

1 APPEARANCES:

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3 the Petitioners.

4 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
5 Department of Justice, Washington, D.C.; on behalf of
6 the Respondents.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in case 06-1195, Boumediene v. Bush, and
5 case 06-1196, Al Odah v. United States.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH W. WAXMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The Petitioners in these cases have three
12 things in common. First, all have been confined at
13 Guantanamo for almost six years, yet not one has ever
14 had meaningful notice of the factual grounds of
15 detention or a fair opportunity to dispute those grounds
16 before a neutral decision-maker.

17 Two, under the decision below, they have no
18 prospect of getting that opportunity.

19 And three, each maintains, as this Court
20 explained in Rasul, that he is quote "innocent of all
21 wrongdoing." Now the government contends that these men
22 are detainable, and the facts of these 37 cases differ,
23 and it may well be that an adjudicatory process
24 that preserves the core features of common law habeas
25 would reveal perhaps that some of these Petitioners are

1 lawfully detainable. But limited DTA review of the
2 structurally flawed CSRT process cannot provide any
3 reliable examination of the Executive's asserted basis
4 for detaining these Petitioners, let alone an adequate
5 substitute for traditional habeas review.

6 CHIEF JUSTICE ROBERTS: I thought that we
7 ruled in the Hamdi case that procedures quite similar to
8 those under the DTA were adequate for American citizens?

9 MR. WAXMAN: Well, with respect, Mr. Chief
10 Justice, what you ruled -- as I understand what the
11 plurality held in Hamdi was that so long as there was a
12 process accompanying detention, that provided for
13 meaningful notice of the factual grounds for detention,
14 a meaningful opportunity to present evidence in response
15 to that before a neutral tribunal with the assistance of
16 counsel, that determination would certainly be entitled
17 to substantial deference by a habeas court; and we don't
18 dispute that.

19 CHIEF JUSTICE ROBERTS: So that --

20 MR. WAXMAN: That's not what they got.

21 CHIEF JUSTICE ROBERTS: So our judgment in
22 this case depends upon whether we agree with you or the
23 government that the procedures available under the DTA
24 are meaningful under Hamdi?

25 MR. WAXMAN: It -- I think your decision in

1 this case, the question -- the principal question we
2 think is presented by the case is whether or not the DTA
3 review of the CSRT procedures that occurred in this case
4 adequately substitute for the writ of habeas corpus.

5 JUSTICE GINSBURG: Mr. Waxman, how could
6 that be, because the D.C. Circuit never got to that
7 question? The D.C. Circuit, as I understand it, ruled
8 that there was no access to habeas, end of case.

9 So the D.C. Circuit never examined the
10 procedure under the DTA, did it?

11 MR. WAXMAN: No. The district court -- the
12 two district judges sitting in habeas went to the merits
13 of the case, and Judge Green did evaluate the
14 procedures. The D.C. Circuit held that the
15 Constitution, neither the Suspension Clause nor the Due
16 Process Clause, applies to these people. And therefore
17 it didn't reach the merits. But --

18 JUSTICE GINSBURG: So shouldn't we, if we
19 agree with you, that there is authority in the
20 D.C. Circuit, send it back to them to make that
21 determination whether habeas being required, this is an
22 adequate substitute.

23 MR. WAXMAN: Well, I'm not saying that this
24 Court couldn't do that. It certainly could do that.
25 But one of the principal -- the principal guarantee of

1 habeas corpus through the centuries has been a speedy --
2 the remedy of speedy release for somebody who is
3 unlawfully being held in executive detention.

4 These 37 men have been held in isolation for
5 6 years, and it is manifest on the record in this case.
6 There's no doubt about how the CSRT has proceeded.
7 There is little doubt about the circumscribed nature of
8 the D.C. Circuit's review. The D.C. Circuit has already
9 held that the Constitution doesn't apply.

10 CHIEF JUSTICE ROBERTS: Your argument
11 wouldn't be any different with respect to the
12 availability of habeas if these people were held for one
13 day, would it? We don't look at the length of detention
14 in deciding whether habeas is available, do we?

15 MR. WAXMAN: Well, I want to give a
16 qualified disagreement with your hypothetical, because
17 it's entirely clear that, as I think members of this
18 Court have indicated and that habeas traditionally
19 indicates, there may be military exigencies, there may
20 be a limited time period in which it is inappropriate
21 for a habeas court to rule. And moreover -- if there --

22 CHIEF JUSTICE ROBERTS: Well, let me just
23 stop you there. Do you want this Court to rule on
24 whether or not there are military exigencies that
25 require the holding and detention of these enemy

1 combatants?

2 MR. WAXMAN: No, what I was referring to
3 were sort of the hypothetical of battlefield -- somebody
4 is captured -- you know -- and the next day or the next
5 week from the battlefield, does he or she have the right
6 to -- does a habeas court have constitutional
7 jurisdiction. Putting aside-

8 CHIEF JUSTICE ROBERTS: Putting aside the
9 battlefield hypothetical, we're talking about
10 Guantanamo. Your argument is that somebody held one day
11 in Guantanamo has the right to habeas. So the extent of
12 detention is irrelevant to your assertion.

13 MR. WAXMAN: I don't think so, with respect.
14 I think -- I don't think -- I think it is appropriate
15 for a habeas -- if the Executive says we have detained
16 this person, we believe this person is an enemy
17 combatant who may be lawfully detained under the AUMF,
18 we have an administrative process that is fair, that
19 will -- that will determine the facts. You should stay
20 your hand to allow that procedure to occur. Of course,
21 that is appropriate, so long as the procedure is
22 meaningful and speedy. That's what we do in immigration
23 cases.

24 JUSTICE GINSBURG: But your basic position
25 has to rest on Guantanamo Bay being just like if we had

1 the detainees in, say, the Everglades. But do you
2 concede that if these people had never been brought to
3 the United States, if the facility were in, say,
4 Germany, that these detainees would have no access to
5 habeas, no access to our courts?

6 MR. WAXMAN: I wouldn't agree with that for
7 two reasons. First of all, I think these people are in
8 a place that is even -- that is under even more complete
9 control and jurisdiction of our national Executive than
10 they would be in the Everglades, because there are no
11 Federalism constraints here. Our national government
12 supplies the only law.

13 And if they were detained in Germany, the
14 question would be A, are they being detained by the
15 United States or by some multinational coalition force
16 as was the case, for example, in Hirota.

17 B, are there other laws, or can they invoke
18 the jurisdiction of another court? And the answer to
19 that question would depend upon the terms of our --

20 JUSTICE SCALIA: Who says that -- let's
21 consider first the basis on which the court of appeals
22 decided this case.

23 They decided it -- in Rasul, we had held
24 that the habeas statute extended to Guantanamo, and that
25 those people who had filed their suits before the

1 statute, at least, could bring a suit.

2 Congress acted. And enacted a new habeas
3 statute which makes it very clear that the habeas
4 statute, at least, does not apply to these people in
5 Guantanamo.

6 Your assertion here is that there is a
7 common law constitutional right of habeas corpus that
8 does not depend upon any statute.

9 Do you have a single case in the 220 years
10 of our country or, for that matter, in the five
11 centuries of the English empire in which habeas was
12 granted to an alien in a territory that was not under
13 the sovereign control of either the United States or
14 England.

15 MR. WAXMAN: The answer to that is a
16 resounding yes.

17 JUSTICE SCALIA: What is -- what are they?

18 MR. WAXMAN: They are the cases that were
19 discussed and cited by the majority opinion in Rasul,
20 and we have -- we have added other ones to them, but
21 it's showing --

22 JUSTICE SCALIA: What cases -- what case in
23 particular do you think in Rasul?

24 MR. WAXMAN: I think the opinion of two of
25 the three law lords in the Earl of Crewe, which the

1 majority cited as In re Sekgome. It is certain -- the
2 government concedes it was the case in Mwenya. It was
3 true in the Indian cases. And, in fact, as we point out
4 --

5 JUSTICE SCALIA: Mwenya involved an English
6 -- an English subject, not an alien.

7 MR. WAXMAN: Indeed, it did.

8 JUSTICE SCALIA: The question there is an
9 alien.

10 MR. WAXMAN: Indeed, it did, and the
11 government --

12 JUSTICE SCALIA: So it's totally irrelevant.

13 MR. WAXMAN: Well, no -- let me take a shot
14 at convincing you that it's not totally irrelevant. The
15 Crown Counsel in that case, in his brief, stated
16 forthrightly that subjecthood or citizenship didn't
17 matter and, in fact, in the very minority opinion that
18 the government relies on in its brief here in Earl of
19 Crewe, Lord Justice Kennedy specifically said that the
20 citizenship is irrelevant. It isn't and wasn't --

21 JUSTICE SCALIA: In both of those cases, it
22 was a citizen, nonetheless. In 220 years of our
23 history, or five centuries of the -- do you have a
24 single case in which it was not a citizen of England or
25 a citizen of the United States in which a common-law

1 writ of habeas corpus issued to a piece of land that was
2 not within the sovereign jurisdiction?

3 MR. WAXMAN: Well, the Court majority in
4 Rasul cites a case involving the Isle of Jersey, the
5 Channel Islands. None of those were within the
6 sovereign courts' --

7 JUSTICE SCALIA: They were not regarded as
8 part of the crown's dominion, but they were part of the
9 crown's sovereign territory.

10 MR. WAXMAN: I'll take one more chance,
11 Justice Scalia.

12 JUSTICE SCALIA: Okay, try them. I mean,
13 line them up.

14 (Laughter.)

15 MR. WAXMAN: Okay. Here they go. In the
16 Indian cases -- I mean, first of all, let's say that
17 citizenship was not a notion at common law. The
18 question was subjecthood, and subjecthood was a very
19 ill-defined term that had no fixed parameters, as our
20 reply brief points out.

21 Certainly many of the petitioners in the
22 Indian cases that we cited -- and in fact that Sir John
23 Chambers decided -- were not Englishmen or people who
24 would have been otherwise considered --

25 JUSTICE SCALIA: And the cases were decided

1 under a statute that applied in India, not under --
2 under the common law.

