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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: So therefore one could say  
17 that 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 that the government is putting forward, can this -- can  
3 Denedo go? He said, I was misinformed by my counsel. I  
4 never would have entered a plea if I had known I would  
5 be subject to deportation. And he said, I never found  
6 out about it until what, 8 years later, when the  
7 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 service members, 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 review within the civilian



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

4 JUSTICE GINSBURG: Mr. Shah, you just said  
5 something about -- you answered my question and Justice  
6 Stevens' 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 application  
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 on  
25 notice that the military court convictions were posing a

1 problem to his citizenship, potential citizenship  
2 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 Article III system this -- in comparable circumstances,  
13 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 would like your  
20 response to this. I take it you accept the fact that in  
21 testimony before the House, at least, at the time the  
22 present system went into effect the general counsel for  
23 the Department of Defense, Mr. Taft, testified to a  
24 House committee that coram nobis would be available in  
25 the -- in the Article I courts. And if that is so,

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

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

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

8 MR. SHAH: That was during a subsequent  
9 amending process of the act.

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

12 MR. SHAH: It was I think it was in terms of  
13 the 1983 amendments to the UCMJ. There have been  
14 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 was the subject matter?

18 MR. SHAH: Okay. Well, what Mr. Taft was  
19 testifying to, we believe, are -- he was -- the specific  
20 testimony that Mr. Taft was giving was related to the  
21 boards of correction, I believe, and whether that the  
22 boards of correction should retain jurisdiction review  
23 of final court-martial judgments, so his testimony was  
24 related to that distinct issue.

25 JUSTICE SOUTER: Now, with respect to the

1 boards of correction, I take it there's nothing  
2 specifically in the statute that says there's coram  
3 nobis jurisdiction?

4 MR. SHAH: Nothing specific in the UCMJ?

5 JUSTICE SOUTER: Yes.

6 MR. SHAH: There's nothing specific in the  
7 UCMJ --

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

14 MR. SHAH: No, Your Honor. What Mr. Taft  
15 was testifying to was the state of the prevailing law in  
16 1983 before the CAAF. The fact that Congress did not  
17 amend the UCMJ in light of Mr. Taft's testimony -- this  
18 Court has said on multiple occasions that we don't read  
19 into congressional silence --

20 JUSTICE SOUTER: Oh, I quite agree. The  
21 premise of my -- sort of my argument to you a second ago  
22 was that if we accept the proposition that Mr. Taft was  
23 making a correct statement of law --

24 MR. SHAH: Right.

25 JUSTICE SOUTER: -- then the logic would in

1 effect answer your argument that because there is no  
2 specific grant of coram nobis jurisdiction with respect  
3 to special court-martials and subsequent proceedings,  
4 there couldn't be any. That's the only point that I was  
5 trying to make.

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

16 JUSTICE SOUTER: It is pretty limited. What  
17 is it, it's limited to fact and fraud.

18 MR. SHAH: To fraud on the court and newly  
19 discovered evidence.

20 The person who drafted that provision --

21 JUSTICE GINSBURG: Is it available to  
22 someone who enters a guilty plea?

23 MR. SHAH: It does not appear it would be  
24 available to someone who has entered a guilty plea. The  
25 government is not aware of any cases where the military

1 has granted an Article 73 petition to someone who has  
2 pled guilty.

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

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

22 Now, there was -- it was explaining what 73  
23 did, but it was not an explanation to the effect that if  
24 you didn't get under the tent flap in 73 you were out  
25 completely. Am I correct about that?

1 MR. SHAH: Well, I'll read the testimony to  
2 you, Justice Souter.

3 JUSTICE SOUTER: Okay.

4 MR. SHAH: And this appears on pages 25 to  
5 26 of the government's brief, and it says: "What we did  
6 was to combine what amounts to a writ of error coram  
7 nobis with a motion for a new trial on newly discovered  
8 evidence. We have provided for both of them and to our  
9 minds they are the only additional circumstances over  
10 and above the appeal that need a remedy."

11 JUSTICE SOUTER: Okay, I see.

12 MR. SHAH: So I think that's conclusive on  
13 this point and provides a firm ground on which to  
14 distinguish this Court's decision in Morgan, which you  
15 referenced earlier, that applies coram nobis in the  
16 Article III system. Congress considered it for the  
17 Article I system and rejected it in the military courts.

18 JUSTICE ALITO: Does that mean that your  
19 argument boils down to the proposition that the relevant  
20 provisions of the UCMJ were intended to eliminate coram  
21 nobis, or is there more to your argument than that?

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

25 JUSTICE ALITO: All right. Well, then I'm

1 not quite sure I understand your argument. Maybe you  
2 can explain why you contend that if the Respondent had  
3 been convicted in a Federal district court and  
4 everything else was the same, he would be able to  
5 petition for a writ of coram nobis, but he can't in the  
6 military courts. What is the basis for that? Both a  
7 Federal district court -- a Federal district court is a  
8 creature of statute. It has the jurisdiction that  
9 Congress gives it and no greater jurisdiction. It has  
10 certain what's been termed inherent authority. The All  
11 Writs Act applies to it. All of those things are true  
12 of the military courts as well. So what is the basis  
13 for the distinction?

14 MR. SHAH: There are two distinctions, at  
15 least two distinctions, Your Honor. The first is in the  
16 Federal court system there is an independent basis of  
17 jurisdiction when someone is bringing a Federal  
18 constitutional challenge, collateral challenge to their  
19 conviction. That separate independent basis of  
20 jurisdiction is 1331. There is -- there is independent  
21 basis of jurisdiction. The All Writs Act does not  
22 confer jurisdiction. The Court made that very clear in  
23 Goldsmith. What it requires is an independent basis of  
24 jurisdiction. That exists in Article III courts. It  
25 does not exist in the military court system. That's the



1 first distinction.

2           The second distinction, Your Honor, even if  
3 this Court wasn't convinced by that jurisdictional  
4 argument, is that Congress specifically considered  
5 whether to -- to allow coram nobis petitions within the  
6 military court system. The All Writs Act was designed  
7 to be a residual source of authority to fill gaps within  
8 the system. It is not --

9           JUSTICE ALITO: Well -- well, that, as I  
10 understand, was the argument I started out with: That  
11 the --Your argument is that the UCMJ was intended to  
12 eliminate coram nobis if it had been previously  
13 available. That's your -- that's the argument you're  
14 making now?

