No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI *et al.*,
Petitioners / Appellees

versus

DONALD RUMSFELD *et al.*,
Respondents / Appellants

On Appeal from the United States District Court
for the Eastern District of Virginia
Civil Action # 2:02CV439

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS In Support of *Petitioners / Appellees*

STEVEN D. BENJAMIN, Esq.
P.O. Box 2464
Richmond, VA 23218
(804) 788-4444

Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers

DONALD G. REHKOPF, JR., Esq.
BRENNA & BRENNA
31 East Main Street, Suite 2000
Rochester, New York 14614
(585) 454-2000 X 12

On Brief

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

PARTIES and AMICI:

Except for *Amicus Curiae* herein, the National Association of Criminal Defense Lawyers [NACDL], all parties appearing before the District Court below ar e listed in Appellants' Brief.

RULE 26.1 DISCLOSURES:

1. The NACDL is a not-for-profit, profe ssional Bar Association for the criminal defense bar, with over ten thousand subscribed members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is ***not*** a publicly held company; does ***not*** have any parent corporation; does ***not*** issue or have any stock; and does ***not*** have any financial interest in the outcome of this litigation.

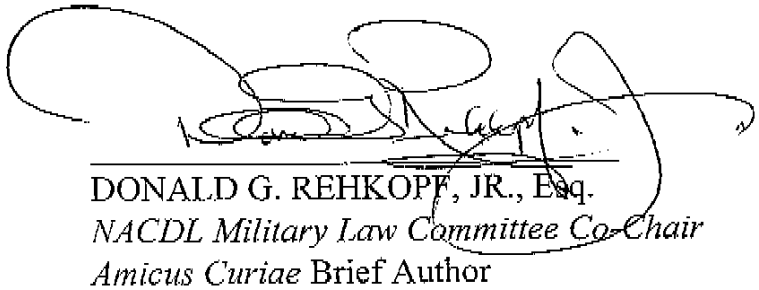
RULINGS UNDER REVIEW:

The Ruling of the District Court under review appears in the Parties *Joint Appendix*.

RELATED CASES:

1. *Padilla et al. v. Bush, et al,* U.S.D.C., Southern District of New York, Civil # 02-Civ-4445 (MBM);

2. *Rasul v. Bush, et al.,* U.S. Court of Appeals, D.C. Circuit, No. 02-5288, appeal from the U.S.D.C. for the District of Columbia.



October 24, 2002

DONALD G. REHKOPF, JR., Esq.
NACDL Military Law Committee Co-Chair
Amicus Curiae Brief Author

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PREAMBLE

> *Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.*[1]

Amicus Curiae has grave concerns over the posture of this *interlocutory* appeal. The Respondents' arguments raise serious and fundamental issues which threaten to eviscerate 210 years of constitutional jurisprudence, and to destroy the basic concept of "co-equal" branches of government. We are not only alarmed that Respondents persist with their autocratic notion of an "Imperial President," but that they do so on misstated "facts;" on mythical legal concepts that have no basis in domestic or international law; and by failing to provide this Court with relevant and *controlling* legal authority.

I. *"FALSUS IN UNO, FALSUS IN OMNIBUS."*

As *Amicus Curiae,* the NACDL advocates a standard of professional responsibility that includes candor to the court. Our criticisms should not be viewed as *de minimis* quibbling over obscure and irrelevant matters. Rather, *Amicus*

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[1]*Schecter Poultry Corp. v. United States,* 295 U.S. 495, 528-29 (1935).

enemy combatants" was authorized by Congress,[9] the Joint Resolution[10] does ***not*** mention "enemy combatants," nor authorize the *incommunicado*, ***military*** imprisonment of a ***U.S. citizen***.[11]

Respondents' make much ado about the "Mobbs' Declaration,"[12] yet *Amicus* suggests that the Court's skepticism below was warranted, and that this declaration is indeed meaningless for evaluating Hamdi's detention. Hamdi was transferred to the U.S. base at Guantanamo Bay, Cuba in January 2002.[13] Thus, by any mental process, the decision to detain him, in whatever status, had already been made. Yet, Mobbs' very position was not effectuated until months later - April 24, 2002.[14] But even his position as "Special Advisor to the Undersecretary of Defense (Policy)," is ***not*** the *correct* office responsible for such determinations. Rather, it is the ***Assistant Secretary of Defense for International Security Affairs***.[15]

Respondents also argue that 10 U.S.C. § 956, somehow provides legal

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[9]Resp.Br. 18.

[10]*Authorization for Use of Military Force,* 115 Stat. 224 (2001).

[11]*In re Territo,* 156 F.2d 142 (9th Cir. 1946), is inapposite as he was (a) a *bona fide* POW, and (b) *not* held *incommunicado.*

[12]Resp.Br. 36-7.

[13]*Id.,* at 7.

[14]*See,* 67 Fed.Reg. 35596 (May 20, 2002), creating his job.

[15]*See,* fn. 8, *supra.*

particularly useful from an information standpoint ***and sent a group of them here.***[21]

These criteria - classified or not - utterly fail to comply with both international and U.S. law pertaining to classifying detainees. It is clear that the Court below was properly skeptical of Respondents' claims.[22] Where Respondents err, *Amicus* submits, is that an *initial* "battlefield" detention (a true function of military command), simply never occurred with respect to Hamdi - he surrendered to a *third* party! As *unclassified* Central Command Regulation 27-10, paragraph 5(a) [Addendum E-3 *et seq.*,][23] shows, there is no evidence Hamdi committed a "belligerent act" against the *United States,* and thus his "status" is clearly disputed. To camouflage this issue under the guise of "classification," is unconscionable.

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[21]January 27, 2002, Press Conference, Guantanamo Bay. Available on-line at: http://www.useu.be/Terrorism/USResponse/Jan2702RumsfeldSenatorsGuantanamo.html [last accessed: October 17, 2002].

[22]If Respondents' detention of Hamdi is *ultra vires,* following "orders" from the Commander-in-Chief is not a defense. *Compare, Youngstown Sheet & Tube v. Sawyer,* 103 F.Supp 569, 576 (D. DC 1952), *aff'd* 343 U.S. 579 (1952), and Persico, *Nuremberg: Infamy on Trial* (NY: Penguin Books, 1994).

[23]*Amicus* is unable to verify that this is the current edition, other than as of October 17, 2002, it was still part of the U.S. Army JAG School's publications.

II. THE LABEL "ENEMY COMBATANT" IS A MEANINGLESS TERM UNDER U.S. MILITARY AND INTERNATIONAL LAW.

Respondents repeatedly call Hamdi an "enemy combatant," but nowhere define its meaning or even provide authority that it *has* any legal meaning.[24] *Amicus* respectfully suggests that this *label* is both unwarranted procedurally and meaningless substantively.[25]

Ex Parte Quirin, 317 U.S. 1(1942), used the term "enemy combatant" synonymously with that of "enemy soldier,"[26] in the context of discussing "belligerents" in a formal, declared war. The Court gave no indication that it was creating a new jurisprudential concept in *either* international law or the Law of War. Nor is the phrase used in any of the 1949 Geneva Conventions or subsequent usage within international law. That the term "enemy combatant" has ***no other*** accepted ***legal meaning*** than being synonymous with that of "enemy soldier," is easily ascertained by the Supreme Court's next usage of the phrase in, *In re Yamashita,* 327

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[24] *Amicus* is aware that this Court also used the phrase, "enemy combatant." *Hamdi v. Rumsfeld,* 296 F.3d 278, 281-83 (4th Cir. 2002). This inaccuracy is understandable as the issue had not been briefed.

