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2 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3 -----X  
3

4 JOSE PADILLA, DONNA R. NEWMAN,  
4 AS NEXT FRIEND OF JOSE  
5 PADILLA,  
5

6 Petitioner-Appellee/  
6 Cross-Appellant,  
7

7 v. New York, N.Y.  
8 03-2235 (L)  
8 03-2438 (con)

9 DONALD RUMSFELD,  
9  
10 Respondent-Appellant/  
10 Cross-Appellee.  
11

11 -----X

12 November 17, 2003  
13 10:00 a.m.

14 Before:

15 HON. ROSEMARY S. POOLER, Chief Judge  
15 HON. BARRINGTON D. PARKER, JR.  
16 HON. RICHARD C. WESLEY  
16  
17  
17

18 APPEARANCES

18  
19 DONNA R. NEWMAN, ESQ.  
19 ANDREW G. PATEL, ESQ.  
20 Attorneys for  
20 Petitioner-Appellee/Cross Appellant  
21

21 JENNY S. MARTINEZ  
22 Professor - Stanford Law School  
22 Amicus Curiae in support of  
23 Petitioner-Appellee/Cross Appellant  
23

24 PAUL D. CLEMENT,  
24 Deputy Solicitor General for  
25 Respondent-Appellant/Cross Appellee  
25

1 3BHLPADA

2 (10:00 a.m.)

3 JUDGE POOLER: Good morning. Please  
4 be seated. We have only one case on our  
5 calendar this morning. Padilla and Newman, as  
6 it's styled, versus Rumsfeld.

7 This panel has issued two orders on  
8 the course of argument, which I assume all  
9 parties have received. So we'll begin with the  
10 first set of issues, and then we'll take  
11 appearances and hear who's arguing on those  
12 issues.

13 The first set of issues, to which  
14 we've allotted 10 minutes per side -- and you  
15 will let me know if you have reserve rebuttal.  
16 And on those issues, since the petitioner  
17 prevailed, the government will go first. And I  
18 see the respondent reserved two minutes for  
19 rebuttal. And those issues are whether  
20 Ms. Newman can bring this habeas proceeding as  
21 Jose Padilla's next friend, not certified, I  
22 believe, but still before us; whether Secretary  
23 of Defense Rumsfeld is a proper respondent; and  
24 if so, whether the District Court had personal  
25 jurisdiction over Rumsfeld.

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(212) 805-0300

1 3BHLPADADA

2 We'll begin with Mr. Clement.

3 MR. CLEMENT: Thank you, your Honors,  
4 and may it please the Court:

5 This case certainly raises momentous  
6 questions of the proper separation of powers  
7 when the nation comes under attack. But the  
8 unanswered questions about the separation of  
9 powers and what ability the Executive has to  
10 respond when the nation comes under attack as it  
11 did on September 11th should be resolved in the  
12 proper forum.

13 Mr. Padilla is being held in  
14 Charleston, South Carolina, and both common  
15 sense and ample case law suggests that this  
16 petition, too, should have been filed in  
17 Charleston, South Carolina. The case law in the  
18 specific context where somebody is in prison and  
19 challenges their confinement, that very  
20 confinement, the law is clear that the proper  
21 respondent in such a habeas petition is the  
22 prisoner's immediate custodian, and that would  
23 be Commander Marr, who is the commandant of the  
24 facility in South Carolina.

25 Now, to be sure, there is case law

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(212) 805-0300

1 3BHLPADA

2 that adopts a more flexible approach in unusual  
3 situations or in situations that deviate from  
4 the traditional habeas context.

5 JUDGE PARKER: Why isn't this as  
6 unusual as it gets? Here we have a situation  
7 where an American citizen was picked up on a  
8 material witness warrant, brought into this  
9 district; in the course of litigating the  
10 propriety of his detention, two delegates from  
11 the Department of Defense showed up and took him  
12 to Charleston. I -- as far as I can see, that  
13 fact pattern is unprecedented.

14 MR. CLEMENT: Your Honor, this  
15 certainly is an unusual case. I would simply  
16 state, though, it is not unusual for relevant  
17 purposes under the habeas action, because this  
18 is a classic case where a petitioner challenges  
19 the fact of their current confinement. And  
20 although there are unusual --

21 JUDGE WESLEY: In the normal  
22 circumstance, though, you have someone who's  
23 been convicted of a crime and they have held by  
24 a warden in a particular area and this court --  
25 any many courts -- have recognized that the

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1 3BHLPADDA

2 location of the habeas proceeding is more  
3 relevant to particularly the criminal proceeding  
4 from which he is held, or, in the instance of,  
5 say, looking for release, where his military  
6 superiors were. So why wouldn't Secretary  
7 Rumsfeld be the logical person to sue? He's the  
8 one that's certified to the President that  
9 Mr. Padilla is an enemy combatant. Isn't he a  
10 logical person to sue, whose determination as  
11 what holds Mr. Padilla --

12 MR. CLEMENT: With respect to your  
13 Honor, might be a logical person to sue in a  
14 habeas petition, but the law on habeas is clear,  
15 and now 2255 and the divisions implement that  
16 have a specific statutory exemption for federal  
17 habeas when it comes to the sentencing court.

18 JUDGE WESLEY: If Secretary Rumsfeld  
19 were to change his mind and determine this would  
20 be no longer a representative enemy combatant,  
21 or the policy reasons behind his detention were  
22 no longer present, would he not be the logical  
23 person to order Mr. Padilla's release?

24 MR. CLEMENT: Certainly, but in the  
25 other situation, the attorney general would be

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(212) 805-0300

1 3BHLPADA

2 the logical person to order the release of any  
3 individual.

4 JUDGE WESLEY: I didn't mean that  
5 whole process. Here you have the individual who  
6 made, in conjunction with the President of the  
7 United States, made the determination to hold  
8 Mr. Padilla uncharged, unaccused of anything  
9 other than his complaisance with regard to  
10 al Qaeda activities. So isn't Secretary  
11 Rumsfeld the logical person to sue?

12 MR. CLEMENT: Again, with respect, no.  
13 The military -- this Court recognized that the  
14 parole board was the person that ordered the  
15 release of the prisoner, and yet this Court held  
16 that it's not the parole board who's the --

17 JUDGE POOLER: But the parole board  
18 wasn't in the same chain of command as the  
19 warden. Could Commandant Marr produce  
20 Mr. Padilla before this Court if Secretary  
21 Rumsfeld was opposed to that production? That's  
22 the question.

23 MR. CLEMENT: With respect, I'm not  
24 sure it is, because if that were the --

25 JUDGE PARKER: That was Judge Pooler's

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1 3BHLPADA

2 question.

3 MR. CLEMENT: I realize that, but if  
4 that were the rule, then every military habeas  
5 would have to be brought against the Secretary  
6 of Defense because there is a chain of command.

7 JUDGE POOLER: It's not in every  
8 military habeas where the Secretary of Defense  
9 has taken a personal role in procuring the  
10 movements of the petitioner from one district to  
11 another, and has been personally involved in the  
12 decision-making. Doesn't that make it  
13 different?

14 MR. CLEMENT: With respect, I don't  
15 think that makes a difference for habeas.  
16 purposes. This Court, in its Hamdi decision  
17 said, the military cases say, when somebody is  
18 in the chain of command if their immediate  
19 custodian is available for suit then you don't  
20 move up the chain of command to the top.

21 JUDGE POOLER: But the parole board  
22 wasn't even in the same system as the warden let  
23 alone the same chain of command. They're  
24 operating separately.

25 MR. CLEMENT: If I could direct this

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1 3BHLPADA

2 court's attention to the way that this court has  
3 treated the difference between unattached  
4 reserve itself who are not directly in the chain  
5 of command and those that are in active service  
6 in their units, this Court had two cases in the  
7 early 70's or late 60's, one of which is Orlando  
8 against Taylor, which is cited in the briefs,  
9 and that unattached reservists -- just like  
10 Strait against Taylor.

11 This Court also had a decision which  
12 unfortunately we did not cite in the briefs but  
13 I'd like to cite it for you, and that is United  
14 States ex rel. Rudick against the United States,  
15 412 F2d 16, and in that case, this Court held  
16 that it was not proper to sue the Secretary of  
17 Defense in the Southern District of New York,  
18 but that rather the proper person to sue was  
19 that individual's commanding officer in  
20 California.

21 And in Orlando, this Court  
22 distinguished that prior precedent of this Court  
23 and said, Well, it's a different situation when  
24 you have unattached reservists because there  
25 isn't any sort of normal chain of command, and

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2 in a sense, you don't have custody in the actual  
3 physical custody sense. But they distinguished  
4 the prior and said, No, in the context of  
5 somebody actually attached to a unit, there you  
6 do have the kind of custody that's relevant for  
7 the military, and you cannot go up to the top of  
8 the chain of command just because that's more  
9 convenient.

10 JUDGE WESLEY: Are you going to argue  
11 the jurisdictional sweep of the Court, whether  
12 Secretary Rumsfeld is within the -- present in  
13 the Southern District? Is that part of your  
14 argument?

15 MR. CLEMENT: It is part of my  
16 argument, your Honor, I think that the Court,  
17 too --

18 JUDGE WESLEY: I don't want to cut  
19 across anything else you wanted to say with  
20 regard to proper party, but I do have some  
21 questions about that.

22 JUDGE PARKER: I'm still curious.  
23 Suppose Secretary Rumsfeld orders Commander Marr  
24 not to produce Mr. Padilla? Where are we at  
25 that point?

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(212) 805-0300

1 3BHLPADA

2 MR. CLEMENT: Well, your Honor, I  
3 don't know, but --

4 JUDGE PARKER: What options does she  
5 have?

6 MR. CLEMENT: I think she would have  
7 the same options in this case as she would in  
8 any other case where somebody is being detained  
9 by the military, and I think there is no  
10 indication that anybody in the military chain of  
11 command is going to disobey an order of this  
12 Court or the Southern District, and I think the  
13 answer to that question is the same as in any  
14 other habeas petition, which is we can imagine a  
15 situation where hypothetically there would be a  
16 problem with having the immediate custodian as  
17 opposed to the person at the top of the chain  
18 because that immediate custodian is in that  
19 chain of command under the person at the top of  
20 the chain and you can imagine the person at the  
21 top of the chain instructing the person on the  
22 bottom not to obey a court order. But, I mean,  
23 as a realistic matter, that's not going to  
24 happen. And as a practical matter, if that were  
25 a reason to skip over the immediate custodian,

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(212) 805-0300

1 3BHLPADADA

2 that would be a reason in every military habeas  
3 to do so.

4 I notice my time is out.

5 JUDGE POOLER: Why don't you just turn  
6 to the other issue?

7 JUDGE WESLEY: Let me ask you a couple  
8 of questions. I want to understand if I have my  
9 facts right. Padilla comes in to Chicago on a  
10 flight from overseas. He is seized on a  
11 material witness order signed by Mukasey in the  
12 Southern District with regard to a grand jury  
13 sitting investigating the World Trade Center  
14 attack of September 11th, 2001. Correct?

15 MR. CLEMENT: Right.

16 JUDGE WESLEY: Early May of 2002.

17 MR. CLEMENT: Exactly right, your  
18 Honor.

19 JUDGE WESLEY: He's held in Chicago  
20 for a few days -- and the material witness  
21 warrant was filed upon an affidavit by an FBI  
22 agent.

23 MR. CLEMENT: I believe that's right.

24 JUDGE WESLEY: He's then transported  
25 by FBI agents, who are employees of the federal

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(212) 805-0300

1 3BHLPADA

2 government but serve under the Attorney  
3 General's direction.

4 MR. CLEMENT: That's right.

5 JUDGE WESLEY: And he comes to  
6 New York and he's held in the Metropolitan  
7 Correctional Center.

8 MR. CLEMENT: I believe that's right.

9 JUDGE WESLEY: Is that a Department of  
10 Justice facility also?

11 MR. CLEMENT: I think it either is, or  
12 by contract is.

13 JUDGE WESLEY: Pursuant to a material  
14 witness warrant. He's then held for a number of  
15 days here and Miss Newman is appointed.

16 MR. CLEMENT: That's correct.

17 JUDGE WESLEY: He confers with Miss  
18 Newman, still under the material witness  
19 warrant.

20 MR. CLEMENT: Correct.

21 JUDGE WESLEY: In early June, the  
22 Department of Justice informs Judge Mukasey that  
23 it wants the material witness warrant withdrawn.

24 MR. CLEMENT: That's correct.

25 JUDGE WESLEY: And sometime that day

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1 3BHLPADADA

2 or the -- at least before Padilla leaves  
3 New York.

4 MR. CLEMENT: That's correct.

5 JUDGE WESLEY: At or about the time  
6 the President of the United States signs an  
7 order concluding he's an enemy combatant.

8 MR. CLEMENT: That's correct.

9 JUDGE WESLEY: What acts of Secretary  
10 Rumsfeld other than the removal of Padilla did a  
11 Department of Defense employee travel from South  
12 Carolina to New York and pick up Mr. Padilla and  
13 remove him to South Carolina?

14 MR. CLEMENT: I believe they did, your  
15 Honor. The exact facts of this were not  
16 explored fully below. My understanding is that  
17 it was -- it was the deFense Department's  
18 transport service that picked up Mr. Padilla.  
19 He may have been in marshal custody. I'm  
20 actually not positive. It appears the actual  
21 transfer of custody took place in South Carolina  
22 by -- I believe the transportation arrangements  
23 were made by the Defense Department.

24 JUDGE WESLEY: So at most, a  
25 Department of Defense employee of -- under the

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(212) 805-0300

1 3BHLPADA

2 direction of Secretary Rumsfeld came to New York  
3 and removed Mr. Padilla?

4 MR. CLEMENT: That's correct.

5 JUDGE POOLER: So your argument is not  
6 that the Secretary of Defense didn't perform  
7 acts that would bring him under the long-arm  
8 statute. You just said the long-arm statute  
9 doesn't apply to habeas.

10 MR. CLEMENT: That's correct. Our --  
11 with respect to the habeas statute, in light of  
12 the text of the habeas statute, that the  
13 relevant concept is territorial jurisdiction,  
14 whether or not the individual can be served in  
15 the territory of the Southern District.

16 JUDGE WESLEY: If Secretary Rumsfeld  
17 were present in New York, like the Court  
18 analyzed in other cases, then his presence would  
19 serve as a solid jurisdictional basis, would it  
20 not?

21 MR. CLEMENT: It would, but --

22 JUDGE WESLEY: The -- "present" in the  
23 constitutional sense.

24 MR. CLEMENT: Yes, in the  
25 constitutional sense. But, your Honor, with the

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(212) 805-0300

1 3BHLPADA

2 caveat that in the Rudick case, this Court, you  
3 know, looked at it as a territorial jurisdiction  
4 matter, and I think the difference is  
5 significant because I think in the Orlando and  
6 Strait class of cases where what you're talking  
7 about is sort of hypothetical custody, and  
8 you're already relaxing the normal rules of  
9 habeas, it makes sense in those cases to have a  
10 more flexible standard about services of  
11 process, because the whole theory of those cases  
12 is that the Army is the custodian of the  
13 individual in the Southern District of New York,  
14 and so it would be inconsistent with the theory  
15 that gets you past the first issue to not have a  
16 more relaxed standard.

17 But I think in Rudick and Schlanger  
18 and Semitz, which is the Supreme Court sort of  
19 analogue -- in those cases where you're talking  
20 about actual custody, I think in those cases  
21 there's no point in deviating from the habeas  
22 statute and you really look to the territory  
23 jurisdiction of the District Court because  
24 that's how you give meaning to the statutory  
25 direction that the habeas petition enacts in

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(212) 805-0300

1 3BHLPADA

2 respect to the Court's jurisdiction.

3 JUDGE WESLEY: Is it your position  
4 that if Secretary Rumsfeld is an appropriate  
5 party, this action should be transferred to the  
6 D.C. circuit as opposed to South Carolina?

7 MR. CLEMENT: I think that --

8 JUDGE WESLEY: Indeed, that's where he  
9 is actually present, is he not?

10 MR. CLEMENT: Actually, I think it's  
11 the Eastern District of Virginia, and the Monk  
12 case has a footnote that addresses that very  
13 question, but certainly either the District of  
14 Columbia or the Eastern District of Virginia  
15 would be a more appropriate form.

16 But our position is Commandant Marr is  
17 the proper respondent and the case should be  
18 transferred to South Carolina.

