

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

ABU BAKKER QASSIM and A'DEL ABDUL  
HAKIM,

Petitioners/Plaintiffs,

v.

GEORGE W. BUSH, *et al.*,

Respondents/Defendants.

Case No. 05 cv 0497 (JR)

SEPTEMBER 19, 2005 DECLARATION OF SABIN WILLETT

Pursuant to 28 U.S.C. § 1746, I, Sabin Willett declare the following to be true.

1. I attended the public session of the September 8, 2005 oral argument held in the United States Court of Appeals for the District of Columbia Circuit, in nos. 05-5062, *et al.*, and 05-5064, *et al.*

2. Attached as Exhibit 1 to this declaration is a transcript of that public session obtained, via other habeas counsel, from the official reporter. I believe the transcript to be substantially accurate.

I declare under penalty of perjury that the foregoing is true.

dated: 9/19/05

  
Sabin Willett

# EXHIBIT 1

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

-----  
LAKDAR BOURMEDIENE, DETAINEE,  
CAMP DELTA, ET AL.,

Appellants,

v.

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

Appellee.  
-----

No. 05-5062, et al.

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

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.  
-----

No. 05-5064, et al.

Thursday, September 8, 2005

Washington, D.C.

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

BEFORE:

CIRCUIT JUDGES SENTELLE, RANDOLPH AND ROGERS

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APPEARANCES:

ON BEHALF OF THE APPELLANTS:

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

ON BEHALF OF THE APPELLEE:

GREGORY G. KATSAS, DEPUTY ASSISTANT ATTORNEY GENERAL

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P R O C E E D I N G S

THE CLERK: Case number 05-5062, et al. Lakdar Boumediene, Detainee, Camp Delta, et al., Appellants v. George W. Bush, President of the United States, et al. Case number 05-5064, et al. Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al., Appellants v. United States of America, et al. Mr. Wilner and Mr. Oleskey with Appellant Detainees, Mr. (indiscernible).

THE COURT: Counsel?

MR. WILNER: Good morning, Your Honor. May it please the Court, my name is Tom Wilner and I'm with the law firm of Sherman and Sterling. I represent the Petitioners in the Al Odah case. Today I'm arguing on behalf of all of the Appellees from Judge Green's appeal.

Your Honors, despite all the briefs and all the words we've thrown at you, I think that the issue before you right now is really a very simple one and I'd just like to take a few moments to lay out what I think are some undisputed things about the case.

As we all know, over 14 months ago, the Supreme Court ruled in this case. It held explicitly that the habeas statute applies to these Petitioners. That they are entitled to consideration of their claims on the merits and are remanded to the District Court to do so. Based on that decision, I think there is no dispute, we all agree, that the

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1 District Court has the jurisdiction to consider the merits of  
2 their claims. Now what are their claims?

3 The government asserts that it has the authority to  
4 hold them because they are enemy combatants. But the  
5 Petitioners claim that they are not enemy combatants no matter  
6 how broadly that term might be defined. And that in the words  
7 of the Supreme Court "they are wholly innocent of any  
8 wrongdoing." That is a factual claim on the merits and it  
9 cannot be decided on the basis of a motion to dismiss.

10 The government has put in its returns to the  
11 Petitions in the form of the CSR key material, setting forth  
12 its factual justifications for the detentions. But those  
13 returns cannot simply be accepted as true. Under the plain  
14 terms of the habeas statute, the Petitioners have the right to  
15 rebut or traverse those returns and present evidence of their  
16 own.

17 THE COURT: Did they do that?

18 MR. WILNER: Pardon?

19 THE COURT: Did they do that?

20 MR. WILNER: No sir, we have not been allowed that  
21 opportunity. We have not had an opportunity to traverse the  
22 returns. We have not had that opportunity. So in those  
23 circumstances a motion to dismiss is simply improper. I think  
24 the issue now before you is as simple as that. Indeed what  
25 the government is doing is trying to invert. It's asking you

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1 to invert the standards of a motion to dismiss and accept its  
2 allegations as true rather than those in the petitions.  
3 That's exactly --

4 THE COURT: Let me ask you, Counsel. I thought that  
5 the procedural posture of all of these cases was they had been  
6 joined together before Judge Green and some before Judge Leon  
7 to settle some of the mutual issues. And basically these are  
8 questions of law. So Judge Green has made some decisions and,  
9 at least in part, denied the government's motion to dismiss.  
10 And but for -- or Section 1292 order, the cases would be back  
11 before the original District Court Judge and at that point you  
12 would be able, would you not, to produce or offer evidence to  
13 rebut the government's returns?

14 MR. WILNER: Yes, yes, Your Honor.

15 THE COURT: So procedurally we're just not there  
16 yet.

17 MR. WILNER: You know that's exactly what I'm  
18 saying, Your Honor. What happened in this case is the  
19 government put in its return and then filed -- and said we  
20 move to dismiss, as a matter of law. You haven't stated a  
21 claim. And I'm saying the claim is a basic factual claim,  
22 cognizable and evident and habeas. We say we are not enemy  
23 combatants, they say we are, and we have not had the  
24 opportunity to traverse the return yet.

25 Their argument, as you know, their main argument was

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1 a legal argument. They said well it doesn't matter if you  
2 traverse a return or not because you don't have any rights in  
3 the constitution that are cognizable and habeas. That's wrong  
4 and I can say that, but I think it's terribly important to  
5 note that what's an issue here is a factual issue. That's a  
6 factual issue and we have not had the point.

7 Now let me say about their claim that we have no  
8 rights under the constitution.

9 THE COURT: Mr. Wilmer, let me back you up. In the  
10 main cases, the 12 detainees and Al Odah.

11 MR. WILNER: Yes, sir.

12 THE COURT: You represent them, right?

13 MR. WILNER: Yes, sir.

14 THE COURT: They had three claims for relief. The  
15 first was what?

16 MR. WILNER: Our claims for relief at that time were  
17 to meet with the prisoners, to have them meet with the  
18 families, and to have an impartial tribunal to determine their  
19 status.

20 THE COURT: And then you had an Alien Tort Act  
21 claim, right? And then an APA claim.

22 MR. WILNER: Yes, sir.

23 THE COURT: There are three claims.

24 MR. WILNER: That's right. Yes, sir.

25 THE COURT: For relief.

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1 MR. WILNER: And may I just say the first claim was  
2 based, of course, on 2241, as well -- so we stated a cause of  
3 action under --

4 THE COURT: It wasn't, in fact, as I recall, there  
5 was no claim for release. It was just the terms and  
6 conditions of the confinement.

7 MR. WILNER: The first claim was for terms and  
8 conditions but the right to an impartial tribunal to determine  
9 their status.

10 THE COURT: Under the due process clause.

11 MR. WILNER: But also a cause of action under 2241.  
12 We stated a cause of action under -- we asserted.

13 THE COURT: What, if anything, in those three claims  
14 that -- you have -- we have before us the original complaints.  
15 They have not been amended?

16 MR. WILNER: Yes, we did amend, Your Honor. We  
17 amended after -- we amended to really assert a habeas claim.

18 THE COURT: When?

19 THE COURT: But the amended complaint, as I recall,  
20 reads as Judge Randolph is stating it. Does it not?

21 THE COURT: I believe it does.

22 MR. WILNER: Okay, you know, excuse me, Your Honor.  
23 Yes, we moved for leave to amend and the Court though has not  
24 acted on it. The government moved to dismiss.

25 THE COURT: Okay. What's before us now are the

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1 original complaints with three claims. Of those three claims,  
2 none of them turn on whether your client is or is not  
3 affiliated with al Qaeda.

4 MR. WILNER: Excuse me, Your Honor, I think they  
5 did. We asserted in the complaint, in the factual complaint,  
6 that we were innocent, that we were innocent of any wrongdoing  
7 as the Supreme Court noted. That we were captured by mistake,  
8 turned over by bounty hunters, and were innocent, were  
9 unconnected. And one of our claims was for an impartial  
10 tribunal to determine that, either a Court or an impartial  
11 tribunal at that time. So our claim was of innocence and to  
12 have a factual determination. Now we didn't say release us at  
13 that time, but we asserted that under the habeas statute as  
14 well. We absolutely did. The question was whether the Court  
15 has jurisdiction. And as Your Honor held at that time, as the  
16 Court held at that time, it felt that the Court didn't have  
17 jurisdiction.

18 THE COURT: Courts don't feel.

19 MR. WILNER: I'm sorry?

20 THE COURT: Courts don't feel.

21 MR. WILNER: I'm sorry?

22 THE COURT: You said the Court "felt" that it didn't  
23 have jurisdiction. I said Courts don't feel.

24 MR. WILNER: Oh, I'm sorry. Well, I meant the Court  
25 held at that time that it didn't have jurisdiction. The

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1 Supreme Court has said there is jurisdiction. There is  
2 clearly jurisdiction in the District Court now.

3 THE COURT: But that's all the Supreme Court held.  
4 It did not say Eisentrager is overruled as to the merits of  
5 any claim.

6 MR. WILNER: Well --

7 THE COURT: Eisentrager cuts against coverage of  
8 these prisoners by any part of the constitutional allocation  
9 for the Bill of Rights, does it not?

10 MR. WILNER: Your Honor, well, let me answer that  
11 two ways.

12 THE COURT: All right.

13 MR. WILNER: I believe when a Court decides that  
14 jurisdiction exists, it doesn't -- the issue of cause of  
15 action is a separate issue. Clearly, as the Court pointed out  
16 in the Hamdan case, it had -- the Court did not decide the  
17 issue whether there was a cause of action under the Geneva  
18 Conventions.

19 THE COURT: Or anywhere else.

20 MR. WILNER: Well, now, I want to disagree with that  
21 a little bit.

22 THE COURT: All right.

23 MR. WILNER: I think that the Court -- of course,  
24 Bell v. Hood does not prevent a Court from deciding both  
25 jurisdiction and whether there is a substantive cause of

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1 action. I think in this case the Supreme Court did decide  
2 both that there was jurisdiction and that there was a  
3 substantive cause of action for violation of U.S. laws.

4 THE COURT: That's Footnote 15?

5 MR. WILNER: So I do, but I -- I'm sorry?

6 THE COURT: Are you talking about Footnote 15?

7 MR. WILNER: More than Footnote 15, Your Honor.

8 THE COURT: Tell me what more than Footnote 15.

9 MR. WILNER: Well, more than Footnote 15. And if I  
10 may, after I do this, I'd like to get back to why I don't  
11 think that matters because I think it's terribly important and  
12 I think I might even be able to show people. But, Your Honor,  
13 the Court held that it really rejected the government's claim  
14 that Guantanamo was extra territorial. It did that  
15 explicitly. It said that --

16 THE COURT: Explicitly?

17 MR. WILNER: Yes, yes. It said that the claim --  
18 that the presumption against extra territoriality applies to  
19 Guantanamo does not hold here. Whatever weight that might  
20 have elsewhere, it doesn't have weight to a territory such as  
21 Guantanamo, which is within the territorial jurisdiction of  
22 the United States. So I think that's --

23 THE COURT: That's not a very direct quote is it,  
24 Counselor?

25 MR. WILNER: Not a direct quote from the opinion,

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1 but I do have it here. I mean I can see it. But they did say

2 --

3 THE COURT: If it's not from the opinion, it's not a  
4 direct quote in the sense of what I'm asking you.

5 MR. WILNER: It's not a direct quote. But, Your  
6 Honor, they did reject the government's claim of extra  
7 territoriality with respect to Guantanamo.

8 THE COURT: But the Court kept saying the only issue  
9 before us is this narrow question of jurisdiction. Isn't that  
10 correct?

11 MR. WILNER: No, I don't think they did just say  
12 that.

13 THE COURT: The Court did explicitly say that,  
14 didn't they?

15 THE COURT: At the beginning, the middle, and the  
16 end.

17 THE COURT: Yeah.

18 MR. WILNER: The Court said that the question before  
19 it is whether these people have a right to judicial review of  
20 the legality of the detention imposed upon them. And it  
21 answered that question in the affirmative. Later on in the  
22 opinion, it said "jurisdiction to determine the merits of  
23 their claim." Jurisdiction to hear the merits of their claim.  
24 Can I just back up? If I agree that all the Court decided was  
25 jurisdiction, and I think it did go further with respect to

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1 legal rights, and I'll deal with that later, there is no doubt  
2 that the Court has the jurisdiction to hear the merits of the  
3 claim. The point I'm making is the essential claim here is a  
4 factual claim. It's a claim that they are not enemy  
5 combatants. That's a factual claim that cannot be settled on  
6 a motion to dismiss. We've got to have a right to submit our  
7 traverse to the returns. We've never had a right.

8 Now can I just try to demonstrate that for a second?  
9 Let me give an example. Let's say that the government goes  
10 out and it has an order to detail all redheaded men. Somebody  
11 could bring an action against that, a challenging under  
12 habeas, and probably, unless there is a great reason for it,  
13 that classification would not withstand constitutional  
14 scrutiny.

15 Let me change the hypo a little bit. Let's say that  
16 Congress passed a statute saying I can pick up the -- it's  
17 right to pick redheaded men and that a constitutional  
18 amendment is adopted making that constitutional. Clearly,  
19 somebody couldn't come in and challenge that on constitutional  
20 grounds, but let's say somebody came in and said you've got  
21 the wrong guy. I'm not a redheaded man. That would be a  
22 claim cognizable and habeas as it was in the Bowman case where  
23 the claim was purely factual.

24 Everybody agreed that a person could be held for  
25 treason. The question before Justice Marshall, Chief Justice

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1 Marshall in the Court, was, is there sufficient evidence of  
2 that? Do the facts square with the legal authority?

3 Let me change the hypo just a little bit more.

4 Let's say that we go to war with Japan and the government  
5 asserts the power to pick up all Japanese -- people of  
6 Japanese descent in the United States, and goes on and does it  
7 and somebody brings a habeas claim about that. Now they could  
8 challenge that on constitutional grounds and the Court might  
9 or might not find that that's constitutional.

10 THE COURT: Let me change the hypothetical. Suppose  
11 that an individual is arrested on the streets of Washington,  
12 D.C., brought before a magistrate, a preliminary hearing is  
13 held, probable cause is determined, and the individual files a  
14 habeas corpus petition saying you've got the wrong man.  
15 What's happens then?

16 MR. WILNER: I think that there would be  
17 jurisdiction to hear that. You might in that case, you defer  
18 to the power of process in that case, which is a Court  
19 process. But that's a claim -- excuse me, Your Honor.

20 THE COURT: Well then -- okay. Which raises the  
21 question, accepting everything you say, should the Court not  
22 defer to the process of the tribunal that made a  
23 determination?

24 MR. WILNER: The CSRT -- yeah.

25 THE COURT: And your answer to that is no.

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1 MR. WILNER: My answer -- that is no for separate  
2 reasons, but --

3 THE COURT: But what are the reasons?

4 MR. WILNER: The reasons are a myriad. First of  
5 all, let me say, you only get to that question if you accept  
6 they have a right to review. Once they have a right to  
7 review, the question is whether you defer to the tribunal.

8 THE COURT: Yeah. I'm assuming that.

9 MR. WILNER: Okay. Well, the reasons for that start  
10 out, first of all, this is a tribunal which wasn't authorized  
11 by law. It's not a Commission like what this Court confronted  
12 in the Hamdi decision or what existed before in Curran or  
13 Yamashita. There was no statutory authority for the CSRT. As  
14 a matter of fact, the order announcing it was put in place by  
15 the Deputy Secretary of Defense, not even the President, as --

16 THE COURT: But let's assume we reject that on the  
17 basis of the plurality opinion in Hamdi, and you can argue  
18 back and forth, but assume it was required by the Hamdi  
19 opinion, okay? So what --

20 MR. WILNER: I'm sorry. I assumed that this  
21 Commission was required by Hamdi.

22 THE COURT: No, it's not required. It's not  
23 required. At least put into effect in light of the Supreme  
24 Court's opinion in Hamdi. But then what is the basis for not  
25 deferring to their judgement?

