstitutional under the Suspension Clause. It's not
19 dependent upon whether it's supplied just to pending cases.
20 All future --
21 MR. WILNER: It is. It is.
22 THE COURT: Why is that?
23 MR. WILNER: Absolutely, Your Honor. It's only
24 unconstitutional in our view if you apply it to pending cases.
25 And Mr. Oleskey will get into that. And that's not our basic

1 argument. Our basic argument --

2 THE COURT: I'm sorry. I want to make sure I

3 understood that. You're conceding that the statute is

4 constitutional, except as applied to pending cases; is that

5 correct?

6 MR. WILNER: Your Honor, we're not conceding it, but

7 we don't challenge it. Here's our view. In the future, the

8 government may come up with -- the statute sets up a

9 prospective scheme. They may come up with great CSRT

10 procedures in the future. There are three new safeguards.

11 They might combine them with the Army field hearings and they

12 may be robust procedures, which --

13 THE COURT: But that goes to the validity of the

14 tribunal; that doesn't go to the scope of habeas corpus.

15 MR. WILNER: But, Your Honor, I think it does. And

16 let me -- the government -- Congress can set up an alternative

17 to habeas, if it's adequate. And I think appellate review --

18 THE COURT: Oh, I see.

19 MR. WILNER: -- on a adequate procedure can be

20 adequate and in the future might be, in the past it wasn't.

21 Let me just make this one point. You need to be explicit to

22 revoke habeas. Senator Graham had it in his original bill

23 that this applies to pending cases. Congress took that out.

24 It elected to make that provision, (e)(1) effective -- take

25 effect on the date of enactment. That's a well-understood

1 term in this -- in touching -- as Justice Scalia said, "It
2 means prospective on enactment." The Supreme Court said,
3 "Take effect on enactment is an inept way to reach pending
4 cases." What the government is asking you to do is rewrite
5 the statute. Congress took those words out and they are
6 asking you to put them back in.
7 THE COURT: There is at least an argument that take
8 effect upon enactment has a different effect when you're
9 dealing with a jurisdictional statute.
10 MR. WILNER: Yes, Your Honor. And they made --
11 THE COURT: This is a jurisdictional question.
12 MR. WILNER: Yes, Your Honor. And they made that
13 argument. They relied on it in the first briefs in January.
14 But it's clear in the Hughes case and also the LaFontant case
15 also makes clear that jurisdictional statutes aren't to be
16 read any differently. You look behind the statute itself to
17 see if it effects substantive rights.
18 THE COURT: Suppose you file a diversity -- a case
19 under diversity jurisdiction and you file a complaint. And
20 the next day, Congress passes a statute, which they've been
21 urged to do often, abolishing habeas corpus jurisdiction in
22 the District Courts. Does that mean because you already filed
23 the case that you can go forward? It already says effective
24 the date of enactment.
25 MR. WILNER: Your Honor, under the Supreme Court

1 precedence, if they said this shall take effect on the date of
2 enactment that's a term of [our new] statutory construction.
3 THE COURT: But that means the District Court has --
4 no longer has jurisdiction.
5 MR. WILNER: It does. It means it no longer has
6 jurisdiction over cases filed in the future. That's what the
7 Supreme Court has said. If you just --
8 THE COURT: Where did the Supreme Court say that the
9 most clearly?
10 MR. WILNER: It said it, Your Honor, in three
11 places. It said it in Landgraf at 511 --
12 THE COURT: Was Landgraf jurisdictional?
13 MR. WILNER: Hmm?
14 THE COURT: Was Landgraf jurisdictional?
15 MR. WILNER: No, Landgraf, the issue was -- Landgraf
16 was not a jurisdictional statute, as such.
17 THE COURT: Right.
18 MR. WILNER: It was a statute that --
19 THE COURT: I think what Judge Randolph and I are
20 both pursuing is how did the rules of the construction of that
21 phrase vary, if it all, if the statute is jurisdictional.
22 MR. WILNER: Your Honor, and that's right. I mean,
23 I think that's a good question.
24 THE COURT: I thought it was.
25 MR. WILNER: It was actually -- sorry.

1 THE COURT: I think Judge Randolph thought it was.
2 Go ahead.
3 THE COURT: In other words, has the Supreme Court
4 adopted the distinction Justice Scalia had drawn between when
5 is a statute retroactive, a distinction between a
6 jurisdictional provision and what he describes as substantive?
7 MR. WILNER: Yes. Well, and that's what the Hughes
8 case said. You don't read a jurisdictional statute any
9 differently than a regular statute.
10 THE COURT: You have the citation of the best quote
11 from Hughes?
12 (End of first CD.)
13 THE COURT: Is this on your side?
14 MR. WILNER: It's 520 US and 951. And, of course,
15 there is LaFontant. I can't ever pronounce it.
16 THE COURT: LaFontant.
17 MR. WILNER: LaFontant case.
18 THE COURT: Our case.
19 MR. WILNER: I know, Your Honor. And I don't have
20 the particular page on that, but in determining whether --
21 "jurisdictional statutes are to be evaluated in the same
22 manner as any other statute. In order to determine whether a
23 statute applies to a case that was filed prior to passage of
24 the statute, the Courts must determine does it speak to the
25 substantive rights of the parties." That's the issue, and

1 this one does. If you take away --

2 THE COURT: Yeah, but not the rights that Landgraf

3 was talking about.

