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IN THE SUPREME COURT OF THE UNITED STATES

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SALIM AHMED HAMDAN, :

Petitioner, :

v. : No. 05-184

DONALD H. RUMSFELD, SECRETARY OF :

DEFENSE, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, March 28, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

NEAL KATYAL, ESQ., Washington, D.C.; on behalf of the Petitioner.

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

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JUSTICE STEVENS: We'll hear argument in number 05-184, Hamdan against Rumsfeld.

Mr. Katyal, you may proceed.

ORAL ARGUMENT OF NEAL KATYAL

ON BEHALF OF PETITIONER

MR. KATYAL: Justice Stevens, and may it please the Court:

We ask this Court to preserve the status quo to require that the President respect time-honored limitations on military commissions. These limits, placed in Articles 21 and 36 of the Uniform Code of Military Justice, require no more than that the President try offenses that are, indeed, war crimes and to conduct trials according to the minimal procedural requirements of the UCMJ and the laws of war themselves. These limits do not represent any change in the way military commissions have historically operated. Rather, they reflect Congress's authority under the Define and Punish Clause to codify limits on commissions, limits that this Court has historically enforced to avoid presidential blank checks. And because this commission transgresses those limits, it should be struck down and the District Court order reinstated.

1 If I could turn to the jurisdictional matter for
2 a few moments first, we believe that the DTA, while
3 certainly not a model of clarity, does not divest this
4 Court of jurisdiction, for four essential reasons. The
5 first is that, if I could turn to the surreply at page --
6 the appendix at page 14(a), that contains the initial
7 version of the bill that passed the Senate on November
8 10th. And at 14(a) it says, on the effective-date
9 provision, "The amendment made by paragraph 1," which is
10 the jurisdiction-stripping provision, "shall apply to any
11 application or other action that is pending on or after
12 the date of enactment of this Act." That language clearly
13 attempted to strip courts of jurisdiction over Guantanamo
14 claims. That language, however, was changed in the final
15 version of the DTA, and the final version of the DTA is
16 found at page 10(a) of the surreply. And that has the
17 following as its effective date. It has two effective-
18 date provisions.

19 The first one I want to start with is H(2),
20 review of combatant status tribunal, CSRT, and military
21 commission decisions, "Paragraphs 2 and 3 of subsection
22 (e) shall apply with respect to any claim whose review is
23 governed by one of such paragraphs and that is pending on
24 or after the date of enactment of the Act." And then,
25 there is a separate provision for the rest of the DTA, for

1 --

2 JUSTICE SCALIA: Where was that change made from
3 the prior version?

4 MR. KATYAL: The change was made between
5 November 10th and November 15th.

6 JUSTICE SCALIA: Yes, but, I mean, what -- it
7 was made in what house? Was it made by the Conference
8 Committee?

9 MR. KATYAL: It was made in the Senate.

10 JUSTICE SCALIA: It was made in the Senate. So
11 the House presumably never saw the prior --

12 MR. KATYAL: That --

13 JUSTICE SCALIA: -- language.

14 MR. KATYAL: That's correct.

15 JUSTICE SCALIA: And the President, who signed
16 this bill, never saw the prior language.

17 MR. KATYAL: That is correct.

18 JUSTICE SCALIA: So, why should we attribute to
19 both the House and to the President a knowledge of the
20 prior version of the legislation?

21 MR. KATYAL: Well, because the language itself
22 was, I think, the subject of an immense amount of debate.
23 And, indeed, when the language was --

24 JUSTICE SCALIA: In the Senate.

25 MR. KATYAL: In the Senate. And well known.

1 And, indeed, you don't have to attribute any knowledge to
2 the President. We have evidence in the record that the
3 administration tried to change the language back to the
4 original formulation. And, indeed, in the House, the
5 chairman of one of the -- the vice chairman of the
6 Conference Report said that the change in the language was
7 in -- was -- the change in the language meant that it
8 grandfathered pending cases such as this one. So, this is
9 not an example of which we have to resort simply to the
10 negative inference of Lindh. However, we do think that is
11 the second reason for you to believe that this case is
12 grandfathered under the existing DTA.

13 JUSTICE ALITO: But isn't that --

14 JUSTICE GINSBURG: What, in addition to this
15 case -- I mean, this case is pending in the U.S. Supreme
16 Court. There are many cases pending in the District Court
17 when this law comes into effect. What about those cases?

18 MR. KATYAL: We believe that, as the cosponsor
19 said, on November 15th when they introduce the final
20 version of the language, that all of those cases are
21 grandfathered with respect to the H(1) effective-date
22 provision and the E(1) jurisdiction-stripping provision.
23 However, that still leaves in place the Government's main
24 argument in the D.C. Circuit below, which is that the E(2)
25 provision governing CSRT and final decisions, and the H(2)

1 provision governing final decisions of -- final decisions
2 of CSRTs, truncates all of the review that is currently in
3 the D.C. Circuit. So, it's certainly -- it's certainly
4 possible, though it's not, of course, presented in this
5 case, to read the DTA as truncating the vast majority of
6 claims at Guantanamo in current pending cases.

7 Of course, that isn't the issue before you here.
8 The issue before you here is simply the Hamdan case, and
9 there was -- and there was a strong -- the strong desire
10 by the Congress not to interfere with this Court's
11 traditionally exercised jurisdiction.

12 JUSTICE SCALIA: Please go over that again. I'm
13 not -- I'm not sure I understood -- I understood your
14 response.

15 MR. KATYAL: Okay.

16 JUSTICE SCALIA: You say that it could be read
17 to preclude cases in the lower courts, but not here.

18 MR. KATYAL: That's right, cases in which there
19 is a final CSRT decision; that is, that the Government's
20 argument in the D.C. Circuit, Justice Scalia, is that
21 there are two different ways in which the DTA truncated
22 the review of Guantanamo cases. One is the claim that the
23 jurisdiction-stripping provision applies to pending cases.
24 That, we reject. That, we think the Senate rejected on
25 November 15th when it passed the bill. The other is the

1 claim that the E(2) provision governing final decisions of
2 CSRTs, which does, of course, apply to pending cases, as
3 the plain text says, eliminates and truncates a -- the
4 vast majority of the detainees' claims.

5 That is the provision --

6 JUSTICE SOUTER: Does that mean, in practical
7 terms, that the -- that the -- that the other claims that
8 are in the District Court get transferred to the Circuit,
9 the Circuit is bound by the limitations that you've just
10 described, and, at the end of the day, the complaining
11 parties in those cases can raise the question whether they
12 -- whether Congress could properly have truncated them, as
13 it did, but it's simply got to wait?

14 MR. KATYAL: Absolutely. And --

15 JUSTICE SOUTER: Okay.

16 MR. KATYAL: -- to be clear, that's not the
17 position we're saying that is the DTA. That's not
18 presented here.

19 JUSTICE SOUTER: I realize --

20 MR. KATYAL: That's the issue --

21 JUSTICE SOUTER: Yes.

22 MR. KATYAL: -- below, in the D.C. Circuit.

23 In addition, we believe that this statute
24 doesn't fall within the Bruner Hallowell presumption that
25 the Government seeks to -- seeks to use here, for a few

1 reasons. The first is, this is not a statute that is
2 merely divesting a lower court of jurisdiction. Rather,
3 it's a statute that alters substantive rights of Mr.
4 Hamdan. In particular, as the Government itself says, it
5 eliminates question 2, upon which certiorari was granted,
6 which is compliance with the Geneva Conventions. In
7 addition, it alters entirely what both courts below found,
8 which is that Mr. Hamdan has a pretrial right, a right
9 analogous to *Abney versus United States*, to bring his
10 claim now, because he's challenging the jurisdiction of
11 the tribunal. That pretrial right is something that
12 mirrors -- that goes all the way back to the founding, in
13 the early cases that this Court decided, on pretrial
14 habeas.

15 In addition, we believe that --

16 JUSTICE ALITO: Why does it -- why does it
17 affect the scope of the review that he could get
18 eventually? If there's a final decision, there can be
19 review of whether the use of the standards or procedures
20 that were used by the commission to reach a final decision
21 is consistent with the Constitution and laws of the United
22 States? Why doesn't that encompass any claim that he
23 might want to make later on?

24 MR. KATYAL: Well, as the Government says, it
25 does -- certainly does not encompass question 2, because

1 it eliminates the word "treaties." It's a change from the
2 habeas corpus statute. More generally, it doesn't do two
3 things. First, if that's the reading that the Government
4 wants to give, well, then it essentially means that the --
5 that the President has the ability to block habeas corpus
6 or post-DTA review for all time, because, Justice Alito,
7 it doesn't turn on -- you can't walk into court right
8 after you're convicted, under the DTA; you can only walk
9 into court after a final decision. And a final decision
10 requires the sign-off of the President of the United
11 States. And so, effectively, this reading would give a
12 litigant the ability to block Federal Court review for all
13 time.

14 JUSTICE ALITO: I mean, criminal litigation
15 review after the final decision is the general rule.
16 There generally is not any interlocutory -- any
17 interlocutory appeal. And what you say could happen in
18 any criminal case if you assume bad faith on the part of
19 the people who are responsible for making the decisions
20 along the way. They could delay indefinitely and postpone
21 the entry of a final decision.

22 MR. KATYAL: Justice Scalia -- Justice Alito, if
23 this were a final -- if this were like a criminal
24 proceeding, we wouldn't be here. The whole point of this
25 is to say we're challenging the lawfulness of the tribunal

1 itself. This isn't a challenge to some decision that a
2 court makes. This is a challenge to the court itself.
3 And that's why it's different than the ordinary criminal
4 context that you're positing. The ordinary criminal
5 context you're positing -- and I'm thinking of a case like
6 Schlesinger versus Councilman, a court-martial case --
7 what the Court has said is that it's the -- the predicate
8 for abstention is the idea that Congress has fairly
9 balance the rights of both sides, an independent branch,
10 and has -- and has made certain determinations. Here,
11 none of that has happened. It's all been made by the
12 executive. And the difference is crucial in military
13 justice, because, as Justice Kennedy said for the Court in
14 Loving, the framers harbored a deep distrust of military
15 tribunals. And the thing that makes it different than the
16 ordinary criminal context, the thing that, as this Court
17 said, stops military justice from being lawless is the
18 Congress of the United States setting clear limits on the
19 use of military justice.

20 Now, if those limits had been observed, if this
21 Court -- if the military commission complied with the
22 rules of courts-martial, we wouldn't be here. Our whole
23 point is that they don't, and that it falls outside of the
24 well-recognized abstention exception for courts-martial
25 cases.

1 In addition, we believe that to further -- to
2 further on -- Justice Alito, on your point -- this point
3 is already said in the military commission context that a
4 different rule applies. In Quirin, this Court rushed in
5 to hear a military-commission challenge before the
6 commission was over, and the reason why it did so was, it
7 said that the public interest required adjudication of
8 these issues. And the public interest is no less severe
9 in that case than it is here. That is, this is a military
10 commission that is literally unbounded by the laws,
11 Constitution, and treaties of the United States. And if
12 you adopt the Government's position here, it effectively
13 replicates the blank check that this Court rejected in
14 Hamdi.

15 JUSTICE SCALIA: Could I come back to Justice
16 Alito's question as to what the normal procedure would be
17 in criminal cases? Suppose you're -- you have a challenge
18 to the makeup of the tribunal in a criminal case. Is it
19 -- is it the normal practice that you would get to raise
20 that challenge? Let's say one of the judges is
21 disqualified for some other reason. Can you normally
22 raise that challenge before the criminal case is filed?

23 MR. KATYAL: I don't believe so.

24 JUSTICE SCALIA: So, there would be nothing
25 different in this situation, if you couldn't raise it

1 until it was final.