15           MR. SHAH: Well, again, I would -- I would  
16 quibble with the characterization to -- to -- that it  
17 was previously available. As of the enactment of the  
18 UCMJ in 1950, coram nobis relief had never been  
19 available within the military justice system.

20           JUSTICE ALITO: Well, what is the difference  
21 on the face -- on their face between the relevant  
22 provisions of the UCMJ and the provisions that govern  
23 the ability of a criminal defendant in Federal district  
24 court to get relief after being convicted? There are  
25 limited avenues that are provided under the Rules of

1 Criminal Procedure and under the statutes --

2 MR. SHAH: Right. Right.

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

5 MR. SHAH: The difference is significant,  
6 Your Honor. In the -- in the military court system  
7 there is only one avenue for post-conviction relief.  
8 That is, after your -- and I'm speaking after your  
9 direct review -- appellate review process has been  
10 complete, there's only one, and that is the Article 73  
11 new trial petition. Of course, in -- in the Article III  
12 system there are several independent grants of  
13 jurisdiction, the habeas jurisdiction --

14 JUSTICE GINSBURG: But I thought the Morgan  
15 case said that coram nobis was not dependent on any  
16 independent basis of jurisdiction. Didn't the Court say  
17 that a coram nobis application challenging a conviction  
18 is a step in the criminal case and not like habeas,  
19 where relief is sought in a separate case and record,  
20 the beginning of a separate proceeding?

21 MR. SHAH: Right. In -- in Morgan, Your  
22 Honor, the Court was refuting the argument that 2255,  
23 section 2255, occupied the field and, therefore there  
24 wouldn't be a coram nobis petition. It rejected that  
25 argument. But I don't think the rejection of that

1 argument means that coram nobis, which is still a  
2 residual source of authority, is available when Congress  
3 has specifically rejected its application within the  
4 Article I system.

5 JUSTICE KENNEDY: Well, but -- but you're  
6 shifting ground a little bit. The tenor of the  
7 questions from Justice Alito and Justice Ginsburg really  
8 is to the effect: Does coram nobis require an  
9 independent source of -- of jurisdiction? And I should  
10 think not.

11 MR. SHAH: Well, your --

12 JUSTICE KENNEDY: The whole idea of coram  
13 nobis is to protect the integrity of the jurisdiction  
14 the court already has.

15 MR. SHAH: Your Honor, this Court could not  
16 have been clearer in Goldsmith. It says the All Writs  
17 Act requires an independent basis, an existing  
18 independent basis of jurisdiction.

19 JUSTICE KENNEDY: I -- I acknowledge that.  
20 But there is a source of jurisdiction here. Coram nobis  
21 is to ensure the accurate exercise of jurisdiction that  
22 the court has earlier asserted.

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

1 JUSTICE BREYER: But suppose -- suppose that  
2 the problem was a professional soldier convicted a  
3 certain number of years ago of a particular crime, a few  
4 years later through some amazing mistake they wrote the  
5 wrong number down. The clerk just wrote the wrong  
6 number of the code provision. That's all.

7 MR. SHAH: Okay.

8 JUSTICE BREYER: And it made it a felony  
9 instead. It was actually a misdemeanor. What's he  
10 supposed to do? I mean, normally you go back to the  
11 Court and say: Judge, you know, they just made --  
12 everyone admits it's a simple transcribing error. Would  
13 you please correct it? Now, how -- how is that supposed  
14 to work in the military?

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

16 JUSTICE BREYER: Yes. No, he's -- he's  
17 finished his sentence. This is several years ago. They  
18 just now discovered it, and it could affect him in the  
19 future that it happened in fact to be a misdemeanor he  
20 was convicted of. But the -- the code section they  
21 wrote down is a felony.

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

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

2 MR. SHAH: -- to get relief, he can go to  
3 the Court of Federal Claims and bring a Tucker Act  
4 action. There is a 6-year statute of limitations.

5 JUSTICE BREYER: No, this is 7 years.

6 (Laughter.)

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

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

13 MR. SHAH: Well --

14 JUSTICE BREYER: You are saying -- you are  
15 saying, whether you are in the military, whether you are  
16 out of the military, no matter how egregious, no matter  
17 how obvious, there is no route for a military person, a  
18 professional, to go and get an obvious error corrected  
19 if -- if he has missed the statute, that there was an --  
20 the civil statute of limitations, it's hard for him to  
21 go to the Tucker Act. He's been in the Philippines the  
22 entire time.

23 MR. SHAH: Justice Breyer, to make your  
24 hypothetical work he has to no longer be in custody. He  
25 has had to have discovered this error 6 years after the

1 conviction has happened.

2 JUSTICE BREYER: Yes, it happened. It  
3 really happened.

4 MR. SHAH: The military would have had to  
5 deny this -- correcting his --

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

12 MR. SHAH: Well --

13 JUSTICE BREYER: No military soldier can  
14 correct an error, no matter how egregious, even a  
15 technical -- you know, they just wrote the wrong thing  
16 down, because Congress didn't want them to. Now, I  
17 doubt that Congress thought about that. I'm just not  
18 sure they didn't want them to.

19 MR. SHAH: Well -- well, Your Honor, once  
20 again, your hypothetical, I think there would be an  
21 administrative recourse there. And, of course, there's  
22 always the fail-safe of a presidential pardon if the  
23 obvious -- if the error is that obvious and that  
24 egregious.

25 Now, you did refer to a second argument,

1 which is an independent argument, which is that the  
2 military courts lack jurisdiction for the independent  
3 reason that Respondent -- it's an independent reason,  
4 Your Honor, that he lacks any remaining connection to  
5 the armed forces and, therefore, cannot invoke the  
6 military courts. This Court held in *Toth v. Quarrels*  
7 that Congress lacks power under Article I to extend  
8 military court jurisdiction over a civilian.

