03-2235 & 2438

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE PADILLA, (Real Party in Interest), by Donna R. Newman, as *Next Friend of Jose Padilla,*
Petitioners / Appellees / Cross-Appellants

versus

DONALD RUMSFELD, Secretary of Defense,
Respondent / Appellant / Cross-Appellee

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
and
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
In Support of *Petitioners / Appellees / Cross-Appellants*

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Rule 26.1 - Disclosure Statement
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

PARTIES and AMICI:

Except for *Amici Curiae* herein, the National Association of Criminal Defense Lawyers [NACDL] and the New York Association of Criminal Defense Lawyers [NYSACDL], all parties appearing before the District Court below are listed in Appellant's Brief.

RULE 26.1 DISCLOSURES:

1. The NACDL is a not-for-profit, professional 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. The NYSACDL is a not-for-profit professional Bar Association for the criminal defense bar of New York, and has approximately one thousand subscribed members. It is an affiliate organization of the NACDL.

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. The NYSACDL 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: None.

_____ _____, 2003

DONALD G. REHKOPF, JR., Esq.
NACDL Military Law Committee Co-Chair
Vice President, NYSACDL

INTERESTS OF AMICI CURIAE

The *New York State Association of Criminal Defense Lawyers* [NYSACDL], is a not-for-profit corporation with a subscribed membership of approximately 1,000 attorneys, which include private practitioners, public defenders, legal aid, and law professors. It is a recognized State Affiliate of the *National Association of Criminal Defense Lawyers.*

The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; to protect individual rights and improve the practice of criminal law; to enlighten the public on such issues; and to promote the exchange of ideas and research, to include appearing as *Amicus Curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of almost 11,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 plus state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field

of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

Amici are the preeminent criminal defense bar associations in New York and nationally, respectively. We have been involved as *amici curiae* at every stage of the proceedings below and filed three briefs with the District Court on the issues herein.

The interest of *Amici Curiae* in this case arises due to the fundamental nature of the constitutional issues presented. The basic right of a citizen to legal counsel and to communicate freely with that attorney has been absolutely debilitated in this case. Furthermore, the constitutional basis for depriving a citizen of his liberty without any due process of law, is a matter of grave constitutional concern - especially when such confinement is done in a matter that has now held the citizen *incommunicado* in a military prison for ***fourteen*** months. As such NYSACDL and NACDL respectfully requests *Amici Curiae* status herein.

PRELIMINARY STATEMENT

Amici Curiae respectfully submit this Brief in response to *both* the Appellant's and Cross-Appellants' initial briefs. We first address the Respondent's arguments as to jurisdiction [Point I], "next friend" status [Point II], and Mr. Padilla's entitlement to meaningful access to his attorney [Point III]. We then address Mr. Padilla's arguments that the President lacks any *constitutional* authority to declare him an "enemy combatant" and thus, militarily detain him *incommunicado* [Point IV]. We next address the term "enemy combatant" itself from a jurisprudential perspective and as applied to Mr. Padilla [Point V]. Finally, we suggest an appropriate constitutional balance for resolving the issues herein [Point VI].

I. THE DISTRICT COURT BELOW HAD JURISDICTION.

A. Subject Matter Jurisdiction.

It is beyond cavil that a District Court has subject matter jurisdiction over a *habeas corpus* proceeding. Art. III, §§ 1 and 2, U.S. Const. 28 U.S.C.§ 1331, confers "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 2241, of Title 28, U.S.C., specifically confers such jurisdiction for *Writs of Habeas Corpus. See, Zadvydas v. Davis,* 533 U.S. 678 (2001); and *INS v. St. Cyr,* 533 U.S. 289, at 298 (2001).

Jurisdiction also attaches pursuant to 28 U.S.C. § 1343(a)(4), which provides original jurisdiction, "To . . . secure equitable or other relief under any Act of

Congress providing for the protection of civil rights . . . ."[1] and, jurisdiction also lies under 28 U.S.C. § 1356, as the "person" of the Petitioner certainly has been "seized" within the United States.

Lastly, the actions of the *government* secured jurisdiction (and venue), in the Court below via 18 U.S.C. 3238 [extraterritorial jurisdiction "in the district in which the offender . . . is first brought."] *see, United States v. Yousef,* 327 F.3d 56, at 114-15 (2nd Cir. 2003). The government should not now be heard to complain about a jurisdictional nexus that it created.

B. *In Personam* Jurisdiction.

Rule 81(a)(2), F.R.Civ.P., states: "The writ of habeas corpus . . . shall be directed to the person having custody[[2]] of the person detained."[3] This is also the language of 28 U.S.C. § 2242.

There was no issue as to the District Court's jurisdiction pertaining to the validity of Petitioner's detention under the Material Witness Order. The government was detaining Petitioner, and the District Court had subject matter jurisdiction, *in personam* jurisdiction and venue to adjudicate that controversy. *Yousef, supra.* While

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[1] *See* 18 U.S.C. § 4001(a).

[2] "Custody" in the ***military*** context is quite different than post-conviction custody, discussed *infra.*

[3] As discussed in detail *infra, Amici* note that in ***military*** *habeas corpus* cases, it has long been accepted federal practice that the Service Secretary or Secretary of Defense be designated as the appropriate Respondent. *See, e.g., Burns v. Wilson,* 346 U.S. 127 (1953).

that matter was pending, however, the President, acting as Commander in Chief, issued an Order directing that Petitioner's custody be transferred to the military.

Respondent is the Secretary of Defense. Thus, 28 U.S.C. § 1346(a)(2), confers jurisdiction over him. Furthermore, under a Court's Supplemental Jurisdiction, 28 U.S.C. § 1367(a), the present claims - the continued illegal detention of the Petitioner - are totally related to the original claims under litigation on the Material Witness issues. It is still the United States government who is detaining Petitioner, just a different federal agency. Indeed, "service of process" may be had pursuant to Rule 4(e), F.R.Civ.P., in any judicial district and in any event, Rule 4(i), F.R.Civ.P., governs service upon the respondent.

In personam jurisdictional issues flow from Fifth Amendment, Due Process concerns. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584 (1999). No such concerns burden the Respondent here, especially in light of 28 U.S.C. §§ 1346 and 2241. Nor is this a case of *forum non conveniens.* Petitioner was before the District Court in a pending matter and the Respondent *ex parte* caused his physical removal out of the Southern District. That act of removal without notice and an opportunity to seek a judicial stay, should not now give rise to a complaint that the District Court could not *continue* to exercise its jurisdiction over Mr. Padilla's claims of illegal and unconstitutional imprisonment. *Ex parte Endo,* 323 U.S. 283 (1944).

Finally, the *All Writs Act,* 28 U.S.C. § 1651, provides that the Court "may issue all writs necessary ***or appropriate*** in aid of [its] jurisdiction. . . ." [emphasis added].

Padilla v. Bush, 233 F.Supp 2d 564, at 601 (SD NY 2002).

C. The Secretary of Defense Is The Proper Respondent.

Respondent has contested his status as a proper Respondent. There is a substantial body of case law, in which the Solicitor General's Office participated, that strongly suggests otherwise for *military* habeas corpus cases. *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), for example, had the Secretary of the Air Force, Quarles, as lead Respondent, and if the Respondent's position is correct, then the Supreme Court should have dismissed Toth's "next friend" petition since Toth was confined in a military brig in Korea.[4]

A long line of Supreme Court cases are consistent with *Toth.* *Amici* respectfully suggest that Respondent errs in his jurisdictional analysis by failing to conceptually differentiate the cases that he cites[5] — *post*-conviction attacks by *convicted* prisoners who are incarcerated pursuant to a "judgment" of a court, committing them to a prison sentence — from the reality of the case at bar. Here, Petitioner is incarcerated *incommunicado*, ***not*** by a valid court order or judgment, *e.g.,* a conviction, but by a *military order* of the Commander-in-Chief absent any Due

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[4]*Compare, Goldsmith v. Clinton, et al.,* 48 M.J. 84 (CAAF, 1998), *rev'd Clinton v. Goldsmith*, 526 U.S. 529 (1999), where *both* the President and Secretary of Defense were named Respondents.

[5]One exception is *Monk v. Martin, Sec'y of the Navy,* 793 F.2d 364 (D.C. Cir. 1986), which is neither binding nor persuasive in light of Supreme Court precedent to the contrary, which *Amici* will address *infra.* *See also, Monk v. Zelez,* 901 F.2d 885 (10th Cir. 1990) [granting *habeas* relief].

Process. Thus, Respondent's legal authority is not only irrelevant, but regrettably misleads the Court. The situation is drastically different in "military" cases — the area of jurisprudence that *Amici Curiae* respectfully submits is both controlling, but also supported the proper exercise of the District Court's *continuing* jurisdiction. Respondent's position — if correct — ultimately could result in *no* Court having *habeas corpus* jurisdiction, simply by the *fiat* of the Commander in Chief confining "detainees" in United States military prisons overseas. That of course is not the law.[6] *Toth, supra; St. Cyr, supra* at 298-99.

Burns v. Wilson, 346 U.S. 127 (1953) [post-conviction *habeas* action], begins by noting the *substitution* of Secretary of Defense Wilson for his predecessor. Why substitute the lead Respondent if he is not a proper party to begin with? *Burns* further confirms the plenary power of Congress; "Congress has taken great care . . . to define the rights of those subject to military law. . . ." 346 U.S. at 140. If Petitioner is subject to ***military*** confinement, it *must* be based on some valid *Congressional* enactment.

