

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Appellants,

v.

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

Appellee.

No. 05-5062, et al.

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

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 05-5064, et al.

Thursday, September 8, 2005

Washington, D.C.

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

BEFORE:

CIRCUIT JUDGES SENTELLE, RANDOLPH AND ROGERS

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

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

ON BEHALF OF THE APPELLEE:

GREGORY G. KATSAS, DEPUTY ASSISTANT ATTORNEY GENERAL

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P R O C E E D I N G S

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

THE COURT: Counsel?

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

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

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

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

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

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

17 THE COURT: Did they do that?

18 MR. WILNER: Pardon?

19 THE COURT: Did they do that?

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

1 to invert the standards of a motion to dismiss and accept its
2 allegations as true rather than those in the petitions.

3 That's exactly --

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

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

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

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

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

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

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

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

11 MR. WILNER: Yes, sir.

12 THE COURT: You represent them, right?

13 MR. WILNER: Yes, sir.

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

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

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

22 MR. WILNER: Yes, sir.

23 THE COURT: There are three claims.

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

25 THE COURT: For relief.

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

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

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

10 THE COURT: Under the due process clause.

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

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

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

18 THE COURT: When?

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

21 THE COURT: I believe it does.

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

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

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

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

18 THE COURT: Courts don't feel.

19 MR. WILNER: I'm sorry?

20 THE COURT: Courts don't feel.

21 MR. WILNER: I'm sorry?

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

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

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

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

6 MR. WILNER: Well --

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

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

12 THE COURT: All right.

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

19 THE COURT: Or anywhere else.

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

22 THE COURT: All right.

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

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

4 THE COURT: That's Footnote 15?

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

6 THE COURT: Are you talking about Footnote 15?

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

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

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

16 THE COURT: Explicitly?

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

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

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

1 but I do have it here. I mean I can see it. But they did say
2 --

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

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

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

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

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

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

17 THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

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

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

24 MR. WILNER: The CSRT -- yeah.

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

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

3 THE COURT: But what are the reasons?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: With respect to the 12 individuals I

1 mentioned, when were the returns filed?

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

5 THE COURT: October/November of last year?

6 MR. WILNER: Yes.

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

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

11 THE COURT: You had a couple of months.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. WILNER: No, I did not.

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

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

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

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

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

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

23 MR. WILNER: Yes.

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

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

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

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

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

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

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

15 THE COURT: Where does it come from then?

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

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

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

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

11 With respect to the CSR --

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

15 MR. WILNER: No, he did not.

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

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

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

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

25 THE COURT: And the legality of the detention

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

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

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

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

9 THE COURT: What are the other issues?

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

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

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

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

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

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

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

16 THE COURT: Yeah, sure.

17 MR. WILNER: Thank you.

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

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

25 THE COURT: Good morning, Counsel.

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

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

19 Judge Sentelle, as you mentioned --

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

21 MR. KATSAS: The basis for?

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

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

1 sovereign territory of the United States --

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

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

12 THE COURT: Then what more is there?

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

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

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

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

25 Now the detainees cite two features of Rasul. One

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

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

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

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

23 MR. KATSAS: I'm sorry?

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

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

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

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

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

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

5 If you --

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

7 THE COURT: Yeah.

8 MR. KATSAS: I'm sorry?

9 THE COURT: Why does that follow?

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

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

14 MR. KATSAS: Well --

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

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

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

22 MR. KATSAS: Right.

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

25 MR. KATSAS: Right.

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

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

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

8 MR. KATSAS: Okay.

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

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

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

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

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

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

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

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

19 MR. KATSAS: If --

20 THE COURT: So where does it come --

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

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

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

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

8 THE COURT: Let's assume they were.

9 MR. KATSAS: That --

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

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

12 THE COURT: (Indiscernible).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. KATSAS: Right.

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

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

7 MR. KATSAS: Okay.

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

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

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

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

23 THE COURT: Factual challenge.

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

1 legally sufficient to satisfy any due process requirements --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: With or without evidence?

10 MR. KATSAS: I'm sorry?

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

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

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

20 MR. KATSAS: There is a habeas --

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

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

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

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

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

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

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

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

25 MR. KATSAS: I'm sorry?

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

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

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

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

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

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

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

1 MR. KATSAS: Right.

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

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

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

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

15 THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

12 MR. KATSAS: Oh, absolutely.

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

15 MR. KATSAS: Sure.

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

18 MR. KATSAS: Sure.

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

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

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

1 fit within it.

