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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 08-267, United States v. Denedo.

Mr. Shah.

ORAL ARGUMENT OF PRATIK A. SHAH

ON BEHALF OF THE PETITIONER

MR. SHAH: Mr. Chief Justice, and may it please the Court:

The Court of Appeals for the Armed Forces, or CAAF, held that military appellate courts possess open-ended jurisdiction under the All Writs Act to entertain a coram nobis challenge to the merits of a final court-martial conviction. This Court should reverse that decision, both because the All Writs Act cannot supply jurisdiction that Congress chose not to confer and because Respondent is a civilian who may no longer invoke the military court system.

As this Court explained in Clinton v. Goldsmith, military courts, as Article I courts, are strictly limited to the bases of jurisdiction conferred upon them by the Uniform Code of Military Justice, or UCMJ. Three related aspects of the UCMJ make clear that it does not confer jurisdiction over Respondent's coram nobis petition.

1           First, as noted in Goldsmith, the UCMJ  
2 narrowly circumscribes military appellate jurisdiction  
3 to the findings and sentences of a court-martial  
4 conviction. That is a direct review jurisdiction. UCMJ  
5 Articles 66 and 67, which define appellate jurisdiction,  
6 do not contemplate any further review within the  
7 military appellate courts.

8           Second, once direct appellate review is  
9 complete and the military authority executes the  
10 judgment, UCMJ Article 76 affirmatively forecloses any  
11 further military court review. As this Court has  
12 recognized on two prior occasions, UCMJ Article 76 marks  
13 the terminal point of proceedings within the  
14 court-martial system.

15           JUSTICE GINSBURG: Mr. Shah, how does that  
16 differ from the general rule that a judgment becomes  
17 final and has preclusive effect once the appellate route  
18 has been exhausted or the time to pursue it has expired?  
19 It seems to me that Article 76 simply codifies the rule  
20 that applies ordinarily in criminal cases, in civil  
21 cases, stating when a judgment becomes final for  
22 preclusion purposes.

23           MR. SHAH: Your Honor, yes, Article 76 does  
24 that, but it does more than that. As this Court  
25 recognized in Gusik and in Councilman, it marks the end

1 of proceedings within the military court system.

2 Now, beyond the text, what this Court looked  
3 at in *Gusik* -- in *Gusik*, it was a Petitioner seeking  
4 habeas review. One of his alternative arguments in  
5 *Gusik* was that Article 76 essentially violated the  
6 Suspension Clause because it -- it marked the end of --  
7 no further proceedings within the military court system  
8 as well as within the Article III court system. The  
9 Court agreed with the petitioner that Article 76 marked  
10 the end of any further proceedings within the military  
11 court system. It disagreed that it also effected a  
12 repeal of Article III habeas jurisdiction, but there was  
13 no disagreement between the petitioner, the government,  
14 and this Court in *Gusik* that it did mark the end of  
15 proceedings within the military court system.

16 JUSTICE SCALIA: Therefore, one can say that  
17 that point wasn't decided in the case, right?

18 MR. SHAH: Well, Your Honor, one could say  
19 that, but this Court again in *Councilman* ratified that  
20 line, that the Court drew in *Gusik*. It -- it reiterated  
21 the reasoning that Article 76 forecloses any further  
22 proceedings within the military court system. So I  
23 don't think it's just dicta. It was relevant to its  
24 denial of the Suspension Clause claim, and the Court  
25 reiterated that in *Councilman* 25 years later.

1 JUSTICE GINSBURG: Where, in your view, in  
2 the view that the government is putting forward, can this  
3 -- can Denedo go? He said, I was misinformed by my  
4 counsel. I never would have entered a plea if I had  
5 known I would be subject to deportation. And he said, I  
6 never found out about it until, what, 8 years later, when  
7 the government -- 8 years after his conviction, the  
8 government said, you're subject to deportation. Where  
9 can he go with that plea?

10 MR. SHAH: Your Honor, it appears that  
11 Respondent no longer has any further remedies to -- to  
12 pursue. But we think the important point is that in a  
13 general -- in the general case, Petitioner is bringing  
14 -- the exact same claim the Respondent is bringing is  
15 normally going to have several avenues of remedy outside  
16 --

17 JUSTICE GINSBURG: We're assuming now,  
18 because we haven't gone any further than his plea, that  
19 he was so misinformed and he didn't lack diligence in  
20 failing to bring it earlier, that he was surprised by  
21 the government's action, so he was unaware and,  
22 therefore, unable to make this plea any earlier. You  
23 have given us the answer that it's too bad, he's just  
24 out of any court.

25 MR. SHAH: Well, Your Honor, I think it's

1 important to note that the UCMJ marks the high-water  
2 mark of process within the military justice system.  
3 What the UCMJ did is it took the prior system, which  
4 didn't even allow for real direct review within the  
5 military court system, and it made that direct review  
6 system much more robust. It added an intermediate court  
7 of review. It took administrative review that was  
8 embodied within boards of tribunals that had typically  
9 been under the Judge Advocate General. It moved that  
10 out and gave it greater independence to provide more  
11 robust intermediate appellate review. It added an  
12 entire level of a new court, the Court of Appeals for  
13 the Armed Forces, which provided additional -- a new  
14 level of review. And then it said still --

15 JUSTICE KENNEDY: Well, part -- part of  
16 independence is the assurance that the court has the  
17 ability to do justice in the case before it, and I think  
18 the purpose of coram nobis or coram vobis is to protect  
19 the integrity of the court, and that's all this court is  
20 asking. So that's quite consistent with what you've  
21 just said.

22 MR. SHAH: Well -- well, Your Honor, in  
23 enacting the UCMJ, Congress was balancing several  
24 values. On the one hand, it was balancing the rights of  
25 servicemembers, but at the same time, it was balancing

1 the important value of maintaining good order and  
2 discipline within the armed -- within the armed forces,  
3 mindful of the military's primary mission in fighting  
4 wars and defending the nation.

5 Now, given those competing values, it was --  
6 it was reasonable for Congress to draw a line at some  
7 point and say it, the conviction is final and to the  
8 extent you want to seek further collateral review, you  
9 have to go to the civilian system to seek that review.  
10 That -- that line is reasonable not only from a  
11 historical standpoint, but also from a practical  
12 standpoint, given the institutional limitations --

13 JUSTICE STEVENS: But is there collateral  
14 review available in the civilian system in your view?

15 MR. SHAH: Yes, as a general matter, there's  
16 --

17 JUSTICE STEVENS: I mean in this case.

18 MR. SHAH: In this case, Respondent no  
19 longer has any reviews because the time has passed.  
20 2241 would --

21 JUSTICE STEVENS: So the answer is no in  
22 this case?

23 MR. SHAH: No, there is no further review,  
24 Your Honor, in this case. Now, as a general matter  
25 there are ample avenues of -- of review within the

1 civilian court system. For the entire time that a  
2 petitioner would be confined, he can seek 2241 habeas  
3 relief in the Federal court system. Even after --

4 JUSTICE GINSBURG: Mr. Shah, you just said  
5 something about -- you answered my question and Justice  
6 Stevens's question: This person is out because it's too  
7 late for him. He was convicted in what, was it --

8 MR. SHAH: 1998, Your Honor.

9 JUSTICE GINSBURG: Yes. And the government  
10 never said anything about deportation until 2006? And  
11 they went through -- he twice applied for  
12 naturalization, is that correct?

13 MR. SHAH: That is correct, Your Honor.

14 JUSTICE GINSBURG: And he was turned down on  
15 grounds that had nothing to do with deportation. The  
16 government never alerted him to the possibility that he  
17 would be deportable. They turned down his applications  
18 with no hint of that, and you say that he is -- he's out  
19 of time, but nothing counts against the government  
20 because of that 8-year lapse?

21 MR. SHAH: Right. Your Honor, in the  
22 denials I agree with you that they did not alert him to  
23 deportation, but it based its denials on his military  
24 court convictions. So to that extent, he was somewhat  
25 on notice that the military court convictions were

1 posing a problem to his citizenship -- potential  
2 citizenship status.

3 Now, it is true, you're absolutely right,  
4 that the government did not begin deportation  
5 proceedings until October 2006, and until that time he  
6 was not on notice, but the fact that this particular  
7 claimant -- that the time has run should not be  
8 dispositive. For example --

9 JUSTICE SOUTER: Well, the time -- I mean,  
10 the time may very well run in the civil system, and yet  
11 I take it that under -- you accept Morgan, and in the --  
12 in the Article III system this -- in comparable  
13 circumstances, this Petitioner could seek coram nobis.

14 MR. SHAH: Right. There are two reasons,  
15 Your Honor --

16 JUSTICE SOUTER: And I take it you also -- I  
17 don't think there's any dispute that the All Writs Act  
18 applies to the Article I court as well as to the Article  
19 III court. And I take it -- and I'd like your response  
20 to this. I take it you accept the fact that in  
21 testimony before the House, at least, at the -- at the  
22 time the present system went into effect, the general  
23 counsel for the Department of Defense, Mr. Taft,  
24 testified to a House committee that coram nobis would be  
25 available in the -- in the Article I courts. And if

1 that is so, isn't the -- kind of the most reasonable way  
2 to construe the statute, including Article 76, as  
3 allowing for this?