19 JUDGE PARKER: I take it from the  
20 government's written presentation that Padilla  
21 ostensibly is being held so that he can be  
22 questioned for intelligence-related materials.

23 MR. CLEMENT: That's certainly one of  
24 the reasons for his detention, your Honor.

25 JUDGE PARKER: Right. Well, suppose

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(212) 805-0300

1 3BHLPADA

2 the government determined that the discussions  
3 with Mr. Padilla would go more expeditiously or  
4 would be more fruitful in, say, Guantanamo, and  
5 Mr. Rumsfeld decided to move him to Guantanamo?  
6 Would he be reachable by writ there?

7 MR. CLEMENT: Certainly in the case  
8 where the writ had already been filed while  
9 Mr. Padilla was held in South Carolina, we think  
10 that that Court would retain jurisdiction.

11 JUDGE PARKER: On the facts here,  
12 let's says that we adjourned here and you get  
13 back to your office and you see a note on your  
14 desk that Mr. Padilla has been taken to  
15 Guantanamo.

16 MR. CLEMENT: Then I would think, your  
17 Honor, if this Court were to transfer the case  
18 to South Carolina as opposed to dismiss the  
19 case, then I think that the rule of Endo is once  
20 a petition is properly filed where somebody is  
21 within the territorial jurisdiction of a  
22 specific court, that court does not lose  
23 jurisdiction over the petition just because the  
24 individual's moved to a different district or is  
25 moved to Guantanamo.

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(212) 805-0300

1 3BHLPADA

2 But the key point is that only applies  
3 once the petition has been filed.

4 JUDGE PARKER: Which is not the case  
5 here.

6 MR. CLEMENT: Which is not the case  
7 here.

8 JUDGE PARKER: But then if you get  
9 back to your office and you find he's gone to  
10 Guantanamo, he's history.

11 MR. CLEMENT: I want to be specific --

12 JUDGE PARKER: Is that right?

13 MR. CLEMENT: If this Court were to  
14 dismiss the petition so that at a moment in time  
15 there was no petition pending and then at that  
16 point, this individual was moved to  
17 Guantanamo --

18 JUDGE PARKER: This U.S. citizen.

19 MR. CLEMENT: This U.S. citizen was  
20 moved to Guantanamo -- which, by the way, isn't  
21 what they would do, but I'm answering a  
22 hypothetical. I say that because if that were  
23 to happen, then in that instance, a new habeas  
24 petition would properly be filed, in our view,  
25 in the Eastern District of Virginia or, as the

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(212) 805-0300

1 3BHLPADADA

2 colloquy suggests, perhaps in the District of  
3 Columbia.

4 JUDGE PARKER: But would that reach a  
5 U.S. citizen detained in Guantanamo?

6 MR. CLEMENT: Absolutely. Our  
7 position is if it's a U.S. citizen, wherever  
8 they are held there will be habeas jurisdiction.

9 JUDGE POOLER: Why wasn't the motion  
10 to quash the material witness subpoena, which is  
11 what started this legal action, why wouldn't  
12 that qualify as a previous action? After all,  
13 there was no need to file a habeas until the  
14 petitioner was spirited out of this district.

15 MR. CLEMENT: Your Honor, the law on  
16 that is quite clear that it's the finding --  
17 filing of the habeas petition, not any other  
18 filing, not any preliminary proceedings, that is  
19 the relevant points for judging whether or not  
20 the petition is filed and whether or not the  
21 rule of Endo would apply. And I think there's a  
22 Seventh Circuit case the citation of which  
23 escapes me for the moment, but there's a  
24 citation that makes it clear close doesn't count  
25 in this context. It's a matter of whether or

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(212) 805-0300

1 3BHLPADA

2 not the movement took place after the petition  
3 and the habeas petition was filed.

4 JUDGE POOLER: I was just going to  
5 move on.

6 JUDGE WESLEY: Well, at the time of  
7 the material witness proceedings, he was held  
8 pursuant to the act of the Attorney General.

9 MR. CLEMENT: That's right. Not the  
10 Secretary of Defense.

11 JUDGE WESLEY: Where is Mobbs located?

12 MR. CLEMENT: Mr. Mobbs is located in  
13 the Pentagon.

14 JUDGE WESLEY: And Jacoby, where is  
15 he?

16 MR. CLEMENT: The Pentagon as well.

17 JUDGE WESLEY: They were not in  
18 New York?

19 MR. CLEMENT: No.

20 JUDGE WESLEY: Assuming we affirm  
21 Judge Mukasey's position, set it back for a  
22 hearing, where would all the witnesses come  
23 from?

24 MR. CLEMENT: That begs a lot of  
25 questions.

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(212) 805-0300

1 3BHLPADA

2 JUDGE WESLEY: Talked about  
3 convenience to the parties. The only person  
4 here is Ms. Newman, is she not?

5 MR. CLEMENT: Under our view, there  
6 would not be a lot of witnesses. So it depends  
7 a little bit on how this Court envisions the  
8 proceedings taking place, but certainly Mobbs,  
9 certainly.

10 JUDGE POOLER: Actually, the  
11 government thinks no witnesses are necessary.

12 MR. CLEMENT: That's right. We do  
13 think this can be decided on the declaration, so  
14 it's a hard question to answer.

15 JUDGE PARKER: So affirmance is  
16 irrelevant.

17 JUDGE WESLEY: Is what I asked.

18 MR. CLEMENT: I suppose under  
19 affirmance, we would be arguing for a limited  
20 scope of witnesses, but if you start envisioning  
21 who you want to talk to, it's probably folks  
22 like Mr. Mobbs, Vice Admiral Jacoby, maybe the  
23 FBI agents from Chicago and D.C. So I'm not  
24 sure that, in the end, the convenience factor  
25 is -- really point this Court to New York as the

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(212) 805-0300

1 3BHLPADA

2 proper forum.

3 JUDGE POOLER: In spite of running out  
4 of time, you have reserved two minutes, which  
5 you continue to maintain.

6 And I now will hear from petitioner on  
7 these procedural issues. Thank you very much.

8 MS. NEWMAN: May it please the Court:

9 A writ of habeas corpus is designed to  
10 be flexible, a flexible remedy, but the  
11 government has raised here procedural hurdles  
12 which have precluded resolution in this matter.

13 Unless the Court has questions on next  
14 friend, we'll move onto the jurisdictional  
15 issue.

16 JUDGE POOLER: Please.

17 MS. NEWMAN: Thank you. According to  
18 the government, they present an extraordinary  
19 argument here. They say that the federal court,  
20 where their transaction that is the subject  
21 matter of this litigation arose, the seizure of  
22 Mr. Padilla, from the Metropolitan Correction  
23 Center, just a few yards away from here, by the  
24 military, has no power to judge the lawfulness  
25 of the action by the federal officer whose

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(212) 805-0300

1 3BHLPADADA

2 conduct is at issue. The argument really boils  
3 down to an attempt to resurrect a rigid formula  
4 to habeas jurisdiction that long ago was  
5 rejected by the Supreme Court and this Circuit.

6 JUDGE PARKER: All they're saying is  
7 that Padilla's custodian is the commander of the  
8 brig in Charleston.

9 MS. NEWMAN: The statute does not  
10 direct that the custodian must be the -- of  
11 which it speaks must be the immediate custodian.  
12 In addition, if you look at really the factual  
13 context here, Commander Marr, whom they say is  
14 the immediate custodian, at best is a nominal  
15 custodian. She takes her directions from  
16 Secretary Rumsfeld. It is not the same -- it is  
17 not analogous to the warden situation. As  
18 Judge -- Chief Judge Mukasey found, this is a  
19 unique case. This is different than the  
20 traditional case. It's a nontraditional case,  
21 and as the government agrees, that there are  
22 exceptions to any rule that they --

23 JUDGE PARKER: How is Commander Marr  
24 different from the garden variety warden?

25 MS. NEWMAN: The focus, your Honor, is

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(212) 805-0300

1 3BHLPADA

2 not only to look at Commander Marr, because, in  
3 fact, under Braden, the petition can issue as  
4 long as a custodian can be reached by service of  
5 process. So while the government may say that  
6 Commander Marr is the appropriate custodian, in  
7 fact, as Chief Judge Mukasey said, for the  
8 reasons he stated, some of the reasons that  
9 Judge Wesley said, he is so intimately involved,  
10 that is, Secretary Rumsfeld, in this case, from  
11 the very inception.

12 JUDGE PARKER: Suppose you had some  
13 major criminal the prosecution of whom was  
14 directed by the Attorney General? We had a case  
15 awhile back here, there was a fellow named  
16 Barnes who was a major drug dealer up in Harlem.  
17 And the Attorney General, you know, directed the  
18 U.S. Attorney here to prosecute him and directed  
19 the U.S. Attorney here to try the case  
20 personally. Under that fact situation, I  
21 suppose you would argue that Attorney General  
22 Bell would have been the custodian?

23 MS. NEWMAN: Well, the distinction is  
24 in that case, the Barnes case that you're  
25 mentioning, Defendant Barnes went through a

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(212) 805-0300

1 3BHLPADDA

2 whole process, went through a trial, through the  
3 judicial system, so the only time he would bring  
4 the habeas -- of course, the collateral  
5 attack -- would be well down the road.

6 JUDGE PARKER: So what? What  
7 difference does that make?

8 MS. NEWMAN: Your Honor, there is a  
9 distinct difference. Here, Secretary Rumsfeld  
10 from the inception, there's no legal -- there's  
11 no process here. So that he really -- unlike in  
12 the Barnes situation where whether or not he's  
13 released, acquitted, etc., goes to the jury,  
14 here in this situation, Secretary Rumsfeld from  
15 the inception directed -- exercised control,  
16 direct control, and continues to have a  
17 substantial role. So that he determines whether  
18 or not at some point --

19 JUDGE PARKER: He did what he did, but  
20 he left Mr. Padilla in the hands of the  
21 commandant of the brig, i.e., the warden of the  
22 penitentiary.

23 JUDGE POOLER: And you heard counsel  
24 say that no commandant, no commander of the  
25 brig, would disobey an order of this Court.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 MS. NEWMAN: I understand that, your  
3 Honor. I don't know that. With all due respect  
4 to my adversary, I think we do really need  
5 Commander Marr to tell us that. We do have, of  
6 course, in our history ex parte Merryman. I'm  
7 not suggesting -- all I am saying, that you  
8 wouldn't -- all I'm suggesting is that we have  
9 history that says otherwise. We have Department  
10 of Defense regulations that tell us otherwise.

11 But the significance is not to  
12 focus -- because there could be other  
13 respondents. There is not -- it is not  
14 necessary to have one respondent, in many, many  
15 cases, particularly military cases.

16 JUDGE WESLEY: You get a lot of  
17 support in Braden, I take it?

18 MS. NEWMAN: Yes.

19 JUDGE WESLEY: But in that case, the  
20 individual served the writ was incarcerated in  
21 another state, so the sense of bringing a writ  
22 of habeas corpus in that state, contesting the  
23 conviction in another state, it doesn't seem to  
24 make too much sense. And the Court said, Look,  
25 in essence -- to the warden in Alabama -- this

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 is where he was being held, and the writ was  
3 going to be filed in Kentucky, right?

4 MS. NEWMAN: Detainer in Kentucky.

5 JUDGE WESLEY: In essence, they said  
6 the warden in the other state is in essence  
7 holding him as an agent for the state. He's  
8 temporarily detained there. But to make him  
9 wait until he's served his time in the other  
10 state and come back is just imponderable. Can't  
11 allow that to happen. So therefore they said  
12 it's appropriate to bring the proceeding in the  
13 state where the conviction was held.

14 Maybe it was speedy trial, but isn't  
15 that substantively quite different than the  
16 circumstance here? This isn't two competing  
17 parties with regard to his rights. It's a  
18 warden that's holding him pursuant to a  
19 determination by the President of the United  
20 States, and the legitimacy of which then is the  
21 focus of a writ of habeas corpus. And is it not  
22 then most appropriate to bring it where he is,  
23 because by bringing it there doesn't preclude,  
24 as it might have in Braden -- or Braden from  
25 examining the merits of his contention? They're

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 easily examined there.

3 Mr. Hamdi was able to get review of  
4 his situation and get to the Circuit. In fact,  
5 he's been in the circuit twice faster than here.  
6 That doesn't say anything about us and Judge  
7 Mukasey, but that -- with much great success, I  
8 might add.

9 But in any event, I mean -- seriously,  
10 that other case is about the difficulty of  
11 litigating the legitimacy of his claim. You  
12 don't have that barrier here.

13 Why should we allow the Southern  
14 District to be the place where it's litigated  
15 when he's not here?

16 MS. NEWMAN: There are specific  
17 reasons, your Honor, that this is the best  
18 forum. Because, in fact, certainly in Braden,  
19 Braden said not only custodians be reached by  
20 service of process.

21 JUDGE WESLEY: I'm not talking about  
22 convenience. I'm talking about legitimate  
23 objection or differentiation from a lot of what  
24 it normally says in the normal case: Bring the  
25 writ where the individual's detained. And I

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 would submit to you that there are instances  
3 where there are exceptions to that. Where,  
4 because of the peculiar facts of the case, you  
5 can't litigate the right to obtain a writ in the  
6 jurisdiction where he's detained. And I don't  
7 see that problem here. Is that problem here?

8 MS. NEWMAN: I think, in fact, your  
9 Honor, there are cases that go beyond that.  
10 It's not only because it's not feasible, as you  
11 say in the Braden example, but if you really  
12 look through the trilogy of the Supreme Court's  
13 cases in the 1970s, which is Schlanger, Strait  
14 and Braden, look through all those cases, where  
15 in fact the immediate custodian was one of the  
16 issues.

17 So if you look first at Schlanger,  
18 again, the immediate custodian, they said you  
19 have to go to Georgia. But there was no reason,  
20 as we learned in Strait, which clarified it, as  
21 there was no context to Arizona, here, to get to  
22 the context issue here, because that's what your  
23 Honor's alluding to, yes. All three cases  
24 really deal, practicality, if you look at  
25 everything, you go down to where is it really

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 the context.

3 The cause of action here arose here.

4 That is, Mr. Padilla was seized from the  
5 Metropolitan Correction Center without notice to  
6 me. Judge Mukasey, of course, who's intimately  
7 familiar with the facts, having signed the  
8 material witness warrant, as we then learned was  
9 essentially the same facts which were presented  
10 to the President for him to sign the June 9th  
11 order.

12 The independent knowledge of that that  
13 Judge Mukasey has isn't just papers, as the  
14 Court's aware; it's not just sending down  
15 papers. It's much more than that. It's  
16 knowledge. It's a genuine knowledge of the case  
17 that cannot be duplicated anyplace else. And  
18 because Secretary Rumsfeld --

19 JUDGE PARKER: What do you mean  
20 "general knowledge of the case"? Can't be  
21 duplicated anywhere else? We all have read a  
22 foot of wonderful briefs. Anybody who reads the  
23 briefs knows what the case is about.

24 MS. NEWMAN: I think there's an  
25 intimate knowledge, just like in a 2255

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADDA

2 collateral attack to a sentence. That's why the  
3 Congress, if I could just -- I'm sorry.

4 JUDGE WESLEY: I'm dying to ask a  
5 question, but I'm waiting.

6 MS. NEWMAN: I wanted to say that  
7 Congress then, in reviewing it then in a 2255,  
8 where the question is sentencing -- sentencing,  
9 it goes back to the district court judge.  
10 Certainly the same analogy. All the trial,  
11 etc., the transcripts, etc., can go back -- if  
12 there's not a trial, just even a simple  
13 sentence, can go back someplace else. But in  
14 fact, it's significant that the District Court  
15 judge ruled that -- I'm sorry, your Honor?

16 JUDGE WESLEY: What strikes me is that  
17 when one reads Strait.

18 MS. NEWMAN: Yes.

19 JUDGE WESLEY: Strait seems to imply  
20 that the Supreme Court indicated the commander  
21 is really present where he is because all of his  
22 contacts were in California with him, right?  
23 And the government wanted the case to be brought  
24 in Indiana. And the government -- the court  
25 said, Look, let's be serious. Everything is

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 here. He had face-to-face dealings with  
3 everybody. His enrollment in the military  
4 program and everything else was there. That's  
5 the logical place to bring it. That's really  
6 where the presence is, and the Commander was  
7 actually operating through the circuits there.

8 So at that moment in time, it seems to  
9 me that the United States Supreme Court was  
10 merging its due process understanding of  
11 presence, as articulated in Burger King and all  
12 the cases that came before that, and juxtaposing  
13 it to the statute and understanding what  
14 jurisdiction meant.