4 MR. WILNER: No, no, Your Honor --

5 THE COURT: It was a governing primary conduct.

6 MR. WILNER: Your Honor --

7 THE COURT: I mean, your clients didn't do whatever

8 they were alleged to do because they thought they would get

9 habeas corpus review, right?

10 MR. WILNER: Your Honor, what Landgraf addressed is

11 what is the meaning "shall take effect on an enactment?" And

12 it said that's a particularly inept way, and especially inept

13 way to reach pending cases. Justice Scalia said that that

14 means -- takes effect prospectively on enact, when he said

15 that presumption is too strong to be overcome by anything but

16 a clear statement. Congress knew that.

17 THE COURT: Suppose -- let me give you another

18 hypothetical. Suppose that Congress abolishes the U.S. Courts

19 of Appeals. It did that once.

20 MR. WILNER: Yes, in the 1800s.

21 THE COURT: And suppose that there were pending

22 cases waiting argument in the U.S. Court of Appeals. And it

23 says effective date of enactment no more staff, no more

24 courthouse, no more the judges. You can't take the judge away

25 from the Court, except [indiscernible], but you can take the

1 Court away from the judge.

2 MR. WILNER: Yes.

3 THE COURT: All right. Now, the Court still sits

4 under your theory?

5 MR. WILNER: No. Your Honor, they would --

6 THE COURT: Effective date of enactment.

7 MR. WILNER: No, the Courts wouldn't analyze that

8 under the standard I just say -- does this effect the

9 substantive rights of the parties? And they would say if

10 you're just allocating jurisdiction among Courts to hear the

11 same cause of action, that's fine. But if you are taking away

12 the underlying cause of action, if you're taking away the

13 right to habeas, you've got to be explicit about it and you

14 can't do it that way. Take effect on the date of enactment

15 will not do that. That person's got to have the right to

16 pursue their habeas claim as fully as he had before, as fully

17 as the Supreme Court said he had. And there can't be any

18 question about that. And all this talking about other

19 structures and putting it before the Court doesn't work unless

20 they have that full right.

21 THE COURT: What do you do with the section that

22 says this applies to pending claims?

23 MR. WILNER: Well, you know, I won't say that's a

24 good question too, but it is. First of all, I think it's

25 important to recognize that when Congress said that there was

1 no legislative finding that there are pending cases. And
2 Congress didn't have hearings here and they didn't have any
3 investigate --
4 THE COURT: Wait a minute. The whole point was --
5 MR. WILNER: Okay. Well, let me go on.
6 THE COURT: No, I think that's it.
7 MR. WILNER: No, but I mean, it really is --
8 THE COURT: It's like hiding an elephant with a
9 handkerchief. Everybody knows that there were these elephants
10 out there.
11 MR. WILNER: Yeah. But there really were no
12 hearings here, and I think Congress could have been concerned
13 that there were habeas cases pending where people had not yet
14 had a CSRT and who would have the new CSRTs. In fact, we have
15 found that there are such cases.
16 THE COURT: But this provision wouldn't apply to
17 those cases. This provision only applies to cases where there
18 has been --
19 MR. WILNER: No, no, just the -- no, Your Honor, we
20 read it exactly the opposite. This provision applies. The
21 statute is a perspective statute. It requires the government
22 to issue new CSRT procedures with new safeguards. It does.
23 It's a need to be --
24 THE COURT: No, no, no. That's not my question.
25 MR. WILNER: Okay.

1 THE COURT: It specifically applies to the category
2 Sub 2, right?
3 MR. WILNER: Yes.
4 THE COURT: Sub 2 is review of a tribunal.
5 MR. WILNER: Yes.
6 THE COURT: It says "all pending claims dealing with
7 review of a tribunal are covered."
8 MR. WILNER: Well, it says, Your Honor, "For whom a
9 Combatant Status Review Tribunal has been conducted pursuant
10 to applicable procedures specified by the Secretary of
11 Defense."
12 THE COURT: Right.
13 MR. WILNER: Now, our argument, and I think it's
14 right, this statute requires the Secretary of Defense to issue
15 new procedures with new safeguards that weren't in the old
16 one, got to be a civilian official. Wasn't before. There's
17 got [to be] a periodic review of new evidence. And most
18 importantly, there needs to be a review whether any evidence
19 was obtained through torture. Those are what we say are the
20 procedures they were talking about. Those are --
21 THE COURT: Well, then how do you explain, you've
22 already mentioned, how do you explain the fact that the
23 reference to number two, which we have already gone over,
24 about the -- it has to be supported by -- including the
25 requirement that "the tribunal conclusion supported by a