4 MR. SHAH: No, Your Honor. Mr. Taft's  
5 testimony that you're referring to was not given at the  
6 time of enacting of the UCMJ.

7 JUSTICE SOUTER: What was the occasion for  
8 it?

9 MR. SHAH: That was during a subsequent  
10 amending process of the Act. The only testimony --

11 JUSTICE SOUTER: What were they amending at  
12 the time?

13 MR. SHAH: It was I think in terms of the  
14 1983 amendments to the UCMJ. There have been several --

15 JUSTICE SOUTER: You're way ahead of me  
16 because I don't know what the '83 amendments would refer  
17 to. What --

18 MR. SHAH: Okay.

19 JUSTICE SOUTER: What was the subject  
20 matter?

21 MR. SHAH: Well, what Mr. Taft was  
22 testifying to, we believe, are -- he was -- the specific  
23 testimony that Mr. Taft was giving was related to the  
24 boards of correction, I believe, and whether that the  
25 boards of correction should retain jurisdiction review

1 of final court-martial judgments, so his testimony was  
2 related to that distinct issue.

3 JUSTICE SOUTER: Now, with respect to the  
4 boards of correction, I take it there's nothing  
5 specifically in the statute that says there's coram  
6 nobis jurisdiction?

7 MR. SHAH: Nothing specific in -- in the  
8 UCMJ?

9 JUSTICE SOUTER: Yes.

10 MR. SHAH: Yes, there's nothing specific in  
11 the UCMJ --

12 JUSTICE SOUTER: Now, if he was right about  
13 that, that would undercut your -- your argument that,  
14 with respect to a special court-martial and subsequent  
15 proceedings, there could be no coram nobis, because  
16 there's no specific reference in the statute in either  
17 case?

18 MR. SHAH: No, Your Honor. What Mr. Taft  
19 was testifying to was the state of the prevailing law in  
20 1983 before the CAAF. The fact that Congress did not  
21 amend the UCMJ in light of Mr. Taft's testimony -- this  
22 Court has said on multiple occasions that we don't read  
23 into congressional silence --

24 JUSTICE SOUTER: Oh, I quite agree. The  
25 premise of my -- sort of my argument to you a second ago

1 was that if we accept the proposition that Mr. Taft was  
2 making a correct statement of law --

3 MR. SHAH: Right.

4 JUSTICE SOUTER: -- then the logic would in  
5 effect answer your argument that because there is no  
6 specific grant of coram nobis jurisdiction with respect  
7 to special court-martials and subsequent proceedings,  
8 there couldn't be any. That's the only point that I was  
9 trying to make.

10 MR. SHAH: Your Honor, I don't think we can  
11 read that into the silence, and here is why: We have  
12 much more precise legislative history on this very  
13 point. At the time the provision was enacted, at the  
14 time the UCMJ was enacted, there was Article 73 of the  
15 UCMJ provides one means of collateral review within the  
16 military justice system once a court-martial conviction  
17 is final, and that's a new trial petition, which is  
18 limited to certain subject matter and certain time  
19 limits.

20 JUSTICE SOUTER: I mean it is pretty limited.  
21 What is it, it's limited to fact and fraud?

22 MR. SHAH: To fraud on the court and newly  
23 discovered evidence.

24 The person who drafted that provision --

25 JUSTICE GINSBURG: Is it -- is it available

1 to someone who enters a guilty plea, if the new --

2 MR. SHAH: It does not appear it would be  
3 available to someone who has entered a guilty plea. The  
4 government is not aware of any cases where the military  
5 has granted an Article 73 petition to someone who has  
6 pled guilty.

7 But the important point is at the time that  
8 provision was enacted, the person who drafted that  
9 provision testified before Congress and said, we've  
10 considered the universe of post-conviction remedies, and  
11 specifically named coram nobis relief, and said that  
12 we've looked at it and we think the only circumstances  
13 that warrant appeal within the military court system  
14 beyond coram nobis are those stated within -- or  
15 including coram nobis are those stated within Article 73  
16 specifically.

17 JUSTICE SOUTER: May -- may I ask you  
18 just -- and I'm doing this from memory, so I -- my -- my  
19 premise of the question may be wrong. But I do recall  
20 the quotation of testimony in the brief, and I -- if I  
21 recall it correctly, the person testifying said that --  
22 that 73 was sort of a combination of coram nobis and new  
23 -- and new trial motion practice. But my recollection  
24 was that there was no statement, or at least it wasn't  
25 quoted in the briefs, to the effect that this is all

1 there is.

2 In other words, it was explaining what 73  
3 did, but it was not an explanation to the effect that if  
4 you didn't get under the -- the tent flap in 73, you were  
5 out completely. Am I correct about that?

6 MR. SHAH: Well, I'll read -- read the  
7 testimony to you --

8 JUSTICE SOUTER: Okay.

9 MR. SHAH: -- Justice Souter. And this  
10 appears on pages 25 to 26 of the government's brief, and  
11 it says: "What we did was to combine what amounts to a  
12 writ of error coram nobis with a motion for a new trial  
13 on newly discovered evidence. We have provided for both  
14 of them and to our minds they are the only additional  
15 circumstances over and above the appeal that need a  
16 remedy."

17 JUSTICE SOUTER: Okay, I stand corrected.

18 MR. SHAH: So I think that's -- that's  
19 conclusive on this point and provides a firm ground on  
20 which to distinguish this Court's decision in Morgan,  
21 which you referenced earlier, that -- that applies coram  
22 nobis in the Article III system. Congress considered it  
23 for the Article I system and rejected it in the military  
24 courts.

25 JUSTICE ALITO: Does that mean that your --

1 your argument boils down to the proposition that the  
2 relevant provisions of the UCMJ were intended to  
3 eliminate coram nobis, or is there more to your argument  
4 than that?

5 MR. SHAH: I don't think it's to eliminate  
6 coram nobis. It was never available within the military  
7 court system.

8 JUSTICE ALITO: All right. Well, that --  
9 then I'm not quite sure I understand your argument.  
10 Maybe you can explain why you -- you contend that if the  
11 Respondent had been convicted in a Federal district  
12 court and everything else was the same, he would be able  
13 to petition for a writ of coram nobis, but he can't in  
14 the military courts.

15 What is the basis for that? Both a Federal  
16 district court -- a Federal district court is a creature  
17 of statute. It has the jurisdiction that Congress gives  
18 it and no greater jurisdiction. It has certain --  
19 what's been termed inherent authority. The All Writs  
20 Act applies to it. All of those things are true of the  
21 military courts as well. So what is the basis for the  
22 distinction?

23 MR. SHAH: There are two distinctions -- at  
24 least two distinctions, Your Honor: The first is, in  
25 the Federal court system, there is an independent basis

1 of jurisdiction when someone is bringing a Federal  
2 constitutional challenge, collateral challenge to their  
3 conviction. That separate independent basis of  
4 jurisdiction is 1331. There's -- there's independent  
5 basis of jurisdiction. The All Writs Act does not  
6 confer jurisdiction. The Court made that very clear in  
7 Goldsmith. What it requires is an independent basis of  
8 jurisdiction. That exists in Article III courts. It  
9 does not exist in the military court system. That's the  
10 first distinction.

11 The second distinction, Your Honor, even if  
12 this Court wasn't convinced by that jurisdictional  
13 argument, is that Congress specifically considered  
14 whether to -- to allow coram nobis petitions within the  
15 military court system. The All Writs Act was designed  
16 to be a residual source of authority to fill gaps within  
17 the system. It is not --

18 JUSTICE ALITO: Well -- well, that, as I  
19 understand, was the argument I started out with, that  
20 the -- your argument is that the UCMJ was intended to  
21 eliminate coram nobis if it had been previously  
22 available. That's your -- that's the argument you're  
23 making now?

24 MR. SHAH: Well, again, I would -- I would  
25 quibble with the characterization to -- to -- that it

1 was previously available. As of the enactment of the  
2 UCMJ in 1950, coram nobis relief had never been  
3 available within the military justice system.

4 JUSTICE ALITO: Well, what is the difference  
5 on the face -- on their face between the relevant  
6 provisions of the UCMJ and the provisions that govern  
7 the ability of a criminal defendant in Federal district  
8 court to get relief after being convicted? The -- there  
9 are limited avenues that are provided under the Rules of  
10 Criminal Procedure and under the statutes --

11 MR. SHAH: Right. Right.

12 JUSTICE ALITO: -- just as there are in the  
13 UCMJ. What -- what is the difference?

14 MR. SHAH: The difference is significant,  
15 Your Honor. In the -- in the military court system  
16 there is only one avenue for post-conviction relief.  
17 That is, after your -- and I'm speaking after your  
18 direct review -- appellate review process has been  
19 complete, there's only one, and that is the Article 73  
20 new trial petition. Of course, in -- in the Article III  
21 system there are several independent grants of  
22 jurisdiction, the habeas jurisdiction --

23 JUSTICE GINSBURG: But I thought the Morgan  
24 case said that coram nobis was not dependent on any  
25 independent basis of jurisdiction. Didn't the Court say

1 that a coram nobis application challenging a conviction  
2 is a step in the criminal case and not like habeas,  
3 where relief is sought in a separate case and record,  
4 the beginning of a separate proceeding?