9 JUSTICE SOUTER: I know, but that's --  
10 that's a different -- that's a different issue from --  
11 from whether it -- it may retain some residual  
12 jurisdiction to correct an error with respect to someone  
13 over whom it has had jurisdiction.

14 MR. SHAH: Your Honor, once again, that  
15 would be relying on the long-expired past jurisdiction.  
16 It is --

17 JUSTICE SOUTER: Well, you -- you made that  
18 point before. And I -- I want to follow up with one  
19 question on that. As I recall, it was in response to  
20 the -- to the Morgan argument. The -- the Morgan  
21 analysis was, well, this isn't a -- a new ground or a  
22 new assertion. It is jurisdiction as would be the case  
23 in habeas. It, in effect, is -- is kind of a  
24 metaphysical continuation of the -- the jurisdiction  
25 that existed before.

1           And your response to that was, in effect, a  
2 Goldsmith response. And -- and you said past  
3 jurisdiction doesn't mean present jurisdiction. The  
4 past jurisdiction is over, and that's under -- under the  
5 statute and under Goldsmith that's -- that's the end of  
6 it.

7           Couldn't that same argument simply have been  
8 made, however, in -- in Morgan? In other words, Morgan  
9 was a case in which the point of finality had been  
10 reached. There was no specific statute in Morgan saying  
11 there's coram nobis jurisdiction, and yet the Court's  
12 analysis -- I -- I called it metaphysical a second ago  
13 -- was that this really was simply a continuation of the  
14 past jurisdiction. If that was a sound argument in  
15 Morgan, why isn't it a sound argument with respect to  
16 the -- the military code here?

17           MR. SHAH: Well, because the military --  
18 Congress specifically contemplated that possibility, and  
19 now I'm going back to my Article 73 argument, Your  
20 Honor, and to the legislative history which shows what  
21 Congress was trying to do in Article 73. That is, to  
22 encapsulate whatever post-conviction remedy it's  
23 intended to be available within the military court  
24 system appears in Article 73 that considered coram  
25 nobis.



1 JUSTICE SOUTER: It -- it did do that, and  
2 there's -- there is no question that it certainly made  
3 finality provisions in Article 76. But in the civilian  
4 system, so far as express provision is concerned, there  
5 are limits. There are statutes of limitations, and it  
6 seems to me that the same argument could be made there  
7 that was made here --

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

9 JUSTICE SOUTER: -- that was made there.

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

13 JUSTICE SOUTER: Outside of 1531, is there  
14 any structural difference?

15 MR. SHAH: Yes, Your Honor. In the military  
16 court system, Article 76, even though it was first  
17 enacted in 19 -- in 1950, there were other provisions  
18 analogous to it. It's always been understood within the  
19 military system that once a conviction was final and the  
20 military authority executed the judgment, that was it in  
21 terms of review within the military justice system, save  
22 for a presidential pardon. Any further relief to be  
23 obtained was through an Article III habeas petition in  
24 the Federal courts. That's the understanding that  
25 Congress had when it enacted the UCMJ, and that's the

1 understanding --

2 JUSTICE SOUTER: You could say the same  
3 thing, that when the statute of limitations is passed in  
4 a habeas case or, indeed, after habeas has been fallen,  
5 so far as the statutes governing Article III courts are  
6 concerned, that's the end. And yet Morgan says, no, it  
7 isn't the end. There's this coram nobis jurisdiction.

8 MR. SHAH: Well, the difference is in  
9 Morgan, the Court specifically said that Congress did  
10 not intend to occupy the field when it passed 2255  
11 governing habeas relief for Federal prisoners. That's  
12 not the situation here. We know that Congress intended  
13 to occupy the field when it passed Article 73.

14 So regardless of the jurisdictional  
15 arguments, Your Honor, there's no right of action,  
16 there's no right of coram nobis relief within the  
17 military courts.

18 Your Honor, if there are no further  
19 questions, I would like to reserve the remainder of my  
20 time for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. SHAH: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Freedus.

24 ORAL ARGUMENT OF MATTHEW S. FREEDUS

25 ON BEHALF OF THE RESPONDENT

1 MR. FREEDUS: Mr. Chief Justice, and may it  
2 please the Court:

3 Because there are courts, appellate military  
4 courts must have coram nobis power to protect the  
5 integrity of their judgments. The court of appeals  
6 correctly asserted the same coram nobis power that  
7 Article III courts have.

8 JUSTICE SCALIA: What do you mean, "they  
9 must"? Do you think it's unconstitutional to deprive  
10 them of that?

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

15 JUSTICE SCALIA: That's what you mean by  
16 "they must have"?

17 MR. FREEDUS: And also, Your Honor, they  
18 must have the ability to protect the integrity of their  
19 judgments just like other Federal courts have. The  
20 superior court in D.C. has the power to issue coram  
21 nobis to protect its judgments.

22 JUSTICE SCALIA: That's fine, but -- but is  
23 it unconstitutional for Congress to say military courts  
24 are different, they've always been different, the need  
25 for finality is greater there, and we're conducting a

1 different rule for there?

2 MR. FREEDUS: I think Congress has the  
3 authority to legislate very broadly in the area of  
4 collateral remedies, and Congress could take away the  
5 writ of coram nobis if it left in its place an adequate  
6 and effective substitute, like it did in 2255.

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

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

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

13 MR. FREEDUS: No, Your Honor. We believe  
14 there has to be reasonable opportunity to bring a  
15 colorable constitutional claim for which there is no  
16 other avenue of relief, which we believe is the case  
17 here.

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

21 MR. FREEDUS: The best authority we have for  
22 that, Your Honor, is Webster v. Doe, which we believe  
23 stands for the proposition that courts should read  
24 statutes so as not to preclude judicial review of a  
25 constitutional claim absent an express congressional

1 intent to do so --

2 CHIEF JUSTICE ROBERTS: Well, that's  
3 different than saying there always has to be available  
4 relief. That's saying you think Congress usually  
5 intends there to be available relief. And that would be  
6 a doubtful assumption here, given the rather clear  
7 expressions of finality that -- that are -- that are in  
8 the UCMJ statutes.

