

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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5 SALIM AHMED HAMDAN,

6 Appellant,

7 v.

No. 11-1257

8 UNITED STATES OF AMERICA,

9 Appellee.
10 -----

Thursday, May 3, 2012
Washington, D.C.

11
12 The above-entitled matter came on for oral
13 argument pursuant to notice.

14 BEFORE:

15 CHIEF JUDGE SENTELLE, CIRCUIT JUDGE KAVANAUGH,
16 AND SENIOR CIRCUIT JUDGE GINSBURG

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANT:

19 JOSEPH McMILLAN, ESQ.

20 ON BEHALF OF THE APPELLEE:

21 JOHN DE PUE, ESQ. (DOJ)
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23
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On Behalf of the Appellant

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John De Pue, Esq.
On Behalf of the Appellee

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REBUTTAL ARGUMENT OF:

Joseph McMillan, Esq.
On Behalf of the Appellant

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P R O C E E D I N G S

THE CLERK: Case No. 11-1257, Salim Ahmed Hamdan, Petitioner v. United States of America. Mr. McMillan for the Petitioner, Mr. Pue for the Respondent.

ORAL ARGUMENT OF JOSEPH McMILLAN, ESQ.

ON BEHALF OF THE APPELLANT

MR. McMILLAN: May it please the Court. My name is Joseph McMillan, and I represent the Petitioner, Salim Hamdan. I've asked to reserve three minutes for rebuttal.

I'd like to begin here today, Your Honors, addressing the issue raised by the Court's order on Monday of this week, which was the question of mootness. And our position on that issue is quite simple and, in fact, it's in accord with the Government's as set forth in its brief.

We think the case is not moot. We think it falls quite squarely within the rule announced by the Supreme Court in the Sibron v. New York case, where the Court said that where the issue on appeal is a criminal conviction, as it is here, there is a presumption that adverse collateral consequences apply which --

JUDGE GINSBURG: Is that presumption a rebuttable one?

MR. McMILLAN: That's unclear, Your Honor. I think we see from cases in this Circuit, references to the possibility of presumption. We haven't had a chance to

1 thoroughly review the issues in the Supreme Court, but the
2 Supreme Court's jurisprudence doesn't seem to mention the
3 rebuttal, you know, that this presumption is rebuttable.

4 In fact, Sibron talks in terms of, or even Spencer
5 v. Kemna talks in terms of, kind of, a dual approach, either
6 a presumption or the willingness to accept the most remote
7 possibilities of collateral consequences.

8 JUDGE GINSBURG: And it's clear, I guess, that if
9 the appellant in a criminal matter dies, it's over, right?

10 MR. McMILLAN: I would, you know, without --

11 JUDGE GINSBURG: Well, unless there is a matter of
12 a fine or something.

13 JUDGE SENTELLE: On direct appeal, if the defendant
14 dies, then the case is vacated below.

15 MR. McMILLAN: I'll take the Court's word for it.

16 JUDGE SENTELLE: Yes. I mean, that is --

17 MR. McMILLAN: But that, of course, is not our
18 case.

19 JUDGE SENTELLE: That isn't a hypothetical. We've
20 had that over the years.

21 MR. McMILLAN: And in fact --

22 JUDGE GINSBURG: There might be an exception to
23 that, if there's a fine that would be recouped by the estate.
24 But short of that, just in terms of the sentences over the
25 death, or the death is over it.

1 MR. McMILLAN: I would note that even if the
2 presumption were rebuttable, Your Honors, the Government has
3 stated in pages two and three of its brief that it does not
4 anticipate being in a position to rebut that presumption in
5 this case. If the Court is troubled by the issue of
6 mootness, we would respectfully request an opportunity to
7 brief this, and would be happy to supplement the record, if
8 that were appropriate.

9 But as I said, our assumption going into this is
10 that this is a criminal conviction, and as such it falls
11 squarely under the rules announced in Sibron, and avoids
12 mootness.

13 JUDGE SENTELLE: I suspect we will request further
14 briefing on that. I'm looking back and forth between my
15 colleagues. And we might as well announce that we do wish
16 further briefing on the mootness question. We would like
17 appellant to address that in a brief not to exceed, is 20
18 pages sufficient, do you think?

19 JUDGE GINSBURG: I think 10.

20 JUDGE SENTELLE: 15 pages, to be filed within the
21 next 30 days, to be responded to by the Government in not
22 greater than 15 pages, to be filed within 20 business days
23 thereafter, with the appellant having a right of reply in not
24 more than 10 pages within 10 days thereafter.

25 MR. McMILLAN: Very well. Thank you, Your Honor.

1 JUDGE SENTELLE: And I hope the Clerk got that, but
2 I'm not sure I remember what I said.

3 MR. McMILLAN: Well, turning to the merits, Your
4 Honor, the primary issue that is the basis for this appeal is
5 that the conviction of material support for terrorism is a
6 conviction of an offense that is not a war crime, and
7 therefore it falls outside the jurisdiction of the military
8 commission which handed down that conviction.

9 In this case, we have -- essentially, we stand in a
10 long line of cases in American legal history where, for
11 various reasons, the Government has attempted to expand the
12 jurisdiction of military tribunals. And in each case,
13 Article 3 courts have pushed back on that effort. They have
14 resisted the encroachment of military jurisdiction on Article
15 3 jurisdiction.

16 JUDGE KAVANAUGH: It would help your argument, I
17 think, if you distinguished between Congress' power going
18 forward to create new war crimes under all the Article 1
19 powers, not just define and punish, but the declare war
20 clause and other war powers clauses, so going forward.

21 And then, what we have here, which is before the
22 2006 military commission act, and therefore the standard is
23 the law of war as in 10 USC 821, right?

24 MR. McMILLAN: I think the --

25 JUDGE KAVANAUGH: I mean, I realize you want to,

1 you would like to advance the ball on the going forward
2 point, but you don't need that to win here, correct? All you
3 need to show is that under the law of war in 10 USC 821,
4 material support for terrorism wasn't a previously recognized
5 international law of war war crime.

6 MR. McMILLAN: That's correct. And that is, in
7 fact, now a point that the Government has conceded. And in
8 fact, to grant this appeal, the Court need not even strike
9 out material support of terrorism as an offense. It need
10 only --

11 JUDGE KAVANAUGH: Exactly. That issue can remain
12 open going forward. The question really is whether, again,
13 like the analysis in Hamdan v. Rumsfeld itself of conspiracy,
14 using the analysis or the same kind of analysis is, did the
15 law of war include material support for terrorism as of the
16 time these acts were committed.

17 MR. McMILLAN: Correct. And the acts that were
18 committed, of course, were from February of 1996 to the date
19 of capture, November 2001. And our proposition, our
20 argument, of course, is that during that time, regardless of
21 whether Congress properly exercised its power under the
22 define and punish clause in 2006, to define material support
23 for terrorism as a war crime, as an offense against the law
24 of nations, regardless of what the status was in 2006, it was
25 not in 2001.

1 JUDGE KAVANAUGH: Tell me the difference between
2 aiding and abetting, in your view, and material support?

3 MR. McMILLAN: Well, I think the elements of aiding
4 and abetting are set out in various cases in front of
5 international tribunals. And they differ pretty
6 significantly from material support for terrorism.

7 The elements of aiding and abetting would include a
8 completed criminal act; a substantial contribution by the
9 accused at the completion of that act; knowledge that his
10 conduct would assist; and a specific intent that that crime
11 be committed.