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1 MR. WILNER: Well, and I don't want to argue with  
2 your hypothetical, but I think my first argument would be that  
3 Hamdi authorized, you know, the possibility of these only if  
4 they were appropriately authorized. And so the first time I  
5 see it, that doesn't meet the condition of Hamdi. Is that the  
6 words for you --

7 THE COURT: Appropriately authorized or  
8 appropriately structured - constituted.

9 MR. WILNER: And properly constituted. And properly  
10 constituted. We say it is not appropriately authorized. It  
11 was put in effect in this way. Indeed it said it had no legal  
12 effect. But going beyond that, Your Honor, I'd say that  
13 you've got to recognize the CSRT panel's Combatant Status  
14 Review Tribunals for what they were. They were a last minute,  
15 after-the-fact attempt by the government to really displace  
16 the Court's jurisdiction --

17 THE COURT: What law are you relying on? Let me  
18 just cut to the chase here. Doesn't your argument evolve down  
19 into a due process argument? That these tribunals, you can't  
20 defer to these tribunals because these tribunals are in  
21 violation of the Fifth Amendment due process clause. And that  
22 requires -- I'll just finish it and let you respond. And that  
23 requires us to get back to Judge Sentelle's question, to apply  
24 the Fifth Amendment to an area that, you may disagree with us,  
25 there is nothing in the complaints, that is not the sovereign

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1 territory of the United States. And the Supreme Court has  
2 told us we can't do that in (indiscernible).

3 MR. WILNER: Your Honor, I think that your  
4 hypothetical actually accepts a wrong premise. Let me just  
5 try. And the examples I gave, for instance, if -- let me  
6 start the example again. If we picked up Japanese and there  
7 was constitutionality, and I'm not doing -- and a person came  
8 in and he said, "I'm not of Japanese descent. My name isn't  
9 Hara, it's O'Hara and I'm Irish and you've just made a mistake  
10 here." He would have a right to go in and challenge that.  
11 The question would be is there sufficient basis, in law there  
12 might be, but is there sufficient basis in fact? That's a  
13 factual question.

14 Now before you ever get to questions of another  
15 process, once you are at that point, the habeas statute kicks  
16 in and the habeas statute has very specific procedures of what  
17 happens when you're there. It says somebody files a petition,  
18 the government files a return. That's what they've done now.  
19 They filed a return. Their CSRT procedure is in the form of a  
20 return.

21 Let me -- the CSRT procedures should be treated the  
22 way the government has treated them - as a return. They are  
23 nothing more. They don't displace the procedures of the  
24 habeas statute.

25 THE COURT: With respect to the 12 individuals I

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18

1 mentioned, when were the returns filed?

2 MR. WILNER: The returns were filed in I think  
3 October or November. October/November. What the government -  
4 -

5 THE COURT: October/November of last year?

6 MR. WILNER: Yes.

7 THE COURT: Last year. And when did the District  
8 Court rule in this case?

9 MR. WILNER: The District Court in the Green case  
10 ruled at the end of January. So we had no opportunity.

11 THE COURT: You had a couple of months.

12 MR. WILNER: We weren't allowed. No, she ruled. I  
13 mean they had filed their motion to dismiss. We opposed the  
14 motion to dismiss.

15 THE COURT: But there was time in there where you  
16 could have responded to the returns. You could have traversed  
17 the returns. You said you had no opportunity, but the  
18 District Court didn't order you not to file a traverse.

19 MR. WILNER: Yeah, well, actually, Your Honor, at  
20 that time, we moved for leave to do so. We moved for leave to  
21 take limited discovery as well and they were not acted on.  
22 All opposed by the government, who said we had absolutely no  
23 rights. But I think it's an important thing.

24 THE COURT: You moved to file -- a traverse is a  
25 sworn statement by the Petitioners, is it not?

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1 MR. WILNER: Your Honor, you've got to remember  
2 there was an issue -- I'm sorry. I don't mean to put it that  
3 way. We had moved to go visit our people down in Guantanamo.  
4 We were not granted that right until, what, the end of October  
5 of last year? We couldn't get down there because of logistics  
6 until -- I couldn't get down there until the end of January.  
7 So that's the first time to meet them.

8 THE COURT: Is that because of the press of other  
9 business or --

10 MR. WILNER: No. No. It was not because of the  
11 press of other business. We were fighting and are still  
12 fighting to get down there as often as we can and it's  
13 normally opposed by the government.

14 The fact is, Your Honor, there is a factual question  
15 here. Since day one these people have said you've got the  
16 wrong guys. We want a fair hearing to determine that. That's  
17 all that's been ordered now and we haven't had that  
18 opportunity. There is no basis to dismiss a case on the basis  
19 of their return, which we have not had the opportunity to  
20 rebut. You know, we have done everything we can to rebut it.  
21 There's a factual issue now before the Court and it can't be  
22 disposed of on a motion to dismiss. And procedures of the  
23 habeas statute, as Justice O'Connor pointed out in the Hamdi  
24 opinion, have an outline of what's required under 22 --

25 THE COURT: But Hamdi is not governing here, right?

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1 This is not a Hamdi case, this is a Rasul case, right?

2 MR. WILNER: This is the Rasul case. Yeah. This is  
3 the Rasul case. Your Honor, if you are implying -- yes.

4 THE COURT: In Hamdi it was a U.S. citizen, who  
5 certainly had the protections of -- or at least allegedly U.S.  
6 citizen, certainly had the protections of the Fifth Amendment  
7 and the other constitutional provisions, right?

8 MR. WILNER: That's right, Your Honor.

9 THE COURT: Taking you back to your colloquy with  
10 Judge Rogers and with me as to the breadth of Rasul's  
11 decision, the first sentence in that case is "these two cases  
12 present the narrow but important question whether the United  
13 States lacked, its Courts, lacked jurisdiction to consider the  
14 challenges to the legality of the detentions of foreign  
15 nationals captured abroad and connected with hostility and  
16 incarcerated at Guantanamo Bay Naval Base, Cuba." So the sole  
17 question was jurisdiction, was it not in that case? Nothing  
18 about the merits of the claim, right?

19 MR. WILNER: In defined that way, Your Honor, I  
20 think that's right. I think implicit in the Court's decision  
21 -- can I just say something about that. The government argues  
22 that habeas is a subsidiary procedural right that follows from  
23 substantive constitutional rights. That's the basis of their  
24 argument. I disagree with that. We disagree with that. We  
25 think the right to habeas review is an independent right

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1 created by statute that does not depend on showing a  
2 constitutional violation. I believe that's true. But if the  
3 government is correct, that habeas is a subsidiary procedural  
4 right that only follows from constitutional rights, then it  
5 proves too much because then the Petitioners must have  
6 constitutional rights because the Court decided they had  
7 habeas rights. So if they are in fact tied together, the  
8 Court --

9 THE COURT: The Court might have well have been  
10 saying you have habeas writs in order to inquire into whether  
11 or not your constitutional rights have been violated. Or you  
12 have constitutional rights that have been violated.

13 MR. WILNER: Your Honor, I have two answers to that.  
14 First of all, I think the language of the opinion is  
15 inconsistent with that.

16 THE COURT: I just read you the most summarized  
17 language of that opinion, Counsel.

18 MR. WILNER: Your Honor, with all respect, I think  
19 there is other language and opinion though about the  
20 constitutional rights.

21 THE COURT: I thought you didn't even argue what --  
22 did you argue in the Supreme Court, Mr. Wilner?

23 MR. WILNER: No, I did not.

24 THE COURT: No. Good. The brief that was filed in  
25 the Supreme Court, did that say we're not -- all we're

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1       contending is jurisdiction, we're not going to deal with what  
2       substantive rights are involved?

3               MR. WILNER: No, Your Honor. It said that the issue  
4       is jurisdiction. To the extent that you believe jurisdiction  
5       depends on the existence of substantive rights, then we  
6       believe we have them. And we made exactly the arguments that  
7       the Court really adopts. They said that Guantanamo --

8               THE COURT: Well, you didn't. I mean the Ahrens v.  
9       Clark and the Braden case was in an amicus curiae. It was  
10       never argued before us.

11              MR. WILNER: No, actually it was argued. But you're  
12       right because it was argued in the District Court and it  
13       didn't go anywhere.

14              THE COURT: Could I just back up to Judge Randolph's  
15       earlier question because I want to be clear on this. You say  
16       we should treat the CSRT proceedings as a return by the  
17       government to your petition. In Hamdan, as well as in Hamdi,  
18       and in Curran and Yamashita, in all of those cases the  
19       prisoner had been charged with violation of the laws of war -  
20       murder, whatever. Except for Petitioner David Hicks, as I  
21       read the record, no one has been charged. So we're at that  
22       initial stage of determining status.

23              MR. WILNER: Yes.

24              THE COURT: Now, following up on Judge Randolph's  
25       point, and I need to be clear what your position is, if the

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1 CSRT procedures included all of the protections that you say  
2 they should, then -- and the CSRT's had ruled that your  
3 clients were in fact enemy -- or had failed to rebut the  
4 determination that they were enemy combatants, would you still  
5 be arguing that on habeas there is a factual issue to be  
6 determined by the Habeas Court?

7 MR. WILNER: Your Honor, honestly, that's a more  
8 difficult question. I don't know whether we would. In that  
9 case, as the Court pointed out in Hamdan, we might be  
10 restricted to challenging the decision afterwards. In Hamdan,  
11 the Court accepted that he could file a habeas case stating  
12 claims afterwards. But the difficulty here is, a) the CRT's  
13 had none of those procedural rights.

14 THE COURT: Yeah, but what I'm trying to understand  
15 in your argument, and I didn't pick this up in your brief  
16 candidly, is treating the CSRT's as returns because your  
17 review is they don't comport with Fifth Amendment due process.  
18 And I thought that was the thrust of Judge Randolph's question  
19 and the point that Judge Green certified to us is whether or  
20 not your clients have any Fifth Amendment due process rights.  
21 Because that's the nature of your attack on the process that  
22 has occurred. And if I'm wrong about that, I need to be clear  
23 about that.

24 MR. WILNER: Your Honor, we do say that we have  
25 rights under the Constitution and the Fifth Amendment,

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1 fundamental rights under the Constitution. I believe the  
2 Court recognized that when it said that Guantanamo is not like  
3 the Landsberg Prison. It's much more like Micronesia in  
4 *Ralpo v. Bell*. But it says it's not like the Landsberg  
5 Prison. It's on the other side of the line. It's within the  
6 scope of U.S. law.

7 But we have another argument, which I think is the  
8 correct argument here, that our right to relief does not  
9 depend on showing a violation of the Constitution, that the  
10 fundamental right of habeas corpus in Section 2241(c)1 of the  
11 statute does not depend on it, has never depended on it. What  
12 it shows -- that's a statutory right, an independent statutory  
13 right, that doesn't come from the Constitution. Chief Justice  
14 Marshall made that clear in --

15 THE COURT: Where does it come from then?

16 MR. WILNER: It comes from statute, Your Honor. It  
17 comes from statute. The statute, Section 14 of the First  
18 Judiciary Act in 1789 passed what is now 2241 in the habeas,  
19 2241(c)1 of the Habeas Act, which gives the right to habeas to  
20 anyone in custody under or by color of the authority of the  
21 United States. That basically codified the common law writ of  
22 habeas. And that -- it's an independent -- Chief Justice  
23 Marshall made it clear.

24 THE COURT: Are we sitting as a -- is it your  
25 position we're sitting as a Common Law Court now? That it

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25

1 frees -- here's the question, did it freeze habeas corpus as  
2 of 1789?

3 MR. WILNER: Your Honor, as the Supreme Court said  
4 in Sanseer (phonetic sp.), that habeas under that provision  
5 exists at least as it did in 1789 at the time of the  
6 suspension cause. They said that in Sanseer. So it exists at  
7 least in that. You're sitting as a Common Law Court. You're  
8 sitting as a Court enforcing a U.S. statute, which as the  
9 Supreme Court has said really the meaning of the writ of  
10 habeas corpus must be determined based on the common law.

11 With respect to the CSR --

12 THE COURT: So, in other words, just want to be  
13 clear. These are not -- Judge Green didn't say anything about  
14 this, right?

15 MR. WILNER: No, he did not.

16 THE COURT: Okay. But you've made the argument,  
17 whether it's in your complaints or not, you made the argument  
18 to her.

19 MR. WILNER: Yes, sir. And to the Supreme Court  
20 too.

21 THE COURT: Right. And so what you're saying is, at  
22 a minimum, the District Court should have inquired into the  
23 legality of the detention.

24 MR. WILNER: Yes. And the legality --

25 THE COURT: And the legality of the detention

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1 depended upon whether these individuals were property detained  
2 pursuant to the authorization to use military force.

3 MR. WILNER: To all three -- (indiscernible). I'm  
4 sorry. I missed the last --

5 THE COURT: Detained, pursuant to the authorization  
6 to use military force.

7 MR. WILNER: That's one issue, but I think, Your  
8 Honor --

9 THE COURT: What are the other issues?

10 MR. WILNER: Well, the lawful authority, the  
11 government can't just detain anyone. And it's asserted  
12 authority to detain people who are enemy combatants. There is  
13 a legal question, and Mr. Oleskey will address it, how far the  
14 authorization to use military force goes in doing that. But  
15 I'm saying aside -- putting the legal questions to the side,  
16 there is another question here, a factual question, do you  
17 have the wrong guy? You know, even if you --

18 THE COURT: I know, but you have to measure the --  
19 whether it's the right guy or the wrong guy depends upon what  
20 the authority is to detain. And so if these are all al Qaeda  
21 operatives, they've got the right guys, right?

22 MR. WILNER: Yes. But, Your Honor --

23 THE COURT: According to the authorization to use  
24 military force.

25 MR. WILNER: Your Honor, there are two components to

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1 the standard for habeas. Legal authority. Is this guy  
2 properly held for treason? Is he an enemy combatant? And  
3 that's one thing. But putting those questions aside, what we  
4 say, and have said from the beginning, no matter how broadly  
5 you define that term, we don't fall within it. We're like  
6 O'Hara, not Hara. That we're not there and we've never had  
7 that fair hearing. And it's not a question of measuring it  
8 against the due process standard, it's a question of what  
9 Courts do in habeas. You know, we put in our petition, they  
10 put in a return. And by the way, the CSRT has retreated as a  
11 return by the government. That's what they are. That's how  
12 they treated them. They put in the return, we get a chance to  
13 traverse those.

14 Your Honor, I want to go -- can I reserve the rest  
15 for rebuttal please?

16 THE COURT: Yeah, sure.

17 MR. WILNER: Thank you.

18 THE COURT: Okay. Thank you, Counsel. Whatever  
19 time is left you get back for rebuttal. And we'll have  
20 rebuttal on the principle issues before we close the courtroom  
21 for class today. On each issue, one at a time, before that I  
22 should say. Mr. Katsas?

23 MR. KATSAS: Good morning. May it please the  
24 Court.

25 THE COURT: Good morning, Counsel.

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1 MR. KATSAS: I would like to begin with the question  
2 whether the aliens detained at Guantanamo Bay have any Fifth  
3 Amendment rights. The answer to that question, prior to the  
4 Supreme Court's Rasul decision, would have been crystal clear,  
5 both under one line of precedent, stretching back at least 60  
6 years, standing for the proposition that the Constitution has  
7 no extra territorial application outside of the sovereign  
8 territory of the United States. And under a separate line of  
9 cases, exemplified by Spelar and Vermilya-Brown, standing for  
10 the proposition that military bases like the one at issue at  
11 Guantanamo Bay are, in fact, outside the sovereign territory  
12 of the United States.

13 The detainees' claim here boils down to the  
14 proposition that the Supreme Court's Rasul decision changed  
15 the Fifth Amendment, changed the geographic scope of the Fifth  
16 Amendment, at least to the extent of extending it to  
17 Guantanamo Bay. We think that reading of Rasul is simply not  
18 supportable.

19 Judge Sentelle, as you mentioned --

20 THE COURT: What's the basis for that rule?

21 MR. KATSAS: The basis for?

22 THE COURT: For the restriction to the sovereign  
23 territory as opposed to any territory of the United States?

24 MR. KATSAS: I think in Verdugo, the Supreme Court,  
25 making clear that where the executive is acting outside the

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1 sovereign territory of the United States --

2 THE COURT: I would suggest to you that the basis  
3 for the rule, I don't disagree with -- obviously, the Supreme  
4 Court said that in Verdugo, but the basis for the rule is if  
5 another country has sovereignty over the particular area, then  
6 to apply our procedures is to require another sovereign to  
7 adopt them. And you can't do that. It would be impossible.  
8 But that doesn't -- and that certainly in Verdugo that applies  
9 to Mexico. He was arrested in Mexico. But it doesn't apply  
10 to Guantanamo.