3 And the writ did not come from England; the
4 writ came from English courts in India under a statute.
5 And we decided that in Rasul. I mean, you want to do
6 that in Rasul, that's fine. But you are appealing to a
7 common law right that somehow found its way into our
8 constitution without, as far as I can discern, a single
9 case in which the writ ever to a non-citizen.

10 MR. WAXMAN: Justice Scalia, as Lord
11 Mansfield explained in the King v. Cowle, and both sides
12 are citing to it -- even if the writ -- even with
13 respect to the persons detained outside the English
14 realm, the relevant question was, is this person under
15 the subjection of the crown? Not what is the
16 subjecthood or citizenship of this person? And in fact
17 --

18 CHIEF JUSTICE ROBERTS: What is the
19 relevance to your -- this line of reasoning to the
20 recent enactment by Congress of section 1005(g), which
21 says that the base at Guantanamo is not part of the
22 United States? There is a judgment by the political
23 branches that we don't exercise sovereignty over the
24 leasehold, and it seems to me that, if we're going to
25 adhere to our habeas corpus cases, we would have to

1 reject that determination.

2 MR. WAXMAN: Mr. Chief Justice, let me
3 answer that question directly and then if I may finish
4 my answer to Justice Scalia.

5 We don't contend that the United States
6 exercises sovereignty over Guantanamo Bay. Our
7 contention is that at common law, sovereignty (a) wasn't
8 the test, as Lord Mansfield explained, and (b) wasn't a
9 clear-cut determine -- there weren't clear-cut
10 sovereignty lines in those days. Our case doesn't
11 depend on sovereignty. It depends on the fact that,
12 among other things, the United States exercises --
13 quote -- "complete jurisdiction and control over this
14 base." No other law applies.

15 If our law doesn't apply, it is a law-free
16 zone.

17 JUSTICE ALITO: So the answer to
18 Justice Ginsburg's question, it wouldn't matter where
19 these detainees were held so long as they are under U.S.
20 control. If they were held on a U.S. military base
21 pursuant to a standard treaty with another country, if
22 they were in Afghanistan or in Iraq, the result would be
23 the same?

24 MR. WAXMAN: No, I think, Justice Alito, I
25 want to be as clear about this as I can be. This is a

1 particularly easy straightforward case, but in another
2 place, jurisdiction would depend on the facts and
3 circumstances, including the nature of an agreement with
4 the resident sovereign over who exercises control. And
5 I want to come back to that with the Japan and German
6 example, because I have read the status of forces
7 agreements there.

8 Secondly, even if there technically were
9 jurisdiction, there might very well be justiciability
10 issues under the circumstances of the sort that
11 Justice Kennedy addressed in his concurrence in *Rasul*;
12 that is, there may be circumstances and temporal
13 conditions in which, under the separation of powers, it
14 would be a -- a court would deem it inappropriate to
15 exercise that jurisdiction.

16 And finally, even if it were appropriate to
17 exercise the jurisdiction, the review of a habeas court
18 in the mine run of cases would be anything but plenary
19 because members of enemy armed forces and enemy aliens
20 within the meaning of the Alien Enemy Act are
21 detainable. Period. Now, with respect to --

22 JUSTICE ALITO: What if, in a future war,
23 many of the soldiers and the opposing Army don't wear
24 uniforms? What if it's a war like Vietnam and thousands
25 of prisoners are taken into custody and they are brought

1 to prisoner-of-war camps in the United States as
2 occurred during World War II? Every one of them under
3 your theory could file a habeas petition. Is that
4 right?

5 MR. WAXMAN: Well, if they were in the
6 United States, I think it's clear that they could file a
7 habeas petition. And, you know, the question about how
8 Guantanamo relates to that is for this Court. What's
9 material is that -- I mean we cited to the Court the
10 Army directives and the Army procedures implementing
11 Article V of the Geneva Conventions that were used in
12 Vietnam, which is the only other war we engaged in that
13 had combatants who weren't in uniforms. They not only
14 had a hearing that was near the time and near the place
15 of capture and the right to call witnesses; there's no
16 evidence that classified information was withheld from
17 them. And they not only had a right to counsel; the
18 government provided them counsel, somebody who was their
19 advocate.

20 Now, once a determination like that is made,
21 they may -- if they're detained in the United States --
22 they may file a habeas petition and the response will be
23 there is absolutely no reason not to defer to the
24 adjudication of that tribunal. You have, as I started
25 with the Chief Justice, you had a fair notice of the

1 facts, a fair opportunity to challenge them with the
2 assistance of counsel before a neutral decisionmaker.

3 CHIEF JUSTICE ROBERTS: So to determine
4 whether there's jurisdiction, in every case we have to
5 go through a multi factor analysis to determine if the
6 United States exercises not sovereignty, which you've
7 rejected as the touchstone, but sufficient control over
8 a particular military base? Over the Philippines during
9 World War II, in Vietnam, and it is going to decide in
10 some cases whether the control is sufficient and others
11 whether it isn't?

12 MR. WAXMAN: Well, I don't --

13 CHIEF JUSTICE ROBERTS: And that is a
14 judgment we the Court would make, not the political
15 branches who have to deal with the competing
16 sovereignties in those situations?

17 MR. WAXMAN: You know, I think -- both sides
18 try to derive force from the fact that such claims, such
19 habeas petitions, haven't come forward in floods in the
20 past.

21 I think the reason is that, in the past, we
22 had combat in which -- you know -- I mean in a war of
23 the conventional sort, soldiers wear uniforms, and more
24 to the point, the interests of the captured soldier and
25 the command -- and the capturing officer are aligned.

1 The captured soldier wants to be treated as a prisoner
2 of war or released.

3 The commanding general wants to release
4 civilians who aren't in the Army or turn them over for
5 criminal prosecution. That's why, in the Gulf war,
6 there were 1200 -- roughly, just a few hundred, 1200
7 Article V field tribunal hearings that were held, of
8 which almost 900 were released as civilian
9 non-combatants and the remaining were detained --

10 JUSTICE SCALIA: Counsel, we had 400,000
11 German prisoners in this country during World War II.
12 And not a -- you say it's clear in the Vietnam example
13 that the Chief Justice gave you, it's clear that habeas
14 would lie. 400,000 of these people. It never occurred
15 to them.

16 MR. WAXMAN: Well, first of all, there is
17 Colepaugh --

18 JUSTICE SCALIA: And many of them were
19 civilians, by the way, and not in uniform. Not a single
20 habeas petition filed.

21 MR. WAXMAN: There's -- there are Colepaugh,
22 the Tenth Circuit case and In re: Territo, both of which
23 we discussed. But more to the point, as I said,
24 Justice Scalia, there is no doubt that a member of the
25 German army or somebody who is assisting the German

1 army -- it would be totally unavailing to file a -- to
2 file a habeas petition because they are detainable. It
3 would be like Mr. Ludekey in the United States v.
4 Ludekey saying --

5 JUSTICE SCALIA: He claims he wasn't
6 assisting the German army, just as these people here
7 claim that they were not attacking U.S. bases.

8 MR. WAXMAN: They were provided Article V
9 tribunals that gave them actual notice of the
10 government's facts and actual opportunity to controvert
11 it and a determination by military officers who had not
12 been told that both the commanding general of the
13 southern command and the Secretary of Defense had
14 personally reviewed the evidence and determined that
15 these were enemy combatants; and a habeas court would
16 simply dismiss.

17 And a habeas court could simply say whether
18 we do or don't technically have jurisdiction under
19 battlefield circumstances or circumstances involving
20 foreign detainees in a zone of occupation where active
21 hostilities occur, it is inappropriate under the
22 separation of powers for us to intervene. But these men
23 have been held, taken by the United States, thousands of
24 miles away -- in the case of my six individuals, plucked
25 from their homes, from their wives and children in

1 Sarajevo, detained for three months at the United States
2 request.

3 JUSTICE ALITO: Your primary position is
4 that we should order that they be released, is that
5 correct?

6 MR. WAXMAN: Well, we've asked that they be
7 granted habeas relief. We think what that means is that
8 they should be -- the cases should be returned to the
9 district courts where their cases are proceeding. The
10 government has filed its factual returns to the writ.
11 Judge Green, in the cases pending before her, has
12 established procedures to protect the --

13 JUSTICE KENNEDY: Suppose there had not been
14 a six-year wait, would it be appropriate then for us
15 to -- if you prevail -- remand the case to the habeas
16 court and instruct the habeas court to defer until the
17 Court of Appeals for the District of Columbia has
18 finished the DTA review proceedings?

19 MR. WAXMAN: I would argue that the answer
20 is no for two reasons. The one because there is no
21 prospect, no prospect that the DTA proceedings will be
22 conducted with alacrity or certainty; and second of
23 all --

24 JUSTICE KENNEDY: Why should I assume that
25 the district court in Washington would be any faster

1 than the court of appeals?

2 MR. WAXMAN: Here's -- the -- the -- let's
3 take the cases in front of Judge Green. Judge Leon in
4 the cases of my client just granted the government's
5 motion to dismiss. But in all of the cases the
6 government has filed its factual return under the
7 procedures, under the long-established habeas procedures
8 under 2243. It is -- the burden is now on us. She has
9 already ruled that with respect to secret information or
10 classified information, here are the safeguards that
11 will govern, here's how we will work. And it is simply
12 on us now to adduce and present evidence to try and
13 over -- to try to shoulder the burden we have.

14 In the court of appeals, Justice Kennedy,
15 the government, after two years, has not produced the
16 record on review in a single case. It has now said --
17 two years. It has now said that it cannot do so, and
18 the court of appeals has suggested that what the
19 government ought to do is hold entirely new CSRT
20 proceedings.

21 Now, those proceedings are structurally
22 flawed. Perhaps this Court could say, look, here's how
23 it's going to be. First of all, the Constitution does
24 apply. Second of all, we have to have a hearing in
25 which the following things occur.

1 We either in the Court of Appeals under the
2 All Writs Act or under 28 USC Section 2347C -- the
3 Petitioners have to have the right to adduce and present
4 evidence to controvert the government's return which
5 was -- almost all of the government's evidence was
6 introduced ex parte, in camera, and with a -- to boot
7 with a presumption that it is accurate and genuine.