In *Parisi v. Davidson,* 396 U.S. 1233 (1969), *further rev.,* 405 U.S. 34 (1972), not only was the Secretary of the Army a Respondent, but in denying a stay

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[6] *Amici* note that this is the Government's position in *Odah v. United States,* __F.3d__, 2003 U.S. App. *LEXIS* 4250 (DC Cir. 2003), dealing with the Guantanamo "detainees." That opinion too narrowly restricts the plain language of 28 U.S.C. § 1331, ignored § 1356, and is distinguishable because, *inter alia,* it did not involve citizens.

application in a *non-criminal*, military *habeas* proceeding presented to Justice Douglas, he noted:

> [A]s the Solicitor General points out, the Secretary of the Army is a party to his action; hence the case will not become moot by the deployment [of Parisi].

Parisi had been ordered to Vietnam during the pendency of his *habeas corpus* action and was obviously concerned about jurisdictional issues if he was forced to leave the country. Because of the Solicitor General's admissions, as well as assurances to the lower court that the Respondents' would "produce" Parisi in response to a Court Order, the stay was denied. The military hierarchy requires obedience to orders; that is a given.[7] The military order herein by the Commander in Chief,[8] simply must be obeyed by *all* of his subordinates ***absent*** a judicial challenge that such order is illegal or constitutionally defective. That is the very purpose of this *habeas corpus* action. Here, per the Solicitor General's argument in *Parisi, supra,* Respondent Rumsfeld — as a party herein — could clearly effectuate a *habeas corpus* Order of the Court below.

A plethora of Supreme Court cases demonstrate that it has long been an

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[7]*See* 10 U.S.C. § 892, making it a crime to violate "lawful" orders in the military.

[8]That Secretary Rumsfeld has the requisite "contacts," within the District Court's territorial jurisdiction, is easily demonstrated by the number of Armed Forces Recruiting Stations within the District. This Court has upheld similar jurisdictional grounds for a military *habeas* case, in *Arlen v. Laird, Sec'y of Defense,* 451 F.2d 684 (2nd Cir. 1971). *See also, Lantz v. Seamans, Sec'y of Air Force,* 504 F.2d 423 (2nd Cir. 1974).

accepted jurisdictional practice to denominate the *Secretary of Defense* or applicable Service Secretary as a named Respondent. *See, e.g., Strait v. Laird, Sec'y of Defense,* 406 U.S. 341(1972); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Schlesinger, Sec'y of Defense v. Councilman,* 420 U.S. 738 (1975); *Middendorf, Sec'y of the Navy v. Henry,* 425 U.S. 25 (1976).

Respondent's reliance on *Monk v. Sec'y of the Navy,* 793 F.2d 364 (D. DC 1986), is misplaced. It also is baffling in view of their argument that *only* Commander Marr is a proper respondent, when the Secretary of the Navy is styled as the lead respondent in *Monk!* *Monk* brought a civil suit seeking *inter alia* monetary damages and declaratory relief *after* he had been court-martialed and convicted. Thus, there was a presumptively valid court "judgment" confining him[9] and he had exhausted his direct appeals. *Monk's* holding that a military prisoner can *only* bring a federal *habeas* action in the District where confined,[10] relies on the faulty logic that

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[9]Monk ultimately obtained *habeas* relief, *see, Monk v. Zelez, supra.*

[10]To the extent that *Monk* suggested that Virginia, not the District of Columbia, was the proper venue to sue, that argument plainly ignores the Constitutional doctrinee of our "seat of government," found in Article I, § 8, cl. 17, U.S. Const. *See, e.g., Crandall v. Nevada,* 73 U.S. 35, at 44 (1867):

> ***This government has necessarily a capital established by law, where its principal operations are conducted****. . . .* ***Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation***, to which all its citizens have a right to resort to claim justice at its hands. [emphasis added].

The *Secretary of Defense* is part of the Executive Department, 10 U.S.C. § 111(a).

federal "civilian" prisoners are similarly situated to "military" prisoners. They are not. Civilian prisoners[11] are in jail pursuant to a Court Order - either pretrial or after conviction.[12] Military prisoners in ***pre-trial*** situations (or detainees), such as Petitioner are imprisoned *not* by a Court Order with attendant due process, but by the "order" of a proper commander.[13] As *United States ex rel. Toth v. Quarles, supra*, holds, the legality of that order and subsequent detention is indeed subject to challenge via *habeas corpus.*[14] *See generally Parisi v. Davidson, supra,* and *Arlen v. Laird, supra.* Nor has Respondent identified any "clear statement of congressional intent" to limit *habeas* jurisdiction herein. *St. Cyr, supra* 298.

Of relevance is *Ex Parte Hayes v. Sec'y of Army,* 414 U.S. 1327 (1973), a decision in Chambers by Justice Douglas. Hayes, a U.S. soldier stationed in

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[11]*Amici* distinguishes immigration cases from this category.

[12]The one exception that *Amici Curiae* would note, are those confined via "civil commitment" proceedings, something that mandates Due Process. *See, e.g., Kansas v. Crane,* 534 U.S. 407 (2002) [jury trial for civil commitment]; *accord*, *Kansas v. Hendricks,* 521 U.S. 346 (1997); and *Allen v. Illinois,* 478 U.S. 364 (1986) ["strict procedural safeguards" provided]. *Amici* submit that Petitioner has not even been afforded minimal due process in his "military" confinement.

[13]As discussed *infra*, *Amici* submit that Commander Marr is not legally a "proper" commander under either military or *habeas* jurisprudence.

[14]*Compare*, *Application of Yamashita,* 327 U.S. 1 (1946), where General Yamashita was tried and convicted by a military commission of war crimes while commanding Japanese forces in the Philippines during WW II. While the Supreme Court denied the *writ* on the merits, it did not dismiss it for jurisdictional grounds, as in *Johnson v. Eisentrager,* 339 U.S. 763 (1950) [*habeas* jurisdiction denied to German POW's, confined in Germany].

Germany, filed an original *habeas corpus* application with the Supreme Court. At the *suggestion* of the ***Solicitor General***, Justice Douglas transferred the case to the District Court for the District of Columbia pursuant to 28 U.S.C. § 2241(b). Respondent "suggested" below that this case should be transferred to the appropriate district in South Carolina. The government however, neglects to advise how the jurisdictional issues they raise pertaining to Respondent Rumsfeld here, would not also plague the federal court in South Carolina.

Finally, Respondent's citation to and reliance upon *Schlanger v. Seamans,* 401 U.S. 487 (1971), is misplaced.[15] While they argue in the footnote at page 30 of their Brief that *Strait v. Laird*, 406 U.S. 341 (1972), provided a "fact-specific holding. . . ." the reality is that the Court in *Strait, supra,* actually held that in the military context, it was *Schlanger* that provided the factually unique scenario. Respondent's "territorial jurisdiction" arguments[16] were rejected in any event *after Schlanger,* in *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484 (1973) [the "territorial jurisdiction" argument is "not compelled . . . by the language of the statute [§ 2241] . . . ." *Id.,* 494]. A fair reading of *Braden* shows that the Court fashioned a far broader ruling than what Respondent claims here. "So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction'

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[15]It is puzzling to see the government rely on a *habeas corpus* case where that Respondent, Seamans, was the Secretary of the Air Force. Such certainly defeats their argument that Secretary Rumsfeld is *not* a proper Respondent herein.

[16]Brief of Respondent-Appellant, at 25 *et seq*.

requiring that the prisoner be brought before the court . . . ." 410 U.S. at 495, and in ***military habeas corpus*** cases, "petitioners' absence from the district does ***not*** present a jurisdictional obstacle to the consideration of the claim." *Id.,* at 498 [citations omitted].

D. Commander Marr's Status.

Petitioner was required by Rule 81(a)(2), F.R.Civ.P., to name Commander Melanie Marr[17] as a Respondent. But, it is disturbing to read Respondent's argument:

> Jurisdiction in a habeas proceeding lies only in the district court with territorial jurisdiction over the detainee's immediate custodian. Padilla's immediate custodian is Commander Marr, commanding officer of the Naval Consolidated Brig, Charleston [South Carolina]. [*Brief of Respondent-Appellant,* p. 15].

because that argument is quite wrong. Counsel for Respondent had to have known of Department of Defense Directive [DODD] 2310.1 (1994), entitled, *DoD Program for Enemy Prisoners of War (EPOW) and other Detainees,*[18] which at paragraph 3.3, clearly states:

> 3.3. Captured or detained personnel shall be accorded an appropriate legal status under international law.[[19]] Persons

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[17]Ms. Marr is both a "Commander" by virtue of her military rank [0-5], as well as her position. She is ***not*** however, lawfully Petitioner's "commander," as he is a civilian. Furthermore, under the UCMJ, a Brig "Commander" is ***not*** analogous to a warden of a federal prison.

[18]Available [last accessed, July 21, 2003] in Adobe "pdf." format at: http://www.dtic.mil/whs/directives/corres/pdf/d23101_081894/d23101p.pdf

[19]There is no evidence that this has been done. "International law" states that

> 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)). [emphasis added].

Thus, pursuant to a binding and mandatory Directive from Respondent Rumsfeld's own office, Commander Marr is powerless to do *anything* affecting Petitioner that is ***not*** ordered by either the appropriate Assistant Secretary of Defense, or his/her superiors. Furthermore, DODD 2310.1, paragraph 4.2, designates the Secretary of the *Army* as the "DoD Executive Agent for the administration of the DoD EPOW Detainee Program. . . ."[20]

It is abundantly clear that the Secretary of Defense is indeed *the* proper respondent, while Commander Marr lacks any authority or discretion to do anything but "follow orders." As Chief Justice Taney discovered in *Ex Parte Merryman,* 17 Fed.Cas. 144 (C.C.D. Md. 1861), a "brig" commander upon an order from the

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once captured, *disputed* POW status must be decided by an "appropriate tribunal," such as this Court. *See, The 1949 Geneva Convention Relative to the Treatment of Prisoners of War,* [GPW] http://www.unhchr.ch/html/menu3/b/91.htm. *See also, Convention Relative to the Protection of Civilian Persons in Time of War,* http://www.unhchr.ch/html/menu3/b/92.htm [last accessed, July 28, 2003].