1 preponderance of the evidence and allowing a rebuttable
2 presumption in favor of the government," it comes directly
3 from the procedures that were in effect when your clients went
4 through the tribunal review.
5 MR. WILNER: Well, how do I explain it other than to
6 say hopefully those would be part of the new procedures too.
7 THE COURT: But there is no requirement, is there?
8 MR. WILNER: Well, no, but, Your Honor, what the
9 reading you're talking about does is weed out of the statute
10 any reason for the Congress to have to require new procedures
11 with new safeguards. If everybody just had -- and let me just
12 say, I don't think this is the best written statute in the
13 world and the clearest statute, but I really think in this
14 circumstance, when you are talking about revoking the right of
15 habeas corpus, the ambiguity doesn't help the government.
16 They need a clear statement.
17 The one thing that is clear in this statute is that
18 out of -- you know, that the words of pending cases were
19 eliminated from (h)(1). That's clear. If they might be in
20 (h)(2), they are eliminated from (h)(1) and the government is
21 asking you to rewrite the statute and put them back in. I
22 think that's clear.
23 THE COURT: Isn't it also your argument that since
24 these -- the procedures that were in effect, and still are,
25 were issued by the Deputy Secretary of Defense, that they

1 don't qualify?

2 MR. WILNER: You know, I don't -- I like that

3 argument. I think it's true, but everybody says it's a

4 delegation. But the fact is the Congress said, "Secretary,

5 you've got to do it." The last procedures --

6 THE COURT: Every statute we get --

7 MR. WILNER: I know, I know. But, Your Honor, I

8 think this is different. Congress made a finding here that

9 the old procedures, although it's not explicit, old procedures

10 were inadequate. That's why they required new ones to be

11 issued with specific safeguards. Isn't it an odd thing if all

12 these people are going to get are the old procedures and

13 limited review? It doesn't make sense. The statute makes

14 sense, as it was written.

15 THE COURT: Yes, it does. It makes perfect sense.

16 Because usually legislation is prospective only. If they

17 change the rules of the game, they make it prospective, but

18 whatever else went before is covered by the procedures that

19 were in effect. The Supreme Court did that in Booker.

20 MR. WILNER: Yes, but Your Honor, what we're talking

21 about --

22 THE COURT: In St. Cyr.

23 MR. WILNER: Your Honor, but what we're talking

24 about here is habeas. What went before is these people have a

25 right to habeas in Court.

1 THE COURT: So are all the cases under Booker, when
2 the sentencing guidelines were held to be unconstitutional.
3 MR. WILNER: Yeah, but Your Honor, I mean --
4 THE COURT: They are all habeas cases.
5 MR. WILNER: -- Hughes looked at that and said what
6 Booker was are cases allocating jurisdiction, not taking away
7 the underlying substantive rights of a party. The underlying
8 right to habeas corpus was the most fundamental of substantive
9 rights. It was the only way we get to test its efficiency of
10 the evidence therefore held under. That's the right we're
11 talking about. If you want to say somebody else could do that
12 and we could talk about the standards, that's fine, but you
13 can't take that right away without being explicit. And taking
14 --
15 THE COURT: The government says, as I understand it,
16 that the problem with your argument is you're ignoring (e)(2).
17 And the Supreme Court has suggested that you can look beyond a
18 single subsection to other sections to figure out whether
19 Congress has been clear. That contrary to the dissent in
20 Landgraf, it's not a magic words test, it's just looking at
21 the whole statute, is it clear?
22 MR. WILNER: Well, Your Honor, actually, in
23 Landgraf, they confronted very much the same argument. As a
24 matter of fact, the government's argument was better there
25 because they said certain sections of the statute specifically

1 applies prospectively, so you should really interpret this one
2 to apply retroactively to these cases. And Justice Scalia,
3 and I'm trying to find a quote because it's just so wonderful,
4 but he really, he said, "Look, all this refined argument
5 doesn't substitute for a clear statement." He said, "Take
6 effect upon enactment is presumed to mean it shall take effect
7 -- it shall take effect prospectively under enactment and you
8 can't get around that except with the clearest statement. And
9 you can't do it from other sections in the statute. Those
10 inferences are not enough." I wish I could find the quote,
11 but I lost it, but that's basically it.
12 THE COURT: No, it's in Justice Scalia's concurring
13 opinion.
14 MR. WILNER: Yes, it is. Thank you, Your Honor. I
15 don't know whether we have the two minutes, but thank you.
16 THE COURT: Mr. Oleskey?
17 ORAL ARGUMENT OF STEPHEN H. OLESKEY, ESQ.
18 ON BEHALF OF THE APPELLANTS
19 MR. OLESKEY: Good morning, Your Honor. May it
20 please the Court, Stephen Oleskey for the Boumediene
21 petitioners.
22 The question that was being addressed with prior
23 Counsel was does the Act permit this Court to make the same
24 factual inquiry that a Court would in a similar setting have
25 made in 1789. The answer to that question we submit, however