15 Now, the problem I have in your case  
16 is this: The only connection between  
17 Mr. Padilla and all of this information in  
18 New York was his momentary presence here under  
19 the control of the Attorney General. The  
20 Attorney General's acts, the affidavit of the  
21 FBI agent, not -- Mr. Padilla didn't do a thing  
22 in New York other than be brought here and he's  
23 taken from here. The determination made by  
24 Rumsfeld and the President is done in Washington  
25 on information that's gathered by intelligence

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 agencies from all over the world and synthesized  
3 into two affidavits which are presented to the  
4 President in Washington.

5 And so what is it about New York, what  
6 is it about Mr. Padilla being here one day and  
7 the material witness warrant being withdrawn,  
8 he's being held by the Department of Justice,  
9 and then being taken from New York -- is it the  
10 taking of New York that's the gravamen of your  
11 complaint? Certainly not the gravamen of your  
12 complaint is the legitimacy of the President's  
13 order, and that has nothing to do with New York.

14 And I don't understand -- Judge  
15 Mukasey makes an argument that prior versus  
16 McFadden Oil, a case written by Judge Symonds in  
17 the New York Court of Appeals somehow says  
18 New York has a jurisdictional basis. But  
19 New York's long-arm statute isn't written in  
20 that context. It speaks in terms of a  
21 substantial relationship between the transaction  
22 and the claim. What is the relationship between  
23 Mr. Padilla's removal and the legitimacy of that  
24 removal? It seems to me they're completely  
25 different, and there's no connection from

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 New York. This should be litigated in South  
3 Carolina.

4 MS. NEWMAN: If I may, your Honor, I  
5 think there are two answers to that. I would  
6 start with an analogy to 18 USC 3238 which -- in  
7 U.S. versus Yusef. 327 F3d 6, Second Circuit  
8 2003, and that statute really has to do with a  
9 charge, but it says, where the allegations occur  
10 overseas, the place that you bring that  
11 individual to the U.S. has to be where the first  
12 instance -- it's not Chicago. They didn't bring  
13 him to Chicago. It's where you bring him.  
14 Where he is. Where the allegations first start.  
15 That's where the jurisdiction lies. And it's  
16 under a concept that, as here, the government  
17 chose this forum. They chose this -- the  
18 Southern District of New York. They brought  
19 Mr. Padilla here in the first instance.

20 JUDGE WESLEY: They had a grand jury  
21 going on, because 3,000 people were killed in --  
22 2,700-plus people were killed as a result of  
23 coordinated -- two terrorist planes striking the  
24 World Trade Center and dropping it to the  
25 ground, so it seems to me there's a logical

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 connection that a grand jury investigation might  
3 occur in New York.

4 But that's not the point. Mr. Padilla  
5 was thought to have been a material witness to  
6 that. Then something happened, and it didn't  
7 happen here. It happened in Washington. What  
8 is the connection of the acts that occurred in  
9 New York that somehow made this the logical and  
10 substantial place to litigate the legitimacy of  
11 those acts?

12 MS. NEWMAN: Directing your attention  
13 to New York's long-arm statute, to answer your  
14 question. The statute provides that the cause  
15 of action arises from actions which is the  
16 subject of this lawsuit, and I believe what your  
17 Honor is directing the inquiry to. It is our  
18 position that our habeas begins with the cause  
19 of action of the seizure from the Metropolitan  
20 Correction Center. Not only -- and as your  
21 Honor is aware, it's a one-act statute, and you  
22 can act through your agents. So you don't have  
23 to be sitting in Washington, D.C. and making the  
24 phone calls and never appear in this  
25 jurisdiction.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 JUDGE POOLER: So the seizure itself  
3 is enough to give jurisdiction to this district  
4 in which Mr. Padilla was pursuing legal relief,  
5 and the person who is sought to be the  
6 respondent was responsible for the one act  
7 through his agents? That's your argument?

8 MS. NEWMAN: Yes. There was nothing  
9 more than one act, but we're directing to the  
10 first part of the statute, because the acts  
11 through his agents not only negotiated,  
12 obviously a phone call from the very start to  
13 get this ball rolling, which is the transfer,  
14 you know, from the Department of Justice to the  
15 Department of Defense -- there has to be  
16 conversations back and forth. There is  
17 obviously the -- several conversations on how  
18 the warrant will be withdrawn. So there's a lot  
19 of action there. But we're directing to the  
20 first part of the statute.

21 JUDGE WESLEY: It's definitely a  
22 single-act statute. I'm somewhat familiar with  
23 it....

24 MS. NEWMAN: Yes, I know.

25 JUDGE WESLEY: Let me read to you

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 something Judge Symonds wrote after he said it  
3 was a single-act statute. This is the case that  
4 Judge Mukasey says this doesn't take much time  
5 to resolve.

6 MS. NEWMAN: That's correct.

7 JUDGE WESLEY: It says -- it is a  
8 single-act statute. I'm quoting Page 467:  
9 Single act statute. Approve of one transaction  
10 in New York is sufficient to invoke jurisdiction  
11 even if the defendant never enters New York, so  
12 long as the defendant's activities here were  
13 purposeful and there is a substantial  
14 relationship between the transaction and the  
15 claim asserted.

16 That's why I asked you. It's your  
17 position that his removal is that substantial  
18 relationship between the transaction, the  
19 illegal determination that he's an enemy  
20 combatant, and his continued retention in South  
21 Carolina?

22 MS. NEWMAN: It's also the very  
23 seizure. As the Court is aware, the seizure,  
24 that is very problematic here as well. That's  
25 what occurred in this jurisdiction, just a few

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 yards away. So yes, that is our point, that his  
3 coming here and that the transfer occurred here,  
4 as we've just learned definitively, is the  
5 point, and it does, as that case, as the habeas,  
6 as the petition reads.

7 I'm out of time. I'm more than happy  
8 to answer questions.

9 JUDGE WESLEY: Thank you very much.

10 JUDGE POOLER: Thank you, Counsel.

11 Now is the time for the rebuttal.

12 MR. CLEMENT: Thank you, your Honor.  
13 I'd like to make just a few brief points in  
14 rebuttal.

15 Specifically, Miss Newman makes the  
16 point correctly that the statute itself doesn't  
17 refer to immediate custodian and only talks  
18 about the person who has custody over the  
19 individual. But -- and I think the statutory  
20 term itself suggests that there is one person,  
21 the person who has custody. And in any event,  
22 the immediate custodian rule certainly is not  
23 something that was made up here. It stems from  
24 the Supreme Court case Whales against Whitney,  
25 1885. And in some of these more unusual

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 situations, that rule's been slightly relaxed,  
3 but never in the classic situation where  
4 somebody challenges the lawfulness of their  
5 current confinement and actual normal  
6 confinement.

7 Now, there's reference made to the  
8 Braden case, and I think that is an unusual  
9 situation and I think it bears emphasis, to  
10 focus on what was specifically involved in  
11 Braden, because there the Court was confronting  
12 the ramifications of a relatively recent  
13 decision, the Peyton decision from 1968 that  
14 overruled an earlier case, and it was only with  
15 the Peyton decision that it was even possible  
16 for a habeas petitioner to challenge the  
17 lawfulness of indictment or detention in another  
18 state, so in the Peyton decision of 1968, the  
19 Court had to decide what is the best rule to  
20 deal with that specific unusual situation, and  
21 they said, Well it makes sense -- if what you're  
22 challenging is your indictment in Kentucky, it  
23 certainly makes sense to challenge the action in  
24 Kentucky.

25 The last point I'd like to make is to

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 reinforce the point of what is the proper  
3 gravamen of the complaint in this habeas  
4 petition. And in essence, the gravamen in the  
5 habeas is not the procedure. If you're worried  
6 about the procedure, some different kind of  
7 action should have been brought. But the habeas  
8 petition challenges the lawfulness of your  
9 confinement.

10 The seizure may be tangentially  
11 relevant to that. The actions in Washington,  
12 D.C., may be much more relevant to that. None  
13 of those are what is directly challenged. It's  
14 the current confinement.

15 JUDGE WESLEY: Your right answer is --  
16 do we have the power to transfer it?

17 MR. CLEMENT: I think this Court does  
18 have power to transfer it.

19 JUDGE WESLEY: Should the Court wait  
20 another 18 months before it's adjudicated in  
21 circuit court and he spends three years in  
22 detention?

23 MR. CLEMENT: Your Honor, I think it  
24 would be a regrettable consequence, but I do not  
25 think that the government bears responsibility

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 for that. In the very first pleading before  
3 Judge Mukasey, we told him that this case raises  
4 serious issues, but they should be litigated in  
5 South Carolina. As you your Honor indicated,  
6 the Fourth Circuit has demonstrated an ability  
7 to deal with these cases quite expeditiously, so  
8 I don't think --

9 JUDGE POOLER: Thank you, Counsel. A  
10 little chauvinistic comparison.

11 We turn now to the next set of issues  
12 and they revolve around whether the President  
13 has the authority to designate an American  
14 citizen on American soil as an enemy combatant  
15 and to detain that citizen till the end of  
16 hostilities. On this issue, the respondents  
17 prevailed, so we'll hear first from Petitioner  
18 Professor Martinez, and you have reserved three  
19 minutes for rebuttal, I see.

20 PROF. MARTINEZ: Thank you, your  
21 Honor. May it please the Court:

22 Never before in this nation's history  
23 has the President been granted the unilateral  
24 authority to imprison indefinitely and without  
25 trial an American citizen seized in a civilian

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 setting on U.S. soil. Your Honors, the  
3 Constitution allows him no such power. History  
4 shows the power to imprison citizens on the  
5 grounds that they present a threat to the  
6 security of the state is one of powers most  
7 easily abused by government, so our Founding  
8 Fathers includes in the Constitution numerous  
9 protections and safeguards, including the habeas  
10 suspension, called the Fourth, Fifth and Sixth  
11 Amendments, and even the treason clause of  
12 Article Three.

13 Today the executive branch seeks to  
14 invade these carefully contrasted protections of  
15 the Constitution by claiming sweeping and  
16 ill-defined powers to detain without trial  
17 persons the appellate declares enemy combatants.

18 JUDGE WESLEY: Does he have any  
19 authority to detain at all, in your view?

20 PROF. MARTINEZ: Certainly he does,  
21 under the criminal laws of this country, under  
22 the material witness warrants statute.

23 JUDGE WESLEY: How long can he hold  
24 him under the material witness statute? It  
25 would require a crime had been committed,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 wouldn't it? There would have to be a grand  
3 jury, for which there would be an investigation?

4 PROF. MARTINEZ: Yes, your Honor.

5 JUDGE WESLEY: Let me ask you.

6 Mohamed Atta had been caught at the airport, and  
7 he was a United States citizen. Could the  
8 President have detained him on September 11th?

9 PROF. MARTINEZ: Certainly, your  
10 Honor.

11 JUDGE WESLEY: In your view, could the  
12 President of the United States detain Mohamed  
13 Atta as he's done Jose Padilla? The leader of  
14 the attack on September 11th? Could he have  
15 detained him?

16 PROF. MARTINEZ: I think he could have  
17 detained him.

18 JUDGE WESLEY: On what grounds?

19 PROF. MARTINEZ: If there were  
20 probable cause to believe he had committed a  
21 crime. Certainly the President or any executive  
22 officer has the power to arrest someone without  
23 a warrant in exigent circumstances.

24 JUDGE WESLEY: What if he had some  
25 evidence that he believed that Mohamed Atta was

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 the ringleader of 20 -- both U.S. citizens and  
3 other foreign nationals -- who were going to  
4 begin a large-scale attack upon specific targets  
5 in the United States? Would he be able to hold  
6 him just to get other information from Mr. Atta  
7 to learn the identity of those other  
8 coconspirators who might still be in the public?

9 PROF. MARTINEZ: Under the facts you  
10 describe, certainly he would be allowed to  
11 detain him if those facts were clearly  
12 demonstrated.

13 JUDGE WESLEY: Without filing a  
14 charge?

15 PROF. MARTINEZ: Those facts clearly  
16 demonstrate probable cause, at the very least.

17 JUDGE WESLEY: Let me take some  
18 probable cause off. He's strongly suspected --  
19 he's received money from overseas, he's received  
20 training in airplanes, and there have been  
21 intercepts from identified al Qaeda operatives  
22 outside of the United States that a large attack  
23 is about to begin. Then the name Atta showed  
24 up.

25 JUDGE POOLER: If only what you

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 described were true.

3 JUDGE WESLEY: But what I'd like to  
4 know is what the authorities -- are we taking  
5 this beyond what we envisioned? This happened.  
6 This happened on our soil. And what I ask you  
7 is: Does the President have the authority,  
8 short of probable cause, to detain someone and  
9 interrogate them to learn what they know about  
10 criminal conspiracies or conspiracies to do harm  
11 to American citizens on American soil?

12 PROF. MARTINEZ: Certainly, your  
13 Honor, the ability of an executive official  
14 under the Fourth Amendment to seize someone for  
15 a short investigative purpose, even longer, if  
16 there's a need for some questioning, we  
17 certainly wouldn't dispute the ability of the  
18 executive branch to seize that person. But that  
19 situation is a far cry from the detention of  
20 someone for 18 months without any judicial  
21 review.

22 JUDGE WESLEY: Is the time low?

23 PROF. MARTINEZ: Your Honor --

24 JUDGE WESLEY: Is time a relevant  
25 factor?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 PROF. MARTINEZ: Certainly. I think  
3 the court's have previously held when someone is  
4 arrested they must be brought before a court  
5 within 48 hours.

6 JUDGE WESLEY: In a criminal context.  
7 We're talking about his powers as commander in  
8 chief. Is 30 days too long?

9 PROF. MARTINEZ: I think, your Honor,  
10 that the question really is whether the courts  
11 are open and operating. If the courts are open  
12 and operating and it is not a situation where  
13 there is no ability to avail oneself of the  
14 normal process, then obviously the President  
15 would have that power. But where the courts are  
16 open and operating, within a short frame of  
17 time, if Congress has not acted to say the  
18 situation needs to be suspended, then that  
19 person must be brought before the court.

20 JUDGE WESLEY: I wouldn't say he  
21 wouldn't have habeas, but the courts were open  
22 and clear -- the courts were open and operating  
23 in 1944.

24 PROF. MARTINEZ: But in that case, the  
25 President was acting pursuant to specific

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 Congressional authorization allowing trial  
3 before a military commission, which was also a  
4 legitimate process.

5 JUDGE WESLEY: Of the Articles of War.

6 PROF. MARTINEZ: Yes, sir.

7 JUDGE WESLEY: Are there any corollary  
8 articles enacted by Congress today with regard  
9 to this situation?

10 PROF. MARTINEZ: No, your Honor,  
11 believe it or not. The term "enemy combatant"  
12 is not mentioned in any act of Congress, not  
13 mentioned in any treaty on the law of war.  
14 There is no specific authority which gives the  
15 President this power.

16 And I might note that other nations  
17 have developed that the threat of terrorism is  
18 sufficient to provide an alternative to criminal  
19 process and have done that through legislation,  
20 and our Congress has not seen fit to do that,  
21 although in enacting the Patriot Act after  
22 September 11th, they gave the President numerous  
23 powers to deal with the threat of terrorism,  
24 including the power to detain aliens who the  
25 President suspected were terrorists, and yet

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 Congress placed a strict time limit on that of  
3 seven days.

4 JUDGE WESLEY: If Mr. Atta were  
5 captured, he could have been held for seven days  
6 and detained for only six more, right?

7 JUDGE POOLER: That, plus that  
8 postdates --

9 JUDGE WESLEY: Obviously.

10 PROF. MARTINEZ: It does postdate  
11 that. But the fact it placed limits on the  
12 detention of aliens strongly suggests that  
13 Congress did not believe the President had an  
14 inherent authority to detain American citizens  
15 for a year and a half without any kind of  
16 process at all.

17 The cases that the government cites in  
18 which persons have been detained as enemy  
19 combatants without meaningful judicial review  
20 all involve circumstances far different from  
21 this: Persons who are captured on the  
22 battlefield where there is a heightened argument  
23 that the commander in chief's power are  
24 enhanced, and the courts have consistently held  
25 that whatever the commander in chief's power may

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 be on the battlefield, they don't extend to  
3 areas where the courts are open and operating.

4 JUDGE WESLEY: I take it you don't  
5 find solace in Judge Mukasey's embracing of the  
6 September 18th resolution of Congress, the joint  
7 resolution.