2 MR. KATYAL: Justice Scalia, everything is
3 different about this. That is, in your posited
4 hypothetical, there is some law that you know will govern
5 that ultimate question about disqualification or whatever
6 the --

7 JUSTICE SCALIA: Oh, I know.

8 MR. KATYAL: -- matter --

9 JUSTICE SCALIA: It goes to the merits of the
10 issue. I'm just talking about the timing of the issue.

11 MR. KATYAL: Well, I do think that there's an
12 integral relationship to the -- between the two. That is,
13 that the predicate for abstention has always been that
14 Congress, or some other entity, has fairly balanced the
15 rights of both sides. Here, you don't have that
16 fundamental guarantee. Indeed, if you adopt the
17 Government's reading here, the -- they have said that they
18 want to try 75 military-commission cases or so in the
19 first wave. You will then be left with 75 trials that
20 take place without even the most basic question of what
21 the parameters are that these commissions are to operate
22 under.

23 JUSTICE SCALIA: Well, when you say Congress
24 hasn't fairly balanced it, I mean, I guess that depends
25 upon your reading of the statute. If, indeed, you read it

1 the way the Government reads it, they would assert that
2 Congress did consider these military commissions and
3 thought that it was okay to wait until they had completed
4 their work before full review was provided.

5 MR. KATYAL: But --

6 JUSTICE SCALIA: I mean, it's sort of a -- you
7 know, a -- you're running in a circle.

8 MR. KATYAL: Well, that's precisely, Justice
9 Scalia, our argument, that I don't think one can consider
10 the abstention claim -- and this is what I believe both
11 courts below have held -- you can't consider the
12 abstention claim without deciding the underlying merits.
13 And if you believe that the -- that Congress has fairly
14 balanced the rights and are compliant with the UCMJ and
15 the like, then I don't think -- then you're reaching the
16 merits, and there's no abstention holding.

17 So, if I could turn to the merits -- the merits
18 challenges, the first thing I'd like to discuss on -- is
19 question number 1 and whether this military commission
20 states a charge that violates the laws of war. And we
21 believe it doesn't, for two essential reasons.

22 First, the only charge in this case is one of
23 conspiracy. And conspiracy has been rejected as a
24 violation of the laws of war for -- in every tribunal to
25 consider the issue since World War II. It has been

1 rejected in Nuremberg, it's been rejected in the Tokyo
2 tribunals, it's been rejected in the international
3 tribunals for Rwanda and Yugoslavia, and, most
4 importantly, it's been rejected by the Congress of the
5 United States, in 1997 --

6 JUSTICE STEVENS: Mr. Katyal, will you help me?
7 Where is the conspiracy charge in the papers?

8 MR. KATYAL: The charge itself, Justice Stevens,
9 is found at 63(a) of the Petition appendix.

10 JUSTICE STEVENS: Okay, thank you very much.

11 MR. KATYAL: Sure. And --

12 JUSTICE KENNEDY: And suppose you had a tribunal
13 that was properly constituted, as you contend that it
14 ought to be, and then the charge was conspiracy. Would
15 the -- would the courts then have review before the trial
16 proceeded? And let's assume that it's a conspiracy and
17 some other charge. Is there some analog in ordinary
18 criminal proceedings where you challenge, in advance, the
19 validity of the charge?

20 MR. KATYAL: Ordinarily, Justice Kennedy, the
21 answer would be no, you wouldn't challenge the validity of
22 the charge. And, indeed, I think Councilman itself is a
23 -- is a case in which there was a charge at issue, and the
24 question was subject-matter jurisdiction.

25 The reason why this is different, however, is

1 twofold. First, the claim that Mr. Hamdan is making is
2 that conspiracy itself falls entirely out of any
3 authorization of Congress. In Councilman, the question
4 was -- there was an article, Article 134 of the UCMJ,
5 which was a criminal statute, and it had been interpreted
6 to punish drug dealing. And in the case the court said
7 where -- this Court said, "We will defer as to whether the
8 facts showed the requisite amount of drug dealing to
9 violate the Uniform Code."

10 Here, by contrast, Mr. Hamdan's claim is that
11 the conspiracy charge falls entirely outside of the laws
12 of war as a whole.

13 JUSTICE KENNEDY: Could the tribunal interpret
14 the conspiracy charge to mean joint enterprise, which
15 would be closer, at least, to accepted practice in the
16 international tribunals?

17 MR. KATYAL: The charge itself is one of
18 conspiracy. Joint enterprise is, itself, not an
19 independent charge in international tribunals; so you can
20 charge, for example, murder. And your theory, in an
21 international tribunal, of how you get to murder is joint
22 criminal enterprise. But you'd have to charge the
23 underlying violation, itself. Here --

24 JUSTICE KENNEDY: I'm still not sure why, if we
25 think that there is merit to your argument that the

1 tribunal is not properly established anyway, that you --
2 we have to reach the conspiracy charge.

3 MR. KATYAL: If you --

4 JUSTICE KENNEDY: And if we -- and if we think
5 that you're wrong on that, I don't know why that court
6 can't hear the conspiracy argument.

7 MR. KATYAL: Well, there's two different
8 reasons. The tribunal is not authorized, and that the
9 charge doesn't state a violation. Now, even if we assume
10 that the tribunal is authorized and that all of its
11 microprocedures are authorized under the act of Congress,
12 this -- allowing this charge, conspiracy, is to open the
13 floodgates to give the President the ability to charge
14 whatever he wants --

15 JUSTICE SOUTER: Well, that's --

16 MR. KATYAL: -- in a military commission.

17 JUSTICE SOUTER: Mr. Katyal, I mean, that's a
18 good argument for -- from a broad policy, but isn't there
19 a narrower reason? If we assume that the -- that the
20 commission is properly established for some purpose, by
21 definition that purpose is limited. We are not dealing
22 here, as we would in the normal criminal case, with a
23 court of general jurisdiction. If we're dealing with a
24 court of general jurisdiction, we postpone claims like
25 yours til the end, because we say the jurisdiction is so

1 broad, they probably had it. Maybe not, but we can wait.
2 But in a -- in a -- in a court of limited jurisdiction,
3 or a commission of limited jurisdiction, we can't indulge
4 that presumption. And that's why, I thought, your claim
5 that conspiracy is not cognizable can be raised at the
6 beginning, because it's inseparable from the limited
7 jurisdiction of the court. Am I off in left field?

8 MR. KATYAL: You are --

9 JUSTICE SOUTER: Or do you like that answer.

10 MR. KATYAL: -- absolutely correct, Justice --

11 JUSTICE SOUTER: Okay.

12 MR. KATYAL: -- Souter. And, indeed, I would
13 add to that that the conspiracy charge here, Justice
14 Kennedy, is -- the problem with it is compounded by the
15 fact that the tribunal itself is charging a violation of
16 the laws of war, when the military commission has never
17 operated to try violations of terrorism in stateless,
18 territoryless conflicts. That is, it's not just the
19 charge, but it's where the charge operates that we find so
20 central, that the -- that there are two different things --

JUSTICE ALITO: But is it clear that the --

21 MR. KATYAL: -- there's two different problems.

22 JUSTICE ALITO: -- charges against your client
23 could not be amended?

24 MR. KATYAL: They may be amended, yes.

25 JUSTICE ALITO: Then why should we -- why should

1 there be review, before trial, of a charge that could be
2 amended?

3 MR. KATYAL: Be- --

4 JUSTICE ALITO: There could be additional
5 charges added by the time there's a final decision.

6 MR. KATYAL: And the -- Justice Alito, the
7 Government has had, essentially, now 4 years to get their
8 charges together on Mr. Hamdan. At this point, that --
9 you know, what you have before you is the charge. And
10 that -- and they've stuck with this charge, of conspiracy,
11 which is not a violation of the laws of war. And, indeed,
12 the -- and the -- it's not just conspiracy isn't, but that
13 the commission is operating in totally uncharted waters,
14 because it's charging a violation in a stateless,
15 territoryless conflict, something as to which the full
16 laws of war have never applied.

17 Indeed, Justice Alito, all ten people facing
18 military commissions today, all ten indictments charge
19 conspiracy right now. Seven only charge conspiracy.

20 JUSTICE ALITO: Isn't this contrary to the way
21 legal proceedings and appeals are normally handled? You
22 have a -- essentially, a pretrial appeal concerning the
23 validity of the charge that may not even be the final
24 charge.

25 MR. KATYAL: Not in -- not here, because, as, I

1 think, both courts below indicated, this case, and his
2 challenge, falls very much like Abney versus United
3 States. This is a challenge to the lawfulness of the
4 underlying tribunal and the charge that's against them.
5 Indeed, this Court, in Quirin, heard, as its first
6 question, Does the charge state a violation of the laws of
7 war? That was the first thing it said had to be asked.

8 So, I think the -- what we are doing is applying
9 nothing more than the settled practice that has always
10 been the case with respect to military commissions. And
11 it -- in -- the public interest here, again, just as
12 Quirin, I think, requires some limits placed on military
13 commissions, Justice Alito, because, otherwise, if the
14 Government's position is taken as the final word, it'll
15 give the President the ability to essentially create that
16 blank check, for years on end, render a final decision at
17 some point, and then that final decision will then be
18 subject to the truncated review procedures in the DTA,
19 which I don't think is what Congress intended when they
20 changed the language of the bill. Rather, I think what
21 they did was intend that this Court would decide the basic
22 -- apply the basic structural limits on military
23 commissions that have always applied.

24 JUSTICE STEVENS: May I ask this question about
25 the charge? The charge is not just conspiracy in the

1 abstract, it's conspiracy to do specific things, one of
2 which is attacking civilians and civilian objects. And is
3 it clear that the commission would not have -- a military
4 commission would not have jurisdiction to try a conspiracy
5 to armed civilians in a war zone, for example?

6 MR. KATYAL: It is clear, Justice Stevens. That
7 is -- that is precisely what the international tribunals
8 reject. Conspiracy is a standalone offense. One can
9 charge, as a war crime, attacking civilians and the like,
10 as a pure crime, but what you can't do is charge
11 conspiracy. And, indeed, the Congress of the United
12 States, in 1997, when they wrote the War Crimes Act,
13 essentially made that conclusion, because they defined
14 "war crimes" with incorporating a variety of treaties --

15 JUSTICE KENNEDY: Well, suppose that proof were
16 to show that there was very substantial and knowing
17 involvement rendering him basically an accomplice or a
18 principal, but it was -- it was still found under
19 conspiracy. Would international law violate that?

20 MR. KATYAL: If the --

21 JUSTICE KENNEDY: Assume that he's been given
22 notice of -- during the -- during the course of the
23 proceedings as to what the charges specifically are as the
24 proof is adduced.

25 MR. KATYAL: Justice Kennedy, on this particular

1 point, on conspiracy, yes, if -- that you couldn't charge
2 some other offense, like aiding and abetting, and
3 transmute some conspiracy charge into that. Rather, the
4 international law and the laws of the United States
5 recognize you can prosecute him for aiding and abetting as
6 a violation of whatever the specific underlying crime is,
7 like murder or attacking civilians. What you can't do is
8 use the standalone offense of conspiracy. And here's why.
9 Because the standalone offense of conspiracy is rejected
10 by international law, because it's too vague. And this
11 Court has said that the test for a violation of the laws
12 of war is when universal agreement and practice make it a
13 violation. The world rejects conspiracy, because if it's
14 adopted it allows so many individuals to get swept up
15 within its net.

16 Justice Kennedy, aiding and abetting which
17 requires a much closer relationship between the conduct
18 and the individual offender. Conspiracy does not. And
19 so, for example, under the Government's theory, a little
20 old lady in Switzerland who donates money to al Qaeda, and
21 that turns out to be a front for terrorists acts and so
22 on, might be swept up within this broad definition of
23 conspiracy. And that's why international law has so
24 rejected the concept of conspiracy.

