

**United States Courts of Appeals
For the Fourth Circuit**

Unofficial Transcript

**Padilla vs. Hanft
July 19, 2005**

Judge Luttig: Welcome to this special sitting of the court. The court has conferred and agreed that we will provide all of the necessary time that the parties need. That's in the court's judgment and not the individual litigants judgment, and with that Mr. Clement you may begin.

Mr. Clement: Thank you Judge Luttig, your honors, and may it please the court. As this case comes to the court, the government alleges, and stands ready to prove, with whatever procedures are constitutionally required, that Petitioner trained with Al Qaida before the attacks of September 11, and then after the attacks of September 11th, he took up arms and evaded the United States and allied troops in Afghanistan. Then, after escaping to Pakistan, he received further training by Al Qaida from the likes of 9/11 co-conspirator Ramzi bin as-Shibh, and then at the direction of 9/11 masterminds Khalid Sheikh Mohammed came to the United States, armed with Al Qaida cash and plans and intent on further hostile and war-like acts in the United States. Now the facts that are brought forth in these allegations, again we stand ready to prove by whatever procedure that is Constitutionally necessary, just concerning the Petitioner's activity in Afghanistan, and those are facts that were not part of the record before the Supreme Court last term, those facts alone are sufficient to bring Petitioner within the ambit of the authority to detain combatants recognized by the court in *Hamdi*, and his actions in conspiring with Al Qaida to come to the United States and commit further hostile and war-like acts are sufficient to bring him

within the ambit of *Hamdi* and in the Supreme Court's decision in *Quirin*, and the authority to detain enemy combatants recognized there.

Judge Luttig: I take it there is some question as to that, for instance, at least arguably, Justice O'Connor and her plurality opinion for the court in *Hamdi*, limited that case to the battlefield detention at least through her rejoinder to Justice Scalia writing in dissent, did she not?

Mr. Clement: That is not how I would read that case, I would read that case differently. I think for purposes of the *Hamdi* case she did limit that decision to the circumstances as somebody who was on the battlefield, and took up arms against the United States or allied forces.

Judge Luttig: That is not my point. The point is, did she in effect, limit that opinion to a detention on the battlefield, by her rejoinder of Justice Scalia?

Mr. Clement: Again, that is not how I would read the opinion, your honor.

Judge Luttig: She said that at one point. Correct?

Mr. Clement: No, I think in fairness, when I think that she talks about the narrow circumstances that she is affirming, the President's authority to detain enemy combatants pursuant to the authorization of force, when she describes the narrow circumstances she does not focus on the place of capture.

Judge Luttig: She describes the narrow circumstances, she does not, in the rejoinder, when she refers to the context of this case and Justice Scalia's failure, in her mind, to understand it, she talks about the battlefield detention, does she not?

Mr. Clement: She does your honor, but again, I think I would describe the two parts of the opinion as follows: In setting forth the narrow circumstances, she sets up the ambit of the plurality's holding, in responding to Justice Scalia's dissent she is doing just that, she is responding to a dissent and she is pointing out some of the flaws with the reasoning in the dissent, but I don't think that I would read that response to the dissent as narrowing the holding, which is set forth in the first part of the opinion, when she defines in her own terms, the narrow circumstances that the court provides for in their opinion.

Judge Luttig: If the facts of the case are that it involves a battlefield detention, is it not your understanding that the holding of the case is limited to that set of facts, even if the reasoning could be read broader? The holding is limited to that set of facts?

Mr. Clement: Again, that is not how I would read it your honor, I don't think you read a holding to be co-extensive with the facts of the case. I think you read the holding as the sweep of the reasoning that is necessary to the decision, that is how I would find the holding of the case.

Judge Luttig: I thought it was elementary that a holding of the case is necessarily limited by the facts presented and that everything beyond those facts is dicta.

Mr. Clement: With respect, your honor, that is not my understanding. The *ratio decidendi* of the case is those legal principals necessary to decide the case. They are not ipso facto limited to the facts of the case. So...

Judge Luttig: So if it were necessary to decide that case...

Mr. Clement: Absolutely...

Judge Luttig: ...was a battlefield detention?

Mr. Clement: Absolutely your honor, but if in case number one the court decides that based on a search that took place pursuant to a warrant, and on a Tuesday, the court decides the warrant is constitutionally necessary, the next case that comes up on a Wednesday is not open for the court to decide anew because the *ratio decidendi* of the first case involved the warrant, not the fact that it was on a Tuesday...

Judge Luttig: But we would not say, would we, that the second case is controlled necessarily by the first?

Mr. Clement: Your honor, with all due respect, I would say that it was controlled by the first and I would certainly would think that you would say you are lower court trying to apply Supreme Court precedent, and I would add just by the way of background, that all of this discussion is of course is a discussion of the scope of the *Hamdi* holding but of course none of that would affect

the holding in *Quirin*, which the plurality in *Hamdi* reaffirmed as the most apposite precedent we have in terms....

Judge Michael: Well let's stick with *Hamdi* for a minute, isn't... don't the Laws of War provide the basis for limiting the holding to a battlefield capture and the Supreme Court went to great pains, I think, to say, that you really define what reasonable or necessary and appropriate force is by looking to the Laws of War? And the idea of battlefield capture and detention really grew out of the rejection of the no quarter rule and that meant that, once the Laws of War were developed then you could capture somebody on the battlefield and detain them for the duration of the conflict that rose out of the exigent circumstances on the battlefield. We aren't going to kill everybody, we'll just round them up and hold them until the conflict is over. It seems to me that that's really the basis for limiting the holding in *Hamdi* to battlefield capture and what, you captured Padilla here in a Manhattan jail cell, and it seems to me that battlefield capture is more fundamental to waging war than picking somebody up in this country. So, it seems to me that it makes sense going forward to read *Hamdi* that Judge Luttig suggests to battlefield capture. Doesn't that make sense?

Mr. Clement: Well again, I would like to differ your honor. I think that...

Judge Michael: But what in the law - oh excuse me, go ahead...

Mr. Clement: Talking about the law while talking about the Law of War limits the authority of the military to capture an enemy combatant who is on the battlefield to strictly to the environs of the battlefield.

Judge Michael: What in the Laws of War allows you to undertake a non-battlefield capture and hold someone for the duration? I don't think you cite to anything, in the Laws of War.

Mr. Clement: Your honor, I think... if one wants to talk about the Laws of War I think there are two principals that I would start with. One is the Laws of War that *Hamdi* recognized, it doesn't focus solely on capture on the battlefield, it's the activities on the battlefield that makes somebody an enemy combatant. If they're picked up in town or the battle or something, that doesn't limit the authority...

Judge Michael: Well that may make some sense but what, you've got people in the Defense Department that ought to be studying the Laws of War all the time, you've got the Laws of Warfare, I don't see that you've cited us to anything out of the Laws of War that would authorize a non-battlefield capture and detention. If you can cite us chapter and verse I think that would be helpful.