[20]*Amici* find it curious that in view of this language that the other "enemy combatants" — Hamdi and al-Marri — are also imprisoned in ***Navy*** Brigs within the Fourth Circuit.

Commander in Chief, may not comply even with a valid *writ of habeas corpus*.[21]

To understand why Respondent Marr lacks authority in view of both the Commander in Chief's order and the DoD Directive, *Amici* note that under military law — the *Uniform Code of Military Justice*[22] and the *Manual for Courts-Martial*[23] — that it would be a crime for her not to follow or comply with such. Two specific provisions of the UCMJ apply to Commander Marr:

> **10 U.S.C. § 892. Article 92. Failure to obey order or regulation**
>
> Any person subject to this chapter who -
> (1) violates or fails to obey any lawful general order or regulation;
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
> * * * * *
> shall be punished as a court-martial may direct.

> **10 U.S.C. § 896. Article 96. Releasing prisoner without proper authority**
>
> Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge . . . . shall be punished as a court-martial may direct, ***whether or not the prisoner was committed in strict compliance with law.*** [emphasis added].

To understand these statutes, one turns to the *Manual for Courts-Martial* [MCM] for guidance. The MCM contains the *Rules for Courts-Martial* [RCM], the procedural guidelines used to implement the UCMJ. Two rules govern this situation:

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[21]The Court's contempt power, was not addressed in *Merryman, supra.*

[22]10 U.S.C. § 801 *et seq.*

[23]The *Manual for Courts-Martial (2000 ed)* [hereinafter "MCM"], is an Executive Order, promulgated pursuant to 10 U.S.C. § 836.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* * * * * * Pretrial restraint may consist of conditions on liberty . . . arrest, or confinement.

* * * * *

(4) *Confinement.* Pretrial confinement is physical restraint, ***imposed by order of competent authority***, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.

(b) *Who may order pretrial restraint.*

(1) *Of **civilians** and officers.* Only a commanding officer to whose authority the civilian . . . is subject may order pretrial restraint of that civilian . . . .

* * * * *

(g) *Release.* Except as otherwise provided in R.C.M. 305, ***a person may be released from pretrial restraint by a person authorized to impose it.*** **. . . .** [emphasis added].

Rule 305. Pretrial confinement

(a) *In general.* Pretrial confinement is physical restraint, ***imposed by order of competent authority***, depriving a person of freedom pending disposition of charges.

* * * * *

(c) *Who may order confinement. See* R.C.M. 304(b).

* * * * *

(g) *Who may direct release from confinement.* Any commander of a prisoner[24], an officer appointed under regulations of the Secretary concerned . . . may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate

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[24]Commander Marr is ***not*** Petitioner's "commander" even though she may be the Brig Commander. For *pre-conviction* purposes, Petitioner as a ***civilian,*** has no commander. Absent declaring Petitioner a POW, military law requires a nexus, *i.e.,* a military "status," before one can have a military "commander." *See generally, Solorio v. United States,* 483 U.S. 435 (1987). Calling Petitioner an "enemy combatant" does *not* create any military "status," or subject one to military jurisdiction, either under 10 U.S.C. § 802, or *Solorio, supra.*

> or higher commander of the prisoner and the commander of the installation[25] on which the confinement facility is located.

In view of the fact that (a) Petitioner was ordered into military confinement by the Commander in Chief; (b) by virtue of the governing regulation, DODD 2310.1's express language; and (c) the simple fact that Petitioner is a civilian, even if he is ultimately adjudicated an "unlawful belligerent," Commander Marr simply is not his "custodian" for purposes of military law. Petitioner's "custodian" for the instant *habeas* application is as Rule 304(b), RCM, states, the person who ordered Petitioner's military confinement, either the President or Respondent. And, per Rule 305(g), RCM, Commander Marr may not direct his release.

Amici would note that for persons subject to military law, *i.e.,* the UCMJ,[26] it does not specifically provide for direct *habeas corpus* applications. The Supreme Court has indicated that such relief must be sought from the United States Court of Appeals for the Armed Forces [US CAAF].[27] *See Boyd v. Bond,* 395 U.S. 683, 693

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[25]Even if the Government's logic is correct, Commander Marr still would not be authorized to "release" Petitioner as the Government must concede that she is *not* the commander of the "installation," [base] where the Brig is located. That would be the Commander, Naval Weapons Station, Charleston, SC. The "Brig" is a sub-unit of the Base, see: http://www.nwschs.navy.mil/ [go to "FACTS" link, and scroll down to "Tenant Units][last accessed, July 1, 2002].

[26]*Amici* note that absent POW status, per 10 U.S.C. § 802(a), ***no category*** of detention is recognized by ***Congress*** for Petitioner's confinement.

[27]Review of that Court's decisions is to the Supreme Court through *certiorari.* 10 U.S.C. § 867a. The CAAF is an Article I, civilian court in Washington, DC, and thus its jurisdiction is limited. *See* 10 U.S.C. § 941 *et seq.*

et seq., and footnote 7 (1969). Thus, ***military*** persons illegally confined, obtain *habeas* relief through the *All Writs Act,* 28 U.S.C. § 1651(a). In view of Petitioner's ***non-military status,*** the U.S. Court of Appeals for the Armed Forces would *not* have jurisdiction to entertain an "extraordinary writ" in the nature of *habeas corpus,*[28] especially in view of the restrictive interpretation given by the Supreme Court in *Clinton v. Goldsmith, supra.*

II. ATTORNEY NEWMAN WAS PROPERLY FOUND TO HAVE A SUFFICIENT "ATTORNEY-CLIENT" RELATIONSHIP WITH MR. PADILLA, TO ACT AS HIS "NEXT FRIEND" IN THIS LITIGATION.

Amici respectfully submit that the *findings* and the holding that Ms. Newman is a proper "next friend," by the Court below, are supported in the record and were not an abuse of the Court's discretion. *Padilla, supra,* at 575 *et seq.*

> Here, Newman had a preexisting relationship with Padilla that involved directly his apprehension and confinement. She had conferred with him over a period of weeks in aid of an effort to end that confinement. She submitted at least one affidavit that he signed, and was engaged in attacking the legal basis of his confinement when he was taken into custody by the Defense Department. She is at once the person most aware of his wishes in this case and the person best suited to try to achieve them. It is of no significance whatever that when she and Padilla formed their relationship he was in the custody of the Justice Department and now he is in the custody of a different executive department. The legal issues may have changed, but the nature of the relationship between Newman and her

[28] *Compare, Waller v. Swift,* 30 MJ 139 (CMA 1990) [*habeas* granted]; *Wakin v. Carns,* 24 MJ 407 (CMA 1987) [show cause order issued to government].

client has not. *Id.,* at 576.

See also, Padilla v. Rumsfeld, 256 F.Supp 2d 218, at 221 (S.D. NY 2003) [noting skepticism of the government's challenging next friend status]. *Amici* submit that the decision of the Court below on this issue was correctly decided on both the facts[29] and the law, as demonstrated herein.

A. *Whitmore* Issues.[30]

1. Judicial Estoppel.

The Government first admits that the President directed that the Petitioner be transferred to the military's "control."[31] However, the Government then attacks counsel's "next friend" status. Yet, they fail to mention one salient fact - the Respondent is *precluding* Ms. Newman from getting her client's signature by holding Mr. Padilla *incommunicado.* Thus, the Government hardly has "clean hands,"[32] in this matter and should be *judicially estopped* from contesting counsel's "next friend"

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[29]The government did not contest the underlying facts on this issue below and provided no *evidence* justifying a different result.

[30]*Whitmore v. Arkansas,* 495 U.S. 149 (1990).

[31]*Amici Curiae* submit that the Commander in Chief has no ***lawful*** authority to confine Petitioner, *unless* Petitioner is a *bona fide* Prisoner of War, which Respondent rejects. Respondent has no independent legal authority to ***militarily*** imprison any civilian, citizen or alien, absent a *bona fide* declaration of *martial law* by the President. But even then, "Persons detained in custody may seek, by writ of habeas corpus, to be released. . . ." F.B. Wiener, *A Practical Manual of Martial Law,* 62 (Harrisburg, PA: Military Service Pub. Co., 1940).

[32]*See, e.g., Malarkey v. Texaco, Inc.,* 983 F.2d 1204, 1215 (2nd Cir. 1993).

status. *See, New Hampshire v. Maine,* 532 U.S. 742, at 749-52 (2001).[33] Ms. Newman was and remains Mr. Padilla's attorney and it is simply the Government's actions, *both* in removing him to a military jail and then confining him *incommunicado*, that affirmatively precluded her from having her client personally sign and verify the *Writ* petition herein.

Furthermore, under the circumstances, *i.e.,* the Government's removal and *incommunicado* incarceration, *Amici Curiae* respectfully suggest that resolution is appropriate as the *Federal Rules of Civil Procedure* contemplate: apply Rule 17(a), F.R.Civ.P.,[34] and either allow counsel to obtain her client's signature to "cure" the issue, or equitably bar the Government from asserting this unseemly position. Congress plainly considered the applicability of the *Federal Rules of Civil Procedure* as 28 U.S.C. § 2242 makes reference to them in the context of amending or supplementing the application, to wit: "It may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

2. Attorney Newman Has Proper "Next Friend" Status.

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[33]Lest there be any confusion, *Amici* is not suggesting anything *other than judicial estoppel* of the Government's arguments pertaining to "next friend" status.