8 JUSTICE KENNEDY: Why can't that take place
9 in the CSRT review proceedings that are pending?

10 MR. WAXMAN: Well, I don't -- it could if
11 the military had different procedures to govern the
12 CSRTs. And our submission is that with respect to these
13 Petitioners, you've asked to hold aside the six years.
14 I would say with respect to future detainees, that this
15 Court could issue a ruling -- well, this Court should
16 issue a ruling saying for these people if the writ means
17 anything, the time for experimentation is over. We have
18 tried and true established procedures. We've got
19 experienced district judges including a judge who was
20 the chief judge in the FISA court, who's already
21 established the rules for maintaining confidentiality of
22 classified information.

23 But we are not as a Court saying that there
24 could not readily be an adequate substitute if the
25 administrative procedures generated by the Department of

1 Defense allowed for the process minimums that the Chief
2 Justice asked me about at the beginning and advocated a
3 standard that was authorized -- a substantive standard
4 authorized by the AUMF. DTA review may very well be an
5 adequate substitute.

6 JUSTICE SOUTER: Is that possible for
7 your -- let's say your six clients at this point or for
8 any of the Guantanamo detainees, I guess, because
9 wouldn't they all run into the problem of -- the
10 neutrality problem that you raised? The commanding
11 general, the Secretary of Defense, in effect, have
12 already said these people belong where they are.
13 Wouldn't that make it impossible, really, at this stage
14 of the game to substitute a military procedure?

15 MR. WAXMAN: I certainly think so. But at a
16 minimum, Justice Souter, you would have to have the kind
17 of tribunal that is called for under the uniform code of
18 military justice.

19 JUSTICE SOUTER: I understand that.

20 MR. WAXMAN: Where you don't have the
21 convening authority exercising command control over the
22 tribunal officer.

23 JUSTICE SOUTER: I'm just wondering whether
24 assuming you win this case, that would be an appropriate
25 form of relief. And I'm not sure --

1 MR. WAXMAN: I don't think it is. I
2 certainly don't think it would be unless this Court
3 clarified under the -- I don't know whether this would
4 fall under the guise of clarification; but specify that
5 under the circumstances, the deferential review of the
6 D.C. Circuit in which it presumes accurate and presumes
7 sufficient -- adequate the evidence which the tribunal
8 itself presumed accurate would have to fall; that is, a
9 habeas court would never accord that presumption.

10 JUSTICE SOUTER: I have a quick question. I
11 don't want to interfere with his five minutes of
12 rebuttal.

13 CHIEF JUSTICE ROBERTS: We'll give you your
14 rebuttal time.

15 JUSTICE BREYER: Going back to
16 Justice Scalia's question on the precedent, suppose --
17 and I'm going to be -- I'd like my mind to be clear on
18 this. I thought that the question asked was for you to
19 find an instance where there was no sovereignty of the
20 country and they issued the writ, and it was turning on
21 a technical thing. Whether that was how the question
22 was met or not, what I read here in these different
23 briefs is in 1759, Lord Mansfield, the case can issue --
24 a writ of habeas corpus, no doubt the power could issue
25 it where the place is under the subjection of the crown

1 of England. Then Lord Sellers in Mwenya said subjection
2 is fully appropriate to the powers, that's habeas,
3 irrespective of territorial sovereignty or dominion, in
4 other words, non-technical.

5 In our case in Rasul, both the concurring
6 opinion and the majority opinion say things like the
7 reach of the writ depends not on formal notions of
8 territorial sovereignty, but on the practical questions.
9 Then they both list practical questions.

10 Now suppose we take that as the definition.
11 Now, can you find instances where the writ has been
12 issued by Britain in history to people who were not
13 citizens and who were not actually held in Britain?

14 MR. WAXMAN: Yes.

15 JUSTICE BREYER: They are --

16 MR. WAXMAN: I will cite two examples. I
17 knew that there was one other thing I wanted to try on
18 Justice Scalia. One is -- and it's referenced in our
19 footnote -- you know, in 1777 and 1783, Parliament
20 suspended the privilege of the writ of habeas corpus for
21 people on the high seas or out of the realm,
22 specifically directed at U.S. seamen, at American
23 seamen. And if the writ never extended to American
24 seamen on the high seas or out of the realm, there would
25 have been no point in suspending it.

1 Second of all, the common -- the high
2 court judges who were administering -- issuing the writ
3 for the benefit of detainees in India before it became a
4 sovereign possession were not exercising a statutory
5 authority, with all due respect to Justice Scalia.

6 There was a royal charter that granted
7 those judges the -- all of the common -- the
8 authority -- common law authorities of the Queen's
9 bench.

10 And as the Indian case law explicates,
11 and Sir John Chambers explains, one of those authorities
12 was the exercise of the writ of habeas corpus, not
13 mandamus, outside territories that were no part of the
14 Realm of England.

15 Those are the, I think -- I mean there
16 may be be something in --

17 JUSTICE BREYER: The Spanish doctor, the
18 Swedish doctor, the Spanish sailors, the British spy,
19 they're all in this case.

20 MR. WAXMAN: Well, in this -- in this
21 country, In Re Felateau, which was decided only a few
22 years after the founding, not only was he an enemy
23 alien; he was granted release under the writ of habeas
24 corpus because, not being a citizen, he could not be
25 charged with treason, which was the basis for holding

1 him.

2 JUSTICE SCALIA: Where -- where was he held?

3 MR. WAXMAN: I think in Pennsylvania. Maybe

4 it was --

5 JUSTICE SCALIA: Are you sure he was being

6 held in Pennsylvania?

7 MR. WAXMAN: It was the mid-Atlantic.

8 Excuse me?

9 JUSTICE SCALIA: I mean, you're being held
10 within the jurisdiction of the United States. I am
11 still waiting for a single case, other than the Indian
12 case which you mentioned which was under a statute, a
13 single case in which an alien that -- in a -- in a
14 territory not within the Crown, was granted habeas
15 corpus.

16 And it's not enough to say there was a
17 statute that applied on the seas. That's fine. Just
18 give me one case. There's not a single one in all of
19 this lengthy history.

20 MR. WAXMAN: Well, Justice Scalia, you're
21 asking me to discard the Indian cases, and I've -- I've
22 mentioned to you the cases that the majority of Indians
23 in Rasul relied on, the Earl of Crewe and Mwenya. I've
24 given you the two statutes. I think at this point I
25 have to plead exhaustion from remedies.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Mr. Waxman, this
3 determination, whether it's sovereignty or subjugation
4 or control of non-sovereign territory, would, I expect,
5 have diplomatic consequences. It is, I think, typically
6 an act of war for one country to assert authority and
7 control over another country's jurisdiction.

8 And here we have Section 1005G where
9 Congress and the President have agreed that Guantanamo
10 Bay is not part of the United States, and, yet, you
11 would have this Court issue a ruling saying that it is
12 subject to the total, complete domination and control,
13 or whatever the factors are.

14 What is the reaction of the Cuban government
15 to be to that?

16 MR. WAXMAN: My -- I don't think it's in the
17 record here, but what is in the record are the terms of
18 the lease. And I don't really take it to be disputed
19 that Guantanamo is under the complete, utterly
20 exclusive, jurisdiction and control of the national
21 government of the United States.

22 That's in the lease, itself. The courts of
23 Cuba have so held. They have designated Guantanamo,
24 quote, "foreign territory" unless and until the United
25 States in its sole discretion chooses to vacate the

1 base. And --

2 CHIEF JUSTICE ROBERTS: We -- there are --
3 am I wrong that there are Cuban workers who come on to
4 the base and work?

5 MR. WAXMAN: I'm not sure whether there are,
6 or not, any longer. But unlike -- or if you take --
7 they are not subject -- and it has never been contended
8 that they are subject -- to Cuban control with respect
9 to conduct that is subject to any law of the United
10 States.

11 CHIEF JUSTICE ROBERTS: So if you have two
12 of those workers and they get into a fight over
13 something, one can't sue the other in Cuban courts?

14 MR. WAXMAN: Absolutely not, and this is the
15 key difference, I think, going to Justice Alito's
16 question. Under our established --

17 CHIEF JUSTICE ROBERTS: What authority --
18 what authority do you have for that: That such a suit
19 would not lie in the Cuban court?

20 MR. WAXMAN: Well, first of all, the terms
21 of the lease, and, second of all, I -- I don't know that
22 we cited -- I mean, somebody has cited decisions of the
23 Cuban Government, the judiciary and its executive, that
24 they don't exercise any jurisdiction over --

25 JUSTICE STEVENS: The converse question is:

1 Could we prosecute a crime committed in Guantanamo by
2 Cubans? And the answer is yes.

3 MR. WAXMAN: The answer is certainly yes,
4 and if I can just make the point about bases elsewhere,
5 in Germany and Japan, for example, the status of -- this
6 is the only base, I believe, that -- you know, in
7 something other than an active war zone, that isn't the
8 subject of a status-of-forces agreement that very
9 specifically explicates both the judicial and executive
10 authority over acts that occur on the base.

11 And, for example, under our status-of-forces
12 agreement with Japan, it is entirely clear that if it is
13 a Japanese citizen or a Japanese national or conduct
14 that is subject to the laws of Japan, the Japanese
15 courts have jurisdiction.

16 JUSTICE KENNEDY: You're not heartened by
17 the prospect that the detainees could apply to the Cuban
18 courts, which would then hand process to the Commanding
19 General at Guantanamo?

20 (Laughter.)

21 MR. WAXMAN: Not particularly. Let's put it
22 this way: It has not occurred to us yet.

23 (Laughter).

24 MR. WAXMAN: I mean, this is in -- this is
25 in many respects a uniquely straightforward case. I

1 really didn't mean to be facetious when I said our
2 national control over Guantanamo is greater than it is
3 over a place in Kentucky, because there we have -- under
4 our system of federalism the Federal Government has
5 limited controls.