1 you label that review, is no, it would not be permitted under
2 the Act to make the same review. A question you were raising,
3 as I understand it, Judge Randolph, had to do with a probable
4 cause hearing preliminary to a full trial.
5 In the Guantanamo context --
6 THE COURT: This is preliminary to full trial before
7 a Military Commission, what's the difference?
8 MR. OLESKEY: Because none of the safeguards that
9 are attendant to a full trial in a criminal context are
10 present in the tribunal setting in Guantanamo.
11 THE COURT: Well, that's because of the United
12 States -- the Code of Military Justice.
13 MR. OLESKEY: Yes, but that Code of Military
14 Justice, which is not, in fact, what's been adopted at
15 Guantanamo, provides for battlefield determination. These are
16 not battlefield determinations. These are determinations
17 three years after the seizure of these people all over the
18 world. So in our view it's not an analogy because it's not a
19 battlefield determination, it's incident to a battlefield
20 capture. And the analogy to a probable cause --
21 THE COURT: Prisoners in Eisentrager weren't tried
22 on a battlefield either. And Quirin, which the Supreme Court
23 upheld, was tried down the street at the Department of
24 Justice. That was not a battlefield. So what's that got to
25 do with anything?

1 MR. OLESKEY: Those were, Your Honor, Military
2 Commission, full trials of admitted enemy aliens seized in the
3 conduct of declared wars. They were not the situation where
4 people have been seized in the present context, not given full
5 Military Commission trials, as Quirin, Yamashita, the
6 Eisentrager prisoners were. These are people, as we all
7 recognize, who have been held for five years without any
8 hearings, except for these tribunals in Guantanamo. Those
9 tribunals, as we pointed out in September, don't involve
10 Counsel, don't involve the chance to confront the evidence,
11 don't involve cross-examination, and don't involve the chance
12 to call any witnesses, other than fellow detainees, whose
13 credibility is as suspect as the detainees whose hearings are
14 being held.
15 The Suspension Clause, in our view, prohibits
16 Congress from reducing habeas rights beneath what existed at
17 common law in 1789, unless the conditions set forth in the
18 Suspension Clause is satisfied. But what you'd be able to
19 review here under the Act would not satisfy what was available
20 in 1789, it would not allow you to hold the kind of hearing
21 that Justice Marshall held in Bollman, where he examined the
22 evidence for several days to determine whether Bollman and
23 Swartout should be released.
24 THE COURT: But you would agree, would you not, that
25 at common law there were limits on who could get such a

1 hearing as you're talking about?

2 MR. OLESKEY: What -- yes, Your Honor. But --

3 THE COURT: So, to adopt your position, would we

4 have to decide that a common law, an alien outside of the

5 sovereignty territory and empire, would get a habeas corpus?

6 MR. OLESKEY: We believe that Rasul has answered

7 that question. The case is cited in Rasul, which are

8 amplified at great length in the amicus --

9 THE COURT: Well, the response to that is they all

10 involve British subjects.

11 MR. OLESKEY: Yes, but the St. Cyr Court and the

12 Rasul Court both pointed to the scope of British common law as

13 throwing forth the ancient roots for 500 years of common law

14 habeas.

15 THE COURT: I understand all that, but the question

16 is who was entitled to that review?

17 MR. OLESKEY: An alien held in a territory over

18 which the sovereign exercised full and complete authority,

19 which the Supreme Court has said in Rasul includes Guantanamo.

20 THE COURT: Let's assume for the moment that the

21 statute that Congress passed channels review to this Court in

22 a way that can be characterized as habeas corpus. Assume that

23 for the moment. Then the Suspension Clause argument falls out

24 of the case, doesn't it?

25 MR. OLESKEY: We only press the Suspension Clause if

1 you find that the statute is ambiguous and not to be read as
2 we say it should be read and only if you find, as your
3 question suggests, that review here would not be an adequate
4 and effective substitute for habeas.
5 THE COURT: No, no, no, that's a different question.
6 Whether it's adequate or in -- the Constitution doesn't say
7 that the Executive is forbidden from modifying habeas corpus.
8 It says suspending it. That means totally stopping any habeas
9 corpus petitions for a period of time, temporarily.
10 MR. OLESKEY: Well, the --
11 THE COURT: But if, in fact, what we have here is a
12 modification of habeas corpus, then the Suspension Clause
13 doesn't come into play. Congress has modified habeas corpus
14 many times. One of the common law features of habeas corpus
15 was produce the body. It's what it means, right?
16 MR. OLESKEY: Yes.
17 THE COURT: You look at 2241 now and there is not
18 requirement that the detainee or the prisoner be produced
19 before the Court. That's a big modification of common law.
20 But there -- nobody argues that that's a violation of the
21 Suspension Clause, because it doesn't suspend habeas corpus,
22 it modifies it.
23 MR. OLESKEY: The Suspension Clause is a fundamental
24 limitation on the part of Congress. It says right in the
25 title to that clause 9, "Limits on Congress." So the question

1 is --

2 THE COURT: Yeah, I said -- I didn't mean that

3 (inaudible).