[34]The applicable portions read:

> (a) **REAL PARTY IN INTEREST**. . . . ***No action shall be dismissed*** on the ground that it is not prosecuted in the name of the real party in interest ***until a reasonable time has been allowed after objection for ratification of commencement of the action***. . . . . [Emphasis added].

The Government's reliance on *Whitmore* is curious at best, if not misplaced. The decision in *Whitmore* at page 162, cites with approval *United States ex rel. Toth v. Quarles,* 350 U.S. 11, at 13, n. 3 (1955). If one goes to the opinion in *Toth,* first, the respondent, Quarles, was the Secretary of the Air Force. Furthermore, the footnote cited in *Whitmore*, states: "This habeas corpus proceeding was brought in the District Court for the District of Columbia by Toth's sister while he was held in Korea. . . ." Thus, *two* Supreme Court decisions - *Whitmore* and *Toth* - explicitly contradict the Government's fundamental assertions that (a) the *only* proper respondent is Commander Marr; and (b) that a District Court can only have "jurisdiction" where a "proper respondent with 'custody' over Mr. Padilla is present within this Court's territorial jurisdiction."[35] The Government does not address the conundrum presented by *Toth*, which *Amici* submit is a significant oversight. How one can overlook the fact that Toth's *sister* filed a *writ* seeking *habeas corpus* in the District of Columbia, while Toth himself was confined in ***Korea*** - as well as the fact that the lead respondent in *Toth* was the Service Secretary, in the face of the Government's position herein is mystifying.

That Respondent's legal position on jurisdiction lacks *any* legal support, is further supported by *Whitmore's* reliance on and citation to *Morgan v. Potter,* 157

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[35] As noted above, Commander Marr lacks the "proper authority" to effectuate Petitioner's release. *Amici* would note that Judge Mukasey dismissed Commander Marr as a party without *directly* ruling on this issue. *Padilla, supra,* at 583.

U.S. 195, at 198 (1895), at page 163 of the *Whitmore* opinion. In the context of "next friend" principles, *Morgan* teaches that a "next friend . . . resembles an attorney . . . ." Ms. Newman not only "resembles an attorney," she is and was Petitioner's attorney. The Respondent's objections to counsel's "next friend" status are not well taken and are clearly not supported by the Supreme Court's precedent.

B. It Was Not An Abuse of Discretion to Grant Ms. Newman "Next Friend" Status.

The Respondent's arguments contesting Ms. Newman's next friend status are disingenuous at best. When the affirmative actions of the Respondent are what precluded the verification by the "real party in interest," equity suggests that Respondent should not now be heard to complain.

Furthermore, the Respondent's claim that Ms. Newman is somehow unqualified because:

> "The existence of a significant relationship helps insure that the next friend has a personal stake in the controversy ***and is fully dedicated to serving the detainee's interests"*** Respondent's Brief, 33. [emphasis added]

is insulting to both the District Judge who assigned Ms. Newman, as well as Ms. Newman personally. The Court below assigned Ms. Newman pursuant to its authority under 18 U.S.C. § 3006A(a)(2)(b), implying that the Court found her competent and qualified to represent Mr. Padilla's "interests." The government below made no suggestions under Rule 11(b), F.R.Civ.P. that Ms. Newman, was somehow ***not*** "dedicated to serving [Padilla's] interests," and *Amici Curiae*

respectfully submit that there is nothing in the record before this Court even hinting that the Court below abused its discretion on this issue. *Morgan v. Potter, supra.*

III. MR. PADILLA HAS BOTH THE *RIGHT* TO COUNSEL AND THE RIGHT TO *MEANINGFUL ACCESS* TO HIS COUNSEL.

A. The *Historical* Right to Counsel.

Respondent's Brief contains a serious misrepresentation of military law, to wit:

> There is no basis in historical tradition or practice for recognizing a right of enemy combatants[36] to have counsel for the purpose of challenging their wartime detention. Respondent's Brief, 37.

To the contrary, the "historical tradition [and] practice" - at least in the United States, has been that those militarily detained either under *martial law* or as Prisoners of War can and have availed themselves of the right to counsel.[37] As early as the War of 1812, General Jackson arrested one Louallier under martial law in New Orleans. His attorney filed for a *writ of habeas corpus* and when the federal judge issued it, Jackson had the judge arrested. When martial law ceased Judge Hall held him in

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[36]The term "enemy combatant" is a meaningless term in U.S. military jurisprudence as well as under international law. It results from the Respondent's misreading of *Ex Parte Quirin,* 317 U.S. 1 (1942), which used the term synonymously with that of "enemy soldier," a fact that all of the defendants in *Quirin* were. This is discussed in detail, *post.*

[37]*Amici* would note that it is the Respondent's assertion that the label "enemy combatant" has some jurisprudential meaning, versus the standard and accepted terminology, *viz.,* "lawful (or unlawful) belligerents;" "Prisoners of War" under Article 4, GPW; etc., that is perpetuating much of the confusion on this issue.

contempt.[38] Of particular relevance, Louallier was tried by a court-martial, which dismissed the charges on the grounds that "it had no jurisdiction over him." *Id.*

The Respondent cites *no case*, other than *Hamdi,*[39] which that Court conceded was *sui generis,* for his "historical" proposition. Every single case other than *Hamdi* cited by the Respondents, as well as those *Amici* is aware of, *allowed* a detained person regardless of their legal "status," to have the *meaningful* assistance of counsel, to include personal interactions.[40]

Indeed, in a more modern and relevant case, General Noriega successfully litigated his status as a Prisoner of War, under Article 5, GPW. The District Court in *United States v. Noriega,* 808 F.Supp 791 (S.D. Fl. 1992), held:

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[38]J. Randall, *Constitutional Problems Under Lincoln*, rev. ed (Urbana, IL: Univ. Illinois Press, 1951), at 145.

[39]*Hamdi v. Rumsfeld,* 294 F.3d 598, *f. rev.* 296 F.3d 278, *and* 316 F.3d 450 (4th Cir. 2003).

[40]*See, e.g., Ex parte Merryman, supra,* [civilian "prisoner of state"]; *Ex parte Vallandigham,* 68 U.S. 243 (1863)[civilian]; *Ex Parte Milligan*, 71 U.S. 2 (1866)[civilian]; *Ex Parte Quirin,* 317 U.S. 1 (1942) ["enemy combatants"]; *Application of Yamashita,* 327 U.S. 1 (1946) ["enemy combatant"]; *Johnson v. Eisentrager,* 339 U.S. 763 (1950) [POW's]; *In re Territo,* 156 F.2d 142 (9th Cir. 1946)[POW]; *Colepaugh v. Looney,* 235 F.2d 429 (10th Cir. 1956)["enemy belligerent"]; *Ex parte Benedict,* 3 Fed.Cas. 159 (#1,292)(N.D. NY 1862)(civilian "prisoner of state"); *Ex parte Field,* 9 Fed.Cas. 1 (# 4,761)(D. Vt. 1862)[civilian "prisoner of state"]; *In re McDonald,* 16 Fed.Cas. 18 (# 8,751)(E.D. Mo. 1861)(civilian "prisoner of state"]; *Ex parte Weitz,* 256 Fed. 58 (D. Mass 1919)[civilian - *habeas* granted]; *In re Bartolo,* 50 F.Supp 929 (S.D. NY 1943)[civilian]; and *compare, Jones v. Seward,* 40 Barb. 563 (NY Sup. Ct. 1863)[suit for false *military* imprisonment of civilian]. The concept of "Prisoners of State" is detailed in the seminal work, M. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (NY: Oxford Univ. Press, 1991), at 45. *See also,* Randall, *op cit.*

- GPW "is self-executing and provides General Noriega with a right of action in a U.S. court for violation of its provisions;" *Id.,* at 794

- That it was a "competent tribunal" under international law to make the POW determination regarding General Noriega; *Id.,*and finally

- That General Noriega was "in fact a prisoner of war as defined by Geneva III. . . ." *Id.*

B. Mr. Padilla's *Legal* Right to Counsel.

Respondent assert two arguments for his claim that Mr. Padilla is *not* entitled to counsel:

1. "[T]he laws of war [provide] an authority to detain *without affording access to counsel* . . . ." Respondent's Brief, 38; and

2. "The Constitution . . . *affords no right to counsel* in this case." Respondent's Brief, 39.

Amici Curiae respectfully submit that this Court need *not* reach Respondent's contentions for two fundamental reasons. *First,* Mr. Padilla was granted counsel pursuant to an independent ***statutory*** basis. *Second,* the Order of the Court below, assigning counsel to Mr. Padilla is *not* before this Court on this *interlocutory* appeal.

1. The Independent Statutory Right to Counsel.

On ***June 12, 2002***, Judge Mukasey, pursuant to 18 U.S.C. § 3006A(a)(2)(B), appointed counsel for Mr. Padilla in this *habeas corpus* proceeding. The Respondent did *not* contest or challenge that Order. *See Lawrence v. INS,* 2000 U.S. District *LEXIS* 18429 (S.D. NY 2000)[Government application to vacate order appointing counsel under § 3006A, denied].