25 JUSTICE ALITO: Well, that wouldn't be --

1 JUSTICE KENNEDY: Well, let me put it this way.
2 If we were to find that the Geneva Convention or other
3 settled principles of international law were controlling
4 here, why couldn't we just remand to the D.C. Circuit and
5 let it figure that out? Or let it -- have the tribunal
6 figure it out, in the first instance, assuming the
7 tribunal is properly authorized.

8 MR. KATYAL: Well, it is the role of this Court
9 to confine the tribunal to its lawful jurisdiction. And
10 that's what this Court held in *Quirin*. And that's what we
11 think you should do here. The tribunal itself can't be
12 the judge of its own jurisdiction.

13 JUSTICE KENNEDY: Well, suppose we told the D.C.
14 Circuit that the Geneva Convention or some other body of
15 international law controls, and just remand to it for it
16 to go into all these arguments?

17 MR. KATYAL: Again, we think, at this point,
18 that the public interest is best served by this Court
19 saying that conspiracy doesn't violate -- to set some
20 limits. After all, all -- everyone facing a military
21 commission is facing this charge. Seven are only facing
22 this charge. The Government wants to put 75 of these
23 cases through. And it has taken 4 and a half years since
24 the President's military order --

25 JUSTICE STEVENS: May I ask --

1 MR. KATYAL: -- for this case --

2 JUSTICE STEVENS: -- this question? Supposing
3 the charge had been slightly amended. Instead of saying,
4 "The criminal purpose, and conspired and agreed with Osama
5 bin Laden to commit the following offenses," it said, "It
6 and Osama bin Laden attempted to -- aided and abetted in
7 committing the following offenses." Would it then be --
8 violate the laws of war?

9 MR. KATYAL: If the charge is the specific
10 offenses themselves, not aiding and abetting, Justice
11 Stevens --

12 JUSTICE STEVENS: Well, the specific offenses
13 are attacking civilians and attacking civilian objects.

14 MR. KATYAL: Yes, with respect to this
15 particular claim about conspiracy, that would solve that
16 problem. If you say the charge is attacking civilians,
17 and your theory of proving it is aiding and abetting the
18 murder or the attacking of civilians --

19 JUSTICE STEVENS: And then --

20 MR. KATYAL: -- yes.

21 JUSTICE STEVENS: -- what if the trial judge who
22 looked at the indictment or ruling on a motion to dismiss
23 the indictment, or its equivalent at this time -- said,
24 "Well, I'm going to construe these words 'conspired or
25 agreed' as the substantial equivalent of 'aiding and

1 abetting.'" Would that let the charge stand?

2 MR. KATYAL: That would mix apples and oranges,
3 because "conspiracy" and "aiding and abetting" are two
4 entirely different things. One is a standalone offense.
5 And the one is a theory of how to prove a violation --

6 JUSTICE STEVENS: But the language is "conspired
7 and agreed with." And "agreed with" is pretty close to
8 "tried to do it himself."

9 MR. KATYAL: It's not, Justice Stevens, because
10 it requires a different level of participation, and the
11 liability is entirely different. Because if conspiracy is
12 accepted, you're accepting Pinkerton liability. That's
13 what the Government's own charge said -- the Government's
14 own instruction said, which means that Mr. Hamdan is
15 liable for all the acts of 9/11 and everything al Qaeda
16 has done. "Aiding and abetting," as you are saying,
17 Justice Stevens, in your hypothetical, is a much more
18 closely tethered theory of liability, requiring a higher
19 level of individual culpability and a totally different
20 level of punishment.

21 JUSTICE SCALIA: As I recall the sixth
22 amendment, you're entitled to know the charge against you.
23 And you're saying that the charge of conspiracy is not
24 the charge of aiding and abetting.

25 MR. KATYAL: That is correct.

1 If I could turn to a second argument for why we
2 believe this military commission is impermissible, and
3 that is that it defies the Uniform Code of Military
4 Justice. The Uniform Code of Military Justice, in Article
5 36, sets minimal ground rules for military justice, writ
6 large. And it says that the President can't act in ways
7 that are contrary to, or inconsistent with, this chapter.

8 As Judge Robertson found, already we know that has
9 happened here. Mr. Hamdan has been kicked out of his
10 criminal trial right at the get-go. And the Government's
11 position is that they don't have to abide by the UCMJ,
12 which is a further reason, of course, why we believe that
13 abstention isn't appropriate, because it defies the rules
14 set out by Congress.

15 We're asking this Court to apply the minimal
16 rules of the UCMJ to the military commissions that operate
17 at Guantanamo Bay, because Article 2 of the UCMJ has been
18 extended, and its protections now extend to Guantanamo Bay
19 and protect those who are detained there. And one of its
20 protections is the right to be present, and that has been
21 fundamentally violated by -- already.

22 If I could --

23 JUSTICE SCALIA: You acknowledge the existence
24 of things called commissions. Or don't you?

25 MR. KATYAL: We do.

1 JUSTICE SCALIA: I mean --

2 MR. KATYAL: Absolutely.

3 JUSTICE SCALIA: What is the use of them if they
4 have to follow all of the procedures required by the UCMJ?
5 I mean, I thought that the whole object was to have a
6 different procedure.

7 MR. KATYAL: Justice Scalia, that's what the
8 Government would like you to believe. I don't think
9 that's true. The historical relationship has been that
10 military commissions in courts-martial follow the same
11 procedures. That's what General Crowder said when he
12 testified in 1916, and what this Court has quoted from his
13 testimony. It's what every military treatise says.

14 Now, to be clear, our position is not that
15 military commissions must follow all the rules for courts-
16 martial. Not at all. They must require -- must follow
17 the minimal baseline rules set in the Uniform Code of
18 Military Justice by Congress. They can depart from the
19 panoply of rules, the 867 pages of rules in the Manual for
20 Courts-Martial, so long as they don't depart from the UCMJ
21 itself. Congress has answered this question, Justice
22 Scalia, in Article 36, by saying the President does have a
23 wide ability to depart from the rules, but he can't depart
24 from the fundamentals of the UCMJ. And, indeed, that's
25 what --

1 JUSTICE KENNEDY: What fundamental, other than
2 personal presence, are you concerned with in this case?

3 MR. KATYAL: Well --

4 JUSTICE KENNEDY: Or is that a --

5 MR. KATYAL: Well, we do believe that the --
6 that the entire panoply of UCMJ protection --

7 JUSTICE KENNEDY: I understand --

8 MR. KATYAL: -- is involved.

9 JUSTICE KENNEDY: -- the nature -- the
10 appointing authority and so forth. But so far as the
11 right of a defendant at the proceeding --

12 MR. KATYAL: Well --

13 JUSTICE KENNEDY: -- just right to be present?
14 Is there a requirement of prompt convening of the
15 proceedings?

16 MR. KATYAL: Absolutely. There's an Article 10
17 right for speedy charges. There is also an Article 67
18 right for independent Court of Appeals for the Armed
19 Forces review, which is something that is not guaranteed
20 by this commission. And so -- and, indeed, was a
21 predicate for this Court's abstention holding in
22 Councilman.

23 So, we do believe that there are -- that these
24 fundamental rights apply. And, of course, this is just
25 all, Justice Kennedy, default rules. If the -- if the

1 Congress wants to pass a law to exempt military
2 commissions from Article 36, that -- they are free to do
3 so, and that will then be -- that'll then be --

4 JUSTICE BREYER: But if you have to --

5 MR. KATYAL: -- a simpler case --

6 JUSTICE BREYER: -- approximately the same
7 procedures, what's the point of having a military
8 commission? I think that was implicit in Justice Scalia's
9 question. So, if you go back -- Revolution, Seminoles,
10 Modoc, Mexican War, World War II -- why have them?

11 MR. KATYAL: Well, we had them before, because
12 -- we had them before, because we couldn't find military
13 court-martial jurisdiction. They were situations of
14 absolute necessity. The reason was that the Articles of
15 War, for one reason or another, didn't cover particular
16 individuals. And, therefore, we needed to craft a
17 separate procedure. But, whenever we did so, Justice
18 Breyer, we always said that court-martial rules apply.

19 In 1847, which is really the first instance of a
20 military commission, because General Washington operated
21 under statutory charges to try spying -- but in 1847, we
22 applied court-martial rules by General Order Number 1. In
23 the Civil War, we applied General Order Number 1 again,
24 and it said that it would -- that we needed to apply to
25 court-martial -- court-martial rules, because, otherwise,

1 abuses would arise. And, essentially, the worry is one of
2 forum shopping, that you give the President the ability to
3 pick a forum and define the rules. And that -- and that
4 fundamentally open-ended authority is what I believe this
5 Court rejected in Hamdi, and it's -- and when it rejected
6 the blank check.

7 JUSTICE SCALIA: Mr. Katyal, you've addressed
8 the Detainee Treatment Act in its -- in its capacity as,
9 arguably, removing jurisdiction. Might not the Act also
10 function as a retroactive approval of what the President
11 has done?

12 MR. KATYAL: Certainly, there's nothing in the
13 text of the Act itself -- and even -- I know this isn't
14 relevant for you, but for other individuals on the Court
15 -- there's nothing in the legislative history, or even the
16 post -- even the brief filed by Senators Graham and Kyle,
17 which suggest, in any way, that this was ratification.

18 But suppose it were, Justice Scalia. Suppose it
19 did ratify some sort of military commission. I don't
20 believe that it authorized this military commission with
21 this charge, conspiracy, in this conflict, a stateless,
22 territoryless conflict, with these procedures, procedures
23 that violate the UCMJ.

24 So, it may be that they authorized something.
25 But even that, I think, may be a bit hard, because, after

1 all, what they did was authorize, as Justice Alito said,
2 certain challenges to military commissions.

3 JUSTICE KENNEDY: Do you think, as a minimum,
4 that they authorized a military commission?

5 MR. KATYAL: They -- I think it's perfectly --
6 well, it's a -- it's a -- it is a possible reading to say
7 the DTA authorized some sort of military commission. The
8 text doesn't say so. It is, of course, addressed to the
9 jurisdiction of this Court, and not in any way to the --
10 to the -- to the -- to the underlying merits.

11 I do think that the -- that there is a -- you
12 know, a conceivable argument. However, the reason why I
13 think this Court, if it did decide to reach that ultimate
14 question, should reach it against the Government, is that
15 that kind of back-door kind of -- you know, approval by
16 inference has never been sufficient when it comes to
17 authorizing military jurisdiction, in the most awesome
18 powers of the Government, to dispense life imprisonment
19 and death. That is, I think, a clearer statement would be
20 required in this unique setting, because we aren't talking
21 about, after all, minor things. We're talking about the
22 most grave powers of our Government, the power to dispense
23 life imprisonment and death. And I certainly don't think
24 Congress, on the basis of a few hours of debate, intended
25 to ratify this entire apparatus.

1 If I could turn to question 2 and the Geneva
2 Conventions, I'd like to start with Common Article 3 and
3 its minimal baseline requirements that a regularly
4 constituted court be set up, and one that dispense -- that
5 affords the rights indispensable to civilized peoples.

6 As Judge Williams found, below, that article
7 does apply to Mr. Hamdan, and protects him. It's the most
8 minimal rudimentary requirements that the United States
9 Senate adhered to when it ratified the convention in 1955.

10 And those requirements --

11 JUSTICE SCALIA: It depends on what you mean by
12 "regularly constituted." In your brief, I gather you --
13 what you meant is that a court that was pre-existing. It
14 doesn't necessarily mean that. It just -- it could mean
15 one that was set up for the occasion, but was set up for
16 the occasion by proper procedures. Wouldn't that be a
17 "regularly constituted court"?

18 MR. KATYAL: Well, I think the way that it has
19 been interpreted, "regularly constituted court," is not an
20 ad hoc court with ad hoc rules. So, that is to say,
21 Justice Scalia, if they resuscitated --

22 JUSTICE SCALIA: Well, I mean, not ad hoc in
23 that sense, "I'm creating one court for this defendant,
24 another court for the other defendant," but setting up for
25 the occasion, and for trying numerous defendants, a new

1 court. I don't think that, just because it's a new court,
2 you can say that it's not a "regularly constituted court."