12 Whereas in the Manual for Military Commissions,
13 promulgated in January of 2007, which set out the elements
14 for material support for terrorism, there need not be a
15 completed criminal act, nor a substantial contribution, nor
16 specific intent on the part of the accused.

17 In fact, liability for material support for
18 terrorism can be imposed where the accused's only intent is
19 to support an organization knowing that at some point in the
20 past that organization has engaged in terrorism. So that's a
21 very, very low bar. And it is quite different from the
22 aiding and abetting cases which, in some respects, the
23 Government, I think, relies heavily on.

24 But that option was available to the Government
25 under the MCA, to charge offenses --

1 JUDGE KAVANAUGH: Aiding and abetting.

2 MR. McMILLAN: -- and charge aiding and abetting.

3 JUDGE KAVANAUGH: So picking up on my earlier
4 question, if the statute can't be applied retroactively
5 because of ex post facto, so then we are interpreting the
6 term law of war in 821, and if that means international law
7 of war.

8 There is a debate in Hamdan v. Rumsfeld between
9 section 5 of the plurality opinion, Justice Steven's opinion
10 for four justices, and Justice Thomas' opinion dissenting for
11 three justices, no majority opinion on this issue, of how
12 courts are to go about exercising that authority in
13 interpreting the law of war.

14 Are courts bound to only apply norms that are
15 already recognized in the international law of war when
16 exercising their power under 821, or can, as Justice Thomas
17 suggested, can courts exercise an evolving, flexible,
18 deferential approach going forward, and essentially define
19 new law of war offenses? To me, that's a critical issue.
20 What's the nature of the court's power in interpreting that
21 phrase in the statute? Can you --

22 MR. McMILLAN: Right. And I think if you look at
23 the Supreme Court precedents which bear on the question, I
24 think the Court has said that for, in Hamdan, in Quirin, in
25 Sosa, it has identified --

1 JUDGE SENTELLE: Sosa was a different question.

2 MR. McMILLAN: Admittedly, it was an alien tort
3 statute case.

4 JUDGE SENTELLE: APS question and the language even
5 is, while not unrelated, it is not the same language.

6 MR. McMILLAN: Well, it's language that calls for,
7 you know, an actionable violation under international law --

8 JUDGE SENTELLE: The law of nations.

9 MR. McMILLAN: -- must be of a norm that is
10 specific, universal and obligatory. The plurality in Hamdan
11 spoke in terms of an act does not become a crime without its
12 foundation having been firmly established in precedent, a
13 precedent that must be plain and unambiguous.

14 They looked back to the Quirin case, a military
15 commission case, of course, from the World War II era, and
16 they said that the high standard was met in Quirin where, by
17 universal agreement and practice, the conduct charged was an
18 offense against the law of war. So here we see some of the
19 adjectives --

20 JUDGE SENTELLE: Quirin, at most, tells you that
21 espionage and planned sabotage was sufficient. It doesn't
22 say it's necessary.

23 MR. McMILLAN: Quirin?

24 JUDGE SENTELLE: Quirin does not tell you, you
25 cited Quirin, I thought, just now.

1 MR. McMILLAN: Yes.

2 JUDGE SENTELLE: Was I not correct?

3 MR. McMILLAN: You were correct.

4 JUDGE SENTELLE: And it seemed to me you were
5 arguing that what was present in Quirin is necessary, or --
6 my question is, does that Quirin tell us what's necessary or
7 only what was sufficient?

8 MR. McMILLAN: Well, I think it describes, perhaps,
9 what was sufficient in that case.

10 JUDGE SENTELLE: Yes.

11 MR. McMILLAN: But subsequent decisions, including
12 the Hamdan plurality, really speaks in terms of it being
13 necessary. And that is our position, that there needs to be
14 clear and unambiguous precedent in order to identify conduct
15 as a war crime. And it needs to be recognized by the
16 international community as a whole.

17 Now, admittedly, Congress has --

18 JUDGE KAVANAUGH: But U.S. precedents interpreting
19 the international law of war would be relevant to that
20 inquiry, you would acknowledge, correct?

21 MR. McMILLAN: I think that's correct. I think
22 certainly U.S. precedent court decisions interpreting the law
23 of war. But here again, we need to distinguish or be clear
24 about what the law of war consists of. And that highlights a
25 difference between the parties in this case.

1 The Government has conceded --

2 JUDGE KAVANAUGH: Your position is, it's
3 international law?

4 MR. McMILLAN: Precisely.

5 JUDGE KAVANAUGH: Yes, because the Court has said
6 that.

7 MR. McMILLAN: Exactly.

8 JUDGE KAVANAUGH: Right.

9 MR. McMILLAN: Said that over and over again.

10 JUDGE KAVANAUGH: Yes. Yes.

11 MR. McMILLAN: And the Government has come forward
12 with what we think is a radical and unsound proposition, the
13 proposition that there exists an entirely separate body of
14 law, a U.S. common law of war.

15 We see absolutely no support for that, and the
16 Government cites no support for that in decisions of American
17 courts. We think it has, in fact, troubling implications
18 because, as the Government itself acknowledges in its
19 briefing, it means that military tribunals, military
20 commissions can try cases only a subset of which need to be
21 law of war violations.

22 And so we see this encroachment on the jurisdiction
23 of Article 3 courts that we think, you know, American courts
24 and the framers were determined --

25 JUDGE SENTELLE: I'm not quite sure I followed the

1 last, a subset of which would be a law of war violations,
2 with law of war being defined as you define it. Now, as I
3 understood what's the Government position, they're not saying
4 they can try things that are not law of war. They are saying
5 there is a different way to define law of war.

6 MR. McMILLAN: Well, that's correct, but --

7 JUDGE SENTELLE: I'm not asking you to concede they
8 are correct, but I would ask you to correctly characterize
9 their argument.

10 MR. McMILLAN: No, and I absolutely --

11 JUDGE SENTELLE: So they are not saying that a
12 subset would not be a law of war. They are saying it would
13 be defined, as law of war, differently than -- well, it may
14 be the correct definition but, yes.

15 MR. McMILLAN: I mean, I think their position is
16 that it would be defined as an offense that has been tried
17 under the U.S. common law of war.

18 JUDGE SENTELLE: Yes.

19 MR. McMILLAN: And our position is, that is not the
20 law of war.

21 JUDGE SENTELLE: Right.

22 MR. McMILLAN: There is U.S. practice applying the
23 law of war, and that's what we see in Quirin and Yamashita
24 and other cases. But there is not a separate body of law
25 known as the U.S. common law of war.

1 And when I said that I think we could see that
2 troubling encroachment, what I meant, Your Honor, is that
3 essentially, so long as the Government could create a nexus
4 between conduct and any exercise of any of the war powers, we
5 could be faced with a situation where a claim is advanced,
6 that this offends a U.S. common law of war.

7 What the Government has done, of course, in moving
8 away from the international law of war to a U.S. common law
9 of war, is find a new source in the constitution for this
10 delegated --

11 JUDGE KAVANAUGH: Well, again, you don't need to go
12 there, right? I mean, Congress, I would push back on you on
13 the idea that Congress has to be just a follower and not a
14 leader in defining war crimes. I think Congress has
15 substantial flexibility going forward, based on the scope of
16 all the war powers, in defining war crimes. And the United
17 States would be a leader in defining war crimes in Congress.

18 But it's a whole different question, which is your
19 case. So that's why I'm going to bring you back to your
20 case --

21 MR. McMILLAN: Very good.

22 JUDGE KAVANAUGH: -- which is, should courts, are
23 courts authorized exercising common law authority under 821
24 to do that same thing?