Mr. Clement: Where I'd cite to you for that proposition would be the *Quirin* case, the Supreme Court in *Quirin* itself, exhaustively surveyed the Law of War and what they found that it is well established under the Law of War that somebody who comes across enemy lines, who is affiliated with the enemy, with the intent of destroying buildings here at....

Judge Michael: But those were military targets, I don't mean to take up everyone's time by asking questions but I don't think *Quirin* helps you that much.

Judge Luttig: It seems to me - go ahead...

Mr. Clement: With all due respect your honor, I just wanted to clarify, what you were talking about there, is that you were talking about aluminum plants and things like that...

Judge Michael: Necessary to the war effort...

Mr. Clement: Yes, and I think that in the context of this war, I don't really think that there is any difference between those kind of targets and the apartment buildings that the Petitioner was intending to blow up. I think again that in considering that the *Hamdi* case and *Quirin*, I think it's worth understanding that the *Hamdi* court grounded the President's authority and the authorization of forces.

Judge Luttig: In effect, Mr. Clement, doesn't the United States have to be arguing that, at least in the War on Terror, the battlefield includes the United States?

Mr. Clement: Your honor, I think that is certainly true...

Judge Luttig: Is that the position of the United States?

Mr. Clement: That is the position of the United States.

Judge Luttig: That the United States of America is a battleground in the War on Terror.

Mr. Clement: That is our position and I don't see how it could be otherwise if one understands the context...

Judge Luttig: You keep referring, in fairness in response to our questions, that we have non-battlefield detention here. So the import of the question is this: do we not in effect have a battlefield detention?

Mr. Clement: I think that you can characterize it in that way and I think that's accurate, and again, in fairness to the questions that were asked of me, I think that there is language in the *Hamdi* plurality that is talking about foreign battlefield and so, I mean....

Judge Luttig: Well? That drives you right back into my threshold question whether *Hamdi* as a precedent would control. And if, as your point there suggests, it was limited to foreign battlefields, then *a fortiori* it would not govern here unless you are prepared to say that this is a battlefield.

Mr. Clement: Well, I am prepared to say that this is a battlefield, I am not prepared to say it is a foreign battlefield...

Judge Luttig: That's correct...

Mr. Clement: ...I am, however, willing to say that it's within the realm of holding in *Hamdi*, as our colloquy pointed out, I don't think you would take part of the plurality opinion responding to Justice Scalia's dissent and read that to limit the holding that so clearly stated, and I do think the fact that the Petitioner here was present on a foreign battlefield, whatever else is true, I think is helpful to this court because obviously one of the things that concerns the plurality in the *Hamdi* decision was the length of the detention, and one of the ways that the plurality addressed that concern is that they said, that at least when someone has been on a foreign battlefield. We can assume that there is no difficult question about the length of detention as long as there remains United States troops on that battlefield. And there is a sense in which the fact that the Petitioner was on the battlefield in Afghanistan, and again, we stand ready to prove that fact, that fact can give similar comfort to this court and can give it the same basic way of reasoning that the court adopted in the *Hamdi* case

Judge Luttig: But the visceral problem with that, in - I am only prepared to say the visceral, not logical or legal, is that one has the sense that if you are captured here, and the battlefield is Afghanistan, and that the risk of returning to that battlefield is so attenuated, that the rationale of the *Hamdi* decision would be inapplicable.

Mr. Clement: Again, that might be true if we were fighting a one-front war. But I think that the concern that underlies the *Hamdi* decision, the concern that underlines the *Quirin* and the

concern that has always underlay the authorities of the Laws of War to detain enemy combatants is the concern that the individual would return to the battlefield.

Judge Luttig: You may not understand the question. If we arrest Smith in Chicago, then its hard to convince people that the exigency if we let him go, is that he would return to the battlefield in Afghanistan. That is a totally different matter from saying that if we let him go in Chicago he will blow up a building in Washington. But you don't seem to be ready to argue that fully yet.

Mr. Clement: Well, I do stand ready to argue that, but what I was attempting to say is that the concern that has always underlay the Law of War. It is not a concern that an enemy combatant will return to a particular battlefield, it is always the concern they would return to a battlefield, that is a live battlefield in the Laws of War and I think that because the nature of this war it is least a two-front war. It is at least Afghanistan and the domestic United States, as made painfully clear on September 11th.

Judge Luttig: But the call...

Judge Michael: To make the United States a battlefield wouldn't you have needed more specific authorization from Congress and I guess I think the problem here is, that the *Hamdi* court, or at least the plurality points us to the Laws of War and the War on Terrorism is unconventional and really there hadn't been a lot of development of the Law of War with respect to the War on Terrorism, it is not up to us as a court I think to develop the laws on war. Perhaps we have to look toward Congress to give the President more specific authority, let the President take action

under war powers granted to him and develop it in that way, but it seems to me that as a court we are limited to *Hamdi*, aren't we?

Mr. Clement: With all respect your honor, I don't understand why this court wouldn't be limited to at least a universe that included the *Quirin* case. One thing that I think is particularly...

Judge Michael: My problem with the *Quirin* case is that it seems that those people were coming in to attack military targets, or least targets that were essential to the war effort and *Hamdi* was just, well "just" is the wrong word, but what he was going to do was blow up apartment buildings.

Mr. Clement: Well, your honor, I think another key aspect of the *Hamdi* decision is that it grounded the President's authority, and the authorization of force of September 18th and I think that in order to understand what's clearly included in the war power and what are the kind of targets that Congress in passing the authorizations on September 18th were concerned about, one has to look at those contexts that led to the enactment of that authorization.

Judge Luttig: I would have thought that right out of the chute your first response to Judge Michael would have been that on the face of the AUMF, there was authorization to protect citizens at home.

Mr. Clement: Well, perhaps you would have preferred that I start with the textual answer. I was trying to provide the context with an answer...

Judge Luttig: I'm worried about something more fundamental. You are now moving to the axis of target, as opposed to the axis of enemy. Because the target, if the target has to be, as Judge Michael's question suggests, a military target, then you lose, arguably. If instead, it just has to be the detention of an enemy combatant who is prepared to wield his force against a military target, or a domestic target, then you can still win.

Mr. Clement: I think that is right but what I was trying to be directly responsive to Judge Michael's concern that perhaps the *Quirin* case is limited to, as you would describe the military targets. And I don't think that's true both in terms in the *Quirin* decision itself but I think that particularly in light of the *Hamdi* court's decision to ground its decision on the authorization of force, and the fact that it was passed in the immediate wake of the attacks of 9/11, which did not attack aluminum plants but was an attack on civilians in office buildings and the like, I think that it would be odd to read the authorization of force to authorize the capture of somebody like the Petitioner, who was targeting a military target, as opposed to somebody who is targeting targets that were identical to those that led to the authorization in the first place. Now, I do want to be responsive to your questions as well, though, because I think the relevant text here has identified certainly by the district court, is this language of "necessary and appropriate," and that is the authorizing language of the resolution. But that exact phrase appears at one other place in the authorization, in the perambulatory clause of the authorization of force. And in that specific context what Congress says, is that it is necessary and appropriate to take action to protect the United States and exercise the right to self defense at home and abroad, and so I think it is very difficult in light of that textual evidence to use the words "necessary and appropriate," and to use

that phrase to broad distinction between foreign battlefields and protecting the United States against further attacks in the United States

Judge Michael: Your argument does have some logic but I think that *Hamdi* requires us to look to the Laws of War to decide what's necessary and appropriate. I think that's where I'm having a little trouble with your argument, is, you know, what's specifically in the Laws of War authorizes anything perhaps beyond the battlefield capture, or maybe, yeah besides a battlefield capture.