4 MR. OLESKEY: So the question is can Congress act in

5 such a fashion as not to offend the Suspension Clause. We say

6 that on the government's interpretation, which is essentially

7 that the record in Guantanamo is the record for you to review,

8 yes, there would be such a violation of the Suspension Clause

9 and is accessible by our clients. Let me give you some

10 examples.

11 THE COURT: But before you do, I'm not sure you've

12 answered my question. I said assume that this channels what

13 is in effect a habeas corpus review. It's having an Appellate

14 Court review the legality of the detention and whatever the

15 remedy is, the remedy is. But that's the essence of habeas

16 corpus. You would agree, wouldn't you?

17 MR. OLESKEY: According to what Justice O'Connor

18 said in Hamdi, the essence is a meaningful procedural review -

19 -

20 THE COURT: Of the legality of the --

21 MR. OLESKEY: A meaningful process to review the

22 legality.

23 THE COURT: So, if this is a modification of habeas

24 corpus, the Suspension -- do you think the Suspension Clause

25 still applies, if habeas hasn't been completely suspended?

1 MR. OLESKEY: If the modification doesn't reduce
2 what this Court would do below the minimum threshold set in
3 1789, which is a full inquiry into the grounds for the
4 executive detention, I would agree with you, but if you
5 construe the statute, as the government urges, to reduce what
6 would take place here under the Act to be anything less than
7 the full and meaningful inquiry conducted in 1789 and
8 apparently conducted by Justice Marshall under originally
9 jurisdiction in the Bollin case in 1806, then yes, it would
10 offend the Suspension Clause. And I suggest --
11 THE COURT: Was there any limitation in 1789 on the
12 number of petitions for writs of habeas corpus that a prisoner
13 could file?
14 MR. OLESKEY: I'm not aware of that in the cases
15 we've examined, Your Honor.
16 THE COURT: And now there is. That's a substantial
17 modification. Congress has now three strikes and you're out.
18 MR. OLESKEY: Yes, but we're only pressing one
19 habeas claim here at the moment, the one that my clients filed
20 in 2004 and others filed --
21 THE COURT: I just don't know where you get the idea
22 that a substantial modification or a modification implicates
23 the Suspension Clause. That's my question.
24 MR. OLESKEY: I say again the question for this
25 Court will be whether what you're prepared to say, you being

1 able to do under the Act in making this review is consistent
2 with the scope of the inquiry that could made as of 1789. The
3 government, obviously, says you can't. The government,
4 obviously, says that information derived from coercion would
5 be --
6 THE COURT: I'm going to try one more time. I'm
7 asking where you -- what authority do you have for the
8 proposition that if Congress modifies the scope or the
9 procedures to be used in habeas corpus that that somehow
10 implicates the Suspension Clause? Modifies, therefore, it's
11 suspended.
12 MR. OLESKEY: It depends on what the modification
13 is, Your Honor. That's my point. If the modification is so
14 substantial as to reduce the rights below the historical core
15 called (indiscernible) Rasul and St. Cyr, then it does
16 implicate the Suspension Clause. If it doesn't, it wouldn't.
17 And you'll determine that here.
18 I just want to make two points about that. First,
19 evidence procured by coercion, as Judge Green found, was used
20 at Guantanamo. It's not apparent from the face of the records
21 you'd be examining here. It is part of the determination. It
22 would allow the government to say that some evidence exists
23 classified before the tribunals unknown to you to be from
24 coercion. Coercion -- testimony from coercion for 500 years
25 has been regarded as degrading and unreliable for the

1 government to say it rises only to the level of hearsay is an
2 extraordinary proposition.
3 Secondly, with respect to factual inquiry, you can't
4 get behind the face of those CSIT proceedings. They call in
5 those detainees, they ask them if they're al Quaeda or
6 associated or affiliated with al Quaeda, they say no, the
7 government Military Commission says we have classified
8 evidence that you can't see that says you are, what do you say
9 to that?
10 Our client, Ait Idir, as Judge Green found, said, "I
11 can't say anything other than to say it's not true, unless I
12 have people and evidence that's not here." The Commission
13 said, "We can't help you." Our client, Saber Lahmar, said in
14 Bosnia, "I had a hearing. There was a 90-day investigation.
15 They found that I was exonerated. It's in the record in
16 Bosnia. Get them and you'll see I shouldn't be here." The
17 tribunal recessed.
18 They asked the State Department to find the records.
19 The State Department said they couldn't find the records. I
20 referenced the records in the petition. I attached the Human
21 Rights Court decision that said that these things happened,
22 that they had been exonerated of the charges that sent them to
23 Guantanamo. An exoneration that would bear on their release.
24 You won't find that evidence in the record from Guantanamo
25 because he wasn't allowed to produce it. Only in a habeas