25 MR. McMILLAN: Well, I mean, and I think the answer

1 to that is that courts are precluded from doing that under a
2 200 year old precedent in U.S. v. Hudson and Goodwin where,
3 you know, the Supreme Court, Chief Justice John Marshall
4 says, quote, "The legislative authority of the Union must
5 first make an act a crime, affix a punishment to it, and
6 declare the Court that shall have jurisdiction of the
7 offense."

8 And this is a position that the Supreme Court, in a
9 2001 case essentially, you know, reaffirmed. Quote, "Under
10 our constitutional system, federal crimes are defined by
11 statute rather than by common law."

12 So, I mean, there is no federal common criminal
13 law. And that has been a position that has been accepted by
14 American courts since that 1812 decision.

15 JUDGE KAVANAUGH: Now, I'm sorry, the Government
16 relies on certain Civil War precedents in an attempt to say,
17 actually, this wouldn't require the Court to push out in a
18 new direction. This is just applying precedents that are out
19 there. So can you address those?

20 MR. McMILLAN: Yes, let me speak to that. I think
21 the Government has failed to pay sufficient attention to the
22 pluralities discussion in the Hamdan case about the various
23 types of military commissions that exist. And this goes
24 right back to Winthrop's Military Law and Precedent.

25 You know, there are law of war commissions, there

1 are martial law commissions, and there are occupation court
2 commissions. And each of them are applying different bodies
3 of law.

4 So when we look to the Civil War precedents for
5 that U.S. practice in front of military tribunals, those
6 precedents have to be dealt with with caution, as the
7 plurality said, because it's not clear that a particular
8 offense being charged and prosecuted in those cases is
9 necessarily a law of war offense.

10 So the blurring of those lines is evident in the
11 Government's brief, and it's part and parcel of their
12 assertion that there is a U.S. common law of war. But those
13 lines must be kept clear. And we think the Hamdan plurality
14 provided the guidance that the Court should use.

15 Now, what type of commission was the commission
16 that convicted Salim Hamdan, you know, our position is it was
17 a law of war military commission. And again, the plurality
18 in considering the first commission that tried Mr. Hamdan,
19 you know, made it clear that Guantanamo is not occupied
20 territory. It's not under martial law. And therefore the
21 only type of commission left is a law of war commission.

22 JUDGE SENTELLE: You assume in your brief, in fact
23 you state rather strongly, that all constitutional
24 protections apply to aliens held beyond wars of the United
25 States. You also seem to declare that Eisentrager has been

1 overruled and that this Court's language to the contrary is
2 dicta. Am I over-reading what you are saying, counsel, in
3 those?

4 MR. McMILLAN: Not entirely, Your Honor. You're
5 not over-reading it. We do believe that the Supreme Court
6 addressed the question of whether constitutional rights will
7 apply at the Guantanamo Bay Naval Base --

8 JUDGE SENTELLE: Yes.

9 MR. McMILLAN: -- in the Boumediene case. And it
10 applied a functional analysis, and it asked the question of
11 whether the respect for those rights, or the application of
12 those rights, would be impracticable or anomalous. And it
13 conducted that analysis with respect to --

14 JUDGE SENTELLE: Have we not at least twice said
15 that the Supreme Court there was addressing the suspension
16 clause and not the general full scope of constitutional --
17 well from that point, constitutional guarantee?

18 MR. McMILLAN: We have looked at those cases, Your
19 Honor, and we think there is a key distinction between the
20 habeas proceedings which came before the Court in those post
21 Boumediene cases, and the criminal prosecution that is at
22 issue here.

23 A criminal prosecution implicates a person's life
24 and liberty. And the protections that are part of the truth
25 seeking process in a criminal prosecution, we believe, are

1 fundamental rights. And we believe that due process rights,
2 with respect to that issue, extend to Guantanamo Bay.

3 JUDGE SENTELLE: You do understand that while you
4 may think Eisentrager has been overruled, we don't. I mean,
5 you may call that dicta, but we're very flatly in a holding
6 in Al Macalow, which nobody cites -- I mean, there is no
7 question as to holding there. And I think it is in the two
8 Guantanamo cases, Al Odad and one other.

9 MR. McMILLAN: And of course Eisentrager dealt with
10 a U.S. prison in Germany.

11 JUDGE SENTELLE: Yes. Yes.

12 MR. McMILLAN: And Guantanamo, the U.S. is
13 answerable to no foreign sovereign.

14 JUDGE SENTELLE: Is now U.S. quasi-sovereign and --

15 JUDGE KAVANAUGH: Well, are you taking an all or
16 nothing position or do you look at each individual
17 constitutional right and analyze it separately? You could do
18 that as well, right?

19 JUDGE SENTELLE: Yes, that's right.

20 MR. McMILLAN: Well, I think you certainly could.
21 You know, our view is that the equal protection clause is
22 applied through the due process clause of the Fifth amendment
23 in this case, and that Mr. Hamdan, as the military judge
24 acknowledged, did not receive the same kind of process that
25 he would have received, had he been in any other American

1 court.

2 As one of the opinions from the military judge in
3 the petitioner's appendix on the suppression of evidence
4 says, the judge acknowledged, quote, "The result in this case
5 is at odds with what would normally obtain under our law. It
6 is true that in any other criminal trial held in an American
7 Court, an accused who was questioned before trial without
8 warning regarding his right to remain silent could not later
9 be prejudiced by the admission of those statements against
10 him."

11 So that was a genuine instance, an actual instance
12 where the failure to afford what would normally be recognized
13 as criminal procedural rights to an American citizen were
14 denied to Mr. Hamdan.

15 I see I'm out of time, Your Honor, and I would be
16 happy to --

17 JUDGE SENTELLE: We'll shift you back a couple of
18 minutes for rebuttal. If my colleagues have no further
19 questions, we'll hear from the appellee.

20 ORAL ARGUMENT OF JOHN DE PUE, ESQ.

21 ON BEHALF OF THE APPELLEE

22 MR. PUE: Good morning, Your Honor, and may it
23 please the Court. My name is John De Pue and I'm an attorney
24 with the National Security Division of the Department of
25 Justice.

1 First, the Court has probably pretermitted any need
2 to further discuss the issue of mootness, but it's the
3 Government's position that the Sibron presumption against
4 mootness announced by that Court, is a rebuttable
5 presumption. But we do believe that we cannot --

6 JUDGE GINSBURG: Is rebuttal?

7 MR. PUE: Is a rebuttable presumption, yes. But
8 the ability to accomplish a rebuttal is a very high standard.
9 The Government has got to establish, essentially, that there
10 is no possibility that the conviction could come back and
11 haunt the aggrieved defendant.

12 We don't believe that we can satisfy that burden
13 today because if Mr. Hamdan were recaptured and put in
14 another military commission proceeding, under the military
15 rules relating to military commission proceedings that prior
16 conviction could be used against him to aggravate his
17 sentence. So we don't believe that we can rebut the
18 presumption here, but we will be happy to discuss it further
19 in our papers.

20 JUDGE GINSBURG: And you'll deal, I'm sure, with
21 the suggestion in Spencer quoting back to Lane v. Williams --

22 MR. PUE: Yes.

23 JUDGE GINSBURG: -- that a further violation of law
24 is his obligation to avoid, not the Court's to take into
25 account.