Regardless of what rights to counsel Mr. Padilla may have under international law, the Law of War, or the U.S. Constitution, they are all superfluous - Mr. Padilla's "right to counsel" exists herein pursuant to a specific Act of Congress, something they are entitled to legislate on under Article I, § 8, Cl. 1, [spending power]; § 8, Cl. 18, [Necessary and Proper clause]. *Cf., Ex Parte Bakelite Corp.,* 279 U.S. 438, 449 (1929) [Constitutional power of Congress regarding Courts to "clothe them with functions deemed . . . helpful in carrying those powers into execution."]. Indeed, as the Court below observed:

> The habeas corpus statutes do not explicitly provide a right to counsel for a petitioner in Padilla's circumstances, but *18 U.S.C. § 3006A*(2)(B) permits a court to which a § 2241 petition is addressed to appoint counsel for the petitioner if the court determines that "the interests of justice so require." *18 U.S.C. § 3006A*(2)(B) (2000)(*sic*). ***I have already so determined, and have continued the appointment of Newman and appointed also Andrew Patel, Esq., as co-counsel***. 233 F.Supp.2d at 600 [emphasis added].

This express statutory right to counsel is beyond dispute. *Duran v. Reno,* 193 F.3d 82 (2nd Cir. 1999). That the Court below had the statutory authority to implement this right under the *All Writs Act,* 28 U.S.C. § 165(a), [233 F.Supp.2d at 602], also appears beyond dispute after *United States v. Hayman*, 342 U.S. 205 (1952), and *Harris v. Nelson*, 394 U.S. 286 (1969).

The Respondent, having had the opportunity to challenge the Court's exercise of discretion in finding that "the interests of justice so require" the appointment of

counsel, failed to do so, and thus is now precluded from challenging Mr. Padilla's *statutory* right to counsel. *See generally In re American Preferred Prescription, Inc.,* 255 F.3d 87, 88 (2nd Cir. 2001).

2. The Statutory Right to Counsel Issue is Not Properly Before this Court Under 28 U.S.C. § 1292(b).

Amici suggest that the Order of June 12, 2002, appointing counsel pursuant to § 3006A, is *not* properly before this Court as an interlocutory appeal. The Respondent to the knowledge of *Amici*, never sought to certify *that* Order under 28 U.S.C. § 1292(b). Furthermore, there is nothing in the lower Court's Order of April 9, 2003 [256 F.Supp 2d 218], even hinting that it was certifying anything *other* than the issues contained in its Order of December 4, 2002 [233 F.Supp 2d 564], and those issues did *not* include the Court's decision to appoint counsel under § 3006A.

As the Court held in *United States v. Stanley,* 483 U.S. 669 (1987), "An appeal under [§ 1292(b)] is from the certified order, ***not from any other orders*** that may have been entered in the case." *Id.,* at 677. Furthermore, a Court of Appeals' *jurisdiction* "is confined to the particular order appealed from." *Id. Accord, Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

IV. THE PRESIDENT AS COMMANDER-IN-CHIEF, LACKS ANY TEXTUAL OR IMPLIED CONSTITUTIONAL AUTHORITY TO DECLARE A CIVILIAN CITIZEN AN "ENEMY COMBATANT," AND THUS, TO SEIZE AND DETAIN HIM *INCOMMUNICADO*.

A. Overview.

One of the chief complaints against the British Throne was, according to our

Declaration of Independence, ". . . He has affected to render the Military independent of and superior to the Civil power. . . ."[41] *Amici Curiae* emphasize this history because of its contextual relevance - the Framers of our Constitution were acutely aware of the dangers of surprise attacks as well as full-scale war. The military presence and oppression of King George III's armies were a precipitating factor leading to war. Indeed, "terrorism" was a specific concern:

> "He has excited ***domestic insurrections*** amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, ***whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions***."[42]

Those events were fresh in the minds of the Continental Congress when our Constitution was drafted, debated and ratified. The "civilian supremacy" influence permeates the document itself:

- ✦ Article I, § 8: Congress regulates the military, declares war, etc.;
- ✦ Article II, § 2: The President (a civilian) is the Commander in Chief;
- ✦ Third Amendment: Citizens cannot be forced to "quarter" the military during peacetime, and only in a manner prescribed by law during war;
- ✦ Fifth Amendment: The right to indictment by Grand Jury applies to all citizens "except in cases arising in the land or naval forces. . . ."

The core constitutional concept is one of civilian control over the military. Or,

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[41]For the complete text, [last accessed, July 29, 2003], *See,* http://www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html

[42]*Ibid.* [emphasis added].

"The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson,* 100 U.S. 158, at 169 (1879).

Amici Curiae respectfully assert that the *military* "order" confining the Petitioner as a ***civilian,*** U.S. citizen in a military prison, is simply illegal. Hence, his continued imprisonment is unconstitutional. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). While we recognize the constitutional tensions implicit in claiming illegality of the Commander in Chief's order under separation of powers concepts, it is indeed both the constitutional role and function of the judiciary under Article III, to interpret the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803), resolves this issue.

It is the position of the *Amici* herein that the seizure and imprisonment of the Petitioner violates both the Fourth and Fifth Amendments to the Constitution; that the "War Powers" enumerated in the Constitution are expressly given to the Congress in Article I, § 8; that where Congress has exercised those powers, which it has done via the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* and the *Posse Comitatus Act,* 18 U.S.C. § 1385, that the *Commander in Chief* is Constitutionally bound to follow *and obey* such statutes. Finally, it is long-settled that the President does not have any independent "war powers," *other than* being "Commander in Chief," nor does the Constitution recognize any exceptions by virtue of any claimed "military necessity" or for "national security." *Milligan, supra; Youngstown, supra.*

The writ of habeas corpus is the fundamental instrument

> for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. Const., Art. I, 9, cl. 2. . . . . ***The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.*** *Harris v. Nelson,* 394 U.S. 286, 290-91 (1969) [emphasis added]

B. The "War Powers" Do Not Eviscerate the Fourth and Fifth Amendments.

Petitioner - a civilian citizen - is incarcerated *incommunicado* in a United States *military* confinement facility. No criminal charges are presently pending against Petitioner. Furthermore, Congress has *not* suspended the *Writ of Habeas Corpus* pursuant to its Article I, § 9, cl. 2, power,[43] nor has it exercised its prerogative to declare "war," or otherwise restricted *habeas corpus. St. Cyr, supra.*[44]

1. The Fourth Amendment's Protections:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

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[43]While it would seem obvious that since the "suspension" clause is in Article I, U.S. Const, the *Legislative* article, that only Congress may suspend such, history notes that President Lincoln *sua sponte* ordered the writ suspended during the Civil War. Chief Justice Taney, on Circuit held such action invalid. *Ex Parte Merryman, supra.* Congress later in fact, acted to ratify Lincoln's actions. Act of March 3, 1863, 12 Stat. 755. *Cf.,* Neely, *supra,* and *St. Cyr, supra.*

[44]*Amici* would note, consistent with *St. Cyr,* that if Congress had *any* desire to restrict *habeas* jurisdiction, as Respondent argues is implicit from the Use of Force Resolution, Pub.L. No. 107-40, 115 Stat. 224 (2001), it would have done so when it enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

> supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized. Amend. IV, U.S. Const.

As the Supreme Court observed, "it is recognized that the Fourth Amendment protects people . . . against unreasonable searches and seizures. . . ." *Katz v. United States*, 389 U.S. 347, at 353 (1967).

In *United States v. United States District Court,*[45] a "terrorist" (Plamondon) was accused of bombing a C.I.A. office in Michigan. When the defense moved for disclosure of various "wiretap" evidence, the Attorney General responded *inter alia* that he — not a Court — had approved the wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government." 407 U.S. at 299. The District Court noted that neither the President nor his Attorney General could ignore the Fourth Amendment, ordered the material produced, prompting the government's appeal to the Supreme Court.

The Government went further, arguing that the wiretaps were "a reasonable exercise of the President's power (exercised through the Attorney General) to protect the ***national security.***" 407 U.S. at 301. In rejecting the position and arguments of the Executive Department, the Court refused even with claims of "national security," to ignore the Fourth Amendment and its principles:[46]

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[45]407 U.S. 297 (1972).

[46]A year earlier in the *"Pentagon Papers"* case, *New York Times v. United*

> These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted ***solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.*** . . . [T]hose charged with . . . investigative and prosecutorial duty ***should not be the sole judges of when to utilize constitutionally sensitive means*** in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, ***is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.*** 407 U.S. at 316-17 [emphasis added].

2. Fifth Amendment Violations:

> No person shall be deprived of life, ***liberty***, or property, without due process of law . . . . Amend. V, U.S. Const.

By virtue of the fact that Petitioner is confined in a military prison pursuant to a ***military*** order of the Commander in Chief,[47] versus an "Executive Order," or "Presidential Order," means that any judicial analysis is thereby limited to the military provisions of the Constitution and the President's authority and power thereunder as Commander in Chief.

States, 403 U.S. 713 (1971), the Court rejected "national security" claims as justifying a prior restraint under First Amendment grounds for publishing a classified study of U.S. involvement in the war in Vietnam.

[47] *Amici Curiae* notes that this is a crucial distinction, *viz.,* that the "order" is a military order of the Commander in Chief, versus an Executive Order. The distinction is important because the powers of the President under Article II, of the Constitution clearly include that of being Commander in Chief. However, the Commander in Chief's authority, is by definition constitutionally limited under Article I.

Thus, the constitutional uncertainty herein is *not* whether or not Congress possesses the constitutionally enumerated "War Powers," because it clearly does, but rather what authority *if any,* does the Constitution provide to the President while *acting* as Commander in Chief to ignore applicable Congressional enactments, or specific Amendments to the Constitution? *See* Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NY: Princeton Univ. Press, 1993).[48]

3. "[T]he existence of an emergency does not redistribute the powers of government allocated by the Constitution." [49]

United States v. Robel, 389 U.S. 258 (1967), rejected a government argument that "War Power" justified curtailing constitutional rights, by stating:

> [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934). . . . 389 U.S. at 263-64.