11 MR. KATSAS: I think it's more than that.

12 THE COURT: Then what more is there?

13 MR. KATSAS: It is the proposition, the general  
14 proposition in Verdugo, that for better or worse, we live in a  
15 dangerous world of nation states and the executive needs to be  
16 able to act vigorously in his foreign policy functions without  
17 the kind of restraints that one would expect with respect to  
18 American citizens in this country. The Supreme Court in  
19 Eisentrager made a similar point, more emphatically, on the  
20 specific question of conducting wars.

21 THE COURT: I don't disagree with your reading of  
22 Eisentrager. I don't know that the detainees do either, or  
23 your reading of Verdugo. I'm just asking you what the basis  
24 for this is. And you say it's because we live in a dangerous  
25 world. That's it?

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1 MR. KATSAS: Well, I mean the Supreme -- one has to  
2 draw a line somewhere between what's inside and outside, and  
3 for constitutional purposes the Court has always drawn that  
4 line at sovereignty. The question is whether Rasul changed  
5 that line with respect to the Fifth Amendment. And we think  
6 the answer to that question has to be no because, as Judge  
7 Sentelle pointed out, the very first sentence in the Rasul  
8 opinion defining narrow but important question presented is  
9 one of habeas jurisdiction.

10 That definition and the question presented was no  
11 accident. The detainees in Rasul petitioned for certiorari on  
12 both the habeas jurisdiction question and the Fifth Amendment  
13 merits question. The Supreme Court specifically denied cert  
14 on the Fifth Amendment merits question, redefined the question  
15 presented to be limited, as stated in the first sentence of  
16 the opinion, went on to reason both with respect to  
17 Eisentrager and with respect to Guantanamo in very habeas  
18 specific terms, stated its holding in habeas specific terms,  
19 and then at the end of the opinion repeatedly and emphatically  
20 said that the merits of the case, including the Fifth  
21 Amendment claims are not before us. So I don't think there is  
22 any defensible reading of Rasul that would go against what the  
23 Supreme Court said at the beginning, in the middle, and at the  
24 end.

25 Now the detainees cite two features of Rasul. One

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1 is Footnote 15, which, in context, we think stands only for  
2 the proposition that the allegations are jurisdictionally  
3 sufficient for purposes of Bell v. Hood. The second snippet  
4 from Rasul that they cite to is the proposition that the  
5 characterization of the Guantanamo is outside the territorial  
6 jurisdiction of the United States. As you pointed out, Judge  
7 Sentelle, it's hardly a square holding. But after using the  
8 phrase "territorial jurisdiction," jurisdiction, of course,  
9 being a somewhat ambiguous term, the Court went on to equate  
10 territorial jurisdiction with complete jurisdiction and  
11 control, which is the term in the governing lease and which in  
12 the governing lease is contrasted to the concept of  
13 sovereignty. The Court then --

14 THE COURT: What does Cuba really have left in the  
15 way of sovereignty over Guantanamo?

16 MR. KATSAS: It has any number of things. The  
17 United States' rights in Guantanamo are to operate a naval  
18 station, a naval and coaling station. The United States is  
19 specifically prohibited from engaging in commercial activities  
20 under the lease. We have to pay for the right to be there and  
21 give Cuba --

22 THE COURT: Cuba doesn't cash the check, does it?

23 MR. KATSAS: I'm sorry?

24 THE COURT: Cuba doesn't cash the check.

25 MR. KATSAS: Well, that's their choice. But the

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1 bundle of rights that we have under that sort of arrangement  
2 is far different from what we have let's say over insular  
3 territories. And let me spell out a few. We couldn't  
4 sublease Guantanamo. We couldn't sell Guantanamo. If there  
5 were mineral resources under Guantanamo, we couldn't extract  
6 them. We couldn't move civilian government agencies down to  
7 Guantanamo. We couldn't have a sort of modern homestead act  
8 to encourage civilians to settle in Guantanamo.

9 And take Puerto Rico by contrast, Judge Sentelle.  
10 What we debate with respect to Puerto Rico are issues like  
11 should the United States grant Puerto Rico either statehood or  
12 independence? I mean that's unthinkable with respect to  
13 Guantanamo, precisely because the bundle of rights that we  
14 acquired is limited to running the naval station and is very  
15 much like the bundle of rights in Spelar and Vermilya-Brown,  
16 both of which equated those treaties to the Guantanamo treaty  
17 and in which the Supreme Court said we defer to the executive  
18 branch view that leases of that nature do not affect the  
19 transfer of sovereignty.

20 The second set of issues presented in -- if you  
21 agree with us on our reading of Rasul, it follows that the  
22 detainees have no Fifth Amendment rights. And if that's true,  
23 to the extent there are Fifth Amendment claims in the case,  
24 whether they are habeas proper claims for release or  
25 alternatively whether they are conditions of confinement

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1 claims, obviously if the Fifth Amendment doesn't apply to  
2 these aliens at Guantanamo Bay there is no Fifth Amendment  
3 issue in the case and there is nothing about which to have a  
4 hearing.

5 If you --

6 THE COURT: Well, I don't -- why does that follow?

7 THE COURT: Yeah.

8 MR. KATSAS: I'm sorry?

9 THE COURT: Why does that follow?

10 MR. KATSAS: What question would be material on  
11 those assumptions to any Fifth Amendment --

12 THE COURT: Whether they are being held pursuant to  
13 lawful authority.

14 MR. KATSAS: Well --

15 THE COURT: That's not a due process question.

16 MR. KATSAS: I think it is a due process question if  
17 --

18 THE COURT: Well, let me give you a hypothetical.  
19 In 1790, the year after the first Judiciary Act was passed,  
20 someone is detained by federal officers for jumping off a  
21 bridge.

22 MR. KATSAS: Right.

23 THE COURT: Okay? And it turns out there is no law  
24 against jumping off a bridge.

25 MR. KATSAS: Right.

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1 THE COURT: All right. And he brings a habeas  
2 corpus action. And the federal officers justifies detention  
3 on the basis, well, it's a common law crime and there is a  
4 factual issue there.

5 MR. KATSAS: Yeah, I think that would be a valid  
6 habeas claim.

7 THE COURT: Then let's jump ahead to modern day.

8 MR. KATSAS: Okay.

9 THE COURT: And the claim here is there is no lawful  
10 authority to detain us because we're not affiliated with al  
11 Qaeda. Isn't that a factual question?

12 MR. KATSAS: The question whether or not -- there is  
13 a question, there is a legal question about lawful authority,  
14 which we'll discuss later I think. The factual question  
15 whether or not these detainees are affiliated with al Qaeda is  
16 precisely the question resolved against the detainees in the  
17 CSRT procedures.

18 THE COURT: I understand that, but still they claim  
19 -- this is the same series of questions I asked Mr. Wilner.  
20 They claim that there is no deference due to that Military  
21 Tribunal, right?

22 MR. KATSAS: They claim that, but the controlling  
23 opinion in the Hamdi case, Justice O'Connor's plurality, said  
24 that even with respect to United States citizens, detained as  
25 enemy combatants in this country, the extent of the process

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1 due give them the enormously sensitive government interest at  
2 stake and the executive power to make war and so on. The  
3 extent of process due would be consistent with -- would likely  
4 be consistent with a Military Tribunal.

5 THE COURT: Well, I think that's a different  
6 question because you're talking about what due process rights  
7 of an individual who is an American citizen named as an enemy  
8 combatant. I'm asking a different question. What I'm asking  
9 you is where do you get any authority for the proposition that  
10 in a habeas action challenging the lawfulness of the detention  
11 that we have to defer to a Military Tribunal. I don't want to  
12 make this too long-winded, but the habeas statute says the  
13 only thing that we have to defer to are decisions by --  
14 factfinding by Courts. That's what the habeas statute says,  
15 correct?

16 MR. KATSAS: That's what it says, but --

17 THE COURT: And there is nothing in the habeas  
18 statute that requires us to defer to a Military Tribunal.

19 MR. KATSAS: If --

20 THE COURT: So where does it come --

21 MR. KATSAS: I don't know what the point --

22 THE COURT: Where does it come from that you think  
23 that if they claim we're not lawfully detained because we were  
24 arrested or detained in violation of the authorization to use  
25 military force and this Combat Review Tribunal says no, you

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1 are not, you are al Qaeda, a Court has to defer to the  
2 military. Where does that come from?

3 MR. KATSAS: There are two separate questions. If  
4 the question whether the CSRT orders were properly -- were a  
5 proper exercise of authority under the military orders and  
6 then ultimately under the authorization for use of military  
7 force.

8 THE COURT: Let's assume they were.

9 MR. KATSAS: That --

10 THE COURT: That's essentially a legal question.

11 MR. KATSAS: That's a legal question.

12 THE COURT: (Indiscernible).

13 MR. KATSAS: And I'm happy to discuss that. If we  
14 are right about that question and if Justice O'Connor is right  
15 that the extent of due process can be satisfied in a Military  
16 Tribunal, it seems to me, analytically, the detainees are in a  
17 position, in a like position as if they were collaterally  
18 attacking a judgment --

19 THE COURT: Well, suppose they simply picked up a  
20 shepherd and said we think you look like you might be al Qaeda  
21 and dragged him over to Guantanamo. Wouldn't it not be a  
22 factual question as to whether they had made a seizure that  
23 was outside their lawful authority under the orders and under  
24 the authorization?

25 MR. KATSAS: But the question whether or not that

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1 individual is a shepherd was precisely the question put to the  
2 CSRT and if -- my point is --

3 THE COURT: Suppose the CSRT then says, well, there  
4 is no real evidence whether he's just a shepherd or whether  
5 he's al Qaeda, but we think he looks like an al Qaeda too. We  
6 have to defer to that finding?

7 THE COURT: And let me just footnote, the actual  
8 question before the CSRT was whether the detainee could offer  
9 evidence to rebut the determination that they were al Qaeda or  
10 Taliban related. Which is a little different, isn't it? In  
11 other words, what Justice O'Connor was talking about was Army  
12 Regulation 190, which is implementing Geneva III. That's  
13 different, and of course only four justices went along with  
14 that, and two question that, at least as to a citizen. So I  
15 mean there is no binding authority on that issue, is there?

16 MR. KATSAS: If you measure -- we take Hamdi as the  
17 controlling opinion for purposes of this discussion because  
18 you have the four Justice plurality and Justice Thomas, who  
19 would have gone farther.

20 If you take the analytical framework of Hamdi,  
21 Justice O'Connor, applying Mathews v. Eldridge balancing to  
22 determine the extent of due process rights of American  
23 citizens, who obviously have them, said that, of course,  
24 military exigency will profoundly shape the extent of process  
25 due. And she said it would be permissible to consider

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1 hearsay, it would be permissible to have a presumption in  
2 favor --

3 THE COURT: No, I understand that, Counsel. But all  
4 I'm saying is that there is no holding there that says what  
5 procedures appear in the CSRT's are consistent with what  
6 Justice O'Connor was talking about and I inference --

7 MR. KATSAS: That's not a holding in Hamdi about the  
8 CSRT's because they weren't then in existence.

9 THE COURT: No, no, no. But I mean Petitioners, in  
10 their brief, have repeatedly pointed out the distinctions  
11 between the procedures before the CSRT's and the procedures  
12 under Army Regulation 198.

13 MR. KATSAS: Well, Justice O'Connor cited Army  
14 Regulation 190-8 as a set of procedures that would likely be  
15 constitutionally sufficient to support even the detention of  
16 an American citizen as an enemy combatant. Now --

17 THE COURT: So let me -- go back to Judge Randolph's  
18 question, so I understand what your answer is. You're saying  
19 that a Habeas Court, if it determines, these are my words, not  
20 yours, but I want to see if you agree because this is what I  
21 understand your argument to be, that if the Habeas Court finds  
22 that the CSRT's were authorized --

23 MR. KATSAS: Right.

24 THE COURT: -- and if the procedures before the CSRT  
25 are, and you have to finish my sentence here, then the Habeas

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1 Court's job is over. And I thought Judge Randolph's question  
2 was trying to fill in the blank there. And the blank might be  
3 under the reasoning of Justice O'Connor that the Habeas Court  
4 can conclude that the procedures in the CSRT, or order, are  
5 sufficient to protect against all reasonable detention of  
6 wrongful people.

7 MR. KATSAS: Okay.

8 THE COURT: And if there is a shepherd in there, it  
9 may be true that the shepherd gets caught up in the process,  
10 but because we're in war, this is military, there are lots of  
11 different judgments involved that Courts are incompetent to  
12 deal with, we never get to the individual shepherd case.

13 MR. KATSAS: No. Not exactly. What we do, Judge  
14 Rogers, is ask the question which tribunal, as between a  
15 Habeas Court and a Military Tribunal gets to make the  
16 determination of shepherd or al Qaeda in the first instance  
17 and then --

18 THE COURT: So it's -- the breadth of the first  
19 instance may be the question. Is that a decision to which we  
20 defer. If so, what standard of review? Or is it a rebuttable  
21 presumption? If so, what standard of review?

22 MR. KATSAS: I think if I -- legal challenges --

23 THE COURT: Factual challenge.

24 MR. KATSAS: I think if you assume, for purposes of  
25 this question, that the procedures, the CSRT procedures, are

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1 legally sufficient to satisfy any due process requirements --

2 THE COURT: I understand that the right of habeas  
3 exists independent of, and prior to, the due process clause.

4 MR. KATSAS: Of course, Judge Sentelle, but the right  
5 of habeas is a cause of action to challenge the detention. It  
6 doesn't tell you about --

7 THE COURT: And it exists if there is an unlawful  
8 detention. And as Judge Randolph posited, in the time between  
9 the ratification of the Constitution and the adoption of the  
10 Bill of Rights there could have been an unlawful detention.

11 MR. KATSAS: Sure. But if the military process is  
12 both duly authorized and constitutionally sufficient under the  
13 standards suggested --

14 THE COURT: I find this argument really very  
15 difficult to grasp. On the one hand you began by saying the  
16 Fifth Amendment due process clause doesn't apply to  
17 Guantanamo.

18 MR. KATSAS: Right. This is our fallback.

19 THE COURT: Okay. Point one. Point two --

20 MR. KATSAS: If we win that, this conversation  
21 becomes immaterial.

22 THE COURT: Well, that is where I sort of get off  
23 the boat. Suppose the Fifth Amendment doesn't apply? But  
24 there is still the question whether these individuals were  
25 detained under lawful authority of the United States.

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1       Regardless of what the process is. Why isn't that still a  
2       question? If somebody was held by the military that it was  
3       clear they had no connection with 9/11, no connection with al  
4       Qaeda, no connection with the Taliban, why aren't they  
5       entitled to due process? Or not due process, but habeas  
6       corpus?

7               MR. KATSAS: Because if the process is sufficient  
8       and the claim by that person --

9               THE COURT: But you see the premise of your answer  
10       is the process by, if they got process, but the process  
11       comports with due process, therefore the Court defers. But  
12       that -- so then we have to examine. That requires us, does it  
13       not, Mr. Katsas, to examine, exactly like Judge Green did,  
14       examine whether the combatant tribunals comport with due  
15       process. Which is what you say doesn't apply.

16              MR. KATSAS: Judge Randolph, assuming due process  
17       rights apply to Guantanamo, there is a separate question that  
18       --

19              THE COURT: I'm not assuming that. I'm assuming  
20       they don't apply. And so what I'm asking you what's left and  
21       you say nothing. And my response, the question I still need  
22       an answer to, is what about a claim that we're detained  
23       without lawful authority. It's not a due process claim. It's  
24       a straight habeas corpus 1789 claim.

25              MR. KATSAS: And then the question -- there would be

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1 a legal question whether the orders rendered -- whether the  
2 CSRT tribunal has lawful authority to make the enemy combatant  
3 determination. My point on the shepherd, my point is simply  
4 if we have that authority under the AUMF --

5 THE COURT: You have what authority? That authority  
6 doesn't tell me a thing.

7 MR. KATSAS: The authority to detain, to determine  
8 who is an enemy combatant and then to detain that person.

9 THE COURT: With or without evidence?

10 MR. KATSAS: I'm sorry?

11 THE COURT: With or without evidence? I mean if you  
12 had no evidence he was an enemy combatant, you could still  
13 detain him lawfully?

14 MR. KATSAS: If we set up a process in which that --

15 THE COURT: So you are back to process and you are  
16 still not dealing with Judge Randolph's period of time when I  
17 think 11 states, I don't think we had 13 yet, but when there  
18 was a Constitution but not yet a Bill of Rights, there was no  
19 due process clause, but there was a habeas protection.