1 MR. PUE: That's correct, Your Honor. Yes.

2 JUDGE GINSBURG: That was not a conviction.

3 MR. PUE: Right. That was not.

4 JUDGE GINSBURG: But if that's not in before
5 Article 3 when the issue is parole revocation or something
6 other than a conviction, the question is, why would it be in
7 before Article 3 in a criminal case?

8 MR. PUE: Because the Court has consistently
9 refused to extend the presumption to any context other than
10 that of a criminal conviction because it is found that reason
11 and common sense simply don't provide a basis for such an
12 extension. This is a criminal conviction. The Sibron rule
13 applies and we don't believe that we can rebut the
14 presumption, as I have said here.

15 Now, where my colleague and I --

16 JUDGE SENTELLE: I do want to thank the Government
17 for frankness on that. I would ask both of counsel to
18 consider, I'm not sure I recall mootness ever being used to
19 dismiss a case in a direct review of a criminal conviction.

20 MR. PUE: We couldn't find one either. The
21 closest --

22 JUDGE SENTELLE: I think Lane and all the others
23 are some sort of collateral review.

24 MR. PUE: Yes, the closest ones we could find
25 related to collateral review as well. And that was an

1 additional reason why we didn't think the presumption could
2 be rebutted here. But nevertheless --

3 JUDGE SENTELLE: The one, Juvenile Male, has dicta
4 that seems to say it applies in a direct review, but I didn't
5 find a case where it did.

6 MR. PUE: And we haven't found any other where it
7 was actually applied. The Perez case from the Second Circuit
8 was, of course, as Your Honor says, a collateral review. And
9 there the defendant was barred from ever
10 re-entering the country. And the Court said that the
11 Government, that that probably was enough to rebut the
12 presumption.

13 But here our concern isn't about the defendant
14 rebutting, re-entering the country. It's about his going
15 back on the battlefield and committing another offense and
16 placing himself in jeopardy before a military commission
17 proceeding.

18 Now, if I may turn to the merits, the primary
19 dispute between my colleague and myself is what constitutes
20 the body of military law, law of war, that permits Congress
21 to codify an offense as a violation of the law of war, and
22 make it subject to a trial by a military commission.

23 JUDGE KAVANAUGH: You're agreeing that the statute
24 can't be applied retroactively, the military commission's
25 act?

1 MR. PUE: No, I don't agree that the statute can be
2 applied retroactively. It's our position that all that the
3 statute accomplishes --

4 JUDGE KAVANAUGH: To the extent it codifies a new
5 war crime, can it be applied retroactively, consistently with
6 the ex post facto clause?

7 MR. PUE: If it codified a new war crime, no, it
8 could not. But --

9 JUDGE KAVANAUGH: Okay. So the question turns on,
10 then, whether this was a war crime under the law of war --

11 MR. PUE: Exactly.

12 JUDGE KAVANAUGH: Okay.

13 MR. PUE: And it's our submission --

14 JUDGE KAVANAUGH: And the Supreme Court has
15 repeatedly said, as Justice Kennedy summarized in his
16 separate opinion in Hamdan, the law of war is the body of
17 international law governing armed conflict. This is one of
18 many examples in the U.S. code where Congress has expressly
19 incorporated international law into U.S. law.

20 MR. PUE: That's one source, but we do not believe
21 that that is the only source. And I think that the offense
22 of spying --

23 JUDGE KAVANAUGH: That's codified, right?

24 MR. PUE: -- establishes -- well, it has been
25 codified, but it has now been codified, but the question

1 arises as, what's the basis for codifying? It's not a
2 violation of international law. All international law says
3 about a spy is, if you catch the spy, he loses his immunity
4 and he's subject to be tried in your municipal courts if you
5 have an offense.

6 The question is, where is the offense? What is the
7 source for trying that individual by military commission?
8 And we believe that the Court in Quirin answered that
9 question by relying very heavily upon what it called, our
10 nation's history, our nation's practice, dating back to the
11 trial of Major John Andre for conspiring to surrender West
12 Point back in 1780.

13 JUDGE KAVANAUGH: Well, even in Quirin the Court
14 referred to the international laws of war. The Attorney
15 General in arguing the case in Quirin said that firstly, the
16 law of war is the well established law of nations. You see
17 that in Yamashita. I just don't see this dichotomy that's
18 come out of no where --

19 MR. PUE: That's quite true.

20 JUDGE KAVANAUGH: -- seems unusual to me. You
21 don't see anything like that in Hamdan v. Rumsfeld. The
22 Supreme Court --

23 MR. PUE: Oh, I think you do. I think you do,
24 Judge Kavanaugh. Bear in mind --

25 JUDGE KAVANAUGH: Where?

1 MR. PUE: In addressing --

2 JUDGE KAVANAUGH: Where specifically?

3 MR. PUE: In addressing, on page 602 of that
4 decision.

5 JUDGE KAVANAUGH: Okay.

6 MR. PUE: In addressing the question whether
7 conspiracy was a violation of the law of war, the Executive,
8 through his unilateral authority, could codify as a war
9 crime. Both the plurality of Justice Stevens and the
10 dissenters agreed that it was not sufficient simply to look
11 to international law.

12 JUDGE KAVANAUGH: You also look to U.S. precedents
13 applying that international law, I'm sure.

14 MR. PUE: Yes.

15 JUDGE KAVANAUGH: That's just as you would look at
16 other precedents applying to international law.

17 MR. PUE: But they continued that it wasn't
18 sufficient to look to international law. Justice Stevens
19 explained that even if under the law of nations conspiracy
20 wasn't an offense, we had to inquire further. We had to look
21 to what our common law was, citing Quirin and citing Article
22 21 of the Uniform Code of Military Justice, which
23 incorporated by implication what he referred to as a common,
24 a separate common law of war.

25 JUDGE KAVANAUGH: Separate?

1 MR. PUE: Separate and apart --

2 JUDGE KAVANAUGH: Is the word separate in there?

3 MR. PUE: Separate and apart from international
4 law, yes.

5 JUDGE KAVANAUGH: As opposed to all being one body
6 of law? I'm not sure I see that in Hamdan v. Rumsfeld. It's
7 creative, but I don't see it. You agree, let's start with
8 some basics. You agree material support for terrorism is not
9 a war crime under international law, correct?

10 MR. PUE: That's correct. So, we have to look to
11 another source other than customary international law to
12 codify that.

13 JUDGE KAVANAUGH: And you also would acknowledge --
14 well, I guess you don't acknowledge, but the Supreme Court
15 has often referred to the law of war in 10 USC 821 as being
16 international law, the quote from Justice Kennedy being one
17 of many, many examples.

18 MR. PUE: Yes. That's true, but as I've said
19 earlier --

20 JUDGE KAVANAUGH: Yes, I know you want to --

21 MR. PUE: -- Hamdan opinion goes further than that
22 and talks about a common law of war that's unique to the
23 United States. And as I've said earlier, Judge Kavanaugh, I
24 don't see how you can reach the offense of spying, which it
25 has never been a violation of international law, unless you

1 acknowledge the fact that there is, separate and apart from
2 customary or conventional international law, a municipal law
3 of war.

4 Indeed, in the Quirin case, although it talked
5 loosely about the law of war, it relied primarily upon United
6 States precedents to establish that spying and aiding the
7 enemy were triable by a military commission.

8 And all we maintain that we have accomplished here
9 in establishing material support as an offense triable by
10 military commission, is to codify an offense that has almost
11 as legitimate a parentage as the offense of spying, that is
12 aiding unlawful enemy combatants using an armed conflict as a
13 pretext for visiting outrages against the civilian
14 population.