5 MR. SHAH: Right. In -- in Morgan, Your  
6 Honor, the Court was refuting the argument that 2255 --  
7 section 2255 occupied the field and, therefore, there  
8 wouldn't be a coram nobis petition. It rejected that  
9 argument. But I don't think the rejection of that  
10 argument means that coram nobis, which is still a  
11 residual source of authority, is available when Congress  
12 has specifically rejected its application within the  
13 Article I system.

14 JUSTICE KENNEDY: Well, but -- but you're  
15 shifting ground a little bit. The tenor of the  
16 questions from Justice Alito and Justice Ginsburg really  
17 is to the effect: Does coram nobis require an  
18 independent source of -- of jurisdiction? And I should  
19 think not.

20 MR. SHAH: Well, your --

21 JUSTICE KENNEDY: The whole idea of coram  
22 nobis is to protect the integrity of the jurisdiction  
23 the court already has.

24 MR. SHAH: Your Honor, this Court could not  
25 have been clearer in Goldsmith. It says the All Writs

1 Act requires an independent basis -- an existing  
2 independent basis of jurisdiction.

3 JUSTICE KENNEDY: I -- I acknowledge that.  
4 But there is a source of jurisdiction here. Coram nobis  
5 is to ensure the accurate exercise of jurisdiction that  
6 the court has earlier asserted.

7 MR. SHAH: With respect, Your Honor, I would  
8 argue that the past jurisdiction in this case does not  
9 constitute an existing basis of jurisdiction.

10 JUSTICE BREYER: But suppose -- suppose that  
11 the problem was a professional soldier convicted a  
12 certain number of years ago of a particular crime, a few  
13 years later, through some amazing mistake, they wrote  
14 the wrong number down. The clerk just wrote the wrong  
15 number of the code provision. That's all.

16 MR. SHAH: Okay.

17 JUSTICE BREYER: And it made it a felony  
18 instead. It was actually a misdemeanor. What's he  
19 supposed to do? I mean, normally you go back to the  
20 court and say: Judge, you know, they just made --  
21 everyone admits it's a simple transcribing error. Would  
22 you please correct it? Now, how -- how is that supposed  
23 to work in the military?

24 MR. SHAH: If he is still within custody --

25 JUSTICE BREYER: Yes. No, he's -- he's

1 finished his sentence. This is several years ago. They  
2 just now discovered it, and it could affect him in the  
3 future that it happened in fact to be a misdemeanor he  
4 was convicted of. But the -- the code section they  
5 wrote down is a felony.

6 MR. SHAH: Well, if the military isn't  
7 willing to correct that sort of error on its own as an  
8 administrative matter and that he needs some judicial  
9 forum to --

10 JUSTICE BREYER: Yes. Yes, that's right.

11 MR. SHAH: -- to get relief, he can go to  
12 the Court of Federal Claims and bring a Tucker Act  
13 action. There's a 6-year statute of limitations.

14 JUSTICE BREYER: No, this is 7 years.

15 (Laughter.)

16 MR. SHAH: Well -- well, then, Your Honor,  
17 he probably wouldn't have a judicial forum.

18 JUSTICE BREYER: He can't even do that. So  
19 nobody in the military, in fact, once their thing is  
20 final -- then it has nothing to do with it, in your  
21 view, that he has left the military?

22 MR. SHAH: Well --

23 JUSTICE BREYER: You're saying -- you're  
24 saying, whether you're in the military, whether you're  
25 out of the military, no matter how egregious, no matter

1 how obvious, there is no route for a military person, a  
2 professional, to go and get an obvious error corrected.  
3 If -- if he has missed the statute, that there was an --  
4 the civil statute of limitations, it's hard for him to  
5 go to the Tucker Act. He's been in the Philippines the  
6 entire time.

7 MR. SHAH: Justice Breyer, to make your  
8 hypothetical work he has to no longer be in custody. He  
9 has had to have discovered this error 6 years after the  
10 conviction has happened.

11 JUSTICE BREYER: Yes, it happened. It  
12 really happened.

13 MR. SHAH: The military would have had to  
14 deny this -- correcting his --

15 JUSTICE BREYER: What I'm trying to do is  
16 suggest that I think you -- I can't quite decide what  
17 stool you want to rest on. Part of this you say, well,  
18 he's a civilian that has left the military. And then I  
19 read that. It seems to have nothing to do with it. But  
20 your other argument seems to be that doesn't matter.

21 MR. SHAH: Well --

22 JUSTICE BREYER: No military soldier can  
23 correct an error, no matter how egregious, even a  
24 technical -- you know, they just wrote the wrong thing  
25 down -- because Congress didn't want them to. Now, I

1 doubt that Congress thought about that. I'm just not  
2 sure they didn't want them to.

3 MR. SHAH: Well -- well, Your Honor, once  
4 again, in your hypothetical, I think there would be an  
5 administrative recourse there. And, of course, there's  
6 always the fail-safe of a presidential pardon if the  
7 obvious -- if the error is that obvious and that  
8 egregious.

9 Now, you did refer to a second argument,  
10 which is an independent argument, which is that the  
11 military courts lack jurisdiction for the independent  
12 reason that Respondent -- it's an independent reason,  
13 Your Honor, that he lacks any remaining connection to  
14 the armed forces and, therefore, cannot invoke the  
15 military courts. This Court held in *Toth v. Quarles*  
16 that Congress lacks power under Article I to extend  
17 military court jurisdiction over a civilian, and that --

18 JUSTICE SOUTER: No, but that's -- that's  
19 a different -- that's a different issue from --  
20 from whether it -- it may retain some residual  
21 jurisdiction to correct an error with respect to someone  
22 over whom it has had jurisdiction.

23 MR. SHAH: Your Honor, once again, that  
24 would be relying on the long-expired past jurisdiction.  
25 It is --

1                   JUSTICE SOUTER: Well, you -- you made that  
2 point before. And I want to -- I want to follow up with  
3 one question on that. As I recall, it was in response  
4 to the -- to the Morgan argument. The -- the Morgan  
5 analysis was, well, this isn't a -- a new ground or a  
6 new assertion. It is jurisdiction as would be the case  
7 in habeas. It, in effect, is -- is kind of a  
8 metaphysical continuation of the -- the jurisdiction  
9 that existed before.

10                   And your response to that was, in effect, a  
11 Goldsmith response. And -- and you said past  
12 jurisdiction doesn't mean present jurisdiction. The  
13 past jurisdiction is over, and that's under -- under the  
14 statute and under Goldsmith. That's -- that's the end  
15 of it.

16                   Couldn't that same argument simply have been  
17 made, however, in -- in Morgan? In other words, Morgan  
18 was a case in which the point of finality had been  
19 reached. There was no specific statute in Morgan saying  
20 there's coram nobis jurisdiction, and yet the Court's  
21 analysis -- I -- I called it "metaphysical" a second ago  
22 -- was that this really was simply a continuation of the  
23 past jurisdiction. If that was a sound argument in  
24 Morgan, why isn't it a sound argument with respect to  
25 the -- the military code here?

1           MR. SHAH: Well, because the military --  
2 Congress specifically contemplated that possibility, and  
3 now I'm going back to my Article 73 argument, Your  
4 Honor, and to the legislative history which shows what  
5 Congress was trying to do in Article 73. That is to  
6 encapsulate -- whatever post-conviction remedy it's  
7 intended to be available within the military court  
8 system appears in Article 73 that considered coram  
9 nobis.

10           JUSTICE SOUTER: It -- it did do that, and  
11 there's -- there's no question that it certainly made  
12 finality provisions in Article 76. But in the civilian  
13 system, so far as express provision is concerned, there  
14 are limits. There are statutes of limitations, and it  
15 seems to me that the same argument could be made there  
16 that was made here --

17           MR. SHAH: Well, I think this --

18           JUSTICE SOUTER: -- or here as was made  
19 there.

20           MR. SHAH: Your Honor, I think the structure  
21 of the military court system is different than the  
22 civilian system, and -- and that goes back to --

23           JUSTICE SOUTER: Outside of 1331, is there  
24 any structural difference?

25           MR. SHAH: Yes, Your Honor. In the military

1 court system, Article 76, even though it was first  
2 enacted in 19 -- in 1950, there were other provisions  
3 analogous to it. It's always been understood within the  
4 military system that, once a conviction was final and  
5 the military authority executed the judgment, that was  
6 it in terms of review within the military justice  
7 system, save for a presidential pardon. Any further  
8 relief to be obtained was through an Article III habeas  
9 petition in the Federal courts. That's the  
10 understanding that Congress had when it enacted the  
11 UCMJ, and that's the understanding --

12 JUSTICE SOUTER: Yes, but you could say the  
13 same thing, that when the statute of limitations is past  
14 in a habeas case or, indeed, after habeas has been  
15 followed, that so far as the statutes governing Article  
16 III courts are concerned, that's the end. And yet  
17 Morgan says, no, it isn't the end. There's this coram  
18 nobis jurisdiction.