[25] *See generally,* Maguire, *Law and War: An American Story* (NY: Columbia Univ. Press, 2000); and Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience,* 85-88 (Chapel Hill, NC: Univ. N.C. Press, 1975) [no references to phrase "enemy combatant"].

[26] ". . . an enemy combatant who without uniform comes secretly through the lines . . . ." 317 U.S. at 31. *See, Addenda,* A-3; B; and D-2.

U.S. 1, 7 (1946). But, as the *Yamashita* Court recognized, General Yamashita was a *bona fide* "Prisoner of War," [327 U.S. at 5] - who had been an enemy soldier engaged in combat, *viz.*, an "enemy combatant," with no special military, legal or other significance.

Indeed, the United States *military* does ***not*** elsewhere use the term "enemy combatant" to mean anything ***other than*** a reference to an enemy soldier.[27] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant."[28] Perhaps most damning to the Respondents' assertion in this regard is that the *Department of Defense Dictionary of Military Terms,*[29] nowhere lists or defines the term " enemy combatant."[30] Finally, the phrase "enemy combatant" is ***not*** used in either Convention III, *Treatment of Prisoners of*

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[27]*See, Manual for Courts-Martial, 2000 Ed.*, Rule 916(c), *Rules for Courts-Martial*, and the "Discussion" which notes: "killing an ***enemy combatant*** in battle is justified." [Emphasis added]. The *Manual for Courts-Martial* is an ***Executive Order***.

[28]In military jurisprudence, for the military to exercise "jurisdiction" over an individual, one must first possess military "status." *See, Solorio v. United States,* 483 U.S. 435 (1987). But, as noted in *Solorio,* that is a function textually committed to *Congress,* not the Commander-in-Chief pursuant to Article I, § 8; 483 U.S. at 440-41 .

[29]Available on-line at: http://www.dtic.mil/doctrine/jel/doddict/ [last accessed , September 20, 2002].

[30]This deliberately repeated mantra thus belies any suggestion that the Respondents are mistakenly using the term "enemy combatant" interchangeably with the concept of an "unlawful belligerent." Considering the legions of lawyers in the DoJ and DoD, such usage can hardly be characterized as an innocent "mistake."

War, or Convention IV, *Protection of Civilian Persons in Time of War*, of the 1949 Geneva Accords.

United States ex rel. Zdunic v. Uhl, 137 F.2d 858 (2nd Cir. 1943), is instructive. Zdunic was detained pursuant to the *Alien Enemy Act*, 50 U.S.C. § 21. He challenged the ***factual*** determination that he was an "enemy alien." The District Court denied his *habeas* petition, but the Second Circuit held that he was entitled to a hearing on the "disputed facts" *before* the Court made a determination as to his legal status. *Amicus* proffers that conceptually, *Zdunic's* challenge to his "enemy alien" determination is no different than Hamdi's challenge to Respondents' claim that he is an "enemy combatant." But to say, as Respondents do, that Hamdi (versus an alien), cannot challenge his "labeling," is the height of arbitrariness and a gross denial of due process.

Respondents repeated use of the label "enemy combatant," as if it has some pertinent impact on the Petitioners' case, is respectfully nothing more than verbal camouflage - an attempt to shift the Court's focus away from the serious issue of *habeas corpus*.

III. THE PLAIN LANGUAGE OF THE CONSTITUTION.

> *By virtue of their judicial power, the courts administer international law, including the common law of war, but when this law is displaced by statute or treaty, it becomes the duty of the Courts to administer this superceding municipal law.*[31]

A. The Role of the Judiciary is to Adjudicate, not Abdicate.

> *What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are* ***judicial questions.***[32]

The initial question is ***not*** what "deference" the Judiciary should give the Executive regarding Hamdi. Rather, in making his decisions regarding Hamdi, did the Commander-in-Chief (and Respondents) give due deference to the Constitution in relation to the rights of a U.S. citizen? The second issue which follows the constitutional inquiry is, have the Respondents complied with the governing laws regarding Hamdi's ***military*** imprisonment, to wit: 10 U.S.C. § 809; 18 U.S.C. § 4001; and the applicable treaties?

Deference is additionally inappropriate even where such may "affect" the other branches of government. As the Court noted in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, at 230 (1986), "one of the Judiciary's characteristic

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[31]Wormuth & Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, 112 (Dallas: SMU Press, 1986) [hereinafter "Wormuth"].

[32]*Sterling v. Constantin*, 287 U.S. 378, 401 (1932)[emphasis added].

> "[M]ilitary authorities *must recognize* such writ [*habeas*] and surrender the body of the person . . . ***leaving the whole question to be decided by the court . . . .***" [emphasis added]

This *military* text came from the height of WW II. The law has not changed since then. *Machado v. Commanding Officer*, 860 F.2d 542 (2nd Cir. 1988)[military *habeas* case].

B. *Yamashita's* Precedent Controls.

While beating the "enemy combatant" drum, Respondents ignore *Yamashita, supra.*[37] *Yamashita* was a classic *habeas corpus* case and while the Court denied relief on the merits, its decision on *habeas* jurisprudence remains controlling.

> The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. [327 U.S., at 8]
>
> * * * * *
>
> [Congress] has not withdrawn, and the Executive branch of the government ***could not, unless there was suspension of the writ,*** withdraw from the courts the ***duty and power*** to make such inquiry into the authority . . . as may be made by *habeas corpus*. *Id.,* 9 [Emphasis added].

The Court below had "the duty and power to make such inquiry" ***even if*** labeling Hamdi an "enemy combatant" had some jurisprudential meaning. The Respondents' arguments are just wrong. If their "deference" argument had ***any*** legal

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[37]The opinion makes eight references to "enemy combatants;" all in the context suggested by *Amicus, viz.,* enemy "soldiers."

merit, the *Yamashita* Court certainly would have applied it and *rejected*, not used, the above quoted language.

C. "War Powers" Belong to Congress.

There is a clear textual commitment in Article I, § 8, giving **Congress** not only the power to "declare war," but also the power "***To define and punish*** Piracies and Felonies committed on the high Seas, and ***Offences against the Law of Nations.***" These express grants, along with the other Article I, § 8, powers given to Congress, coupled with the *absence* of any similar powers in Article II, for the President, simply defeat any claims by Respondents that this Court must grant "deference" to the Commander-in-Chief's declaring Hamdi to be an "enemy."

Contrary to Respondents' representations, the President has ***no*** *constitutional* "core war powers."[38] *Youngstown* unequivocally teaches this. Two facts prove it. The President *cannot* veto a Congressional declaration of war.[39] Nor does the President even possess the basic "power" to appoint the Respondent, Secretary of Defense; the Chairman of the Joint Chiefs of Staff; or even commission officers

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[38]Resp.Br. 16. *The Prize Cases,* 67 U.S. 635 (1862), are frequently erroneously cited for this premise. There, Lincoln acted out of "necessity," an emergency power. Congress was not in session, but upon their return, he sought and received legislative ratification. 67 U.S. at 670-71.

[39]Treanor, *Fame, The Founding, and the Power to Declare War,* 82 Cornell L. Rev. 695 (1997).

without the "advice and consent" of the Senate. 10 U.S.C. §§ 113; 152; and 531. The extraordinary "deference" argument is simply a fiction - repudiated by the text and principles of the Constitution. Someone with "core war powers" does not need Senate approval to commission a Second Lieutenant! *Mimmack v. United States,* 97 U.S. 426, 437 (1878).