15 If there is a separate body of United States common
16 law of war, that is clearly an offense within that body that
17 Congress could codify and make subject to trial by a military
18 commission.

19 JUDGE KAVANAUGH: Well there's a -- again, to
20 repeat what I said earlier, there are two separate questions.
21 What Congress can codify going forward, I think, is a
22 significantly different question, at least potentially, than
23 what law of war includes in 821.

24 MR. PUE: That's absolutely correct, Your Honor.
25 And I will acknowledge that in order to win both points on

1 this, including the ex post facto issue, we have to be able
2 to demonstrate that all Congress did was codify an offense
3 that had always existed under our common law of war, under
4 that body of law that we have cited in our briefs that arose
5 primarily during the period of the Civil War when marauders,
6 bandits, and others not enrolled in the Confederate service
7 but acting on their own, committed depredations and outrages
8 on the civilian population.

9 And I maintain, and we maintain, that's all that
10 Congress accomplished here; that it codified these ancient
11 Civil War era offenses that always existed. The offenses
12 were always punishable. As the Quirin Court explained, it
13 was Congress' option to determine whether on the one hand to
14 crystalize these common law of war offenses and codify them,
15 or to leave them as common law offenses. And that's --

16 JUDGE KAVANAUGH: Now, when the Department of
17 Defense General Counsel and the head of the National Security
18 Division told Congress, do not codify material support for
19 terrorism as law of war offenses, because they are not
20 recognized international law war crimes, did they refer to
21 some separate U.S. common law of war?

22 MR. PUE: They did not. But a Deputy Assistant
23 Attorney General Steven Ingle in the Office of Legal Counsel,
24 did. And what Mr. Chris and what Mr. Johnson were concerned
25 about was, as you've recognized, this is not as plainly a

1 violation of a law of war as, say, killing a prisoner of war.
2 There is a question here.

3 JUDGE KAVANAUGH: That alone is a problem if we
4 follow Justice Stevens' suggested approach, correct? That it
5 has to be plain and unambiguous precedent?

6 MR. PUE: No, I don't think that Justice Stevens'
7 approach applies where Congress takes action. Justice
8 Stevens' approach --

9 JUDGE KAVANAUGH: I know. I know. I agree with
10 that potentially, but let's --

11 MR. PUE: Okay.

12 JUDGE KAVANAUGH: -- going backward to what we are
13 talking about in this case, it has to be --

14 MR. PUE: Okay.

15 JUDGE KAVANAUGH: -- if you are not relying on a
16 statute or a treatise, Justice Stevens' plurality opinion
17 says, you have to have a precedent, a precedent that's plain
18 and unambiguous. And you just acknowledged, I think, that we
19 don't have that.

20 MR. PUE: Well, I don't think, I don't think that
21 that, as I said earlier, applies to an act of Congress. I
22 think that you need to defer. You need to afford some
23 deference to Congress --

24 JUDGE KAVANAUGH: For the acts before 2006, we
25 don't have an act of Congress. That's what I'm trying to

1 say.

2 MR. PUE: Yes, you didn't have an act of Congress.
3 You had Congress saying in 2006 and 2009 what it was doing
4 here was codifying offenses that had been traditionally
5 triable under the law of war or otherwise by military
6 commission. And recognition, in my view, that it understood
7 that there were two sources of offenses triable by military
8 commission.

9 JUDGE KAVANAUGH: But we can't just defer to
10 Congress' view on what's ex post facto because that would
11 eliminate the ex post facto clause.

12 MR. PUE: Absolutely not. And we're not asking you
13 to do that, certainly. We're simply asking you to recognize
14 that international law, be it customary or conventional, is
15 not the only source of law to which Congress can look in
16 codifying it.

17 JUDGE KAVANAUGH: Now, in the Civil War precedents,
18 which you place heavy reliance on --

19 MR. PUE: Yes, sir.

20 JUDGE KAVANAUGH: -- opposing counsel says, those
21 were different kinds of military commissions.

22 MR. PUE: Well, he relies very heavily on Justice
23 Stevens' concurring a plurality --

24 JUDGE KAVANAUGH: Plurality.

25 MR. PUE: -- opinion. And very frankly, I don't

1 think that a lot of thought was given to what Colonel
2 Winthrop said about this at the time the decision was
3 rendered. Colonel Winthrop made it very clear that, yes,
4 there are mixed military commissions, but when there are
5 mixed military commissions, the offenses are captioned
6 differently.

7 He said, and I will quote, "The offense where a
8 civil crime is commonly designated by the charge by its legal
9 name is murder, manslaughter, robbery, larceny, et cetera."
10 Where a violation of the law of war, by simple terms of
11 description, being a guerilla. Therefore, all you had to do
12 is look at the specification, see how it's captioned, and
13 that answers the question, something that apparently the
14 plurality in Hamdan overlooked.

15 Not only this, but Justice Stevens -- Colonel
16 Winthrop not only laid out these three separate categories of
17 offenses, but he delineated what crime fell within each
18 category. In the first category, involving provo courts or
19 martial law courts, he said, these involve robbery and
20 murder. With respect to military commissions, these involve
21 war crimes, like being a guerilla.

22 So I don't think that the assessment assigned to by
23 Justice Stevens was totally accurate in looking at what
24 Colonel Winthrop said about these matters.

25 Now, the defendant maintains that this is going to

1 give us inexhaustible latitude to deprive people of their
2 constitutional rights under, to have an Article 3 judge, to
3 have the procedural rights of the Fifth and Sixth Amendment.
4 I believe that reasoning is foreclosed by the Quirin decision
5 itself.

6 Quirin explains that those procedural rights apply
7 only to common law felonies, and that violations of the law
8 of war simply don't constitute common law felonies. And it
9 further cabined the class of offenses that were subject to
10 trial by a military commission by explaining that they are,
11 must be offenses committed by enemy combatants during an
12 armed conflict. So the --

13 JUDGE SENTELLE: Does Quirin deal with the ex post
14 facto question that Judge Kavanaugh raised?

15 MR. PUE: Nothing in the Quirin opinion deals with
16 the ex post facto conviction. I believe the issue was raised
17 but pretermitted. And I can only assume that the Court
18 pretermitted it because it was --

19 JUDGE SENTELLE: Were they all dead by then?

20 MR. PUE: Not quite, Your Honor, no. Because --

21 JUDGE GINSBURG: Not quite all or not quite dead?

22 JUDGE SENTELLE: Not quite dead. I think they were
23 actually hanged between when the issue went to the judge, and
24 when they issued the opinion.

25 MR. PUE: The way I recall the opinion is, the

1 Supreme Court issued an order.

2 JUDGE SENTELLE: Yes.

3 MR. PUE: The execution occurred, the executions
4 occurred and thereafter the opinion was rendered. But as I
5 said, what I think is significant about the Quirin decision
6 is that it did talk in terms of common law of war offenses
7 and identified --

8 JUDGE SENTELLE: Did it use that term, common law
9 of war?

10 MR. PUE: Yes, it did, at page 34 or page 30, I
11 believe. When you look at the area, when they talked about
12 Major Andre's execution, they twice used the word common law
13 of war offenses, as did the Hamdan plurality and dissent.

14 So I think it's rather difficult to deny that there
15 is such a body of law when just several years ago, seven
16 justices of the Supreme Court acknowledged its existence and
17 acknowledged that they needed to look to that body of law,
18 although they came out in a different place.