8 PROF. MARTINEZ: No, your Honor, we do  
9 not believe that the authorization for military  
10 force on September 18th can properly be read to  
11 encompass the detention of citizens on American  
12 soil.

13 JUDGE POOLER: Do you think that has  
14 to be specifically granted, that power.

15 PROF. MARTINEZ: Yes, your Honor. A  
16 general authorization, of course, conveys the  
17 power to use troops in battle, but conveys no  
18 independent authority for the President to seize  
19 persons or property in the United States where  
20 the courts are open and operating.

21 JUDGE POOLER: The government is  
22 impressed that Congress agreed to pay for the  
23 detention of people held. You don't think that  
24 gives the President the power, either, the  
25 authorization to pay for it?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 PROF. MARTINEZ: No, your Honor. We  
3 likewise believe that the appropriation statute  
4 is not sufficiently specific, and the Court so  
5 held in ex parte Endo in considering whether the  
6 appropriations bill by Congress that had paid  
7 for the Japanese internment camps were  
8 sufficient to authorize those camps. And the  
9 Court held in Endo that it was not, that the  
10 power to deprive citizens of liberty must be  
11 clearly and legitimately indicated by Congress,  
12 the precise nature of that.

13 JUDGE POOLER: Don't you believe that  
14 joint resolution actually implies -- the joint  
15 resolution, by his terms -- after all, we need  
16 to read this -- if this was the source of the  
17 President's power, to whom does it apply?

18 PROF. MARTINEZ: Your Honor, I believe  
19 the joint resolution for use of force authorizes  
20 the President to engage our troops in combat  
21 against those persons or conditions and nations  
22 that he believes are responsible for  
23 September 11th. So certainly the action as  
24 taken in Afghanistan was when Congress had in  
25 mind when it passed that resolution which it

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 intended to pass to comply with the War Powers  
3 Act and to authorize our presence of troops in  
4 Afghanistan.

5 JUDGE WESLEY: What do you make of one  
6 of the introductory clauses and findings of that  
7 resolution that the acts rendered both necessary  
8 and appropriate the United States exercises it's  
9 rights to self defense and to protect United  
10 States citizens, both at home and abroad -- is  
11 it your view that the President's powers were  
12 limited to beyond the territorial waters of the  
13 United States? That he wasn't authorized to act  
14 to protect people at home, particularly in light  
15 of the fact that all the attacks that occurred  
16 on September 11th were on U.S. soil?

17 PROF. MARTINEZ: Certainly, your  
18 Honor, I think that the purpose of the use of  
19 force is always to protect Americans at home.  
20 That is why the President has war powers. I  
21 believe the relevant distinction is between the  
22 zone of active combat and parts of the United  
23 States where the courts are open and  
24 functioning.

25 JUDGE WESLEY: If the President became

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 aware of a plan to fly a jetliner into Indian  
3 Point nuclear plant just north of New York City,  
4 could he invoke, pursuant to the resolution of  
5 18th September, 2001 -- could he interdict those  
6 that were planning that and detain them and  
7 question them as he has done Mr. Padilla for 30  
8 days?

9 PROF. MARTINEZ: Your Honor, if there  
10 were a situation of imminent use of armed force,  
11 that would most likely fall within the Commander  
12 in Chief's powers in the field of battle.

13 JUDGE WESLEY: So the field of battle  
14 can be on U.S. soil, can it not?

15 PROF. MARTINEZ: It could. I think  
16 it's helpful to look at prior cases in which the  
17 field of battle has been on U.S. soil, and in  
18 fact, the courts in those cases have drawn the  
19 line between where the field of battle is and  
20 where it is not.

21 So -- for example, in the Duncan case,  
22 which was Hawaii in World War II, the courts  
23 held that although Hawaii had obviously been  
24 part of the theater of combat on the day of  
25 Pearl Harbor, and although it was under the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 threat of invasion throughout World War II, that  
3 it was still within the Court's purview to say  
4 that because the courts were open and operating,  
5 because there was not active combat going on  
6 there, that cases should be tried in front of  
7 civilian courts and not in front of military  
8 courts.

9 And so the fact that it's possible to  
10 have combat on U.S. soil does not mean that the  
11 U.S. is at all times and all places a  
12 battlefield, for purposes of the Commander in  
13 Chief's power.

14 The rule that would subvert the  
15 supremacy of civilian authority, that is the  
16 cornerstone of our Constitution --

17 JUDGE WESLEY: But we do know the  
18 resolution wasn't enacted in a vacuum. It was  
19 enacted seven days after 3,000 Americans were  
20 killed on American soil as a result of the  
21 conspiracy brought off by 20 individuals who had  
22 some allegiance to a terrorist organization.  
23 Those are the findings of the resolution, are  
24 they not?

25 PROF. MARTINEZ: Yes, your Honor. And

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 again, I think it's relevant to look at what  
3 Congress did within a few weeks of passing the  
4 Patriot Act, in defining the bounds of the  
5 President's authority and granting him  
6 additional powers to fight the threat of  
7 terrorism in our nation, and it's quite notable  
8 again, as I said, that Congress placed  
9 substantial limits on the power of the President  
10 to detain aliens and not to any extent with  
11 regard to citizens.

12 In no way did Congress demonstrate in  
13 any way that it thought they were granting the  
14 President unlimited power to imprison citizens  
15 without trial.

16 Historically, the declaration of war  
17 has given the President authority on the field  
18 of battle but has not made him Commander in  
19 Chief of this nation's peoples and inhabitants.  
20 And I think that the government's position has  
21 no limits. Under their theory, the President  
22 could do this to any American at anytime, no  
23 matter where they are, no matter the fact that  
24 the courts are open and operating and normal  
25 civilian processes are available.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2           So your Honors, I would suggest that  
3 this new power the government reaches for is  
4 entirely unprecedented, and if such a new power  
5 is to be created, it must come from Congress,  
6 and Congress did not give the President that  
7 power.

8           JUDGE POOLER: Thank you, Counsel.  
9 You have reserved three minutes. Mr. Clement?  
10 In response?

11           MR. CLEMENT: Thank you, your Honor.  
12 May it please the Court:

13           As I mentioned earlier, this case does  
14 indeed raise momentous issues about the  
15 separation of powers when the nation comes under  
16 attack.

17           JUDGE WESLEY: If Mr. Atta was out  
18 there working today and he's an alien and the  
19 President declared him an enemy combatant -- or  
20 must the President, through the Attorney  
21 General, only deal with Mr. Atta pursuant to the  
22 Patriot Act?

23           MR. CLEMENT: No, your Honor. The  
24 President could certainly designate him enemy  
25 combatant.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 JUDGE WESLEY: Where in the Patriot  
3 Act does the Congress recognize that specific  
4 authority of the President?

5 MR. CLEMENT: That specific authority  
6 wouldn't come from the Patriot Act, your Honor.  
7 But I think it's important to recognize that the  
8 specific provision of the Patriot Act that is  
9 relied on is a direction to the attorney general  
10 as a complement or an addendum to his  
11 immigration authority. It in no way affects the  
12 President's authority as commander in chief to  
13 hold somebody as an enemy combatant.

14 JUDGE WESLEY: Doesn't it create a  
15 curious circumstance where the President could  
16 designate a citizen an enemy combatant and hold  
17 him indefinitely, but if it's an alien who is  
18 likely to be a danger, reasonably -- the  
19 Attorney General only had reason to believe that  
20 he's a danger to the United States, that the  
21 Attorney General in seven days has to either  
22 deport him to charge him; or, in the  
23 alternative, wait an additional six months in  
24 the exercise of his discretion to determine how  
25 to deal with him? Doesn't that seem to you

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 curious that an alien is treated better than a  
3 citizen?

4 MR. CLEMENT: An alien is not treated  
5 better -- with respect to your Honor. The  
6 Patriot Act provision is an additional power for  
7 which there is absolutely no analogue in the law  
8 to a citizen. Because with respect to both, the  
9 President has the authority to treat them as  
10 enemy combatants. In al-Mari, for example, who  
11 is seized in Peoria and transferred to the brig  
12 in Charleston, is an alien.

13 JUDGE WESLEY: Can you point to me in  
14 the record somewhere that says that Congress  
15 didn't intend to preempt the field but define  
16 the field with regard to how war was to be  
17 conducted on native soil in the context of the  
18 Patriot Act?

19 MR. CLEMENT: Well --

20 JUDGE WESLEY: Is there, something in  
21 the legislative history that tells us, Well,  
22 this doesn't preclude the President from  
23 identifying an alien as an enemy combatant, but  
24 holding Mr. Padilla?

25 MR. CLEMENT: I couldn't -- I could

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 point to something along the line of what you  
3 have in mind. I think that the ordinary  
4 presumption is that if Congress doesn't make it  
5 explicit, you don't assume that they've tried to  
6 encroach on the President's authority in a way  
7 that raises one of the greatest separation of  
8 power problems.

9 JUDGE POOLER: You've heard counsel  
10 before you say that in order to detain an  
11 American citizen on American soil, not on the  
12 battlefield, it's her belief that Congress has  
13 to explicitly give this power to the President.

14 MR. CLEMENT: With respect your Honor,  
15 we would disagree. I mean, we think that  
16 whatever authority --

17 JUDGE POOLER: Doesn't 4001 mean that  
18 they have to tell the President that you can  
19 overcome the prohibition of that statute by  
20 giving him that specific power?

21 MR. CLEMENT: Your Honor, if it  
22 weren't for the joint authorization of force in  
23 the provision that you refer to in Title 10, I  
24 would be here arguing that 4001(a) should not be  
25 read to require that kind of Congressional

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 authorization. And --

3 JUDGE PARKER: How could you do that?

4 It says, "except pursuant to an act of  
5 Congress." What would be your argument?

6 MR. CLEMENT: My argument would be  
7 that first of all, one would want to apply a  
8 presumption that one would not want to easily  
9 infer that Congress meant to intrude on the  
10 president's military authority.

11 JUDGE POOLER: How can there be  
12 presumptions and inferences when the plain  
13 language of the statute says that we need an act  
14 of Congress for the President to do what he's  
15 done in this case?

16 MR. CLEMENT: Your Honor, I don't want  
17 to spend too much time making an argument I  
18 don't think I need to make to win, but I do  
19 think if you look at its location, in Title 18;  
20 and you look at the fact -- and the other side  
21 wants to point to the fact that you should pay  
22 attention to the fact that the purpose of  
23 4001(a) was to overrule the Emergency Detention  
24 Act of 1950. And I would take offense to that  
25 because I think if you look at that legislative

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 history and you look at that act --

3 JUDGE PARKER: He could have been  
4 detained under the Emergency Detention Act;  
5 isn't that correct?

6 MR. CLEMENT: Yes, as it existed. But  
7 that, again, was authority before the Attorney  
8 General, and I think if you look at all of these  
9 various points, the Emergency Detention Act was  
10 an additional authority for the Attorney  
11 General.

12 The Endo decision on which my opposing  
13 counsel relies, in that case, the court was very  
14 careful to say that it wasn't making any  
15 pronouncement whatsoever about the authority of  
16 the military to hold individuals as enemy  
17 combatants. The individual in Endo was held  
18 pursuant to civilian authority, not as an enemy  
19 combatant, and the Court made it very clear and  
20 cited Quirin and said that's different.

21 JUDGE PARKER: The problem is the  
22 Congress has spoken specifically on -- with  
23 respect to this subject matter. Congress has  
24 passed 4001, and, as you've pointed out, the  
25 context is reasonably clear. People were upset

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 and embarrassed about Koramatsu. People -- the  
3 Congress, wanted to specifically subtract that  
4 power from the governments arsenal. It wanted  
5 to protect U.S. citizens, so it passed a statute  
6 that says no citizen shall be imprisoned except  
7 pursuant to act of Congress. And unless -- I  
8 take it your argument is that the requisite act  
9 of Congress is the resolution.

10 MR. CLEMENT: I think it's 956.5.

11 JUDGE PARKER: You mean the  
12 appropriations.

13 MR. CLEMENT: It's an authorization to  
14 use appropriated funds. So I don't think a  
15 back-of-the-hand -- that is, an appropriations  
16 really works.

17 JUDGE PARKER: The problem is what is  
18 the language of the authorization -- excuse me,  
19 of the joint resolution, it seems to me has to  
20 be stretched to reach your position with respect  
21 to what it permits. And you have that potential  
22 interpretation of the statute juxtaposed to 4001  
23 which couldn't be clearer.

24 MR. CLEMENT: With respect, your  
25 Honor, I think the context of 4001 doesn't

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADDA

2 inform how to interpret that provision, but with  
3 respect to the authorization itself, it clearly  
4 authorizes the use of the armed forces and the  
5 military force. And I think the important thing  
6 to understand is the Supreme Court has said over  
7 and over again that the ability to hold enemy  
8 combatants is part and parcel of the use of  
9 force and the authorization of military force.

10 JUDGE POOLER: Go to the language of  
11 the joint resolution, and maybe you could help  
12 me with what I'm concerned about. The important  
13 paragraph says that the President is authorized  
14 to use all necessary and prohibitive force  
15 against those nations, organizations or persons  
16 he determines planned, authorized, committed or  
17 aided the terrorist attacks that occurred on  
18 September 11th. Or harbor such persons or  
19 organizations. Okay?

20 And is it your argument -- I want to  
21 do the rest of that sentence -- but is it your  
22 argument that Mr. Padilla fits within that  
23 definition?

24 MR. CLEMENT: I would take the  
25 position it does, your Honor.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 JUDGE POOLER: Can you tell me which  
3 were the triggers of his relationship to that  
4 part of the sentence? No one says he planned --

5 MR. CLEMENT: Right.

6 JUDGE POOLER: -- authorized,  
7 committed or aided the terrorist attacks on  
8 September 11th, as far as we know. Or that he  
9 harbored any organization or person. I think  
10 you're saying he's associated in the affidavits  
11 before us. So tell me where he gets connected  
12 to those words I just read.

13 MR. CLEMENT: He would get connected  
14 as somebody who aided the terrorist attacks.

15 JUDGE POOLER: He aided the terrorist  
16 attacks on September 11th?

17 MR. CLEMENT: Just on the theory that  
18 if you are a member of al Qaeda or that you have  
19 been trained at their camps, then --

20 JUDGE POOLER: But I don't think  
21 there's any allegation in the documents before  
22 us that he was involved before September 11th.

23 MR. CLEMENT: Well, he was -- I think  
24 that --

25 JUDGE POOLER: I think the charge is

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 that he wants to do something new. That's the  
3 dispersion -- the radiological dispersion  
4 device, okay? This seems, after the fact, to  
5 get at the people who did that. Right?

6 Are you saying he's one of the people  
7 that did that?

8 MR. CLEMENT: I think we're talking  
9 past each other because I'm not trying to tell  
10 you that he was one of the -- that he was the  
11 21st hijacker. What I'm trying to tell you is  
12 that anybody who is associated with al Qaeda  
13 fits within that description and that is the way  
14 you treat these issues with respect to military  
15 authority. If you have somebody who is part of  
16 the enemy, who is associated with the enemy,  
17 that he is aiding the enemy.

18 JUDGE POOLER: But here is a case  
19 where we really do have to draw some inferences  
20 and add some interpretative rules, unlike  
21 4001(a) perhaps.

22 MR. CLEMENT: With respect, your  
23 Honor, I would direct the Court's attention to  
24 this Court's decision in Orlando against Taylor.  
25 And this Court in that decision made clear that

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADDA

2 in interpreting a Congressional resolution, that  
3 the courts ought to be very wary about parsing  
4 the text the way that you are, precisely because  
5 this Court recognized that the exact wording --  
6 or that whether one does a formal declaration of  
7 war, whether one primarily focuses on 9/11 or  
8 looks forward, and the exact wording are all the  
9 product of diplomatic concerns, foreign policy  
10 concerns --

11 JUDGE POOLER: So have the people,  
12 when Congress speaks, so it's a product of  
13 perhaps compromise or the will of the people?

14 MR. CLEMENT: Or diplomatic concerns,  
15 or foreign policy concerns.

16 JUDGE POOLER: Perhaps you can help me  
17 with this: The rest of that sentence originally  
18 read: And to deter and preempt any future acts  
19 of terrorists or aggression, and that was  
20 changed, I understand, from the Congressional  
21 Record to read: In order to prevent any further  
22 acts. Can I take any meaning from that or is  
23 that just not meaningful at all?