Starting with *Little v. Barrame, supra,* the Supreme Court has held that military orders of the President are ***subordinate*** to Congressional "war powers." And, in *Jecker v. Montgomery,* 54 U.S. 498, 515 (1851), the Court rejected another Presidential "military" order affecting the Judiciary:

> [U]nder the Constitution of the United States . . . [e]very court of the United States . . . derive(s) its jurisdiction and judicial authority from the Constitution or the laws of the United States. And ***neither the President nor any military officer*** can . . . decide upon the rights of the United States, or of ***individuals*** in prize cases, ***nor administer the laws of nations.*** [emphasis added].[40]

The Joint Resolution did not change this concept, and the Respondents simply cannot claim what does not exist.

D. The Respondents Must Comply With the "Laws of War."

We do not make the laws of war but we respect them so far

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[40]The Court had rejected this Executive "core war power" idea before. "[The President's] conquests do not . . . extend the operation of our institutions and laws beyond the limits before assigned to them ***by the legislative power.***" *Fleming v. Page,* 50 U.S. 603, 615 (1850) [Emphasis added].

> as they do not conflict with the commands of Congress or the Constitution.[41]

The conspicuous absence of *any* reference to any Presidential "core war powers,"in *Yamashita*, deflates any claim that they exist. Respondents further refus e to acknowledge that there is a *bona fide* dispute as to Hamdi's actual status, and that treaties which are the supreme "law of the land," provide for a judicial determination of that status. *See, United States v. Noriega,* 808 F.Supp 791 (S.D. Fl. 1992). No deference is due to an implied suggestion that the Judiciary ignore its responsibilitie s under Article 5, Geneva III [the POW Convention], especially when Respondents continue to ignore their own regulations, *viz.*, DODD 2310.1, paragraph 3.3 (1994).[42] No deference is due an entity that fails to acknowledge, much less follow its own regulations.

Fundamental constitutional law mandates that:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted.[43]

The United States is a signatory to The *International Covenant on Civil and*

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[41] *Yamashita, supra,* 16.

[42] *See,* footnote 8, *supra.*

[43] *United States v. The Schooner "Peggy,"* 5 U.S. 103, 109 (1801).

Political Rights,[44] ["ICCPR"]. During the Senate's "advice and consent" debate prior to ratification in 1992, Senator Pell observed, "The covenant is rooted in Western democratic traditions and values. It guarantees basic rights and freedoms ***consistent with our own Constitution and Bill of Rights***." [emphasis added] [45] Senator Moynihan expressed the same view, "This covenant reflects the principles articulated in our own Bill of Rights."[46] While the United States entered a number of "reservations"[47] ***no reservations*** were given to the following provision of the ICCPR :

> ***Article 9, Section 4:*** Anyone who is deprived of his liberty by arrest or ***detention*** shall be entitled to ***take proceedings before a court***, in order that court may decide without delay on ***the lawfulness of his detention*** and order his release if the detention is not lawful." [emphasis added].

This is consistent with 200 years of *habeas* jurisprudence.

Amicus does not suggest that the ICCPR automatically mandates Petitioner's release, because it is clear that such a function is reserved to the Judiciary *after* ascertaining the legality of the detention. However, by virtue of the ICCPR, the

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[44]G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976; available at: http://www1.umn.edu/humanrts/instree/b3ccpr.htm [last accessed, September 30, 2002].

[45]Congressional Record, S4781, April 2, 1992.

[46]*Id.*, at S4783.

[47]*Id.*

Court below unquestionably acted properly pursuant to 28 U.S.C. §§ 1331; and 2441(c), notwithstanding the Respondents' arguments disputing Hamdi's illegal confinement.

IV. "MARTIAL LAW" HAS BEEN ILLEGALLY ESTABLISHED.

A. Historical Background.

Early in the Civil War, President Lincoln unilaterally suspended the privilege of *habeas corpus* - until he could reconvene Congress and obt ain their constitutional authorization. He also declared *martial law.* [48] Litigation ensued to include *habeas corpus* actions. The Solicitor of Lincoln's War Department, William Whiting, coordinated the government's defenses to these cases, and he issued instructions on how to defend them. Those "litigation instructions" were published in 1864, in a pamphlet entitled, *Military Arrests in Time of War.* That has just been republished: Whiting, *War Powers Under the Constitution of the United States* (Union, NJ: The Lawbook Exchange, Ltd., 2002) [hereinafter "Whiting"]. Without direct citation,

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[48]*See,* Wiener, (a noted military scholar) *A Practical Manual of Martial Law*, 58 (Harrisburg, PA: The Military Service Pub. Co., 1940) [hereinafter "Wiener"].

Amicus respectfully submits that the Respondents make the *verbatim* arguments first advanced by Whiting:

- "[The President's] right to seize, capture, detain, and imprison such persons is as unquestionable as his right to carry on the war."[49]
- "[T]he provision that *unreasonable* seizures or arrests are prohibited has ***no application to military arrests*** in time of war." [emphasis added][50]
- "It is, however, enough to justify arrests in any locality, however far removed from the battlefields of contending armies, that it is a *time* of war, and the *arrest* is required . . .to *prevent* an act of hostility . . . ." [emphasis in original][51]
- "While this ample authority is given to the commander-in-chief to arrest the persons of aliens . . . a ***far greater power over the persons of our own citizens*** is . . . given to the President in case of *public danger*." [emphasis added][52]

Unfortunately for Whiting's career, the Supreme Court firmly rejected these bizarre and unconstitutional arguments in *Milligan, supra.* With the exception of the now discredited Japanese-American internment cases during World War II,[53] - which involved martial law - Whiting's concept of an absolute and unreviewable Chief

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[49]Whiting, 168.

[50]*Id.*, 176.

[51]*Id.*, 192.

[52]*Id.*, 195.

[53]*See, e.g., Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), setting aside Korematsu's conviction, previously upheld in, *Korematsu v. United States,* 323 U.S. 214 (1944).

Executive is both untenable constitutionally and has been rejected for 140 years.[54]

Amicus Curiae respectfully suggests that a close examination of the Respondents' arguments shows that they have established *de facto* "martial law" by the stratagem of using the meaningless label, "enemy combatant." The President defines "martial law" as follows:

> A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require.[55]

Regardless of the label that the Respondents place on Hamdi, [56] he remains a "civilian" who is now somehow subject to *exclusive* military governance and detention. That too, the *Milligan* Court condemned as illegal, for the same reasons that it is illegal herein: "**Martial law** cannot arise from a threatened invasion. ***The necessity must be actual and present***; the invasion real, ***such as effectually closes the courts and deposes the civil administration***." 71 U.S. at 127 [emphasis added].

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[54]*Compare, Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

[55]*Manual for Courts-Martial, United States* (2000 ed.) [hereinafter "MCM"], at I-1, paragraph 2 (a)(2). *Compare,* Wiener's definition at 10:

> [M]artial law is the carrying on of government in domestic territory by military agencies, *in whole or in part,* with the consequent supersession of *some or all* civil agencies. [emphasis in original].

[56]It is ironic that the Government in *Milligan* attempted to defeat the Court's jurisdiction by arguing that *Milligan* was a "Prisoner of War." 71 U.S. at 131.

The Respondents are *sub silentio* seeking the *imprimatur* of this Court justifying their actions under martial law.