6 JUSTICE GINSBURG: I thought this was
7 decided in Rasul. That's why I am so puzzled by the
8 Government's position. I think Justice Kennedy said it
9 most clearly when he said that, well, in every practical
10 respect, Guantanamo Bay is U.S. territory; and whatever
11 Congress recently passed, they can't, as you pointed
12 out, change the terms of the lease.

13 MR. WAXMAN: Yes. I think that's right, and
14 I also think that, although it is correct, as
15 Justice Scalia pointed out at the outset, that the
16 decision in Rasul was a decision about the scope of
17 2241, which has now been amended, and the majority, at
18 least, rendered a decision on the basis of the statute,
19 nonetheless, the Court was construing 2241(c)(1), which
20 is in haec verba with Section 14 of the 1789 act.

21 There are other provisions of the habeas
22 statute like the civil war provisions that -- under
23 which this Court reviews State court convictions and
24 detentions. But the statute that this Court was
25 construing in Rasul was identical in language to the one

1 promulgated in the -- the very first judiciary act of
2 1789, which this Court has said in Bollman was an
3 instantiation, a positive enactment of the writ, that
4 was protected by the Constitution.

5 And so, while technically, the majority was
6 issuing a statutory ruling -- and we don't contend
7 otherwise -- inferentially, its conclusion must extend
8 to the -- the extent of the writ at common law.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Waxman. We will give you five minutes for rebuttal.

12 General Clement.

13 ORAL ARGUMENT OF GENERAL PAUL D. CLEMENT,

14 ON BEHALF OF RESPONDENT

15 GENERAL CLEMENT: Mr. Chief Justice, and may
16 it please the Court:

17 Since this Court's decision in Rasul,
18 Petitioners' status has been reviewed by a tribunal
19 modeled on Army Regulation 190-8, and Congress has
20 passed two statutes addressing Petitioners' rights.

21 Petitioners now have access to the Article
22 III courts and have a right to judicial review in the
23 D.C. Circuit.

24 That review encompasses preponderance
25 claims, claims that the military did not follow their

1 own regulations, and statutory and constitutional
2 claims.

3 JUSTICE STEVENS: General Clement, you said
4 it was modeled after 190-8. Is it identical to 190-8?

5 GENERAL CLEMENT: Justice Stevens, it is
6 virtually identical. If you look at pages 50 and 51 of
7 our brief, you'll see kind of a side-by-side comparison;
8 and the deviations are ones that, we would submit,
9 enhance the rights of the detainees in this particular
10 circumstance.

11 So they are given a right to a personal
12 representative, which is not something that Army
13 Regulation 190-8 provides. They are specifically
14 provided for the ability to submit documentary evidence.

15 JUSTICE STEVENS: How is that personal
16 representative chosen?

17 GENERAL CLEMENT: The personal
18 representative is assigned to the individual by the
19 military.

20 JUSTICE SOUTER: I mean is that personal
21 representative also under an obligation to report back
22 to the military anything that might be unfavorable to
23 the person he is supposedly representing?

24 GENERAL CLEMENT: Well, I don't know about
25 "unfavorable," but I think if there's -- certainly, if

1 there is material intelligence information, he is to
2 provide that information.

3 JUSTICE SOUTER: So he's not -- he is not in
4 the position of counsel, as we understand the term.

5 GENERAL CLEMENT: No. We are not trying to
6 make the point that the personal representative is a
7 counsel. We're just saying it is something that is
8 provided above and beyond 190-8 in terms of the
9 procedure; and there are other particulars as well, like
10 there is the notice of the charges in the unclassified
11 summaries that are provided.

12 Now, there's the complaint on the other side
13 that the unclassified summaries aren't particular
14 enough, but it is worth noting that that's something
15 that is provided here that's not specified by 190-8.

16 JUSTICE STEVENS: Under 190-8, does the
17 defendant have a right to counsel?

18 GENERAL CLEMENT: No, they do not, not under
19 the basic regulations of that. Now, Mr. Waxman
20 correctly indicated that in a particular instance in
21 Vietnam, counsel was provided in 190-8 proceedings, but
22 those are not provided by the basic 190-8 procedures.
23 And, I think it is worth --

24 CHIEF JUSTICE ROBERTS: The DTA, see, is
25 unclear to me, anyway, on this question. You agree that

1 there is the authority under the DTA, and I assume under
2 the Court of Appeals for the D.C. Circuit in reviewing
3 those determinations, to order a release?

4 GENERAL CLEMENT: Well, I -- the way I would
5 answer that, Mr. Chief Justice, is this: In terms, the
6 DTA does not provide for an order of release. And we
7 would certainly have taken the position that, as a first
8 order, if the D.C. Circuit finds a defect in the CSTR,
9 we think the proper remedy would be to order a remand
10 for a new CSTR.

11 But, certainly, if this Court thinks that
12 the constitutional line is -- essentially necessitates
13 that the D.C. Circuit have the authority to order a
14 release, there is no obstacle to that.

15 CHIEF JUSTICE ROBERTS: 2243 doesn't specify
16 the availability of release, either, but it has
17 certainly been interpreted to authorize that by habeas
18 courts in this country.

19 GENERAL CLEMENT: No. And the D.C. Circuit
20 would have available to it the All Writs Act, and the
21 D.C. Circuit, in fact, in its Desmoula decision, which
22 is the decision where the Government has filed an en
23 banc petition -- that protective order that was issued
24 there was done pursuant to the All Writs Act.

25 CHIEF JUSTICE ROBERTS: Yes, but that --

1 GENERAL CLEMENT: The D.C. Circuit hasn't
2 been shy about asserting that authority. And, again, if
3 that's what was required here, they could use that
4 authority to order a release.

5 JUSTICE SOUTER: But doesn't the resort to
6 the All Writs Act beg the question?

7 And that is -- I mean the All Writs Act is
8 there to protect jurisdiction, and the question is
9 whether there is jurisdiction to release.

10 And you say there no textual impediment to
11 it; and, yet, we know -- I forget which brief it was in
12 -- from one of the briefs the -- the instance of the
13 prisoner Ali, one of the Chinese -- is it "Uigars"? Is
14 that how it is pronounced?

15 GENERAL CLEMENT: "Uigars."

16 JUSTICE SOUTER: Who was one of what, 12 or
17 13, who was found not to be an enemy combatant, and the
18 Government's position there was: Go back and do it
19 again in front of another tribunal, another panel,
20 which, in fact, conveniently found that he was.

21 So the practice of -- of the Government, it
22 seems to me, has clearly been to deny the right to
23 release.

24 GENERAL CLEMENT: Well, I would disagree,
25 Justice Souter. Let me say a couple of things to that.

1 One is that I think with respect to the
2 Uigars, in particular, there was a problem with ordering
3 release outright. And it is interesting that when Judge
4 Robertson, the same judge, district court judge, who
5 decided the Hamdan case, had before him one of the
6 Uigars in a habeas petition, he recognized that under
7 habeas he couldn't order release.

8 And the problem wasn't any kind of inherent
9 limitation on what he could order in his jurisdiction.
10 There was just a practical problem, which was --

11 JUSTICE SOUTER: Okay. It was a practical
12 problem. But the fact is that the effectiveness of
13 habeas jurisdiction, for example, in requiring new
14 trials, and so on, depends upon the ultimate sanction,
15 which is the authority of the court to let somebody go
16 if the Government does not comply with a condition.

17 And the -- the Government practice so far
18 under the DTA seems quite contrary to that.

19 GENERAL CLEMENT: Well, again, Justice
20 Souter, what I would say is simply this: that if what
21 the Constitution requires to make the DTA to be an
22 adequate substitute is the power to order release, there
23 is no obstacle in the text of the DTA to that. And the
24 All Writs Act is available to allow them to order
25 release to protect their jurisdiction under the DTA.

1 And I think that would be a solution to that problem.

2 Now, I think, more broadly, let me -- let me
3 say about the DTA and the MCA, it really does represent
4 the best efforts of the political branches, both
5 political branches, to try to balance the interest in
6 providing the detainees in this admittedly unique
7 situation additional process with the imperative to
8 successfully prosecute the global war on terror.

9 JUSTICE BREYER: They get additional
10 process. The question, I guess, is whether it is an
11 adequate substitute for having withdrawn the writ of
12 habeas corpus.

13 On that question, suppose that you are from
14 Bosnia, and you are held for six years in Guantanamo,
15 and the charge is that you helped Al-Qaeda, and you had
16 your hearing before the CSRT.

17 And now you go to the D.C. Circuit, and here
18 is what you say: The CSRT is all wrong. Their
19 procedures are terrible. But just for purposes of
20 argument, I concede those procedures are wonderful, and
21 I also conclude it reached a perfectly good result.

22 Okay? So you concede it for argument's
23 sake. But what you want to say is: Judge, I don't care
24 how good those procedures are. I'm from Bosnia. I've
25 been here six years. The Constitution of the United

1 States does not give anyone the right to hold me six
2 years in Guantanamo without either charging me or
3 releasing me, in the absence of some special procedure
4 in Congress for preventive detention.

5 That's the argument I want to make. I don't
6 see anything in this CSRT provision that permits me to
7 make that argument. So I'm asking you: Where can you
8 make that argument?

9 GENERAL CLEMENT: I'm not sure that he could
10 make that argument.

11 JUSTICE BREYER: Exactly.

12 GENERAL CLEMENT: I'm not sure he can make
13 --

14 JUSTICE BREYER: If he cannot make that
15 argument, how does this become an equivalent to habeas,
16 since that happens to be the argument that a large
17 number of these 305 people would like to make?

18 GENERAL CLEMENT: Well, Justice Breyer, let
19 me take it this way, which is, of course, you're getting
20 to the gravamen of their claim, which is that the DTA
21 and the review provided in the D.C. Circuit is not an
22 adequate substitute for habeas review.

23 And I'll start with the assumption for a
24 second, which I hope is right, because it seems that
25 Judge Friendly reached this conclusion -- and it seems

1 to me the right conclusion -- which is that the base
2 line is 1789.

3 And if you compare what these detainees have
4 under the DTA in terms of judicial review to what would
5 have been available to them at common law in 1789, it is
6 not even close.