24 MR. CLEMENT: I wouldn't take any  
25 meaning from that. If you put yourself back

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 into the mindset of Congress at the time they  
3 passed this resolution, they were not looking  
4 for ways to cut back on the President's  
5 authority.

6 JUDGE POOLER: Except they wrote it --  
7 first it said "to deter", and after a speech by  
8 Senator Byrd, he claims, it was changed, the  
9 word was taken out. "To deter and preempt" were  
10 taken out the joint authorization on which you  
11 rely so heavily. It had to mean something.  
12 Words mean something.

13 MR. CLEMENT: Words mean something,  
14 your Honor, but in this context, this Court has  
15 specifically warned against parsing those terms.  
16 I don't know why Congress changed those words,  
17 and of course none of us will ever really know  
18 what the corporate Congress was trying to do.

19 JUDGE WESLEY: That presumes that  
20 there's a collective will of Congress, which, in  
21 my experience, is Matsomoru.

22 MR. CLEMENT: In mine, too, your  
23 Honor, which is why I was speaking advisedly,  
24 but we'll never know why that was done exactly.  
25 It may have been done out of concerns of

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 international law, about concerns about --

3 JUDGE POOLER: It may have been done,  
4 if I can just finish, out of concern that the  
5 first language, which was so broad, that it  
6 might allow the President to detain a citizen,  
7 an American citizen, found on American soil,  
8 without access to counsel and call him an enemy  
9 combatant. That may be why they changed the  
10 words. We don't know that either, do we,  
11 Counsel?

12 MR. CLEMENT: With respect, I think  
13 that would be quite an inference. I think one  
14 would search the Congressional record for a  
15 reference to 4001(a) in vain, just as you would  
16 search the original.

17 JUDGE POOLER: Not 4001(a). This is  
18 the joint resolution.

19 MR. CLEMENT: What I'm saying -- in  
20 the contention of passing the joint resolution,  
21 I don't think anybody was saying, Oh, be careful  
22 here because if we're too explicit about this  
23 authority here, we're going to override the  
24 provisions of 4001(a).

25 JUDGE POOLER: They took out the words

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 "to deter and preempt". They took that out,  
3 seven days after 9/11. As bitter, as unhappy,  
4 as grieving as this nation was, they took out  
5 the words "to deter and preempt" from the power  
6 given to the President. Does that mean nothing  
7 to you?

8 MR. CLEMENT: I think it does not come  
9 within the category of things that this Court  
10 should draw an inference from. I think to do so  
11 flatly is inconsistent with what this Court said  
12 in Orlando. One doesn't parse these things in  
13 that way. And I think that the authority here  
14 was granted by that provision.

15 I think the authority is also  
16 contained in 10 USC 956. I think there is ample  
17 authority. The Fourth Circuit reached that  
18 conclusion in the Hamdi decision, I think  
19 correctly. I think the other side would like to  
20 ignore the Hamdi decision.

21 JUDGE PARKER: Parse it. What does  
22 that mean. Don't read it carefully?

23 MR. CLEMENT: I think what it means is  
24 that there are different ways that this could  
25 have been phrased. But to draw an inference

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 from that that limits the President's  
3 authority --

4 JUDGE PARKER: We're lawyers. Our  
5 lives are our language.

6 MR. CLEMENT: I realize that, your  
7 Honor. And if this were a domestic case that  
8 didn't implicate the President's war power --

9 JUDGE PARKER: It implicates our  
10 powers as Article Three courts to advise our  
11 coordinate branches on what the Constitution  
12 means.

13 MR. CLEMENT: Absolutely, your Honor.  
14 But as this Court recognized in Orlando, as the  
15 Fourth Circuit recognized in Hamdi, and as the  
16 Supreme Court recognized over and over again in  
17 these realms of foreign policy and the  
18 president's commander in chief authority, the  
19 power of the courts is at its limit.

20 JUDGE PARKER: This is a person picked  
21 up in Chicago.

22 MR. CLEMENT: And Quirin also involved  
23 a U.S. official picked up in Chicago. And it  
24 may be that that case, you know --

25 JUDGE PARKER: Who got counsel. And

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 the civilians in Quirin were tried in civilian  
3 courts, after articles of war.

4 JUDGE POOLER: After articles of war.

5 MR. CLEMENT: The Quirin court was  
6 focussed not just on the specific war crime for  
7 which he was charged but also the lawfulness of  
8 the detention for that war crime. And for that  
9 broader detention, there was no specific  
10 authorization.

11 JUDGE POOLER: They were all members  
12 of the German Army, weren't they? Didn't they  
13 admit they were members of the German Army?

14 JUDGE PARKER: That was stipulated.

15 MR. CLEMENT: It was stipulated.

16 JUDGE POOLER: Do we know, has he  
17 admitted that he's a member of, let alone an  
18 army -- all you say is that he's associated with  
19 al Qaeda.

20 MR. CLEMENT: No, and I think in a  
21 sense I think maybe -- it's up to the Court.  
22 I'm happy to explore any issue at anytime, but I  
23 think that that may be better explored in the  
24 next set of issues, because I assume that the  
25 question here was assuming sort of the state of

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 affairs as laid out in the President's  
3 declaration and Mobbs' declaration.

4 JUDGE POOLER: Assuming it's true.

5 MR. CLEMENT: Then he is -- within the  
6 terms of Quirin, he is affiliated with the enemy  
7 forces. I mean, the fact that --

8 JUDGE POOLER: They were more than  
9 just affiliated. They were members of the  
10 German Army, and that was stipulated, as Judge  
11 Parker points out.

12 MR. CLEMENT: Yes, and I think it's  
13 equally true if the German Army could have  
14 avoided the laws of war by not making them  
15 members and keeping a looser affiliation, they  
16 would gladly stipulate to that.

17 JUDGE WESLEY: I wasn't aware that  
18 they issued membership cards.

19 MR. CLEMENT: That's exactly right.  
20 And unless this Court want to hold that the  
21 President is powerless to deal with an enemy  
22 that doesn't respect --

23 JUDGE PARKER: He could go back to  
24 Congress and get this authorization.

25 MR. CLEMENT: I suppose he could, but

SOUTHERN DISTRICT REPORTERS, P.C.

1 3BHLPADA

2 I don't think that any natural reading of this  
3 would suggest any need to go back to Congress.

4 JUDGE POOLER: But if he's dealing  
5 with a different kind of enemy, which is what  
6 you are saying, that al Qaeda probably doesn't  
7 hand out membership cards, then the President  
8 has to go to Congress because they have the  
9 power to make an American citizen, captured on  
10 American soil, who is associated with, maybe  
11 just an associate member or a full member, of  
12 al Qaeda, he -- Congress is the one that says  
13 that this is someone who the President can act  
14 against.

15 MR. CLEMENT: With respect, your  
16 Honor, I just don't think that's the right  
17 allocation of the separation of powers here. I  
18 think the President's Commander in Chief power  
19 is given, as the federalist papers make clear,  
20 precisely so he can adapt to different --

21 JUDGE POOLER: On that, when there's  
22 an article of war, when two nation states are at  
23 war. But this is an American citizen captured  
24 in O'Hare airport.

25 MR. CLEMENT: As was the case in

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 Quirin, your Honor. And I just don't think that  
3 the difference between a declared war and  
4 dealing with an enemy who is distinguished  
5 largely because they do not obey the laws of  
6 war, that that enemy somehow gets an immunity  
7 from the laws of war.

8 JUDGE POOLER: Congress has to say  
9 that.

10 MR. CLEMENT: With respect, your  
11 Honor, I disagree, and I think that the extent  
12 there's a need for Congressional authorization,  
13 you find it in the authorization of force and  
14 you find it in 10 USC. So I think that -- and  
15 again, I think you go back and look at 18 USC  
16 4001(a), it is designed to deal with the problem  
17 of civilian detentions. It is not directed to  
18 the military.

19 JUDGE PARKER: But in the  
20 constitutional structure, the power to define  
21 offenses against the law of nations, which is  
22 what this is, is not an Article 2 power. It's  
23 an Article 1 power. It's Congress's power.

24 MR. CLEMENT: Your Honor, that may be  
25 true with respect to specific offenses against

SOUTHERN DISTRICT REPORTERS, P.C.

1 3BHLPADA

2 the law of war. But there is also an authority,  
3 and Quirin clearly drew a distinction between  
4 the two, to hold an individual as an unlawful  
5 combatant or as a prisoner of war.

6 JUDGE WESLEY: The article was that  
7 Article 15 wasn't specific and the United States  
8 Supreme Court said the specificity isn't  
9 required; there's enough there to try Quirin.

10 But for a second, can we return to the  
11 language of the authorization? Is it your  
12 position that Mr. Padilla's a member of al Qaeda  
13 or associated therewith?

14 MR. CLEMENT: Associated therewith.

15 JUDGE WESLEY: Is not al Qaeda  
16 identified as one of the organizations that  
17 planned the terrorist attack on September 11th?

18 MR. CLEMENT: That's right, your  
19 Honor.

20 JUDGE WESLEY: The resolution, to be  
21 fair, to read it in total, says that the  
22 President is authorized to use all necessary and  
23 appropriate force against those nations,  
24 organizations -- I presume that means  
25 al Qaeda -- or persons he determines planned,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 authorized, committed or aided the terrorist  
3 attack that occurred on September 11th or  
4 harbored such organizations or persons, comma,  
5 in order to prevent any future attacks --

6 JUDGE POOLER: Further.

7 JUDGE WESLEY: Further attacks.

8 JUDGE POOLER: Further.

9 JUDGE WESLEY: Mine says future -- I'm  
10 reading from my copy -- against the United  
11 States.

12 So he's a member of an organization  
13 identified as having conducted it. Then there's  
14 a comma. I think I understand what commas mean.  
15 It means that if you either aided -- you're part  
16 of an organization that either aided, committed  
17 or harbored, then you can act against them in  
18 order to prevent future attacks.

19 Is that -- that's what it says,  
20 doesn't it?

21 MR. CLEMENT: That is what it says,  
22 your Honor.

23 JUDGE PARKER: Is there anything in  
24 this record that establishes Mr. Padilla as a  
25 member of al Qaeda?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 MR. CLEMENT: There is nothing in this  
3 record that establishes he is a member of  
4 al Qaeda. There are ample things in the record  
5 that say that he is affiliated and associated  
6 with the al Qaeda.

7 JUDGE POOLER: I think you're right.  
8 That will come up when we talk about what proof  
9 the government needs to supply.

10 Do you want to finish any comments on  
11 this topic before I turn to the rebuttal?

12 MR. CLEMENT: If I could make two  
13 brief closing comments.

14 JUDGE POOLER: Sure.

15 MR. CLEMENT: One is: I think this is  
16 important since this is an authorization of  
17 force to keep in mind that the authority to hold  
18 enemy combatants, not try them for specific war  
19 crimes but to hold them, has always been held  
20 part and parcel of the war powers. The -- also  
21 Quirin. Also Ludecke versus Watkins, and the  
22 Isver decision as the justice made in the Arada  
23 case.

24 So there's ample authority that when  
25 the Congress authorizes force to get the persons

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 and organizations that are involved here, then  
3 that was an authorization to hold the  
4 individual.

5 JUDGE POOLER: All those cases, many  
6 of them battlefield cases, many of them with  
7 Articles of War, many of them between nations.  
8 You will agree, I think, that this case before  
9 us is an extension of all of those cases to the  
10 extent that this petitioner was not found on a  
11 battlefield, and to the further extent that he  
12 is an American citizen and to the further extent  
13 that as far as we know, he's not a member of an  
14 Army of a nation state with whom we are at war.  
15 Isn't that? -- can we agree at least on that,  
16 that's not to decide the ultimate question, but  
17 I'm just asking, doesn't it just move the  
18 outside of the box somewhat?

19 MR. CLEMENT: With respect, your  
20 Honor, I guess I'm not -- I agree at the level  
21 that there are differences between this case and  
22 the Quirin. But the only two differences --

23 JUDGE POOLER: This is all leading to  
24 further expansion of the Executive's power.

25 MR. CLEMENT: I think some of the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 factors that you mentioned are on all fours with  
3 Quirin. That was somebody who was a U.S.  
4 citizen or alleged to be and the Court found  
5 that so immaterial they didn't delve into the  
6 question.

7 JUDGE PARKER: But also a member of  
8 the German Army.

9 MR. CLEMENT: But also seized in  
10 Chicago. But I think both stem from the same  
11 fact. That was a war against a formal nation  
12 state. This is not. So as a formal nation  
13 state, sure, you have a card-carrying member of  
14 the German military. And because it's a nation  
15 state you have a declaration of war. So really  
16 it just comes down to the question -- with  
17 respect, your Honor -- as to whether or not it  
18 makes a difference that there's a declaration of  
19 war. And it's hard for us to understand why  
20 when you're waging what is clearly a war against  
21 an adversary who is different from the German  
22 Army, mostly because they steadfastly refused to  
23 obey the laws of war and have insignias and have  
24 memberships that are formal, that somehow that  
25 gives the al Qaeda an exemption from the laws of

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 war.

3 JUDGE POOLER: Do you envision treaty  
4 signing when the war on terrorism is over?

5 MR. CLEMENT: I don't, but I do  
6 envision a declaration by the President that  
7 either phases of the war are over or that the  
8 struggle is over or complete. And I think what  
9 we may likely see in this context is something  
10 where the President maybe makes first a  
11 determination that with respect to say the  
12 ground war in Afghanistan as that affects the  
13 Taliban, that that's complete, but that the war  
14 continues against the al Qaeda.

15 JUDGE POOLER: But is the war of  
16 terrorism really different in quality and  
17 character than the war on poverty or the war on  
18 drugs?

19 MR. CLEMENT: Absolutely, it is, your  
20 Honor. And I think in fairness that is the  
21 question that gets to the heart of this:  
22 Because if the Court is of the view that  
23 notwithstanding the attacks of September 11th,  
24 notwithstanding the authorization of force,  
25 notwithstanding the events that are happening

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 all over the world, that this is just the war on  
3 poverty or perhaps, in a closer analogue, the  
4 war on drugs, then I think that one wouldn't  
5 find the authority for the Executive.

6 But if one understands that the war of  
7 terrorism is quite different, then the  
8 President's authority I think is ample.

9 JUDGE WESLEY: Let's presume you're  
10 right for a second and that this qualifies as an  
11 armed conflict and that Mr. Padilla -- that  
12 there's reason to believe that Mr. Padilla is a  
13 member of al Qaeda, given the fact that he's  
14 spent a considerable period of time in Egypt and  
15 Afghanistan with those whom he associated during  
16 that period of time.

17 How long does Mr. Padilla remain an  
18 enemy combatant? Because the purpose of holding  
19 him is twofold. Under the laws of war, the  
20 first is to take him out of play, I understand.  
21 The second of all is to get information from  
22 him. And the government really hinges its case  
23 on the need to keep him from his attorney.  
24 That's why they wanted to -- they wanted to take  
25 Ms. Newman out of it. They didn't want her

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADDA

2 contacting him. Not that she was undercutting  
3 it in the sense of not being a good American,  
4 but that she was -- served as a reference point  
5 for him so he'd decide whether to get involved,  
6 he would break the interrogation chain, break  
7 the relationship with his interrogator.

8 How long, and who decides how long,  
9 and is it unfettered discretion? If you're  
10 right, is Mr. Padilla in limbo until the  
11 President decides? Or should there be a regular  
12 review? What are the outer limits?

13 I asked Ms. Martinez how long because  
14 she conceded that perhaps he could be, for a  
15 period of time, as an enemy combatant, as an  
16 alien or a citizen. How long could Mr. Padilla  
17 be held as an enemy combatant and who decides  
18 and who reviews it?

19 MR. CLEMENT: Well, your Honor, I  
20 think that, as your question pointed out,  
21 there's two reasons for detention. And --

22 JUDGE WESLEY: To take him out of  
23 play, we understand.

24 MR. CLEMENT: And for purposes of  
25 intelligence gathering.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 JUDGE WESLEY: But once you take him  
3 out of play, he's no longer worth anything,  
4 what's wrong with having him see his lawyer?

5 MR. CLEMENT: I think our position  
6 would be a point is reached where one of those  
7 two purposes is no longer being served, so that  
8 the access to counsel no longer interferes with  
9 the intelligence gathering process or the  
10 intelligence gathering process is complete.  
11 That at that point, when the United States  
12 doesn't want to deny persons held in the United  
13 States access to counsel just for the sake of  
14 it.