The Court went on to observe:

> [The] concept of "national defense" cannot be deemed an

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[48]Hamilton's *Federalist, Number 69,* gives no indication that the framer's intended to give the President any "war powers" other than being the supreme "Commander" of the Nation's armed forces.

[49]F. Wormuth & E. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas TX: Southern Methodist Univ. Press, 1986), at 12.

> end in itself, justifying any exercise of legislative power designed to promote such a goal. ***Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart***. . . . . ***It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties - the freedom of association - which makes the defense of the Nation worthwhile.*** *Id.* [emphasis added].

While *Robel, supra*, referred to Congressional "war powers," (something at least recognized Constitutionally), the concept that such an argument somehow authorizes the Commander in Chief to do what Congress *cannot* do, must be similarly rejected.

C. THE UNCONSTITUTIONAL DETENTION OF MR. PADILLA.

The legality of Mr. Padilla's continued *incommunicado* detention in a United States ***military*** brig as a civilian, is the core issue before the Court. Or, as Chief Justice Marshall eloquently postulated:

> If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. *Marbury v. Madison,* 5 U.S. 137, at 163 (1803)
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> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. *Id.,* at 170.
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> This [judicial] power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States. *Id.,* at 174.

In *Texas v. White,* 74 U.S. 700 (1868), the Court observed with respect to Texas during the Civil War:

> It certainly follows that the State did not cease to be a State, ***nor her citizens to be citizens of the Union.*** If this were otherwise, the State must have become foreign, and her citizens foreigners. *Id.,* at 726 [emphasis added].[50]

A reading of the *Declaration of Independence,* juxtaposed with the very language of the Constitution provides conclusive *constitutional* proof that a "national emergency," or even a formal declaration of war, cannot and does not provide the Commander-in-Chief with the monarchial powers that the Respondent claims. The Constitution applies *as written*, both in times of peace and in war, to Presidents and to peasants and to all citizens in between.

D. An Analysis of *Ex Parte Milligan* - The Controlling Precedent.

The Supreme Court concluded in *Ex Parte Milligan*:

> The Constitution of the United States is a law for rulers and people, ***equally in war and in peace***, and covers with the shield of its protection ***all classes of men, at all times, and under all circumstances***. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, ***but the theory of necessity on which it is based is false***. . . . 71 U.S. 2, at 120-21 (1866)[Emphasis added].

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[50]Absent Congressional action in either declaring War or suspending *habeas corpus*, the Executive cannot summarily deny Mr. Padilla his constitutional rights as a citizen.

Thus, the Respondent's argument of "military necessity" has been expressly rejected *when applied to United States citizens*. To understand both the Court's opinion and its binding effect on this case, one must turn to the specific facts of *Milligan*:

> If he was detained in custody ***by the order of the President***, ***otherwise than as a prisoner of war***; if he was ***a citizen*** of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, ***then the court had the right to entertain his petition and determine the lawfulness of his imprisonment.*** 71 U.S. at 116 [emphasis added].[51]

There simply is *no* factual distinction between Milligan's status and that of Mr. Padilla.[52]

Notably, the Court did ***not*** hold that it was the Commander-in-Chief's decision. Rather it was a *judicial* matter and resolution ***must*** come from both the Constitution ***and*** "the laws authorized" by the Constitution.[53] The Government in *Milligan* - as

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[51]Mr. Padilla was arrested and detained on a grand jury material witness warrant.

[52]For an analysis of Milligan's activities, *see* Randall, *op cit.,* 180 *et seq.* Milligan was charged *inter alia* with "Affording aid and comfort to rebels against the authority of the United States;" and "Violation of the laws of war." 71 U.S. at 6.

[53]*See, e.g.,* 18 U.S.C. § 4001(a), to include its legislative history. The statute - controlling herein, reads in applicable part:

> (a) ***No citizen*** shall be imprisoned ***or otherwise detained*** by the United States except pursuant to an Act of Congress. [Emphasis added].

herein - based its argument for the legality of the military detention on "the 'laws and usages of war.'" 71 U.S. at 121. The Court summarily rejected any suggestion that somehow the "law of war" could triumph over the liberty of a citizen:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; ***they can never be applied to citizens*** in states which have upheld the authority of the government, and ***where the courts are open and their process unobstructed.*** 71 U.S. at 121 [Emphasis added].

Indeed, the very argument espoused by Respondent herein, *i.e.,* Mr. Padilla is too "dangerous" to be allowed to be at liberty, was argued in *Milligan* and summarily rejected as ***unconstitutional***:

> If it was ***dangerous***, in the *distracted condition of affairs*, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," ***the law said arrest him***, confine him closely, render him powerless to do further mischief; and then present his case to the ***grand jury*** of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, ***the Constitution would have been vindicated*** . . . and the securities for personal liberty preserved and defended. 71 U.S. at 122 [Emphasis added].

The Court also eschewed the suggestion that the Commander-in-Chief could, by the ***unilateral*** suggestion of there being a "war," detain and deprive a citizen of their basic constitutional rights:

> **The proposition is this**: that in a ***time of war*** the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to

> judge), ***has the power***, within the lines of his military district, ***to suspend all civil rights and their remedies***, and ***subject citizens*** as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.
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> * * * * *
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> ***The statement of this proposition shows its importance; for, if true, republican government is a failure***, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'-the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. ***Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.*** 71 U.S. at 124-25 [Emphasis added].

E. The Respondent's Actions Illegally Establish "Martial Law."

In the early days of the Civil War, President Lincoln unilaterally suspended the privilege of *habeas corpus* - until he could reconvene Congress and obtain its constitutional authorization. He also declared *martial law,*[54] and litigation ensued to include *habeas corpus* actions. The Solicitor of Lincoln's War Department, William Whiting, Esq., issued instructions to the government's attorneys on how to defend them. *See,* Whiting, *War Powers Under the Constitution of the United States* (Union, NJ: The Lawbook Exchange, Ltd., 2002)(Reprint) ["Whiting"]. *Amici*

[54] *See generally* Frederick B. Wiener, *A Practical Manual of Martial Law* (Harrisburg, PA: The Military Service Pub. Co., 1940) [hereinafter "Wiener"], at 58.

respectfully submit that the Respondent makes the exact same arguments first advanced by Whiting:

- "[The Commander-in-Chief's] right to seize, capture, detain, and imprison such persons is as unquestionable as his right to carry on the war."[55]

- "[T]he provision that *unreasonable* seizures or arrests are prohibited has ***no application to military arrests*** in time of war." [emphasis added][56]

The Supreme Court firmly rejected these unconstitutional arguments in *Milligan, supra.* With the exception of the now discredited Japanese-American internment cases during World War II,[57] - which involved imposition of martial law - Whiting's concept of an absolute and unreviewable Chief Executive is untenable constitutionally and has been rejected for 140 years;[58] or at least until Mr. Padilla decided to contest his detention on the material witness warrant below.

Amici Curiae respectfully suggest that a close examination of the Respondent's arguments herein, shows that they have in reality, subtly established "martial law" by the stratagem of using the meaningless label, "enemy combatant." The President via Executive Order defines "martial law" as:

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[55]Whiting, 168.

[56]*Id.,* 176.

[57]*See, e.g., Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), which set aside Korematsu's conviction that had been affirmed in, *Korematsu v. United States,* 323 U.S. 214 (1944).

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

> A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require.[59]

Regardless of the label that the Respondent places on Mr. Padilla[60], there is no evidence in the record that he was a member of any nation's "military," or engaged in any "combat" [*compare Hamdi*, *supra*] and thus he remains a "civilian." Yet, by Respondent's contentions, he somehow is subject to *exclusive* military detention. That too *Milligan* condemned as illegal, for the same reasons that it is illegal herein:

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[59]*Manual for Courts-Martial, United States* (2000 ed.), 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].

[60]It is ironic that the Government in *Milligan* attempted to defeat the Court's jurisdiction by arguing that he was a "Prisoner of War." The Court's assessment of that argument is equally as applicable to the designation of Mr. Padilla as an "enemy combatant:"

> But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he . . . had not been . . . a resident of any of the states in rebellion. If . . . he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, ***when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?*** 71 U.S. at 131 [Emphasis added].

"***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]. The Respondent's reliance upon *Moyer v. Peabody,*[61] - a martial law case - is irrelevant herein, *unless* he is seeking the *imprimatur* of this Court justifying his actions under martial law.

Here, the Government has *de facto*, illegally and selectively implemented "martial law" as applied to Mr. Padilla. In that context, they thus seek to avoid Constitutional and judicial scrutiny, by beating the drum of a phantom Presidential "war power." The Court in *Milligan* went on to explain:

> It follows, from what has been said on this subject, that there are occasions when ***martial rule*** can be properly applied. ***If***, in foreign invasion or civil war, ***the courts are actually closed***, and it is impossible to administer criminal justice according to law, then, . . . it is allowed to govern by martial rule until the laws can have their free course. ***As necessity creates the rule, so it limits its duration***; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. ***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 that "martial law"*may be* imposed on a selective basis,[62] which is exactly what has been

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[61]212 U.S. 78 (1908); Respondents Brief, 48. *Moyer* was a civil damage suit alleging illegal detention during a State imposed period of *martial law.*

[62]*See, e.g.,* Wiener, *op cit. Compare, Duncan v. Kahanamoku,* 327 U.S. 304

done herein. As one noted *military* 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. . . . 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].[63]

Professor Wiener concludes:

> Persons detained in custody [by martial law] may seek, by writ of habeas corpus, to be released therefrom . . . alleging an unlawful imprisonment.[64]

Indeed, Colonel Winthrop, the most authoritative military legal scholar of the late 19th Century, came to the following 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 effect such suspension.[65] [emphasis added].