3 MR. KATYAL: So long as it is, (a) independent
4 of the executive, which is what it's been interpreted to
5 be, and, (b) affords the rights known to civilized
6 peoples. And here, we think this military commission
7 strays from both of those -- from both of those. It's not
8 independent of the executive --

9 JUSTICE GINSBURG: You've mentioned -- you've
10 mentioned that the defendant has no right to appear before
11 the tribunal. What are the other rights recognized by all
12 civilized people that these tribunals do not guarantee?

13 MR. KATYAL: So far, Justice Ginsburg, all that
14 we have before -- you know, I think all that's happened is
15 the right to be present. To look to what other rights are
16 guaranteed by Common Article 3, you can look to Additional
17 Protocol 1 of the Geneva Conventions, which specifies
18 rights like appeal rights and the like. But they're the
19 most minimal baseline rights. We're not talking about,
20 you know, Miranda rights or something like that. We're
21 talking about just a set of core ideas that every country
22 on the world -- every country in the world is supposed to
23 dispense when they create war-crimes trials. And, even
24 that minimal standard, the Government says they don't want
25 to apply here.

1 And why we think this is enforceable is that Mr.
2 Hamdan is being prosecuted in the name of the laws of war.
3 And he has the right to invoke the Geneva Conventions
4 defensively as a -- as a way to constrain the tribunal, to
5 say that they can't --

6 JUSTICE KENNEDY: How do you want us to view his
7 status? Do we accept the Government's submission that
8 there's probable cause to believe that he was not of -- in
9 a formal uniform, that he was not a formal combatant, but
10 that he was aiding and abetting, or conspiring, with al
11 Qaeda? Can we accept that, that there's probable cause
12 for that?

13 MR. KATYAL: No, Justice Kennedy, for two
14 reasons.

15 JUSTICE KENNEDY: I mean, in -- particularly
16 based on the CSRT hearing?

17 MR. KATYAL: The CSRT, to my knowledge, never
18 asked any of those --

19 JUSTICE KENNEDY: But you have to --

20 MR. KATYAL: -- questions about --

21 JUSTICE KENNEDY: -- you have to give us --

22 MR. KATYAL: -- uniforms or --

23 JUSTICE KENNEDY: -- a beginning point. You
24 have to give us a beginning point.

25 MR. KATYAL: We would love a beginning point.

1 And the beginning point is an Article 5 hearing, which is
2 required by Army Regulation 190-8, in Article 5 of the
3 Geneva Conventions. The CSRT in no way suffices to do
4 that. It didn't ask those questions about, Are -- you
5 know, uniforms, and the like, to my knowledge. Of course,
6 the CSRT isn't in the record, so we don't really know.
7 The Government said, below, that it had, quote, "zero
8 effect on this case," and didn't introduce it.

9 But, be that as it may, suppose that the CSRT
10 did decide that Mr. Hamdan is an enemy combatant. Justice
11 Kennedy, most enemy combatants are prisoners of war. So,
12 if anything, all the CSRT did was affirm Mr. Hamdan's
13 separate claim, apart from Common Article 3, to the full
14 protection of the Geneva Conventions.

15 If I --

16 JUSTICE SOUTER: And that would require a
17 determination by a different tribunal that he was not a
18 POW, in default of which he would be treated as a POW and
19 be entitled to a court-martial? Is that the point?

20 MR. KATYAL: Yes, Justice --

21 JUSTICE SOUTER: Yes.

22 MR. KATYAL: -- Souter.

23 If I could reserve the balance of my time.

24 JUSTICE STEVENS: Yes, you certainly may.

25 General Clement.

1 ORAL ARGUMENT OF PAUL D. CLEMENT

2 ON BEHALF OF RESPONDENTS

3 GENERAL CLEMENT: Justice Stevens, and may it
4 please the Court:

5 The executive branch has long exercised the
6 authority to try enemy combatants by military commissions.
7 That authority was part and parcel of George Washington's
8 authority as Commander in Chief of the Revolutionary
9 Forces, as dramatically illustrated by the case of Major
10 Andre. And that authority was incorporated into the
11 Constitution.

12 Congress has repeatedly recognized and
13 sanctioned that authority. Indeed, each time Congress has
14 extended the jurisdiction of the court-martials, Congress
15 was at pains to emphasize that that extension did not come
16 in derogation of the jurisdiction of military commissions.
17 And in its most recent action, Congress clearly did not
18 operate as somebody who viewed the military commissions as
19 ultra vires. They offered no immediate review, and no
20 review at all for charges resulting in a conviction of
21 less than 10 years.

22 Of course, even more clearly, Congress's most
23 recent action made it clear that the courts no longer have
24 jurisdiction over pre-enforcement challenges. And it's to
25 that I'd like to turn first.

1 JUSTICE STEVENS: But let me just ask this
2 question, Mr. Clement. What sources of law have the
3 commissions generally enforced over the years, beginning
4 with George Washington and so forth? Just Army
5 regulations or American law or foreign law? What are the
6 basic sources of law that they can enforce?

7 GENERAL CLEMENT: Well, what I would say,
8 Justice Stevens, is, they basically enforce the laws of
9 war. At times, there are obviously United States sources
10 that are relevant to that. Obviously, if you have a field
11 manual or something that says specifically that certain
12 offenses are triable under the law of war, that would be
13 very instructive in the tribunals. In certain situations
14 that I don't think are principally relevant here, you
15 might also have war courts that were set up to deal with
16 municipal offenses. But that's not what we have. And
17 then, they would look to U.S. law.

18 JUSTICE STEVENS: And what we have here is
19 enforcement of the laws of war.

20 GENERAL CLEMENT: That is right. And, of
21 course, in this context, you have a controlling executive
22 act in the form of the regulations themselves that make it
23 clear that the executive views things like conspiracy to
24 violate the laws of war to be actionable under the laws of
25 war.

1 Now --

2 JUSTICE STEVENS: If -- just one hypothetical.
3 Assume that the laws of war do not prohibit conspiracy.
4 Just assume -- I know you disagree with it. Could the
5 President, by his action, add conspiracy as a triable
6 offense by a commission?

7 GENERAL CLEMENT: I think if you did that,
8 Justice Stevens, it would present the very difficult
9 question that this Court has never squarely addressed,
10 which is, Does the President have some authority to try,
11 by military commission, beyond that which Congress has
12 joined him in? Obviously, Article 21 of the UCMJ gives
13 Congress's sanction to any military commissions, to the
14 extent they try crimes that are triable by the law of war.
15 So, in that sense, I think, as long as this Court
16 construes consistent with over 100 years of United States
17 tradition and history, the conspiracy to commit a law -- a
18 violation of the law of war is a war crime, then you don't
19 have to reach that --

20 JUSTICE STEVENS: Well, if --

21 GENERAL CLEMENT: -- difficult issue.

22 JUSTICE STEVENS: It's easy if it is a war
23 crime. I'm trying to wrestle with the question of, If we
24 concluded that it were not, and just -- and I'm asking --
25 can the question add an additional crime that the

1 commission could try?

2 GENERAL CLEMENT: I think he --

3 JUSTICE STEVENS: You think he could.

4 GENERAL CLEMENT: I think we would take the
5 position that he could, as a matter of pure constitutional
6 power. I don't think, though -- he is not active in this
7 case on the theory that conspiracy is outside of the laws
8 of war. He's acted inconsistent with 150 years of
9 tradition.

10 JUSTICE STEVENS: So, the basic position you're
11 asserting is that we have -- that the -- this commission
12 intends to try a violation of the laws of war. And do the
13 laws of war then have any application to the procedures
14 that they have to follow?

15 GENERAL CLEMENT: Yes. I mean, in the sense
16 that I think that if there were -- there -- the other side
17 is certainly able to argue, before the military
18 commissions, that certain procedural provisions or the
19 like are prohibited by the law of war or give them some
20 greater entitlement. Now, as this Court has recognized in
21 cases like Madsen, I don't think that the law of war is --
22 you know, extensively regulates procedure. And, indeed,
23 as the Madsen Court recognized, Congress's approach to
24 military commissions has been radically different than its
25 approach to court-martials. In court-martials, they

1 regulate every jot and tittle of the procedure. And if
2 the UCMJ and its provisions for court-martials applies,
3 then the defendants are going to get not just Miranda, but
4 Miranda plus, and a whole panoply of rights.

5 If, on the other hand, this Court follows the
6 precedents in Madsen, it will recognize that only those
7 nine provisions of the UCMJ that expressly reference
8 military commissions will apply, and the rest is left to a
9 much more common-law, war-court approach, where there's
10 much greater flexibility.

11 JUSTICE SOUTER: What do you -- what do you make
12 of the argument that Mr. Katyal just alluded to, that if
13 you take the -- as you do -- take the position that the
14 commissions are operating under the laws of war, you've
15 got to accept that one law of war here is the Geneva
16 Convention right to a presumption of POW status unless
17 there is a determination by a competent tribunal
18 otherwise, with the -- among other things, the rights that
19 that carries. I mean, how -- do you -- why not -- why
20 don't you go from the frying pan into the fire, in effect,
21 when you take the position that the laws of war are what
22 the tribunal is applying?

23 GENERAL CLEMENT: Well, Justice Souter, I don't
24 think there's any frying pan effect or fire effect,
25 precisely because what you have with respect to the claim

1 that the Geneva Conventions applies -- okay, that claim
2 could be brought to the military commissions, but they
3 could adjudicate it and say that the Geneva Conventions
4 don't apply here, for any number of reasons. And I think
5 that this idea that there needs to be an Article 5
6 proceeding --

7 JUSTICE SOUTER: Well, but you're -- are you
8 saying that the -- that the commission will adjudicate POW
9 status under the Geneva Convention? In other words, are
10 you stipulating that the Geneva Convention does apply, so
11 that the only argument left between you and Mr. Katyal
12 would be whether the commission itself was a competent
13 tribunal to make the determination? Is that your
14 position?

15 GENERAL CLEMENT: Well, I don't think so,
16 Justice Souter. I mean, I think the disagreement is more
17 fundamental than that. What I would say is, a claim could
18 be brought in the tribunal that the Geneva Conventions
19 apply. Now, just because the Geneva Convention does apply
20 --

21 JUSTICE SOUTER: Well, do you agree that it
22 applies as part of the law of war?

23 GENERAL CLEMENT: Well, I don't think,
24 consistent with the position of the executive, that the
25 Geneva Convention applies in this particular conflict.

1 JUSTICE SOUTER: But that, I guess, is the
2 problem that I'm having. For purposes of determining the
3 domestic authority to set up a commission, you say, the
4 President is operating under the laws of war recognized by
5 Congress, but for purposes of a claim to status, and,
6 hence, the procedural rights that go with that status,
7 you're saying the laws of war don't apply. And I don't
8 see how you can have it both ways.

9 GENERAL CLEMENT: We're not trying to have it
10 both ways, Justice Souter. The fact that the Geneva
11 Conventions are part of the law of war doesn't mean that
12 the Petitioner is entitled to any protection under those
13 conventions. And --

14 JUSTICE SOUTER: But he is entitled to make a
15 claim under them to determine whether, on the merits, he
16 is entitled. Isn't that entailed by your position?

17 GENERAL CLEMENT: I think it is, Your Honor, but
18 let me just say that that's a claim that he could have
19 brought before the CSRTs, and that is a claim he can still
20 bring before the military commissions.

21 JUSTICE KENNEDY: But I have --

22 GENERAL CLEMENT: Lawful --

23 JUSTICE KENNEDY: -- I have -- I have trouble
24 with the argument that -- insofar as he says there is a
25 structural invalidity to the military commission, that he

1 brings that before the commission. And the historic
2 office of habeas is to test whether or not you are being
3 tried by a lawful tribunal. And he says, under the Geneva
4 Convention, as you know, that it isn't.