7 This is the remarkable liberalization of the
8 writ, not some retrenchment or suspension of the writ.
9 These detainees at common law would face not one, but
10 three obstacles, to getting into court to make these
11 claims. The first, of course, is the geographical
12 limits on the reach of the writ. The second, but
13 equally important, is the line of authority that says
14 that the writ was simply unavailable to prisoners of
15 war. And the third problem would be the
16 well-established common law rule that you can't
17 controvert the facts as set forth in the return.

18 So at common law, somebody who took the
19 incredibly, I think, poor strategic call to concede all
20 of their legal arguments away and say only: I have a
21 constitutional claim here to be brought, I don't think
22 they would have gotten into court with that.

23 JUSTICE SOUTER: But aren't you simply
24 rearguing Rasul?

25 GENERAL CLEMENT: Not at all --

1 JUSTICE SOUTER: We have passed that point;
2 haven't we?

3 GENERAL CLEMENT: Not at all,
4 Justice Souter. And, first of all -- I mean, I take it
5 your -- your principal objection goes to the
6 geographical writ point, because I think that the issues
7 about controverting the facts of the return and the
8 availability of the writs to prisoners of war is
9 something that really wasn't -- had any reason to be
10 before this Court in Rasul.

11 JUSTICE SOUTER: It -- it -- it wasn't, and
12 I didn't want to get into the prisoner of war point.
13 But if you want to get into it, the problem with your
14 prisoner of war point is the United States is not
15 treating them as prisoners of war. They have not been
16 adjudicated prisoners of war, or otherwise, under the
17 Third Geneva Convention, and that argument on the
18 Government's part is entirely circular.

19 GENERAL CLEMENT: With respect, Justice
20 Souter --

21 JUSTICE GINSBURG: General Clement, I
22 remember in a prior hearing about Guantanamo that the
23 Government was taking the position firmly that these
24 detainees were not prisoners of war and, therefore, were
25 not entitled to the protection of the Geneva

1 conventions.

2 So if the Government is maintaining that
3 position, these people are not prisoners of war, then
4 the treatment of a prisoner of war is not relevant.

5 GENERAL CLEMENT: Well, with respect,
6 Justice Ginsburg and Justice Souter -- because I think
7 it gets to the same point -- we are using "prisoner of
8 war" the way that the common law courts use the term
9 "prisoner of war."

10 JUSTICE SCALIA: Is the Geneva Convention
11 modeled after the Constitution of the United States?

12 GENERAL CLEMENT: No, it --

13 JUSTICE SCALIA: What it means by "prisoner
14 of war" is the same thing that the Constitution means?

15 GENERAL CLEMENT: Well, and -- and -- with
16 respect, the Framers in 1789 had the benefit of the
17 three Spanish soldiers and the Schiever case. They
18 didn't have the benefit of the Geneva Convention.

19 JUSTICE SOUTER: And the three Spanish
20 soldiers were -- were ultimately found to be prisoners
21 of war, And, yet, they had process to get into court.
22 There was no question of the jurisdiction of an English
23 court to entertain their claim.

24 GENERAL CLEMENT: The writ was denied,
25 Justice Souter.

1 JUSTICE SOUTER: The relief was denied.

2 GENERAL CLEMENT: No, the writ was denied.

3 JUSTICE SOUTER: That had a hearing under
4 the writ.

5 GENERAL CLEMENT: They did not have a
6 hearing. The writ was --

7 JUSTICE SOUTER: Then how did the court ever
8 come to the conclusion that, in fact, they were
9 prisoners of war?

10 GENERAL CLEMENT: Because it said that -- it
11 looked at the pleading in the petition. There was no
12 hearing. It looked at the petition and it said: on
13 their own showing, they are prisoners of war. They are
14 denied the writ.

15 JUSTICE SOUTER: On their -- on their own
16 showing, but, in fact, the proceeding did not end until
17 the court had come to that conclusion.

18 It was not a conclusion that the court
19 assumed simply on the basis of a Government claim in the
20 return to the writ.

21 GENERAL CLEMENT: It didn't even ask for a
22 return, Justice Souter. I mean -- you know, they
23 decided the case --

24 JUSTICE SOUTER: On the basis of a
25 Government claim formally or informally proffered to the

1 Court. They -- they came to that conclusion, as you
2 said, based on the -- on the prisoners' own showing.
3 But the court certainly -- there is no authority in the
4 prisoner of war case for saying that if the Government
5 make as claim that one is a prisoner of war -- contrary
6 to the Government's prior position, incidentally -- that
7 that forecloses the possibility of consideration under
8 the writ -- the petition as filed.

9 GENERAL CLEMENT: There is authority for
10 that proposition, Justice Souter. It comes along later
11 in the World War II cases in Britain. The reason
12 there's not authority contemporaneous with the 1759
13 cases is because these courts are operating with the
14 common-law rule you can't controvert the facts as set
15 forth in a return. So the petitioners in these cases
16 wisely didn't make a factual dispute; they made a legal
17 dispute. And the courts rejected it time and time
18 again. I thought the Spanish sailors and the Shiver --
19 I'd like to just offer you that the 1941 authority --
20 because this question of course, over time, by 1941, the
21 British courts have relaxed the rule against
22 controverting the facts of the return, and they
23 addressed this question about what kind of factual
24 inquiry is necessary when the government comes back and
25 says that somebody is an enemy combatant, a prisoner of

1 war, or, under the Emergency Detention Act of 1939, a
2 threat to the realm.

3 And in two cases, *Liverridge* against
4 *Anderson* and *Green* against *Anderson*, the law lords, in
5 1941, say that they are not going to look beyond what
6 the government has provided in the return. They're not
7 even, in the *Green* case, going to ask for an affidavit.
8 So if you're looking --

9 JUSTICE SOUTER: Well, was that because they
10 were reflecting 1789 practice, or because they were
11 reflecting the Defense of the Realm Act? I don't know
12 the answer to that.

13 GENERAL CLEMENT: I think it is a pretty
14 good snapshot of where things were as of 1941.

15 JUSTICE SOUTER: Unless you can answer my
16 question, we don't know what the snapshot proves.

17 GENERAL CLEMENT: They were exercising
18 habeas jurisdiction.

19 JUSTICE SOUTER: They were exercising habeas
20 jurisdiction in a court -- in a polity in which
21 Parliament is supreme and Parliament had already passed
22 the Defense of the Realm Act, and I don't -- I mean it.
23 I don't know the answer to the question I asked you.
24 But I think unless we have an answer to that, we don't
25 have a reliable clue as to the understanding of the

1 English courts at a time that's relevant to our inquiry.

2 GENERAL CLEMENT: I think we do have an
3 answer, Justice Souter. It is in the *Liverridge* case,
4 because there there's a question of interpreting the
5 Emergency Detention Act. And they basically have a
6 choice. They can interpret it to allow the detention to
7 turn exclusively on the subjective belief of the home
8 secretary, or they can interpret it to reflect an
9 objective standard. And they choose, over the dissent
10 of Lord Atkins, they choose purely subject if standard.
11 So in interpreting a act of Parliament that could have
12 gone either way they interpreted under the common law
13 writ to involve no factual inquiry whatsoever. And the
14 case at common law in 1789 is a fortiori from that
15 because they would not go beyond the facts as set forth
16 in the return. And the only response the Petitioners
17 have to that common law rule is they can point to a
18 couple of cases where the courts were tempted and did
19 accede to the temptation to peek beyond the return in
20 the context of a child custody case or private custody
21 cases.

22 But this is a situation --

23 JUSTICE BREYER: I thought we were here
24 talking about -- I see that you have a strong argument
25 and they'll have a strong argument in reply. I think

1 both are pretty good, how you interpret these cases. I
2 thought we were talking about what the availability of a
3 forum in which you can make your argument and they can
4 make their argument, and that's why I'm back to the
5 question of this is remedy that's given in the statute
6 sufficient to allow you to make your argument and their
7 to make their argument? And what you said was, when I
8 thought I produced an example of an instance they wanted
9 to argue quite strongly, and you said no, they couldn't.

10 Then you said well, neither could they in
11 England. Well, that I wonder. That's where I'm back
12 to. After all, England doesn't have a written
13 constitution. So it is hardly surprising if they
14 concede everything away in England, they're not going to
15 be able to make any argument. There's nothing left.
16 But let's imagine in England you had a statute and that
17 statute said the government cannot hold an alien in
18 Beckawannaland for six years without either charging
19 them or releasing them. Or except for -- and we have
20 some very detailed preventive detention. Suppose there
21 was a statute like that. And then our friends in
22 England in whatever year conceded every argument but
23 that one.

24 Now, are you going to tell me now that the
25 habeas courts would have said we won't even listen to

1 your argument?

2 GENERAL CLEMENT: As Justice Souter pointed
3 out -- I mean, if you assume that the statute also said
4 any review for that claim should be in the court of
5 appeals, not in the traditional --

6 JUSTICE BREYER: Correct. And you told me
7 in this statute the court of appeals will not listen to
8 that argument. And as I read the statute, I agree with
9 you. Because I can find no place where they could make
10 that argument since it does not concern how well this
11 tribunal did, nor does it concern the constitutionality
12 of the procedures of the tribunal.

13 GENERAL CLEMENT: Well, Justice Breyer, as I
14 say, I think that if you accept that there would be some
15 deference to the ability to bring statutory claims, I
16 don't know why that deference would be limited to the
17 substance and not to the forum.

18 And Congress here has spoken. It has
19 spoken. The political branch has spoken. They have
20 struck a balance. They've given these detainees better
21 rights and access to administrative and judicial review.
22 Anyone --

23 JUSTICE ALITO: If the Court holds that the
24 DTA is not an adequate substitute for habeas, what will
25 happen? Will these Petitioners then have access to all

1 of the procedures that normally apply in a habeas
2 proceeding under 2241? The same right to discovery,
3 subpoena witnesses, access to classified information,
4 presence in court?

5 GENERAL CLEMENT: The government will
6 certainly take the position that they are not entitled
7 to those things. Presumably the Petitioners will be
8 arguing they are entitled to those things.