19 MR. SHAH: Well, the difference is, in  
20 Morgan, the Court specifically said that Congress did  
21 not intend to occupy the field when it passed 2255  
22 governing habeas relief for Federal prisoners. That's  
23 not the situation here. We know that Congress intended  
24 to occupy the field when it passed Article 73.

25 So regardless of the jurisdictional

1 arguments, Your Honor, there's no right of action,  
2 there's no right of coram nobis relief within the  
3 military courts.

4 Your Honor, if there are no further  
5 questions, I'd like to reserve the remainder of my time  
6 for rebuttal.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. SHAH: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Freedus.

10 ORAL ARGUMENT OF MATTHEW S. FREEDUS

11 ON BEHALF OF THE RESPONDENT

12 MR. FREEDUS: Mr. Chief Justice, and may it  
13 please the Court:

14 Because there are courts, appellate military  
15 courts must have coram nobis power to protect the  
16 integrity of their judgments. The court of appeals  
17 correctly asserted the same coram nobis power that  
18 Article III courts have.

19 JUSTICE SCALIA: What do you mean, "they  
20 must"? Do you think it's unconstitutional to deprive  
21 them of that?

22 MR. FREEDUS: No, Your Honor. We believe  
23 that they were given the All Writs Act authority as a  
24 birth right in 1950, and that includes all prerogative  
25 writs, including coram nobis.

1 JUSTICE SCALIA: That's what you mean by  
2 "they must have"?

3 MR. FREEDUS: And also, Your Honor, they  
4 must have the ability to protect the integrity of their  
5 judgments just like other Federal courts have. The  
6 Superior Court in D.C. has the power to issue coram  
7 nobis to protect its judgments. So we --

8 JUSTICE SCALIA: That's fine, but -- but is  
9 it unconstitutional for Congress to say military courts  
10 are different, they've always been different, the need  
11 for finality is greater there, and we're adopting a  
12 different rule for there?

13 MR. FREEDUS: I think Congress has the  
14 authority to legislate very broadly in the area of  
15 collateral remedies, and Congress could take away the  
16 writ of coram nobis if it left in its place an adequate  
17 and effective substitute, like it did in 2255.

18 JUSTICE SCALIA: Oh, oh, oh, so it would be  
19 unconstitutional if they did not leave in its place an  
20 adequate and effective substitute --

21 MR. FREEDUS: Our view is that if --

22 JUSTICE SCALIA: -- which would cover every  
23 situation no matter how fanciful, right?

24 MR. FREEDUS: No, Your Honor. We believe  
25 there has to be reasonable opportunity to bring a

1 colorable constitutional claim for which there is no  
2 other avenue of relief, which we believe is the case  
3 here.

4 CHIEF JUSTICE ROBERTS: What -- which case  
5 of ours establishes the proposition that there always  
6 has to be an available avenue of relief?

7 MR. FREEDUS: The best authority we have for  
8 that, Your Honor, is Webster v. Doe, which we believe  
9 stands for the proposition that courts should read  
10 statutes so as not to preclude judicial review of a  
11 constitutional claim absent an express congressional  
12 intent to do so --

13 CHIEF JUSTICE ROBERTS: Well, that's  
14 different than saying there always has to be available  
15 relief. That's saying you think Congress usually  
16 intends there to be available relief. And that would be  
17 a doubtful assumption here, given the rather clear  
18 expressions of finality that -- that are -- that are in  
19 the UCMJ statutes.

20 MR. FREEDUS: I think -- well, if I could  
21 make two points, Your Honor. On the first, we don't  
22 believe that there is square authority for the bedrock  
23 constitutional proposition that Congress can wipe away  
24 all avenues of relief for a claim. We believe that we  
25 were --

1 CHIEF JUSTICE ROBERTS: You don't -- you  
2 don't think there's authority for the proposition they  
3 can do it?

4 MR. FREEDUS: Correct.

5 CHIEF JUSTICE ROBERTS: I'm looking for  
6 authority that says they can't do it.

7 MR. FREEDUS: I'm not aware of any, Your  
8 Honor. We would -- I think we are --

9 JUSTICE SCALIA: Did -- did coram nobis  
10 relief -- you say it has to be there. Was it ever used  
11 before in the military courts?

12 MR. FREEDUS: Yes. I would like to -- yes,  
13 Your Honor, it has been used since 1966. I assume you  
14 may be asking about before 1950.

15 JUSTICE SCALIA: Indeed, yes.

16 MR. FREEDUS: Yes. Well, the reason it  
17 hasn't happened before 1950 is that the UCMJ was created  
18 in 1950, and that was the first time there were military  
19 courts. There were no courts, so therefore no All Writs  
20 Act authority prior to 1950.

21 JUSTICE SCALIA: Worse still. My goodness.  
22 So you were --

23 MR. FREEDUS: Absolutely.

24 JUSTICE SCALIA: -- convicted by a  
25 court-martial and had no basis for -- for getting that

1 revised, and that -- that lasted for a couple of hundred  
2 years, right? And that was okay or it wasn't okay?

3 MR. FREEDUS: That was -- I think that's the  
4 impetus behind the UCMJ, Your Honor.

5 JUSTICE SCALIA: Well, that's fine. I mean,  
6 you can patch it up and say that they thought it wasn't  
7 a good idea to have just military courts. But it's very  
8 hard to make the constitutional argument you're making  
9 when for a couple hundred years in military -- in  
10 military courts, which are different, there -- there was  
11 no relief at all.

12 JUSTICE STEVENS: Could you clarify  
13 something for me? Are you contending that the result  
14 you seek is constitutionally compelled? I didn't think  
15 you were.

16 MR. FREEDUS: Not -- no, not -- we aren't,  
17 Your Honor. I was more responding to the Chief  
18 Justice's --

19 JUSTICE SCALIA: And you were saying it is.  
20 Just say, no, it's not constitutionally compelled, and  
21 I'll be happy.

22 (Laughter.)

23 MR. FREEDUS: No, Your Honor.

24 CHIEF JUSTICE ROBERTS: Wait, I'm sorry, no  
25 what?

1 JUSTICE KENNEDY: Well, you might -- you  
2 might say that there is a lurking constitutional  
3 question and that we ought to interpret the statute to  
4 avoid a constitutional concern.

5 MR. FREEDUS: I think, Your Honor, that's  
6 the best answer that I should have given.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: I don't like it very  
9 much.

10 But what is -- your argument is that the  
11 Constitution does not require that this person have,  
12 right now, an available avenue of relief, your position?

13 MR. FREEDUS: We don't have square authority  
14 from this Court to support that proposition.

15 CHIEF JUSTICE ROBERTS: So then it becomes,  
16 as Justice Kennedy suggested, a question of whether or  
17 not we should read the statutes here in a particular way  
18 to avoid confronting that question?

19 MR. FREEDUS: Yes, Your Honor, I think  
20 that's where -- we're comfortably in that neck of the  
21 woods, and we really don't need to get closer to the  
22 scarier question that was alluded to. So we --

23 JUSTICE SOUTER: When you say it's lurking,  
24 you're -- you're invoking the doctrine of constitutional  
25 avoidance?

1 MR. FREEDUS: Yes, Your Honor, we are.

2 JUSTICE SOUTER: Okay.

3 JUSTICE SCALIA: I don't think it's much of  
4 a lurk if, for 200 years, this was going on without ever  
5 -- it's not lurking to my mind.

6 JUSTICE GINSBURG: But you are making -- I  
7 thought that the core of your argument is that the All  
8 Writs Act applies to all courts established by Congress,  
9 the military courts are included in that definition, and  
10 there is nothing in the All Writs Act that says it  
11 doesn't apply to the military. But the All Writs Act  
12 requires that the writ be in aid of the court's  
13 jurisdiction. So if you would spell out how the writ  
14 here is in aid of the military court's jurisdiction.

15 MR. FREEDUS: Yes, Your Honor. We believe  
16 it does it in a very similar way that this Court  
17 explained in the United States v. Morgan, and that is  
18 the writ of coram nobis aids the past appellate  
19 jurisdiction that the Navy court had when it affirmed  
20 and reviewed Mr. Denedo's conviction. It had  
21 jurisdiction there.

22 And the coram nobis writ by its very nature  
23 allows a court to correct an error in a case that was  
24 before it, but it failed to perceive that error while it  
25 had the case before it. And had it known the facts we

1 now know after all of the remedies are no longer  
2 available, the court would not have issued the judgment  
3 that it issued.

4 That's the -- in that sense, that's how the  
5 writ aids the jurisdiction the court had in the past.

6 JUSTICE BREYER: Well, if that's so, then I  
7 guess you can have courts reviewing the civilians. They  
8 will review after the event the court-martial  
9 jurisdiction -- the court-martials of people while they  
10 were in the military. That will become a matter of  
11 course anytime. I mean, there are many, many errors.  
12 We have approximately 5,000 petitions a year claiming  
13 some kind of constitutional error, and sometime they're  
14 right.