(1946), discussing the variations and gradations of martial law in Hawaii *after* the Pearl Harbor attack.

[63]Wiener, *op cit.,* 25-26.

[64]*Id.,* at 62.

[65]Colonel William Winthrop, U.S. Army, *Military Law and Precedents,* 2nd ed. (Washington, DC: Gov't Printing Office, 1920) [Legal Classics Library reprint], at

Milligan, lastly 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."[66]

F. Other Basic Constitutional Provisions Applicable Herein.

The mandate of Article II, § 3, U.S. Const., that the President "***shall*** take Care that the Laws be faithfully executed," raises the issue of whether he can *constitutionally* ignore clear, unambiguous and applicable federal statutes. And, if he does so in a manner that deprives a citizen of his/her Constitutional rights, does the Constitution's "judicial power" stand as a bulwark for Due Process? *Marbury v. Madison, supra,* resolves this fundamental juridical concept.

Article III, § 2, cl. 11, U.S. Const., conferring *judicial* power "to all Cases in Law and Equity, arising under this Constitution," does ***not*** contain an exception clause for "enemy combatants," or even a "war time" exclusion. The ***sole*** Constitutional exception is that given to *Congress* in Article I, § 9, U.S. Const., authorizing the suspension of the "Privilege of the Writ of Habeas Corpus," something that Respondent *claims* has not happened. Yet that would be the practical effect of adopting Respondent's arguments, especially those pertaining to Mr. Padilla's right to counsel and his right to meaningful judicial review.

828.

[66]71 U.S. at 132)(concurring opinion of the Chief Justice). Four Justices concurred in the decision of the majority, but disagreed with the rationale.

G. The Law "Authorized By" The Constitution That Is Dispositive Herein.

Congress in enacting 18 U.S.C. § 4001(a), could not have been any clearer in either its language or its intent.[67] "***No citizen*** shall be imprisoned ***or otherwise detained . . . .***" The legislative history, found at 1971 U.S. Code Cong. & Admin. News 1435, leaves *no doubt* as to Congressional intent, *viz.:* the House Report [92-116] makes "clear the intent of the measure to prohibit the imprisonment or detention of a citizen ***except pursuant to an Act of Congress.***" [emphasis added], *Id.* Furthermore, in repealing the *Emergency Detention Act,* the Report notes:

> [The Act] would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense but on mere suspicion that an offense may occur in the future. . . . In a number of ways, also, the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense. *Id.,* at 1438.[68]

The Committee Report concludes with this pertinent observation:

> Repeal [of the Emergency Detention Act] alone might leave citizens ***subject to arbitrary executive action***, with no clear demarcation of the limits of executive authority. *Id.,* at 1438.

Mr. Padilla continues to be "subject to arbitrary executive action" in clear, unadulterated violation of § 4001(a), a fact that this Court respectfully can neither ignore nor sanction as Respondent seeks. Indeed, as one Court has observed in

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[67]*See* fn. 53, *supra,* for the complete text.

[68]Respondent has submitted materials *ex parte* and under seal herein.

considering this statute, "the courts remain under a duty to guard against the violation of federally protected constitutional and federal statutory rights. . . ." *Tyler v. Ciccone,* 299 F.Supp 684, at 688 (W.D. Mo. 1969).

Congress has spoken in unambiguous terms in its enactment of 18 U.S.C. § 4001(a). As *Marbury v. Madison, supra,* teaches, this Court's judicial power exists "because the right claimed is given by a law of the United States" [5 U.S. at 174]. And as the Court concluded in *Webster v. Luther,* 163 U.S. 331, at 342 (1896), "[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

V. THE TERM "ENEMY COMBATANT" IS MEANINGLESS TO THIS LITIGATION.

Ex Parte Quirin, 317 U.S. 1, 31 (1942), used the term "enemy combatant" synonymously with that of "enemy soldier," 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 and, the term was not contemporaneously applied to *civilians* in the same status as Mr. Padilla.[69] Nor did the phrase find its way into any of the 1949 Geneva

[69]As proof that whatever meaning might be ascribed to the term, historically and legally it was *not* applied to the 14 "civilian" "co-conspirators,"in *Quirin*, who were tried in United States District Courts. *See, e.g., Cramer v. United States*, 325 U.S. 1 (1945); and *Haupt v. United States*, 330 U.S. 631 (1947). *See,* L. Fisher, *Nazi Saboteurs on Trial*, (Lawrence, KS: Univ. Press of Kansas, 2003), at 80-84.

Conventions or subsequent usage within international law. That the term "enemy combatant" has ***no other*** accepted meaning or legal definition 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 U.S. 1, 7 (1946). But, as *Yamashita* clearly recognized, General Yamashita was a *bona fide* "Prisoner of War," [327 U.S. at 5] - an enemy soldier engaged in combat, *viz.,* an "enemy combatant."

Indeed, even the United States military does not elsewhere use the term "enemy combatant" to mean anything ***other than*** a reference to an enemy soldier.[70] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant."[71] Perhaps most damning to the Respondent's assertion in this regard is that the *Department of Defense Dictionary of Military Terms,*[72] nowhere lists or defines the term "enemy combatant."

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[70] *See, Manual for Courts-Martial, 2002 Ed.*, Rule 916(c), *Rules for Courts-Martial*, and the "Discussion" which notes as to the defense of "justification," "killing an ***enemy combatant*** in battle is justified." [Emphasis added]. The *Manual for Courts-Martial* is promulgated as an Executive Order.

[71] In military jurisprudence, for the military to exercise "jurisdiction" over an individual, one must first possess military "status." *See Solorio, supra*. But, as *Solorio* held, that is a function textually committed to *Congress,* not the Commander-in-Chief pursuant to Article I, § 8, 483 U.S. at 440-41. But, even Congress cannot "militarize" the status of civilians for purposes of exercising military jurisdiction over them. *Cf., Reid v. Covert,* 354 U.S. 1 (1957), and *Kinsella v. Singleton,* 361 U.S. 234 (1960). Thus, the President can hardly claim power denied to Congress.

[72] Available on-line at: http://www.dtic.mil/doctrine/jel/doddict/ [last accessed, July 29, 2003].

The claim that Mr. Padilla's *status* as an "enemy combatant"[73] has some relevance to his being illegally detained, *incommunicado*, has no foundation. There simply are no "historical tradition(s)," no "established practice(s),"[74] and no "decisions of the Supreme Court and other courts" *(nor have Respondents cited any)* that could rationally allow this Court to conclude that (a) such a status exists or is recognized in the law; or (b) legally justifies the imprisonment of a U.S. citizen under the circumstances herein. Indeed, the record is to the contrary.

Respondents repeated use of the label "enemy combatant" is respectfully nothing more than verbal camouflage - an attempt to shift the Court's focus away from the serious issues of *martial law* and *habeas corpus.*

A. Congress, Not the President, Defines Who Is An "Enemy."

There is a clear textual commitment in Article I, § 8, giving Congress the power "***To define and punish*** Piracies and Felonies committed on the high Seas, and ***Offences against the Law of Nations.***" That express grant, 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 defeats any claim by Respondent that

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[73]This deliberately repeated mantra belies any suggestion that the Respondent is mistakenly using the term "enemy combatant" interchangeably with the concept of an "unlawful belligerent." Considering the legions of lawyers in the DoJ and Department of Defense, such usage can hardly be characterized as an innocent "mistake" herein.

[74]*Amici* limits this to United States citizens; not aliens or members of foreign armed forces, *e.g.,* General Yamashita. *Territo* is inapposite as he was held simply and solely as a "Prisoner of War."

this Court must somehow grant "deference" to the Commander-in-Chief's defining and declaring Mr. Padilla to be an "enemy." Congress has spoken in this regard, and it is respectfully submitted that the Respondent is obligated to utilize the Congressional definition. In 50 U.S.C. § 21, Congress defines "enemy" - limited *first* to "a declared war;" and *second*, as "all natives, citizens, denizens, or subjects *of the hostile nation or government. . . .*" That statute, under those circumstances *does* allow an "enemy" to be confined by the Executive Branch, as it is clearly and expressly limited to *enemy aliens* - not citizens such as Mr. Padilla. Furthermore, it must be interpreted *in pari materia* with 18 U.S.C. § 4001(a). Thus, if Mr. Padilla cannot be an "enemy," logically he cannot be an "enemy combatant," even if such a term had any specific legal meaning.[75]

Finally, *United States ex rel. Zdunic v. Uhl,* 137 F.2d 858 (2nd Cir. 1943), is instructive. Zdunic was arrested and detained pursuant to the *Alien Enemy Act*, 50 U.S.C. § 21. He challenged the Executive's ***factual*** determination that he was an "enemy alien." The District Court [S.D. NY], denied his petition for a writ of *habeas corpus*, but on appeal, this Court noted that he was entitled to a hearing on the "disputed facts" *before* the Court made a determination as to his legal status and remanded the matter for a hearing. *Amici* would point out that conceptually, *Zdunic's* challenge to the Executive's determination that he was an "enemy alien" is no

[75]There is of course no allegation, much less evidence, that Mr. Padilla was engaged in any "combat" activities, such as the allegations against Mr. Hamdi.