15 So an initial determination would be  
16 made that access to counsel is now appropriate.  
17 That wouldn't necessarily -- that's not the same  
18 determination.

19 JUDGE PARKER: By whom?

20 MR. CLEMENT: By -- by -- by the  
21 intelligence community. Principally, the  
22 Secretary of Defense. Or ultimately, the  
23 Secretary of Defense.

24 JUDGE WESLEY: But in Quirin, we know  
25 he was going to be tried by a military council.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 Can Mr. Padilla be tried by a military court on  
3 the President's orders now?

4 MR. CLEMENT: Not under that current  
5 order. That doesn't suggest --

6 JUDGE WESLEY: The current order  
7 doesn't cover U.S. citizens, does it?

8 MR. CLEMENT: It does not, your Honor.  
9 That doesn't mean that couldn't be amended.

10 JUDGE WESLEY: Then we're in an odd  
11 circumstance. We have the Patriot Act on one  
12 side, which seems to set specific time limits  
13 and incorporate habeas corpus, and you say,  
14 Well, we could use our war powers to hold an  
15 alien enemy combatant.

16 Now, on the other side, we have  
17 tribunals where these enemy combatants could be  
18 tried in military courts as the President has  
19 already decided with regard to some people on  
20 Guantanamo Bay.

21 And then we have Mr. Padilla. We have  
22 Mr. Padilla, whose purpose of being held is for  
23 intelligence gathering, and yet -- we don't  
24 know? Certainly, you don't believe that the  
25 appellate has the right to suspend a writ of

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 habeas corpus?

3 MR. CLEMENT: I wouldn't take a  
4 position whether -- certainly he hasn't done it.

5 JUDGE WESLEY: We know that Congress  
6 is the only with the power to do that.

7 MR. CLEMENT: We know that Congress  
8 can do it.

9 JUDGE WESLEY: So he has a right to a  
10 writ of habeas corpus.

11 MR. CLEMENT: We've never denied him  
12 the right of habeas corpus. I think the dispute  
13 has always been what is the proper scope of that  
14 writ in these circumstances.

15 JUDGE POOLER: Can I ask you one  
16 question about intelligence gathering?

17 MR. CLEMENT: I'd be happy to, but one  
18 piece of the puzzle that I think is missing on  
19 your question, and I just want to place it  
20 there, which is that an alien also can be held  
21 exactly as Mr. Padilla is, and al-Mari is the  
22 example. So in a situation with respect to an  
23 alien where the President has more --

24 JUDGE PARKER: Under this resolution.

25 MR. CLEMENT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 JUDGE PARKER: So why did Congress  
3 waste its time passing 1226AA if the power  
4 existed already?

5 MR. CLEMENT: To give the Attorney  
6 General an additional authority as to -- an  
7 adjunct to his immigration power. That was my  
8 point in that the alien has a variety of  
9 weapons. And those are more limited as to a  
10 citizen, but that doesn't take off the table the  
11 one thing, both with respect to 18 and a  
12 citizen, which is the ability --

13 JUDGE PARKER: If the President has  
14 authority under the resolution, why did the  
15 Attorney General need any additional authority?

16 MR. CLEMENT: First of all, there are  
17 individuals who can be held, your Honor, via the  
18 Patriot Act who cannot be held as an enemy  
19 combatant, both because the standard's lower,  
20 but also because it's not an element of the  
21 Patriot Act detention authority that you should  
22 be affiliated with the al Qaeda. So it's really  
23 analogous to the Quirin court.

24 The Quirin court heard an argument  
25 that you can't hold these individuals for

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 military commission because treason's available  
3 as a criminal offense. The Court said no.  
4 First of all, broader authority than that. And  
5 second of all, it's not an element of treason to  
6 be affiliated with the enemy. So in that sense,  
7 there's different authorities.

8 JUDGE POOLER: I just wanted to ask  
9 about the process of intelligence gathering,  
10 which is one of your twin goals, from what I  
11 hear you say, maybe the more important of the  
12 goals that are extant right now vis-a-vis this  
13 petitioner.

14 In the past, we have had rogue agents  
15 of the CIA or the FBI who it turns out have  
16 compromised this country's national security by  
17 giving information to countries with whom we  
18 were at war or -- the Cold War, the war on  
19 terrorism -- let's just say "at war". And we  
20 needed that information to protect ourselves.  
21 But we didn't hold them incommunicado.

22 What did we do, actually?

23 MR. CLEMENT: With respect to most of  
24 those individuals, criminal charges were brought  
25 and then an agreement was reached where there

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 was an exchange --

3 JUDGE POOLER: So we bargained with  
4 them and took the death penalty off the table --  
5 in some cases, pensions, as homely as that --  
6 and got the information we went.

7 Now, isn't it true that Mr. Padilla,  
8 based on assuming everything you say is true in  
9 the declarations before us, isn't it true that  
10 he could be charged with several crimes that  
11 would bring either life imprisonment or the  
12 death penalty?

13 MR. CLEMENT: I would think that's  
14 true. I haven't looked at the record with that  
15 question in mind.

16 JUDGE POOLER: So why isn't the  
17 traditional plea bargain, which the government  
18 knows how to do, why isn't that the way to get  
19 information from someone who has it and you want  
20 it rather than keeping him incommunicado in a  
21 brig?

22 MR. CLEMENT: Your Honor, I think that  
23 there are different ways of dealing with  
24 different individuals, and there are some  
25 individuals who have been charged in the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 criminal justice system and have effectively  
3 pled to an offense and have provided information  
4 as a result. So that is a tool that with  
5 respect to some individuals is deemed the best  
6 way to proceed and the best way to gather  
7 intelligence.

8 JUDGE POOLER: And it's  
9 constitutional.

10 MR. CLEMENT: It is constitutional.  
11 But there's another constitutionally available  
12 mechanism that the Quirin case says is  
13 constitutional --

14 JUDGE POOLER: But what I'm saying is  
15 if you had done that, what you did with the  
16 rogue agents, you wouldn't be facing these  
17 ultimate issues of the President's powers or the  
18 constitutionality of the government's actions.  
19 Isn't that correct?

20 MR. CLEMENT: Absolutely correct. If  
21 the executive branch wanted to limit itself to  
22 one intelligence gathering tool and close  
23 another, it could have done that and avoid this  
24 question. But the Executive made a question  
25 that the intelligence value and the intelligence

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 gathering processes with respect to al Qaeda was  
3 so important that they did not want to take any  
4 tools off the table. And I think with respect  
5 that, that intelligence-based judgment is the  
6 kind of judgment to which courts have  
7 traditionally deferred.

8 JUDGE WESLEY: Article 3 trial. And  
9 if the Court says tried for treason, doesn't  
10 mean he can't be tried in a military court as an  
11 enemy combatant.

12 JUDGE POOLER: I think it's the  
13 battlefield judgments where Article 3 has  
14 been -- has been shown, battlefield judgments.

15 MR. CLEMENT: With respect, the  
16 al Qaeda made the battlefield the United States,  
17 and there's substantial evidence that they're  
18 trying to make the battlefield the United States  
19 again. So when we see somebody in the United  
20 States, given the locus of the attacks to date,  
21 the locus of where future attacks are planned,  
22 it would seem to be an odd view indeed -- the  
23 authority is fine if we can capture somebody  
24 over in Afghanistan, but we can't use the same  
25 basis in authority here.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 JUDGE POOLER: If what you say is  
3 true, that the battlefield is now the United  
4 States -- and I'm not going to bow to you about  
5 9/11; I walked out my building right next door  
6 and saw both towers on fire. So I understand  
7 what you're talking about.

8 But if that has become the  
9 battlefield, Congress has to say that, and I'm  
10 not certain they did yet.

11 MR. CLEMENT: With respect, I think  
12 the President has a reservoir of authority to  
13 respond, and -- when the battlefield is in the  
14 United States. And with respect, I think the  
15 problem with both your reading of 4001(a) and  
16 your authorization of force reading is that  
17 doesn't allow you to draw any distinction  
18 between Mr. Padilla and Mr. Atta. And if  
19 there's an imminent attack on the United States  
20 and the President is in a position to stop that  
21 because he's the Executive and can act with  
22 dispatch, he shouldn't have to call up on the  
23 phone and say, Geez, guys, we need a resolution  
24 before I can do anything. Otherwise, 18 USC  
25 4001(a) stands in the way.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 JUDGE POOLER: There is a vehicle to  
3 stop that, but we weren't addressing that, so  
4 those questions just are -- I just don't know  
5 how useful they are.

6 MR. CLEMENT: Fair point, your Honor.  
7 I don't think this Court -- if there had been  
8 the ability to stop these attacks, I don't think  
9 this Court would tarry long over the question of  
10 whether or not the officers had to pay damages  
11 because they violated 18 USC 4001(a).

12 JUDGE WESLEY: What might develop is  
13 possibility they might occur again.

14 MR. CLEMENT: I think that's right,  
15 your Honor.

16 JUDGE POOLER: Thank you for a lively  
17 discussion.

18 Professor Martinez? Three minutes  
19 rebuttal.

20 PROF. MARTINEZ: Thank you, your  
21 Honors.

22 Your Honors, Congress is open for  
23 business. It's been open for business for the  
24 past 18 months. The courts are open and  
25 operating, and so Mr. Clement's hypotheticals

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 about the President's necessity of action where  
3 he doesn't have time to get the authority he  
4 needs are a far cry from the situation.

5 JUDGE WESLEY: It's that the  
6 President's action's been on the table since  
7 June, 2002. He hasn't done a single thing to  
8 repudiate what he did to Mr. Padilla, has he?

9 PROF. MARTINEZ: Correct, your Honor.

10 JUDGE WESLEY: Can't we infer then,  
11 because isn't there a firm statutory instruction  
12 that when Congress doesn't act faced with a  
13 condition it's chosen not to intervene? Has  
14 there been a single bill introduced or  
15 resolution condemning Mr. Padilla's detention?

16 PROF. MARTINEZ: No, Congress has not  
17 said anything.

18 JUDGE WESLEY: Completely silent? All  
19 465 members of Congress have been completely  
20 silent for 18 months. In light of --

21 PROF. MARTINEZ: Congressional  
22 inaction is insufficient to satisfy the  
23 necessity of the Congress -- for the  
24 Constitution to create Congressional action --  
25 dramatically upsets the separation of powers.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 The same argument was made in the steel seizure  
3 case.

4 JUDGE PARKER: Perhaps Congress is  
5 waiting to see what we say to this issue, since  
6 it's our position, is it not, to determine  
7 whether the kind of actions of the President  
8 were consistent with his Constitutional  
9 authority.

10 PROF. MARTINEZ: That's correct, your  
11 Honor. And I would also just reiterate in the  
12 seizure case that exact argument was made. It  
13 was held insufficient that Congress had not  
14 attempted the president's seizure of the steel  
15 mills.

16 JUDGE WESLEY: May be a little more  
17 realistic.

18 PROF. MARTINEZ: Yes, your Honor. As  
19 your Honor's indicated, the plain text of 4001  
20 makes it clear what is implicit, which is that  
21 no citizen may be imprisoned except pursuant to  
22 an act of Congress, and I think it's clear here  
23 that Congress has in no way indicated its  
24 intention to depart from our nation's long  
25 constitutional history that off the battlefield,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 where the courts are open and functioning, that  
3 citizens cannot be imprisoned without trial.

4 Contrary to the government's evidence,  
5 an authorization for use of force on the  
6 battlefield, even in a traditional conflict,  
7 cannot be read to confer authority on the  
8 President to detain persons or property off the  
9 battlefield. In Quirin, there was an express  
10 authorization from Congress allowing Quirin to  
11 be tried in military commission, and the Quirin  
12 court made clear that it had no occasion to  
13 describe the meticulous care the boundaries of  
14 military jurisdiction and limited its holding to  
15 the facts before it, which is that on the facts  
16 conceded there, namely that they were members of  
17 the German Army, on those conceded facts they  
18 were tried.

19 JUDGE WESLEY: That was the real  
20 argument. They were trying to say criminal  
21 court and the Court said, Well, I'm sorry, but  
22 you're addressed in the guidelines, and they  
23 felt enough Congressional authorization.

24 But Quirin is what it is, but it's --  
25 but it's not everything that everybody wants it

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 to be. It's merely the decision as to where the  
3 individual can be tried.

4 PROF. MARTINEZ: That's correct, your  
5 Honor.

6 To conclude, your Honor, the  
7 government's arguments about the scope of this  
8 war demonstrate the breadth of the position that  
9 the government seeks -- namely, that this power  
10 can be exercised anywhere at anytime against any  
11 person in the United States for as long as the  
12 appellate deems fit. The President seeks an  
13 unchecked power to substitute military rule for  
14 the rule of law, wherever and whenever he wants,  
15 without Congressional authorization, without  
16 review by the courts when they're open and  
17 functioning. Your Honors, such power we believe  
18 is inconsistent with a free and democratic  
19 society, and the Constitution demands that it be  
20 rejected.

21 JUDGE POOLER: Thank you, Counsel.

22 We'll turn to our last set of issues  
23 which assume, for the sake of this discussion,  
24 that the President does have the power to  
25 designate Mr. Padilla as an enemy combatant, and

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 we will discuss here the proper scope of review  
3 for the President's decision. The government's  
4 burden to prove. And Padilla's access to  
5 counsel.

6 Even though both parties prevailed on  
7 one or a set of the issues, we view the  
8 respondent here as prevailing, so we'll begin  
9 with petitioner. Mr. Patel will argue, and  
10 Professor Martinez will have rebuttal.

11 Mr. Patel?

12 MR. PATEL: Thank you, your Honor.  
13 For 17 months, Jose Padilla has been confined in  
14 a military prison without access to family,  
15 counsel or any court. The government asks this  
16 Court to endorse the indefinite incommunicado  
17 military detention of a U.S. citizen based on  
18 multiple levels of hearsay without allowing that  
19 citizen an opportunity to be heard.

20 The writ of habeas corpus is the tool  
21 to test the legality of executive intention, and  
22 the government concedes that Mr. Padilla has the  
23 right to file such a writ. But in this Court  
24 and in the court below, they have raised  
25 procedural objections to make the filing of that

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 writ a meaningless act. The government has  
3 asked this Court to endorse the constructive  
4 intention of a writ of habeas corpus, a power  
5 that the Constitution gives exclusively to  
6 Congress.

7 JUDGE WESLEY: You say constructive.  
8 Fill it out for me a little bit.

9 MR. PATEL: There has been no act by  
10 which the Executive has asked Congress to  
11 suspend a writ of habeas corpus. They have  
12 merely made the filing of the writ of habeas  
13 corpus meaningless by preventing counsel from  
14 meeting with Mr. Padilla.

15 What normally happens in a habeas  
16 proceeding is the petitioner, Mr. Padilla, is  
17 allowed to respond to the facts that the  
18 government allege. They have prevented that  
19 from happening. So the very factual  
20 determinations that ultimately have to be made  
21 in this case cannot be made because the  
22 government has acted in such a way as to prevent  
23 him from having any access to his attorneys.

24 JUDGE PARKER: What remedy do you want  
25 for that? Do you propose for that?

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(212) 805-0300

1 3BHLPADDA

2 MR. PATEL: I think the remedy that  
3 Judge Mukasey outlined is appropriate, your  
4 Honor: That he be permitted to meet with  
5 counsel; that he be permitted to submit factual  
6 responses; and Judge Mukasey can then decide the  
7 merits of the writ.

8 JUDGE POOLER: You would argue for a  
9 different standard.

10 MR. PATEL: That is correct, your  
11 Honor. It is actually to both the standard of  
12 review of the jurisdictional facts and for the  
13 ultimate burden of proof that the government has  
14 to establish.

15 JUDGE WESLEY: But the government  
16 doesn't say that you're not entitled to writ.  
17 It's just that they seem to parse out how much  
18 of it you can get in a traditional sense. Can  
19 you tell me of any case that you're aware of in  
20 which someone who's entitled to a writ of habeas  
21 corpus doesn't have counsel and/or has no  
22 contact with his or her next friend, nor do they  
23 have the ability to discuss factual assertions?

24 MR. PATEL: Judge, not only can I cite  
25 you the cases, but even during the Civil War

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(212) 805-0300

1 3BHLPADA

2 when the writ was suspended, people who were  
3 considered, quote, "enemies of the state",  
4 prisoners of states, as opposed to prisoners of  
5 war, were still allowed access to their family  
6 and allowed access to the courts. And that's,  
7 in fact, where the Milligan case arose. Those  
8 people did have access to counsel, and  
9 ultimately the Supreme Court said that was  
10 someone who should not be tried by a military  
11 tribunal.