15 MR. FREEDUS: Yes, Your Honor.

16 JUSTICE BREYER: So that's what you foresee?

17 MR. FREEDUS: I would -- yes and no.

18 JUSTICE BREYER: What way is it no?

19 MR. FREEDUS: No is when the individual is  
20 not in custody and the 6-year statute of limitations has  
21 expired for all the types of claims that are available  
22 for a collateral attack of a court-martial conviction, a  
23 declaratory judgment attack, a mandamus attack, Court of  
24 Federal Claims attack, all those --

25 JUSTICE BREYER: Why -- in other words, in

1 the case I posed, he would -- he -- in your view, he  
2 wouldn't have any remedy. You would agree with the  
3 government about that, if it's 7 years later you find a  
4 clerical error?

5 MR. FREEDUS: We agree. But we don't think  
6 it's necessary, actually, to decide the issue here. The  
7 issue here really is whether coram nobis is available --

8 JUSTICE BREYER: Well, if, in fact, you're  
9 waiting until the -- the civil courts have lost all  
10 jurisdiction because the statute of limitations has  
11 expired, why do you need this? Why can't they just go  
12 -- I mean, why do you need this special thing that  
13 hasn't existed for 200 years? Why don't they just go to  
14 a civil case? And moreover, why doesn't your client  
15 fall within that situation?

16 You're claiming that if all the statutes  
17 have run and everything, there is no coram nobis  
18 jurisdiction, I thought in your case they had all run.

19 MR. FREEDUS: This gets to the other piece  
20 of the answer I was trying to give, and that is a  
21 petitioner from the military system could not file a  
22 coram nobis petition in the Article III courts or the  
23 Court of Federal Claims because there's no authority  
24 that supports the proposition that you can take a coram  
25 nobis petition and attack a judgment from a different

1 jurisdiction. Coram nobis has to allow the court that  
2 issued -- that -- that --

3 JUSTICE BREYER: Then you're saying that  
4 what you're foreseeing is through coram nobis,  
5 indefinitely, a person outside the military who once was  
6 in it can bring constitutional challenges?

7 MR. FREEDUS: Yes, Your Honor, in the  
8 military justice system.

9 JUSTICE BREYER: Yes, okay, and we see those  
10 every day, don't we? But there is one difference. The  
11 difference is that often, though not always, a person in  
12 habeas who challenges a prior normal, civil system  
13 conviction, the State can retry him. And I guess, in  
14 the instance that we're talking about, he can never be  
15 retried. So in fact the difference would be, in your  
16 view, the civilians who bring this would never be  
17 retried if they're right.

18 MR. FREEDUS: That's correct, Your Honor.

19 JUSTICE BREYER: And so they would have in  
20 that sense greater protection in the military system  
21 than in the ordinary criminal courts a person has in  
22 habeas, because the option of retrial is often but not  
23 always there. Now, why would Congress have intended  
24 that?

25 MR. FREEDUS: I think it's the very nature

1 of the coram nobis petition, Your Honor, and that is  
2 coram nobis petitioners have already served their entire  
3 sentence, so the societal interest to seek a retrial is  
4 much lesser than in the habeas case where there's a  
5 lengthy sentence less -- left, and if someone gets out  
6 of jail --

7 CHIEF JUSTICE ROBERTS: Well, but the  
8 collateral consequences of the conviction are pretty  
9 dramatic. In this case, they decide whether this guy  
10 stays in the country or is deported.

11 MR. FREEDUS: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: Well, so I think  
13 Justice Breyer's question is still on the table. Why  
14 would Congress intend to afford greater relief and  
15 remedies to somebody who's outside -- was within the  
16 military system and is now outside, than to an ordinary  
17 civilian under Article III jurisdiction?

18 MR. FREEDUS: I think there is a classic  
19 distinction between the habeas and the coram nobis  
20 petitioner. In a coram nobis petitioner under 2255, if  
21 they were to file a successful petition long after a  
22 statute of limitations had expired, they would be in no  
23 different position than a coram nobis -- a successful  
24 coram nobis petitioner in the military.

25 We would say, we do believe there's a -- a

1 colorable argument for -- for the ability to retry Mr.  
2 Denedo, but it's not pivotal to our case. Our view is  
3 that the inability --

4 JUSTICE GINSBURG: Where? Colorable --

5 JUSTICE KENNEDY: In the civilian courts or  
6 the military courts?

7 MR. FREEDUS: The military courts, Your  
8 Honor.

9 JUSTICE BREYER: I think you have a good  
10 answer to what my question was. I thought that was a  
11 good answer. It's helping me. And -- but where I'm --  
12 where I'm slightly -- and maybe this is just not  
13 relevant to this case or maybe it's for the future.  
14 Coram nobis, I thought, was a writ that means really  
15 like technical clerical errors or something really  
16 unusual. Is this -- I mean, it's hardly ever there.  
17 I've not really seen more than a handful of cases.

18 So -- so is this writ supposed to be  
19 available or what you're claiming is what I call a  
20 typical error of inadequate representation? And I don't  
21 know the answer to that question, but I think it's --  
22 maybe you could say that's not presented. Maybe that's  
23 for a later case. I don't know how to treat it. That's  
24 why I'm asking.

25 MR. FREEDUS: I think Morgan is helpful on

1 that, Your Honor. Morgan is a violation of the right to  
2 counsel, and it's this Court's --

3 JUSTICE GINSBURG: But was -- that question  
4 wasn't resolved, was it? I thought we were just talking  
5 about the authority of the military courts to issue this  
6 writ, and the question that Justice Breyer has raised,  
7 well, is this ineffective assistance of counsel adequate  
8 grounds to issue the writ? I thought that question was  
9 certainly not raised before this Court.

10 MR. FREEDUS: Well, the government hasn't  
11 urged that there's no ineffective assistance of counsel.  
12 It's not in their opening --

13 JUSTICE KENNEDY: Well, let's assume it  
14 raised because Justice Breyer asked a question --

15 MR. FREEDUS: Yes.

16 JUSTICE KENNEDY: -- and I would be  
17 interested in the answer.

18 JUSTICE BREYER: I knew it wasn't.

19 MR. FREEDUS: Yes, Your Honor.

20 JUSTICE BREYER: I thought it might be your  
21 answer: Well, that isn't raised. And that would be a  
22 perfectly good answer.

23 MR. FREEDUS: That's -- that's why --

24 JUSTICE BREYER: I'm telling you my honest  
25 problem which I'm trying to think through: Where are we

1 going with this?

2 MR. FREEDUS: I think --

3 JUSTICE BREYER: What's going to happen one  
4 way or the other way? That's why I asked the question.  
5 So all I'm asking is your best thought on it.

6 MR. FREEDUS: Yes, Your Honor. I think  
7 United States v. Kwan and United States v. Castro are  
8 two court -- two cases that give the answer to your  
9 question and both of those indicate that ineffective  
10 assistance of counsel, in very similar factual  
11 circumstances to this, is a basis for coram nobis relief  
12 after -- after the ineffective assistance is discovered.  
13 We recognize this Court has granted in --

14 JUSTICE GINSBURG: Military courts now,  
15 since 1950, have quite a record of saying coram nobis is  
16 available in these courts. However, they have routinely  
17 thrown out the cases on the merits. Is there any case  
18 within the military where the military has said anything  
19 like inadequate assistance of counsel qualifies as a  
20 reason to grant the writ?

21 MR. FREEDUS: Aside from this -- this case  
22 below, Your Honor, I don't know of a case that raised  
23 ineffective assistance of counsel. And you are correct  
24 that the vast majority of these cases are thrown out of  
25 court in the most -- in the briefest of orders. There

1 are cases where relief has been granted. They are few  
2 and far between. Del Prado is one. It involved a  
3 compositional jurisdictional error to the -- to the  
4 court. An individual failed to elect a military judge  
5 alone in writing and waived the right to have a -- a  
6 member's jury trial, and that was deemed a  
7 jurisdictional defect. And long after the case was  
8 final, the -- the conviction was set aside. And I would  
9 note the court in that case observed that personal  
10 jurisdiction was no obstacle to granting the coram nobis  
11 relief.

12 JUSTICE SCALIA: Was that person retried, do  
13 you know?

14 MR. FREEDUS: I do not know, Your Honor.

15 JUSTICE SCALIA: Was he still in the  
16 military?

17 MR. FREEDUS: I do not know. He was -- the  
18 relief -- the decretal paragraph of the -- of the  
19 decision indicates that he was restored all rights and  
20 benefits, but it stops shy of saying, you know, here's  
21 your uniform back.

22 JUSTICE GINSBURG: Do I understand correctly  
23 that since 1989 there were a total of 30 coram nobis  
24 petitions filed, and of those only 4 were granted?

25 MR. FREEDUS: The statistics that we cited

1 in our brief, Your Honor, were 10 coram nobis petitions  
2 at the court of appeals within the last 10 years --

3 JUSTICE GINSBURG: Yes.

4 MR. FREEDUS: -- and 176 writ appeals from  
5 the lower courts up to the court of appeals that don't  
6 break out the category of writs. They could be habeas,  
7 they could be coram nobis, mandamus. So we don't know  
8 what percentage of the 176. But even if it was a -- a  
9 significant percentage, it's still a tiny percentage of  
10 the court's overall docket.