5 GENERAL CLEMENT: Well, and we disagree with
6 those claims. We think that most of those claims -- to
7 the extent that he thinks some procedural requirement is
8 provided either by the Geneva Convention, if applicable --
9 but we don't think it would be -- and that argument would
10 be made; but, if by some other, sort of, principle of the
11 law or that a procedure is required --

12 JUSTICE KENNEDY: Well, it's not some --

13 GENERAL CLEMENT: -- he could -- he could make
14 that argument.

15 JUSTICE KENNEDY: -- procedural -- it's the
16 structural requirement of the composition and the -- and
17 the appointing origins of the court.

18 GENERAL CLEMENT: Well, again, I think he could
19 -- he could bring that claim. I don't think it would be
20 well taken by the -- by the commission. I don't think
21 it's a valid claim. I also don't think, if -- there's any
22 reason why that claim has to be brought at this stage in
23 the procedure. We think that abstention --

24 JUSTICE SCALIA: I thought --

25 GENERAL CLEMENT: -- principles --

1 JUSTICE SCALIA: I thought we -- I thought we
2 established, earlier -- somebody told me -- that, in the
3 normal criminal suit, even if you claim that the forum is
4 not properly constituted, that claim is not adjudicated
5 immediately, it's adjudicated at the conclusion of the
6 proceeding.

7 GENERAL CLEMENT: Well, of course that's true.
8 And --

9 JUSTICE SCALIA: We --

10 GENERAL CLEMENT: -- also --

11 JUSTICE SCALIA: We don't -- we don't intervene
12 on habeas corpus when somebody says that the panel is
13 improperly constituted. We wait until the proceeding's
14 terminated, normally.

15 GENERAL CLEMENT: That's exactly right, Justice
16 Scalia. And this Court made clear that it doesn't
17 intervene --

18 JUSTICE KENNEDY: Well, is --

19 GENERAL CLEMENT: -- even when a U.S. --

20 JUSTICE KENNEDY: -- is that -- is that true?
21 If a group of people decide they're going to try somebody,
22 we wait until that group of people finishes the trial
23 before the Court -- before habeas intervenes to determine
24 the authority of the tribunal to hold and to try?

25 GENERAL CLEMENT: Well, with respect, Justice

1 Kennedy, this isn't a "group of people." This is the
2 President invoking an authority that he's exercised in
3 virtually every war that we've had. It's something that
4 was recognized in the Civil War, something in the World
5 War II that this Court approved.

6 JUSTICE KENNEDY: I had thought that the
7 historic function of habeas is to -- one of its functions
8 -- is to test the jurisdiction and the legitimacy of a
9 court.

10 GENERAL CLEMENT: Well, but -- habeas corpus
11 generally doesn't give a right to a pre-enforcement
12 challenge. And this Court, for example, in Schlesinger
13 against Councilman --

14 JUSTICE SCALIA: To a forum that is prima facie
15 properly constituted. I mean, it -- this is not a -- you
16 know, a necktie party. Where it parades as a court, and
17 it's been constituted as a court, we normally wait until
18 the proceeding's completed.

19 GENERAL CLEMENT: Well, that's exactly right,
20 Justice Scalia. And Congress has spoken to this precise
21 issue in the DTA. Whatever was the question about
22 applying --

23 JUSTICE STEVENS: But, Mr. Clement --

24 GENERAL CLEMENT: -- judge made --

25 JUSTICE STEVENS: -- if you assume that the laws

1 of war apply, and perhaps the treaty applies, isn't the
2 issue whether this is a "group of people," on the one
3 hand, or a "regularly constituted court," on the other?

4 GENERAL CLEMENT: Well, I mean, I don't really
5 think there's any serious dispute about which it is. I
6 mean, this is something that is --

7 JUSTICE STEVENS: Well, they argue very
8 strenuously that this is really just a "group of people"
9 --

10 GENERAL CLEMENT: Well -- and if this Court --

11 JUSTICE STEVENS: -- because it's not a
12 "regularly constituted court" within the meaning of the
13 treaty.

14 GENERAL CLEMENT: Well, Justice Stevens, I think
15 that even if a court might have had jurisdiction to hear
16 just that issue and --

17 JUSTICE STEVENS: Yes.

18 GENERAL CLEMENT: -- nothing else before the
19 DTA, Congress has now spoken, and Congress has made it
20 clear that, whatever else is true, these military
21 commission proceedings can proceed, and exclusive review
22 can be done after the fact, after conviction, in the D.C.
23 Circuit.

24 JUSTICE SOUTER: Exclusive review of what? I
25 don't see that the -- that the -- that the DTA preserves a

1 right to review of the very issue that they want to raise
2 here.

3 GENERAL CLEMENT: Well, I think I disagree, at
4 least --

5 JUSTICE SOUTER: They can -- they can -- they
6 can review their enemy combatant determination. They can
7 review the consistency of the procedure of the court with
8 whatever law applies. But I don't see that there is a
9 clear reservation of right to get to the very basic
10 question of the -- of the constitution of the court
11 itself.

12 GENERAL CLEMENT: Oh, I disagree, Justice
13 Souter. E(3) specifically preserves the claim that the
14 commissions were not, and the procedures were not,
15 consistent with the Constitution and laws of the United
16 States --

17 JUSTICE SOUTER: So, you're reading --

18 GENERAL CLEMENT: -- to the extent --

19 JUSTICE SOUTER: -- procedures --

20 GENERAL CLEMENT: -- they're pledgeable.

21 JUSTICE SOUTER: -- to encompass the very act
22 constituting the court itself? Is that the Government's
23 -- I mean, are you going to go on the record --

24 GENERAL CLEMENT: Sure, if they want to come in
25 and argue that there is a violation of Article 21 of the

1 UCMJ, or Article 36 of the UCMJ, after their conviction,
2 they are perfectly free to do that --

3 JUSTICE BREYER: It's hard for me to --

4 GENERAL CLEMENT: -- under E(3), but --

5 JUSTICE BREYER: -- see that with the language
6 of this, because the language that you're talking about
7 refers to "such standards." "Such standards and
8 procedures" refer to the preceding paragraph, which is
9 standards and procedures specified in the military order
10 referred to in subparagraph (a). That military order is
11 an order of August 31st which talks about procedures.
12 It's not the order that sets up the commission, which is
13 an order issued the preceding November. Rather, this
14 language seems to mean what it says.

15 But even if it didn't -- even if it didn't,
16 wouldn't your reading raise a terrifically difficult
17 constitutional question, if not this case, in cases that
18 are pending right now, where prisoners in Guantanamo are
19 claiming that they have not yet had the CSRT hearing,
20 they're claiming, one or two, "We had it, and we're still
21 here. We won, but we're still here." They're claiming,
22 "We don't want to be sent back to Qatar." And they're
23 claiming, some, that they were tortured. All right?

24 Now, if we could avoid the case with your
25 interpretation here, and avoid that constitutional

1 question -- we can't avoid it. So, my question is, one,
2 How is what you're arguing consistent with the language I
3 quoted? And, two, How could it, if we accepted your
4 interpretation, possibly avoid the most terribly difficult
5 and important constitutional question of whether Congress
6 can constitutionally deprive this Court of jurisdiction in
7 habeas cases?

8 GENERAL CLEMENT: Well, Justice Breyer, let me
9 answer both pieces of that. I certainly think that such
10 standards and procedures to reach the final decision are
11 consistent with the Constitution and laws of the United
12 States. There is a reference to the first military order.
13 I believe there's also a reference to any other
14 subsequent orders implementing that. All of that,
15 together, implements the November 13th order. So, I would
16 think that there is -- it is very easy to read this
17 language to allow any challenge that is being brought
18 here, with the possible exception of the treaty challenge.

19 JUSTICE GINSBURG: Would you --

20 GENERAL CLEMENT: And --

21 JUSTICE GINSBURG: Would you --

22 GENERAL CLEMENT: -- I think the language is
23 capacious enough if the treaty challenge is what you
24 thought was very important, the D.C. Circuit, at the end
25 of the day, could decide whether or not there is a

1 requirement that the treaty challenge be brought.

2 JUSTICE GINSBURG: General Clement, if you can
3 straighten me out on the piece that you read about
4 "consistent with the Constitution and laws of the United
5 States," I thought that it was the Government's position
6 that these enemy combatants do not have any rights under
7 the Constitution and laws of the United States.

8 GENERAL CLEMENT: That is true, Justice
9 Ginsburg. And Congress, in this Act, was very careful to
10 basically write without prejudice to the answer to that
11 question. So, we would have that argument. The other
12 side would have their argument. What this Act provides
13 that we don't have any argument on, that was something
14 that wasn't before this Court, say, in the Rasul decision,
15 was the fact that the procedures that the military has
16 promulgated are going to be enforceable under this
17 exclusive review provision. So, there at least will be
18 some law to apply now under this exclusive review
19 provision.

20 JUSTICE GINSBURG: But what --

21 GENERAL CLEMENT: So, that --

22 JUSTICE GINSBURG: But how will the question,
23 whether the laws in the United -- and Constitution -- of
24 the United States, whether these petitioners have any
25 claim to state under the laws and Constitution of the

1 United States? Because as I read -- the review that's
2 provided doesn't open up that question. It's a very
3 narrow review that's given to the D.C. Circuit.

4 GENERAL CLEMENT: Well, Justice Ginsburg, I
5 certainly think that Petitioner will be up there arguing
6 that Eisentrager is no longer good law, not just as a
7 statutory matter, as a constitutional matter, and those
8 arguments will be made. Without respect to that,
9 certainly the arguments about Article 21 and Article 36,
10 that are very much at the centerpiece of their argument
11 here today, would also be available to the D.C. Circuit.
12 And if there's some constitutional requirement that that
13 review be slightly broader or slightly narrower, that
14 seems like something that can better be adjudicated in the
15 context of a concrete case at the point that that review
16 is sought.

17 JUSTICE GINSBURG: Is there --

18 GENERAL CLEMENT: But one thing I --

19 JUSTICE GINSBURG: Is there -- is there any
20 review in this Court, following the D.C. Circuit, either
21 the original classification or the conviction -- is there
22 -- does this Court have any part in the scheme?

23 GENERAL CLEMENT: Yes, Justice Ginsburg, there
24 would be 1254 review. Once the provision is in the Court
25 of Appeals, then the case would be under -- under E(3),

1 the review provision -- then the case would be in the
2 Court of Appeals for purposes of this Court's 1254
3 jurisdiction.

4 JUSTICE BREYER: I still don't see the answer to
5 my question, which had two parts. As to the language, (a)
6 which is what's cross-referenced, refers to Military
7 Commission Order Number 1, August 31, 2005, or any
8 successor military order. The order, as I understand it,
9 that's created the commission by the President, is an
10 order which was November 13, 2001, not a successor to
11 2005.

12 But leaving the language aside, what I'm mostly
13 interested in, because I think your interpretation
14 inevitably creates it, is, What is the answer to the claim
15 that it is not constitutional for Congress, without
16 suspending the writ of habeas corpus, to accomplish the
17 same result by removing jurisdiction from the courts in a
18 significant number of cases, even one?

19 GENERAL CLEMENT: Well, Justice Breyer, let me
20 answer that question in two parts, which is to say that I
21 think that this case, and most of the cases, don't raise a
22 serious Suspension Clause problem, for the simple reason
23 that I think deferring review or channeling it to the
24 Court of Appeals does not amount to a suspension.

25 JUSTICE BREYER: I listed four sets of cases

1 that I don't see how you could possibly shoehorn into E(2)
2 and E(3), even if you are able to shoehorn this one. And
3 my language was designed to make you see how difficult it
4 is.