1 hearing would I be allowed to produce that evidence and show
2 that that man has already been exonerated by prior proceedings
3 conducted by a government which is a friendly government in
4 the country where he was seized.
5 THE COURT: Seeing no further questions, you time
6 has ended. Thank you, Counsel.
7 Mr. Katsas, you have five minutes, and then I will
8 arbitrarily and capriciously give Mr. Wilner two minutes for
9 no particular reason. Go ahead.
10 REBUTTAL ARGUMENT OF GREGORY G. KATSAS, ESQ.
11 ON BEHALF OF THE APPELLEES
12 MR. KATSAS: On the phrase "take effect
13 immediately," which governs the habeas ouster, that is a term
14 of art. What Landgraf says is that that phrase is not
15 sufficient to extend a statute retroactively to pre-enactment
16 primary conduct, but Landgraf also reaffirms a different line
17 of cases, including Bruner governing jurisdictional statutes.
18 THE COURT: What did Hughes say about that? Hughes
19 does use the quotation from I believe the one from Justice
20 Scalia as well as the majority and does say that if -- under
21 jurisdictional wording it actually affects substantive rights
22 of the parties and then the usual rules of retroactivity
23 apply, is that not --
24 MR. KATSAS: In a circumstance like Hughes where the
25 statute created new jurisdiction and eliminated a substantive

1 defense and gave relators a new cause of action, with respect
2 to ousting statutes, pure jurisdictional ouster, the term of
3 our understanding reflected in cases like Bruner is that a
4 Court needs jurisdiction on day two no less than on day one,
5 and if a statute takes -- if a jurisdictional ouster takes
6 effect immediately and doesn't reserve pending cases, the
7 Court has no jurisdiction and must dismiss --
8 THE COURT: But the argument there is those cases
9 are where whoever it is, the petitioner or the defendant,
10 still gets to file the same cause of action. And the claim
11 here is that that is not happening. In other words an (e)(2)
12 changes the nature of the habeas review.
13 MR. KATSAS: (e)(2) does, Judge Rogers, but --
14 THE COURT: But you are arguing we have to read the
15 two together. That's your whole case.
16 MR. KATSAS: I think we win even if you artificially
17 read (e)(1) and (e)(2) independently. But it's much --
18 THE COURT: Not based on the cases you've cited.
19 The cases are just, you know, saying, all right, we're going
20 to put it in from the federal court to the local court. We're
21 going to put it from the district court to an administrative
22 agency, but the nature of the underlying inquiry is still
23 available. And the cause of action is still available.
24 MR. KATSAS: Well, if you look at this purely in
25 terms of (e)(1), we have Hallowell and LaFontant, which say

1 that the elimination of any judicial review of an
2 administrative adjudication simply changes the tribunal. But
3 I want to emphasize that's not what we have and I think our
4 principal and strongest and best argument is that what the
5 statute does in its provisions together is it replaces habeas
6 corpus with an exclusive alternative scheme.
7 THE COURT: Can we talk about that scheme? You've
8 heard what Counsel just said. Is your reading of (e)(2) such
9 that this Court would be in a position to say, for example,
10 that the Bosnian government's investigation should have been a
11 part of the record and that absent that the CSRT, in my
12 hypothetical, did not have a sufficient factual basis to make
13 a determination?
14 MR. KATSAS: I think the petitioner -- a petitioner
15 could raise that kind of claim as a violation of the CSRT
16 procedures and seek review in this Court on the ground that
17 the tribunal failed to follow its own procedures.
18 THE COURT: No, but you know and I know that those
19 procedures say something like, you know, if it's convenient.
20 MR. KATSAS: If it's?
21 THE COURT: Convenient --
22 MR. KATSAS: Um-hmm.
23 THE COURT: -- the evidence shall be produced.
24 MR. KATSAS: Um-hmm.
25 THE COURT: Can we second guess that? Convenience?

1 In other words, I'm trying to understand -- when you first
2 stood up, I thought you were taking a slightly different tact,
3 and I just -- then the questioning suggested, when we were
4 talking with petitioners' Counsel, I just want to see how far
5 you either agree or disagree with the suggestion that this is
6 simply, this statute, the DTA, is simply channeling the habeas
7 review to this Court and that, basically, the type of inquiry
8 that was available in 1789 in habeas, and maybe even after
9 1789, remains available.
10 MR. KATSAS: Well, what the statute -- whether
11 described as channeling or alternative, what the statute does
12 is it preserves review of all legal claims challenging the
13 lawfulness of custody. And in addition, it creates this other
14 subset of claims for review of consistency with the
15 procedures.
16 THE COURT: All right, but on the former, in
17 reserving review of all legal claims, is the petitioner, or
18 the moving party, able to produce factual evidence?
19 MR. KATSAS: No.
20 THE COURT: No. So it's different than a normal
21 habeas. I mean, there isn't the proffer, the return, the
22 traverse. We're not going to have that.
23 MR. KATSAS: It's different from the modern habeas
24 practice in the United States District Courts under 28 USC
25 2241.