Here, the Respondents have *de facto*, illegally and selectively implemented "martial law" as applied to Hamdi. They thus seek to avoid Constitutional and judicial scrutiny, by claiming a phantom Presidential "war power." Again, the Respondents' arguments herein are directly linked to Whiting's:

> [The President] must have the power to hold whatever persons he has a right to capture ***without interference of courts*** during the war, and he has the ***right to capture*** all persons who ***he*** has reasonable cause to believe are hostile to the Union, and are engaged in hostile acts. [emphasis added].[57]

In rejecting Whiting's position, the Court in *Milligan* wisely went on to explain: "***Martial rule can never exist where the courts are open***, and in the proper and unobstructed exercise of their jurisdiction." 71 U.S. at 127 [Emphasis added]. This interpretation of martial law was not an aberration, nor are the federal courts barred from reviewing this issue. But, it is imperative to keep in mind the fact that "martial law"*may be* imposed on a selective basis,[58] which is exactly what has been

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[57]Whiting, 203. In addition to *Milligan's* rejection of these arguments, the Supreme Court in another "terrorist" case, expressly rejected a unilateral judgment by the Executive under Fourth Amendment principles; *United States v. United States District Court,* 407 U.S. 297 (1972).

[58]*See,* Wiener, *op cit.*, and *Duncan v. Kahanamoku,* 327 U.S. 304 (1946), and (continued...)

done herein. As one noted scholar observes:

> Where . . . measures of martial rule have been undertaken in a situation which does not involve the existence of necessity, an ***aggrieved person*** is entitled to a remedy then and there. . . . [T]there is ***no doctrine*** which renders the courts impotent until the alleged emergency has vanished. This right to ***immediate redress*** has been upheld by the Supreme Court [citing *Constantin,* 287 U.S. at 403] [emphasis added].[59]

Professor Wiener also concludes:

> Persons detained in custody [by martial law] may seek, by writ of habeas corpus, to be released therefrom, or, after release, to sue those ordering or executing their arrest for damages, alleging an unlawful imprisonment.[60]

Colonel Winthrop, the most authoritative American military legal scholar, came to this conclusion regarding ***martial law***:

> The most considerable and important part of the exercise of martial law is the ***making of arrests of civilians*** charged with offenses against the laws of war. But to arrest and hold at will . . . is practically to suspend the citizen's privilege of the writ of *habeas corpus.* . . . [Thus] it becomes material to inquire whether, under the provisions of the Constitution relating to the suspension of the privilege of the writ, the President, or a military commander representing him, is authorized to order or

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[58](...continued)
its discussion of the gradations of martial law in Hawaii *after* the Pearl Harbor attack.

[59]Wiener, 25-26.

[60]*Id.*, 62.

effect such suspension.[61] [emphasis added].

Milligan, additionally is instructive in that all nine Justices concurred in holding that the federal courts had "jurisdiction of the petition of Milligan for the writ of habeas corpus."[62]

Finally, the Court is urged to study *U.S. ex rel. Palmer v. Adams,* 26 F.2d 141 (D.CO, 1927), [1927 U.S. Dist. LEXIS 1846][63] which possesses remarkably similar juridical *habeas* concepts, albeit imposed by State conditions. The Court first observed:

> Alongside of the regular form of government, . . . militiamen . . . are exercising arbitrary power, arresting people and holding them without charges. . . . The return . . . simply alleges that in the exercise of honest judgment the Governor deems it for the best interests of the community, and the preservation of law and order, to ***detain the petitioners without filing charges,*** admitting them to bail, or intent to submit them to a military or the local court for hearing and trial. [* 5; emphasis added]
>
> * * * * *
>
> It seems to me there either must be martial law or no martial law, and, until there is, no rogatory body can lawfully go around . . . depriving individuals of the rights that the Constitution . . . guarantees. ***We have either one thing or the other. The two cannot exist side by side.*** [* 7; emphasis added].

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[61]Winthrop, U.S. Army, *Military Law and Precedents,* 2nd ed., at 828 (Washington, DC: GPO, 1920) [Legal Classics Library reprint].

[62]71 U.S. at 132)(concurring opinion of the Chief Justice). Four Justices concurred with the majority, but disagreed with their rationale.

[63]Appeal dismissed as moot, 29 F.2d 541 (8th Cir. 1928).

Finally, the Court concluded:

> Petitioners are claiming rights under the Federal Constitution, and I have been unable to find a case where the federal courts have recognized the right . . . ***to arrest and detain citizens at will, without filing charges, especially when it is admitted that the courts and civil authorities have not been interfered with, overthrown, or supplanted by the military forces.*** [*9-10; emphasis added].[64]

B. The *De Facto* Suspension of *Habeas Corpus.*

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it. Art. I, § 9, cl. 2, U.S. Constitution.

One commentator cogently observed:

> The important point is that where there is no suspension of the privilege of the writ the prisoner is able at ***all times*** to secure ***judicial inquiry*** as to the reasons for his being in custody. [emphasis added][65]

The ***process*** involving a *Writ of Habeas Corpus* is three-fold: the first is having a court ***entertain*** the Petition;[66] the second, involves the Court actually issuing the

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[64]*See, United States v. Yasui,* 48 F.Supp. 40 (D.OR., 1942), for an exhaustive analysis of this issue under federal law. *Yasui,* like *Korematsu, supra,* is also another reason ***not*** to grant "deference" to Respondents', "military" decisions - these, and other Japanese "internment" convictions of WW II, were procured by fraud and "manipulated evidence" of a "serious wartime threat," and the convictions ultimately were set aside. *Yasui v. United States,* 772 F.2d 1496, 1498 (9 th Cir. 1985).

[65]Wiener, *op cit.,* 70.

[66]*Amici Curiae* would agree that at least until now, the Courthouse doors have (continued...)

Writ[67]; and third, assuming *arguendo* that the Court *grants* a *Writ,* being able to enforce it. This *third* prong is the crux of this litigation.

One question and one question only, bring s this litigation to its head: Will the Respondents ***comply*** with an Order granting a *Writ of Habeas Corpus*? That was the dilemma that Chief Justice Taney faced in *Ex Parte Merryman,* 17 Fed.Cas. 144 (C.C.D. Md. 1861). He issued the *Writ* but the Marshall was unable to serve it, as Merryman was confined within the bowels of a secure, military installation (as is Hamdi), and President Lincoln simply chose to ignore it.[68]

If, as Respondents claim, "[The detention of] an enemy combatant . . . falls within the President's core war powers. . . ." [Resp.Br. 16], it is not unreasonable to assume that they will then continue their argument that "The military's determination that Hamdi is an enemy combatant . . . should be given effect," [Resp.Br . 25] and, as in *Merryman,* simply refuse to enforce any ensuing Court Order.[69] Thus, while the

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[66](...continued)
not been closed to the physical filing of *Habeas Corpus* petitions, as this case demonstrates. *Compare,* the prohibition on filing such a *writ* in *Duncan v. Kahanamoku,* 327 U.S. 304, 309 (1946).

[67]Or alternatively, issuing a "Show Cause" order. *See, e.g., Walker v. Johnson,* 312 U.S. 275 (1941).

[68]*Merryman* was decided before Congress acted to suspend the *Writ* in 1863.

[69]*Merryman,* did not address the Court's contempt power.

actual "privilege" seeking *habeas* relief might itself not be suspended, that becomes meaningless absent a way to enforce a granted *Writ*.

NACDL respectfully submits, that with one notable constitutional exception, the actions of the Respondents track exactly the actions of Lincoln's suspension of the *Writ* during the Civil War. Lincoln had the benefit of an Act of Congress on March 3, 1863, [12 Stat. 755] Respondents herein do *not*. Lincoln's actual suspension of *habeas corpus* was done on an *ad hoc* basis. As *Milligan, supra,* and *Kahanamoku, supra,* hold, if the civilian courts are open and functioning, it is unconstitutional to preclude the Great Writ.