5 GENERAL CLEMENT: Well, but --

6 JUSTICE BREYER: But I listed four that I don't
7 see how anybody could shoehorn into that.

8 GENERAL CLEMENT: But, with respect, Justice
9 Breyer, I think that cuts both ways, because I don't think
10 there's any particular interpretation of these provisions
11 on the table before this Court that's going to eliminate
12 those potential Suspension Clause issues.

13 JUSTICE SOUTER: But the whole point, it seems
14 to me, of the argument, is, Should we not consider the
15 significance of those very questions, because, if we
16 don't, as Justice Breyer said, at the end of the day, as
17 you describe it, we will have to face the serious
18 constitutional question of whether Congress can, in fact,
19 limit jurisdiction without suspending habeas corpus? The
20 whole point is to grapple with them now, and to -- and to
21 treat them in a way that allows for this adjudication, so
22 that we avoid this constitutional difficulty tomorrow.

23 GENERAL CLEMENT: Well, Justice Souter, first of
24 all, I would think general principles of constitutional
25 avoidance would say deferring the constitutional question

1 is a good thing, not a bad thing. The one point I would
2 --

3 JUSTICE SOUTER: We may not have to reach the
4 constitutional question. That's what -- that's what
5 constitutional avoidance hopes for.

6 GENERAL CLEMENT: Right. But I don't see any
7 argument on the other side that's really a constitutional
8 avoidance argument. Their principal argument is --

9 JUSTICE BREYER: No, the argument --

10 GENERAL CLEMENT: -- don't apply this --

11 JUSTICE BREYER: -- the other side -- if you
12 want the argument, the other side is, there are several
13 hundred cases already pending. And, therefore, if we
14 accept your interpretation, we know we have to reach the
15 constitutional argument. If we reject your
16 interpretation, since all these cases, several hundred of
17 them, are already there, it might be: new ones won't be
18 brought. But, of course, "new ones won't" might. And,
19 therefore, what is your answer to --

20 GENERAL CLEMENT: Well --

21 JUSTICE BREYER: -- the question that this is
22 unconstitutional -- if not here, in other places?

23 GENERAL CLEMENT: And, Justice Breyer, what I
24 would say is that our interpretation basically provides
25 for pending claims exactly the way that Congress did.

1 With respect to any future claims that might be brought,
2 there may or may not be a constitutional question.

3 And if I could turn to our interpretation of the
4 DTA, it's the only one that really, I think, reads the
5 various provisions in the statute in harmony. Now, this
6 Court's decision in Bruner, and in a host of other cases,
7 says that when Congress eliminates jurisdiction, pending
8 cases fall, unless there's a savings clause. The closest
9 thing to a savings clause in the statute, in E(1), is the
10 provision that says "except pursuant to Section 1005."

11 And I think that's important, because if Congress wanted
12 to put in a savings clause of the kind that this Court
13 seems to refer to in Bruner, and that would certainly be
14 consistent with Senator Levin's intent, it would have been
15 very easy. Instead of saying "except for Section 1005,"
16 they could have said "except for pending cases."

17 The choice is important, because what does
18 Section 1005 provide? It provides the exclusive review in
19 E(2) and E(3). And then, H(2), in very complementary
20 fashion, says that, just in case there's any question
21 about it, those provisions on E(2) and E(3) apply to
22 pending claims governed by those sections. I think every
23 word's important. It doesn't say "pending cases," it says
24 "pending claims."

25 Congress understood two important things. There

1 were no cases currently pending under E(2) and E(3),
2 because Congress was creating E(2) and E(3). It also knew
3 that most of the cases before the D.C. Courts had some
4 claims that were pure challenges to the final cert
5 determination and other claims. So, what H(2) says is --
6 H(2) says that, to the extent those cases involve claims
7 governed by E(2) and E(3), they are preserved under E(2)
8 and E(3); otherwise, this -- there's no savings clause
9 that covers those claims, and their jurisdiction is
10 removed. The --

11 JUSTICE STEVENS: May I ask --

12 GENERAL CLEMENT: -- retroactivity aspect -- I'm
13 sorry.

14 JUSTICE STEVENS: May I just ask this, to
15 clarify? When they do take some jurisdiction of some
16 habeas corpus claims, do you defend that, in part, as a
17 permissible exercise of the power to suspend the writ, or
18 do you say it is not a suspension of the writ?

19 GENERAL CLEMENT: I think both, ultimately. I
20 mean, I don't think --

21 JUSTICE STEVENS: Well, it can't be both.

22 [Laughter.]

23 GENERAL CLEMENT: Well, I -- I don't see why I
24 can't have alternative arguments here, as for anywhere
25 else, Justice Stevens. We think that Congress, in this

1 action, did not do anything that triggers the suspension
2 of the writ. But if you think that --

3 JUSTICE STEVENS: Well, that --

4 GENERAL CLEMENT: -- it did, I think that --

5 JUSTICE STEVENS: -- that's your position, they
6 did not suspend the writ. You're not arguing that it's a
7 justifiable suspension of the writ.

8 GENERAL CLEMENT: Well, I think the terms of the
9 Suspension Clause would be satisfied here because of the
10 exigencies of 9/11. If the question is, Am I taking the
11 position that Congress consciously thought that it was
12 suspending the writ? then I would say no.

13 JUSTICE STEVENS: Okay.

14 GENERAL CLEMENT: And if you think, in order for
15 there be to a -- to be a valid suspension, Congress has to
16 do it consciously, then I think you could see why the
17 arguments are mutually exclusive. My view would be that
18 if Congress, sort of, stumbles upon a suspension of the
19 writ, but the preconditions are satisfied, that would
20 still be constitutionally valid. So, I think that may be
21 the disagreement.

22 JUSTICE SOUTER: Isn't there a --

23 GENERAL CLEMENT: I mean --

24 JUSTICE SOUTER: Isn't there a pretty good
25 argument that a suspension of the writ of Congress is just

1 about the most stupendously significant act that the
2 Congress of the United States can take? And, therefore,
3 we ought to be at least a little slow to accept your
4 argument that it can be done from pure inadvertence?

5 GENERAL CLEMENT: Well, a couple of things,
6 Justice Souter. I would agree with you if what we were
7 talking about is suspending the right as to citizens
8 within the Continental United States, but all Congress did
9 here is restore the law to the understanding of the law
10 that had prevailed for 200 years. Now, this Court
11 obviously took a different view --

12 JUSTICE SOUTER: If we have to --

13 GENERAL CLEMENT: -- in Rasul.

14 JUSTICE SOUTER: -- get to the issue, in
15 accordance with Justice Breyer's question, whether or not
16 the writ of habeas corpus was suspended, you are leaving
17 us with the position of the United States that the
18 Congress may validly suspend it inadvertently. Is that
19 really your position?

20 GENERAL CLEMENT: I think at least if you're
21 talking about the extension of the writ to enemy
22 combatants --

23 JUSTICE SOUTER: The writ is the --

24 GENERAL CLEMENT: -- held outside --

25 JUSTICE SOUTER: The writ is the --

1 GENERAL CLEMENT: -- the territory of the United
2 States --

3 JUSTICE SOUTER: Now, wait a minute. The writ
4 is the writ.

5 GENERAL CLEMENT: Okay.

6 JUSTICE SOUTER: There are not two writs of
7 habeas corpus for some cases and for other cases. The
8 rights that -- the rights that may be asserted, the rights
9 that may be vindicated, will vary with the circumstances,
10 but jurisdiction over habeas corpus is jurisdiction over
11 habeas corpus. And it seems to me that the position you
12 have taken is that if, at the end of the day, we have to
13 reach the question that Justice Breyer described, the
14 answer to that question may be, "Yes, the writ of habeas
15 corpus was suspended by inadvertence. Congress did not
16 intend to do it." Is that really your position?

17 GENERAL CLEMENT: No, Justice Souter. There's
18 no -- my point is not inadvertence. It's whether they
19 have to say or incant any magic words that they are now
20 invoking the power --

21 JUSTICE SCALIA: They could surely --

22 GENERAL CLEMENT: -- to suspend the writ.

23 JUSTICE SCALIA: -- set forth a procedure which
24 amounts to a suspension of the writ. And if that
25 procedure is done in a state of insurrection or invasion,

1 that would constitute a suspension of the writ, even
2 though they don't say, "We are suspending the writ of
3 habeas corpus."

4 GENERAL CLEMENT: That is my point. And there's
5 nothing inadvertent here --

6 JUSTICE SOUTER: Is it also your point when
7 there is no insurrection or invasion?

8 GENERAL CLEMENT: Well, then any effort to
9 suspend the writ would be invalid. But this is not a case
10 where there's any question of --

11 JUSTICE SOUTER: Perhaps that's something that a
12 court ought to inquire into when it gets into the question
13 of congressional intent.

14 GENERAL CLEMENT: I don't think --

15 JUSTICE SOUTER: And how specific --

16 GENERAL CLEMENT: -- I disagree with that.

17 JUSTICE SOUTER: -- that intent --

18 GENERAL CLEMENT: I guess my point would --

19 JUSTICE SOUTER: -- and how specific that intent
20 must be.

21 GENERAL CLEMENT: I don't think I disagree with
22 that. But there's two separate points here, is that --
23 one is, Does Congress have to say, "We are now suspending
24 the writ under our Suspension Clause"? And I don't think
25 there's any call to say that they have to do that.

1 Obviously, in cases like St. Cyr, this Court has been very
2 clear to say, "Congress obviously can't stumble upon the
3 Habeas Clause."

4 JUSTICE SOUTER: Okay. Let's --

5 GENERAL CLEMENT: But that's not --

6 JUSTICE SOUTER: Let's --

7 GENERAL CLEMENT: -- at issue here.

8 JUSTICE SOUTER: Let's assume we do not have a
9 magic-words requirement. Given the significance of
10 suspending the writ of habeas corpus, should we not have a
11 pretty clear statement requirement?

12 GENERAL CLEMENT: Yes. And there's no question
13 that Congress, here, tried to amend the habeas statute.
14 This is not like St. Cyr, where they didn't go after 2241
15 in terms. There's nothing subtle about this statute with
16 respect to the clarity with which it speaks --

17 JUSTICE SOUTER: There may be nothing --

18 GENERAL CLEMENT: -- to the habeas statute.

19 JUSTICE SOUTER: -- subtle about the statute,
20 but there is something very silent about the statute as to
21 whether Congress understood that it was -- that it was
22 acting under its authority to suspend the writ of habeas
23 corpus. And, at the very least, that unclarity it
24 manifested by the effective-date provision. H(1) doesn't
25 have the language that it had before the amendment.

1 Therefore, it seems to me, there would be some difficulty,
2 if we have to get to the question, in finding a clear
3 intent on the part of Congress to suspend the writ under
4 its Article I power.

5 GENERAL CLEMENT: With respect, Justice Souter,
6 I don't think making a retroactivity analysis or holding
7 here is going to spare you the trouble of dealing with the
8 Suspension Clause argument. I mean, in St. Cyr, it's
9 worth noting that this Court addressed the specificity
10 with which the statute applied separately from the
11 retroactivity question. Here, to take the first question
12 first, there's no question, this wolf comes as a wolf.
13 Congress was going after 2241. It clearly did that. All
14 of E(1) --

15 JUSTICE SOUTER: It comes --

16 GENERAL CLEMENT: -- is a new subsection.

17 JUSTICE SOUTER: It comes as a wolf under H(2),
18 but the wolf is silent under H(1), and the wolf used to
19 speak under H(1), and it had its teeth taken out.

20 [Laughter.]

21 GENERAL CLEMENT: With respect, Justice Souter,
22 H(1) never spoke to the question. An earlier provision,
23 D(1), had very different language, in an earlier provision
24 of the statute, that spoke with greater clarity. I'll
25 grant --

1 JUSTICE SOUTER: And that's --

2 GENERAL CLEMENT: -- you that.

3 JUSTICE SOUTER: -- gone.

4 GENERAL CLEMENT: That's gone. But just because
5 Congress could have made it clearer doesn't mean that the
6 Government loses here.