9 The answers to those questions will be
10 unclear because the review provided by the DTA and the
11 habeas statute, if it is applied in this context, either
12 way, whatever the vehicle for that judicial review, it
13 will be unprecedented. And there will be difficult
14 questions that will need to be worked out, and I don't
15 understand why --

16 JUSTICE SCALIA: General Clement, if we had
17 to either charge or release these people, what would
18 they be charged with? Waging war against the United
19 States? Is there a statute that prevents non-citizens
20 from waging war against the United States and provides
21 criminal penalties?

22 GENERAL CLEMENT: Not as such,
23 Justice Scalia. Now, of course, we might have an
24 argument as to some of these individuals, that they
25 engaged in unlawful --

1 JUSTICE STEVENS: As I understand the
2 government's position, these people are not in uniform,
3 so they're not an under the law of war. They have all
4 committed murder, not just fighting a war. That's your
5 theory, I think. They are all committed war crimes.
6 Those that were caught on the battlefield, I mean. I'm
7 talking about those.

8 GENERAL CLEMENT: Right, and the ones that
9 actually killed somebody would have committed murder.

10 JUSTICE STEVENS: That's right. And they
11 are not prisoners of war under the law of war, because
12 they were not in uniform.

13 GENERAL CLEMENT: They don't qualify for
14 prisoner of war status, but just to be clear I think
15 certainly when the British cases are talking about --

16 JUSTICE STEVENS: I'm talking about common
17 law. I mean under the law of war, the common law of
18 war. They were not prisoners of war.

19 GENERAL CLEMENT: They would not qualify for
20 prisoner of war status. They're enemy combatants --

21 JUSTICE STEVENS: Their engaging in war-like
22 acts would be the crime of murder or the crime of
23 assault and so forth and so on. That's how I understand
24 your theory in one of these prosecutions is that not --

25 GENERAL CLEMENT: That would be our theory

1 in those cases --

2 JUSTICE STEVENS: I mean it is your theory?

3 GENERAL CLEMENT: That would be our theory

4 in those cases -- and it is our theory in those cases

5 we've chosen to prosecute --

6 JUSTICE STEVENS: Right.

7 GENERAL CLEMENT: -- in the military

8 commissions, but there are other individuals with

9 respect to whom we don't have the right kind of evidence

10 in order to go with the full-blown military commission

11 trial, but we still have the option that this Court

12 recognized in *Kirin* and *Hamdi* and most particularly in

13 *Kirin*, not just to try people who are unlawful

14 combatants for their unlawful combatancy, but also to

15 hold them as we would hold anybody else who was captured

16 as preventative detention.

17 JUSTICE STEVENS: For the duration of

18 hostilities, if you can show that they are enemies.

19 GENERAL CLEMENT: Well, I think if we can

20 show that they were enemy combatants, that's exactly

21 right.

22 JUSTICE SOUTER: And you are operating today

23 under a broader concept, as I understand it, of "enemy

24 combatant"?

25 GENERAL CLEMENT: Than? I'm sorry? Broader

1 than what?

2 JUSTICE SOUTER: Than was indeed the case
3 for example in our early litigation, let alone at the
4 time of Kirin.

5 GENERAL CLEMENT: Well two things,
6 Justice Souter. One thing is that with respect to the
7 definition that the military commissions -- I'm sorry --
8 that the C-Cert 7 apply, that is a broader definition, I
9 would quickly add though that with respect to the
10 majority of individuals -- I mean you have the
11 Petitioners from Bosnia that Mr. Waxman represents, but
12 most of these people were seized in Pakistan and
13 Afghanistan, and so the situation is not that different.
14 And obviously we would take the position to the extent
15 you have some concerns about the breadth of the
16 definition, what this Court -- what the plurality said
17 in Hamdi in footnote 1 gets it exactly right. The way
18 to deal with those concerns is in the adjudication of
19 particular cases which can take place under the DTA or
20 can take place in habeas.

21 And again I think the burden --

22 JUSTICE SOUTER: But how can -- and this
23 again, maybe I should know the answer to this, but I
24 don't. How could that be litigated under the DTA?
25 Doesn't any proceeding under the DTA simply have to

1 accept the statutory definition?

2 GENERAL CLEMENT: No, it does not. I mean
3 it's a regulatory --

4 JUSTICE SOUTER: You mean -- you're saying
5 if it gets to the court of appeals, they can raise the
6 constitutional claim that the definition is broader than
7 constitutionally could be enforced. Is that what you're
8 saying?

9 GENERAL CLEMENT: That was in my points,
10 Justice Souter. So I think that --

11 JUSTICE KENNEDY: I didn't understand that
12 point when you were having your colloquy with
13 Justice Breyer, either. I thought you were going to
14 answer to Justice Breyer, that the court of appeals does
15 have the right to determine whether to the extent the
16 Constitution and the laws of the United States are
17 applicable, whether such standards and procedures, such
18 as CSRT, are -- - to make the determination -- are
19 consistent with the Constitution --

20 GENERAL CLEMENT: Yes, Justice --

21 JUSTICE KENNEDY: -- that's provided in the
22 MCA.

23 GENERAL CLEMENT: It absolutely is. I think
24 Justice Breyer's hypothetical was cleverly crafted,
25 though, to take that off the table.

1 JUSTICE BREYER: It wasn't cleverly
2 redrafted. I wanted to say that the people I'm thinking
3 of are not challenging those procedures. What they say
4 is you could have the best procedure in the world, and
5 they're totally constitutional -- we'll assume that --
6 they're assuming it. They're not going to concede it.
7 They're assuming it.

8 On that assumption, we still think that
9 Congress, the President, the Supreme Court under the
10 law, cannot hold us for six years without either trying
11 us, releasing us, or maybe confining us under some
12 special statute involving preventive detention and
13 danger which has not yet been enacted.

14 JUSTICE KENNEDY: But the statute --

15 JUSTICE BREYER: They are arguing it.

16 JUSTICE KENNEDY: But the statute talks
17 about standards. Why can't that question that
18 Justice Breyer raised be reached by the Court of Appeals
19 under the CSRT review hearings when it determines the
20 constitutional adequacy of the standards, or am I
21 missing something?

22 GENERAL CLEMENT: Well, I think, again, that
23 Justice Breyer's hypothetical, as I understood it, sort
24 of assumed away the adequacy of all of the standards and
25 just said: Putting all of that to one side, I have some

1 other constitutional claim.

2 And I'm just not so sure that habeas ever
3 allowed you to sort of bring every claim that you
4 possibly wanted to; and I think the -- what I -- the way
5 I read this Court's Hamdi decision is what was
6 envisioned on a habeas case in a case where Army
7 Regulation 190-8, which, of course, the plurality cited,
8 was complied with. It was in that case: The habeas
9 petition in court would take that as a starting point,
10 and that you wouldn't necessarily be able to say: Look,
11 it was nice that we had that proceeding, but put that to
12 one side. I have another claim.

13 I don't think the court, even in habeas,
14 would have envisioned that that would go forward.

15 JUSTICE KENNEDY: Just one more question on
16 that point: Would the Court of Appeals in -- under the
17 MCA have the authority to question the constitutionality
18 of the definition of noncombatant -- of unlawful
19 combatant?

20 GENERAL CLEMENT: Absolutely,
21 Justice Kennedy. That would be available to them in the
22 D.C. Circuit.

23 JUSTICE STEVENS: General Clement, I thought
24 your answer to Justice Breyer -- and maybe I'm missing
25 something -- would be that there is a third alternative

1 which he didn't consider, namely: That these are
2 combatants picked up on the battlefield, and they may be
3 detained indefinitely without proving they committed a
4 crime.

5 And that is your position, I think.

6 GENERAL CLEMENT: That is our position. I
7 mean I want to give Justice Breyer's hypothetical its
8 due. I mean there might be claims that you could have
9 brought, hypothetical claims that you could have brought
10 at some level, and that the DTA does --

11 JUSTICE STEVENS: You have a hypothetical
12 claim that a particular prisoner says: I was kidnapped
13 by people who were not in the United States Army and
14 sold for a bounty. And I am -- I just happened to be
15 there when I got kidnapped.

16 And then there is a genuine question of fact
17 as to whether the fact that they may have been sold in
18 that manner justifies detention, which is a different
19 question entirely from whether they committed a
20 violation under the law of war.

21 GENERAL CLEMENT: Absolutely,
22 Justice Stevens. But that question, of course, can be
23 considered by the D.C. Circuit on review, because
24 they're specifically entitled to a preponderance review
25 in the D.C. Circuit. So that's a claim that they

1 clearly could bring.

2 They can also bring the statutory and
3 constitutional claims to the standards and procedures,
4 and they can make claims that the procedures that are
5 set forth in the CSRTs are not provided. And I think,
6 again, if you compare that to what they would have had
7 at the common law, and you ask the question --

8 JUSTICE STEVENS: Let me interrupt again,
9 and I know your argument. But with respect to those
10 claims, do you make the argument in your brief that some
11 evidence is enough to refute that claim, or do you say
12 it is a preponderance standard?

13 GENERAL CLEMENT: It's a preponderance
14 standard, and that's what is set forth in the statute.
15 And, again, that's something where Congress specifically
16 got involved in the CSRTs in a way that I think is
17 different from the Hamdan case and Congress's
18 involvement with the Military Commissions. In the
19 Military Commissions --

20 CHIEF JUSTICE ROBERTS: I suppose any
21 challenges to the adequacy of the standards, or
22 whatever, are the sort of things that would be raised in
23 the D.C. Circuit. And we don't know what that's going
24 to look like yet, because the D.C. Circuit hasn't had an
25 opportunity to rule on those.

1 GENERAL CLEMENT: That's exactly right,
2 Mr. Chief Justice. And that's why, as we say in the
3 brief -- I mean there's a sense in which this is really
4 a facial challenge.

5 I mean, in order for them to prevail with
6 the argument that DTA review is an inadequate
7 substitute, they really have to say that it is
8 inherently an inadequate substitute. That no matter
9 kind of how many times the D.C. Circuit cuts the
10 Petitioner a break --

11 JUSTICE STEVENS: Isn't the main issue the
12 fact that it has taken six years to have the issue
13 resolved -- "relevant" --

14 GENERAL CLEMENT: Well, I mean --

15 JUSTICE STEVENS: They say they have
16 been unlawfully detained for six years from the
17 beginning. And isn't that delay relevant to the
18 question of whether they have been provided such a
19 wonderful set of procedures?