9 MR. FREEDUS: On -- well, if I could make  
10 two points, Your Honor. On the first, we don't believe  
11 that there is square authority for the bedrock  
12 constitutional proposition that Congress can wipe away  
13 all avenues of relief for a claim. We believe that we  
14 were --

15 CHIEF JUSTICE ROBERTS: You don't -- you  
16 don't think there's authority for the proposition they  
17 can do it?

18 MR. FREEDUS: Correct.

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

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

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

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

4 JUSTICE SCALIA: Indeed, yes.

5 MR. FREEDUS: Yes. Well, the reason it  
6 hasn't happened before 1950 is that the UCMJ was created  
7 in 1950, and that was the first time there were military  
8 courts. There were no courts, so therefore no All Writs  
9 Act authority prior to 1950.

10 JUSTICE SCALIA: Worse still. My goodness.  
11 So you were --

12 MR. FREEDUS: Absolutely.

13 JUSTICE SCALIA: -- convicted by a  
14 court-martial and had no basis for -- for getting that  
15 revised, and that -- that lasted for a couple of hundred  
16 years, right? And that was okay or it wasn't okay?

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

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

1 JUSTICE STEVENS: Will you clarify something  
2 for me. Are you contending that the result you seek is  
3 constitutionally compelled? I didn't think you were.

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

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

10 (Laughter.)

11 MR. FREEDUS: No, Your Honor.

12 CHIEF JUSTICE ROBERTS: I'm sorry --

13 JUSTICE KENNEDY: You might say that there  
14 is a lurking constitutional question and that we ought  
15 to interpret the statute to avoid a constitutional  
16 concern.

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

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: I don't like it very  
21 much.

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

25 MR. FREEDUS: We don't have square authority

1 from this Court to support that proposition.

2 CHIEF JUSTICE ROBERTS: So then it comes, as  
3 Justice Kennedy suggested, a question of whether or not  
4 we should read the statutes here in a particular way to  
5 avoid confronting that question?

6 MR. FREEDUS: Yes, Your Honor, I think  
7 where -- we're comfortably in that neck of the woods and  
8 we really don't need to get closer to the scarier  
9 question that was alluded to. I think --

10 JUSTICE KENNEDY: When you say it's lurking,  
11 you're -- you're invoking the doctrine of constitutional  
12 avoidance?

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

14 JUSTICE KENNEDY: Okay.

15 JUSTICE SCALIA: I don't think it's much of  
16 a lurk when for 200 years this was going on. It's not  
17 lurking to my mind.

18 JUSTICE GINSBURG: But you are making -- I  
19 thought that the core of your argument is that the All  
20 Writs Act applies to all courts established by Congress,  
21 the military courts are included in that definition, and  
22 there is nothing in the All Writs Act that says it  
23 doesn't apply to the military. But the All Writs Act  
24 requires that the writ be in aid of the court's  
25 jurisdiction. So if you would spell out how the writ



1 here is in aid of the military court's jurisdiction.

2 MR. FREEDUS: Yes, Your Honor. We believe  
3 it does it in a very similar way that this Court  
4 explained in the United States v. Morgan, and that is  
5 the writ of coram nobis aids the past appellate  
6 jurisdiction that the Navy court had when it affirmed  
7 and reviewed Mr. Denedo's conviction. It had  
8 jurisdiction there.

9 And the coram nobis writ by its very nature  
10 allows a court to correct an error in a case that was  
11 before it, but it failed to perceive that error while it  
12 had the case before it. And had it known the facts we  
13 now know after all the remedies are no longer available,  
14 the Court would not have issued the judgment that it  
15 issued.

16 That's the -- in that sense, that's how the  
17 writ aids the jurisdiction the Court had in the past.

18 JUSTICE BREYER: Well, if that's so, then I  
19 guess you can have courts reviewing the civilians. They  
20 will review after the event the court-martial  
21 jurisdiction, the court-martials of people while they  
22 were in the military. That will become a matter of  
23 course anytime. I mean, there are many, many errors.  
24 We have approximately 5,000 petitions a year claiming  
25 some kind of constitutional error, and sometime they're

1 right.

2 MR. FREEDUS: Yes, sir.

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

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

5 JUSTICE BREYER: What way is it no?

6 MR. FREEDUS: No is when the individual is  
7 not in custody and the six-year statute of limitations  
8 has expired for all the types of claims that are  
9 available for collateral tactic of a court-martial  
10 conviction, a declaratory judgment attack, a mandamus  
11 attack, Court of Federal Claims attack, all those --

12 JUSTICE BREYER: Why -- in other words, in  
13 the case I posed, he would -- he -- in your view, he  
14 wouldn't have any remedy, you would agree with the  
15 government about that, if it's seven years later you  
16 find a clerical error?

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

20 JUSTICE BREYER: Well, if, in fact, you're  
21 waiting until the -- the civil courts have lost all  
22 jurisdiction because the statute of limitations has  
23 expired, why do you need this? Why can't they just go  
24 -- I mean, why do you need this special thing that  
25 hasn't existed for 200 years? Why don't they just go to

1 a civil case? And moreover, why doesn't your client  
2 fall within that situation?

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

6 MR. FREEDUS: This gets to the other piece  
7 of the answer I was trying to give, and that is a  
8 petitioner from the military system could not file a  
9 coram nobis petition in the Article III courts or the  
10 Court of Federal Claims because there's no authority  
11 that supports the proposition that you can take a coram  
12 nobis petition and attack a judgment from a different  
13 jurisdiction. Coram nobis has to allow the court that  
14 issued -- that -- that --

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

19 MR. FREEDUS: Yes, Your Honor, in the  
20 military justice system.

21 JUSTICE BREYER: Yes, okay, and we see those  
22 every day, don't we? But there is one difference. The  
23 difference is that often, though not always, a person in  
24 habeas who challenges a prior normal, civil system  
25 conviction, the State can retry him; and I guess in the

1 instance that we're talking about, he can never be  
2 retried. So in fact the difference would be, in your  
3 view, the civilians who bring this would never be  
4 retried if they're right.