Mr. Clement: And again, your honor, I think that would point you to the *Quirin* case itself, that exhaustively surveys laws of the war, and I think that it is true that the *Quirin* co-conspirators had as their targets aluminum plants and the like but the court made quite clear in surveying this law of war that was really part of the first charge in the *Quirin* case that the offense is to come across enemy lines, intent on hostile acts, that's the language of the court, they talked about hostile acts, it did say, "very specific hostile acts involving aluminum factories," it involved hostile acts and I think in specially context of this battle, the context of 9/11 and 9/18 and the authorization of force, would be very very strange to say that an interest in blowing up apartment buildings, and killing civilians again in the United States, is not a hostile and war-like acts...

Judge Luttig: This line of questions is precisely what underscores the importance of your agreement that this is a battlefield, here domestically. Because if it is, then the Law of War rationale identified in *Hamdi*, obtains four square, because you are preventing, in this instance, Padilla, from returning to the battlefield, i.e., not Afghanistan, but the United States.

Mr. Clement: I certainly agree with the logic that is reflected in that question and I would say that again, in light of the context of 9/11, the context of the authorization in which the court grounded the authority in the *Hamdi* case would be very passing authority to detain only obtained in foreign battlefield and not as the enemy combatant came closer to the target.

Judge Luttig: But this is a policy argument, Mr. Clement, and it's unpersuasive on the technical legal point that Judge Michael is raising. He says *Hamdi* was confined to the Laws of War and the Laws of War don't require, the Laws of War identified in *Hamdi*, do not require the detention of Padilla in the United States, what is the response to that if it's not, the United States is part of the battlefield?

Mr. Clement: I think there are two responses, your honor, it is that, your answer, it is also the answer of the Laws of War talked about in *Hamdi* talked about a foreign battlefield and the fact that he is still there is relevant. And again, with respect, I think, take another World War II era case, the *Torrito* case, okay, that is an individual on the front in Italy. He was detained in the United States, now the concern as time wore on in World War II was the Italian front was no longer an active theatre of war, the only remaining active theater of war was with Germany. That didn't mean we would release them we were concerned about Giovanni Torrito making his way into Germany. The point is there is a concern of enemy forces finding their way to a relevant battlefield. I think, with all respect, that....

Judge Luttig: Why would you go surveying the universe of possible battlefields to the seeming exclusion of the United States? Is it just a reluctance to represent on behalf of the United States that the President believes that this is a battlefield on the War on Terror?

Mr. Clement: No its not your honor, it's a simple...

Judge Luttig: Well then why wouldn't you say that's it? And then you're covered by *Hamdi*, you're covered by the Laws of War, relied upon in *Hamdi*, and you don't have to resort to this more attenuated argument that, "Well, take for instance the battlefield on terrorism moves to London, our concern is that Padilla may fly to London." Well that's okay, but it's hardly persuasive.

Mr. Clement: Well, your honor with all respect, I think, I color my reluctance to the advocate's unwillingness to rest on a single argument when he has two. And I think that the fact...

Judge Luttig: The question is, the advocate usually rests on his best argument and not his second best if he only has one.

Mr. Clement: Well I haven't had any resistance to resting on both your honor, but I'm not going to give up the fact that the Petitioner was present in Afghanistan, that is a relevant fact in this case, it is a potential basis for this court to limit its holding or at least have something in its mind about why his detention might not be indefinite because you can point to the objective fact that there are 18,000 troops still on the ground in Afghanistan....

Judge Luttig: Turn him over to the criminal process. Am I concerned that turned over to the criminal process that he would return to Afghanistan? No, not especially.

Mr. Clement: Well in similar ways your honor, I think that the Congress that authorized the use of force on September 18th was primarily concerned with protecting the United States from further attack. This is not a situation...

Judge Luttig: I do too, but I'm trying to get you to make that argument, if that's the government's argument.

Mr. Clement: And it is the government's argument, and with all due respect I think I have made that argument but I am not going to stand here and say that it is our only argument. With respect, I think that the, I'm surprised we're having trouble meeting eye to eye on this because the same concerns that seem to underline your questions, underlying my reading of the *Hamdi* decision, which is to say, I think it would be very perverse on September 18th an interest in authorizing force in detention on foreign battlefields in Afghanistan, when at that point we didn't know the battlefield in Afghanistan, but we were awfully awfully concerned that the battlefield would again be in the United States. And in acting in response to attacks launched from within the United States on the United States it would be very very odd to read that authorization to authorize the use of force and detention abroad but not to authorize the use of force in detention in the United States to protect the United States, and so I think that it is a very relevant fact for this case and that is why those individuals in the *Quirin* case were enemy combatants not lawful

combatants because they didn't confine themselves to the battlefield. With respect, I think, to *Quirin* and the authorizations of September 18th are all consistent with the fundamental proposition that when enemies come to the United States to engage in hostile war-like acts here and target civilians they are violating the Laws of War, they are not taking any special privileges under the law. There are no other questions.

Judge Luttig: You have reserved some time for rebuttal.

Mr. Clement: Thank you your honor.

Judge Luttig: Mr. Patel, whenever you are ready.

Mr. Patel: Thank you your honor, may it please the court. Your honor, it has been the birthright of every American citizen, even when suspected of the most horrible crime, to be punished according to the law. The Founders protected that birthright with the habeas suspension clause, the only emergency mechanism in the Constitution, and Congress enhanced that birthright when it enacted the Non-Detention Act to appeal the Emergency Detention Act, an act that authorized preventative executive detention of spies and saboteurs.

Judge Luttig: But would the non-detention act apply to *Hamdi*? And if not, why not?

Mr. Patel: Your honor, Justice O'Connor found that the Non-Detention Act requires Congress...

Judge Luttig: Would it apply to *Hamdi* or not?

Mr. Patel: It did apply to *Hamdi* your honor, and Justice O'Connor found that it would be satisfied in the authorization of the use of force in the narrow circumstances...

Judge Luttig: If that is true, then how can it not be true *a fortiori* as to Padilla?

Mr. Patel: Your honor, the authorization, when Congress enacted the authorization of the use of force, there was not a word of debate about a domestic application of that statute.

Judge Luttig: There was no debate about detentions of the kinds that we are talking about in either of these cases was there?

Mr. Patel: That's true your honor and what Justice O'Connor found was that the detention *Hamdi* authorized, that Congress authorized a detention that potentially flowed from the Laws of War.