20 MR. KATSAS: There is a habeas --

21 THE COURT: The habeas must go beyond due process  
22 when you are talking about unlawful detention.

23 MR. KATSAS: It could give you the -- yeah, it could  
24 give you the right to challenge, to raise the question,  
25 whether this system is lawfully authorized under --

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1 THE COURT: I'm not talking about a system. We're  
2 talking about the individual's detention.

3 MR. KATSAS: And my point is that if there is a  
4 permissible -- if there is a military process that is  
5 authorized in the sense of legal authority and if the  
6 procedures comport with whatever due process minimums exist,  
7 then the question of evidence and factual innocence is  
8 properly adjudicated by that tribunal just as in an ordinary  
9 2254 case if there is a duly authorized state court to  
10 adjudicate a question of guilt or not. That's the tribunal in  
11 which --

12 THE COURT: Yeah, but that's because the habeas  
13 statute requires deference to the factfinding of the State  
14 Court. But there is nothing in here, in the statute anyway,  
15 that requires deference to a Military Tribunal.

16 What is the situation in Immigration cases when  
17 someone is held to be deported and the Immigration authorities  
18 make a determination they're deportable and they bring a  
19 habeas action? Do the Federal Courts defer to the  
20 determination of the Immigration authorities? Are there cases  
21 on that?

22 MR. KATSAS: I don't know the answer to that.

23 THE COURT: There are also some statutes that  
24 address some of those.

25 MR. KATSAS: I'm sorry?

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1 THE COURT: There are also some statutes Congress  
2 has passed that have addressed precisely the question Judge  
3 Randolph poses.

4 MR. KATSAS: Oh, and if there were --

5 THE COURT: And we don't have that here.

6 MR. KATSAS: If a detainee has -- seeks to enforce a  
7 right under a statute, habeas challenging custody, habeas  
8 would give the detainee a cause of action.

9 THE COURT: Yeah, I know, yeah. But there's nothing  
10 that says absence such a statute, is there? That Habeas Court  
11 defers to the Immigration Agency determination?

12 MR. KATSAS: Well, let's -- I don't know the answer  
13 to Immigration, but let's focus on enemy combatant  
14 determinations, which the Supreme Court said are the  
15 fundamental incident of waging war. Justice O'Connor suggests  
16 that Military Tribunals are a permissible forum in which to  
17 make enemy combatant determinations. It makes no sense to  
18 both say that and then to say that on habeas review a  
19 Petitioner can come in and simply say I am innocent, I am not  
20 an enemy combatant, and then re-litigate de novo the precise  
21 question that on -- by hypothesis.

22 THE COURT: There is a difference between re-  
23 litigating de novo and reviewing the decision of another  
24 tribunal. I mean we do that all the time. We review  
25 decisions of other tribunals with various standards of review.

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1 MR. KATSAS: Right.

2 THE COURT: I don't know that anybody is saying it  
3 has to be a de novo review. It could be for substantial  
4 evidence.

5 MR. KATSAS: I mean Judge Green seemed to  
6 contemplate some sort of factfinding, some sort of de novo  
7 factfinding. Judge Sentelle, I agree with you. If there were  
8 a sufficiency type review, if any such review were appropriate  
9 in this context, I think it surely would have to be enormously  
10 deferential. In a garden --

11 THE COURT: You can't agree with me. I asked a  
12 question. You can't agree or disagree with the question.

13 THE COURT: Judge Green didn't reach any of what we  
14 are talking about.

15 THE COURT: Yeah.

16 THE COURT: Judge Green was making her decision on  
17 the basis that the due process clause applies to Guantanamo,  
18 right?

19 MR. KATSAS: Right. The due process clause applies  
20 and then --

21 THE COURT: And I think the premise of the questions  
22 that you are hearing from us is let's assume it doesn't. What  
23 is left? And that is an issue that Judge Green never  
24 addressed.

25 MR. KATSAS: The Court would be left, or the various

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1 other claims, I mean the ATS claim that they've asserted --

2 THE COURT: Was a common law habeas claim. That's  
3 what's left. That's one thing that's left anyway.

4 THE COURT: That's the hard claim that's left.

5 MR. KATSAS: I mean there is a --

6 THE COURT: I don't know -- by the way, I don't know  
7 why it has to be a common law habeas. I mean the argument it  
8 seems to me is they are being held in violation of the law of  
9 the United States. And that law, you agree that the -- do you  
10 agree that the authorization to use military force is a law of  
11 the United States?

12 MR. KATSAS: Oh, absolutely.

13 THE COURT: Yeah. And it has extra territorial  
14 effect, does it not?

15 MR. KATSAS: Sure.

16 THE COURT: It applies in Guantanamo, it applies in  
17 Afghanistan, it applies in France, Belgium, Bosnia, right?

18 MR. KATSAS: Sure.

19 THE COURT: Okay. So there is no problem with extra  
20 territoriality or anything else. The question is whether that  
21 law authorized the detention of these individuals, and that's  
22 a factual question, and it's also a legal question.

23 MR. KATSAS: It's a legal --

24 THE COURT: Well, it's both. I mean you have to  
25 determine the scope of the law and whether these individuals

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1 fit within it.

2 MR. KATSAS: The question whether the authorization  
3 for use of military force authorizes the military regime set  
4 up in the military orders by the Deputy Secretary and the  
5 Secretary of the Navy is a legal question. We think the  
6 answer to that question surely has to be yes, because the AUMF  
7 authorizes necessary and appropriate military force and the  
8 Supreme Court in Hamdi said that detaining enemy combatants is  
9 necessary and appropriate precisely because it is a  
10 fundamental aspect of waging war. That's your authorization  
11 point. Then there is the distinct point about what procedures  
12 are constitutionally compelled in order to figure out who is  
13 an enemy combatant.

14 THE COURT: Let me test this a little bit, Mr.  
15 Katsas, so I can understand your position. Suppose that an  
16 individual is, in fact, detained in Afghanistan, brought to  
17 Guantanamo, and like all the individuals before these  
18 tribunals were set up, has given -- there is no tribunal. And  
19 that individual hasn't been before a tribunal. That  
20 individual brings a habeas corpus action. What does the Court  
21 do with that?

22 MR. KATSAS: The Court could -- the Court would have  
23 a question whether an alien --

24 THE COURT: And the action is based on I'm not  
25 within the authorization to use military force.

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1 MR. KATSAS: Right. And it's an alien held abroad.

2 THE COURT: Held in Guantanamo.

3 MR. KATSAS: Yeah. I think the answer to that  
4 question would be no habeas review, because the AUMF is not  
5 judicially enforceable by aliens and --

6 THE COURT: Well, if that's the answer to that  
7 question, then the fact that these tribunals operated is  
8 irrelevant to your position.

9 MR. KATSAS: That's -- sure. But we have many  
10 alternative layers here. In Hamdan, you reserved an analogous  
11 question whether a detainee could make a separation of powers  
12 argument that the President acted Ultra Vires.

13 THE COURT: Okay, but we have your answer, and the  
14 answer you gave is that, forget about the tribunals, that the  
15 habeas corpus couldn't do anything. For the individual  
16 detained, no process, he's in Guantanamo, brings a habeas  
17 action, the Habeas Court couldn't do anything. That's your --  
18 that's what you just said. What I don't get is why not?

19 MR. KATSAS: Because that alien still needs a source  
20 of rights to claim either that the detention was unauthorized  
21 or that the detention was in violation of a constitutional  
22 provision. And then you would have the question whether --

23 THE COURT: And the alien holds up the habeas  
24 statute and says, "Here's my source of rights. You can't hold  
25 me without lawful authority, period. And you don't have

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1 lawful authority. That's my right."

2 MR. KATSAS: Lawful authority. But that's different  
3 from what I understand our opponent's notion of the common law  
4 to be, which is that a judge has a sort of free floating  
5 discretion to make a determination whether or not there is  
6 sufficient cause, independent of the question, whether there  
7 is any source of positive law, any constitutional right being  
8 violated. But --

9 THE COURT: But if there is a positive law source,  
10 you still have to bring this prisoner within it, don't you? I  
11 mean it brings us back to the shepherd. You can't just come  
12 in and say we have the right to arrest the detained enemy  
13 aliens, enemy combatants. This guy was out in the field. He  
14 looks like an enemy combatant. Is that enough for you to hold  
15 him against the habeas?

16 MR. KATSAS: What we can say is that the shepherd  
17 has no constitutional rights. As an alien abroad, can't  
18 challenge authorization. Alternatively --

19 THE COURT: Can challenge in Guantanamo.

20 MR. KATSAS: If he could challenge authorization,  
21 this detention is authorized, he is afforded constitutionally  
22 sufficient procedures and if he has a claim of factual  
23 innocence, he makes it to the CSRT, subject at most to very  
24 deferential review under something like a sum evidence --

25 THE COURT: You got us then too at a review? Are

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1 you conceding a possibility of a review? You just said at  
2 most a very deferential review. Is that --

3 MR. KATSAS: We think there is none. There is no  
4 review of sufficiency fact-based type questions. My time is  
5 running low, but I'll tell you quickly.

6 THE COURT: Your position is that the authorization  
7 to use military force empowers the unreviewable discretion of  
8 the military to detain anybody.

9 MR. KATSAS: We're saying it's not judicially  
10 enforceable by aliens. But if we're wrong about that, we are  
11 also saying that this system of enemy combatant detentions  
12 fall squarely within an authorization that --

13 THE COURT: Unless my colleagues have further  
14 questions, your red light is on. We will hear rebuttal.

15 MR. KATSAS: Thank you.

16 THE COURT: How much time is left for rebuttal? You  
17 have four minutes for rebuttal, Counselor.

18 MR. WILNER: Thank you, Your Honor. Let me just  
19 make two quick points. The government argument, and the  
20 government just said, that these aliens at Guantanamo have no  
21 rights. Well, they clearly have the right to the writ of  
22 habeas corpus, which has been called the most fundamental  
23 right developed under the common law - the right to review the  
24 legality of their detention. I agree with Judge Randolph, the  
25 question is whether they are held in accordance with U.S.

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1 legal authority, and that is both a legal question, the scope  
2 of the definition of enemy combatant, and also a factual  
3 definition, however you define it, do they fall within it, and  
4 they say no.

5 I think the government makes another fundamental  
6 error.

7 THE COURT: Common Law Courts in England, if the  
8 King detains somebody and puts them in the tower, and somebody  
9 brought a petition for a writ of habeas corpus, what would the  
10 Courts in England do about that?

11 MR. WILNER: Exactly what started out -- the whole  
12 idea of habeas -- of course, we start out, the government or  
13 the King or our government doesn't just have the right to  
14 detain people. They've got to point to some authority to do  
15 it.

16 THE COURT: Okay. The King says that I'm holding  
17 this individual for treason. That's my return.

18 MR. WILNER: And then the King -- the whole point of  
19 habeas, it's a procedure which requires the custodian to come  
20 forward and give a legal and factual justification for holding  
21 these people.

22 THE COURT: Suppose there is a factual. The reason  
23 treason, he said he engaged in seditious liable, all right?  
24 And that's all. And gave a few details. Now do the Common  
25 Law Courts of England then hold a evidentiary hearing to

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1 determine whether that was true or not true?

2 MR. WILNER: Yes. And Chief Justice Marshall in  
3 Bowman goes through this. There is a difference. If somebody  
4 is being held for trial, the question would be is there really  
5 probable cause to commit this person to the charge of treason,  
6 trial on treason. And what Chief Justice Marshall did in  
7 there, he said, look, first we look what does treason mean?  
8 And then he said, well, what is the evidence that you're  
9 presenting as a reason for committing this person? I mean he  
10 said is there sufficient evidence to commit him on treason?  
11 And they examined that evidence in detail, found it was  
12 totally insufficient, and discharged him. So that's a  
13 question -- but I think this point is really important that  
14 you're making.

15 The government's misconception is that somehow that  
16 what we have brought is a collateral attack on another  
17 proceeding, on a prior proceeding. Well, that's not what we  
18 brought. We didn't bring a collateral attack on a prior  
19 proceeding authorized by law. It's not like challenging a  
20 State Court. This is a basic challenge to executive  
21 detention. And in that case, and you've got to remember that  
22 the CSRT's, the tribunals they're talking about, weren't put  
23 in place until long after our case was filed. Indeed, not  
24 until --

25 THE COURT: Well, but that's not fair. When your

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1 case was filed, you didn't make any of the arguments that  
2 you're making now.

3 MR. WILNER: Well, Your Honor, excuse me, I really  
4 think we did. Oh, I've just got 56 senticans (phonetic sp.)  
5 today. I really think we did. We said we have a right under  
6 the habeas statute. That's not what's in our jurisdictional  
7 base. A right to a determination. But you know --

8 THE COURT: There was no common law habeas claim.

9 MR. WILNER: Yes, Your Honor -- well, we certainly  
10 made it very squarely in the Supreme Court saying exactly the  
11 hypothetical you did. If this happened -- if we brought a  
12 case before the Bill of Rights was enacted we would have that  
13 right. But my point is that they put this procedure in, not  
14 only long after we filed the case, but long -- but after the  
15 Supreme Court ordered it back to the District Court to --

16 THE COURT: I don't understand what's wrong with  
17 that, if this is habeas.

18 MR. WILNER: Your Honor, what's wrong with it I  
19 think is what they were trying to do. Once this was remanded  
20 at the District Court, the procedures of the habeas statute,  
21 enacted by Congress, apply, and they require a traverse --

22 THE COURT: That argument seems to be assuming that  
23 once they have detained somebody wrongfully, they have to let  
24 him go if it's found to be wrongful. That they can't --

25 MR. WILNER: No.

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1 THE COURT: -- cure the wrong that they've committed  
2 and continue to hold him.

3 MR. WILNER: No, no, but at that point, you're  
4 before a Court. You can't just take the jurisdiction away  
5 from you, Your Honor, when Congress has given it to you.  
6 That's a Congressional enactment. The executive can't put  
7 through some --

8 THE COURT: Congress gave the right to habeas --  
9 gave the jurisdiction to hear habeas. But assuming that there  
10 is something wrong and it can't ever be cured is quite  
11 different than saying that jurisdiction can't be taken away.

12 MR. WILNER: But, Your Honor --

13 THE COURT: What were they supposed to do when the  
14 Court said the detention is unlawful? Continue to hold people  
15 unlawfully?

16 MR. WILNER: No, Your Honor, absolutely not. But  
17 what they did then is put in -- the statute triggers  
18 procedures at that point and the executive has no authority  
19 and there is no precedent for taking it away from them. 2243,  
20 2246, 2248 have procedure.

21 THE COURT: By the way, do you know how much help it  
22 would have been if one of you all had included in your  
23 supplement, your statutory appendix, the statutes that deal  
24 with habeas?

25 MR. WILNER: I think we put in the habeas statute.

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1 Yes, we did, Your Honor.

2 THE COURT: I mean the fact of the matter is we're  
3 somewhat --

4 THE COURT: (Indiscernible).

5 MR. WILNER: I'm sorry? I --

6 THE COURT: We're somewhat at sea here because the  
7 Rasul case does not connect -- it's difficult to fit the  
8 situation here with the statute, the habeas corpus statute, as  
9 it is written now. The habeas statute, as written now, does  
10 not seem to contemplate the sort of situation we have. And  
11 that's why I asked you whether you think we're sitting as a  
12 Common Law Court as well, whether -- because you are relying  
13 on the common law of habeas corpus, whether that's frozen in  
14 time in 1789 or whether that too has to be accommodated, as a  
15 Common Law Court would do to a particular situation that's  
16 facing us now.

17 MR. WILNER: Your Honor, habeas, 95 percent of the  
18 habeas cases are under 2254 or 2255, dealing with prior  
19 convictions. This is an unusual case. Thankfully it is  
20 unusual because we haven't had many executive detentions in  
21 the last 200 years. But really what the Court did in Hamdi --

22 THE COURT: Well, how many people were detained in  
23 World War II? Millions.

24 MR. WILNER: There weren't -- the only habeas cases  
25 I'm aware of are those that were after -- following a military

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1 commission. You know, Your Honor, most of the people there  
2 were in uniforms. There was no question about them.

3 THE COURT: But you said there were no executive  
4 detentions. There were millions of people.

5 MR. WILNER: But they were -- Your Honor, well, one  
6 thing is this is a case, this is why I say it's not a  
7 collateral attack. When we first came to this Court, the  
8 government had never followed its procedures. There were no  
9 hearings. The Article V hearings or something -- and that's  
10 one -- you know, they've got to follow their hearings. This  
11 whole case probably came up because they didn't follow their  
12 procedures.