20 GENERAL CLEMENT: Well, Justice Stevens, I
21 think the delay is going to be relevant to whether or
22 not courts should expedite hearings, and the like. But
23 I don't think it should cloud the basic constitutional
24 question before this Court.

25 CHIEF JUSTICE ROBERTS: The procedures that

1 are before us under the DTA and the MCA, of course,
2 weren't available for the whole six-year period, were
3 they?

4 GENERAL CLEMENT: No, of course not. And I
5 think it is worth recognizing that Congress legislated
6 in this area not in year one, and then six years have
7 gone by. Congress legislated with these particular
8 procedures and this level of review in years four and
9 five.

10 And the fact that they didn't immediately
11 take effect, I think, is not an accident. It is a
12 product of the fact that Congress in this area was
13 providing unprecedented review.

14 JUSTICE GINSBURG: General --

15 GENERAL CLEMENT: And, of course, when you
16 do something unprecedented, new questions will arise.

17 JUSTICE GINSBURG: I think, to go back to
18 the beginning, my notion of your position was you never
19 get to that question: Is the review of these procedures
20 adequate in the D.C. Circuit, because there is no
21 authority, period, for the D.C. Circuit to engage -- to
22 grant what is before us is if the -- our applications
23 for a writ of habeas corpus.

24 You say that's out the door. They might
25 bring some other proceedings. I thought that was your

1 position.

2 GENERAL CLEMENT: I think that is our
3 position, Justice Ginsburg. But our position is they
4 want -- they styled something -- they filed something
5 called a habeas petition. Congress subsequently has
6 come in and said: The way we are going to deal with
7 this is we are going to remove jurisdiction for that
8 habeas petition, and we're going to allow you to file a
9 DTA review provision -- a DTA review petition.

10 Now, their argument is that Congress can't
11 force that choice on them because this is an inadequate
12 substitute for habeas. The Suspension Clause applies in
13 Guantanamo; and therefore, the DTA is effectively
14 unconstitutional to the extent it prevents us with
15 proceeding with our habeas petition.

16 Now, there are a variety of ways this Court
17 could reject that claim. It seems to me that the most
18 straightforward way, though, is to simply ask the
19 question: If the level of review provided by the DTA in
20 the DTA petition were provided by statute in 1789 or
21 even 1941, for that matter, would it have been seen as a
22 liberalization of the writ, or a contraction and
23 suspension of the writ?

24 And I think it is very, very clear that if
25 this statute had passed, if this kind of review was

1 provided in 1789 or in 1941, it would have been greeted
2 as a remarkable -- remarkable liberalization of the writ
3 as it had then been understood.

4 And I think we are in the situation where
5 these individuals, for the first time, are really
6 allowed this kind of access to the court system.

7 And when that happens, there are going to be
8 difficult questions. We have difficult questions about
9 what the record on review is. We have difficult
10 questions about the extent to which classified
11 information should come in.

12 But all of those difficult questions are
13 going to be waiting for us if we go back to the habeas
14 courts, because the same kind of issues --

15 JUSTICE BREYER: Well, on that -- and you
16 just mentioned remedy. Suppose, contrary to what you
17 hope for, that the Court were to say that this is -- we
18 have a minute or two.

19 Suppose they were to say that this is an
20 unconstitutional suspension of the writ, and that the
21 remedy here written in the statute is not adequate in
22 respect to many claims that might be made.

23 On that assumption, the habeas would lie.
24 Now, it has been six years, and habeas is supposed to be
25 speedy.

1 And, yet, people have serious arguments,
2 anyway, that they are being held for six years without
3 even having those arguments heard.

4 Is there anything in your opinion that this
5 Court could say by way of remedy that could get the
6 D.C. Circuit or the others to decide this and the CSRT
7 claims, there are 305 people to do this quickly within a
8 period of months rather than six more years? And if so,
9 what?

10 GENERAL CLEMENT: I mean, obviously lower
11 courts take anything this Court says very, very
12 seriously. So, if this Court makes it clear --

13 JUSTICE BREYER: Are we faced with this
14 problem, and I don't want to put you right on the spot,
15 what approximately would you say in respect to this?
16 Because it is a serious problem.

17 GENERAL CLEMENT: Well, I mean -- let me --
18 if I could, I would answer it as to what this Court
19 should say about what the D.C. Circuit should do on DTA
20 review. I prefer to discuss the opinion where we win
21 rather than the opinion where we lose.

22 As to that opinion, the courts -- the lower
23 courts should be instructed to with due cognizance for
24 the fact these individuals have been detained six years
25 and this is the process that has been provided in order

1 to decide whether or not that continuing custody is
2 lawful, they should expedite this to the greatest extent
3 possible.

4 JUSTICE KENNEDY: How can we fit your
5 position when we have no jurisdiction here?

6 JUSTICE SOUTER: If you win, we never get to
7 these issues.

8 GENERAL CLEMENT: With respect if you win --
9 if we win, you still write an opinion saying that we
10 win, and that opinion can still say everything --

11 JUSTICE KENNEDY: Our opinion says have a
12 nice day, everybody.

13 (Laughter.)

14 JUSTICE SOUTER: You can't win without
15 reversing the Court of Appeals.

16 GENERAL CLEMENT: You can certainly affirm
17 on alternative grounds.

18 JUSTICE SOUTER: If we affirmed on
19 alternative grounds, leaving the court of appeals'
20 reasoning as it stands, these interesting questions that
21 you referred to will never arise.

22 GENERAL CLEMENT: I don't think that's
23 right, Justice Souter. There is active litigation going
24 on in the D.C. Circuit over basically these questions
25 and how this litigation is going to take place. And if

1 this Court in affirming on -- begrudgingly affirming and
2 directing the D.C. Circuit to move with all appropriate
3 dispatch, that's going to be read just as carefully and
4 taken just as seriously if it's an affirmance than if
5 it's a vacate or a reversal.

6 CHIEF JUSTICE ROBERTS: Is that because the
7 withdrawal of jurisdiction does not apply to review of
8 the proceedings in the D.C. Circuit that's provided
9 under the statute? In other words, your argument that
10 the habeas jurisdiction doesn't extend doesn't reach the
11 review of the adequacy of the DTA proceedings?

12 GENERAL CLEMENT: That's exactly right.
13 That's exactly right.

14 JUSTICE SOUTER: Why would they litigate
15 that adequacy if they have determined in advance that
16 substantively the individuals who are petitioning have
17 absolutely no rights?

18 GENERAL CLEMENT: They hadn't decided that,
19 Justice Souter. That might have been a problem back in
20 Rasul. But now whatever the answer to the question of
21 whether the Constitution provides rights in Guantanamo,
22 they have rights. They have the statutory right to
23 preponderance review. They have a statutory right to
24 have the military follow its own procedures. And they
25 have lots of arguments in the lower courts trying to

1 take advantage of those rights that they have.

2 So there will be a meaningful procedure in
3 the D.C. Circuit --

4 JUSTICE SOUTER: At the end of the day, the
5 only thing, as I understand it, that could possibly be
6 adjudicated would be the question of formal adherence to
7 procedure or not. There would never be an adjudication
8 that ever went to the merits because the merits issue,
9 as I understand it, is already -- I mean merits of
10 relief -- have already been prior admitted by the
11 existing determination of the circuit in this case.

12 GENERAL CLEMENT: Well, Justice Souter, I'm
13 not sure that this Court -- I understand your question,
14 I believe, which is that the D.C. Circuit, I think,
15 almost unavoidably reading this Court's Rasul decision
16 and reading it as a statutory rather than a
17 constitutional holding, has stuck with its circuit
18 precedent and said that there aren't constitutional
19 rights here. That is going to be true unless this Court
20 reverses it in habeas or in the DTA review.

21 It would seem particularly strange that if
22 that's the real problem that this Court would somehow
23 decide, well, you know, we really think the DTA is an
24 adequate substitute, but the only way we can correct
25 this other mistake, in our view, that the D.C. Circuit

1 is laboring under is to rule against the government.

2 JUSTICE SOUTER: You were arguing that the
3 question of the adequacy of the substitution should, in
4 fact, be litigated in a plenary fashion in the Court of
5 Appeals or the district court for that matter?

6 GENERAL CLEMENT: No. I think that's the
7 issue before this Court now. And this Court, for
8 example --

9 JUSTICE SOUTER: I thought you said a moment
10 ago that there were all of these interesting questions
11 that could be explored if there was a remand?

12 GENERAL CLEMENT: I'm sorry, Justice Souter,
13 I may have misspoke.

14 JUSTICE SOUTER: Maybe I misunderstood you.

15 GENERAL CLEMENT: The interesting questions
16 that I think are left on the remand, no matter what, are
17 issues about whether or not based on the Abraham
18 declaration that the military followed their own
19 procedures for assembling the record below, or whether
20 the military followed its own procedures for providing
21 exculpatory evidence. Those are all questions that
22 aren't questions that require the answer to the question
23 of whether Eisentrager is still good law --

24 JUSTICE SOUTER: You are talking about in
25 effect about evidentiary procedural questions?

1 GENERAL CLEMENT: I mean --

2 JUSTICE GINSBURG: You're talking about
3 taking the statute, Congress's statute that set up this
4 system with limited review in the D.C. Circuit and
5 saying that's it. The D.C. Circuit never got to that
6 question because it said the acts that these people are
7 trying to bring habeas doesn't exist. The only thing
8 that they have, the only remedy they have is the one
9 that Congress provided. And it seems to me the only
10 question before us is whether there is jurisdiction in
11 the court of appeals to decide that threshold issue.
12 They tossed it out and didn't reach -- didn't say one
13 word about the adequacy of the procedures or of the
14 things that you're talking about.

15 GENERAL CLEMENT: I think that's right,
16 Justice Ginsburg. I want to be clear that my position
17 is that an alternative ground for affirmance, which
18 would allow this Court to address some of those
19 questions, is that the D.C. Circuit was right to say
20 that the DTA review, that the habeas petition should be
21 dismissed. The reason they were right is because the
22 DTA is an adequate substitute for habeas.