Judge Luttig: That's my point, if the AUMF authorized the detention of *Hamdi* which we now know by virtue of the Supreme Court that it did, then how can it not possibly have authorized the detention of your client? I can understand the argument that the AUMF did not speak to this kind of detention at all, but post-*Hamdi*, by the Supreme Court, that is not an acceptable

argument. Once that is rejected then it seems to me that there is no basis to distinguish this detention from that in *Hamdi*, on the face of the AUMF.

Mr. Patel: Your honor, I think in going back to the series of questions that Mr. Clement responded to, *Hamdi*, by the court's terms was limited to the narrow circumstances of a foreign battlefield that is...

Judge Luttig: No, I may have given him the devil but it comes back around to you. The explicit reasoning of the court, the reasoning on which it grounded its decision was that represented by Mr. Clement. Now, Justice O'Connor, perhaps unfortunately, and perhaps even unwittingly came back around in response to Justice Scalia, and, as I said to Mr. Clement, at least arguably limited the case to battlefield capture, but the principles articulated as those underlying the decision did not.

Mr. Patel: Your honor, if I may, I would suggest the court that not only did she do it intentionally she actually did it repeatedly, in that on page 265 it says that "we hold that although Congress authorized it, the detention of enemy combatants in the narrow circumstances alleged here"...

Judge Luttig: Yes, but those narrow circumstances allege, unfortunately for you, were specifically delineated at the outset of the analysis and it did not include locus of capture.

Mr. Patel: Your honor, twice she says that basis for detention was that it was on a foreign battlefield.

Judge Luttig: No, I don't believe she did. And if you got one of those, much less two, you should read them to us.

Mr. Patel: Your honor, if I may - Justice Scalia largely ignored the contents of this case that a U.S. captured in a foreign combat zone, that's on page

Judge Luttig: That is not one. That is describing the context. What you said was that she had twice said that the basis for the decision - I can describe the context as one in which there is a battlefield detention but not have that serve as the basis for my reasoning and sometimes that is explicit and my suggestion to you is, this is one of those cases.

Mr. Patel: Your honor, if I may also just point out. One other thing again is she is responding to, and this is talking about the facts of the case which, as your honor says, the court decides the facts of the case before it, and this is also on page 2643. This is criticizing Justice Scalia because she found the fact of battlefield capture to be irrelevant and therefore if she is ignoring the dissent because of the problem of battlefield capture, then clearly...

Judge Luttig: The problem with that for you is that the battlefield capture can be understood to fit under the analysis because of the second prong of that analysis, namely that you took arms against the military forces of the United States, so that that statement can be consistent with the two principles set out and not, therefore, represent a departure from the reasoning articulated.

Mr. Patel: Your honor, if I may suggest - I think there is also another way to look at that which is the basis of the intention of the court fell on is the detention the Court upheld in *Hamdi* is really a very traditionally military detention and that when you have an area of combat where by definition, ports are not open that you have no other law, but military law. That it is perfectly reasonable and appropriate for the military to detain those who are captured.

Judge Luttig: I agree, but that's just not what the court said in *Hamdi*. You are absolutely right, that that is the traditional understanding and environmentally as it were contextually, that's what one thinks. But we now have a settled Supreme Court opinion, it sets forth its reasoning unmistakably, and it does not rest on that.

Mr. Patel: Your honor, the *Hamdi* decision, and your honor if I could go back to the authorization, what the Court found was that the detention was authorized by the AUMF. When the AUMF was passed, there was no discussion about suspending the writ of habeas corpus, doing away with the right to trial. None of the core concerns domestically were discussed. A few weeks later, when Congress passed the Patriot Act, there were extensive discussions on those very issues. Congress debated whether it was permitted to hold aliens, not citizen-aliens...

Judge Luttig: But that still doesn't mean that it's narrowest finest point that Congress did not believe itself addressing the enemy combatant on U.S. soil, when it enacted the Patriot Act. It's a little bit like the Supreme Court, what it called the clarification of *Milligan*.

Mr. Patel: Your honor, we would submit that *Milligan* and the principles that it stands for, to have them prove, which is that the Constitution stands as a shield for all citizens in war and peace – that is still good law. Your honor, what we stand here today and ask will you accept Mr. Clement's invitation to have them prove whatever it is they want to prove against Mr. Padilla by the only constitutionally known method of fact finding, which is the criminal process. That's how in this country, when we accuse people of doing wrong, that we prove it. Your honor, I may be the first lawyer to stand here and ask that my client be indicted by a federal grand jury.

Judge Luttig: But with all respect, that begs the question before our court, that the President of the United States at the moment does not want that, and he stands on a right to detain your client without criminal trial and process and in that posture, we have to decide the question of whether he has the authorization to do that. So that's where we are.

Judge Michael: And I think the answer to that question is that he can do it if he can do it under the Laws of War, and, certainly, if your man had been captured on the battlefield in Afghanistan, I don't think we should even be here today. He wasn't captured there, but the basis for the decision in *Hamdi*, or at the least the discussion about why a battlefield capture and detention is ok under the Laws of War seems ought to also apply here, and, that is, the whole idea of a battlefield detention is to prevent the soldier, or the person, from returning to the battlefield, and, what difference does it make where he's captured? As a matter of fact, the Laws of War say that someone has fallen into the hands of the enemy if he is captured by civilian police or civil defense authorities, it doesn't matter. The point is to keep the person from going back to join the battle and the whole idea is that you don't get a free pass, I mean, if we were to rule in your favor

here today, we would be saying that if you are a soldier and you aren't captured on the battlefield, you get a free pass to go back to the battle. Isn't that right?

Mr. Patel: Actually, your honor, respectfully I would say that what you are given a free pass to is an indictment and trial and to suffer whatever consequences Congress has imposed for the conduct the jury finds you've committed.

Judge Michael: But there's your two separate questions: Whether your fellow can be indicted criminally is a separate question from whether he took up arms against us in Afghanistan, and I think we've got the answer the question of whether a non-battlefield capture is okay under the Laws of War is, then it doesn't matter what can be done to him civilly. The whole idea would submit, of the Suspension Clause...

Mr. Patel: Your honor, I think the answer to your question is the whole premise we - is both the history and the text of the Suspension Clause looks at invasion and rebellion at home. And so when we're talking about domestically, we have a different focus, and I think the purpose and history of that clause and the reason is that it is the only common law writ that is preserved in the Constitution.

Judge Luttig: Does the President have any military detention power domestically?

Mr. Patel: I would say, yes, your honor, for members of the armed forces.

Judge Luttig: You mean the power to detain a member of another country's armed forces, or the U.S. armed forces have the authority to detain?

Mr. Patel: I believe I was answering your question that, under the Uniform Code of Military Justice, certainly the President has the authority to militarily detain our own soldiers that violate it, but I don't think that's where your honor was going. Other than that, I would say the answer is no.