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

6 JUSTICE BREYER: And so they would have in  
7 that sense greater protection in the military system  
8 than in the ordinary criminal courts a person has in  
9 habeas, because the option of retrial is often but not  
10 always there. Now, why would Congress have intended  
11 that?

12 MR. FREEDUS: I think it's the very nature  
13 of the coram nobis petition, Your Honor, and that is  
14 coram nobis petitioners have already served their entire  
15 sentence, so the societal interest to seek a retrial is  
16 much lesser than in the habeas case where there's a  
17 lengthy sentence less -- left, and if someone gets out  
18 of jail --

19 CHIEF JUSTICE ROBERTS: Well, but the  
20 collateral consequences of the conviction are pretty  
21 dramatic. In this case they decide whether the guy  
22 stays in the country or is deported.

23 MR. FREEDUS: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: Well, so I think  
25 Justice Breyer's question is still on the table. Why

1 would Congress intend to afford greater relief and  
2 remedies to somebody who's outside -- was within the  
3 military system and is now outside, than to an ordinary  
4 civilian under Article III jurisdiction?

5 MR. FREEDUS: I think there is a classic  
6 distinction between the habeas and the coram nobis  
7 petitioner. In a coram nobis petitioner under 2255, if  
8 they were to file a successful petition long after a  
9 statute of limitations had expired, they would be in no  
10 different position than a coram nobis -- a successful  
11 coram nobis petitioner in the military.

12 We would say, we do believe there's a -- a  
13 colorable argument for -- the ability to retry Mr.  
14 Denedo, but it's not pivotal to our case. Our view is  
15 that the inability --

16 JUSTICE GINSBURG: Where? Colorable --

17 JUSTICE KENNEDY: In the civilian courts or  
18 the military courts?

19 MR. FREEDUS: The military courts, Your  
20 Honor.

21 JUSTICE BREYER: I think you have a good  
22 answer to what my question was. I thought that was a  
23 good answer. It's helping me. And -- but where I'm  
24 slightly -- and maybe this is just not relevant to this  
25 case or maybe it's for the future. Coram nobis, I

1 thought, was a writ that means really like technical  
2 clerical errors or something really unusual. Is this --  
3 I mean, it's hardly ever there. I've not really seen  
4 more than a handful of cases.

5 So -- so is this writ supposed to be  
6 available for what you're claiming is what I call a  
7 typical error of inadequate representation? And I don't  
8 know the answer to that question, but I think it's --  
9 maybe you could say that's not presented. Maybe that's  
10 for a later case. I don't know how to treat it. That's  
11 why I'm asking.

12 MR. FREEDUS: I think Morgan is helpful on  
13 that, Your Honor. Morgan is a violation of the right to  
14 counsel, and it's this Court's --

15 JUSTICE GINSBURG: But was -- that question  
16 wasn't resolved, was it? I thought we were just talking  
17 about the authority of the military courts to issue this  
18 writ, and the question that Justice Breyer has raised,  
19 well, is this ineffective assistance of counsel adequate  
20 grounds to issue the writ? I thought that question was  
21 certainly not raised before this Court.

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

25 JUSTICE KENNEDY: Well, let's assume it

1 raised because Justice Breyer asked the question --

2 MR. FREEDUS: Yes.

3 JUSTICE KENNEDY: -- and I would be  
4 interested in the answer.

5 JUSTICE BREYER: I knew it was.

6 MR. FREEDUS: Yes, Your Honor.

7 JUSTICE BREYER: I thought it might be your  
8 answer: Well, that isn't raised. And that would be a  
9 perfectly good answer.

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

11 JUSTICE BREYER: I'm telling you my honest  
12 problem which I'm trying to think through: Where are we  
13 going with this?

14 MR. FREEDUS: I think --

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

18 MR. FREEDUS: Yes, Your Honor. I think  
19 United States v. Kwan and United States v. Castro are  
20 two court -- two cases that give the answer to your  
21 question and both of those indicate that ineffective  
22 assistance of counsel in very similar factual  
23 circumstances to this is a basis for coram nobis relief  
24 after -- after the ineffective assistance is discovered.  
25 We recognize this Court has granted in --

1 JUSTICE GINSBURG: Military courts now since  
2 1950 have quite a record of saying coram nobis is  
3 available in these courts. However, they have routinely  
4 thrown out the cases on the merits. Is there any case  
5 within the military where the military has said anything  
6 like inadequate assistance of counsel qualifies as a  
7 reason to grant the writ?

8 MR. FREEDUS: Aside from this -- this case  
9 below, Your Honor, I don't know of a case that raised  
10 ineffective assistance of counsel. And you are correct  
11 that the vast majority of these cases are thrown out of  
12 court in the most -- in the briefest of orders. There  
13 are cases where relief has been granted. They are few  
14 and far between. Del Prado is one. It involved a  
15 compositional jurisdictional error to the -- to the  
16 court. An individual failed to elect military judge  
17 alone in writing and waived the right to have a -- a  
18 member's jury trial, and that was deemed a  
19 jurisdictional defect. And long after the case was  
20 final the conviction was set aside, and I would note the  
21 Court in that case observed the personal jurisdiction  
22 was no obstacle to granting the coram nobis relief.

23 JUSTICE SCALIA: Was that person retried, do  
24 you know?

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



1 JUSTICE SCALIA: Was he still in the  
2 military?

3 MR. FREEDUS: I do not know. He was -- the  
4 relief -- the decretal paragraph of the -- of the  
5 decision indicates that he was restored all rights and  
6 benefits, but it stops shy of saying, you know, here's  
7 your uniform back.

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

11 MR. FREEDUS: The statistics that we cited  
12 in our brief, Your Honor, were ten coram nobis petitions  
13 at the court of appeals within the last 10 years --

14 JUSTICE GINSBURG: Yes.

15 MR. FREEDUS: -- and 176 writ appeals from  
16 the lower courts up to the court of appeals that don't  
17 break out the category of writs. They could be habeas,  
18 they could be coram nobis, mandamus, so we don't know  
19 what percentage of the 176. But even if it was a -- a  
20 significant percentage, it's still a tiny percentage of  
21 the court's overall docket.