23 JUSTICE GINSBURG: That would be -- we would
24 be deciding that as a court of first view because they
25 didn't decide that? You don't need an adequate

1 substitute for habeas because you have no right to
2 habeas.

3 GENERAL CLEMENT: I think that's a fair
4 observation, but obviously this Court --

5 JUSTICE STEVENS: General Clement --

6 GENERAL CLEMENT: In the context -- I mean
7 this has been fully briefed in, and in the context of
8 where the Court uses an alternative ground for
9 affirmance, it would not be a novel situation, I don't
10 think.

11 JUSTICE STEVENS: General Clement, your
12 suggested reason why they're right is quite different
13 from the reason they actually gave. They did not reach
14 the question of the adequacy of these procedures.

15 GENERAL CLEMENT: I think that's a fair
16 point, Justice Stevens, though I would say that really
17 their reasoning encapsulates one of the three reasons
18 why at common law they were right.

19 JUSTICE STEVENS: Yes, but they did not
20 reach this very important part of the whole case. And,
21 Of course, the substitute procedures here are not nearly
22 the same as those in our prior cases of where we
23 sustained the 2255 and district here.

24 GENERAL CLEMENT: Oh, that's right,
25 Justice Stevens, but in fairness, in those situations

1 you were dealing with sort of substitutes for core
2 habeas under situations where they're was no dispute
3 that there was a robust right to habeas at common law,
4 and so here you first deal with the situation of -- all
5 right, the baseline is, as Judge Friendly suggests,
6 1789, is this an adequate substitute? And that even if
7 somehow -- and I don't know how you get past that --
8 then you I think still might ask the question that this
9 Court asked in the Felker case, which is, you know,
10 giving some deference to Congress's ability to shape the
11 scope of the writ, is there a problem here? I think we
12 would point the Court to Felker.

13 JUSTICE STEVENS: And you say those later
14 cases are not relevant because habeas corpus in the
15 modern world is much broader than it was in 1789.
16 That's part of your point?

17 GENERAL CLEMENT: That is part of our point.

18 JUSTICE STEVENS: Yes.

19 GENERAL CLEMENT: And we would say, though
20 --

21 JUSTICE STEVENS: And the comparison you ask
22 us to make is between what the habeas writ was in 1789,
23 not what the comparison to a habeas writ would be today?

24 GENERAL CLEMENT: We would start with that
25 proposition, but I think this isn't a case where it's

1 just 1789 versus today because as I read this -- -

2 JUSTICE STEVENS: I don't think you would
3 seriously contend that the procedures set forth in the
4 statute are equivalent to those afforded under the
5 habeas writ under today's jurisdiction?

6 GENERAL CLEMENT: It's a hard question for
7 me to answer -- -

8 JUSTICE STEVENS: At least you haven't
9 argued that.

10 GENERAL CLEMENT: Well, no, but I mean the
11 question is, you know, in a different case, sure, there
12 would be a different habeas. But we don't know sort of
13 the answer as to what habeas looks like in the context
14 of enemy combatants detained in a place like Guantanamo,
15 and we suggest, based on our best reading of Hamdi that,
16 if there was habeas jurisdiction now, that the
17 proceeding that would unfold would not be the plenary
18 habeas that is envisioned by Petitioners but would be a
19 much more narrowly circumscribed habeas. I would also
20 point out that, again, it's not just --

21 JUSTICE STEVENS: On the point I made, I
22 think that's critical to your argument that the
23 substitute is adequate.

24 GENERAL CLEMENT: I think that's right. I
25 would say, though, that our only baseline is not 1789

1 because, as we read this Court's decision in Rasul,
2 Rasul is based on the predicate that until 1973 and
3 Braden's overruling of Ahrens, that the habeas statute
4 would not have gone to Guantanamo. And unless this
5 Court is willing to say that there was an inchoate
6 Suspension Clause violation until 1973 when Braden comes
7 along, it seems like the tradition in this country too,
8 based on the immediate custodian rule and the
9 territorial jurisdiction of the courts, was that habeas
10 in Guantanamo is a novelty. It's -- 1973 at best.

11 If I could finish with just bringing the
12 Court's attention to one thing. This is in an amicus
13 brief that is in support of us, the Criminal Justice
14 Legal Foundation brief. But there's sufficiently little
15 precedence for the Court to rely on, and I want the
16 Court to have this: The Schiever case, which is one of
17 the prisoner-of-war cases. There's not -- in the Rasul
18 case, Justice Stevens, and the parties, we both cited to
19 volume 97 of English Reporter and the report of the case
20 by Burrow -- there is in the English Reports an
21 alternative report of that case, from Kenyon. And the
22 report of that case which is 96 English Reports 1249 is
23 actually longer on the law, shorter on the facts, but
24 longer on the law than the report by Lord Burrow. So I
25 wanted the court to have that available to them.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General Clement.

3 Mr. Waxman, we'll give you five minutes.

4 REBUTTAL ARGUMENT OF SETH W. WAXMAN.

5 ON BEHALF OF THE PETITIONERS

6 MR. WAXMAN: Thank you, Your Honor.

7 I want to speak mostly about the adequacy of
8 the substitute and particularly the question that you
9 and Justice Kennedy asked about adjudication of the
10 standard on remand, but just to take first things first,
11 I don't -- I don't believe I've ever seen the
12 government's -- the case *Liverridge* or *Green* cases cited
13 by the government before. And I don't know what they
14 say. But it is absolutely incorrect that DTA review of
15 the CSRTs is a liberalization of the traditional writ.
16 As this Court made -- or the King's Bench made clear in
17 the *Bushell's* case and all of the commentators including
18 *Sharpe*, who both sides are citing as authoritative, here
19 agree in cases of executive detention, where there
20 wasn't a trial occurring, the court absolutely could --
21 the prisoner could controvert the facts of the return in
22 *Schiever* and *Spanish Citizens* -- *Spanish Prisoners*,
23 there wasn't an original hearing because the court
24 issued -- sat as *nisi prius* court and considered
25 affidavits of the prisoners and third parties and

1 determined on the basis of the affidavits that they were
2 prisoners of war.

3 But it is absolutely clear that the writ did
4 extend to the question of "I am not a combatant. I am
5 not a warrior, number one. And number two, it did go in
6 non-criminal detentions to the underlying facts of the
7 detention, and that goes to the point about the standard
8 that Justice Kennedy asked and the Chief Justice asked.

9 We agree that, if and when the D.C. Circuit
10 ever addresses the merits of these cases, and not only
11 is there no CSR -- complete record on return in any
12 case, but the government has suggested they proceed five
13 at a time, and we're now two years running without a
14 single one -- but there's no doubt that the argument
15 we're making in Roman numeral 2 of our brief, that the
16 CSR, the Wolfowitz definition is not authorized
17 detention under the AUMF, which as this Court in Hamdi
18 said, incorporates long-established law-of-war
19 principles and American traditions.

20 We can raise that claim because they have to
21 establish that the procedures and standards were
22 consistent not only with the Constitution but also with
23 the laws of the United States. And the problem this is
24 this --

25 CHIEF JUSTICE ROBERTS: That is an argument

1 that, I gather, both sides agree is available to you
2 under the DTA before the D.C. Circuit.

3 MR. WAXMAN: That is absolutely correct.
4 But what -- what habeas at its core was -- and we're
5 talking -- I'm happy to live in the world of 1789 now --
6 is executive detention and not the more modern
7 innovations where, well, certain procedures weren't
8 constitutional or whatever, but you have no right to
9 hold me. The facts won't allow you to hold me. The
10 D.C. Circuit cannot --

11 JUSTICE KENNEDY: What does that tell you
12 about the adequacy of the substitute?

13 MR. WAXMAN: Because the D.C. Circuit --
14 because the D.C. Circuit is reviewing a record that was
15 adduced ex parte, in camera, with a presumption to boot
16 that it is -- that the evidence is both accurate and
17 complete, and the D.C. Circuit is -- has already said it
18 will not hear any new evidence and it must apply that
19 same presumption that that evidence that was heard ex
20 parte in camera with its own presumption is correct.
21 And here's -- let me just give you an example of what
22 difference this makes. You have the unredacted version
23 of Judge Green's district court opinion. I don't. She
24 discusses -- she does address the adequacy of the
25 substitute. And she addresses the case of two

1 individuals. One is Mr. Ait-Idir, who is my client, and
2 you have both in her opinion and our brief this truly
3 Kafka-esque colloquy at his hearing in which he is
4 accused of associating with a known Al-Qaeda operative,
5 which he denies, but he can't be told the name.

6 Mr. Kurnaz is the other Petitioner who is
7 discussed in her brief. He was a Petitioner in this
8 Court, but he has since been released by the government
9 because of the fact that he had what the CSRTs won't
10 give him, which is a lawyer. He was told, two years
11 after he was detained -- he's a German permanent
12 resident -- he was told at his CSRT, as many of these
13 individuals were not, that he was being held because he
14 associated with a known terrorist. And he was told the
15 name.

16 He was told that he associated with somebody
17 called Selcook Bilgen who, the government contended, was
18 (a) a terrorist, who was -- had blown himself up while
19 Mr. Kurnaz was in detention -- may I simply finish this
20 account -- while he was in detention and in a suicide
21 bombing; and all that Mr. Kurnaz could say at his CSRT
22 where he had no lawyer and had no access to information
23 was I never had any reason to suspect he was a
24 terrorist.

25 Well, when the government, in the habeas

1 proceedings, filed its factual return in Judge Green's
2 court, it filed as its factual return the CSRT record.
3 His counsel saw that accusation. Within 24 hours, his
4 counsel had affidavits not only from the German
5 prosecutor but from the supposedly deceased Mr. Bilgen,
6 who is a resident of Dresden never involved in terrorism
7 and fully getting on with his life.

8 That's what -- and that evidence would not
9 have been allowed in under DTA review. It wouldn't have
10 been in the CSRT, and it won't come in under DTA review.
11 And that's why it is inadequate.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Waxman.

14 The case is submitted.

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

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