19 JUDGE KAVANAUGH: But I think common law is not the
20 distinction. The distinction is between a common law that is
21 international law based --

22 MR. PUE: Yes.

23 JUDGE KAVANAUGH: -- and is rooted in norms that
24 are well-established --

25 MR. PUE: Yes, right.

1 JUDGE KAVANAUGH: -- in international law.

2 MR. PUE: Right.

3 JUDGE KAVANAUGH: And similar to our alien tort
4 statute jurisprudence.

5 MR. PUE: Yes.

6 JUDGE KAVANAUGH: Or to some separate and distinct
7 U.S. common law of war that you would say can deviate from
8 the international common law of war. Because you admit, I
9 think you are telling us here today, material support for
10 terrorism is not an offense under the international common
11 law of war, but it is a long recognized offense under the
12 U.S. common law of war.

13 MR. PUE: That's correct, Your Honor. Yes.
14 Absolutely. They are separate bodies of law. The customary
15 and conventional international law, the law of nations that
16 can be reached under the define and punish clause, we submit,
17 is not the only source of law to which Congress can look.

18 It can also look to our customs and traditions as
19 Colonel Winthrop said, since the -- in the history of our
20 wars, since the founding of our nations, to discern what
21 offenses are subject to trial by a military commission. And
22 that, we maintain, is exactly what Congress did with respect
23 to the codification of providing material support.

24 JUDGE KAVANAUGH: Slightly different question. Do
25 you acknowledge aiding and abetting as distinct from material

1 support?

2 MR. PUE: Yes, we do, Your Honor. Yes. It's a --

3 JUDGE KAVANAUGH: Harder to prove, lesser scope,
4 which is -- correct?

5 MR. PUE: Yes, Your Honor. And it's a theory of
6 principal culpability. This is something different. This is
7 like the common law offense that we've cited before of aiding
8 a belligerent.

9 JUDGE KAVANAUGH: So aiding and abetting precedents
10 don't help you here.

11 MR. PUE: No, I don't believe that they do. I
12 think we can charge them separately. And I would point out
13 that while we are discussing Congress' constitutional
14 authority here, we do believe that they have authority under
15 the define and punish clause, as well as the war-making
16 powers, when that clause is read in tandem with the necessary
17 and proper clause, just like the courts ordinarily do in
18 implementing a treaty.

19 They don't just look to the four corners of a
20 treaty, they do other things that aid and assist in the
21 formulation of that treaty.

22 No one disputes that terrorism is a violation of
23 international law, particularly when committed in the context
24 of an armed conflict. In the Military Commissions Act,
25 Congress has codified terrorism. But under the necessary and

1 proper clause, it is our submission that they have the
2 ability not only to codify that terrorism offense, but those
3 that are proximately related to it, to ensure that terrorists
4 will not be able to --

5 JUDGE SENTELLE: Again, I want to make sure that
6 each side understands the other's position. Is it clear to
7 you that the appellants agree that terrorism is a violation
8 of international law?

9 MR. PUE: One of the defendant's amicus' has said
10 it, the international law scholars have said exactly that.

11 JUDGE SENTELLE: I'm not going to bind them to the
12 amicus, counsel.

13 MR. PUE: That is the sense of what I received.
14 Yes, Your Honor. In fact, I would also note --

15 JUDGE SENTELLE: And if they are taking the
16 position, as I understand it, that it has to be universally
17 recognized or at least widely recognized and have a standard
18 definition, is there, in fact, an internationally agreed
19 definition of terrorism?

20 MR. PUE: I think there is a core understanding as
21 to what terrorism consists of. Yes.

22 JUDGE SENTELLE: Maybe. The last time I tried to
23 find an internationally accepted standard or definition for
24 terrorism, I don't think I found one.

25 MR. PUE: Yes.

1 JUDGE SENTELLE: That doesn't mean there isn't one.

2 MR. PUE: In fact, you have a case that says that,
3 that's about 30 years old. But I would have to say that
4 since that, the House reports, certainly in this case,
5 said --

6 JUDGE SENTELLE: The cases citing that case are
7 less than 30 years old, and still didn't find one, I think.

8 MR. PUE: That's true. That's correct. But --

9 JUDGE SENTELLE: I think I wrote one of those
10 citing it, and I've been here less than 30 years. Not much
11 less, but a little less than 30 years.

12 MR. PUE: Well, I think that today there can be
13 little dispute, that terrorism, as a mode of warfare --

14 JUDGE SENTELLE: Okay.

15 MR. PUE: -- violates international law, article 33
16 of the Geneva Civilian Convention.

17 JUDGE SENTELLE: Okay.

18 MR. PUE: Thank you, Your Honors.

19 JUDGE SENTELLE: Thank you, counsel. I give you
20 back two minutes for rebuttal.

21 REBUTTAL ARGUMENT OF JOSEPH McMILLAN, ESQ.

22 ON BEHALF OF THE APPELLANT

23 MR. McMILLAN: Thank you, Your Honor. A few quick
24 points. First, I think it was clear, perhaps, from the
25 colloquy with opposing counsel that the Court understands

1 that at the time of the charged conflict in this case, from
2 1996 to November of 2001, there was not a statute identifying
3 material support for terrorism as a war crime, and therefore,
4 we believe we are squarely within that standard described by
5 the plurality in Hamdan as a requirement that there be clear
6 and unambiguous precedent.

7 JUDGE KAVANAUGH: That's a plurality. That may be
8 what we follow, but that's not binding.

9 MR. McMILLAN: And we would also, as well, point
10 to the Sosa language which, although it doesn't deal with the
11 law of war, deals with an international law --

12 JUDGE SENTELLE: Laws of the nations.

13 MR. McMILLAN: -- offense, which must be obligatory
14 specific.

15 JUDGE KAVANAUGH: Opposing counsel relies a lot on
16 Quirin. Can you address that?

17 MR. McMILLAN: I can, Your Honor.

18 JUDGE SENTELLE: Please.

19 MR. McMILLAN: There's a number of things that I
20 think need to be pointed out. The Quirin opinion, in our
21 reading, very squarely places the law of war within the body
22 of international law, as the Justice Kennedy opinion or
23 language that you cited.

24 What the Quirin Court said is, "From the very
25 beginning of its history, this Court has recognized and

1 applied the law of war as including that part of the law of
2 nations that prescribes for the conduct of war, the status,
3 rights and duties of any nations and enemy individuals."
4 Subsequently, in the opinion it refers to the law of war as
5 "that branch of international law." So --

6 JUDGE KAVANAUGH: But then opposing counsel went on
7 to talk about spying. Can you talk about that?

8 MR. McMILLAN: Right. Now, spying is something
9 that the Government places great reliance on. And they are
10 correct that it is not denominated as a war crime under
11 international law. But it does not stand for the
12 proposition.

13 The trying of the offense of spying in a military
14 tribunal does not -- there is nothing uniquely American about
15 that, and it cannot be advanced as a uniquely American common
16 law of war practice or common law of war principal.

17 In fact, Winthrop speaks to spying and he very
18 clearly identifies it as an offense that's recognized by the
19 international community. He writes in Military Law and
20 Precedents, "A spy under capture is not treated as a prisoner
21 of war but as an outlaw, to be tried and punished as such.
22 Under the law of nations and of war, his offense is an
23 exclusively military one, cognizable only by military
24 tribunals."

25 So what we have here is a couple of things. We see

1 under the law of nations and the law of war, trying and
2 executing spies is not uniquely American. And also, we see
3 the reference to an outlaw status for a spy.