13 You know, if they had followed their procedures, the  
14 case would probably have never been filed and most of these  
15 people would have never been at Guantanamo. What they did is  
16 they waited until after the Supreme Court remanded it to the  
17 District Court and then suddenly put a procedure in place. By  
18 that time, the statutory procedures at 2243, 2246, and 2248  
19 are in place, and they couldn't displace Congressional  
20 mandates of what should occur. Thank you very much, Your  
21 Honor.

22 THE COURT: Your light is on and it's now time for I  
23 guess Mr. Oleskey to further enlighten the Court.

24 MR. OLESKEY: May we have a moment to shift, Your  
25 Honor?

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1 THE COURT: We are going to take a brief recess  
2 before we proceed further.

3 (Recess.)

4 THE COURT: It's beginning to be a long day. We  
5 don't promise there won't be another recess before we get  
6 done. Go ahead, Counselor.

7 MR. OLESKEY: Good afternoon, Your Honor. Stephen  
8 Oleskey for the Boumediene Petitioners. And also associated  
9 with the argument of the El-Banna Petitions, who are the  
10 English residents who were seized in Africa in cases 5107,  
11 5108. I want to make it clear that I adopt, as we did in our  
12 brief, the arguments made by Mr. Wilner on C-1.

13 THE COURT: Did you make any of those arguments  
14 before Judge Leon?

15 MR. OLESKEY: We made -- I'm sorry, Your Honor, were  
16 you through?

17 THE COURT: Judge Leon, did you make any of those  
18 arguments?

19 MR. OLESKEY: We argued C-1, but our predominant  
20 argument was on C-3, Your Honor.

21 THE COURT: You argued that there is a common law  
22 right to that -- that applies here?

23 MR. OLESKEY: Yes.

24 THE COURT: I looked for that, but I didn't see it.

25 MR. OLESKEY: We had a long footnote before Judge

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1 Leon and we raised that argument in a footnote with you  
2 because we knew that the Al Odah Petitioners were briefing,  
3 argument that case, as they have. I want to make it clear  
4 that our Petition, with cites 2241, and --

5 THE COURT: Judge Leon didn't mention that argument.

6 MR. OLESKEY: Judge Leon didn't mention many of the  
7 arguments, which he termed, in general, frivolous without  
8 merit and the like. That was one of the difficulties that we  
9 had with Judge Leon, Your Honor.

10 THE COURT: As our former colleague, Edner Mitner  
11 (phonetic sp.) would say THE COURT:

12 MR. WILNER: anything stuck in the margin is deemed  
13 to be of marginal importance. You understand that, Counselor.

14 MR. OLESKEY: Thank you, Your Honor. I'm not going  
15 to address the C3R at length because it's been addressed in  
16 your questions with Mr. Wilner and is discussed at length in  
17 our brief. I simply want to say that we can't lead Rasul in  
18 light of this Court's decision in Al Odah without coming to  
19 conclusion that the Footnote 15, while brooding about in part,  
20 6 of Rasul, which says the matter is remanded to the District  
21 Court for consideration of merits, that that means something  
22 and that the government has never given any explanation really  
23 that's cullible (phonetic sp.) as to what it means. And that  
24 the footnote, which takes you back to the Verdugo case, the  
25 insular cases, is really all about a parallel between

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1 Guantanamo as being a place where the U.S. exercises its laws  
2 to the fullest. Much like that was found, we did in the  
3 Philippines. Much like was found, we did sufficient in the  
4 Marshal Islands for purposes of this Court's decision in  
5 *Ralpho*. So that what has been referred to as the fundamental  
6 rights, which liberty is pre-eminent, get extended in those  
7 limited circumstances. That's the core of the argument. I  
8 understand that the Court has it and you are either going to  
9 agree with our position, the brief, that the Supreme Court  
10 resolved it, and that the government should not be re-  
11 litigating that case here, or you won't. But I know you'll  
12 understand.

13 THE COURT: The government resolved what precisely,  
14 Counselor? You just said the government -- that *Rasul*  
15 resolved it. What is the it that *Rasul* resolved?

16 MR. OLESKEY: We believe *Rasul* resolved the question  
17 whether the Guantanamo detainees have constitutional rights to  
18 raise permanent or indefinite deprivation of their liberty in  
19 Guantanamo in the habeas proceeding. That's what that --

20 THE COURT: Because of Footnote 15?

21 THE COURT: Yeah, to raise it, but does that mean  
22 that they have constitutional rights?

23 MR. OLESKEY: Well, this Court said, as I read your  
24 *Al Odah* decision, that the rights are secondary to  
25 jurisdiction. If there is no right, there is no jurisdiction.

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1 The Supreme Court then said there's jurisdiction. I can't  
2 read --

3 THE COURT: Forget we said anything. Just look at  
4 Rasul and tell me how the Supreme Court resolved that  
5 question.

6 MR. OLESKEY: They resolved it in the footnote,  
7 which I described and which is discussed at length in our  
8 brief and in the instruction in Part 6 at the very end, to  
9 return the matter in the first instance to the District Court  
10 for consideration of the merits.

11 THE COURT: Well, Mr. Katsas raises a good point.  
12 What about the question presented refrained by the Supreme  
13 Court? How can you say that in light of the Supreme Court's  
14 rejection of a question presented that would have raised the  
15 very issue you are arguing?

16 MR. OLESKEY: I think the Supreme Court went out of  
17 its way and Footnote 15 and Part 6 to make the point that they  
18 were reversing Al Odah because the war rights that could be  
19 asserted by these men in Guantanamo. And that the reference  
20 to Justice Kennedy's concurrence in Verdugo and to the line of  
21 cases there to include the Balzac case and the Dorr case, both  
22 of which this Court had cited in Al Odah, can only mean that  
23 the Court was analogizing Cuba, that little piece of Cuba that  
24 we completely control, to the situation that existed in the  
25 insular cases in the territories.

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1 THE COURT: And did not have Rasul. Would you have  
2 any claim to the possession of constitutional rights by the  
3 detainees in Guantanamo?

4 MR. OLESKEY: Well, we do have Rasul, of course.

5 THE COURT: Yeah, but that's why I asked you the  
6 question if we didn't have it.

7 MR. OLESKEY: Well, I know. That was the argument  
8 as I understand it two years ago in this Court and then --

9 THE COURT: I understand that two years ago, Supreme  
10 Court reversed in Rasul and stated the question in the habeas  
11 jurisdictional terms. I'm asking you a hypothetical question  
12 if they had not take that case at all, if we had not had the  
13 Barra case at all, if we had only Eisentrager to look at,  
14 would you have a claim to constitutional rights?

15 MR. OLESKEY: Yes.

16 THE COURT: You would? Tell me about that.

17 MR. OLESKEY: Because Guantanamo is not Landsberg  
18 Prison in Germany. There had been a military process there  
19 under military commissions. That had all happened and the  
20 United States was a power that shared rights to occupy Germany  
21 and rights over that prison at that time and these men were  
22 essentially convicted of an offense against the laws of war,  
23 namely continuing resistance after the surrender of Germany.

24 THE COURT: Did not Eisentrager hold though that the  
25 prisoners could not even assert those rights in an American

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1 Court? Because a good deal of the rationale has to do with  
2 the military having to come back to defend, not to the kind of  
3 factual based merits argument you're making now.

4 MR. OLESKEY: Well, they did look at the merits  
5 there. Look at the merits in Curran and both of those cases I  
6 think have to be seen in light of what was happening in World  
7 War II.

8 THE COURT: What I'm asking you is we can't grant  
9 your petition, or we can't rule in your favor here, can we,  
10 unless we hold that Rasul overruled Eisentrager?

11 MR. OLESKEY: Yes, you can.

12 THE COURT: We can?

13 MR. OLESKEY: You can find that Rasul and  
14 Eisentrager are harmonious for the reasons that I've just  
15 stated.

16 THE COURT: Because Guantanamo is sovereign  
17 territory of the United States?

18 MR. OLESKEY: Sufficient for purposes of habeas,  
19 yes.

20 THE COURT: If we had only Justice Kennedy's  
21 concurrence, you might have a good argument there, but they  
22 don't even need his concurrence. We have to look to the  
23 majority, not to the concurrence. And where in the majority  
24 do we find the position that you are arguing here?

25 MR. OLESKEY: The majority is the entity that put

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1 Footnote 15 in.

2 THE COURT: Footnote 15 is your best argument, isn't  
3 it?

4 MR. OLESKEY: Yes. And then directly --

5 THE COURT: Virtually your only argument.

6 MR. OLESKEY: Well, and then directively, the case  
7 back for consideration.

8 THE COURT: But the problem with that is a steel  
9 company problem. The Supreme Court was looking at  
10 jurisdiction. They are not at merits. That's all they looked  
11 at as far as the clarity of the sentence at the beginning of  
12 the opinion, the narrow issue that we decide today is, and  
13 then as I read it to your co-counselor.

14 MR. OLESKEY: Let me pass on to --

15 THE COURT: You know, Justice Douglas, in a case  
16 called Tidewater Oil Company, said in a descent footnotes  
17 don't count. He said that in a footnote, by the way, which is  
18 --

19 MR. OLESKEY: Point taken, Your Honor. Just  
20 wrapping up that colloquy, Your Honor, we think that that  
21 footnote confirms the vitality and validity of the insular  
22 cases.

23 THE COURT: I'm not sure, you went awhile ago to  
24 Part 6 of the opinion, I'm not sure why you think it supports  
25 your position here. Part 6 is very short and seems to again

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1 being declaring a rather narrow question of review, doesn't  
2 it?

3 MR. OLESKEY: The last sentence, which I take to be  
4 the summing up in the instruction that the Court is giving the  
5 Lower Courts, I'm sorry, I have it here somewhere. I believe  
6 says in substance, therefore the matter is remanded to the  
7 District Court for further consideration in light of the  
8 merits.

9 THE COURT: What about the first sentence and the  
10 second sentence of 6? And there is only about three or four  
11 sentences. "Whether and what further proceedings may become  
12 necessary after Respondents make their response. The merits  
13 the Petitioners claim are matters we need not address now.  
14 What is presently at stake is only," I'm italicizing only,  
15 "whether the Federal Courts have jurisdiction in terms of the  
16 legality of the executive potentially indefinite detention of  
17 individuals who claim to be totally innocent of wrongdoing."  
18 Whether the Courts have jurisdiction. That's, again, as Judge  
19 Rogers says, the beginning, the middle, and the end is  
20 narrowing it just to that one question.

21 MR. OLESKEY: I agree that you've correctly quoted  
22 the language before -- the language I quote. That language,  
23 the last sentence seems to be the direction to the Lower  
24 Courts, not to this Court, but to the District Courts in the  
25 first instance. I can't make anything of merits other than to

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1 a consideration of what rights are asserted in other  
2 jurisdiction been found and that's what we are here discussing  
3 today.

4 THE COURT: It certainly doesn't assume that there  
5 are any merits (indiscernible).

6 MR. OLESKEY: Only let me talk about my clients,  
7 Your Honor, in that respect. Because, as the Court is aware  
8 from our brief, these are not men who were detained or  
9 captured, although the government often uses that verb, on the  
10 battlefield in Afghanistan. These are not people who were  
11 seized anywhere. They are people who were, in fact, arrested  
12 by the Bosnians in October of 2001 because we said to the  
13 Bosnians that we had information that they were plotting to  
14 blow up the U.S. Embassy. They then were held for 90 days.  
15 Their homes were fully searched. Their computers were seized  
16 and searched. They were interrogated under a system, the  
17 Bosnian Supreme Court, which we validated in the date and  
18 accords in 1995.

19 After that, the -- and during that period there was  
20 an opportunity to come forward, the United States or anybody,  
21 with evidence that would support those claims. No evidence  
22 was forthcoming. The Bosnian process concluded that there was  
23 insufficient evidence to hold them on those charges. The  
24 Bosnian Supreme Court ordered them released on January 17,  
25 2002. And as they were walking out of the central jail in

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1 Sarajevo, having been announced on television that they were  
2 going to be released, they were turned over to Bosnian  
3 security forces, who turned them over to the United States  
4 military, were resident there not because of any battle in  
5 Bosnia but because of the peacekeeping activities that we  
6 undertook with Western Europe in Bosnia after that terrible  
7 war, and they were found and gagged to Guantanamo.

8 At that time, there was also an order from the  
9 Bosnian Human Rights Chamber, which is a Court set up by  
10 Dayton to have the supreme authority to speak on human rights  
11 matters in Bosnia, which forbade that transfer. When they got  
12 to Guantanamo, they held for two and a half years without  
13 being charged. They were never charged. They were told in  
14 October of 2004 that the claims that the CSRT advanced, that  
15 you have before you on the record, and there are various of  
16 those claims, but that was the first time that they were ever  
17 informed in any formal sense of why it was that they were  
18 taken to Guantanamo in early 2002.

19 Now at the time that they were taken to Guantanamo  
20 there was no definition that we can find of what it is that  
21 the United States says makes a enemy combatant subject to  
22 being detained under the authorization for use of military  
23 force. The definition that the Supreme Court was given by the  
24 government, and it relied on Hamdi, which the Supreme Court  
25 found consistent with the laws of war, was sufficient to

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1 authorize detention of people seized on the battlefield in  
2 Afghanistan subject to subsequent process to determine whether  
3 they were properly held had to do with whether or not you were  
4 baring arms on the battlefield in Afghanistan against United  
5 States forces.

6 So that's the definition insofar as there is one of  
7 who was allowed to be detained in Guantanamo at the time, at  
8 least at the time of the Supreme Court argument. And that's  
9 the -- but that's not the definition that was applied to my  
10 clients in Guantanamo in these CSRT tribunals. What was  
11 applied to them was a definition that the Deputy Defense  
12 Secretary created by an order on July 7, 2004, which  
13 significantly broadened both the language of the AUMF and also  
14 broadened the language of the statute.

15 As Mr. Wilner has commented, what Justice O'Connor  
16 said in the Hamdi case was that perhaps a properly authorized  
17 tribunal could make a determination that the Courts would  
18 review and give some deference to. The detainees in  
19 Guantanamo were all reviewed by their various tribunals under  
20 this definition created by the Deputy Defense Secretary on  
21 July 7, 2004. What the basis is on which they were held,  
22 between the time they were charged so to speak under that  
23 definition in October 2004 and the time they were first taken  
24 to Guantanamo in the case of my clients in 2002, is not  
25 apparent for the record. But the first definition that's the

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1 formal one that appears in the record, as I understand it, is  
2 a definition given to the Supreme Court in late 2003 or early  
3 2004.

4 THE COURT: You know how the governments return for  
5 each one of the individuals you represent.

6 MR. OLESKEY: Yes, Your Honor.

7 THE COURT: If the information in the government's  
8 return, without disclosing what that was, is accurate, did the  
9 United States have a basis for detaining your client?

10 MR. OLESKEY: No.

11 THE COURT: And the reason for that is --

12 MR. OLESKEY: Well, I've got to discuss part of that  
13 in the close session, but part of it is that, I can certainly  
14 say now, these are not people who were --

15 THE COURT: Involved in 9/11? Is that --

16 MR. OLESKEY: -- involved in 9/11.

17 THE COURT: So even if they were al Qaeda operatives  
18 planning to blow up U.S. embassies outside of Afghanistan, you  
19 would say the United States had no authority to detain them?

20 MR. OLESKEY: If they are al Qaeda operatives, I  
21 think, as the Supreme Court read the AUMF, you could probably  
22 detain them because they are members of an organization that's  
23 generally understood to have been the motivating force behind  
24 9/11.

25 THE COURT: What if they are affiliated with that

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1 organization?

2 MR. OLESKEY: Well, it doesn't -- the statute  
3 doesn't say that. That gets in because in the order of July  
4 7, 2004 the language was substantially broadened to delete any  
5 reference or connection or nexus to 9/11, to include  
6 individuals supporting the Taliban or al Qaeda, as opposed to  
7 those members of the Taliban and al Qaeda, to refer to  
8 individuals part of a supporting forces associated with the  
9 Taliban and al Qaeda, as opposed to being part of the Taliban  
10 and al Qaeda. And then also add a reference to individuals  
11 who committed a belligerent act, whatever that may have been.  
12 So that definition that was given to the Supreme Court after  
13 the arguments here was significantly broadened by the order of  
14 July 7, 2004.