Judge Luttig: So the President of the United States, if he's called into the Situation Room in the middle of the night, and he's told by either the Director of the FBI or an army general that someone has landed at NY LaGuardia and they are about to set off a bomb in downtown Manhattan, the President of the U.S. has to do what, call the U.S. Attorney there and ask that the man be picked up by law enforcement?

Mr. Patel: Your honor, the man can be detained by civilian authorities.

Judge Luttig: No, no, no, we're right there at the point...

Mr. Patel: Absolutely...

Judge Luttig: ...does he have to be detained by law enforcement and if the President sends the military after him, it's illegal?

Mr. Patel: Your honor, if the military picks him up, they must, as soon as the situation is...

Judge Luttig: You said he had no authority to do that.

Mr. Patel: Your honor, if I may, he must be surrendered to civilian authorities immediately.

Judge Luttig: No, that's too simple, that's just to beg the question, I mean, he cannot, can he?

Mr. Patel: The answer is no.

Judge Luttig: In your view, he cannot.

Mr. Patel: That's correct.

Judge Luttig: That's honest and that is the import of your argument.

Judge Michael: Does it matter whether he is a citizen or an alien, or is your position the same with respect to that?

Mr. Patel: Under the factual situation that Judge Luttig outlined, we would say it doesn't matter whether he is a citizen or an alien, obviously 4001 addresses citizens.

Judge Luttig: What if he is wearing the uniform of the enemy and armed?

Mr. Patel: If he's wearing the uniform of the enemy and armed, then we're in the situation, your honor, where we would still say no.

Judge Luttig: That the military cannot detain him?

Mr. Patel: That the military cannot detain him absent authorization from Congress, your honor.

Judge Michael: Your position is that the President doesn't have that.

Mr. Patel: The President has no authorization to act militarily domestically. Your honor, that is a huge change. I mean, the very structure of the Constitution was to limit the possibility of executive detention, and to and to keep the civilian in charge of the military.

Judge Luttig: We might as well not even have a President of the United States if in the circumstance I described to you his hands are tied behind his back to protect the citizens of the U.S.

Mr. Patel: your honor, the President has many tools to protect them...

Judge Luttig: But he doesn't have the tools immediately at his disposal, he's got to go through the U.S. Attorney in the Southern District.

Mr. Patel: He doesn't have that one tool, your honor. He doesn't have power to detain people domestically militarily, but he has, and your honor, when Congress passed the Patriot Act just a few weeks after 9/11, they enhanced his civilian law enforcement powers to deal with terrorism and they've done it three additional times since then.

Judge Luttig: This is a failure to appreciate the real world circumstances that can confront a President of the United States. To go back to the hypothetical, his army general says this man has just disembarked, he will set off the bomb in Manhattan within minutes, in our view, and we have him targeted and we know where he is, but you only have minutes. Your position is that the President must say "do nothing, because I have no authority. I will contact my Attorney General, he will in turn contact the U.S. Attorney in the Southern District who will in turn contact law enforcement on the ground there who will in turn reach your army general to get the coordinates of the target and then we will send out the marshals, the New York City police, to intercept the man. That's what you would require of the President in that kind of emergency?

Mr. Patel: The procedure that your honor outlined, the question, your honor, is the authority, and I would respectfully submit, your honor, that the President sits both as Commander in Chief and as the Chief Magistrate, that whatever process it takes to get there, and cannot use his military power...

Judge Michael: So you're letting Judge Luttig run you into a hole that I think you don't have to be run into. Throughout history, the war power and the civilian criminal power have been used hand in hand, the Laws of War say that in certain situations where if you've done something that

would be both a war crime and a domestic crime, the preference is to try the person domestically, but that's sort of beside the point, but it seems to me that you can concede that the President, when he's confronted with an emergency like Judge Luttig describes can use whatever power he has to meet that immediate emergency. The question is whether, if he happens to use the military to pick up the person that Judge Luttig described, can he then detain him militarily? And I think meeting an immediate problem, and we're worried in this case about long range detention for the duration of some conflict. It seems to me you can give in to Judge Luttig on his question and go into the long-term duration problem, the the long term detention problem.

Mr. Patel: Your honor, I understood Judge Luttig to be asking the theoretical question. The practical question is the President can use whatever authority is available and then, if the military is there, he must be turned over to civilian authority.

Judge Luttig: You're exactly right, but neither should you be concerned that you've given away the farm, because even if you were to get out of the hole you dug, not that I dug for you, you would still be on an incredible slippery slope which I do not believe you could stand up straight on. Namely, the emergency and the exigency, because now, and maybe you recognize this and that's exactly why you don't want to go where Judge Michael would lead you, because then you've got the man who is bent on setting off the bomb in Manhattan, you don't know whether he's got compatriots on the ground or not, you don't know his capability to communicate or not, and you don't know his ability to escape or not. You don't want him in the hands of the New York City Police as opposed to the U.S. military until you have all of those questions answered to your satisfaction that he doesn't present an ongoing, continuing threat to the national security.

Mr. Patel: Your honor, as we sit here and stand here in this courtroom, we have to deal with the powers of the office of the President, which are not unlimited and you do not have to deal with, we are fortunate to not have to deal with, exactly the situation you honor is addressing.

Judge Luttig: Well, I don't know, though, because in this day and time, those no longer seem like hypotheticals.

Mr. Patel: Your honor, the problem is, there's only one Emergency Clause in the Constitution, and it is that which gives Congress, not the President, Congress, the power to suspend the writ of habeas corpus.

Judge Luttig: The question is whether there is another emergency power that resides in the inherent power of the President of the United States.

Mr. Patel: Your honor, respectfully, as Justice Jackson said in *Youngstown*, I don't think we should rightfully re-do what the Founders wrote. They envisioned...

Judge Luttig: Surely you wouldn't analogize this to *Youngstown* and legislation?

Mr. Patel: No, your honor, but the Founders, the people who wrote the Constitution, the people who limited executive detention, they knew what war was, they'd lived through it firsthand, they knew from the history of the English crown that the authority that your honor is describing is a

slippery slope of its own and that's why I would submit, your honor, that it is the job of Congress, not for the court, not for the President, to define this power. If we are going to allow executive detention of some sort, that's a job for Congress to define, your honor.

Judge Luttig: And there is an argument that there is absolutely no emergency authority residual in the President of the United States and that's exactly the argument you've been making and that's a fine argument, but that is what it is.

Mr. Patel: Your honor, it is what it is and it is what the Constitution says, we submit. And there's a way to change that, people think it's necessary to change it and I think your honor that history tells us we need to proceed very cautiously in going down this road. Since the Magna Carta, preventing executive detention is one of the cornerstones of what it means to be a democracy.

Judge Michael: In the aftermath of 9/11, we had troops, I suppose they were actually National Guard troops, in airports, train stations, are you suggesting that they couldn't, if they saw somebody who had information that somebody was carrying, credible information that somebody was carrying a bag through the airport with a bomb in it that these troops couldn't stop that person and detain him?

Mr. Patel: your honor, I'm not exactly sure what the chain of command was for the National Guard but it was still present in the...

Judge Michael: I'm pretty certain there were some direct army troops. Let's assume that it wasn't National Guard...

