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

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

Petitioner-Appellee/
 Cross-Appellant,

v.

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

DONALD RUMSFELD,

Respondent-Appellant/
 Cross-Appellee.

-----X

November 17, 2003
 10:00 a.m.

Before:

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

APPEARANCES

DONNA R. NEWMAN, ESQ.
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 Attorneys for
 Petitioner-Appellee/Cross Appellant

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 Amicus Curiae in support of
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PAUL D. CLEMENT,
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 Respondent-Appellant/Cross Appellee

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2 (10:00 a.m.)

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

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

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

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2 We'll begin with Mr. Clement.

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

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

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

25 Now, to be sure, there is case law

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE PARKER: That was Judge Pooler's

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2 question.

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

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

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

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

25 MR. CLEMENT: If I could direct this

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

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

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

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

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

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

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

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

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

4 JUDGE PARKER: What options does she
5 have?

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

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

4 I notice my time is out.

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

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

15 MR. CLEMENT: Right.

16 JUDGE WESLEY: Early May of 2002.

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

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

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

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

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

4 MR. CLEMENT: That's right.

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

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

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

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

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

16 MR. CLEMENT: That's correct.

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

20 MR. CLEMENT: Correct.

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

24 MR. CLEMENT: That's correct.

25 JUDGE WESLEY: And sometime that day

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

4 MR. CLEMENT: That's correct.

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

8 MR. CLEMENT: That's correct.

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

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

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

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

4 MR. CLEMENT: That's correct.

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

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

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

21 MR. CLEMENT: It would, but --

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

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

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

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

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2 respect to the Court's jurisdiction.

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

7 MR. CLEMENT: I think that --

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

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

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

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

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

25 JUDGE PARKER: Right. Well, suppose

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

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

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

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

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

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

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

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

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

12 JUDGE PARKER: Is that right?

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

18 JUDGE PARKER: This U.S. citizen.

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

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

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

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

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

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

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

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

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

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

11 JUDGE WESLEY: Where is Mobbs located?

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

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

16 MR. CLEMENT: The Pentagon as well.

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

19 MR. CLEMENT: No.

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

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

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

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

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

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

15 JUDGE PARKER: So affirmance is
16 irrelevant.

17 JUDGE WESLEY: Is what I asked.

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

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2 proper forum.

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

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

8 MS. NEWMAN: May it please the Court:

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

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

16 JUDGE POOLER: Please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MS. NEWMAN: Yes.

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

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

4 MS. NEWMAN: Detainer in Kentucky.

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

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

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2 easily examined there.

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

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

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

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

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

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

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

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

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2 the context.

3 The cause of action here arose here.

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

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

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

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

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

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

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

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

18 MS. NEWMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MS. NEWMAN: Yes, I know.

25 JUDGE WESLEY: Let me read to you

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

6 MS. NEWMAN: That's correct.

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

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

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

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

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

9 JUDGE WESLEY: Thank you very much.

10 JUDGE POOLER: Thank you, Counsel.

11 Now is the time for the rebuttal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 PROF. MARTINEZ: Yes, your Honor.

5 JUDGE WESLEY: Let me ask you.

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

9 PROF. MARTINEZ: Certainly, your
10 Honor.

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

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

18 JUDGE WESLEY: On what grounds?

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

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

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

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

13 JUDGE WESLEY: Without filing a
14 charge?

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

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

25 JUDGE POOLER: If only what you

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2 described were true.

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

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

22 JUDGE WESLEY: Is the time low?

23 PROF. MARTINEZ: Your Honor --

24 JUDGE WESLEY: Is time a relevant
25 factor?

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

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

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

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

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

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

5 JUDGE WESLEY: Of the Articles of War.

6 PROF. MARTINEZ: Yes, sir.

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

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

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

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

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

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

9 JUDGE WESLEY: Obviously.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE WESLEY: If the President became

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

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

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

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

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

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

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

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

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

25 PROF. MARTINEZ: Yes, your Honor. And

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. CLEMENT: Well --

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

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

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

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

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

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

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

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2 authorization. And --

3 JUDGE PARKER: How could you do that?

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

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

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

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

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2 history and you look at that act --

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

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

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

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

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

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

11 JUDGE PARKER: You mean the
12 appropriations.

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

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

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

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

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

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

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

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

5 MR. CLEMENT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2 international law, about concerns about --

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

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

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

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

25 JUDGE POOLER: They took out the words

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE PARKER: Who got counsel. And

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

4 JUDGE POOLER: After articles of war.

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

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

14 JUDGE PARKER: That was stipulated.

15 MR. CLEMENT: It was stipulated.

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

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

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

4 JUDGE POOLER: Assuming it's true.

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

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

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

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

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

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

25 MR. CLEMENT: I suppose he could, but

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

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

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

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

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

8 JUDGE POOLER: Congress has to say
9 that.

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

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

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

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

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

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

14 MR. CLEMENT: Associated therewith.

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

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

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

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

6 JUDGE POOLER: Further.

7 JUDGE WESLEY: Further attacks.

8 JUDGE POOLER: Further.

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

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

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

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

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

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

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

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

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

14 JUDGE POOLER: Sure.

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

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

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

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

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

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

25 MR. CLEMENT: I think some of the

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

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

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

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2 war.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 JUDGE PARKER: By whom?

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

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

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

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

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

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

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

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

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

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2 habeas corpus?

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

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

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

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

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

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

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

24 JUDGE PARKER: Under this resolution.

25 MR. CLEMENT: Yes.

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

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

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

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

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

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

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

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

22 What did we do, actually?

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

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2 was an exchange --

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

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

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

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

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

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

8 JUDGE POOLER: And it's
9 constitutional.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 Professor Martinez? Three minutes
19 rebuttal.

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

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

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

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

9 PROF. MARTINEZ: Correct, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 JUDGE POOLER: Thank you, Counsel.

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

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

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

11 Mr. Patel?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. PATEL: Your Honor is correct.

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

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

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

24 JUDGE WESLEY: Be careful now.

25 MR. PATEL: In other words, your

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2 Honor --

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

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

6 JUDGE WESLEY: I suspect you don't.

7 But in any event, Counselor, what evidence do
8 you want to present?

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

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

17 MR. PATEL: Judge --

18 JUDGE WESLEY: I'm just asking.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2 that the Court must make.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUDGE POOLER: There is no review.

25 MR. CLEMENT: There is a review, but

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

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

12 MR. CLEMENT: I don't --

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

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

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

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

9 MR. CLEMENT: Right.

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

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

16 JUDGE POOLER: Ah --

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

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

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

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

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

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

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2 I mean, is that any right at all?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE POOLER: That's what flows from

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

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

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

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

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

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

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

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

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

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

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

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2 bringing factual challenges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUDGE WESLEY: Sure.

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

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

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

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

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

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

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

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

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

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

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

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2 empowered to grant his release. Thank you.

3 JUDGE POOLER: Thank you, Counsel.

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

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

13 (Off the record discussion)

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

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

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

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2 JUDGE POOLER: Oh.

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

13 JUDGE POOLER: Correct.

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

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

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

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

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

10 JUDGE POOLER: Which is done.

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

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

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

25 If that's responsive....

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

4 MR. PATEL: No.

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

10 The Court will be adjourned.

11 (Adjourned)

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