1 THE COURT: Well, I'm back in Mr. Bollman's
2 situation.
3 MR. KATSAS: Well, if we -- but if go back to
4 Bollman, Judge Rogers, Chief Justice Marshall was very clear
5 on this point. He described, with respect to fact questions -
6 -
7 THE COURT: He held five days of hearings.
8 MR. KATSAS: He described habeas as appellate in
9 nature and the hearings with respect were sufficiency hearings
10 based on the record introduced, created in the lower tribunal,
11 which is precisely what it is to be appellate in nature.
12 THE COURT: But my hypothetical in the beginning was
13 consistent with that. It's simply that the tribunal failed to
14 consider evidence that would have shown this petitioner
15 arguably was not an enemy combatant. And so failing to have -
16 - not having reviewed that evidence, we would reverse. I'm
17 just asking. Is that kind of review available?
18 MR. KATSAS: You would reverse only if you conclude
19 that the failure to consider that evidence is either
20 inconsistent with the Constitution and laws of the United
21 States or alternatively with the CSRT procedures.
22 THE COURT: And the procedures say that the detainee
23 shall have a -- is it -- a right to call witnesses, if
24 reasonably available.
25 MR. KATSAS: Right.

1 THE COURT: So if Mr. Oleskey is correct, the
2 question would be whether this -- the evidence from this
3 tribunal in Bosnia was reasonably available. And if we
4 determine that it was reasonably available then we would set
5 aside the tribunal's ruling.
6 MR. KATSAS: You could do that. It's hard for me to
7 imagine that that would be the right result, but you could
8 make that inquiry.
9 THE COURT: We would have -- that's part of their
10 procedure.
11 MR. KATSAS: Exactly.
12 THE COURT: Yeah.
13 MR. KATSAS: On the question of CSRTs and the
14 suggestion that is statute is fundamentally about changing
15 CSRT procedures, the new procedures, what the statute does is
16 it requires the Secretary of Defense to submit new procedures
17 that largely -- it largely leaves the details of that
18 requirement to the Secretary. It imposes modest requirements
19 on the new procedures, but they are expressly prospective in
20 marked contrast to the judicial review provisions, which
21 expressly apply to pending cases.
22 THE COURT: Okay, now I have noticed your light was
23 on for quite some time. Unless my colleagues wish to subject
24 with you further, we will terminate your tenure at the podium.
25 And as I said, I'm going to give a couple of minutes to Mr.

1 Wilner.

2 MR. KATSAS: Thank you very much.

3 THE COURT: Nobody is quite sure how you combine two

4 cases in which one set is petitioner and one is respondent and

5 the other and vice versa. We're going to go with Mr. Wilner I

6 think a couple more minutes here.

7 MR. KATSAS: Thank you.

8 REBUTTAL ARGUMENT OF THOMAS WILNER, ESQ.

9 ON BEHALF OF THE APPELLANTS

10 MR. WILNER: Thank you very much, Your Honor, I

11 appreciate it.

12 I want to address for a second Judge Randolph's

13 questions about modification of habeas. You've got to

14 remember that the government isn't saying that habeas is

15 modified here. They are saying that the statute prevents any

16 court judge or justice from considering a habeas claim. Now,

17 assuming that the transfer to the Court of Appeals was

18 considered a modification of habeas, the issue of adequacy

19 that Mr. Oleskey was talking about does come into play, Your

20 Honor. Because --

21 THE COURT: It's a habeas statute, isn't it?

22 MR. WILNER: I'm sorry?

23 THE COURT: It's incorporated by reference in this

24 habeas statute.

25 MR. WILNER: Yes, but they say --

1 THE COURT: But you say it's not habeas.

2 MR. WILNER: Yes, but it specifically says --

3 consider -- no one can consider it a writ of habeas corpus, so

4 it's an abolishment of the writ.

5 THE COURT: Except as provided in Section 1005.

6 MR. WILNER: Yes. Okay.

7 THE COURT: Right?

8 MR. WILNER: Yes.

9 THE COURT: Except that -- doesn't that mean -- if

10 you parse those words, you can't consider writ of habeas

11 corpus, except as provided in --

12 MR. WILNER: And I think the "except as provided"

13 that they said it shall take effect on the date of enactment.

14 But, Your Honor, even conceding that, the issue still is

15 important because, as the Court held in Swain v. Pressley, you

16 can substitute or modify, so long as what you come up with at

17 the end is neither an inadequate nor ineffective to test the

18 legality of the person's detention. That's why I said so long

19 as what you end up with is adequate to test the legality of

20 the detention. You can modify lots of ways if you don't hurt

21 that basic right.