Mr. Patel: I'm sorry, your honor...

Judge Michael: Let's assume that it was somebody in the regular Army in an airport.

Mr. Patel: Your honor, um...

Judge Michael: I mean they have to have emergency detention authority, I mean it would be crazy for them to have to call the FBI or a local policeman and say "I know that man has a bomb in his bag, you arrest him, I can't."

Mr. Patel: Your honor, you don't to either be, in other words, if you see somebody who is doing something dangerous, a citizen, you don't need any particular badge or uniform to prevent bad acts from happening. But the question, your honor, is who has the authority to detain, and, I'm thinking, your honor, of President Washington during Shays Rebellion, he sent the troops out...

Judge Michael: Well, the question before us is detain for the duration of the conflict.

Mr. Patel: your honor, in that instance, those troops were under the command of a civil magistrate, and I think someone picked up by the regular Army could be turned over to the

police and that would be the detaining authority, would be within the civilian authority and that's the Constitutional plan. Your honor...

Judge Luttig: Let me ask you this question on a slightly less cerebral level. It seems to me that after the Supreme Court's reliance in *Hamdi* on the AUMF and after its gloss on *Quirin*, again, in rejoinder to Justice Scalia, at least in part, that the *Quirin* court would have permitted the detention. Certainly if it had permitted the military trial and its limitation per *Quirin* on *Milligan* that on the extant of law, it's exceedingly difficult to maintain the position you have.

Mr. Patel: your honor, traditionally under the Law of War, lawful combatants can be detained, unlawful combatants can be detained and tried. The issue of detention without trial was never discussed by the *Quirin* court, but, your honor, if there's one thing I would submit, your honor, I'm just quoting from the Federalist 84, Alexander Hamilton, "Confinement of a person by secretly hurrying him to jail, where sufferings are unknown and forgotten, is a less public but less striking and therefore a more dangerous arbitrary government than even an execution." That's not an issue that's before the court in *Quirin*, your honor. Detention without trial is not a lesser included.

Judge Luttig: But it was implicitly before the court in *Hamdi*. And the court in *Hamdi* did not cite to the Federalist papers on this point,

Mr. Patel: That's true your Honor.

Judge Luttig: It held that there must be post-detention process, which may connote, though I'm not sure, trial and prosecution. But in all events, it did not say anything about this at all.

Mr. Patel: your honor, that is true, what the court in *Hamdi* found is it is theoretically possible to detain an American citizen who is found bearing arms against United States troops on foreign battlefield, and then what they did, your honor, was, to continue with the Law of War analogy, to apply what is essentially a Geneva Convention Article 5- type of fact-finding hearing to determine whether a person is or not someone on a foreign battlefield.

Judge Luttig: But what significance do you ascribe, if any, to the, what it appears to me, to be the quite significant observation as to the reasoning in *Quirin* on the detention question itself?

Mr. Patel: your honor, as I said, the core issue in *Quirin*, is not detention, and it was not even trial

Judge Luttig: The significance is that today's Supreme Court looks at *Quirin*, a non-detention case, at least not specifically a detention case, but in the context of a detention case, i.e., *Hamdi*, says we have no doubt that the *Quirin* court would have permitted the detention as almost a lesser included action to the trial by military tribunal, so in terms of understanding today's law through the lens of today's Supreme Court, you lose both *Quirin*, *Hamdi*, and by operation of the same analytical tact, *Milligan*. So you have nothing to stand on in terms of the limited authority that we have from the Supreme Court.

Mr. Patel: If I may your honor, I think there is another way to look at that picture which is that *Quirin* and *Hamdi* applied the Law of War, to certainly in *Hamdi* which is our most recent discussion of it, to the foreign battlefield situation, to the exigency of the battlefield .

Fortunately in the case before us, your honor, we have someone who was taken by the military, by order of a Judge, Mr. Padilla was arrested as he came off the plane in Chicago by FBI agents by order of an Article 3 judge, brought to New York, held in a maximum security federal jail, and he wasn't released by the military until they got an order vacating the material witness warrant. We don't have any of the facts that give rise to either *Quirin* or *Hamdi*.

Judge Luttig: Could the President have detained the attackers on 9/11, who brought down the World Trade Center, had he learned at the time of their arrival in the United States that that was their intention.

Mr. Patel: Absolutely, your honor...

Judge Luttig: On what authority?

Mr. Patel: On law enforcement authority, not military authority.

Judge Luttig: No military power to have detained?

Mr. Patel: That's correct, your honor.

Judge Luttig: Now if we are to assume the war question, that is that there is a war and it's a war on terror, where is the battlefield? I assume you will say it's not in New York City and it's not in London, and it's not in Chicago...

Mr. Patel: Your honor is correct...

Judge Luttig: ...where is it?

Mr. Patel: your honor, we have always defined battlefields by the function, that is, where courts cannot operate, that is where the battlefield is and certainly on June 9th and on May 8th in Chicago, 2002 – in Chicago courts were open and operating and the facts of this case prove that, because, as I said before, Mr. Padilla was arrested by court process so on those circumstances, in the battlefield and Afghanistan is a battlefield.

Judge Luttig: So, if the CIA detains somebody in Afghanistan, and brings them here, the courts are open for them?

Mr. Patel. That's correct.

Judge Luttig: But the military cannot?

Mr. Patel. That's correct.

Judge Michael: That can't be the answer that the battlefield is anywhere the court's aren't open. I mean, the courts were open in *Quirin*...

Mr. Patel: That's true, your honor, but the question in *Quirin* is what kind of court those defendants were going to be tried before, that was the issue, the issue in *Quirin* is, is there jurisdiction over these defendants; and what the Court in *Quirin* found was that they waived any objection military jurisdiction when they took off their uniforms. That's what made it a violation of the Law of War. Had they come in their uniforms and done what they were planning to do, they could've been detained, but they could not have been tried, because there would've been no violation of the Law of War.

Judge Luttig: But we do know that criminal process was available against them and that's the touchstone of the analysis.

Mr. Patel: The criminal process, yes your honor.

Judge Luttig: Answer, according to *Hamdi*, detention would have still then authorized by the Supreme Court in *Quirin*.

Mr. Patel: Again your honor, it was not - that was an issue that was neither briefed nor discussed in *Quirin*. And *Hamdi* found under the extraordinary circumstances on a foreign battlefield somebody carrying a gun - because your honor, the risk of error on a foreign battlefield when

someone is carrying a gun, they are who the government thinks they are is pretty high, pretty low, excuse me...

Judge Luttig: If you want to go on to individual cases, and this is a point in your brief, that's not necessarily true. You can envisage a situation where the enemy combatant arrives in Chicago and it is clearer from all the surrounding circumstances that that is what he is, then it was when he was in battle on the battlefield.

Mr. Patel: your honor, the solution under the Constitution is charging and trying. And, your honor, that's what we've done for 225 years in this country and it's at the beginning – it is the birthright of an American citizen, and if your honors have any more questions, I'd like to make a few comments in closing, your honor.