4 Now, there's an anomalous status for a spy. It's a
5 status that the U.S. Attorney General in a 1918 Attorney
6 General's opinion, sort of discusses as well. This is an
7 opinion right in the closing days of World War I, Attorney
8 General Gregory wrote, "The spy dealt with in the laws of war
9 is not engaged in anything criminal, using the word criminal
10 in a technical sense. Spying within the lines or zone of
11 military operations of the enemy is one of the recognized
12 modes or incidents of warfare. If caught within the
13 lines" --

14 JUDGE SENTELLE: And Quirin went on to recognize
15 that while that might be true, that nonetheless, when you are
16 conducting military operations out of uniform and not as part
17 of a regular force, you are in violation of the laws of war.

18 MR. McMILLAN: And that's precisely what the Quirin
19 Court found. And it wasn't spying.

20 JUDGE SENTELLE: Quirin seems to be culling that
21 there might be other sources than universally accepted
22 international law, might they not?

23 MR. McMILLAN: Well, I think that a close look at
24 the Quirin case reveals that there were four charges, the
25 first of which the Supreme Court drilled down on and really

1 analyzed closely, and found to be a recognized violation of
2 the law of war.

3 And that first charge, we would submit, Your Honor,
4 is not spying. It is sabotage. It is crossing behind the
5 enemy lines with the intention to destroy military
6 facilities. And the Court came to the conclusion that that
7 was a recognized violation of the law of war.

8 So the Government's reliance on Quirin as an
9 example of trying spying in a military commission -- now
10 spying, we know, was one of the four charges that is later
11 included in the Quirin case. But the Court did not reach it.
12 The Court passed over and silenced the question of whether
13 spying does or does not fall within the law of war.

14 So the reliance on Quirin, and the reliance on
15 spying for the proposition that there is a U.S. common law of
16 war, is unsupported by a look at the Quirin case. The
17 other --

18 JUDGE GINSBURG: Mr. McMillan, one second. What
19 was the import of your point that spying was not a uniquely
20 American common law?

21 MR. McMILLAN: I think the import of that, Your
22 Honor, is to demonstrate that where the Government points to
23 American practice in trying a spy in front of a military
24 tribunal, that there is, that that comports with longstanding
25 international practice. That, in fact, that is consistent

1 with international practice, and does not represent an
2 American common law of war. So that was the import.

3 The other point that I'd like to mention is
4 deference.

5 JUDGE KAVANAUGH: Well, under your theory, I think
6 just to get this nailed down, you don't think a U.S. Court
7 applying 10 USC 821 law of war could push international law
8 into a new direction, correct?

9 MR. McMILLAN: You know, I think the most
10 instructive case that the Court should look at on that
11 question, Your Honor, is a case that we cite and discuss in
12 our brief, but the Government ignores. And it's an old case.
13 It's an 1820 case, U.S. v. Furlong.

14 And in U.S. v. Furlong, we had a statute. We had a
15 statute which purported to prosecute individuals for
16 piratical murder, piratical murder. And an indictment was
17 before the Supreme Court of a foreigner on a foreign ship at
18 sea for both piracy and -- well, for piratical murder.

19 The Court drills down onto that and takes, there is
20 no deference to the statute. The Court looks very hard at
21 whether or not piracy and/or murder are indeed violations of
22 the law of war. With respect to piracy --

23 JUDGE SENTELLE: No question.

24 MR. McMILLAN: -- it concludes, it certainly is a
25 well recognized violation of the law of war conferring

1 universal jurisdiction. Therefore, Congress had the
2 punishing power to reach out and punish piracy.

3 But it struck down the indictment for murder. And
4 what it says is, "Nor is it any objection to this opinion
5 that the law," the statute that Congress passed, "that the
6 law declares murder to be piracy. These things are so
7 essentially different in their nature that not only the
8 omnipotence of the legislative power can confound or identify
9 them."

10 So not even the omnipotence of the legislative
11 powers, says the Supreme Court, will confer law of war or
12 international law offenses on things that Congress may
13 mistakenly believe so.

14 It writes elsewhere in this opinion, in what I
15 think is an accurate description of what's happened with the
16 MCA, the Supreme Court writes, "It is obvious that the penman
17 who drafted the section under consideration acted from an
18 indistinct view of the divisions of his subject. He has
19 blended all crimes punishable under the admiralty
20 jurisdiction in the general term of piracy. But piracy is
21 robbery at sea."

22 Murder is a distinct, a quite distinct thing. And
23 what we've got in the MCA is, admittedly, many legitimate war
24 crimes.

25 JUDGE KAVANAUGH: This is your broader argument,
26 again, right, that Congress doesn't have the power?

1 MR. McMILLAN: Exactly so, that Congress --

2 JUDGE KAVANAUGH: Going forward.

3 MR. McMILLAN: -- Congress may crystalize, so to
4 speak, an evolving, an evolving international consensus, and
5 confer greater definitional certainty on it. That's its
6 proper function and role under the define and punish clause.
7 But it can only do so once that consensus has emerged.

8 JUDGE KAVANAUGH: Doesn't the declare war clause
9 give Congress some power in defining war crimes?

10 MR. McMILLAN: We would --

11 JUDGE KAVANAUGH: I think Hamdi said that one of
12 the incidents of war, when an authorization has been passed,
13 is the ability to try unlawful offenders or unlawful
14 warriors.

15 MR. McMILLAN: The Government would certainly,
16 certainly argues that some of these other war powers in
17 Article 1, Section 8 are sufficient. But we would suggest
18 respectfully, that they are not. And, you know, the Supreme
19 Court has spoken in terms of the phrase, "The war power
20 cannot be invoked as a talismanic incantation to support any
21 exercise of Congressional power that can be brought within
22 its ambit." Now, what you see in the Toth case --

23 JUDGE KAVANAUGH: Well, that doesn't tell us much.
24 that's a very general comment.

25 MR. McMILLAN: It's like no blank check.

1 JUDGE KAVANAUGH: It's not a blank check. Yes, I
2 got it.

3 MR. McMILLAN: It's like no blank check. Yes,
4 exactly. But its --

5 JUDGE KAVANAUGH: That doesn't get you very far in
6 a specific analysis.

7 MR. McMILLAN: What we see in a more specific
8 sense, perhaps, is both Toth v. Quarles, and Reid v. Covert.
9 And in that case we see the Government had attempted to
10 prosecute, in courts martial, individuals who were no longer
11 in active duty military, in one case an ex-serviceman whose
12 crime had occurred during his period of active service, in
13 the other case a spouse of a serviceman.

14 And in both those cases, the Government advanced an
15 argument that the Government's, you know, prosecution, was
16 justified by both clause 14 -- Article 1, Section 8, clause
17 14, the power to regulate the armed forces, the power, of
18 course, which sets up the court martial, in tandem with the
19 necessary and proper clause.

20 So we see this theory having been presented to the
21 Court, that, as in this case, the theory is the define and
22 punish clause, in tandem with the necessary --

23 JUDGE SENTELLE: Again, now, that's going -- you
24 don't have to win this going forward. You're only talking
25 about, you can win this looking backward. Both of those --

1 MR. McMILLAN: That would be the narrowest grounds.

2 JUDGE SENTELLE: Both of those cases have been
3 affected by further legislation since that time, have they
4 not?

5 MR. McMILLAN: Well, I --

6 JUDGE SENTELLE: And you don't have to concede that
7 that legislation is constitutional. You don't have to
8 concede anything about it, but it has been, the question of
9 whether a serviceman can be tried in a court martial after
10 discharge has been affected by statute since then.