15 THE COURT: Put aside the authorization for use of  
16 military force. Is it your proposition that if the United  
17 States has information that an individual is about to blow up  
18 an embassy in Bosnia that the United States has no authority  
19 to detain that individual?

20 MR. OLESKEY: My position is this, Your Honor, that  
21 the AUMF does not give --

22 THE COURT: I said put that aside. The President of  
23 the United States, through the CIA, has firm information.  
24 We'll accept it as true for the purpose of this question. But  
25 an individual is about to blow up the embassy in Bosnia. Is

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1 it your position that the United States has no authority to  
2 detain that individual?

3 MR. OLESKEY: I have to say it depends. And let me  
4 explain.

5 THE COURT: It depends?

6 MR. OLESKEY: It depends.

7 THE COURT: What's it depend on?

8 MR. OLESKEY: It depends on whether the Bosnian  
9 authorities are there and can deal with the attack. If they  
10 can't --

11 THE COURT: Regardless whether they can, it's going  
12 to be an attack on a U.S. embassy.

13 MR. OLESKEY: But are they five miles outside town?  
14 Are they driving a suicide truck into the embassy?

15 THE COURT: Okay. That's a --

16 MR. OLESKEY: I don't think in that instance, to  
17 take Bosnia, that U.S. troops, if they happen to be there, can  
18 drive to some corner of Bosnia and capture those men, unless  
19 they are about to do imminent harm or damage to U.S. property  
20 or persons. And in any event, if there --

21 THE COURT: Why? The imminent part of thing comes  
22 from the clear and present danger test, which is a First  
23 Amendment concept thing. The First Amendment doesn't apply in  
24 Bosnia. So where does that imminence come from?

25 MR. OLESKEY: Imminent, exigent; an immediate

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1 circumstance is the point I'm making, Your Honor.

2 THE COURT: Well, they are sitting in their rooms  
3 and they're putting the bombs together and they're not going  
4 to blow it up for three weeks.

5 MR. OLESKEY: Then unless Article II gives the  
6 Commander-in-Chief --

7 THE COURT: Well, that's the question.

8 THE COURT: That's where we're going to. Yeah.

9 THE COURT: That is the question.

10 MR. OLESKEY: (Indiscernible) then the President  
11 does -- the Chief Executive, the Commander-in-Chief does not  
12 have that authority. In Hamdi, they carefully tethered the  
13 authority of the President to the laws of war.

14 THE COURT: I want to make sure I understand your  
15 answer to that question. You are saying that if the President  
16 has information through the CIA or anybody else, call it  
17 unimpeachable evidence, that somebody is about to blow up a  
18 United States embassy, Article II does not empower the  
19 President to take action against those people?

20 MR. OLESKEY: I don't believe the Constitution  
21 empowers the President to fly in the military to some other  
22 country under those circumstances, unless it's the only way to  
23 prevent whatever is going to happen.

24 THE COURT: Justice Jackson once said that the  
25 Constitution is not a suicide pact.

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1 MR. OLESKEY: Yes, but he also said in the  
2 Youngstown case that if you accept this expansive notion then  
3 I think the discussion, Your Honor, about the President's  
4 power being essentially unlimited in this area either has no  
5 beginning or has no end. And we're talking about limits on  
6 the President's power found in the Constitution, found --

7 THE COURT: The limits are that when information  
8 comes to the Executive that imperils U.S. life and property  
9 the Executive can take action. That's a limit.

10 THE COURT: And that's a fair paraphrase of Jackson  
11 and Youngstown too, isn't it?

12 MR. OLESKEY: Well, I think that's one paraphrase,  
13 yes. But it doesn't say --

14 THE COURT: Category 1.

15 MR. OLESKEY: It doesn't say, Your Honor, that the  
16 President can then hold those men for 43 months in Guantanamo  
17 or any number of months without either subjecting them to the  
18 criminal process or turning them over to the --

19 THE COURT: That's a different question. Now you're  
20 coming much closer to the facts of the case granted, but as  
21 far as your answer to Judge Randolph, I still understand it to  
22 be that you see no Article II power to defend the embassy. Is  
23 that correct?

24 MR. OLESKEY: I agree -- if the premise is that  
25 there is no way to prevent the imminent harm, I agree the

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1 President can take action to seize. But --

2 THE COURT: I didn't understand that premise to be  
3 in there. The premise is there's going to be -- there is good  
4 information there is going to be an attack on a U.S. embassy.  
5 Don't give me any ifs, ands, or buts, just tell me, does the  
6 President have the authority, and if you say it depends,  
7 that's all right, you can say that, but I want to make sure I  
8 understood it correctly.

9 MR. OLESKEY: I do say that it depends. But then,  
10 more importantly, I say that even if it is necessary to  
11 exercise that authority, the President --

12 THE COURT: Does your argument today depend on being  
13 correct in that position?

14 MR. OLESKEY: No.

15 THE COURT: Okay.

16 MR. OLESKEY: This is, of course, the series of  
17 questions that are asked in the argument -- motion dismissed  
18 in front of Judge Green. The hypotheticals are asked to  
19 Government Counsel, including supposed little old lady in  
20 Switzerland who wants to give money to an orphanage in  
21 Afghanistan and she doesn't know it's an al Qaeda front, do  
22 you have the authority under the AUMF or otherwise to seize  
23 her and take her to Guantanamo? My recollection of the answer  
24 was yes, we do, Your Honor.

25 In any event, the definition that was applied in

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1 Guantanamo in all of these hearings, including our clients,  
2 was the definition authored on July 7, about ten days after  
3 the decision of the Supreme Court. It was not the decision  
4 that the Supreme Court had. It's a broad, very broadly,  
5 expansive definition and it permits essentially targeting of  
6 people like Swiss grandmothers or others around the world who  
7 have no nexus to 9/11.

8 Of course, in the CSRT's there was nobody to attack  
9 the application and use of that standard because there were no  
10 Counsel; there were only these Personal Representatives, who  
11 were lined military officers with no legal training, who had  
12 no duty or loyalty to any of the prisoners they represented.  
13 So nobody in our tribunals raised the issue of this expanded  
14 and expansive definition. Nobody asked where the authority  
15 was of the Deputy Defense Secretary to issue this order.  
16 Nobody noticed that the order doesn't cite any authority on  
17 its face, it just says, "Order for Combat Status Review  
18 Tribunals," and begins with a definition and ends with a  
19 procedure, which was then implemented further by the order of  
20 the Navy Secretary at the end of July.

21 THE COURT: See, my question really went to the  
22 issue raised is that order that you're referring to doesn't  
23 necessarily have to depend upon an interpretation that the  
24 authorization needs military force.

25 MR. OLESKEY: Not if the President otherwise has

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1 that authority.

2 THE COURT: If the President has other authority  
3 under the Constitution itself, right?

4 MR. OLESKEY: Yes.

5 THE COURT: And it's not so hypothetical. I mean  
6 the Combat Review, and this is unclassified, found that your  
7 client, one of your clients, was planning an attack on an  
8 American embassy and was in contact with al Qaeda, was a  
9 Mujahideen member of a network and also a likely member of  
10 another organization that was affiliated with al Qaeda.

11 Now given all that information, that's why I asked.  
12 If that's true, you may contest the factual basis of it,  
13 although your client had an opportunity to do in the tribunal.  
14 If all that's true, I just don't understand what your argument  
15 is that there's no authority in the Executive Branch to detain  
16 this person.

17 MR. OLESKEY: The authority would have to be found,  
18 if it's outside the AUMF, under Article II. The Supreme Court  
19 tethered the authority to detain, in the limited and now the  
20 Circuit answers there, to the AUMF, and particularly linked it  
21 to the laws of war. It said in substance that it would  
22 sustain the grant of authority in the AUMF because, under laws  
23 of war, there was an accepted principle at stake which is  
24 preventing combatants captured in Afghanistan from returning  
25 to the battlefield. But my clients were not captured in

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1 Afghanistan and they are not on any battlefield anymore than  
2 anybody is in London and New York.

3 THE COURT: Why doesn't the same principle apply  
4 that you don't return individuals like this two in Bosnia to  
5 blow up U.S. embassies?

6 MR. OLESKEY: Because that's not a principle of the  
7 law of war; that's a principle of detention under our criminal  
8 laws. Title 18 has a plethora of statutes to deal with  
9 terrorist actions. People have been indicted and convicted  
10 under those. Most recently, beginning with the first World  
11 Trade Center bombing, the Al Khobar barracks bombing, the  
12 U.S.S. Cole, and so on. Our criminal process is robust. So  
13 there is no reason for plenary authority in the President,  
14 which would be a quantum leap in anything any Court has ever  
15 authorized the President to do to hold people indefinitely  
16 without subjecting them to the criminal process. This isn't a  
17 military commission, mind you. These are these very summary  
18 processes that occurred in July of 2004.

19 THE COURT: Your argument is the President does have  
20 authority to detain the individual but then is required to  
21 bring that individual into the United States to face the  
22 indictment in a federal grand jury.

23 MR. OLESKEY: Well, they could be held and indicted  
24 and charged in the country where they are or both could occur,  
25 as often happens. I'm not saying that the law or rule doesn't

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1 apply to any aspect of the war on terror. Rather, it does not  
2 apply to every aspect of the war on terror, so called, and  
3 seizures of civilians in friendly nations who never set foot  
4 on a battlefield --

5 THE COURT: Why is it so called?

6 MR. OLESKEY: Because Congress has never enacted the  
7 statute from my understanding entitled war on terror  
8 authorizations granted in connection with that and so forth.  
9 It's a metaphor for the situation we're engaged, it's not a  
10 formal statutory definition, as I understand it. That's all I  
11 meant.

12 Of course, the District Court did not examine into  
13 this issue about whether or not the definition that was  
14 applied in Guantanamo was a definition that was passed upon  
15 and sanctioned by the Supreme Court in Hamdi. It's simply  
16 treated, in my case, what the tribunals had done in Guantanamo  
17 as factually sufficient, even if they had rights under the  
18 habeas statute. And referred repeatedly as if it was a fact  
19 that had been resolved in a habeas review rather than a fact  
20 provided in a so called return in the habeas proceedings to my  
21 client as terrorist enemy combatants and the like.

22 THE COURT: Can you tell me, I asked Mr. Wilner this  
23 question, and I want to be clear about your situation, the  
24 government made returns with respect to each one of the  
25 detainees that you're representing?

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1 MR. OLESKEY: Yes.

2 THE COURT: Okay. And when did those returns come  
3 in?

4 MR. OLESKEY: I believe those returns came in late  
5 October/November, because I know the final decisions in my  
6 case range I believe from October 20th to October 29th. So my  
7 best recollection would be sometime in November, Your Honor.

8 THE COURT: That the returns came in?

9 MR. OLESKEY: That the process was complete.

10 THE COURT: Okay. And when did Judge Leon rule?

11 MR. OLESKEY: Judge Leon ruled on about January  
12 17th, but the hearing was on December 2nd. And it was after  
13 that hearing before Judge Leon, the motion to dismiss --

14 THE COURT: And I asked Mr. Wilner this, were you  
15 planning to traverse, get sworn statements to rebut the  
16 government's return?

17 MR. OLESKEY: I was planning to do whatever the  
18 District Court allowed me in a habeas statute to do to  
19 traverse or rebut.

20 THE COURT: Did you file an -- I don't know that you  
21 need a motion to do that, but you certainly needed access to  
22 the detainees.

23 MR. OLESKEY: Yes. Which I did --

24 THE COURT: What efforts did you make to get access?

25 MR. OLESKEY: We made efforts to have access from

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1 the time we appealed the case, which was in July of 2004. As  
2 the Court may or may not know, there is an elaborate security  
3 clearance process you have to go through in order to go and  
4 talk to your clients. And then when that's over, you have to  
5 get in line because there are limited slots in Guantanamo that  
6 the military has allocated for lawyers to go in a holding area  
7 to interview their clients. So pushing as hard as we could,  
8 the first time we got there I think was in the third week of  
9 December of 2004, which was two to three weeks after the case  
10 had been submitted to Judge Leon.

11 THE COURT: Did you take sworn statements from these  
12 detainees?

13 MR. OLESKEY: I didn't take sworn statements because  
14 the case had been submitted to Judge Leon on the motion to  
15 dismiss and there was no procedural ground or format at that  
16 time to submit anything. We had --

17 THE COURT: There was. I mean under 18 U.S.A. 2248.

18 MR. OLESKEY: But Judge Leon treated this as if it  
19 were a summary judgment. We filed our petition. These  
20 motions to dismiss were filed. Judge Leon had the CSRT  
21 results, but it does not appear that he looked at the CSRT  
22 results. He just generally considered that they were  
23 legitimate because they were the result of this process.

24 THE COURT: He didn't rely on them anyway.

25 MR. OLESKEY: Excuse me?

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1 THE COURT: He did not rely on the returns.

2 MR. OLESKEY: No, not as I read his decision. So,  
3 procedurally, the first chance we had to get there was the end  
4 of December and in my view of the process, we are in no  
5 position to file anything with the record on the motion to  
6 dismiss closed at that time. What we have been allowed to do,  
7 which is not at all the same as a traverse, we've been allowed  
8 to file comments in these review boards that are going on,  
9 which is another military process which assumes that your  
10 client is an enemy combatant but perhaps for some reason the  
11 military will decide they should go home. That's not the same  
12 as being allowed to appear in Federal Court and argue the  
13 reasons why the process was deficient.

14 THE COURT: You've had access to the classified  
15 material.

16 MR. OLESKEY: Yes.

17 THE COURT: You are not permitted to share that with  
18 the detainees?

19 MR. OLESKEY: That's right.

20 THE COURT: Okay. And where does that come from?

21 That --

22 MR. OLESKEY: I believe that's part of the order or  
23 a series of orders issued by Judge Green at the government's  
24 instigation. The theory of the government being, if we told  
25 the detainees classified information and they really are

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1 people who deserve to be in Guantanamo, that's a breach of  
2 security. So it is a hindrance in the development of our case  
3 ultimately, assuming that you do as Wolasky (phonetic sp.) and  
4 reverse and send it back to the District Court to hold the  
5 prudential incremental factfinding that Hamdi contemplates.  
6 And then you won't be --

7 THE COURT: That's actually unusual in cases  
8 involving classified information, even at the criminal trials.

9 MR. OLESKEY: I understand.

10 THE COURT: Would hearsay be permitted under your  
11 vision of that factual determination in the District Court?

12 MR. OLESKEY: I didn't get that question, Your  
13 Honor.

14 THE COURT: Under your -- in what you contemplate,  
15 you were talking about an evidentiary hearing I thought before  
16 the District Courts about the validity of the information that  
17 the government put in the return? Would hearsay be permitted?

18 MR. OLESKEY: It could be, depending on its  
19 reliability. I think that the Supreme Court contemplated in  
20 Hamdi that all those issues would be worked out on a case-by-  
21 case basis by the District Courts.

22 THE COURT: That's in a tribunal. That's not in a  
23 Court. The Supreme Court was talking about a separate  
24 tribunal, not a judicial -- do the rules of evidence apply in  
25 habeas corpus cases?

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1 MR. OLESKEY: I believe they do.

2 THE COURT: Well, if they do, then hearsay wouldn't  
3 be permitted.

4 MR. OLESKEY: I understand. But we had that gloss  
5 and --

6 THE COURT: And that means that military commanders  
7 from around the globe would have to come to Washington to  
8 testify?

9 MR. OLESKEY: I don't know whether it would be  
10 depositions or not. I wish I was at the point where these  
11 questions were real because I would like to be back in the  
12 District Court making the arguments about the scope of my  
13 authority to challenge his attention.

14 Just in closing, we have briefed, and I'll discuss  
15 in a moment in the closed session extensively, on the  
16 insufficiency of the process at Guantanamo, not just on its  
17 face because of the Wolfowitz or the Defense Department order  
18 of July 7th, which goes well beyond anything that's in the  
19 statute that was improved by the Supreme Court, not just  
20 because the instructions of the tribunals were these men had  
21 been repeatedly found to be enemy combatants under some  
22 standard the record doesn't disclose. And when the government  
23 was asked in front of Judge Green are those prior  
24 determinations written down anywhere, the answer came back not  
25 that we're informed. But these military officers in Cuba I'm

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1 told, these are men who are properly seized and properly  
2 detained and this has been determined through multiple levels  
3 of review by others before you. None of that, however, could  
4 be substantiated. Nonetheless, that's what they were told.