12 JUDGE WESLEY: The government offers a  
13 number of immigration cases where an offer of --  
14 standard of some evidence, and that that should  
15 be the standard. Judge Mukasey accepted that,  
16 and you take exception do that. Are you -- can  
17 you cite to me a case in which habeas has been  
18 examined without a hearing? I mean, some  
19 evidence means some evidence to support a  
20 conclusion, but generally it's some evidence  
21 that arises from an administrative proceeding  
22 where evidence was presented.

23 MR. PATEL: If I understand your  
24 Honor's question correctly, you are correct. In  
25 every case where the some evidence standard has

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 been applied, there has been some fact finding  
3 proceeding below in which the petitioner was  
4 allowed to participate. That is about now  
5 notice of the claim against him and he had the  
6 opportunity to respond. And in reviewing the  
7 administrative determination, what the courts  
8 have looked at initially was: Was the process  
9 fair? That's really what the heart and soul of  
10 the some evidence standard is about. It is a  
11 procedural review. Was the process fair? Did  
12 this person have a realistic truthful  
13 opportunity to participate? And then to make  
14 sure that it was not a complete arbitrary  
15 decision, to see whether in fact there was some  
16 evidence.

17 In all candor, your Honor, we aspire  
18 to the level of due process that the convicted  
19 felons in Hill got. We have had nothing. Zero.  
20 Zero.

21 JUDGE WESLEY: But you got Judge  
22 Mukasey. If we -- I know some evidence  
23 standards, but presuming that to be the case,  
24 such presumptions are always dangerous to make  
25 as to end results, but presume that that

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(212) 805-0300

1 3BHLPADA

2 occurred, what kind of evidence would you seek  
3 to presented to Judge Mukasey? I mean,  
4 Ms. Newman put an affidavit in on behalf of  
5 Mr. Padilla which is fair based and said, Well,  
6 your Honor, he was going to Chicago because of  
7 his son. Didn't deny some of the allegations  
8 that were in the redacted affidavit. But in  
9 essence said he was going to Chicago to see his  
10 son. Would it be your position that you would  
11 want to call Secretary Rumsfeld?

12 JUDGE POOLER: The affidavit, I think,  
13 postdates.

14 MR. PATEL: Your Honor is correct.

15 JUDGE WESLEY: I apologize. What I  
16 really want to know is do you want to call  
17 Jacoby, do you want to call Mobbs, do you want  
18 to call --

19 JUDGE POOLER: They don't have  
20 personal knowledge, I think they admit that.

21 MR. PATEL: Your Honor, I don't think  
22 that they're competent witnesses. In the sense,  
23 the evidentiary sense --

24 JUDGE WESLEY: Be careful now.

25 MR. PATEL: In other words, your

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(212) 805-0300

1 3BHLPADA

2 Honor --

3 JUDGE WESLEY: I'm sure you don't mean  
4 disrespect.

5 MR. PATEL: No, I don't.

6 JUDGE WESLEY: I suspect you don't.  
7 But in any event, Counselor, what evidence do  
8 you want to present?

9 MR. PATEL: I can't answer that  
10 question, your Honor, because I haven't spoken  
11 to my client. I can assume that there are any  
12 number of scenarios that are completely  
13 consistent --

14 JUDGE WESLEY: Do you want to call the  
15 informants that were used in the Mobbs  
16 affidavit?

17 MR. PATEL: Judge --

18 JUDGE WESLEY: I'm just asking.

19 MR. PATEL: You're asking me what the  
20 government's going to do to prove their --

21 JUDGE WESLEY: The government will  
22 submit their affidavits that say there is some  
23 evidence.

24 MR. PATEL: We will submit a  
25 responding affidavit, and if Judge Mukasey

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(212) 805-0300

1 3BHLPADADA

2 determines then that there's a still a factual  
3 dispute, then he will order a hearing.

4 JUDGE WESLEY: Isn't that exactly what  
5 Canby was nervous about, that there would be  
6 some kind of weighing by the three judges about  
7 military decisions as to whether this fellow, in  
8 the confines of --

9 MR. PATEL: That, your Honor, whether  
10 an American citizen falls within military  
11 jurisdiction is classically a decision made by  
12 an Article 3 court.

13 JUDGE WESLEY: We know entitled. He's  
14 entitled to a writ. But I'd still like to know  
15 what you'd prove -- you're a smart fellow. You  
16 are here. Tell me what you think you'll prove.

17 MR. PATEL: What I think I'll prove,  
18 your Honor -- this is again pure speculation --  
19 I think we'll prove that Mr. Padilla deserves to  
20 be released and go home. And that's it.

21 JUDGE PARKER: What you're suggesting  
22 is that given an opportunity to put on proof,  
23 presumably after you've had a chance to meet  
24 with your client and talk to your client and  
25 explore the facts with your client, that you

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 would, at least in broad brush, be prepared to  
3 demonstrate at a hearing or at the appropriate  
4 time that he was not an enemy combatant.

5 MR. PATEL: That's correct, your  
6 Honor. That is absolutely correct.

7 JUDGE POOLER: And the standard of  
8 review that the Article 3 court brings to a  
9 declaration to the President.

10 MR. PATEL: Traditionally, your Honor,  
11 the standard of review of whether or not someone  
12 is subject to military authority is a de novo  
13 review as to the burden of proof.

14 JUDGE POOLER: They have been  
15 conflated in our discussions, the standard of  
16 review and the burden. So it's helpful to point  
17 out that they're two separate issues.

18 MR. PATEL: Your Honor, actually, I  
19 thought the way this Court's order of  
20 November 7th articulated the two issues was  
21 right on. And I think that the initial -- there  
22 is an initial jurisdictional fact that has to be  
23 determined: Is this man, is Jose Padilla  
24 subject to military jurisdiction? That is a  
25 de novo review. It is a factual determination

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 that the Court must make.

3 Then the question becomes, Well, has  
4 the government proved that? And that we submit  
5 should be done by clear and convincing evidence.  
6 And your Honor, in Addington, the Supreme Court  
7 really talked a great deal about what it means  
8 to be -- what a burden of proof is. And it  
9 really reflects the level of confidence that the  
10 fact finders should have in the correctness of  
11 its determination, and when we're talking about  
12 the loss of liberty, traditionally courts have  
13 required a higher standard.

14 We are not suggesting today that this  
15 should be done to the reasonable doubts  
16 standards as it would be done in a criminal  
17 case, but we are asking at least the same level  
18 of certainty that a citizen -- that the  
19 government must prove before a mentally  
20 incompetent individual can be detained in the  
21 hospital for medical treatment; before an alien  
22 can be deported to a friendly country; and  
23 before someone who is accused of crime, who has  
24 the entire panoply of constitutional rights,  
25 including the speedy trial clock --

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(212) 805-0300

1 3BHLPADA

2 JUDGE POOLER: But, Counsel, I think  
3 the government would be impatient with your  
4 comparison to the civilian panoply of rights.  
5 You heard the discussions here about the  
6 battlefield now being our own soil. And we've  
7 heard some descriptions of September 11th and  
8 what it did to this country. I think the  
9 government now argues that the panoply of rights  
10 that you rely on don't apply to September 11th,  
11 to certain circumstances. That's the heart of  
12 what we are talking about.

13 MR. PATEL: Your Honor, there is no  
14 act of Congress that in any way limits that  
15 after September 11th would breach the due  
16 process laws.

17 JUDGE WESLEY: We do know, like in the  
18 Patriot Act, that Congress severely restricts  
19 reviewing the discretion of the Attorney  
20 General.

21 MR. PATEL: Your Honor, but there has  
22 been no act of Congress that says that an  
23 American citizen can be detained without access  
24 to a court reviewing that. There is just no  
25 such act of Congress.

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(212) 805-0300

1 3BHLPADA

2           The Fifth Amendment, due process  
3 clause, as Justice Frankfurter said in his  
4 concurring opinion, the requirement of due  
5 process is not a fairweather or timid assurance.  
6 It must be respected in periods of calm and in  
7 times of trouble.

8           Your Honor, this is the land of the  
9 free and the home of the brave. That means  
10 something. Those words mean something.

11           JUDGE POOLER: As terrible as 9/11  
12 was, it didn't repeal the Constitution, you  
13 mean.

14           MR. PATEL: That's correct, your  
15 Honor. That's correct. That's absolutely  
16 right. That which makes this country great did  
17 not change, and we still owe it to ourselves to  
18 require that citizens be treated to due process  
19 and a fair hearing before an impartial jurist.

20           JUDGE POOLER: Thank you, Counsel.  
21 Now we'll have rebuttal from cocounsel, and  
22 we'll hear from Mr. Clement, who's taking on all  
23 three of you, I see.

24           MR. CLEMENT: Thank you again, your  
25 Honor. May it please the Court --

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(212) 805-0300

1 3BHLPADADA

2 JUDGE POOLER: Mr. Clement, if we  
3 reverse the District Court on the second  
4 constellation of issues, that is, whether the  
5 President has the power, would we have to reach  
6 these issues?

7 MR. CLEMENT: I don't think so, your  
8 Honor. If you say the President has no  
9 authority to do this, then I think these issues  
10 effectively go away. I think, though, that the  
11 same reasons that you would take the position  
12 that the separation of powers allows the  
13 President to make this designation in the first  
14 place also inform the standard of review and  
15 also inform the role of counsel and require that  
16 the role be strictly circumscribed.

17 JUDGE POOLER: Do you see how we have  
18 conflated, as Mr. Patel just agreed, the  
19 standard of review and the burden of proof?

20 MR. CLEMENT: I do, your Honor.  
21 The -- I think the government may have  
22 contributed to the conflation, because to my  
23 standpoint they were conflated for a reason.

24 JUDGE POOLER: There is no review.

25 MR. CLEMENT: There is a review, but

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(212) 805-0300

1 3BHLPADA

2 this is ultimately, in our view, a review of a  
3 military judgment, and in that context of -- I  
4 would say it's a little to bifurcate it, the  
5 proof that's necessary for the original military  
6 decision, and then a standard of review for the  
7 judicial review.

8 JUDGE POOLER: Are there other  
9 military decisions that weren't made on a  
10 battlefield or when there were nation states at  
11 war?

12 MR. CLEMENT: I don't --

13 JUDGE POOLER: You call this a  
14 military decision, and of course once the  
15 Secretary of Defense is involved it becomes  
16 military. But are there other cases that are  
17 similar to this that have not taken place on a  
18 battlefield where nation states were at war?

19 MR. CLEMENT: Well, I think, if I  
20 understand the question correctly, that the  
21 answer would be yes. I'm not sure, though, that  
22 they would lead to the same kind of reviewable  
23 situations or they would implicate the habeas  
24 petition, but if you look at the kind of  
25 information that the government had here and the

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(212) 805-0300

1 3BHLPADADA

2 judgment that it made, it was a military  
3 determination to take somebody they thought was  
4 affiliated with enemy forces and incapacitate  
5 them.

6 JUDGE POOLER: So what I'm getting is  
7 the moment where the military takes charge of  
8 Mr. Padilla, when he's already in jail.

9 MR. CLEMENT: Right.

10 JUDGE POOLER: That's different from  
11 finding Mr. Hamdi on a battlefield in  
12 Afghanistan, isn't it?

13 MR. CLEMENT: Well, with respect, your  
14 Honor, I guess I don't think so. I mean, I  
15 think that.

16 JUDGE POOLER: Ah --

17 MR. CLEMENT: I think in all wars --

18 JUDGE POOLER: Even though the Fourth  
19 Circuit, who you desperately want to be in front  
20 of rather than us, even though they said the two  
21 cases are apples and oranges.

22 MR. CLEMENT: They did say that, your  
23 Honor, and I think with respect to certain  
24 aspects of the case, it may make a difference,  
25 but I think at the same time that the Hamdi

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(212) 805-0300

1 3BHLPADA

2 panel said -- I guess it was en banc -- they  
3 said apples and oranges, even the panel said  
4 this doesn't prejudge the Padilla case in any  
5 way. They went on to cite the Quirin case no  
6 less than 10 times, and pretty much at every  
7 critical juncture of their opinion.

8 So in light of the fact that the  
9 primary precedent that the AMB court was relying  
10 on was the Quirin case, that involved domestic  
11 incapacitation, seizure of somebody  
12 domestically, it's a little hard to say that the  
13 Hamdi situation is just so fundamentally  
14 different than this situation that we have  
15 before us, what was before the Supreme Court in  
16 the Quirin case.

17 JUDGE WESLEY: The reason for cutting  
18 off his lawyer, offered by the government, is  
19 that the lawyer will, in essence, interrupt the  
20 interrogation chain. If that's a valid reason,  
21 then he has a right to habeas corpus action,  
22 doesn't he? He's got to bring it by himself.  
23 Ms. Newman brought it on his behalf. And what's  
24 the value of that writ of habeas corpus if he's  
25 left on his own in the brig in South Carolina?

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(212) 805-0300

1 3BHLPADADA

2 I mean, is that any right at all?

3 MR. CLEMENT: I think it's quite a  
4 robust right, your Honor. And I think the value  
5 of it, as suggested by Mr. -- suggested by Judge  
6 Pooler's first question to me, which is to say  
7 that if this Court were to hold that the purely  
8 legal claims that are brought in this habeas  
9 petition are sufficient to invalidate the  
10 detention, then if that's the holding of the  
11 Court, then that is, obviously, a significant  
12 value of the writ of habeas corpus. But our  
13 view is that the writ's available, but --

14 JUDGE WESLEY: But that's where it  
15 ends, in your view.

16 MR. CLEMENT: Our view is it ends with  
17 these legal arguments, and we think that it  
18 would also allow -- I mean, it plays an  
19 important role because what it does is force the  
20 government to articulate the basis for its  
21 detention of the individual and why it feels  
22 this individual's --

23 JUDGE WESLEY: We understand the legal  
24 arguments, and they're opining about the law in  
25 another matter, but once you go past that,

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(212) 805-0300

1 3BHLPADA

2 there's the netherworld, and the netherworld is  
3 the conflation of the standard of review and the  
4 standard -- and the support of the Executive's  
5 determination. In your view, he's entitled to  
6 no hearing on that question at all. All we have  
7 to do is satisfy ourselves that there is hope.

8 MR. CLEMENT: I think this is the  
9 proper way to answer that question. We feel the  
10 habeas does not necessitate access to counsel.  
11 That's not to say, as I said earlier, that if  
12 the intelligence purposes are no longer served  
13 by not allowing access to counsel, access would  
14 be provided, but we think the habeas can  
15 identify both the important legal issues -- but  
16 there's two other roles that the habeas petition  
17 serves in this area that I think are important  
18 and are not purely legal.

19 One is, by forcing the government to  
20 articulate its basis for holding the individual,  
21 that would allow this Court to, for example,  
22 police the line between Quirin and Milligan and  
23 make sure that the government's not asserting an  
24 authority to hold somebody who's not affiliated  
25 with the enemy or the like. They couldn't go

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(212) 805-0300

1 3BHLPADA

2 beyond the determination that the Executive  
3 feels the individual is affiliated, but that  
4 places the role -- but the role --

5 JUDGE POOLER: How can Mr. Padilla  
6 contest that when the two affidavits on which  
7 you ask us to rely are not on personal  
8 knowledge -- they're what we call hearsay -- in  
9 an evidentiary context? How will you ever  
10 contest that without bringing the person  
11 associated with al Qaeda into the courtroom for  
12 cross-examination in our system?

13 MR. CLEMENT: I think you're right.  
14 That is the system, in our normal context. And  
15 our position would be the normal context would  
16 not apply. It never has in the past. If one is  
17 not going to defer to the Executive's judgment  
18 what you would do is almost have to bring in the  
19 individuals that are referenced in Footnote 1 of  
20 the Mobbs declaration on Page 5.

21 I think it's fair to say, when you  
22 talk about, is the testimony of two people who  
23 are in al Qaeda who are detained by the United  
24 States military, who are viewed as important  
25 confidential information and intelligence

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 sources, they are not viewed as being entirely  
3 forthcoming. We understand that they have  
4 provided some information designed to mislead.  
5 But they also provided much other information  
6 that has been corroborative and very useful.  
7 And that's exactly the kind of information that  
8 the military is used to relying on in making  
9 judgments about -- whether relying on in  
10 selecting targets, in deploying troops, and in  
11 this case, incapacitated somebody believed to be  
12 an enemy combatant. And those are difficult  
13 judgments, but those are judgments the military  
14 makes every day in the context of decisions that  
15 are quintessentially military.