22 But they are rarer than hen's teeth, Your  
23 Honor. These cases, one a year maybe would be the  
24 average of a coram nobis --

25 JUSTICE BREYER: What is the theory of the

1 jurisdiction of the military court in the circumstance  
2 where the individual is still in the military, he's been  
3 convicted, and he is in custody? So he wants to get out  
4 of custody. Now, what's the theory of that? He can --  
5 I take it it's accepted, is it, that they can, that such  
6 a person can ask the military justice system -- I don't  
7 know which court -- for release on the ground that he  
8 didn't -- wasn't adequately represented or some other  
9 ground?

10 MR. FREEDUS: That would be a habeas case,  
11 Your Honor.

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

15 MR. FREEDUS: Yes. There are --

16 JUSTICE BREYER: And what's the theory of  
17 the jurisdiction that the military courts have over  
18 that?

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

21 JUSTICE BREYER: Aiding what jurisdiction?

22 MR. FREEDUS: The direct review authority of  
23 the military --

24 JUSTICE BREYER: But they've already  
25 directly reviewed it.

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

2 JUSTICE BREYER: So there is no more direct  
3 review to be had?

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

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

7 MR. FREEDUS: It aids it in the same way  
8 this Court recognized it can do so in Goldsmith, where  
9 it acknowledged that a mandamus writ could issue after  
10 finality --

11 JUSTICE BREYER: I see.

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

14 CHIEF JUSTICE ROBERTS: Within -- within the  
15 military system?

16 MR. FREEDUS: Yes, Your Honor, within the  
17 military justice system. In that -- in Goldsmith it was  
18 a situation where Goldsmith was out of the -- you know,  
19 out of the military. He had a final -- I guess he was  
20 in custody, but he had a final court-martial conviction,  
21 and this Court indicated that a writ of mandamus could  
22 issue to aid past appellate jurisdiction to compel  
23 adherence to the --

24 CHIEF JUSTICE ROBERTS: All within the  
25 system. I mean, the difference with this case is that

1 you're talking about somebody who is, I guess that's the  
2 issue, out of the military system.

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

7 MR. FREEDUS: The fact --

8 CHIEF JUSTICE ROBERTS: At any time somebody  
9 who is out of the military system, whose judgment is  
10 supposedly final under the provisions that Congress has  
11 established, he could come back and knock on the door 20  
12 years later and say, I want to review my conviction.

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

14 CHIEF JUSTICE ROBERTS: And he would be  
15 within the military system.

16 MR. FREEDUS: He would be a civilian, former  
17 service member --

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. FREEDUS: -- filing a coram nobis  
20 petition, and the coram --

21 CHIEF JUSTICE ROBERTS: And he's back in the  
22 military system, 20 years later.

23 MR. FREEDUS: For purposes of the coram  
24 nobis petition.

25 JUSTICE KENNEDY: In coram nobis cases in

1 the civil system, do courts appoint special masters when  
2 they're an appellate court and they have to find out if  
3 coram nobis was --

4 MR. FREEDUS: Yes, Your Honor.

5 JUSTICE KENNEDY: Or do they use district  
6 courts as special masters?

7 MR. FREEDUS: They --

8 JUSTICE KENNEDY: In this case, the court  
9 had to invent a procedural device: There's going to be  
10 a new court-martial, which is a little odd because it's  
11 a new court-martial sitting in judgment on somebody who  
12 isn't even in the military any more.

13 MR. FREEDUS: It's not a court-martial, Your  
14 Honor. It's what's called a DuBay proceeding, and what  
15 happens is -- and this in the decretal paragraph of the  
16 decision below. A remand is for further factual  
17 development, and if the case can be disposed of on  
18 declarations, if the government came forth -- it didn't  
19 do so below -- but if it did so on remand and provided  
20 affidavits that blew our affidavits out of the water,  
21 the court could dismiss the petition out of hand.

22 If they couldn't do that or if there is a  
23 credibility contest that needed to be resolved, what  
24 would happen is the court would order what's called a  
25 DuBay hearing, where a judge is appointed. And it's

1 just like an evidentiary hearing. Witnesses are  
2 presented and they're cross-examined and then findings  
3 of fact and conclusions of law are drawn. And then that  
4 is put into a record, added to the record of trial, and  
5 reviewed in the coram nobis petition.

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

8 MR. FREEDUS: We don't believe so. We  
9 believe the court -- the Navy court here has decisional  
10 authority under Article 66 to do factfinding. It's a  
11 very unique court. Congress created these courts with  
12 factfinding power, which is different than I think  
13 virtually all appellate courts, save maybe one or two  
14 unusual situations. But these courts have factfinding  
15 power, so it's right in Article 66. And these courts  
16 also have rulemaking authority. And so does the court  
17 of appeals, and it has exercised that to provide for  
18 these procedures. So we don't believe --

19 JUSTICE SOUTER: Where are -- where are the  
20 procedures set out for -- for military habeas?

21 MR. FREEDUS: They're not, and actually that  
22 -- that -- this Court pointed that out in *Noyd v. Bond*.  
23 It said that military appellate court have habeas power,  
24 but the court of appeals hadn't provided rules, and  
25 Congress could facilitate with rules but hadn't, but

1 that didn't stop this Court from saying habeas power  
2 existed. The absence of the procedure --

3 JUSTICE SOUTER: Are you -- are you arguing  
4 then that if it has habeas power without a -- a textual  
5 basis, there's no reason to argue that it lacks coram  
6 nobis power because there's no textual basis?

7 MR. FREEDUS: I think the answer to that is  
8 yes. The negative in there caught me. But, yes, I  
9 think that's what we're saying.

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

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

13 JUSTICE GINSBURG: In what case?

14 MR. FREEDUS: In *Noyd v. Bond* this Court  
15 squarely held that military -- the Court of Appeals at  
16 the time has habeas authority.

17 CHIEF JUSTICE ROBERTS: For someone still  
18 within the military system?

19 MR. FREEDUS: That was the case where the  
20 individual was pending appeal, I believe.

21 CHIEF JUSTICE ROBERTS: So the answer --

22 JUSTICE GINSBURG: But that was --

23 CHIEF JUSTICE ROBERTS: -- to Justice  
24 Ginsburg is that we have never held that with respect to  
25 a situation like the facts here, where you're dealing

1 with somebody who is outside -- long departed from the  
2 military system?