Yet, a distillation of Respondents' arguments shows the parroting of Whiting's arguments, *viz.*, it is the Commander-in-Chief, not the Judiciary, who determines what the federal courts can do in relation to a Unit ed States citizen. *Milligan* and its progeny show the continued error of that legal position, and if there is *any* doubt, Winthrop resolves it:

> Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and the weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is ***not*** empowered of his own authority to suspend the privilege of the writ of *habeas corpus*. . . .[70]

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[70]Winthrop, *op cit.*, 830.

The President - if Respondents' arguments are followed - will have effectively suspended the privilege of *habeas corpus* on an *ad hoc* basis against Mr. Hamdi today, Mr. Padilla tomorrow, and thereafter, unknown and unchecked other citizens who do not meet Respondents criteria for "good" citizens. Such then is the end of liberty[71] and a repudiation of the *Magna Carta:*

> "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." *Magna Carta* (1297)[72]

CONCLUSIONS

This case stands to define as Chief Justice Marshall observed, "The very essence of civil liberty" in our history and jurisprudence. But, it is not yet "ripe" for a decision on this *interlocutory* appeal. If the arguments of the Respondents are correct, *viz.,* that the liberties of our citizenry are or can be determined solely by the Commander-in-Chief, then *Amicus Curiae* respectfully submits that 215 years of constitutional law have been in error, and the concept of an independent judiciary, a

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[71]*See,* Justice Stephen Breyer, *Our Democratic Constitution,* 77 N.Y.U. L. Rev. 245 (2002); "The United States is a nation built on principles of human liberty - a liberty that embraces concepts of democracy."

[72]The *Magna Carta* of 1215 went through many revisions. *National Archives and Records Administration,* edition.

false premise of our Founding Fathers. Such a seminal and profound conceptual change cannot be made on this record where the facts have been barely addressed and the *Petitioner* having had no opportunity to confront and contest the "evidence" purportedly used against him. *Walker v. Johnson, supra,* and the Federal Rules of Civil Procedure[73] compel the obvious conclusion that Respondents' zeal is premature . If there is a legitimate *factual* basis under United States and international law for the detention of the Petitioner, let the Respondents "make their case," to include using the *Classified Information Procedure Act.* [74] If not, then the Great Writ must lie.

Petitioner is being held by U.S. troops, on a *secure* U.S. military installation, by and under orders of U.S. officials [the Respondents]. The profound const itutional issues pertaining to the fundamental separation of powers principle as well as the concept of "martial law," respectfully demand a more thorough and judicious treatment than what the status of this case allows. It is an insult to the Judiciary and especially to the Court below, for Respondents to argue that "national security" issues must truncate the fair and orderly administration of justice.

One of our earliest legal commentators on "military law," rejected the Respondents' position herein - and he was a military officer!

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[73]This is indeed a *civil* action, governed by the F.R.Civ.P.

[74]18 U.S.C. App. § 1 *et seq.*

> ***The substitution of this power for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period, or trial by a military body.***
>
> Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus*. . . .[75]

This Court is now the guardian of a *citizen's* rights and the principles of our Constitutional heritage. Terrorism must not result in tyranny, and the "home of the brave" must remain the "land of the free."

Dated: October 24, 2002.

Steven D. Benjamin /dgr per telephone

STEVEN D. BENJAMIN, Esq.
P.O. Box 2464
Richmond, VA 23218
(804) 788-4444
Counsel of Record for Amicus Curiae
NACDL

DONALD G. REHKOPF, JR., Esq.
BRENNA & BRENNA
31 East Main Street, Suite 2000
Rochester, New York 14614
(585) 454-2000 X 12

NACDL *Military Law Committee, Co-Chair*
On Brief

[6927]

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[75]William C. DeHart, Captain, U.S.A. (Acting Judge Advocate of the Army), *Observations on Military Law* (NY: Wiley & Halsted, 1859 ed.) [reprinted, 18 *Classics in Legal History*, Wm. S. Hein & Co, Buffalo, NY, 1973].

CERTIFICATE OF COMPLIANCE

1. This Brief of *Amicus Curiae* has been prepared using WordPerfect Suite 7, Times New Roman font, 14 point.

2. EXCLUSIVE of the Statement of Interest by *Amicus Curiae*, Table of Contents, Table of Authorities, any Addendum containing statutes, rules or regulations, and the Certificate of Servic e, this Brief contains ***6927 words*** out of a maximum allowable ***7000 words.***

I understand that a material misrepresentation may result in the Courts striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

Steven D. Benjamin /dcl per telephon

STEVEN D. BENJAMIN, Esq. Date: October 24th, 2002
Counsel of Record for Amicus Curiae

Date: October 24th, 2002

DONALD G. REHKOPF, JR., Esq.
NACDL Military Law Committee Co-Chair
Brief Author

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Brief of Amicus Curiae,* National Association of Criminal Defense Lawyers, was sent to the following counsel as indicated on the 25th day of October, 2002:

1. Lawrence R. Leonard, Esq.
U.S. Attorney's Office
World Trade Center
101 West Main Street
Suite 8000
Norfolk, VA 23510
(757) 441-6739 = FAX
Via FedEx Overnight

2. Gregory G. Garre, Esq.
Solicitor General's Office
U.S. Department of Justice
905 Pennsylvania Ave. N.W.
Washington, DC 20530-0001
(202) 514-4283 - Voice
(202) 514-9769 - Fax
Via Facsimile

Counsel for Appellants
and

3. Geremy C. Kamens, Esq.
Office of the
Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0880 - FAX
Via Facsimile

4. Robert J. Wagner, Esq.
Office of the
Federal Public Defender
150 Boush Street, Suite 403
Norfolk, VA 23510
(757) 457-0880 = FAX
Via FedEx Overnight

Counsel for Appellees

DATE: October 25, 2002.

Steven D. Benjamin/dgr per telephone
STEVEN D. BENJAMIN, Esq.
Counsel of Record for Amicus Curiae

DONALD G. REHKOPF, JR., Esq.
NACDL Military Law Committee

OPERATIONAL LAW HANDBOOK (2003)

COL Tia Johnson
Chair, International and Operational Law Department

LCDR William O'Brien, JAGC, USN
Editor

Contributing Authors

CDR Brian J. Bill, JAGC, USN
LTC Daniel Culver
COL Joseph M. Davis
MAJ Andrew Glass
MAJ Larry Gwaltney
Lt Col Thomas Hamilton, USMC
CDR Mark R. Higgins, USCG
MAJ Brad Huestis
MAJ Eric Jensen
COL Tia Johnson
Lt Col Michael Jordan, USMC
MAJ Jonathan Kent
Lt Col Albert W. Klein, USAF
MAJ Mike Lacey
Maj Jeanne M. Meyer, USAF
MAJ Matthew A. Myers, Sr.
LTC Curt Parker
MAJ Michael L. Smidt
LTC Pam Stahl
LTC Ken Tozzi
MAJ Kevin Walker
Maj Cody Weston, USMC
MAJ Shelley Williams

Technical Support

CDR Brian J. Bill, JAGC, USN
Ms. Janice D. Prince, Secretary
SGT Tre Melendez
CW3 Tommy Worthey, LTMO

JA 422

All of the faculty who have served before us
and contributed to the literature in the field of operational law.

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, Virginia 22903

CHAPTER 2
THE LAW OF WAR
REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of Defense Instruction 5000.2, Operation of the Defense Acquisition System, 23 October 2000.
16. Dep't of Defense Directive 5100.77, DoD Law of War Program, 9 December 1998. 17. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 27 August 1999.