11 But they are rarer than hen's teeth, Your  
12 Honor. These cases, one a year maybe is -- would be the  
13 average of a coram nobis --

14 JUSTICE BREYER: What is the theory of the  
15 jurisdiction of the military court in the circumstance  
16 where the individual is still in the military, he's been  
17 convicted, and he is in custody? So he wants to get out  
18 of custody. Now, what's the theory of that? He can --  
19 I take it it's accepted, is it, that they can -- that  
20 such a person can ask the military justice system -- I  
21 don't know which court -- for release on the ground that  
22 he didn't -- wasn't adequately represented or some other  
23 ground?

24 MR. FREEDUS: That would be a habeas case,  
25 Your Honor.

1 JUSTICE BREYER: All right. It's a habeas  
2 case. Now, do you have -- can you do that in the  
3 military?

4 MR. FREEDUS: Yes. There are --

5 JUSTICE BREYER: And what's the theory of  
6 the jurisdiction that the military courts have over  
7 that?

8 MR. FREEDUS: It's similar in that it's All  
9 Writs Act authority aiding the --

10 JUSTICE BREYER: Aiding what jurisdiction?

11 MR. FREEDUS: A direct review authority of  
12 the military --

13 JUSTICE BREYER: But they've already  
14 directly reviewed it.

15 MR. FREEDUS: Correct. And that's --

16 JUSTICE BREYER: So there is no more direct  
17 review to be had.

18 MR. FREEDUS: That's correct, Your Honor.

19 JUSTICE BREYER: So how does this aid the  
20 direct review that is to be had, since there is none?

21 MR. FREEDUS: It aids it in the same way  
22 this Court recognized it can do so in Goldsmith, where  
23 it acknowledged that a mandamus writ could issue after  
24 finality --

25 JUSTICE BREYER: I see.

1           MR. FREEDUS:  -- to compel adherence to the  
2 court's own judgment, so that --

3           CHIEF JUSTICE ROBERTS:  Within -- within the  
4 military system?

5           MR. FREEDUS:  Yes, Your Honor, within the  
6 military justice system.  In that -- in Goldsmith, it  
7 was a situation where Goldsmith was out of the -- you  
8 know, out of the military.  He had a final -- well, I  
9 guess he was in custody.  But he had a final  
10 court-martial conviction, and this Court indicated that  
11 a writ of mandamus could issue to aid past appellate  
12 jurisdiction to compel adherence to the --

13           CHIEF JUSTICE ROBERTS:  All within the  
14 system.  I mean, the difference with this case is that  
15 you're talking about somebody who is -- I guess that's  
16 the issue -- out of the military system.

17           The problem with your position is that it  
18 would dramatically expand the jurisdiction of the  
19 military system.  It would sort of follow everybody  
20 they've dealt with around for their life, right?

21           MR. FREEDUS:  The fact --

22           CHIEF JUSTICE ROBERTS:  At any time somebody  
23 who is out of the military system, whose judgment is  
24 supposedly final under the provisions that Congress has  
25 established, he could come back and knock on the door 20

1 years later and say, I want to review my conviction.

2 MR. FREEDUS: That's correct, Your Honor.

3 CHIEF JUSTICE ROBERTS: And he would be  
4 within the military system.

5 MR. FREEDUS: He would be a civilian, former  
6 servicemember --

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. FREEDUS: -- filing a coram nobis  
9 petition, and the coram nobis --

10 CHIEF JUSTICE ROBERTS: And he's back in the  
11 military system, 20 years later?

12 MR. FREEDUS: For purposes of the coram  
13 nobis petition.

14 JUSTICE KENNEDY: In -- in coram nobis cases  
15 in the civil system, do courts appoint special masters  
16 when they're an appellate court and they have to find  
17 out if coram nobis was --

18 MR. FREEDUS: Yes, Your Honor.

19 JUSTICE KENNEDY: Or do they use district  
20 courts as special masters?

21 MR. FREEDUS: They --

22 JUSTICE KENNEDY: In this case, you had --  
23 the court had to invent a procedural device. There's  
24 going to be a new court-martial, which is a little odd  
25 because it's a new court-martial sitting in judgment on

1 somebody who isn't even in the military anymore.

2 MR. FREEDUS: It's not a court-martial, Your  
3 Honor. It's what's called a DuBay proceeding, and what  
4 happens is -- and this in the decretal paragraph of the  
5 -- the decision below. A remand is for further factual  
6 development, and if the case can be disposed of on  
7 declarations, if the government came forth -- it didn't  
8 do so below -- but if it did so on remand and provided  
9 affidavits that blew our affidavits out of the water,  
10 the court could dismiss the petition out of hand.

11 If they couldn't do that or if there was a  
12 credibility contest that needed to be resolved, what  
13 would happen is the court would order what's called a  
14 DuBay hearing, where a judge is appointed. And it's  
15 just like an evidentiary hearing. Witnesses are  
16 presented and they're cross-examined, and then findings  
17 of fact are made, conclusions of law are drawn. And  
18 then that is put into a record, added to the record of  
19 trial, and reviewed in the coram nobis petition.

20 JUSTICE KENNEDY: But all of that is  
21 extra-statutory in your -- this instance?

22 MR. FREEDUS: We don't believe so. We  
23 believe the court -- the Navy court here has decisional  
24 authority under Article 66 to do factfinding. It's a  
25 very unique court. Congress created these courts with

1 factfinding power, which is different than I think  
2 virtually all appellate courts, save maybe one or two  
3 unusual situations. But these courts have factfinding  
4 power, so it's right in Article 66. And these courts  
5 also have rulemaking authority. And so does the court  
6 of appeals, and it has exercised that to provide for  
7 these procedures. So we don't believe --

8 JUSTICE SOUTER: Where are -- where are the  
9 procedures set out for -- for military habeas?

10 MR. FREEDUS: They're not, and actually that  
11 -- that -- this Court pointed that out in *Noyd v. Bond*.  
12 It said that military appellate courts have habeas  
13 power, but the court of appeals hadn't provided rules,  
14 and Congress could facilitate with rules but hadn't, but  
15 that didn't stop this Court from saying habeas power  
16 existed. The absence of the procedure --

17 JUSTICE SOUTER: Are you -- are you arguing  
18 then that if it has habeas power without a -- a textual  
19 basis, there's no reason to argue that it lacks *coram*  
20 *nobis* power because there's no textual basis?

21 MR. FREEDUS: I think the answer to that is  
22 yes. The negative in there caught me. But, yes, I  
23 think that's what we're saying, Your Honor.

24 JUSTICE GINSBURG: But this Court has never  
25 held that the military courts have habeas jurisdiction?

1 MR. FREEDUS: Yes, it has, Your Honor.

2 JUSTICE GINSBURG: In what case?

3 MR. FREEDUS: In *Noyd v. Bond*, this Court  
4 squarely held that military -- the court of appeals at  
5 the time has habeas authority.

6 CHIEF JUSTICE ROBERTS: For someone still  
7 within the military system?

8 MR. FREEDUS: That was the case where the  
9 individual was pending appeal, I believe.

10 CHIEF JUSTICE ROBERTS: So the answer --

11 JUSTICE GINSBURG: But that was --

12 CHIEF JUSTICE ROBERTS: -- to Justice  
13 Ginsburg is that we have never held that with respect to  
14 a situation like the facts here, where you're dealing  
15 with somebody who is outside -- long departed from the  
16 military system?

17 MR. FREEDUS: Well, I would -- I would  
18 direct the Court's attention, if I could, to footnote 11  
19 of *Goldsmith*, where this Court says: "And of course,  
20 once a criminal conviction has been finally reviewed  
21 within the military system, and a servicemember in  
22 custody has exhausted other avenues provided under the  
23 UCMJ to seek relief from his conviction" -- citing *Noyd*,  
24 the six pages therein which refers to the military  
25 court's habeas power. This Court in *Goldsmith* put

1 habeas power in the context of a -- a final case, so  
2 habeas authority after final relief.

3 JUSTICE SCALIA: It's talking about somebody  
4 still within the military, if I -- if I heard the quote  
5 correctly, right?

6 MR. FREEDUS: An individual is out of the  
7 military if they -- if their dismissal has been executed  
8 -- or their discharge has been executed and they're in  
9 Leavenworth. They could even be moved to another  
10 Federal penitentiary and still in custody.

11 JUSTICE GINSBURG: The --

12 MR. FREEDUS: So they're not really in the  
13 military.

14 JUSTICE GINSBURG: The quote you referred to  
15 from Goldsmith says: "And a servicemember in custody."  
16 So I think Goldsmith, in that footnote that you're  
17 citing, is presenting a servicemember still in custody,  
18 having exhausted all other areas, can come to a Federal  
19 district court and seek habeas. It's not talking about  
20 someone who is out of the military.

21 MR. FREEDUS: I read it differently, Your  
22 Honor. I read it -- the next clause in that sentence is  
23 referring to habeas outside. I read this sentence as  
24 clearly saying that there's direct review. There's  
25 habeas after direct review within the military. And

1 then there's of course collateral review in the Article  
2 III courts, if -- if everything misfires within the  
3 military justice system.