16 JUDGE PARKER: But what troubles me,  
17 Mr. Clement, is the ease with which you  
18 transpose principals that are obviously  
19 applicable in a military context to the domestic  
20 situation, and I certainly take the force of  
21 your point that the way al Qaeda has operated  
22 has changed the landscape. But it strikes me  
23 that when all is said and done, the power that  
24 you are asking us to give to the Executive is  
25 power that, as I read the Constitution, is

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 Congressional power. But beyond that, it seems  
3 to me to be breathtaking in its sweep.

4 And were we to give -- were we to  
5 construe the Constitution as permitting this  
6 kind of power in the Executive with only the  
7 modest -- according to the government's  
8 proposal -- only the modest kind of judicial  
9 review, we would be effecting a sea change in  
10 the constitutional life of this country, and we  
11 would be making changes that have been  
12 unprecedented in civilized society.

13 MR. CLEMENT: With respect, your  
14 Honor, obviously the executive branch disagrees  
15 with that assessment. I think that the sea  
16 change -- there's no sea change here because the  
17 power that the Executive's asserting is the  
18 power that's exercised in virtually every  
19 military engagement in this nation's history,  
20 which is the power to hold enemy combatants,  
21 even individuals not going to be tried with a  
22 specific war crime, but to hold them for  
23 purposes of detention and intelligence  
24 gathering. That has happened over and over  
25 again in military engagement -- after military

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 engagement, without specific authorization from  
3 Congress, because as --

4 JUDGE PARKER: Then 4001, in your  
5 view, is a provision that we should be prepared  
6 to just forget about.

7 MR. CLEMENT: No. Again, I think the  
8 Court should read it for what it's worth, but  
9 it's location, Title 18, its history, as  
10 repealing an authority of the Attorney General,  
11 but not the military, to hold individuals, all  
12 of that informs the fact that 18 USC 4001(a) has  
13 never been thought to constrain the power of the  
14 military. And the history of detaining  
15 individuals as enemy combatants in military  
16 operations for purposes of detention and  
17 intelligence gathering does not just predate  
18 4001(a), it postdates it as well, and there have  
19 never been in the context of the current  
20 operations in Iraq and the like -- I don't know,  
21 I've never tried to parse the various  
22 resolutions in all of those situations -- but  
23 there's certainly been situations where the  
24 United States has engaged in military force,  
25 caught enemy combatants, and in those cases

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADA

2 there was no Congressional authorization as well  
3 because the whole operation was very  
4 short-lived.

5 And so I think that this is not a sea  
6 change. And I think that the Quirin case is  
7 quite on point because that, too, involved  
8 United States citizens held in the United  
9 States. The court there talked about the  
10 specific Congressional authorization for the  
11 trial on specific military crimes which, of  
12 course, resulted in death in the instance of 68  
13 individuals, but it also talked about the  
14 authority to detain individuals, and it treated  
15 that as a lesser power.

16 JUDGE PARKER: Does the authority to  
17 define who an enemy combatant is rest with the  
18 Executive or the Congress?

19 MR. CLEMENT: I think that it is -- it  
20 rests primarily with the Executive. I think  
21 that Congress -- you know, I think foreign  
22 policy has always been an area --

23 JUDGE PARKER: That is law-making, is  
24 it not?

25 JUDGE POOLER: That's what flows from

SOUTHERN DISTRICT REPORTERS, P.C.

1 3BHLPADADA

2 it. The President can define it, but to then  
3 take the acts, to be authorized to take the  
4 acts, I think that's the question.

5 MR. CLEMENT: But I would view it as  
6 primarily part of the Article 2 power and the  
7 Commander in Chief power. And I think that  
8 certainly Congress could -- I mean, you know,  
9 foreign policy is an area of shared  
10 responsibility. So obviously if Congress tried  
11 to restrict the ability -- and in fairness, if  
12 4001(a) wasn't in Title 18 and it was in  
13 Title 10, and it was specifically directed at  
14 military detentions, I think that would raise an  
15 extremely difficult separation of powers  
16 question. I can assure you I or somebody from  
17 the executive branch would be up here telling  
18 you that that violates the separation of powers,  
19 and I'm sure counsel for the Senate or the House  
20 of Representatives would be up here telling you,  
21 No, it doesn't.

22 But what I would say is that -- and  
23 the Fourth Circuit did this in the Hamdi  
24 opinion. Is it's best to avoid having to decide  
25 that question. And I think that this is where

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(212) 805-0300

1 3BHLPADADA

2 it spills over into the secondary. But I think  
3 if one has questions about exactly whether the  
4 joint authorization specifically covers this, I  
5 think the benefit of the doubt should be in  
6 terms of finding the authority to do this and  
7 avoiding those very difficult separation of  
8 powers questions.

9 But to be responsive, we do think that  
10 that power resides in Article 2 and is given to  
11 the President as Commander in Chief at the  
12 founding, because there's always been that  
13 residual authority to hold individuals as enemy  
14 combatants.

15 JUDGE PARKER: So could the President  
16 then promulgate regulations defining conduct  
17 that would turn someone into an enemy combatant?

18 MR. CLEMENT: Yes. In fact, the  
19 President has essentially done that with respect  
20 to the military commissions that have been  
21 authorized for non-United States citizens. I  
22 mean, obviously there are going to be some  
23 questions --

24 JUDGE POOLER: Could he do that to  
25 U.S. citizens?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

1 3BHLPADADA

2 MR. CLEMENT: We would say yes, he  
3 could. He hasn't done that. I think that again  
4 shows the Executive has respect for the --  
5 essentially, treatment of citizens versus  
6 aliens, and has provided greater tools dealing  
7 with aliens than United States citizens.

8 I guess it really comes back to Judge  
9 Pooler's question, because all of these  
10 authorities may strike us as being quite extreme  
11 and quite unusual if one has the perspective of  
12 the civil justice system or the typical criminal  
13 justice system.

14 But with respect to the military  
15 justice system, this is the way that things have  
16 been done for 200 years. And I mean, there are  
17 not that many cases challenging the detention of  
18 enemy combatants or prisoners of war. But that  
19 doesn't mean that thousands upon thousands upon  
20 thousands of people have been detained in that  
21 capacity over the nation's many conflicts. It's  
22 always been understood that that authority to  
23 hold somebody as an enemy combatant does not  
24 immediately occasion the right to counsel and  
25 does not get someone in the court system

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2 bringing factual challenges.

3 JUDGE WESLEY: If he's an enemy  
4 combatant and the President has that authority  
5 as Commander in Chief, how long is the  
6 legitimacy of his being held without any  
7 communication with anyone? What's the outer  
8 limit of how long Jose Padilla can remain  
9 incommunicado to the world?

10 MR. CLEMENT: The authority to hold  
11 someone as an enemy combatant lasts only so long  
12 as the conflict.

13 JUDGE WESLEY: But you offer up the  
14 reason why he has no right to have contact with  
15 people, because it will, in fact, interrupt the  
16 interrogation chain. How are we supposed to  
17 know that, and who assures us that you'll  
18 regularly let someone know that? I mean, where  
19 is it in the law, where's the structure? If he  
20 loses this, if -- say we were to send it back to  
21 Mukasey under an order and said, It's okay,  
22 there's some evidence. And it comes back up and  
23 it's affirmed again? That's res judicata. How  
24 long does Padilla wait before he submits it  
25 again?

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2 MR. CLEMENT: I think that these kind  
3 of -- I mean, if the gravamen of the challenge  
4 is a Quirin challenge, that he's been held  
5 without counsel too long, that he's been held as  
6 an enemy combatant too long.

7 JUDGE WESLEY: I'm telling you this as  
8 the reason you offered to me. I'm not making  
9 this up. You said he had no right to  
10 communicate with counsel because it will  
11 interfere with this very important national  
12 security interest of gathering intelligence.  
13 And I would submit to you that that was the  
14 reason you offered 18 months ago. What's the  
15 reason today?

16 MR. CLEMENT: That reason continues to  
17 be true. Now, it may not be true that much  
18 longer, I don't know. And as I've told you --

19 JUDGE POOLER: So one of the  
20 affidavits, one of the public affidavits says  
21 the information is perishable. He hasn't been  
22 associated with anyone, I assume, related to  
23 al Qaeda since he's been in the brig.

24 MR. CLEMENT: That's right, your  
25 Honor. But to the extent that he has

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2 information about the way that these attacks  
3 were planned -- you know, I don't want to get  
4 into any of the classified information, but some  
5 of these attacks have had long gestation  
6 periods, so I don't think it's an easy  
7 conclusion that this individual is already stale  
8 and has nothing more to give.

9 But what I would like to make clear is  
10 that at the point that that judgment is  
11 remanded, which is absolutely an intelligence  
12 judgment, then access to counsel would be  
13 provided.

14 JUDGE PARKER: That's a pure Trust Me  
15 argument.

16 MR. CLEMENT: It's a pure Trust Me.  
17 Trust the Executive to make the judgment about  
18 the intelligence values, because that's the  
19 branch entrusted with these kind of intelligence  
20 decisions. Are there are no further questions?

21 JUDGE POOLER: We'll hear from  
22 Professor Martinez on the rebuttal on these  
23 three issues.

24 PROF. MARTINEZ: Thank you, your  
25 Honor. With all due respect to Mr. Clement,

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2 this is not the way our nation has done things  
3 for the past 200 years. For the past 200 years,  
4 citizens who have been found as civilians  
5 sitting on American soil have gotten access to a  
6 lawyer and have gotten a hearing --

7 JUDGE POOLER: Don't you think the  
8 world's changed? That's what we've been  
9 hearing. The world changed after  
10 September 11th.

11 PROF. MARTINEZ: If that's true, your  
12 Honor, it's a job for Congress, not for the  
13 President alone. The cases Mr. Clement cites  
14 involve the detention of persons without process  
15 and all involve battlefield captures which, as  
16 Judge Parker's questions and others suggest, are  
17 fundamentally different circumstances than an  
18 individual picked up as a civilian on American  
19 soil.

20 JUDGE WESLEY: That's true in  
21 conventional war. But conventional war is set  
22 field pieces and insignias. Neither of those  
23 is -- the world is different.

24 The question is: What of the  
25 difference and how does it interact with the

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2 Court? And how are the judicial principals that  
3 you find to be determined? Can we rest assured  
4 that, in your view, that the President could  
5 conduct a war on U.S. soil and what would be  
6 necessary for him to be allowed to do so?

7 PROF. MARTINEZ: Your Honor, I think  
8 it's important to recognize the relationship  
9 between this question and the authority  
10 question.

11 JUDGE WESLEY: Sure.

12 PROF. MARTINEZ: Because what the  
13 President seeks to do is to expand his power to  
14 detain persons far beyond what has ever been in  
15 any past conflict. And our position is that's  
16 primarily a job for Congress, and the difficulty  
17 of determining what procedures should be used in  
18 this new context also highlights the extent to  
19 which legislation is necessary to define the  
20 parameters of any such power and what procedures  
21 ought to be followed.

22 But in addition, if this Court finds  
23 that the President has the authority to expand  
24 that category, I think this Court needs to  
25 recognize that the balance of factors in a

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(212) 805-0300

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2 situation where a person is detained in a  
3 civilian setting, where they don't concede that  
4 they're maybe of an armed force, as the  
5 defendants in Quirin did, there's a much greater  
6 risk of error and a much greater potential for  
7 abuse by the government of its power, and that  
8 demands more process than would be appropriate  
9 on the battlefield, and that's been done in the  
10 past.

11 Other Democratic nations, confronted  
12 with the threat of terrorism and recognizing it  
13 as a different problem from that they've dealt  
14 with in the past, have had legislation defining  
15 who can be detained, under what conditions,  
16 granting access to counsel, providing the means  
17 for judicial review at regular intervals. If  
18 that's what the government thinks is necessary  
19 here, it's a job for Congress to come up with  
20 those measures.

21 JUDGE WESLEY: Mr. Padilla's unique in  
22 the sense that he's the only U.S. citizen  
23 arrested on U.S. soil as an alleged al Qaeda  
24 operative who was deemed an enemy combatant.  
25 Anyone else who have been arrested, all have

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2 been tried in the current context, have they  
3 not? Hamdi and everyone else?

4 PROF. MARTINEZ: Yes. The government  
5 has used the threat of enemy combatant status in  
6 those prosecutions.

7 JUDGE WESLEY: But he's the only one  
8 on U.S. soil, a U.S. citizen -- U.S. soil, U.S.  
9 citizen, detained as an enemy combatant.

10 PROF. MARTINEZ: He is the only person  
11 now. That's correct, your Honor. I think  
12 what's important to recognize is that the  
13 government's position has no limits. Under  
14 their theory, they can do this to any American.  
15 They can pick up any person off the street, and  
16 so long as the President turns in a piece of  
17 paper that says that that person is associated  
18 with al Qaeda, that person has no rights and the  
19 courts are powerless to intervene.

20 Your Honor, that has never been the  
21 law in this country, and it cannot be the law.

22 Under our Constitutional tradition,  
23 Mr. Padilla is entitled to the help of a lawyer  
24 and, at a minimum, is entitled to tell the Court  
25 his side of the story, and the Court is

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2 empowered to grant his release. Thank you.

3 JUDGE POOLER: Thank you, Counsel.

4 One housekeeping matter. Mr. Clement,  
5 we were informed that Judge Mukasey asked the  
6 government to expedite access to the sealed  
7 documents by Mr. Padilla's counsel. I think  
8 that they said they asked for this months ago.  
9 Is there any view on the horizon as to when they  
10 might have access to those documents?

11 MR. CLEMENT: Give me one second, your  
12 Honor.

13 (Off the record discussion)

14 MR. PATEL: Your Honor, just to  
15 clarify the request, perhaps -- we had  
16 submitted -- Ms. Newman and I had submitted  
17 applications for security clearance.

18 JUDGE POOLER: You need security  
19 clearance. I understand Judge Mukasey asked the  
20 government to speed it along.

21 MR. PATEL: It's been my understanding  
22 that the government's position, at least as to  
23 the Mobbs classified document, was even if we  
24 had clearances, that they would rather withdraw  
25 it than turn it over to us.

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2 JUDGE POOLER: Oh.

3 MR. CLEMENT: I think the position of  
4 Judge Mukasey was, not with specific reference  
5 to specific sealed affidavits, but if counsel is  
6 going to ever get access to Mr. Padilla,  
7 whether, you know, by Order of the Court or  
8 because the Executive feels that the  
9 intelligence gathering process is complete, then  
10 at that stage, I think they would still need a  
11 security clearance, because he would still, I  
12 think --

13 JUDGE POOLER: Correct.

14 MR. CLEMENT: And then there was a  
15 colloquy -- I don't think there was any order  
16 about this. But the background checks aren't  
17 complete. There would need to be a briefing.  
18 That hasn't happened, but it could happen  
19 rapidly.

20 JUDGE POOLER: So they have been  
21 granted clearance to see the documents? Is that  
22 what you mean by the background?

23 MR. CLEMENT: There's two questions  
24 here. There's whether or not the lawyers for  
25 Mr. Padilla would get reference or access to the

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2 sealed materials. As far as I know, that's not  
3 the order of Judge Mukasey. It's -- that wasn't  
4 like the specific reason he thought it was  
5 important to get the clearances.

6 And then what I'm saying is with  
7 respect to the processing of the clearances,  
8 there's basically two steps: There has to be a  
9 background investigation.

10 JUDGE POOLER: Which is done.

11 MR. CLEMENT: Which is done. And  
12 there then has to be a briefing, which doesn't  
13 take long.

14 JUDGE POOLER: So the answer is: It's  
15 in process?

16 MR. CLEMENT: The answer is,  
17 basically, the time-consuming part of it is  
18 complete. And whenever there is a reason for  
19 sort of either Court order or, you know, an  
20 Executive decision that that access will no  
21 longer interfere with the intelligence  
22 gathering, that at that point they would be  
23 briefed and we would be over that hurdle. So it  
24 won't pose any time obstacle at this point.

25 If that's responsive....

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2 JUDGE POOLER: It is. Did you want to  
3 say something?

4 MR. PATEL: No.

5 JUDGE POOLER: Before Counsel leave, I  
6 want to thank you all for wonderful argument and  
7 terrific briefing, and also from all the amici.  
8 They give us plenty to think about. Thank you  
9 all.

10 The Court will be adjourned.

11 (Adjourned)

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