History has taught us as a people that executive detention is dangerous because we do not know the limits of it. Even in wartime, democracies do not allow the military to lock up their own citizens. The Constitution was established in part to limit that. The Founders did everything they could to limit the power that's in question before this court – the power of the government to use its military authority to lock up one of its citizens. This country has faced grave threats before without sacrificing that fundamental...

Judge Michael: But *Hamdi* says directly that there is no bar to this nation's holding one of its own citizens as an enemy combatant.

Mr. Patel: That's absolutely true, you honor, on a foreign battlefield...

Judge Michael: But that's contrary to what you've just been telling us.

Mr. Patel: No, your honor, it's not – *Hamdi* says that on the foreign battlefield, when someone is carrying a gun, to detain someone. But when someone comes...

Judge Michael: That's not what the sentence I just read said...

Mr. Patel: That's true, your honor, but that is the context of the case, that's the facts, that's what the issue was before the court, when we have a case where there is no law. We are dealing with the Law of War in its purest sense, that citizenship is not a defense, but once you come to this country citizenship is what 4001 was about. Domestic rebellion and invasion is for the Suspension Clause. The use of the President's wartime power is not unitary, it's shared with Congress and that is why the clear statement rule requires that he be authorized to act, and those are the traditions we ask this court to hold, those have kept us quite well for the last 229 years. We think it should continue. If the court has no other questions, I thank you.

Judge Luttig: Thank you. Mr. Clement you've reserved some time for a rebuttal.

(end of disc 1)

(start of disc 2)

Mr. Clement: Thank you your honor. I would like to attempt to make about four points of the rebuttal. First, I want to try to be as responsive as I can to Judge Michael's concern that somehow a civilian target makes an individual less of an enemy combatant. With all respect, I

think that is not consistent with the Law of War. I can try to make that point in two ways. One: I can point to some sources that the Supreme Court relied on in *Quirin*, which make it clear that there's no limitation to military targets and there's authority citing footnote 11 in the *Quirin* case where just one of the various authorities that the courts looking to in the Law of War they said "The agent who attempts to steal through the territory occupied by the enemy to further in any manner the interest of the enemy if captured is not entitled to the privilege of the Law of War. And so is an enemy combatant. So, in any manner is just one of the authorities, but I want...

Judge Michael: But the question is whether picking somebody up like that and detaining them for the duration is a fundamental incident of waging war because Section 507B of The Laws of Land Warfare say that violations of the Law of War committed within the United States by persons not subject to the Uniform Code of Military Justice, will usually constitutes violations of federal or state criminal law and preferably will be prosecuted under such law, that suggests to me that somebody who is going after a non-military target or detention of such a person for the duration of the hostilities may not be a fundamental incident of waging war.

Mr. Clement: With respect your honor, first of all I would say the very fact that the source that you cite to uses...

Judge Michael: It's your source, the Law of Land Warfare, and you've not... sorry, go ahead.

Mr. Clement: With the very fact that it says there is a preference for the indictment option suggests, that there's an option, that there is more than one option, and that detention is an option. And I would pick up on the point...

Judge Michael: But it also suggests that maybe detaining such a person under military authority might not be a fundamental incident of waging war and that's what *Hamdi* was talking about, capturing somebody on the battlefield is a fundamental incident of waging war, maybe capturing somebody in this country who is about to bomb a domestic target, may not be a fundamental incident of waging war as we've traditionally understood war, maybe we're in a new era.

Mr. Clement: And with respect your honor, even in the old wars that people understood more concretely, like World War II, the authority to hold somebody and to try them for specific war crimes who was in the United States in support of the enemy was recognized by the Supreme Court in *Quirin*. And its also true that some of the authorities that the court pointed to in *Quirin* do talk about the fact they were targeting when an enemy comes in and targets war material and the like, but that's because the intentional targeting of civilians which was what the Petitioner was on about in the United States, is unlawful combatancy even if you are in uniform on a battlefield. So, in this sense this person is in the absolute crosshairs of being an unlawful combatant because they're engaged...

Judge Luttig: Don't you see all of these niceties don't get you very far unless you are prepared to boldly say that the United States of America is a battlefield in the War on Terror? And don't

you see that if you are prepared to say that and you can successfully defend that position, it cuts a wide swath through everything that you have been challenged on here today?

Mr. Clement: your honor, I can say that, I can say it boldly, but I can also say that I don't know whether you would say that, or in your opinion that would have been true in World War II, but whether or not it was true in World War II there was the authority to detain the individuals in *Quirin*, and I think that's same authority applies to these individuals and as you yourself pointed out, and I think this is responsive to one of the questions that Judge Michael was asking me, I think that its not really open after the *Hamdi* decision to try to distinguish the *Quirin* case on the grounds that *Quirin* involved detention for trial before a military commission and this case involves a detention because what the Supreme Court in the *Hamdi* case said was that effectively, that the detention authority is the lesser included authority. The phrase that Justice O'Connor used was "near" detention after noting what *Quirin* upheld, she said she would have trouble believing that the court had any difficulty with "near" detention of an individual during the period of relevant hostilities. So, I think that if you put those cases together, I agree that the United States unfortunately was made a battlefield on September 11th and that we stand ready to prove that Petitioner came here with the intent to make it the battlefield again, but I would also say that even if that were not true, as presumably it may not have been true in World War II, the fact that we were at war with Al Qaida, the fact that somebody who had signed up to train with Al Qaida and come here on a mission for Khalid Sheikh Mohammad, would not disable the President either under his inherent authority or under the authorization for the use of military force for detaining that individual.

Judge Luttig: No, but it would go a long way toward taking you out from under *Hamdi* and its reasoning and that's Judge Michael's question.

Mr. Clement: And in fairness, I think that's right. I mean, I think if the only precedent we had was *Hamdi*, and we didn't have *Quirin*, that I would probably be up here making just the one argument but given that we have *Quirin*, I would like to make both because I think this case is really an *a fortiori* case. One way of thinking about this case is it really asks a very simple question, which is whether somebody who is in that sort of shaded overlapped region of the then diagram that includes the *Hamdi* authority and then *Quirin* authority can be detained by the President. I think either case answers that question.

Judge Luttig: Well, how would you describe the shaded portion? That may be the tension that you and I seem to be having with each other.

Mr. Clement: Well I would describe it as somebody who was on the foreign battlefield and took up arms that they evaded troops on a foreign battlefield and then came to the United States, also a battlefield, in order to engage in activities and war-like acts on behalf of the enemy.

Judge Luttig: And I would suggest that maybe there's not a shaded grey area.

Mr. Clement: That would be fine, as long as it's in one of these circles, and I think it is. I think the President has that authority.