3 MR. FREEDUS: Well, I would -- I would  
4 direct the Court's attention, if I could, to footnote 11  
5 of Goldsmith, where this Court says: "And of course,  
6 once a criminal conviction has been finally reviewed  
7 within the military system, and a servicemember in  
8 custody has exhausted other avenues provided under the  
9 UCMJ to seek relief from his conviction" -- citing Noyd,  
10 the six pages therein which refers to the military  
11 court's habeas power -- this Court in Goldsmith put  
12 habeas power in the context of a -- a final case, so  
13 habeas authority after final relief.

14 JUSTICE SCALIA: It's talking about somebody  
15 still within the military, if I -- if I heard the quote  
16 correctly, right?

17 MR. FREEDUS: An individual is out of the  
18 military if they -- if their dismissal has been executed  
19 -- or their discharge has been executed and they're in  
20 Leavenworth. They could even be moved to another  
21 Federal penitentiary and still in custody.

22 JUSTICE GINSBURG: The --

23 MR. FREEDUS: So they're not really in the  
24 military.

25 JUSTICE GINSBURG: The quote you referred to



1 from Goldsmith says: "And a servicemember in custody."  
2 So I think Goldsmith, in that footnote that you're  
3 citing, is presenting a service member still in custody,  
4 having exhausted all other areas, can come to a Federal  
5 district court and seek habeas. It's not talking about  
6 someone who is out of the military.

7 MR. FREEDUS: I read it differently, Your  
8 Honor. I read it -- the next clause in that sentence is  
9 referring to habeas outside. I read this sentence as  
10 clearly saying that there's direct review. There's  
11 habeas after direct review within the military. And  
12 then there's of course collateral review in the Article  
13 III courts, if -- if everything misfires within the  
14 military justice system.

15 JUSTICE GINSBURG: Well, what am I missing?  
16 I thought that the footnote reads once a criminal  
17 conviction has been finally reviewed within the military  
18 system a service member, having exhausted all other  
19 areas, can petition in a Federal district court for a  
20 writ of habeas corpus. I don't see anything that talks  
21 about someone who is no longer a service member.

22 MR. FREEDUS: Right. I -- I see the  
23 in-custody and exhausted avenues provided in the UCMJ as  
24 referring to a phase before you get to the Article III  
25 courts. Obviously, if I'm reading it wrong, the Court

1 will let me know, but I read that as prior to Article  
2 III review.

3           If I could talk briefly about the 1983  
4 legislation -- it came up in opposing counsel's opening.  
5 I think it sheds a lot of light on the availability of  
6 coram nobis relief. When Mr. Taft testified, he wasn't  
7 simply giving his -- he wasn't simply stating the state  
8 of the law. He was providing the state of the law as a  
9 premise for legislative action, in particular stripping  
10 collateral review authority from the correction boards,  
11 which used to be able to review collaterally, after  
12 final judgment, military convictions. And that existed  
13 before the UCMJ was enacted.

14           CHIEF JUSTICE ROBERTS: This is -- this is  
15 at a hearing. This isn't a Member of Congress,  
16 obviously, that we're talking about. It's not even a  
17 single Member of Congress?

18           MR. FREEDUS: This is the chief counsel for  
19 the Department of Defense proposing the legislation and  
20 offering the only premise there was for the particular  
21 legislative change that I'm referring to, which is  
22 stripping the -- the correction boards of this  
23 collateral review power and saying, when we do that,  
24 don't worry, Congress, because it will channel these  
25 collateral -- post-final collateral attacks into the

1 military courts, and -- and they can have habeas. He  
2 says habeas -- I'm sorry --

3 CHIEF JUSTICE ROBERTS: Under the specific  
4 --

5 MR. FREEDUS: -- coram nobis.

6 CHIEF JUSTICE ROBERTS: Under the specific  
7 provision that was at issue, which is accompanied by  
8 very strict finality provisions.

9 There's no suggestion in his testimony that  
10 the availability of the relief that he's talking about  
11 continues after the individual is outside the military  
12 system. He's channeling -- he says these are channeled  
13 through a specific provision applicable only within the  
14 military system.

15 MR. FREEDUS: I don't read it that way, Your  
16 Honor. I read it as channeling apt post-final attacks  
17 within the military -- within the courts in the military  
18 justice system, even though the person is -- is -- a  
19 final judgment typically happens before an individual is  
20 no longer in the service. A final judgment is final  
21 because the discharge has been executed. So what he's  
22 referring to is, once you have a final judgment, you  
23 then can seek collateral relief in the military the way  
24 you used to be able to do it in the correction boards in  
25 the military courts. And he was saying, now that we're

1 getting rid of this one collateral remedy in the  
2 correction boards, we're giving you this other one.  
3 We're not giving -- we're just channeling all of them  
4 into the military appellate courts, which is a more  
5 appropriate judicial forum. And he says clearly it  
6 would denigrate the courts to have administrative bodies  
7 overturning their judgments, once again showing that  
8 these are final judgments that we're talking about. And  
9 the only -- that was the only premise he offered to make  
10 the change.

11               So stripping away one remedy while leaving  
12 another intact was the single premise, which is  
13 reflected in the House -- the Senate report on page 52  
14 of our brief, where Congress adopts the exact language  
15 out of his sworn testimony with, you know, a tiny  
16 variation, but that's the premise for the change in the  
17 legislation.

18               I'd also note that, in that legislation,  
19 this is the Department of Defense proposing to open the  
20 door to this Court's jurisdiction for the first time in  
21 -- in 28 U.S.C. 1259. And when it did that -- it had to  
22 survey the whole landscape of military justice  
23 jurisdiction, and when it did that, it saw there were  
24 direct review cases, which are reflected in 1259  
25 paragraphs 1, 2, and 3, and this other category that is

1 defined by what's not in paragraphs 1, 2, and 3, and  
2 that's the All Writs Act cases. The government  
3 acknowledges --

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

9 MR. FREEDUS: I think that's implicit in  
10 final judgment, Your Honor. If there's a final  
11 judgment.

12 CHIEF JUSTICE ROBERTS: Well, a final  
13 judgment is subject to review in the appellate courts  
14 within -- in the military system, just like you have --  
15 a final court of appeals judgment is subject to review  
16 in our system.

