IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSE PADILLA (Real Party in Interest),

DONNA R. NEWMAN,

***as Next Friend of Jose Padilla*,**

Petitioners,

- versus -

Civil Action No.

02-Civ-4445 (MBM)

GEORGE W. BUSH, *ex officio* as

Commander in Chief, *et al.,*

Respondents.

BRIEF

of

AMICI CURIAE

by

THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

and

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTERESTS OF *AMICI CURIAE*

NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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 more than 10,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 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.

The interest of *Amici Curiae* in this case arises due to the fundamental nature of the core 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 holds the citizen *incommunicado.* As such NYSACDL and NACDL respectfully requests *Amici Curiae* status herein.

POINTS and AUTHORITIES

I. JURISDICTION.

A. Subject Matter Jurisdiction.

It is beyond cavil that a District Court of the United States has subject matter jurisdiction over a *habeas corpus* proceeding. Art. III, §§ 1 and 2, U.S. Const. Indeed, 28 U.S.C.§ 1331, expressly 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).

B. *In Personam* Jurisdiction.

Amici Curiae will first address this issue due to traditional concerns stemming from the language of Rule 81(a)(2), F.R.Civ.P., *viz.,* "The writ of habeas corpus . . . shall be directed to the person having custody of the person detained."

There was no issue as to this Court's jurisdiction pertaining to the validity of Petitioner's detention under the "material witness" issue. The government under the auspices of the Department of Justice was simply detaining Petitioner, and this Court had subject matter jurisdiction, *in personam* jurisdiction and venue to adjudicate that controversy. While that was pending, however, the President of the United States, acting in his capacity as Commander in Chief of the Armed Forces, issued a written Order directing that Petitioner's custody be transferred to the United States military.

Respondents are the President *ex officio* as Commander in Chief, and agents of the United States. Thus, 28 U.S.C. § 1346, confers jurisdiction over all Respondents herein. Furthermore, under this 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 herein. 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 respondents herein.

In personam jurisdictional issues flow from Fifth Amendment, Due Process concerns. *See, generally, Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, at 584 (1999). No such concerns burden the Respondents here, especially in light of 28 U.S.C. § 1346. Nor is this a case of *forum non conveniens.* Petitioner was before this Court in a pending matter and the Respondents - not the Petitioner - caused his physical removal out of this judicial District. That act of removal, should not now give rise to a complaint that this Court should not exercise its Supplemental Jurisdiction, assuming of course that it is even necessary to reach that issue.

Finally, pursuant to the *All Writs Act,* 28 U.S.C. § 1651, even if there were any question as to *in personam* jurisdiction herein, that statute provides that this Court "may issue all writs necessary ***or appropriate*** in aid of [its] jurisdiction. . . ." [emphasis added].

C. *Whitmore* Issues.[1]

1. Judicial Estoppel.

Amici begins with an observation based upon the Respondents' *Motion to Dismiss*. The Government first admits that Respondent Bush directed that the Petitioner be transferred to the military's "control."[2] Upon information and belief, the source being Petitioner's counsel, Ms. Newman, this activity was done *ex parte,* without either notice to or the consent of Petitioner's counsel. However, the Government then proceeds to expend considerable effort and paper arguing about the failure of the *Amended Petition for Writ of Habeas Corpus* to be personally signed by Petitioner, and attacking Ms. Newman's "next friend" status. Thus, the Government hardly has "clean hands,"[3] in this matter and should in any event be *judicially estopped* from contesting Ms. Newman's "next friend" status. *See, New Hampshire v. Maine,* 532 U.S. 742, at 749-52 (2001).[4] Ms. Newman was and remains Mr. Padilla's attorney and it is simply the

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1 *Whitmore v. Arkansas,* 495 U.S. 149 (1990).

2 If the Commander in Chief did *not* direct Petitioner's transfer to and military confinement, then Petitioner's continued incarceration is even more constitutionally suspect. As will be discussed, *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 Respondents apparently reject. Respondents Rumsfeld, Ashcroft and Marr have no independent legal authority to imprison any U.S. citizen, absent a Court Order.