5 THE COURT: After the Combat Status Review Tribunal,  
6 do they have a right of appeal within the military system?

7 MR. OLESKEY: No. What happens is, according to the  
8 order of July 7th and implementing order of the Navy Secretary  
9 at the end of July, there is a review by the legal officer for  
10 the tribunals and then a final review by the principle  
11 director of the tribunals.

12 THE COURT: What is the Administrative Review Board  
13 I saw in some of these papers?

14 MR. OLESKEY: That's a different entity that was  
15 created after the CSRT's, also by the Defense Department, the  
16 premise of which is even if you've been found to be an enemy  
17 combatant you might now have insufficient intelligence value  
18 or insufficient dangerousness posed to the United States but  
19 you can nonetheless be released.

20 THE COURT: It's an annual review.

21 MR. OLESKEY: The annual review of which the first  
22 is now underway. But, again, there is no right for Counsel to  
23 appear and advocate in those proceedings. It's purely  
24 administrative and purely military. I believe my time has run  
25 out.

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1 MR. KATSAS: Thank you. Let me start with the  
2 question of authorization and then try to circle back to the  
3 question of who gets to do the factfinding and what standards  
4 of review apply.

5 The enemy combatant detentions at issue here  
6 encompass members or supporters of the Taliban and al Qaeda,  
7 both as a matter of Article II and as a matter of the AUMF. I  
8 think that category of Defendants can be permissibly detained.  
9 In the AUMF, Congress gave the President the authority to take  
10 necessary and appropriate force against nations,  
11 organizations, or person who committed the September 11  
12 atrocities and against nation's organizations or persons who  
13 harbored such people.

14 We think it's perfectly clear that al Qaeda is an  
15 organization that committed the September 11 attacks and the  
16 Taliban is a government that harbored al Qaeda, and therefore,  
17 the President could take necessary and appropriate force  
18 against al Qaeda or the Taliban.

19 The next step in the analysis is what constitutes  
20 necessary and appropriate force. The Hamdi case answers that  
21 question to the extent the Court said that one fundamental  
22 incident of waging war and committing Armed Forces is  
23 detaining enemy combatants. In this case, al Qaeda and the  
24 Taliban.

25 And if all of that is true and the AUMF

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1 authorization builds on the President's independent Article II  
2 authority, we think the authorization question whose  
3 reviewability I was debating with you on the last round, is  
4 firmly established with respect to that class of people. And  
5 then if that's true the next question in the analysis becomes,  
6 well, how do you determine who is or is not a Taliban or al  
7 Qaeda affiliate?

8 And it seems to me that gets us back to the question  
9 of procedures. And with respect to the how do you determine  
10 who is or who is not an enemy combatant question, there is a  
11 lot of history bearing on that question. There is Army  
12 Regulation 190-8, which has been on the books for four or five  
13 decades which contemplates a determination by a duly  
14 constituted military tribunal. That is the way enemy  
15 combatant determinations have been done under 190-8. I mean  
16 it's the way they were done with respect to the 2 million  
17 people detained during World War II. And so both, because the  
18 AUMF, with respect --

19 THE COURT: 190-8 requires that the tribunal be  
20 composed of officers of a particular rank.

21 MR. KATSAS: And one of --

22 THE COURT: Colonel Major said it?

23 MR. KATSAS: AUMF is three commissioned officer, I'm  
24 sorry, 190-8 is three commissioned officers, one of whom must  
25 be field grade. The --

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1 THE COURT: And that's Major Colonel.

2 MR. KATSAS: The tribunals constituted here are 06  
3 and two field grade, so the tribunal -- this is one of many  
4 respects, Judge Randolph, in which the CSRT process exceeds  
5 the extent of process contemplated by 190-8. The detainee is  
6 given a substantially more senior tribunal. The members of  
7 that tribunal have expressed requirements of independence.

8 THE COURT: 106 and two other field grades. Is that  
9 correct?

10 MR. KATSAS: 106 and two field grades for the  
11 CSRT's, as against three CO's, one of whom is field grade. So  
12 you have a substantially more senior tribunal which has sort  
13 of recusal and independence requirements.

14 THE COURT: And 06 would be a field grade. It's the  
15 highest field grade, if I recall correctly. So it's an 06 an  
16 two other field grades.

17 MR. KATSAS: Yes, sir. 06 and two 04's would be the  
18 lowest --

19 THE COURT: Okay. Or an 05 in there.

20 MR. KATSAS: Right. But the lowest level to the  
21 extent that one protection built into the system is having  
22 officers of rank and stature. The tribunal afforded to these  
23 detainees --

24 THE COURT: I've got you now. I was just trying to  
25 make sure I substantially understood what you said.

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1 MR. KATSAS: Right. So you have the --

2 THE COURT: Which is not easy in this courtroom  
3 sometimes.

4 MR. KATSAS: You have a substantially -- a senior  
5 tribunal with expressed independence requirements. If you  
6 look at the orders establishing the CSRT procedures, you also  
7 have notice provided to a detainee and you have advanced  
8 notice of all but the classified information. That's the CSRT  
9 proceeding. In the 190-8 proceeding, there is no provision  
10 for advanced notice of anything. So in that respect, the  
11 detainee is substantially better off.

12 With respect to participation rights in the tribunal  
13 --

14 THE COURT: I thought the timing and burden of proof  
15 was different under 190-8.

16 MR. KATSAS: No, Judge Rogers, in both -- 190-8  
17 requires a preponderance standard. It is silent on the  
18 question who actually bears the burden. The CSRT procedures  
19 propose a preponderance standard subject to two tweaks on  
20 that. One is that the government evidence is presumed to be  
21 correct, which goes to matters like authentication and so on.  
22 But, two, just as importantly, the tribunal is charged with  
23 determining the reliability of every piece of evidence. So  
24 you have a preponderance standard and a reliability  
25 determination.

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1 THE COURT: This is not -- these tribunals are not  
2 190-8 tribunals.

3 MR. KATSAS: Not literally. But they are CSRT --  
4 they are tribunals --

5 THE COURT: They can't be because 190-8 is designed  
6 to determine whether someone is a prisoner of war within the  
7 meaning of the Geneva Convention.

8 MR. KATSAS: No, it actually goes beyond that. It  
9 contemplates that determination or other determinations of a  
10 like nature and it has various categories of detainees,  
11 various possible dispositions, including POW, but with various  
12 other retained personnel and civilian internees and other  
13 detainees. But in any event --

14 THE COURT: But that all follows the Geneva  
15 Conventions.

16 MR. KATSAS: Whether or not, I don't think they are  
17 literally 190-8 tribunals, but crucial point for purposes of  
18 this discussion is the procedures afforded to detainees in  
19 order to make the necessary enemy combatant or not  
20 determination vastly exceed the procedures contemplated by  
21 190-8. The tribunal, for reasons I've said, more notice in  
22 terms of participation rights. The detainee can introduce --  
23 he can participate at the hearing, he can testify, he can call  
24 witnesses, if reasonably available, he can introduce  
25 documentary evidence, which is not available under 190-8, and

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1 --

2 THE COURT: That isn't the argument, that in fact as  
3 190-8 has been applied for decades, the burden has been on the  
4 government to come forth with evidence. Then the burden  
5 shifts and the ultimate burden remains on the government and  
6 the finding has to be made by a preponderance. And except for  
7 the provision for a military representative everything else is  
8 the same.

9 MR. KATSAS: No, that's -- with respect, Judge  
10 Rogers, that --

11 THE COURT: I mean I know how your brief wants to  
12 read it, but I'm just looking at the language of the  
13 Regulation and the language of the CSRT's.

14 MR. KATSAS: Right. Put them side by side and make  
15 the comparisons. The tribunal has --

16 THE COURT: But I think the critical point is who  
17 has the burden of coming forward with the evidence. And the  
18 CSRT's were designed simply to allow the detainee to rebut a  
19 predetermined decision.

20 MR. KATSAS: No, that's actually not correct.

21 THE COURT: That's what the CSRT order says.

22 MR. KATSAS: The members of the panel, the members  
23 of each panel were charged with making a fact-based  
24 determination whether or not the detainee is an enemy  
25 combatant. You're right, there is a presumption that the

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1 government's evidence is regular and accurate. That is --  
2 that piece of it was specifically cited with approval by the  
3 Hamdi plurality. But against that one --

4 THE COURT: Remember the Hamdi, they are talking  
5 about having Counsel, etc.

6 MR. KATSAS: I'm sorry?

7 THE COURT: In Hamdi, the Supreme Court is talking  
8 about having Counsel, etc.

9 MR. KATSAS: Having Counsel in --

10 THE COURT: I know you say it's only in the habeas  
11 proceedings.

12 MR. KATSAS: In the habeas proceedings. But, Judge  
13 Rogers, the Supreme Court also contemplates a 190-8 proceeding  
14 to make this determination in which the detainee would not  
15 have Counsel. Compare that to the CSRT procedures, which have  
16 two very, very significant structural innovations protective  
17 of the detainee, relative --

18 THE COURT: I mean, Counsel, you cannot go -- you  
19 have to deal with the language in the order. It says  
20 "notified of an opportunity to contest the designation as an  
21 enemy combatant." And then it says the CSRT is supposed to  
22 determine "if they determine that the detainee shall no longer  
23 be classified." I mean it's an after-the-fact review is what  
24 I'm getting at, as distinct from the Army Regulation 190-8. I  
25 mean I'm literally quoting the language. In any event, we can

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1 both quibble about the language.

2 MR. KATSAS: But there is no concept of deference  
3 built into the CSRT proceeding. It is not a proceeding to be  
4 appellate like in order to confirm a determination that some  
5 other military authority has made. It is a first instance  
6 proceeding in every relevant respect. There is introduction  
7 of evidence. There is detainee participation. And if I could  
8 just say in terms of comparing the overall set of rights in  
9 the two kinds of proceedings there are, as I said, two major  
10 structural innovations in the CSRT's. One is that the  
11 recorder in the CSRT's is affirmatively charged with searching  
12 all of the relevant government files. Not only for  
13 information that might tend to prove that the detainee is an  
14 enemy combatant, but also for all information that might tend  
15 to disprove that proposition.

16 That's the first point. There is none of that in  
17 190-8. Second point, in 190-8, the detainee is sort of left  
18 by himself without a lawyer or anyone else. In the CSRT  
19 proceeding, the detainee is given a personal representative  
20 who is charged with explaining the system and the detainees  
21 rights, helping the detainee develop evidence, which in many  
22 cases involves affidavits and so on submitted abroad and  
23 commenting on the classified evidence that the detainee can't  
24 see. So whether --

25 THE COURT: So does the Habeas Court have to

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1 determine whether or not in fact the recorder made these  
2 searches?

3 MR. KATSAS: Made what?

4 THE COURT: You said the CSRT procedures are unique  
5 in that the recorder has to research all government records,  
6 including for exculpatory evidence. Does have Habeas Corpus  
7 Court have to determine in each case whether the recorder did  
8 this?

9 MR. KATSAS: No, I don't think so, but, and I'll  
10 explain that answer in a minute. What I want to tie down,  
11 what I hope to tie down, is the proposition that whether you  
12 view the extensiveness of the military procedures here as  
13 going to the extent of any due process rights as we have in  
14 our brief or alternatively to some sort of common law habeas  
15 concept that the Court has been suggesting. Whether you view  
16 it either way, those procedures, on their face, stack up very  
17 favorably to the set of procedures --

18 THE COURT: Counselor, I understand that maybe what  
19 you want to talk about, but Judge -- former Judge, now Justice  
20 Ginsberg used to say (indiscernible) the Court wants you to  
21 talk about. It's only three votes and you want to talk to  
22 what those are and you have a question from Judge Rogers in  
23 front of you that you promised us an explanation to and then  
24 gone completely afield from it. Could you go back to that  
25 please?

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1 MR. KATSAS: The question is if you assume by  
2 hypothesis, as I've been trying to demonstrate, that the  
3 procedures are facially sufficient under whatever relative  
4 standards are, can a detainee make a fact-based attack to  
5 custody on --

6 THE COURT: Can the Habeas Court review whether the  
7 recorder made the search that the order requires? That's what  
8 the question was as I understood it.

9 MR. KATSAS: And I think the answer to that question  
10 has to be no under the Supreme Court's decision in Yamashita.

11 THE COURT: That was after a trial, full trial, full  
12 Counsel.

13 MR. KATSAS: It was after a military tribunal.

14 THE COURT: I know, but he had Counsel. I mean it's  
15 totally different. The government had the burden of proof,  
16 etc. I mean it was a trial on criminal charges.

17 THE COURT: Yeah.

18 MR. KATSAS: Well, that's true, but here we have a  
19 proceeding whose procedures exceed the ones that the Supreme  
20 Court said would be good enough even to detain American  
21 citizens as enemy combatants.

22 THE COURT: I didn't see the Supreme Court say that  
23 the Habeas Corpus Court was barred from determining whether or  
24 not an individual habeas Petitioner actually received those  
25 procedures.

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1 MR. KATSAS: In Yamashita, what you had was a  
2 military tribunal --

3 THE COURT: Counsel, I will concede that in both  
4 Curran and Yamashita the Supreme Court said the Habeas Court  
5 is not to determine guilt or innocence. But that was guilt or  
6 innocence on criminal charges. It didn't say anything about  
7 whether or not the Habeas Court had the scope of review  
8 extended to did the prisoner receive the procedures that the  
9 government said he was entitled to. That's not a factual  
10 question in the sense of am I a shepherd or am I an al Qaeda  
11 supporter?

12 MR. KATSAS: Two responses. To the extent  
13 Yamashita, as you point out, was a criminal prosecution, that  
14 distinction cuts in our favor. Generally, Yamashita was  
15 criminally convicted and ultimately executed. And if the  
16 deference to the military in that context compels a principle  
17 that Habeas Courts don't review for factual innocence or  
18 conduct of the proceedings where a person's life is literally  
19 at stake, how much more clearly would those principles not  
20 compel --

21 THE COURT: Well, the question is whether or not, if  
22 you don't get all of the procedural rights that General  
23 Yamashita had and you are facing the possibility of indefinite  
24 detention, does the Habeas Court have a role in determining  
25 whether the individual Petitioner received the protections

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1 that the government says he or she is entitled to?

2 MR. KATSAS: Yamashita said more than simply that  
3 the Habeas Court doesn't review for guilt or innocence. It  
4 also said that the Habeas Court doesn't review the conduct of  
5 the proceedings or particular evidentiary determinations and I  
6 think my answer to your original question rests on the  
7 instinct that what we have here, as in Yamashita, are facially  
8 valid procedures and the detainee wants to make a contention  
9 that in a particular case they weren't followed. Yamashita  
10 said you didn't follow your own rules of evidence. Your  
11 hypothetical is the recorder didn't follow his own obligations  
12 under the procedures.

13 THE COURT: No, that would be where the Yamashita is  
14 arguing that the District Court abused his discretion, or  
15 something like that, in applying the rules of evidence.  
16 That's a different type of -- I mean if under those  
17 regulations Yamashita had a right to Counsel and he didn't get  
18 Counsel, did the Habeas Court look at that? I didn't see the  
19 Supreme Court saying the Habeas Court couldn't look at that.

20 MR. KATSAS: I think in terms --

21 THE COURT: Do you think so?

22 MR. KATSAS: Assuming Fifth Amendment rights, if the  
23 question is does the panoply of procedures provided satisfy  
24 either a Fifth Amendment right or a common law habeas right or  
25 whatever the legal standard is by which you are going to

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1 measure, yes that claim, the Habeas Court could look at that.  
2 Here, assuming Fifth Amendment rights, the Habeas Court can  
3 look at the question, for instance, whether there is a right  
4 of access to classified information by the detainee or whether  
5 the detainee has a right not only to a personal representative  
6 but also to a lawyer. Those sorts of questions we think are  
7 reviewable, assuming again Fifth Amendment rights.

8 My point about Yamashita is I think it is the very  
9 different kind of claim, either I am innocent or you  
10 misapplied your own rule of evidence is treated differently.

11 THE COURT: So you answer yes both to Judge  
12 Sentelle's question that you could lock up anybody without any  
13 evidence and detain them and you could continue to detain them  
14 whether they got the procedures that you say are on the books  
15 or not. Is that right? Is that your position I mean?