Lawful Combatants and Unprivileged Belligerents

Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat."

Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS (Sea), and GPW; gain "combatant immunity" for their warlike acts; and become prisoners of war if captured.

> ***Geneva Convention of 1949 Definition.*** (GPW, art. 4; GWS, art. 13.) Combatants include: armed forces of a Party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of armed forces of a government not recognized by a detaining authority or occupying power.
>
> ***Protocol I Definition.*** Article 43 states that members of the armed forces of a party to the conflict, except medical personnel and chaplains, are combatants. Article 44(3) of GP I allows that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of the Law of War.

Unprivileged belligerents. May be treated as criminals under the domestic law of the captor. Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities.

Forbidden Conduct with Respect to Enemy Combatants and Nationals

It is especially forbidden to declare that no quarter will be given, or to kill or injure enemy personnel who have surrendered. H. IV Reg. Art. 23. It is also forbidden to kill or wound treacherously individuals belonging to the hostile nation or armed forces. H. IV Reg. Art. 23. Belligerents are likewise prohibited to compel nationals of the enemy state to take part in hostilities against their own country. H. IV art. 23.

Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec.1989, at 4.

Non-combatants. The law of war prohibits attacks on non-combatants. Among others, non-combatants include civilians, medical personnel, chaplains, and those out of combat, including prisoners of war and the wounded and sick.

Joint Publication 1-02

Department of Defense Dictionary of Military and Associated Terms

12 April 2001

(As Amended Through 14 August 2002)

[EXTRACTS]

JOINT PUBLICATION 1-02, *Department of Defense Dictionary of Military and Associated Terms* [current through 14 August 2002].

[p. 73] **civilian internee** 1. A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he or she has committed an offense against the detaining power. 2. A term used to refer to persons interned and protected in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention). Also called **CI.** See also **prisoner of war.**

[p.131] **detainee** A term used to refer to any person captured or otherwise detained by an armed force.

[No listing for "enemy combatant"]

Department of Defense

DIRECTIVE

NUMBER 2310.1

August 18, 1994

ASD(ISA)

SUBJECT: DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (Short Title: DoD Enemy POW Detainee Program)

References: (a) DoD Directive 5100.69, "DoD Program for Prisoners of War and Other Detainees," December 27, 1972 (hereby canceled)
(b) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, August 12, 1949
(c) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949
(d) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949
(e) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
(f) DoD Directive 5100.77, "DoD Law of War Program," July 10, 1979

1. REISSUANCE AND PURPOSE

This Directive:

1.1. Reissues reference (a) to update policy and responsibilities within the Department of Defense for a program to ensure implementation of the international law of war, both customary and codified, about EPOW, to include the enemy sick or wounded, retained personnel, civilian internees (CIs), and other detained personnel (detainees). Detainees include, but are not limited to, those persons held during operations other than war.

1.2. Designates the Secretary of the Army as the Executive Agent for the Department of Defense for the administration of the DoD EPOW Detainee Program.

2. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, and the Defense Agencies. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard when it is operating as a Military Service in the Navy.

3. POLICY

It is DoD policy that:

3.1. The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions (references (b) through (e)).

3.2. The U.S. Military Services shall be given the necessary training to ensure they have knowledge of their obligations under the Geneva Conventions (references (b) through (e)) and as required by DoD Directive 5100.77 (reference (f)) before an assignment to a foreign area where capture or detention of enemy personnel is possible.

3.3. Captured or detained personnel shall be accorded an appropriate legal status under international law. Persons captured or detained may be transferred to or from the care, custody, and control of the U.S. Military Services only on approval of the Assistant Secretary of Defense for International Security Affairs (ASD(ISA)) and as authorized by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War (references (d) and (e)).

3.4. Persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. Detainees may be interviewed for intelligence collection purposes at facilities and installations operated by U.S. Army Military Police.

4. RESPONSIBILITIES

4.1. The Under Secretary of Defense for Policy shall:

4.1.1. Have primary staff responsibility for the DoD EPOW Detainee Program.

4.1.2. Ensure that the ASD(ISA) shall provide for overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed plans, policies, and new courses of action with the DoD Components and other Federal Departments and Agencies as necessary.

4.2. The Secretary of the Army, as the DoD Executive Agent for the administration of the DoD EPOW Detainee Program, shall act on behalf of the Department of Defense in the administration of the DoD EPOW Detainee Program to:

4.2.1. Develop and provide policy and planning guidance for the treatment, care, accountability, legal status, and administrative procedures to be followed about personnel captured or detained by, or transferred from the care, custody, and control of, the U.S. Military Services.

4.2.2. Provide for an EPOW and CI camp liaison and assistance program on transfer of persons captured or detained by the U.S. Military Services.

4.2.3. Plan for and operate a U.S. EPOW and CI Information Center and its branches.

4.2.4. Under the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War (references (d) and (e)), on the outbreak of an armed conflict, or when persons are captured or detained by the U.S. Military Services in the course of the full range of military operations, ensure that a national-level information center exists that can fully serve to account for all persons who pass through the care, custody, and control of the U.S. Military Services.

4.2.5. Provide, in coordination with the ASD(ISA), appropriate reports to the OSD, the Chairman of the Joint Chiefs of Staff, and information or reports to other U.S. Government Agencies or Components, to include the Congress of the United States, or to the International Committee of the Red Cross.

4.2.6. Designate a single point of contact to provide necessary advice and technical assistance to the ASD(ISA), the Military Departments, and the Chairman of the Joint Chiefs of Staff.

4.2.7. Ensure that the Judge Advocate General of the Army, in coordination

with the Army General Counsel and the General Counsel of the Department of Defense, provides legal guidance within the Department of Defense about the DoD EPOW Detainee Program, to include review of plans and policies developed in connection with the program, and coordination of special legislative proposals and other legal matters with other Federal Departments, Agencies, or Components.

4.3. The Secretaries of the Military Departments shall:

4.3.1. Develop internal policies and procedures consistent with this Directive in support of the DoD EPOW Detainee Program.

4.3.2. Ensure that appropriate training, as required, under DoD Directive 5100.77 (reference (f)), is provided so that the principles of the Geneva Conventions (references (b) through (e)), and obligations under them, are known by members of their Departments.

4.3.3. Ensure that suspected or alleged violations of references (b) through (e) and other violations of the international law of war are promptly reported to the appropriate authorities and investigated in accordance with DoD Directive 5100.77 (reference (f)).

4.4. The Commanders of the Unified Combatant Commands shall:

4.4.1. Issue and review appropriate plans, policies, and directives as necessary in consonance with this Directive.

4.4.2. Provide for the proper treatment, classification, administrative processing, and custody of those persons captured or detained by the Military Services under their command and control.

4.4.3. Ensure that suspected or alleged violations of references (b) through (e) and other violations of the international law of war are promptly reported to the appropriate authorities and investigated in accordance with reference (f).

4.4.4. Ensure that personnel deployed in support of the range of military operations are cognizant of their obligations under references (b) through (e), and, more generally, the law of war.

4.5. The Chairman of the Joint Chiefs of Staff shall:

4.5.1. Provide a review of plans, policies, and programs of Commanders of

Combatant Commands to ensure conformance with this Directive.

4.5.2. Ensure that appropriate planning documents provide for and use intelligence estimates of numbers and rate of capture of EPOW, CIs, or other detainees.

4.5.3. Ensure that operational exercises routinely test capabilities to provide care, custody, and control of EPOW, CIs, and other detainees.