4 JUSTICE GINSBURG: Well, what am I missing?  
5 I thought that the footnote reads once a criminal  
6 conviction has been finally reviewed within the military  
7 system a servicemember, having exhausted all other  
8 areas, can petition in a Federal district court for a  
9 writ of habeas corpus. I don't see anything that talks  
10 about someone who is no longer a servicemember.

11 MR. FREEDUS: Right. I -- I see the  
12 in-custody and exhausted avenues provided in the UCMJ as  
13 referring to a phase before you get to the Article III  
14 courts. Obviously, if I'm reading it wrong, the Court  
15 will let me know, but I read that as prior to Article  
16 III review.

17 If I could talk briefly about the 1983  
18 legislation -- it came up in opposing counsel's opening.  
19 I think it sheds a lot of light on the availability of  
20 coram nobis relief. When Mr. Taft testified, he wasn't  
21 simply giving his -- he wasn't simply stating the state  
22 of the law. He was providing the state of the law as a  
23 premise for legislative action, in particular stripping  
24 collateral review authority from the correction boards,  
25 which used to be able to review collaterally, after

1 final judgment, military convictions. And that existed  
2 before the UCMJ was enacted.

3 CHIEF JUSTICE ROBERTS: This is -- this is  
4 at a hearing. This isn't a Member of Congress,  
5 obviously, that we're talking about. It's not even a  
6 single Member of Congress?

7 MR. FREEDUS: This is the chief counsel for  
8 the Department of Defense proposing the legislation and  
9 offering the only premise there was for the particular  
10 legislative change that I'm referring to, which is  
11 stripping the -- the correction boards of this  
12 collateral review power and saying, when we do that,  
13 don't worry, Congress, because it will channel these  
14 collateral -- post-final collateral attacks into the  
15 military courts, and -- and they can have habeas. He  
16 says habeas -- I'm sorry --

17 CHIEF JUSTICE ROBERTS: Under the specific  
18 --

19 MR. FREEDUS: -- coram nobis.

20 CHIEF JUSTICE ROBERTS: Under the specific  
21 provision that was at issue, which is accompanied by  
22 very strict finality provisions.

23 There's no suggestion in his testimony that  
24 the availability of the relief that he's talking about  
25 continues after the individual is outside the military

1 system. He's channeling -- he says these are channeled  
2 through a specific provision applicable only within the  
3 military system.

4 MR. FREEDUS: I don't read it that way, Your  
5 Honor. I read it as channeling apt post-final attacks  
6 within the military -- within the courts in the military  
7 justice system, even though the person is -- is -- a  
8 final judgment typically happens before an individual is  
9 no longer in the service. A final judgment is final  
10 because the discharge has been executed. So what he's  
11 referring to is, once you have a final judgment, you  
12 then can seek collateral relief in the military the way  
13 you used to be able to do it in the correction boards in  
14 the military courts. And he was saying, now that we're  
15 getting rid of this one collateral remedy in these  
16 correction boards, we're giving you this other one.  
17 We're not giving -- we're just channeling all of them  
18 into the military appellate courts, which is a more  
19 appropriate judicial forum. And he says clearly it  
20 would denigrate the courts to have administrative bodies  
21 overturning their judgments, once again showing that  
22 these are final judgments that we're talking about. And  
23 the only -- that was the only premise he offered to make  
24 the change.

25 So stripping away one remedy while leaving

1 another intact was the single premise, which is  
2 reflected in the House -- the Senate report on page 52  
3 of our brief, where Congress adopts the exact language  
4 out of his sworn testimony with, you know, a tiny  
5 variation, but that's the premise for the change in the  
6 legislation.

7 I'd also note that, in that legislation,  
8 this is the Department of Defense proposing to open the  
9 door to this Court's jurisdiction for the first time in  
10 -- in 28 U.S.C. 1259. And when it did that -- it had to  
11 survey the whole landscape of military justice  
12 jurisdiction, and when it did that, it saw there were  
13 direct review cases, which are reflected in 1259  
14 paragraphs 1, 2, and 3, and then this other category that  
15 is defined by what's not in paragraphs 1, 2, and 3, and  
16 that's the All Writs Act cases. The government  
17 acknowledges --

18 CHIEF JUSTICE ROBERTS: I'm sorry. I've had  
19 the chance to go back and look at the Senate report, and  
20 like Mr. Taft's testimony, there's no suggestion in  
21 there that the relief he's talking about continues after  
22 someone is out of the service.

23 MR. FREEDUS: I think that's implicit in  
24 final judgment, Your Honor. If there's a final  
25 judgment.

1                   CHIEF JUSTICE ROBERTS: Well, a final  
2 judgment is subject to review in the appellate courts  
3 within -- in the military system, just like you have --  
4 a final court of appeals judgment is subject to review  
5 in our system.

6                   MR. FREEDUS: Your Honor, the -- the key  
7 difference is that -- two things: He's referring to  
8 post-finality, which means that the discharge or the --  
9 you know, the sentence has been executed. The person is  
10 out. They're a civilian at that point. And coram  
11 nobis, by its very nature, is someone who is not in  
12 custody. So I don't think it's too much of an inference  
13 to read that what he is saying here is --

14                   CHIEF JUSTICE ROBERTS: When you have review  
15 in the appellate system -- someone is -- the judgment is  
16 they're to be discharged, and they seek review. Are  
17 they discharged while the review is going on?

18                   MR. FREEDUS: No, on direct review, you're  
19 right, Your Honor. They're -- they remain within the  
20 service, and it's interesting that the government cites  
21 Mr. Taft's testimony as authoritative on that point.  
22 And that -- that makes good sense. Keep the person in  
23 for a direct review so that if their sentence is set  
24 aside, we can retry.

25                   But there has been decades of military

1 justice authority that says even if someone is  
2 discharged before their conviction is set aside -- so  
3 they're on direct review, their conviction is set aside,  
4 after they're already out in their civilian world, you  
5 know, doing whatever they're doing -- if the government  
6 wants to retry them, they do. And the government is --  
7 is the party that asserts continuing jurisdiction to  
8 re-prosecute.

9           And that's why this case is so  
10 distinguishable from *Toth v. Quarles*, because in *Toth*  
11 there was no conviction while the individual was on  
12 active duty. And that's why there couldn't have been a  
13 retrial. Here there was conviction on active duty,  
14 which is where jurisdiction attaches. It cements in.  
15 And if the government wants to invoke that to retry Mr.  
16 Denedo, it can try that.

17           I would say, though, that if -- if there  
18 were a personal jurisdiction loophole here, like there  
19 was for the MEJA, the Military Extraterritorial  
20 Jurisdiction Act, Congress could fix it in a heartbeat.  
21 But we're talking about, you know, 10 cases in 10 years.  
22 So even if someone, you know, got away without retrial  
23 --

24           CHIEF JUSTICE ROBERTS: You -- you don't  
25 think that if you prevail in this case, we're going to

1 see a lot more coram nobis petitions than we did before?

2 MR. FREEDUS: I -- I think there would be an  
3 uptick, and there may actually have been an uptick while  
4 this case has been up here at this level, because it's  
5 -- it has gotten a lot of visibility in the military,  
6 just like there was an uptick after *Noyd v. Bond* when  
7 this Court declared for the first time that military  
8 courts had All Writs Act power.

9 So I think there could be an uptick. But  
10 once the novelty of it wears off, I think you will see  
11 that level off, and you'll see the same trend that we've  
12 seen since 66 when it was available the first time. I  
13 mean, this isn't new. The only thing new here is the  
14 government's interpretation of Article 76.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. FREEDUS: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Mr. Shah, you have 3  
18 minutes remaining.

19 JUSTICE SCALIA: Mr. Shah, could you tell us  
20 what the government's position is on whether, when  
21 somebody has been discharged from the service and then a  
22 conviction which he -- which he suffered while he was in  
23 the service is set aside, can he be retried in military  
24 courts?

25 REBUTTAL ARGUMENT OF PRATIK A. SHAH

1 ON BEHALF OF THE PETITIONER

2 MR. SHAH: Not if he is past his enlistment  
3 period, no, Your Honor. The government's view is they  
4 would not be able to retry him.

5 I'd just like to make four quick points in  
6 response: First, to the Chief Justice's question, could  
7 someone be in custody after finality? Of course, yes,  
8 that -- that could be the case. The military doesn't  
9 have to issue a bad conduct discharge as part of its  
10 sentence. He could still be in confinement within the  
11 military during the post-finality period.

12 The second point I would like to make is  
13 that Noyd v. Bond is clearly distinguishable. That  
14 dealt with habeas review within the military while the  
15 person was still pursuing his direct appeal. So there  
16 was a clear, independent basis of jurisdiction in the  
17 Noyd v. Bond type situation, and that's the Article 66  
18 and 67 direct review jurisdiction, and that --

19 JUSTICE SOUTER: What has direct review got  
20 to do with habeas?

21 MR. SHAH: Well -- well, Your Honor, the --  
22 the habeas would be in aid of the direct review  
23 jurisdiction. In -- in Noyd -- in the Noyd v. Bond --

24 JUSTICE SOUTER: In the civil system, we  
25 regard it as -- as entirely a separate proceeding.

1           MR. SHAH: Well, what was going on in Noyd  
2 v. Bond, Your Honor, is he was pursuing a habeas  
3 petition for release pending the -- the resolution of  
4 his direct appeal. So the military courts just referred  
5 the petition to the same court reviewing his direct  
6 appeal on the merits, and it became part and parcel of  
7 that jurisdiction.