16 MR. KATSAS: The extent of habeas review, we think,  
17 is, as I've described with Yamashita, but, but I sense your --  
18 I sense I haven't persuaded you with that. But we do -- I  
19 want to be clear here. We do have a fallback position in  
20 that, Judge Rogers, think of how many steps removed this  
21 Yamashita point that we've been debating is from the regime  
22 that Judge Green seemed to be envisioning. I am urging the  
23 proposition that there is no review of fact-based sufficiency  
24 or application of rule of evidence type claims.

25 Okay, if you don't go that far, the next most

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1 protective possibility, it seems to me, would be some sort of  
2 deferential review by the Habeas Court of either the innocence  
3 determination or the application of the procedure or whatever  
4 it would be. It would surely, both under traditional habeas  
5 principles and I think out of respect to the crucial military  
6 interests at stake, that review I think would have to be very  
7 deferential.

8 I suggested a sum evidence standard. If you focus  
9 on review of factual innocence, the standard that comes to  
10 mind for ordinary criminal cases is the sufficiency standard  
11 of Jackson v. Virginia. That --

12 THE COURT: Oh, I was thinking the habeas context.  
13 Sufficient cause to hold a prisoner. I'm just -- these are  
14 all questions, Counselor. I'm just trying to see how far --

15 MR. KATSAS: Sufficient -- right, but -- sufficient  
16 cause, again, in a context whereby hypothesis we have a  
17 sufficient set of procedures and you are testing their  
18 application in a particular case, I'm suggesting to you if  
19 there were review of fact questions, two points; number one,  
20 it would be review, and number two, it would be deferential.  
21 That is --

22 THE COURT: See, just hypothetically, Counsel, I  
23 thought what the concern of the District Court was you do --  
24 the Habeas Court does have to look at the procedures.  
25 Assuming that upon finding them to be sufficient to protect

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1 against the likelihood of erroneous determinations, that then  
2 what would follow, and we don't know yet because the District  
3 Court hasn't ruled, might well be a very deferential approach  
4 toward what the CSRT has determined.

5 MR. KATSAS: We don't know exactly what would  
6 follow, but we have some strong hints from the District  
7 Court's opinion that what she had in mind when she invokes a  
8 principle that the detainees' allegation of factual innocence  
9 and so on are to be presumed true, subject to further  
10 factfinding, what she seems to have in mind is something like  
11 a de novo redetermination of the very questions, the very  
12 fact-based questions, that were committed to the military  
13 tribunal in the first instance. And my point is that makes no  
14 sense because there is no point in the commitment. There is  
15 no point in having a 190-8 on the books for 50 years. There  
16 is no point in Justice O'Connor saying, look, if you want to  
17 set up a military system to make these adjudications, 190-8  
18 looks like a pretty good option, even for citizens detained  
19 here.

20 And the final point, the final point I'd like to  
21 make, above and beyond the distinction between deferential  
22 review on the one hand and de novo factfinding on the other,  
23 is the sort of most intrusive aspect of Judge Green's world  
24 view on this set of issues is the proposition that if, on your  
25 hypothetical, the recorder is not doing his job or, to take an

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1 actual instance cited by Judge Green, if hypothetically an  
2 evidentiary rule designed to keep out unreliable evidence were  
3 misapplied in a particular case. That, at most, gives you a  
4 concern about that particular case. It doesn't give the  
5 Habeas Court license to embark on de novo or whatever  
6 factfinding might be perceived. Because, for instance, among  
7 the 54 detainees, she cited one moot case in which she raised  
8 a concern about the admission of particular piece of evidence.  
9 So I think we also have that element of going too far.

10 For all of those reasons, we think whatever review  
11 the Court conducts, you can review the general legal  
12 questions. Is there a right of access to classified  
13 information? We say no. I want belabor it unless the Court  
14 wants more detail. Is there a right to have a lawyer. We say  
15 no. Same general -- and then there are these series of case  
16 specific type arguments about particular rules not being  
17 followed, particular detainees claiming being innocent, things  
18 of that nature.

19 THE COURT: Does the government continue to take the  
20 position it took in the Hamdan case, that if the only evidence  
21 was evidence secured by torture that would not be a sufficient  
22 ground on which to hold someone? And secondly, if the only  
23 evidence were the unwitting act?

24 MR. KATSAS: The rule, this goes to the point I was  
25 raising about the rule of evidence. The CSRT's are bound to

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1 apply the rule of evidence keyed to reliability. We think  
2 that rule, properly applied, would screen out evidence  
3 procured by torture.

4 THE COURT: Properly applied.

5 MR. KATSAS: Yes. Okay. Then let's talk about what  
6 that means. If the District Court raises a concern about its  
7 application in one case, that's a concern about the one case,  
8 not the 53. And then let's look at that case. Well, first of  
9 all, it's moot, so I don't know that there would be any  
10 occasion for further inquiry. But second, assuming you have  
11 some degree of review, take a look at the case, what you find  
12 in that particular case is multiple independent --

13 THE COURT: No, no. My hypothetical was if the only  
14 evidence was evidence produced as a result of torture.

15 MR. KATSAS: Right.

16 THE COURT: I thought in the Hamdan case the  
17 government had taken the position that that would not be a  
18 sufficient ground on which to detain.

19 MR. KATSAS: I don't know.

20 THE COURT: Well, all right. But I mean you,  
21 yourself, just said that the CSRT's are to look at the  
22 reliability of evidence. And if that were properly applied,  
23 then there would be no problem.

24 MR. KATSAS: Right.

25 THE COURT: But I get your -- I anticipate your next

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1 step will be that it's for the staff, Attorney General, what  
2 is his name or title? The person who reviews the CSRT for  
3 legal sufficiency.

4 MR. KATSAS: There are two layers. There is a  
5 review for legal sufficiency and then there is a further  
6 review by the director of the CSRT's.

7 THE COURT: Yeah. Your position would be that's the  
8 only review that's available. That it's not for the Habeas  
9 Court.

10 MR. KATSAS: My position is wherever you come down  
11 on the spectrum of possibilities from that one on down, the  
12 one possibility that cannot possibly be right is that a  
13 concern about misapplication in one case creates a de novo  
14 retrial not only in that case but also in every other with  
15 respect to every other Petitioner.

16 THE COURT: How about as to that case?

17 THE COURT: Yeah. How about as to that one case?

18 MR. KATSAS: As to that one case, I think you -- our  
19 --

20 THE COURT: Think through this carefully.

21 MR. KATSAS: Our broad -- our Yamashita position is  
22 no review. If you disagree, I think there would be some  
23 degree of deferential review and if you apply that principle,  
24 some evidence standard and abusive discretion standard,  
25 however you articulate it, if you apply that principle to the

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1 case identified by Judge Green, I think you would be very  
2 comfortable in affirming the designation as to that detainee.

3 THE COURT: I'm not quite sure how to apply  
4 Yamashita to this case for the reasons (indiscernible). The  
5 Yamashita Court dealt with the -- it said we're not concerned  
6 with the guilt or innocence, we're concerned with the lawful  
7 power of the Commission to try the Petitioner for the events  
8 charged in the present case. Before us, we have no offense  
9 charged.

10 MR. KATSAS: No, but we have an enemy combatant  
11 determination, which is the analog of the offense charged.  
12 And indeed punishment --

13 THE COURT: Well, it is for this extent. Yamashita  
14 knew exactly what his sentence, and granted it was a hanging  
15 in that case, but in this case, once you've determined this  
16 person is an enemy combatant, as far as we can tell, this  
17 could be life imprisonment or it could be the day after  
18 tomorrow. It certainly won't bother Justice Kennedy in  
19 (indiscernible).

20 MR. KATSAS: In Hamdi itself, which was an enemy  
21 combatant case, the Court reasoned back from Curran and  
22 Yamashita, which were military commission trial for war crimes  
23 cases, and the Court in Hamdi said, look, this case is  
24 different because it's an EC determination, but they said of  
25 course if the principles are good to justify a criminal trial

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1 with someone's life at stake, the similar principles will  
2 justify what the Court described as the mere detention, non-  
3 punitive detention, for enemy combatant status. So the  
4 distinction between a criminal punishment, which was death in  
5 that case, and an EC detention, I think, cuts in our favor,  
6 not against us.

7 THE COURT: But I thought Judge Sentelle's question  
8 was pointing out the fact that in Hamdi, as well as in Hamdan,  
9 charges had been placed by the government. Here there are no  
10 charges, except for Petitioner Hicks.

11 MR. KATSAS: But there is the analog --

12 THE COURT: So that the context --

13 MR. KATSAS: The analog to the charge, the criminal  
14 charge, in the EC context is --

15 THE COURT: Combatant (indiscernible).

16 MR. KATSAS: -- the accusation that we think you are  
17 an enemy combatant for the following reason and this is why  
18 we're detaining you and if you want to contest it you have  
19 every right to do so in a hearing which affords procedures  
20 well beyond those the Supreme Court said would be sufficient,  
21 even as to American citizens.

22 THE COURT: What is the difference, in your view,  
23 between the Al Odah group of cases and the Boumediene group of  
24 cases? If any?

25 MR. KATSAS: Not much. The Fifth Amendment

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1 questions are common to both. The general legal questions are  
2 common to both. The Al Odah Petitioners have raised a couple  
3 of additional arguments about procedural defects and the  
4 Boumediene Petitioners have raised a couple of fact-based  
5 arguments about their particular circumstances. But I think  
6 the broad legal principles about Rasul that I began some time  
7 ago discussing with you and the general discussion I've been  
8 having with Judge Rogers about how a Habeas Court -- the  
9 extent of the procedures given at the military stage and how  
10 the Habeas Court reacts to that. I think for those purposes  
11 the cases are the same.

12 THE COURT: You think the Boumediene Petitioners  
13 have sufficiently raised the, for lack of a better word, the  
14 common law habeas corpus claim?

15 MR. KATSAS: I don't know. We haven't contested it.  
16 If I could just say one more sentence. There were no charges  
17 in the sense of criminal charges against Mr. Hamdi either.

18 THE COURT: Turned Hamdi loose. I mean we're sort  
19 of ignoring the elephant in the room on that one. Once the  
20 Supreme Court acted, they turned him loose. Are you going to  
21 turn these guys loose if we do something?

22 MR. KATSAS: Not to my knowledge.

23 THE COURT: Well, as Judge Green pointed out, they  
24 wouldn't be released. There are all other kinds of  
25 constraints on him. That's right in her opinion. Even if the

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1 writ were granted.

2 MR. KATSAS: Well, not under her opinion. But if  
3 what is ultimately imposed is anything remotely like the  
4 regime envisioned by the detainees, with something either at  
5 the military or at the judicial process approaching a full  
6 blown trial, that system will collapse of its own weight. And  
7 that is a profound intrusion on the President's statutory and  
8 constitutional powers to use the Armed Forces in order to  
9 protect the lives and safety of American citizens.

10 THE COURT: I have one other question. Just to  
11 clear this up for me. I think there is a line of Supreme  
12 Court cases that says that you cannot use habeas corpus,  
13 whether it's 2254 or 2255, to challenge the conditions of  
14 confinement, right?

15 MR. KATSAS: Right.

16 THE COURT: In these cases, the complaints,  
17 certainly in Al Odah, are challenging the conditions of the  
18 confinement. I can't see my family, I can't do this, I can't  
19 do that, and so on and so forth. Do you, or is it your  
20 position that those claims are properly rejected because they  
21 are not seeking proper habeas release?

22 MR. KATSAS: Yes. Habeas, the logic of those 2254  
23 and 2255 cases is that habeas is a challenge to custody itself  
24 rather than to conditions. That line of reasoning applies  
25 equally to the habeas actions here.

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1 THE COURT: Why doesn't that line also apply to the  
2 condition of confinement that -- we're being held without  
3 having had a proper hearing before a tribunal?

4 MR. KATSAS: I think the hearing, as I understand  
5 the claims on the other side, the hearing before the -- the  
6 reason for having the hearing before the tribunal is to  
7 challenge the fact of custody. And I think that claim would  
8 be cognizable on habeas. I mean subject to these other legal  
9 restrictions. But the claims about hours of exercise and so  
10 on are not cognizable for all of the reasons we've discussed  
11 plus the one you just mentioned.

12 THE COURT: Okay.

13 THE COURT: What do you do if the President of this  
14 Circuit that says a prisoner is entitled to the writ of habeas  
15 corpus when, though lawfully in custody, is deprived some  
16 right which he is lawfully entitled, even in his confinement,  
17 the deprivation of which serves to make his imprisonment more  
18 burdensome than the law allows or curtails his liberty to a  
19 greater extent than the law permits, citing a Supreme Court  
20 case. This is Miller v. Overhauser.

21 MR. KATSAS: I'm sorry. I'm not familiar with --

22 THE COURT: Well, somebody cited it. I can't  
23 remember which brief it's in.

24 MR. KATSAS: I don't recall, but in any event, the  
25 conditions of confinement claims --

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1 THE COURT: Well, the Second Circuit agrees with us.  
2 So I mean this is our Circuit.

3 MR. KATSAS: When we looked at this question, we  
4 didn't find a D.C. Circuit case.

5 THE COURT: All right.

6 MR. KATSAS: But in any event, those claims have the  
7 same -- are subject to the same independent legal constraints  
8 that we've been discussing. You've been very generous with  
9 your time. I thank you for your attention.

10 THE COURT: Thank you, Counsel. Any time left for  
11 rebuttal? I'll give you two minutes for rebuttal.

12 MR. OLESKEY: Thank you, Your Honor. This question  
13 about deference in habeas has come up and I just wanted to  
14 bring your attention the Zadvydas case, which is a Supreme  
15 Court case I think all of us have cited, which is a pre-  
16 detention removal case where the government appears to advance  
17 substantially the position being advanced here.

18 THE COURT: What's the citation on it?

19 MR. OLESKEY: The citation is 533 U.S. 678. And the  
20 Supreme Court said that it was not correct that little or no  
21 review should be conducted. Whether a set of particular  
22 circumstances amounts to detention within or beyond, the  
23 question there was a reasonable period is something that can  
24 be determined pursuant to statutory authority. Basic federal  
25 habeas statute grants the Federal Court's authority to answer

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1 that question. We think that clearly is the case here where  
2 it's not a pre --

3 THE COURT: I'm not familiar with that case. Could  
4 -- what are the facts of it?

5 MR. OLESKEY: The case involved whether the extent  
6 to which someone who was going to be -- who was unlawfully in  
7 the United States and had been found to be unlawfully in the  
8 United States.

9 THE COURT: Oh, that was what I was -- it's a  
10 deportation case?

11 MR. OLESKEY: Yes.

12 THE COURT: Yeah. Okay.

13 MR. OLESKEY: And there is a final order of removal  
14 and how long they could be held where I believe the problem  
15 was there was no place to send them.

16 THE COURT: I know that case.

17 MR. OLESKEY: All right. The other point I make  
18 here is the irony to us of the consequence position that the  
19 government is arguing here about military commissions, which  
20 after all, as the Court pointed out, at least are tethered to  
21 a law of war charges is that here our clients can be found to  
22 be detained indefinitely, which Justice O'Connor said in Hamdi  
23 could be a generation or so, without charges that are tethered  
24 to the law of war, anything that is recognized, only found in  
25 this order that the Deputy Defense Secretary issued in July of

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1 2004.

2 As to the notion that the recorder is going to find  
3 exonerative evidence and has a responsibility to do so, and  
4 I'll point out in a moment exactly what happened with the only  
5 exonerative evidence that any recorder brought to the  
6 attention of anyone of the tribunals involving any of my  
7 clients.

8 And lastly, notion that somehow this personal  
9 representative plays a meaningful role I think is totally  
10 disabused by the failure in the record to show that they  
11 played any other than a passive role, which is not surprising  
12 because they are required to go and tell detainees --

13 THE COURT: Okay, Counsel, unless my colleagues have  
14 questions, your red light is on.

15 MR. OLESKEY: Thank you, Your Honor.

16 THE COURT: We have agreed that you can have a  
17 hearing on the classified material.

18 MR. OLESKEY: Yes.

19 THE COURT: I don't want more than the absolute  
20 necessary number of people in this courtroom so that our  
21 security personnel do not have to conduct a census in order to  
22 find out whose in here properly. We are going to break for  
23 about five minutes or so. We come back, I don't want to see  
24 more than four people at that table and no more than two at  
25 that table. And then we want to hear only what we have to

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1 hear. Give us a recess.

2 (Recess.)

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CERTIFICATE

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

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Debra Blum

9/15/05

DEPOSITION SERVICES, INC.