4.5.4. Ensure that a single point of contact is designated within the Chairman's organization to act on the policy, politico-military, and other issues involved in the execution of this Directive, and provide necessary liaison with OSD and the Department of State, the Services, and the Combatant Commands.

4.6. The Assistant to the Secretary of Defense for Public Affairs shall monitor the public affairs aspects of the DoD EPOW Detainee Program, provide public affairs policy guidance as appropriate, and provide coordination of public affairs matters with other Federal Departments, Agencies, or Components.

4.7. The Assistant secretary of Defense for Command, Control, Communications, and Intelligence shall ensure that the Director of the Defense Intelligence Agency shall:

4.7.1. Provide intelligence staff assistance in the review and development of operational and contingency plans for military use in foreign military or related operations, and support the effort to estimate the capture and rate of EPOW, CIs, or other detainees.

4.7.2. Provide appropriate and timely information from the intelligence community on policies and activities of foreign powers about their nationals or others in the custody of U.S. or allied forces.

4.7.3. Develop and provide evaluated analysis of enemy organization and policies designed to disrupt EPOW camp organizations through acts of sedition or other attempts for disorder by EPOW or CIs interned or otherwise in the custody of U.S. or allied forces.

4.7.4. Coordinate all intelligence and counterintelligence aspects of the DoD EPOW Detainee Program with other DoD Components and Federal Departments and Agencies as necessary.

5. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the Under Secretary of Defense for Policy within 120 days; forward two copies of changes to existing implementing documents within 90 days.

John M. Deutch
Deputy Secretary of Defense

Enclosures - 1
E1. Program Objectives

E1. ENCLOSURE 1

PROGRAM OBJECTIVES

E1.1.1. To ensure obligations and responsibilities of the U.S. Government are observed and enforced by the U.S. Military Services about EPOW, CIs, and other detainees, throughout the range of military operations.

E1.1.2. To ensure continuing policy development and planning for administration of activities in time of peace and war and the formulation of special legislative proposals where appropriate.

E1.1.3. To provide for necessary liaison and technical advice or assistance to allied detaining powers to monitor and report on the treatment of EPOW, CIs, and others captured or detained by the U.S. Military Services, including those who were transferred to the care, custody, and control of the U.S. Military Services, and who are subsequently transferred to another power in accordance with international law and the Geneva Convention for Protection of Civilian Persons in Time of War or the Geneva Convention Relative to the Treatment of Prisoners of War (references (e) and (d)).

E1.1.4. To ensure humane and efficient care and full accountability for all persons captured or detained by the U.S. Military Services throughout the range of military operations.

INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT
THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY
CHARLOTTESVILLE, VIRGINIA

LAW OF WAR WORKSHOP DESKBOOK

CDR Brian J. Bill, JAGC, USN
Editor

Contributing Authors

CDR Brian J. Bill, JAGC, USN

MAJ Geoffrey S. Corn, JA, USA

LT Patrick J. Gibbons, JAGC, USN

LtCol Michael C. Jordan, USMC

MAJ Michael O. Lacey, JA, USA

MAJ Shannon M. Morningstar, JA, USA

MAJ Michael L. Smidt, JA, USA

All of the faculty who have served with and before us and contributed to the literature in the field of the Law of War

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II. PRISONER OF WAR STATUS AS A MATTER OF LAW

A. Important Terminology.

1. Prisoners of War (POWs): A detained person as defined in Articles 4 & 5, GPW (FM 27-10, ¶61).

2. Civilian Internees: A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power (Joint Pub 1-02).[xvii]

3. Retained personnel: Medical and religious personnel retained by the Detaining power with a view toward assisting POWs (Art. 33, GPW).

4. Detainees: A term used to refer to <u>any</u> person captured or otherwise detained by an armed force (Joint Pub 1-02). It includes those persons held during operations other than war (DoDD 2310.1).

5. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere. *See* Art. 44, GCC and 1951 UN Convention Relating to the Status of Refugees.[xviii]

6. Dislocated civilian: A generic term that includes a refugee, a displaced person, a stateless person, an evacuee, or a war victim.[xix]

7. In sum, **always use the term detainee**: it is the broadest term without legal status connotations.

APPENDIX

UNITED STATES CENTRAL COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

REGULATION
NUMBER 27-13

07 FEB 1995

Legal Services
CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY
FOR ENEMY PRISONER OF WAR STATUS

1. PURPOSE. This regulation prescribes policies and procedures for determining whether persons who have committed belligerent acts and come into the power of the United States Forces are entitled to enemy prisoner of war (EPW) status under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW).

2. APPLICABILITY. This regulation is applicable to all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR.

3. REFERENCES.

a. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.

b. DA Pamphlet 27-1, Treaties Governing Land Warfare, December 1956.

c. FM 27-10, The Law of Land Warfare, July 1956.

d. J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross.

4. GENERAL.

a. Persons who have committed belligerent acts and are captured or otherwise come into the power of the United States Forces shall be treated as EPWs if they fall into any of the classes of persons described in Article 4 of the GPW (Annex A).

b. Should any doubt arise as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW Article 4, he shall be treated as an EPW until such time as his status has been determined by a Tribunal under this regulation.

c. No person whose status is in doubt shall be transferred from the power of the United States to another detaining power until his status has been determined by a Tribunal convened under GPW Article 5 and this regulation.

Note: This regulation has been re-formatted for this publication.

ADDENDUM D-3

5. DEFINITIONS.

a. Belligerent Act. Bearing arms against or engaging in other conduct hostile to United States' persons or property or to the persons or property of other nations participating as Friendly Forces in operations in the USCENTCON AOR.

b. Convening Authority. An officer designated by the Commander, U.S. Central Command (CENTCOM) to convene GPW Article 5 Tribunals.

c. Detainee. A person, not a member of the US Forces, in the custody of the United States Forces who is not free to voluntarily terminate that custody.

d. Enemy Prisoner of War (EPW). A detainee who has committed a belligerent act and falls within the one of the classes of persons described in the GPW Article 4.

e. Interpreter. A person competent in English and Arabic (or other language understood by the Detainee) who assists a Tribunal and/or Detainee by translating instructions, questions, testimony, and documents.

f. A Person Whose Status is in Doubt. A detainee who has committed a belligerent act, but whose entitlement to status as an EPW under GPW Article 4 is in doubt.

g. President of the Tribunal. The senior Voting member of each Tribunal. The President shall be a commissioned office serving in the grade of 04 or above.

h. Recorder. A commissioned officer detailed to obtain and present evidence to a Tribunal convened under this regulation and to make a record of the proceedings thereof.

i. Retained Persons. Members of the medical service and chaplains accompanying the enemy armed forces who come into the custody the US forces who are retained in the custody to administer to the needs of the personnel of their own forces.

j. Screening Officer. Any US military or civilian employee of the Department of Defense who conducts an initial screening or interrogation of persons coming into the power of the United States Forces.

k. Tribunal. A panel of three commissioned officers, at least one of who must be a judge advocate, convened to make determinations of fact, pursuant to GPW Article 5 and this regulation.

6. BACKGROUND.

a. The United States is a state-party to the four Geneva Conventions of 12 August 1949. One of these conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. The text of this convention may be found in DA Pamphlet 27-1.

b. By its terms, the GPW would apply to an armed conflict between the United States and any country.