[laughter]

Mr. Clement: Now I would like to make one or two other points, which is, the other side suggests that somehow indictment in criminal trial is the only option available to the executive in this context. That is of course not the sole remedy. There are treason charges that are certainly available to the citizen conspirator. In *Quirin* the court specifically said that the executive need not go the treason route. The material support charges, the treason charges, that Judge Foyt pointed to as being available here apply extraterritorially, those same criminal charges were brought against somebody like Walker Lindh and could have been brought against somebody like Hamdi yet that was not a reason for the majority of the court to say the President lacked the authority to detain Hamdi. I think also there is some emphasis on the other side about the notion that somehow the fact that the Petitioner was originally detained by civilian authorities makes some difference. Again, in the *Quirin* case itself, the conspirators were first taken into custody by the FBI agents in Chicago and New York, they weren't apprehended by the military at the border, they were taken into custody in the first instance by the FBI. But that was not a basis for saying they could not be treated as enemy combatants. There is a certain extent I'm not quite sure to what extent, but I think that the Petitioner's case here today relied in some degree on the proposition that the President doesn't have the inherent authority to take action to protect the United States. I would think that that argument is rejected simply by the text of Article 2 of the Constitution taken as a whole, but if one needed another authority, one need only look to the Prize cases where Justice Grier writing for the court said that not only does the President have the authority to take actions to protect the United States when it comes under attack, he is duty-bound to do so, and so I think there is no question that the Constitution as written, and as

interpreted by the Supreme Court, gives the President an important role in protecting the United States, especially when it comes under attack. The other point I

Judge Michael: Congress really has the dominant role doesn't it, though? I mean, isn't the President's power of, or doesn't the President's power as Commander and Chief only have force to the extent that it's authorized by Congress, I mean after all, Article 1, Section 8 gives the Congress the power to declare war and to make rules concerning capture on land and water.

Mr. Clement: Well your honor, I certainly think that as Justice Jackson would have put it, the President's power is at it's zenith when he acts pursuant to a congressional authorization. But I think Justice Jackson, even his tripartite formula understands there is a reservoir of executive authority, that there is at least a possibility of executive action, even when its contrary to act of Congress, if it's a core Article 2 pursuant to the Commander in Chief.

Judge Michael: But how long does this authority extend? Does it extend if the President picks up somebody in the emergency situation that Judge Luttig spelled out for us, does the power of detention extend for the duration of the conflict in that situation?

Mr. Clement: I think it would certainly, it would certainly extend for the period of the exigency and I would think that the courts would be inclined to defer to the President's determination of length of the exigency at least absent some kind definitive congressional action. And certainly the detention of Padilla here, the Petitioner, has been opened ditorious[?] available to Congress and they have not taken action to prevent it, and I think that especially in light of the Supreme

Court's decision in *Hamdi*, the fairness reading of the authorization of use of military force is that it does authorize force and as a necessary component of force it authorizes that detention authority in the context of enemy combatants. The last point I like to leave you with,

Judge Luttig: For the duration of hostilities?

Mr. Clement: For the duration of hostilities..

Judge Luttig: That's the point, not that it just authorizes it, we know that. The question is, for how long does it authorize it? Answer: *Hamdi* says for the duration of the hostility.

Mr. Clement: Exactly. I think that in that respect the fact there are still troops on the ground in Afghanistan which is what the court in *Hamdi* pointed to, that's a highly relevant fact for saying that whatever difficult questions might arise later when the courts would still be open to hear

Judge Michael: You're retreating your first argument.

Mr. Clement: What's that?

Judge Michael: You're retreating your first argument with that.

Mr. Clement: No, I think its relevant, there is this question for how long will hostilities last. I don't think there's any, Congress enacted the authorization of force on September 18th.

Congress has remained to open, if they wanted to withdraw that authorization of force, limit it to Afghanistan, those are options that are available to them. I think that in light of the text of it, which gives references necessary to appropriate force both at home and abroad in the context the week after September 11th attacks to the United States it would be very odd to ask some further Congressional action to read that authorization as giving the President less authority as the enemy approaches the target that we're most concerned about, which is the domestic United States.

Judge Luttig: Suppose, now that we've gone down the path, suppose the Congress legislatively authorized a resolution that the President must release Padilla now. Does the President retain the residual inherent power to say "No in my view that this is a grave danger to the national security in reliance upon that authority in the Constitution and I will not do so."

Mr. Clement: I think that is a theoretical possibility, the obvious difference

Judge Luttig: Does he have the power in the United States view?

Mr. Clement: I don't want to answer that hypothetical question because that is precisely the kind of hypothetical question that I think the executive branch would try to negotiate its way around and not try to get itself in that situation. But what I would answer...

Judge Luttig: No but its there under the hypothetical, its in that situation. That Congress has said to release him.

Mr. Clement: Then I think that the President made a determination as Commander and Chief that it was necessary to continue to detain him, then we would have a case where Justice Jackson would say that the President's asserted authority is at its lowest ebb. What makes that case and the hypothetical so radically different in this case, is that in light of the *Hamdi* decision, I think you have the executive authority pursuant to the authorization to use military force at its zenith. The last point, if I could make is simply...

Judge Michael: Before you get there, let me ask a follow up question to what Judge Luttig just asked. Suppose that the war in Afghanistan or the hostilities ended tomorrow, would you release Padilla from military detention and turn him back over to the civil authorities for detention?

Mr. Clement: I do not know the answer to that, your Honor. I think what, what I do know is that the courts in South Carolina would remain open to hear a habeas petition filed at that point and however this court decides this case, if it wrote it in a way that relied on the fact that the troops are still on the ground in Afghanistan, that that habeas petition would effectively be without prejudice on that question, and at that point we could make a determination and at that point I might be down to Judge Luttig's one argument, and we might have a different case before us. And I think you could imagine the situation where that a determination might be made that once the troops are no longer on the ground in Afghanistan that certain Taliban detainees are released, certain Al Qaida detainees are not released. But that would I think pose a different and more difficult question...

Judge Luttig: On what rationale would you take that course?

Mr. Clement: On the rationale that certain of the individuals were detained in the context of relative conflict one: which is solely the conflict in Afghanistan, but other individuals were detained where the relevant context, and the relevant conflict was a broader conflict that includes the United States. I think the last thing I would like to say is I think, everybody likes to quote the Federalist Papers and to point to the authority that is suggested by Hamilton that it would be so dangerous which would give the executives the authority to detain somebody and drag them off in secret. I think its important to remember that deciding the authority question before this court today, that the government does stand ready. I mean and this is not in posture as the *Hamdi* case was, in a sense the court has now instructed in the *Hamdi* case, the rough outlines anyway, to what a due process hearing looks like in this context, and there may be specific questions about exactly how that can play out, but the government stands ready to make its case. So if there is any concern here about mistakes that can be made in the context of a non-battlefield detention versus a battlefield detention, those can be dealt with in the due process hearing that the court has provided for in the *Hamdi* case, the question today is the sole question of the authority to detain an individual like this as I've said before, I don't think it's a rational reading of the *Quirin* case and the nature of the September 11th attacks, the text of the September 18th resolution to say the President lacks the authority as the enemy gets closer. Thank you very much.

Judge Luttig: Thank you. Thank you both counsel for excellent arguments. The court will adjourn court for the day and will come down and greet counsel.