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

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

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

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

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

2 THE COURT: Held in Guantanamo.

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

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

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

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

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

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

1 lawful authority. That's my right."

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

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

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

19 THE COURT: Can challenge in Guantanamo.

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

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

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

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

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

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

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

15 MR. KATSAS: Thank you.

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

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

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

5 I think the government makes another fundamental
6 error.

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

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

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

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

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

1 determine whether that was true or not true?

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

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

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

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

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

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

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

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

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

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

25 MR. WILNER: No.

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

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

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

12 MR. WILNER: But, Your Honor --

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

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

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

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

1 Yes, we did, Your Honor.

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

4 THE COURT: (Indiscernible).

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

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

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

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

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

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

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

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

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

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

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

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

3 (Recess.)

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

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

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

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

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

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

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

23 MR. OLESKEY: Yes.

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

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

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

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

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

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

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

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

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

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

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

20 THE COURT: Because of Footnote 15?

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. OLESKEY: Yes.

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

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

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

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

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

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

11 MR. OLESKEY: Yes, you can.

12 THE COURT: We can?

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

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

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

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

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

1 Footnote 15 in.

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

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

5 THE COURT: Virtually your only argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. OLESKEY: Yes, Your Honor.

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

10 MR. OLESKEY: No.

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

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

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

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

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

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

25 THE COURT: What if they are affiliated with that

1 organization?

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

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

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

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

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

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

5 THE COURT: It depends?

6 MR. OLESKEY: It depends.

7 THE COURT: What's it depend on?

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

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

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

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

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

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

25 MR. OLESKEY: Imminent, exigent; an immediate

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

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

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

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

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

9 THE COURT: That is the question.

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

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

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

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

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

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

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

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

14 THE COURT: Category 1.

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

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

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

1 President can take action to seize. But --

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

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

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

14 MR. OLESKEY: No.

15 THE COURT: Okay.

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

25 In any event, the definition that was applied in

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

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

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

25 MR. OLESKEY: Not if the President otherwise has

1 that authority.

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

4 MR. OLESKEY: Yes.

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

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

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

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

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

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

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

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

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

5 THE COURT: Why is it so called?

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

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

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

1 MR. OLESKEY: Yes.

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

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

8 THE COURT: That the returns came in?

9 MR. OLESKEY: That the process was complete.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. OLESKEY: Excuse me?

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

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

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

16 MR. OLESKEY: Yes.

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

19 MR. OLESKEY: That's right.

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

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

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

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

9 MR. OLESKEY: I understand.

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

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

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

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

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

1 MR. OLESKEY: I believe they do.

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

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

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

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

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

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

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

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

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

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

20 THE COURT: It's an annual review.

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

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

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

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

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

25 And if all of that is true and the AUMF

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

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

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

21 MR. KATSAS: And one of --

22 THE COURT: Colonel Major said it?

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

1 THE COURT: And that's Major Colonel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 --

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

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

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

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

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

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

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

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

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

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

6 MR. KATSAS: I'm sorry?

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

9 MR. KATSAS: Having Counsel in --

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

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

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

1 both quibble about the language.

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

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

25 THE COURT: So does the Habeas Court have to

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

3 MR. KATSAS: Made what?

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

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

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

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

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

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

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

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

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

17 THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

20 MR. KATSAS: I think in terms --

21 THE COURT: Do you think so?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Properly applied.

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

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

15 MR. KATSAS: Right.

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

19 MR. KATSAS: I don't know.

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

24 MR. KATSAS: Right.

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

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

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

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

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

16 THE COURT: How about as to that case?

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

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

20 THE COURT: Think through this carefully.

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

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

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

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

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

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

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

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

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

12 THE COURT: So that the context --

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

15 THE COURT: Combatant (indiscernible).

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

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

25 MR. KATSAS: Not much. The Fifth Amendment

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

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

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

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

22 MR. KATSAS: Not to my knowledge.

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

1 writ were granted.

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

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

15 MR. KATSAS: Right.

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

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

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

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

12 THE COURT: Okay.

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

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

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

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

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

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

5 THE COURT: All right.

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

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

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

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

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

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

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

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

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

11 MR. OLESKEY: Yes.

12 THE COURT: Yeah. Okay.

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

16 THE COURT: I know that case.

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

1 2004.

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

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

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

15 MR. OLESKEY: Thank you, Your Honor.

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

18 MR. OLESKEY: Yes.

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

1 hear. Give us a recess.

2 (Recess.)

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CERTIFICATE

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

Debra Blum

9/15/05

DEPOSITION SERVICES, INC.