ADDENDUM D-4

c. The GPW provides that any person who has committed a belligerent act and thereafter comes into the power of the enemy will be treated as an EPW unless a competent Tribunal determines that the person does not fall within a class of persons described in GPW Article 4.

d. Some detainees are obviously entitled to EPW status, and their cases should not be referred to a Tribunal. These include personnel of enemy armed forces taken into custody on the battlefield.

e. Medical personnel and chaplains accompanying enemy armed forces are not combatants; therefore, they are not EPWs upon capture. However, they may be retained in custody to administer to EPWs.

f. When a competent Tribunal determines that a detained person has committed a belligerent act as defined in this regulation, but that the person does not fall into one of the classes of persons described in GPW Article 4, that person will be delivered to the Provost Marshal for disposition as follows:

(1) If captured in enemy territory. In accordance with the rights and obligations of an occupying power under the Law of Armed Conflict (See reference at paragraph 7c).

(2) If captured in territory of another friendly state. For delivery to the civil authorities unless otherwise directed by competent US authority.

7. RESPONSIBILITIES.

a. All US military and civilian personnel of the Department of Defense (DoD) who take or have custody of a detainee will:

(1) Treat each detainee humanely and with respect.

(2) Apply the protections of the GPW to each EPW and to each detainee whose status has not yet been determined by a Tribunal convened under this regulation.

b. Any US military or civilian employee of the Department of Defense who fails to treat any detainee humanely, respectfully or otherwise in accordance with the GPW, may be subject to punishment under the UCMJ or as otherwise directed by competent authority.

c. Commanders will:

(1) Ensure that personnel of their commands know and comply with the responsibilities set forth above.

(2) Ensure that all detainees in the custody of their forces are promptly evacuated, processed, and accounted for.

(3) Ensure that all sick or wounded detainees are provided prompt medical care. Only urgent medical reasons will determine the priority in the order of medical treatment to be administered.

ADDENDUM D-5

(4) Ensure that detainee's determined not to be entitled to EPW status are segregated from EPWs prior to any transfer to other authorities.

d. The Screening Officer will:

(1) Determine whether or not each detainee has committed a belligerent act as defined in this regulation.

(2) Refer the cases of detainees who have committed a belligerent act and who may not fall within one of the classes of persons entitled to EPW status under GPW Article 4 to a Tribunal convened under this regulation.

(3) Refer the cases of detainees who have not committed a belligerent act, but who may have committed an ordinary crime, to the Provost Marshal.

(4) Seek the advice of the unit's servicing judge advocate when needed.

(5) Ensure that all detainees are delivered to the appropriate US authority, e.g., Provost Marshal, for evaluation, transfer or release as appropriate.

e. The USCENTCOM SJA will:

(1) Provide legal guidance, as required to subordinate units concerning the conduct of Article 5 Tribunals.

(2) Provide judge advocates to serve on Article 5 Tribunals as required.

(3) Determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

(4) Retain the records of all Article 5 Tribunals conducted. Promulgate a Tribunal Appointment Order IAW Annex B of this regulation.

f. Tribunals will:

(1) Following substantially the procedures set forth at Annex C of this regulation, determine whether each detainee referred to that Tribunal:

(a) Did or did not commit a belligerent act as defined in this regulations and, if so, whether the detainee

(b) Falls or does not fall within one of the classes of persons entitled to EPW status under Article 4 of the GPW.

(2) Promptly report their decisions to the convening authority in writing.

ADDENDUM D-6

g. The servicing judge advocate for each unit capturing or otherwise coming into the possession of new detainees will provide legal guidance to Screening Officers and others concerning the determination of EPW status as required.

8. PROPONENT. The proponent of this regulation is the office of the Staff Judge Advocate, CCJA. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to United States Central Command, CCJA, 7115 South Boundary Boulevard, MacDill Air Force Base, Florida 33621-5101.

FOR THE COMMANDER IN CHIEF:

R. L. NEAL
LtGen, USMC
Deputy Commander in Chief and
Chief of Staff

OFFICIAL:
ROBERT L. HENDERSON
LTC, USA
Adjutant General

DISTRIBUTION:
A (1 Ea)

ADDENDUM D-7

APPENDIX C

TRIBUNAL PROCEDURES

1. JURISDICTION. Tribunals convened pursuant to this regulation shall be limited in their deliberations to the determination of whether detained persons ordered to appear before it are entitled to EPW status under the GPW.

2. APPLICABLE LAW. In making its determination of entitlement to EPW status the Tribunal should apply the following:

a. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of Warfare on Land, 18 October 1907; 36 Stat. 2277; TS 539; 1 Bevans 631.

b. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949; 6 UST 3114; TIAS 3362; 75 UNTS 31.

c. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces, 12 August 1949; 6 UST 3217; TIAS 3363; 75 UNTS 85.

d. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August1949; 6 UST 3316; TIAS 3364; 75 UNTS 135.

e. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; 6 UST 3516; TIAS 3365; 75 UNTS 287.

3. COMPOSITION.

a. Interpreter. Each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and Arabic (or other language understood by the Detainee). The interpreter shall have no vote.

b. Recorder. Each Tribunal shall have a commissioned officer appointed by the President of the Tribunal to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The recorder shall have no vote.

c. Tribunal. A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation. The senior member of each Tribunal shall be an officer serving in the grade of O-4 or above and shall be its President.

4. POWERS OF THE TRIBUNAL. The Tribunal shall have the power to:

a. Determine the mental and physical capacity of the detainee to participate in the hearing.

ADDENDUM D-8

b. Order U.S. military witnesses to appear and to request the appearance of civilian witnesses.

c. Require the production of documents and real evidence in the custody of the United States and to request host nation assistance in the production of documents and evidence not in the custody of the United States.

d. Require each witness to testify under oath. A form of oath for Muslim witnesses is attached (Annex E). The oath will be administered by the judge advocate member of the Tribunal.

5. RIGHTS OF THE DETAINEE.

a. The detainee shall have the right to be present at all open sessions of the Tribunal.

b. The detainee may not be compelled to testify.

c. The detainee shall not have the right to legal counsel, however, the detainee may have a personal representative assist him at the hearing if that personal representative is immediately available.

d. The detainee shall be informed, in Arabic (or other language understood by the Detainee) of the purpose of the Tribunal, the provisions of GPW Articles 4 and 5, and of the procedure to be followed by the Tribunal.

e. The detainee shall have the right to present evidence to the Tribunal, including the testimony of witnesses who are immediately available.

f. The detainee may examine and cross-examine witnesses, and examine evidence. Documentary evidence may be masked, as necessary, to protect sensitive sources and methods of obtaining information.

g. The detainee shall be advised of the foregoing rights at the beginning of the hearing.

6. APPLICABLE PROCCEDURE.

a. Admissibility of Evidence. All evidence, including hearsay evidence, is admissible. The Tribunal will determine the weight to be given to evidence considered.

b. Control of Case. The hearing is not adversarial, but rather is a fact-finding procedure. The President of the Tribunal, and other members of the Tribunal with the President's consent, will interrogate the detainee, witnesses, etc. Additionally, the President of the Tribunal may direct the Recorder to obtain evidence in addition to that presented.

c. Burden of Proof.

(1) Under this regulation, a matter shall be proven as fact if the fact-finder is persuaded of the truth of the matter by a preponderance of the evidence.

ADDENDUM D-9

(1) A statement of the time and place of the hearing, persons present, and their qualifications.

(2) A brief resume of the facts and circumstances upon which the decision was based.

(3) A summary or copies of all evidence presented to the Tribunal.

c. In cases in which the detainee has been determined to be entitled to EPW status no record of the proceedings is required.

d. The original and one copy of the Tribunal's decision and all supporting documents will be forwarded by the President to the convening authority within one week of the date of the announcement of the decision.