11 MR. McMILLAN: No, I do understand that.

12 JUDGE SENTELLE: As has the extent of regulation,
13 perhaps not of spouses, but at least contractors. Some of
14 those can be enforced.

15 MR. McMILLAN: Right. There have been
16 developments, and I do understand that. But the
17 constitutional principal --

18 JUDGE SENTELLE: But going forward, you don't have
19 to look far -- because we don't have to fight for the
20 constitutionality of those statutes in this litigation.

21 MR. McMILLAN: But the constitutional principal
22 that's mentioned in Toth and in Reid, I think has not been
23 modified. And that is that when, you know, we're looking at
24 the jurisdiction of military tribunals, the Court says, "In
25 determining the scope of the constitutional power of Congress

1 to authorize trial by military tribunals, this presents
2 another instance of calling for the least possible power
3 adequate to the end proposed."

4 So notwithstanding possible statutory changes to,
5 you know, to the jurisdiction of courts martial, we see this
6 constitutional principal set forward in those two cases that
7 I believe endorse, and it has a very, very long history in
8 the United States.

9 JUDGE SENTELLE: This does call for, perhaps not a
10 concession on your part, but at least a clarification. In
11 Quirin there is some reliance on the preamble from the Hague
12 Convention that would seem to indicate that the existing
13 language concerning international law is not exclusive, which
14 would seem to suggest that there are sources of law of war,
15 that there are sources of law of war other than universally
16 accepted international law. Would that not be at least an
17 arguable position with reference to the Quirin dispute?

18 MR. McMILLAN: Respectfully, Your Honor, we would
19 disagree with that. We do not think that the law of war has
20 other sources than outside of international law.

21 JUDGE SENTELLE: The convention to which I'm
22 referring, which is quoted by the Court at 35, "until a more
23 complete code of the laws of war has been issued, the high
24 contracting parties deem it expedient to declare that in
25 cases not excluding the regulations adopted by them, the

1 inhabitants and the belligerents remain under the protection
2 and rule of the principals of the law of nations as they
3 result from the uses we've established among civilized people
4 from the laws of humanity and the dictates of public
5 conscious," which would seem to encompass what you're arguing
6 for, but to leave open the boundaries, because otherwise why
7 would the language have been, if not open-ended, at least
8 open-sighted at that point.

9 MR. McMILLAN: Yes. That's a famous clause that
10 is more admonitory, I think, than anything else, that calls
11 on --

12 JUDGE SENTELLE: It's not only famous. It's a
13 clause that is quoted with some reliance by the Court in
14 Quirin.

15 MR. McMILLAN: Right. And it basically calls for
16 further elaboration, I think, of the mitigating effect.

17 JUDGE SENTELLE: Which would not be needed if we
18 were strictly bound by the then existing law of war, which it
19 does seem strange that something that is essentially common
20 law in nature can be so rigid.

21 MR. McMILLAN: Well, I would suggest that the law
22 of war has certainly evolved, Your Honor. But in order to
23 actually prosecute a person for a law of war offense, there
24 needs to be that clear consensus, that clear precedent. So
25 it's not necessarily rigid.

1 JUDGE SENTELLE: Then whence would come the first
2 precedent? That goes back to Judge Kavanaugh's question, can
3 the United States not be a leader as well as a follower in
4 the --

5 MR. McMILLAN: I think the leadership can certainly
6 come, but it needs to be the leadership of the international
7 community, not running counter to the thrust of the
8 international community. As we see the sources of
9 international authority that are included in our petitioner's
10 appendix, such as the report from the U.N. Special Reporter
11 affirmatively denying material support for terrorists.

12 JUDGE KAVANAUGH: Or the leadership, I realize this
13 isn't your position, could come from Congress, not the Court,
14 right? I mean, I agree, you are not going to concede that.
15 I understand.

16 JUDGE SENTELLE: We're not going to force you into
17 that.

18 JUDGE KAVANAUGH: I understand that.

19 MR. McMILLAN: Thank you, Your Honor.

20 JUDGE SENTELLE: Yes, I think that -- one of my
21 colleagues has asked to further question the appellee's
22 counsel.

23 ORAL ARGUMENT OF JOHN DE PUE, ESQ.

24 ON BEHALF OF THE APPELLEE

25 MR. PUE: Yes, Your Honor.

1 JUDGE KAVANAUGH: For Hamdan, even after his
2 sentence was served, the Government could have detained him
3 for the duration of the hostilities --

4 MR. PUE: That is correct, Your Honor. Yes.

5 JUDGE KAVANAUGH: -- as Justice Stevens said in
6 Hamdan v. Rumsfeld, correct?

7 MR. PUE: Yes, that is correct.

8 JUDGE KAVANAUGH: And the Government did not do so,
9 presumably making the judgment that he's not currently
10 dangerous?

11 MR. PUE: Well, that may have been part of it, Your
12 Honor. I don't know what the deliberations were there, and
13 I'm not going to speculate. But he was released and he's
14 back in Yemen now.

15 JUDGE KAVANAUGH: But he was released, even though
16 you're asking us to uphold the designation of him as a war
17 criminal. He was released, even though the Government had
18 the authority to detain him.

19 MR. PUE: To retain him. Yes. That's correct. He
20 was released.

21 JUDGE KAVANAUGH: Okay.

22 MR. PUE: And I have nothing further. I was going
23 to make some comments about Reid v. Covert, but I believe
24 Chief Judge --

25 JUDGE SENTELLE: Unless my colleagues have

1 questions, your time is up.

2 MR. PUE: Yes, and I believe the Chief Judge took
3 care of my concerns.

4 JUDGE GINSBURG: Just a followup.

5 JUDGE SENTELLE: Okay. Go ahead. And then, if
6 necessary, we'll give additional rebuttal back to the --

7 MR. PUE: Yes, I don't think I need anything to say
8 further. Your Honor has covered what other point --

9 JUDGE SENTELLE: Well, I think Judge Ginsburg may
10 have had a question.

11 JUDGE GINSBURG: Yes, I have a question.

12 MR. PUE: Yes, Judge.

13 JUDGE GINSBURG: There is a specific standard, I
14 believe, for releasing somebody from Guantanamo, right?

15 MR. PUE: I don't know of that. I don't know of
16 any such standard.

17 JUDGE GINSBURG: Well, in some instances we've seen
18 someone is deemed no longer an enemy combatant. I don't know
19 if it's in conjunctive or in separate cases where it refers
20 to not a threat to --

21 JUDGE SENTELLE: To be returned.

22 JUDGE GINSBURG: -- to the United States.

23 MR. PUE: I'm simply not aware of that, Judge
24 Ginsburg.

25 JUDGE GINSBURG: Okay. All right.

1 MR. PUE: Thank you.

2 JUDGE SENTELLE: Okay. I don't know that his not
3 knowing anything requires you to rebut it.

4 MR. McMILLAN: My only point, Your Honor, would be
5 that no longer an enemy combatant is not sufficient to gain
6 release from Guantanamo.

7 JUDGE SENTELLE: Okay. I don't know what is, but
8 people do get released. I thought the place was supposed to
9 -- never mind. Give us a recess.

10 (Recess.)

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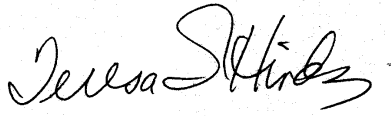
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DIGITALLY SIGNED CERTIFICATE

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



Teresa S. Hinds

Date

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