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

25 CHIEF JUSTICE ROBERTS: Well, you have

1 review in the appellate system. Someone is -- the  
2 judgment is they're to be discharged, and they seek  
3 review. Are they discharged while the review is going  
4 on?

5 MR. FREEDUS: No, on direct review, you're  
6 right, Your Honor. They're -- they remain within the  
7 service, and it's interesting that the government cites  
8 Mr. Taft's testimony as authoritative on that point.  
9 And that -- that makes good sense. Keep the person in  
10 for a direct review so that if the sentence is set  
11 aside, we can retry.

12 But there has been decades of  
13 military justice authority that says even if someone is  
14 discharged before their conviction is set aside -- so  
15 they're on direct review, their conviction is set aside,  
16 after they're already out in their civilian world, you  
17 know, doing whatever they're doing -- if the government  
18 wants to retry them, they do. And the government is --  
19 is the party that asserts continuing jurisdiction to  
20 re-prosecute.

21 And that's why this case is so  
22 distinguishable from *Toth v. Quarles*, because in *Toth*  
23 there was no conviction while the individual was on  
24 active duty. And that's why there couldn't have been a  
25 retry. Here there was conviction on active duty, which

1 is where jurisdiction attaches. It cements in. And if  
2 the government wants to invoke that to retry Mr. Denedo,  
3 it can try that.

4 I would say, though, that if --  
5 if there were a personal jurisdiction loophole here,  
6 like there was for the MEJA, the Military  
7 Extraterritorial Jurisdiction Act, Congress could fix it  
8 in a heartbeat. But we're talking about, you know, ten  
9 cases in ten years. So even if someone, you know, got  
10 away without retrial --

11 CHIEF JUSTICE ROBERTS: You -- you don't  
12 think that if you prevail in this case, we're going to  
13 see a lot more coram nobis petitions than we did before?

14 MR. FREEDUS: I -- I think there would be an  
15 uptick, and there may actually have been an uptick while  
16 this case has been up here at this level, because it has  
17 -- it has gotten a lot of visibility in the military,  
18 just like there was an uptick after *Noyd v. Bond* when  
19 this Court declared for the first time that military  
20 courts had All Writs Act power.

21 So I think there could be an uptick. But  
22 once the novelty of it wears off, I think we will see  
23 level off. And you will see the same trend that we have  
24 seen since 66 when it was available the first time. I  
25 mean this isn't new. The only thing new here is the

1 government's interpretation of Article 66.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. FREEDUS: Thank you, Your Honor.

4 Mr. Shah, you have three minutes remaining.

5 JUSTICE SCALIA: Mr. Shah, could you tell us  
6 what the government's position is on whether, when  
7 somebody has been discharged from the service and then a  
8 conviction which he -- which he suffered while he was in  
9 the service is set aside, can he be retried in military  
10 courts?

11 REBUTTAL ARGUMENT OF PRATIK A. SHAH

12 ON BEHALF OF THE PETITIONER

13 MR. SHAH: Not if he has passed his  
14 enlistment period, no, Your Honor. The government's  
15 view is they would not be able to retry him.

16 I would just like to make four quick points  
17 in response. First, to the Chief Justice's question,  
18 could someone be in custody after finality? Of course,  
19 yes, that -- that could be the case. The military  
20 doesn't have to issue a bad conduct discharge as part of  
21 its sentence. He could still be in confinement within  
22 the military during the post finality period.

23 The second point I would like to make is  
24 that *Noyd v. Bond* is clearly distinguishable. That  
25 dealt with habeas review within the military while the



1 person was still pursuing his direct appeal. So there  
2 was a clear, independent basis of jurisdiction in the  
3 Noyd v. Bond type situation, and that's the Article 66  
4 and 67 direct review jurisdiction, and that --

5 JUSTICE SOUTER: What has direct review got  
6 to do with habeas?

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

10 JUSTICE SOUTER: In the civil system we  
11 regard it as -- as entirely a separate proceeding.

12 MR. SHAH: Well, what was going on in Noyd  
13 v. Bond, Your Honor, is he was pursuing a habeas  
14 petition for release pending the -- the resolution of  
15 his direct appeal. So the military courts just referred  
16 the petition to the same court reviewing his direct  
17 appeal on the merits, and it became part and parcel of  
18 that jurisdiction.

19 The third point I would like to -- to make  
20 is in response to Justice Kennedy's question, which  
21 shows the incompatibility of coram nobis relief within  
22 the military justice system. That they've had to create  
23 this DuBay procedure where -- where a new court-martial  
24 -- and DuBay sets this out. The new court-martial does  
25 have to be convened, and then they would have a

1 factfinding tribunal in which new -- a new military  
2 judge would have to be assigned to govern it.

3 None of that is specified within Congress's  
4 scheme. That has all been created. It shows the  
5 incompatibility of the practical burdens that this  
6 procedure places on the military, and nothing in Article  
7 66(c) which governs the jurisdiction of the military  
8 appellate courts, the intermediate courts, references  
9 any independent factfinding power. It says in a case  
10 referred to it, the court of criminal appeals may act  
11 only with respect to the findings and sentence as  
12 approved by the convening authority. It may affirm only  
13 such findings of guilty and the sentence or such part or  
14 amount of the sentence as it finds correct in law and  
15 fact and determines on the basis of the entire record.

16 CHIEF JUSTICE ROBERTS: Why don't you  
17 briefly make your fourth point.

18 MR. SHAH: The fourth -- fourth point is in  
19 response to Justice Breyer. My military colleagues  
20 inform me that in the situation of a true clerical  
21 error, they could go to the Board of Correction of  
22 Military Review and seek correction of that error.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 The case is submitted.

25 (Whereupon, at 11:08 a.m., the case in

1 the above-entitled matter was submitted.)

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