7 JUSTICE SOUTER: The very fact --

8 GENERAL CLEMENT: Senator --

9 JUSTICE SOUTER: -- that Congress chose to
10 remove the clarity of the prior provision is of no
11 significance?

12 GENERAL CLEMENT: It's not of dispositive
13 significance, Justice Souter.

14 JUSTICE SCALIA: I don't think Congress chose to
15 do that. One house of Congress chose to do it. We don't
16 know what the other house thought, and we don't know what
17 the President thought.

18 GENERAL CLEMENT: That's a very fair point,
19 Justice Scalia. But even to get at the very -- what
20 happened here is very analogous to the legislative
21 evolution this Court found unilluminating in Martin
22 against Haddocks. There, the attorneys fees provision you
23 had before it -- before you, used to be in 802 of the
24 statute, which was expressly applicable to pending cases.
25 Congress moved it out into its own separate section that

1 didn't expressly apply to pending cases.

2 JUSTICE SOUTER: What --

3 GENERAL CLEMENT: This Court did not --

4 JUSTICE SOUTER: Whatever may be the standard of
5 due care for courts in reviewing acts of Congress with
6 respect to attorneys fees, it doesn't reach the level
7 that, it seems to me, is incumbent on us when we're
8 talking about suspending the writ of habeas corpus.

9 GENERAL CLEMENT: I don't disagree with that,
10 Justice Souter, but there's no special habeas
11 retroactivity law. There is a special rule, under St.
12 Cyr, for habeas, but we amply satisfy that, because --

13 JUSTICE SOUTER: Can --

14 GENERAL CLEMENT: -- 22- --

15 JUSTICE SOUTER: Yes.

16 GENERAL CLEMENT: -- this whole thing is a
17 2241(e) new section. So, this is all about amending
18 habeas.

19 JUSTICE GINSBURG: May I ask you another
20 question about the clarity with which Congress spoke?
21 This law was proposed and enacted some weeks after this
22 Court granted cert in this very case. It is an
23 extraordinary act, I think, to withdraw jurisdiction from
24 this Court in a pending case. Congress didn't say,
25 explicitly, it was doing that. It hasn't done it, as far

1 as I know, since McArdle. But there Congress said, "We
2 are withdrawing jurisdiction in this very case." They
3 didn't say that here. So, why should we assume that
4 Congress withdraw our jurisdiction to hear this case once
5 the case was already lodged here?

6 GENERAL CLEMENT: I think the answer, Justice
7 Ginsburg, is that, you're right, this isn't like ex parte
8 McArdle. What made ex parte McArdle so unique is,
9 Congress went after this Court's appellate jurisdiction,
10 and that alone. What Congress has done here, which is not
11 that unusual, and it's certainly happened several times
12 since McArdle, is that the Court has modified the
13 jurisdiction of all the courts, and that has had the
14 effect of eliminating jurisdiction in this Court over a
15 pending case.

16 JUSTICE KENNEDY: Mr. --

17 GENERAL CLEMENT: That's happened any number of
18 times. The Guagliardo cases that we cite in our brief
19 provide one example. And as Justice Holmes made the point
20 there, it's not a situation where you go after this
21 Court's appellate jurisdiction, as such. There, it's a
22 situation, as Justice Holmes put it, that, when the root
23 is cut, the branches fall; when the District Court loses
24 jurisdiction over these cases, then this Court loses
25 jurisdiction. But it's much less of an affront to this

1 Court than the kind of statute that Congress passed in the
2 McArdle situation.

3 JUSTICE KENNEDY: Mr. Clement, I, for one, have
4 lost track of your time. I'm interested in your arguments
5 on the -- on the legitimacy and the regularity of these
6 commissions.

7 GENERAL CLEMENT: And if I could talk to various
8 aspects of that, I'm happy --

9 JUSTICE BREYER: Can I put the --

10 GENERAL CLEMENT: -- to do so.

11 JUSTICE BREYER: -- that issue in -- don't --
12 ignore my question, which is the same as Justice
13 Kennedy's, if it doesn't help. I'm trying to focus this.
14 And, in my mind, I take their argument as saying, "Look,
15 you want to try a war crime. You want to say this is a
16 war crimes tribunal. One, this is not a war, at least not
17 an ordinary war. Two, it's not a war crime, because that
18 doesn't fall under international law. And, three, it's
19 not a war crime tribunal or commission, because no
20 emergency, not on the battlefield, civil courts are open,
21 there is no military commander asking for it, it's not in
22 any of those in other respects, like past history. And if
23 the President can do this, well, then he can set up
24 commissions to go to Toledo, and, in Toledo, pick up an
25 alien, and not have any trial at all, except before that

1 special commission."

2 Now, I've tried to summarize a whole bunch of
3 points for you to get at, as you wish.

4 GENERAL CLEMENT: Let me try to hit a couple --
5 [Laughter.]

6 GENERAL CLEMENT: Let me try to hit a couple of
7 highlights.

8 JUSTICE SCALIA: I'll be interested in your
9 answer, if you can get it out.

10 [Laughter.]

11 GENERAL CLEMENT: Let me try to hit a couple of
12 highlights. This is much more of a call for military
13 commissions in a real war than, certainly, the use of
14 military commissions against the Medoc Indians or any
15 number of other instances in which the President has
16 availed himself of this authority in the past. I think
17 the events of 9/11 speak to the fact that this is a war
18 where the laws of war are involved.

19 As to whether or not the law of war encompasses
20 the crime of conspiracy to violate the laws of war, we
21 think that is clearly established. That is something that
22 the United States treated as a valid war crime in the
23 Civil War. That is something that the United States
24 treated as a valid war crime in World War II.

25 I would invite you, as to the former, to look at

1 Winthrop's Treatise, page 839, note 5. He makes it very
2 clear that those conspiracies are not just conspiracies of
3 municipal law, what he called "of the first class," but
4 they included the second class, which are classic war
5 crimes. The most prominent examples are the Lincoln
6 conspirators and a conspiracy at Andersonville Prison to
7 deny POWs their lawful rights. Clearly, those are classic
8 war crimes. In World War II, of course, conspiracy was
9 also charged. And this Court saw it in the Kearing case,
10 although it didn't reach that element of the charge.

11 Now, I think it's very important to understand
12 that history, because the most relevant text on this
13 question is Article 21's reference to the law of war. And
14 as this Court was crystal clear in the Madsen case, what
15 that reference is, is Congress's effort, when it extended
16 the jurisdiction of the courts-martials to include more
17 and more crimes, that it didn't want to crowd out the
18 military jurisdiction of the military commissions just
19 because they had concurrent jurisdiction. And this Court,
20 in Madsen, said what Congress authorized was the
21 jurisdiction of the military commissions as it existed in
22 1916, and then presumably again when it passed Article 21
23 of the UCMJ, the jurisdiction that existed as of 1950.
24 Well, in 1960, you could try conspiracies to violate the
25 law of war. In 1950, you could violate conspiracies to

1 the law of war.

2 So, now let me try to get to the procedures that
3 would be applicable. The argument that's made here is an
4 extraordinary one, that Article 36, when it says that
5 military commissions can deviate from the laws of
6 evidence, to the extent the President determines
7 necessary, except that it must apply to the -- comply with
8 the provisions of the UCMJ. Clearly, what that provision
9 means is the provisions of the UCMJ that specifically
10 impose requirements on the military commissions. And
11 there are nine of them. And they impose some -- certain
12 minimum rules.

13 But to say that that provision incorporates all
14 of the UCMJ provisions that put much higher requirements
15 on courts-martials, is to violate this Court's Madsen
16 decision, which clearly recognized that there were
17 differences between court-martials and military
18 commissions. And, although that was an act -- that was a
19 case that addressed the articles of war, Article 38 is
20 identical to Article 36(a) of the UCMJ, so that's not a
21 difference that matters.

22 And, if I could say, the other thing is, that
23 just violates any normal principle of statutory
24 construction, because then the nine express references to
25 the military commissions are rendered utterly superfluous.

1 Clearly, what Congress had in mind was that,
2 "You must comply with those provisions of the UCMJ that
3 apply specifically to the military commissions."

4 If I could make this point clear, because I
5 think it's helpful in reading the past cases, what made
6 Yamashita and other of the World War II cases so difficult
7 is that the President in that situation constituted
8 commissions that violated even the procedural rules that
9 the articles of war made specifically applicable to the
10 commissions. And so, if you look, for example, at Justice
11 Rutledge's dissent in the Yamashita case, he was at pains
12 to emphasize that very few of the provisions of the
13 articles of war applied to military commissions. And the
14 difficulty was that the -- that the military, in that
15 case, was not complying with even those provisions that
16 specifically applied to military commissions by terms.

17 That's not an issue here. These military
18 commissions comply with all of the provisions of the UCMJ
19 that are specifically addressed to military commissions.
20 So, I just don't think there's a procedural problem here.

21 The import of extending Article 2 jurisdiction
22 to new individuals doesn't mean that anything in
23 Yamashita, as to this point, is really no -- is still
24 relevant. What that does is, it takes away the argument
25 -- to the extent that these individuals are within Article

1 2, it takes away the argument that the President doesn't
2 have to even comply with those provisions of the UCMJ that
3 are expressly directed to the military commissions. But
4 that's not an argument we're making here.

5 The argument on the other side of this is really
6 that when Congress specifies that nine rules apply to
7 military commissions, and everything else applies to
8 courts-martials, that somehow all of them have to apply to
9 the military commissions. And as Justice Scalia's
10 question alluded to earlier, in order to accept that
11 argument, you really have to believe that what Congress
12 was doing when it was carefully preserving the military --
13 the jurisdiction of the military commissions was simply to
14 preserve the option of calling something that had to
15 comply with every single statutory requirement in the
16 court-martials. They got to label it something else.
17 They got to label it a "military commission."

18 Clearly, if you look at the legislative history
19 of Article of War 15 and Article 21, as they were
20 developed in the Madsen decision and discussed in the
21 authoritative testimony of General Crowder, that's exactly
22 what wasn't going on. They wanted to make sure that this
23 argument, that as we get more and more things that come
24 within the military jurisdiction of the courts-martials,
25 that somehow we're cutting back on the military

1 commissions. That's not what they wanted.

2 The next thing that may be lurking in the
3 question is the question of, What about the Geneva
4 Conventions? And I think that, very importantly, we have
5 arguments that we have surfaced in our briefs that the
6 Geneva Conventions do not provide relief in these
7 circumstances, that they do not apply, for various
8 reasons. But the first question, at the outset, is
9 whether this Court is going to overrule that portion of
10 Eisentrager that basically said the Geneva Conventions are
11 not judicially enforceable.

12 Now, of course, this Court can say, "That was
13 the '29 Convention, and this is the 1949 Convention."
14 But, as the Court of Appeals correctly determined --

15 JUSTICE STEVENS: And there was a footnote
16 dicta.

17 GENERAL CLEMENT: Well, I don't think it was
18 dicta, Justice Stevens. If there's one thing I think the
19 Eisentrager decision has, it's an awful lot of alternative
20 holdings. And --

21 [Laughter.]

22 GENERAL CLEMENT: -- Justice Black was concerned
23 about that, and said, "What are you doing reaching the
24 merits when you have, you know, said there's no
25 jurisdiction?" But the Court, as a holding, said that the

1 Geneva Conventions of 1929 did not apply. There aren't
2 any material differences about 1949 Conventions.

3 And I ask you to think about why that makes
4 sense. Because the 1949 Geneva Conventions were being
5 negotiated contemporaneously with this Court's decision in
6 Eisentrager. And even if you think the rule is different
7 today, at that point, Justice Jackson was quite correct
8 that the idea that an enemy combatant would get access to
9 the domestic courts of a detaining power was absolutely
10 absurd. And so, what the -- the framers of the Geneva
11 Convention recognized that they were dealing with a group
12 of people that were uniquely vulnerable. So, they went to
13 great pains to make sure there were mechanisms to enforce
14 their rights. And so, there are various provisions for
15 party-to-party enforcement. There are various provisions
16 for getting the protecting powers, which is now a role
17 basically taken over by the ICRC, to get access to the
18 detainees and to provide other mediating effects.