22 I just wanted to point out in the habeas --

23 THE COURT: I want to go back to the language again,

24 Mr. Wilner. I just pulled it out. It says, "Except as

25 provided in Section 1005," which gives us jurisdiction, "no

1 Court Justice or Judge shall have jurisdiction to hear or
2 consider an application for a writ of habeas corpus." Now
3 that -- I think common English would suggest that the "except
4 as provided" means that that's part of the writ of habeas
5 corpus, the statute we're arguing about here, which is why I
6 asked the question about modification.
7 MR. WILNER: Your Honor --
8 THE COURT: I grant you, the government doesn't
9 argue this, but we have an obligation to read the statute.
10 MR. WILNER: You do, indeed, Your Honor, and I think
11 you have a strong argument on that one, but let me just say
12 still the issue of modification is the modification can't go
13 and reduce, as it said, "it can be neither inadequate nor
14 ineffective to test the legality of a person's detention."
15 That's the issue.
16 THE COURT: But what our whole discussion here has
17 been about in part, has it not, as to what (e)(2) really means
18 in terms of the scope of review.
19 MR. WILNER: Yes.
20 THE COURT: It may need a particular case before
21 you'll have the answer to that.
22 MR. WILNER: Well --
23 THE COURT: In other words, can the statute only be
24 read for what you describe as an adequate habeas inquiry?
25 MR. WILNER: Your Honor, as I started out, I said if

1 the government were to concede --

2 THE COURT: I know.

3 MR. WILNER: -- that you really can -- Court of

4 Appeals can test the efficiency of the factual evidence in a

5 way that's adequate, and we can argue about that, and can

6 order release if they find it inadequate. That would be

7 something, but the government doesn't come anywhere close to

8 conceding that. They say if we don't have constitutional

9 rights we are out of Court and that you can't look at the

10 facts and you can only look --

11 THE COURT: Well, if they conceded it, we wouldn't

12 have to accept it anyway.

13 MR. WILNER: I'm sorry?

14 THE COURT: Even if the government conceded that, we

15 wouldn't have to accept that.

16 MR. WILNER: No. That's right. Unless you read the

17 statute to give an adequate substitute for habeas that would

18 allow you to do an inquiry into the facts and order release,

19 you do have Suspension Clause problems. And as I said, as

20 Justice Scalia pointed out, and I had the quote and now have

21 lost it again, but it's 288. It's at a --

22 THE COURT: [We're close to deferring] this Court

23 statute which merely addressed which Court shall entertain a

24 case as opposed to whether the case can be brought at all or

25 something.

1 MR. WILNER: Yes, sir. But, Your Honor, he also --
2 THE COURT: I wanted to ask you about -- I'm sorry,
3 go ahead.
4 MR. WILNER: He also talked about the arguments that
5 government take here that based on other sections of the
6 statute you should interpret this repeal as being retroactive
7 or affecting pending cases. And he said these were fine and
8 "arguments are no substitute for clear statements. Shall take
9 effect upon an enactment, meaning shall have prospective upon
10 enactment, and that presumption is too strong to be overcome
11 by any inference drawn from language in other sections of the
12 statute."
13 THE COURT: I want to go back to Hughes before you
14 sit down.
15 MR. WILNER: Yes, sir.
16 THE COURT: Because I take it you think that's your
17 strongest case on the question of jurisdiction?
18 MR. WILNER: On the jurisdictional issue?
19 THE COURT: Retroactivity, yeah.
20 MR. WILNER: On the fact that it applies to even a
21 jurisdictional statute, yes, Your Honor.
22 THE COURT: Right. Justice Thomas said, "Statutes
23 merely addressing which Court shall have jurisdiction," and we
24 can pause there, it's District Court or Court of Appeals, and
25 this statute addresses which Court is going to have

1 jurisdiction, "Statutes which merely address which Court shall
2 have jurisdiction to entertain a particular cause of action
3 can fairly be said merely to regulate the secondary conduct of
4 litigation, not the underlying primary conduct of the
5 parties." Which is how he explains why statutes changing
6 jurisdiction apply across the board to pending cases. And the
7 relevant conduct in Hughes was not the litigation conduct, it
8 was the disclosure to the -- Hughes' disclosure to the
9 government or his submission of an allegedly false claim.
10 MR. WILNER: Your Honor, we are agreeing. We are
11 agreeing. I'm not arguing with you. District Court of
12 Appeals -- if you have simply shifted a habeas case from the
13 District Court to this Court, and you could do the same thing
14 as the District Court, then there is no subsequent, then
15 you're just shifting forums. I agree. That's not the way the
16 government reads it. I'm skeptic --
17 THE COURT: We don't know what the proper scope of
18 review of the District Court was.
19 MR. WILNER: Well, no, Your Honor.
20 THE COURT: That's an issue on the merits.
21 MR. WILNER: No. But, clearly, and this is what the
22 argument was about last time, it's not confined to whether
23 there is a violation in the Constitution, it's whether there
24 is lawful authority to hurt somebody, to hold somebody. It's
25 got to be an inquiry to see whether you've got an innocent

1 shepherd or whether a person is really O'Hara rather than
2 Hara. It's got to have that inquiry. Thank you, Your Honor.
3 THE COURT: Thank you, Counsel. I think we're going
4 to let that be the end of the proceedings for the day. Give
5 us recess.
6 (Recess.)
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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Debra Blum 03/29/06

DEPOSITION SERVICES, INC.