different than Mr. Padilla's challenge to Respondent's claim that he is an "enemy combatant." But to say that Mr. Padilla cannot challenge his labeling by the Executive Branch (but an alien can), is the height of arbitrariness and a gross denial of due process.[76]

B. The United States Is *NOT* At "War."

The Respondents' rhetoric claiming justification for their actions as occurring "during wartime," is just that - rhetoric. Under international and domestic *military* law, "war" is a term of art. Indeed, it is Congress that is given the power to "declare war,"something it has not done. Art. I, § 8, U.S. Const. *See generally Bas v. Tingy,* 4 U.S. 37 (1800). While *Amici* recognize that "wars" do not have to be formally declared, *e.g.,* Vietnam, the distinguishing feature is that it constitutes armed hostilities *between* nations.[77] That is *not* presently the case, and even if it was so, it is clear that by Executive Order 13268, July 2, 2002,[78] any purported state of war with the Taliban regime in Afghanistan, was terminated on that date "given the success of

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[76]*See also, United States ex rel. Schwarzkopf v. Uhl,* 137 F.2d 898, at 900 (2nd Cir. 1943) [disputed issues of "fact" entitles relator to a hearing]. "[E]ven citizens of the United States . . . may disregard their duty and commit acts favoring the enemy. But they cannot for that reason be held in custody under the statute in question." *Id.,* at 903. *Compare, United States ex rel. Stabler v. Watkins,* 158 F.2d 883 (2nd Cir. 1948)[*habeas* on enemy alien detention remanded for *further* fact-finding hearing].

[77]Thus, the creation of the "Confederate States of America" met this test for purposes of the Civil War.

[78]http://www.whitehouse.gov/news/releases/2002/07/print/20020703-1.html. Thus, Judge Mukasey's concerns over *mootness* are more than hypothetical herein. 233 F.Supp.2d at 570.

the military campaign. . . ." The reality is however, that the United States was ***not*** "at war" with Afghanistan - we were engaged in a lawful act of belligerent reprisal under international law.[79]

When it comes to exercising *military* jurisdiction over ***civilians***, after *Reid v. Covert, supra,* three separate federal appellate courts have concluded that it is simply unconstitutional *absent* a formal declaration of war. *See Robb v. United States,* 456 F.2d 768, at 771 (Ct. Cl. 1972)["time of war" refers to "war formally declared by Congress"]; *United States v. Averette,* 41 CMR 363 (CMA 1970)[same]; and *Latney v. Ignatius,* 416 F.2d 821 (DC Cir. 1969) [*habeas corpus* granted to civilian confined by military].

Congress has defined the term "period of war" as *inter alia* "the period beginning on the date of any future ***declaration of war*** by the Congress. . . ." [38 U.S.C. § 101(11); emphasis added][80] Thus, *Amici Curiae* respectfully submit that with respect to Mr. Padilla, it is simply and plainly unconstitutional for the military to exercise *any* jurisdiction under the facts absent a formal declaration of war by Congress or, a formal declaration of *martial law.*.

Finally, even assuming *arguendo* that we are in a state of war, that does ***not*** turn off the application of the *Bill of Rights* like a light switch, contrary to the

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[79]*See* Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law,* 170 Mil. L. Rev. 155 (2001).

[80]*See generally, The War Powers Resolution,* 50 U.S.C. § 1541 *et seq.*

assertions of the Respondent. As the Court stated in *United States v. Cohen Grocery Co.,* 255 U.S. 81, at 66 (1921):

> We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that ***the mere existence of a state of war could not suspend or change*** the operation upon the power of Congress of ***the guaranties and limitations of the Fifth and Sixth Amendments*** as to questions such as we are here passing upon. [citing *inter alia, Milligan, supra*] [emphasis added].

War, absent martial law, is irrelevant for constitutional considerations.

> It is fundamental that the great powers of ***Congress*** to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process, *under the gravest of emergencies* has existed throughout our constitutional history, for it is then, *under the pressing exigencies of crisis,* that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. (Citing *inter alia, Milligan, supra*). *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, at 164-65 (1962) [emphasis added].

The Respondent's argument is simply misplaced - there is no "national security" exception to the Constitution and *neither* the Commander-in-Chief nor Congress can "dispense with fundamental constitutional guarantees." The inherent evil of the Respondent's arguments are their effect: the consummate deprivation of liberty and the concomitant exclusion of judicial review.

Deference is additionally *inappropriate* herein in the context of applying 18 U.S.C. § 4001(a), even where such may "affect" the other branches of government.

As noted in *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 (1986), "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." Clearly the rights and liberty of Mr. Padilla are more compelling than the rights of whales.

Amici urge this Court to follow the rationale of *Hammond v. Lenfest,* 398 F.2d 705 (2nd Cir. 1968). *Hammond* was a military *habeas corpus* action who sought a discharge from the Navy. There as here, the military had established a comprehensive system of regulations. Hammond argued that the government failed to follow its own regulations,[81] while the government responded that its military decisions are "not subject to judicial review." 398 F.2d at 715. Or, as this Court cogently phrased it, "As we understand the government's position, it contends that ***no matter how arbitrary and capricious the denial, we are without power to afford a remedy. . . .***" *Id.* The Court rejected that contention there and should do so again.

VI. THE APPROPRIATE CONSTITUTIONAL BALANCE.

Amici Curiae recognize that this case appears before this Court in an "adversarial" perspective. But, its posture is virtually unique in our constitutional

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[81] *See,* DOD Directive 2310.1 (1994); and Army Regulation [AR] 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997).

system. It is *not* simply petitioner versus respondent. It is unique in that it is a lone citizen who claims that his government has abandoned and imprisoned him, and via the Great Writ, he seeks judicial review of the harsh consequences such entails.

Absent the imposition of *martial law* - and the concomitant *de facto* admission that the government has failed or is incapable of protecting society and our Republic, thus requiring the *military* to perform the ordinary duties of our government - the lone citizen is constitutionally entitled to invoke *habeas corpus* proceedings. That requires judicial intervention as in any other lawsuit. While the government may make moral judgments regarding its citizens, the role of the judiciary, while constitutionally sacred, is the rule of law - not politics or morality.

The lone citizen here is of course Mr. Padilla, and his government has done more than abandon him. For fourteen months, it has subjected him to the debilitating effects of martial law - military imprisonment, without charges, without judicial or grand jury "probable cause," and totally *incommunicado*. The government has not only abandoned him, it has presumed him to be guilty of uncharged crimes. And, unlike an ordinary litigant before this Court, the government is using its *military* power to preclude him from *continuing* his attorney-client relationship. The government even in this posture challenges ***both*** the right of his attorney to advocate on his behalf, and also objects to judicial intervention to adjudicate this citizen's constitutional claims, arguing instead that "military" judgment, *i.e.,* ***martial considerations*** supercede the Constitution. Mr. Padilla is, in the eyes of the

Respondent, guilty of "constructive treason" as he alone has defined, charged and sentenced. The time-honored words of Justice Brandeis bear repeating:

> The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw.[82]

This case pits — ***not*** the *actions* of Mr. Padilla, for he has been charged with no crime — but the actions of the *Respondent*, against the Constitution. That is the sole constitutional "balance" required. Petitioner's application does not seek judicial involvement or interference with the Commander-in-Chief's roles in either directing combat activities or foreign relations. Mr. Padilla merely seeks judicial intervention over his *military* imprisonment in conjunction with the commands of 18 U.S.C. § 4001(a). In the ***fifteen*** months that he has now been incarcerated, if the Government does not yet have sufficient evidence to establish "probable cause" that Mr. Padilla has committed *any* crime, then the writ must lie.

Terrorism may have struck a hard and foul blow on September 11, 2001, but it did not destroy our government. But, if we abandon the Constitution in seeking revenge, we then by definition admit the failure and inability of our government to protect us. That has *not* happened - our government is functioning, Congress is in session and the courts are open.

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[82] *Olmstead v. United States,* 277 U.S. 438, at 484 (1928)(Brandeis, J., dissenting).

Justice Frankfurter concurring in *Dennis v. United States,* 341 U.S. 494 (1951), observed: "Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency. . . ." 341 U.S. at 520. He also warned:

> We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights. *Id.,* at 549.

We must remember that:

> Those who won our independence by revolution were not cowards. . . . They did not exalt order at the cost of liberty. *Whitney v. California,* 274 U.S. 357, at 377 (1927) (Brandeis, J. concurring)

CONCLUSION

Justice, as implemented through the Courts and not the military, must decide Mr. Padilla's fate herein. *Amici Curiae* respectfully submit that this Court should *affirm* the Order of the Court below to the extent that it found that jurisdiction and venue were proper in that district; that the Respondent is the proper respondent; that Attorney Newman is a proper "next friend;" and that Mr. Padilla has a right to counsel pursuant to 18 U.S.C. § 3006A.

We further submit that the Court should *remand* the case with instructions that consistent with normal "security" measures, that Mr. Padilla should have meaningful and unrestricted access to his counsel to satisfy *his* initial burden of proof;[83] that the Court below conduct an appropriate evidentiary hearing consistent with the strictures of the *Classified Information Procedures Act,*[84] to resolve disputed factual matters; and in view of the liberty interests at stake, to apply the "proof beyond a reasonable doubt" standard.[85] [13,978]

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[83] *Machado v. Commanding Officer,* 850 F.2d 542, 544 (2nd Cir. 1988)[military *habeas* - "preponderance" standard for Petitioner].

[84] 18 U.S.C. App. § 1 *et seq.*

[85] *In re Winship,* 397 U.S. 358, 365-67 (1970).

DATED: This ____ day of _____, 2003

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