19 So, what you have is a treaty that's really
20 written against the backdrop, that of course these people
21 aren't going to be able to get to the domestic courts of
22 their detaining -- the detaining power. If you look at
23 the treaty, and read it as a whole, I think it's almost
24 impossible to read it as applying judicially enforceable
25 rights in the domestic courts. The constant --

1 JUSTICE BREYER: Does it -- does it -- does it
2 define the contours, along with other relevant
3 international sources, of the meaning of the statutory
4 words "laws of war." He's being charged with a violation
5 of the laws of war in both statutes, like -- what is it?
6 -- 2240 -- 2441, in Quirin. To get the meaning of that
7 term, the courts looked to other law.

8 JUSTICE KENNEDY: And, in particular, why isn't
9 he part of Common Article 3 under the Geneva Convention,
10 as Judge Williams found? That's part of the same
11 question.

12 GENERAL CLEMENT: Well, Judge Williams found
13 that, you know, Common Article 3 was applicable here. I
14 don't know why that the Common Article 3, and nothing else
15 would be judicially enforceable. And I don't read his
16 opinion as saying otherwise. I think he still took the
17 view that the entirety of the Geneva Conventions were not
18 judicially enforceable.

19 Now, I take it that the thrust of the question,
20 though, is, Don't these Geneva Conventions, even if
21 they're not applicable for one reason or another, don't
22 they form the background of some sort of customary
23 international law that influences what -- how we should
24 interpret the word "law of war" in the statute? And I
25 would say, at a minimum, if there is some role for

1 customary international law here, it has to, consistently
2 with The Paquete Habana case, take into account and give
3 due weight to a controlling executive act.

4 Here, the President has determined, for example,
5 that conspiracy is an actionable violation of the law of
6 war that can be tried in front of these commissions. He's
7 made that clear. He's also made clear that these
8 procedures are sufficient and supply the rights. And so,
9 I think that has to take -- be taken into account into the
10 analysis.

11 I think, also, since Article 21 is the most
12 logical place you would -- you would look to any of this
13 as the law of war, I think it's important to understand
14 that I would read that as incorporating some question
15 about what kind of crimes can be brought in this
16 jurisdiction.

17 JUSTICE BREYER: Is it the President, and not
18 Congress, defining the content of the law, the criminal
19 law, under which a person will be tried? Isn't there a
20 "separation of powers" problem there?

21 GENERAL CLEMENT: I sure hope not, Justice
22 Breyer, because that's been the tradition for over 200
23 years. And Article 21 itself makes this clear, because
24 what does it say can be tried by military commission? It
25 says anything that's made a violation of statute or law of

1 war.

2 JUSTICE STEVENS: But I don't --

3 GENERAL CLEMENT: So --

4 JUSTICE STEVENS: -- think, Mr. Clement, the 200
5 years have approved of his adding additional crimes under
6 the law of war. I mean, he has never -- I don't think we
7 have ever held that the President can make something a
8 crime which was not already a crime under the law of war.

9 GENERAL CLEMENT: I think that may be true,
10 Justice Stevens --

11 JUSTICE STEVENS: Yes.

12 GENERAL CLEMENT: -- certainly as to the Article
13 --

14 JUSTICE STEVENS: And one --

15 GENERAL CLEMENT: -- 21 point.

16 JUSTICE STEVENS: -- of the issues is whether
17 he's done that here --

18 GENERAL CLEMENT: But --

19 JUSTICE STEVENS: -- I think.

20 GENERAL CLEMENT: But there's no innovation in
21 trying conspiracy as a violation of the law of war.

22 JUSTICE STEVENS: If you're right on that,
23 you're right on the ultimate question, too.

24 GENERAL CLEMENT: Well, I hope so, because
25 there's really no question that conspiracy has been

1 charged. And, like you said, I would encourage you to
2 look at footnote 5 on page 839 of the Winthrop Treatise;
3 and this Quirin case had, also, that charge brought before
4 it. Colepaugh against Looney, which is a Tenth Circuit
5 case from World War II, involved the charge of conspiracy.

6 Now, they're going to come up here and tell you,
7 "Well, but that wasn't -- you know, in Colepaugh and
8 Quirin, that wasn't the one that the Court settled on."
9 But that doesn't dispute the fact that that is a crime
10 that has traditionally been charged as a violation of the
11 law of war.

12 JUSTICE KENNEDY: Your time is -- why isn't harm
13 done on a uniquely vulnerable individual that -- you used
14 the phrase "uniquely vulnerable individuals" were involved
15 in another case, but not here. Why not here?

16 GENERAL CLEMENT: Well, he's -- I mean, I -- I'm
17 not saying that he isn't somebody who is protected by the
18 laws of war, the customary laws of war. I think that he
19 is protected by those. I don't think he's protected by
20 the Geneva Conventions, but that's largely because he
21 chose not to comply with the basic laws of war. He's
22 obviously --

23 JUSTICE SCALIA: I thought -- I thought -- I
24 thought you said all prisoners of war were uniquely
25 vulnerable -- I thought that was the point you were making

1 --

2 GENERAL CLEMENT: That is the point --

3 JUSTICE SCALIA: -- and had -- needed --

4 GENERAL CLEMENT: -- that I'm making --

5 JUSTICE SCALIA: -- needed protection of the --
6 of the supervising powers, or whatever they're called.

7 GENERAL CLEMENT: Right, but not the domestic
8 courts of the detaining power. And if he's any different
9 than a usual prisoner of war, it's because he's
10 disentitled themselves to some protections by what has
11 been determined by the ccert protections.

12 Let me just address, if I could, the idea that
13 having provided him with ccert, we now have to provide him
14 with an Article 5 hearing. The ccert provisions provide
15 all of the protections, and then some, that were normally
16 provided in an Article 5 hearing. They were focused on
17 the question that is relevant in this dispute, which is
18 whether or not somebody is an innocent civilian or an
19 unlawful enemy combatant. Nobody has a claim here that
20 they were part of the uniformed al Qaeda division that
21 complied with all of the laws of war, such that they are
22 entitled to POW status. The POW unlawful enemy combatant
23 line is not one that really needs to be policed in this
24 conflict. The serious concern -- and it was his claim
25 when Petitioner walked into Federal Court in Washington --

1 he said, "I am not an enemy combatant. I did not take up
2 arms against the United States." That's the claim that he
3 brought to the ccert, the ccert rejected.

4 For these purposes, at this stage in the
5 litigation, that ought to be enough to allow the
6 proceeding to go forward in front of the military
7 commission.

8 One of the defenses in the military commissions
9 is lawful combatancy immunity. He can make the argument
10 that he wants to make in front of the commissions. If the
11 commission rejects the argument, then there will be review
12 of that decision in the Court of Appeals on a concrete
13 record. This Court can then address that under 1254.

14 The use of military commissions to try enemy
15 combatants has been part and parcel of the war power for
16 200 years. Congress recognized it in 1916 in the Articles
17 of War, then again, after World War II, in the UCMJ. This
18 Court recognized it in a host of cases, not just Quirin,
19 but Yamashita, Eisentrager, and, most clearly, in Madsen.

20 Since that is such an important component of the law of
21 war, something that has been part and parcel of that power
22 from Major Andre's capture to today, there is no reason
23 for this Court to depart from that tradition.

24 Thank you.

25 JUSTICE STEVENS: Thank you, Mr. Clement.

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Mr. Katyal.

REBUTTAL ARGUMENT OF NEAL KATYAL

ON BEHALF OF PETITIONER

MR. KATYAL: It is a foundational role of this Court, as Justice Kennedy says, to test the lawfulness of tribunals, particularly executive detention. And in the pretrial area, that's the historic role of this Court from Bereford to Quirin. This claim is -- Mr. Hamdan's claim is primarily a jurisdictional one, as both courts below found when they recognized his ability to bring this pretrial challenge, because he is not an offender under the laws of war until he obtains his Article 5 hearing, because the charge doesn't state a violation of the laws of war, which is, itself, jurisdictional, and because it doesn't follow the procedures of the laws of war, which this Court, in Yamashita, in pages 5, and, in the dissent, at page 72, recognized as jurisdictional.

JUSTICE STEVENS: I don't want to --

MR. KATYAL: Now, that was --

JUSTICE STEVENS: I don't want to take up from your time, but have you read the footnote that the -- Mr. Clement relies on very heavily?

MR. KATYAL: With respect to conspiracy? Yes, I have. And I do believe the text says that they're referring to domestic offenses. It's certainly the case

1 that conspiracy has been tried as a violation of the laws
2 of war at some point in the Civil War. But that has been
3 entirely eclipsed by the modern laws of war, which have
4 rejected it everywhere.

5 And if you adopt the Government's reading,
6 Justice Stevens, that the laws of war are frozen into time
7 in 1916, then I believe there goes the Government's case
8 entirely, because the thrust of the Government's case is
9 the laws of war have to adapt to this stateless,
10 territoryless organization known as al Qaeda. If we're
11 playing by 1916 rules, there is no way that this
12 commission would have been accepted in 1916.

13 Now, all of those jurisdictional pretrial
14 challenges were accepted by the courts below when the full
15 panoply of DTA rights -- when the full panoply of rights
16 existed. Now the DTA certainly circumscribes the scope.
17 We don't know whether question 1 very clearly is able to
18 be raised after the DTA's enactment. We certainly --
19 question 2, as the Solicitor General has said, is not
20 raisable. We don't know when it can be raised, because
21 the President can block final review for all time under
22 the DTA. He has the keys to the Federal courthouse. And
23 if you defer to this system and give the President the
24 ability to launch all of these tribunals for 75
25 individuals with these charges, with these procedures, you

1 will be countenancing a huge expansion of military
2 jurisdiction. Conspiracy is one of the few offenses,
3 Justices, that has now been rejected by the laws of war
4 internationally in tribunal after tribunal. It's
5 certainly never been approved by a Federal Court. And,
6 indeed, it has been rejected. In Colepaugh, for example,
7 no challenge to conspiracy was raised.

8 The Government's argument, in the end, it seems
9 to me, is one that this Court rejected in Levin, because
10 it depends, as its predicate, on the idea that the
11 President has ultimate flexibility with respect to these
12 military commissions, except for the nine provisions in
13 the UCMJ which govern translators and deposition
14 testimony. It is inconceivable that the UCMJ, when
15 enacted, intended to regulate military commissions with
16 only that bare bones to it. Indeed, General Crowder said,
17 "Military commissions and courts-martial follow the same
18 procedures."

19 Finally, Justices, we'd just point out that the
20 predicate of abstention is not met here. This is not a
21 ordinary criminal trial applying lawful ordinary
22 procedures. This is an ad hoc trial in which the
23 procedures are all defined with the President. He says
24 the laws of war do not apply when we're talking about
25 protecting this vulnerable individual at Guantanamo. But

1 then he says they do apply and permit him to charge Mr.
2 Hamdan with the one offense which is rejected entirely at
3 international law.

4 It was a great American patriot, Thomas Paine,
5 who warned, "He who -- that would make his own liberty
6 secure must guard even his enemy from oppression, for if
7 he violates that duty, he establishes a precedent that
8 will reach unto himself."

9 That's what we're asking you to do here, just
10 enforce the lawful uses of military commissions and the
11 historic role of this Court.

12 Thank you.

13 JUSTICE STEVENS: Thank you, Counsel.

14 The case is submitted.

15 [Whereupon, at 12:31 p.m., the case in the
16 above-entitled matter was submitted.]

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