8           The third point I would like to -- to make  
9 is in response to Justice Kennedy's question, which  
10 shows the incompatibility of coram nobis relief within  
11 the military justice system. That they've had to create  
12 this DuBay procedure where -- where a new court-martial  
13 -- and DuBay sets this out. A new court-martial does  
14 have to be convened, and then they would have a  
15 factfinding tribunal in which new -- a new military  
16 judge would have to be assigned to govern it.

17           None of that is specified within Congress's  
18 scheme. That has all been created. It shows the  
19 incompatibility of the practical burdens that this  
20 procedure places on the military. And nothing in  
21 Article 66(c) which governs the jurisdiction of the  
22 military appellate courts, the intermediate courts,  
23 references any independent factfinding power. It says  
24 in a case referred to it, the court of criminal appeals  
25 may act only with respect to the findings and sentence

1 as approved by the convening authority. It may affirm  
2 only such findings of guilty and the sentence or such  
3 part or amount of the sentence as it finds correct in  
4 law and fact and determines on the basis of the entire  
5 record.

6 CHIEF JUSTICE ROBERTS: Why don't you  
7 briefly make your fourth point.

8 MR. SHAH: The fourth -- fourth point is in  
9 response to Justice Breyer. My military colleagues  
10 inform me that in the situation of a true clerical  
11 error, they could go to the Board of Correction of  
12 Military Review and seek correction of that error.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 The case is submitted.

15 (Whereupon, at 11:08 a.m., the case in the  
16 above-entitled matter was submitted.)

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<p style="text-align: center;"><b>A</b></p> <p><b>ability</b> 7:17 18:7 28:4 38:1</p> <p><b>able</b> 16:12 50:25 52:13 57:4</p> <p><b>above-entitled</b> 1:11 59:16</p> <p><b>absence</b> 47:16</p> <p><b>absent</b> 29:11</p> <p><b>absolutely</b> 10:3 30:23</p> <p><b>accept</b> 10:11,20 13:1</p> <p><b>accepted</b> 42:19</p> <p><b>accompanied</b> 51:21</p> <p><b>accurate</b> 20:5</p> <p><b>acknowledge</b> 20:3</p> <p><b>acknowledged</b> 43:23</p> <p><b>acknowledges</b> 53:17</p> <p><b>act</b> 3:12,15 10:17 11:10 16:20 17:5,15 20:1 21:12 22:5 27:23 30:20 33:8,10 33:11 43:9 53:16 55:20 56:8 58:25</p> <p><b>action</b> 6:21 21:13 27:1 50:23</p> <p><b>active</b> 55:12,13</p> <p><b>added</b> 7:6,11 46:18</p> <p><b>additional</b> 7:13 15:14</p> <p><b>adequate</b> 28:16 28:20 39:7</p> <p><b>adequately</b> 42:22</p> <p><b>adherence</b> 44:1 44:12</p> <p><b>administrative</b></p>	<p>7:7 21:8 23:5 52:20</p> <p><b>admits</b> 20:21</p> <p><b>adopting</b> 28:11</p> <p><b>adopts</b> 53:3</p> <p><b>Advocate</b> 7:9</p> <p><b>affect</b> 21:2</p> <p><b>affidavits</b> 46:9,9</p> <p><b>affirm</b> 59:1</p> <p><b>affirmatively</b> 4:10</p> <p><b>affirmed</b> 33:19</p> <p><b>afford</b> 37:14</p> <p><b>ago</b> 12:25 20:12 21:1 24:21</p> <p><b>agree</b> 9:22 12:24 35:2,5</p> <p><b>agreed</b> 5:9</p> <p><b>ahead</b> 11:15</p> <p><b>aid</b> 33:12,14 43:19 44:11 57:22</p> <p><b>aiding</b> 43:9,10</p> <p><b>aids</b> 33:18 34:5 43:21</p> <p><b>alert</b> 9:22</p> <p><b>alerted</b> 9:16</p> <p><b>Alito</b> 15:25 16:8 17:18 18:4,12 19:16</p> <p><b>allow</b> 7:4 17:14 36:1</p> <p><b>allowing</b> 11:3</p> <p><b>allows</b> 33:23</p> <p><b>alluded</b> 32:22</p> <p><b>alternative</b> 5:4</p> <p><b>amazing</b> 20:13</p> <p><b>amend</b> 12:21</p> <p><b>amending</b> 11:10 11:11</p> <p><b>amendments</b> 11:14,16</p> <p><b>amount</b> 59:3</p> <p><b>amounts</b> 15:11</p> <p><b>ample</b> 8:25</p> <p><b>analogous</b> 26:3</p> <p><b>analysis</b> 24:5,21</p>	<p><b>answer</b> 6:23 8:21 13:5 32:6 35:20 38:10,11 38:21 39:17,21 39:22 40:8 47:21 48:10</p> <p><b>answered</b> 9:5</p> <p><b>anymore</b> 46:1</p> <p><b>anytime</b> 34:11</p> <p><b>appeal</b> 14:13 15:15 48:9 57:15 58:4,6</p> <p><b>appeals</b> 3:10 7:12 27:16 42:2,4,5 47:6 47:13 48:4 54:4 58:24</p> <p><b>appear</b> 14:2</p> <p><b>APPEARAN...</b> 1:14</p> <p><b>appears</b> 6:10 15:10 25:8</p> <p><b>appellate</b> 3:11 4:2,5,7,8,17 7:11 18:18 27:14 33:18 44:11 45:16 47:2,12 52:18 54:2,15 58:22</p> <p><b>applicable</b> 52:2</p> <p><b>application</b> 19:1 19:12</p> <p><b>applications</b> 9:17</p> <p><b>applied</b> 9:11</p> <p><b>applies</b> 4:20 10:18 15:21 16:20 33:8</p> <p><b>apply</b> 33:11</p> <p><b>appoint</b> 45:15</p> <p><b>appointed</b> 46:14</p> <p><b>appropriate</b> 52:19</p> <p><b>approved</b> 59:1</p> <p><b>approximately</b> 34:12</p> <p><b>apt</b> 52:5</p>	<p><b>area</b> 28:14</p> <p><b>areas</b> 49:18 50:8</p> <p><b>argue</b> 20:8 47:19</p> <p><b>arguing</b> 47:17</p> <p><b>argument</b> 1:12 2:2,7 3:3,6 12:13,25 13:5 16:1,3,9 17:13 17:19,20,22 19:6,9,10 22:20 23:9,10 24:4,16,23,24 25:3,15 27:10 31:8 32:10 33:7 38:1 56:25</p> <p><b>arguments</b> 5:4 27:1</p> <p><b>armed</b> 3:10 7:13 8:2,2 23:14</p> <p><b>Article</b> 3:20 4:10,12,19,23 5:5,8,9,12,21 10:12,18,18,25 11:2 13:14 14:5,15 15:22 15:23 17:8 18:19,20 19:13 23:16 25:3,5,8 25:12 26:1,8 26:15,24 27:18 35:22 37:17 46:24 47:4 50:1,13,15 56:14 57:17 58:21</p> <p><b>Articles</b> 4:5</p> <p><b>aside</b> 40:21 41:8 54:24 55:2,3 56:23</p> <p><b>asked</b> 39:14 40:4</p> <p><b>asking</b> 7:20 30:14 38:24 40:5</p> <p><b>aspects</b> 3:23</p>	<p><b>asserted</b> 20:6 27:17</p> <p><b>assertion</b> 24:6</p> <p><b>asserts</b> 55:7</p> <p><b>assigned</b> 58:16</p> <p><b>assistance</b> 39:7 39:11 40:10,12 40:19,23</p> <p><b>Assistant</b> 1:15</p> <p><b>assume</b> 30:13 39:13</p> <p><b>assuming</b> 6:17</p> <p><b>assumption</b> 29:17</p> <p><b>assurance</b> 7:16</p> <p><b>attaches</b> 55:14</p> <p><b>attack</b> 34:22,23 34:23,24 35:25</p> <p><b>attacks</b> 51:14 52:5</p> <p><b>attention</b> 48:18</p> <p><b>authoritative</b> 54:21</p> <p><b>authority</b> 4:9 16:19 17:16 19:11 26:5 27:23 28:14 29:7,22 30:2,6 30:20 32:13 35:23 39:5 43:9,11 46:24 47:5 48:5 49:2 50:24 55:1 59:1</p> <p><b>availability</b> 50:19 51:24</p> <p><b>available</b> 8:14 10:25 13:25 14:3 16:6 17:22 18:1,3 19:11 25:7 29:6,14,16 32:12 34:2,21 35:7 38:19 40:16 56:12</p> <p><b>avenue</b> 18:16 29:2,6 32:12</p>
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