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

4 Lest there be any confusion by either the parties or the Court, *Amici* is not suggesting any thing *other than* such *judicial estoppel* of the Government's arguments pertaining to "next friend" status for purposes of this litigation.

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 either the original or amended *Writ* petition herein.

Furthermore, under the circumstances, *i.e.,* the Government's clandestine removal and *incommunicado* incarceration, *Amici Curiae* respectfully suggest that the Court resolve this the way that the *Federal Rules of Civil Procedure* contemplate: apply Rule 17(a), F.R.Civ.P.,[5] and either allow Ms. Newman to obtain her client's signature to "cure" the issue, or equitably bar the Government from asserting this schizophrenic and unseemly position. Congress plainly considered the applicability of the *Federal Rules of Civil Procedure* as 28 U.S.C. § 2242 clearly 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."[6]

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5 The applicable portions read:

> (a) **REAL PARTY IN INTEREST**. Every action shall be prosecuted in the name of the 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*** by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. [Emphasis added].

6 *Amici* would note a curious procedural defect with Respondents. *Motion to Dismiss.* Petitioner's *Amended Petition* is a "verified" pleading. Respondents' motion is presumably brought pursuant to Rule 12(b)(1) and (2), F.R.Civ.P., and they do not deny the *verified* facts of the *Amended Petition.* Thus, Petitioner's facts should be deemed "admitted" for purposes of resolving the *Motion to Dismiss.* Rule 8(d), F.R.Civ.P. More troublesome procedurally, *Amici* suggest, is Respondents complete failure to provide any evidentiary basis for their factual averments. *Compare,* Rule 56(e), F.R.Civ.P. For example, Respondents claim that Petitioner is "being held,

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

The Government's reliance on *Whitmore* is curious at best, if not quite 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 lead respondent, Quarles, was the Secretary of the Air Force. Furthermore, if one reads the footnote cited in *Whitmore*, it notes *inter alia*: "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 herein that (a) the *only* proper respondent is Commander Marr; and (b) and that a United States District Court can only have "jurisdiction" where a "proper respondent with 'custody' over Padilla is present within this Court's territorial jurisdiction." Respondents' joint[7] *Motion to Dismiss,* page 2. The Government of course 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 - not even within the territory of the United States, but in Korea - as well as the fact that the lead

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consistent with the laws and customs of war. . . ." as an "enemy combatant." [*Motion to Dismiss,* p. 4]. These are factual averments without any evidentiary basis presented to the Court, and on information and belief, the source being Petitioner's counsel, they are *disputed* by Petitioner. Despite the rhetoric, Congress simply has ***not*** issued a Declaration of War, a necessary pre- condition *Amici* respectfully suggests, for the above examples to be true.

7 *Amici* would also point out to the Court herein, that a conflict of interest *appears* on the face of the Government's *Motion to Dismiss*, for counsel to represent all Respondents jointly. Commander Marr, an active duty military officer, is subject to prosecution by court-martial for disobeying the "orders" of her superiors, [*see* 10 U.S.C. § 892] which Respondent's Bush and Rumsfeld are, *viz.,* she could *not* release Petitioner herein even if she honestly believed him to be illegally confined. As noted, she would be first violating the "confinement" order of her superiors, and in any event, she would also be subject to criminal prosecution via court-martial for illegally releasing a prisoner pursuant to 10 U.S.C. § 896. As will be shown, she lacks the "proper authority" to effectuate Petitioner's release.

respondent in *Toth* was the Service Secretary, in the face of the Government's position herein is mystifying. While Respondents' counsel may claim ignorance or mistake, they *cannot* claim that *Toth* is a jurisprudential aberration as this precise footnote was cited by the *Whitmore* Court as noted above - the very case the Government relies upon herein!

That Respondents' legal position on jurisdiction lacks *any* legal support, is further supported by *Whitmore's* reliance on and citation to *Morgan v. Potter,* 157 U.S. 195, at 198 (1895), at page 163 of the *Whitmore* opinion. In the context of "next friend" principles, *Morgan* teaches the reader that a "next friend . . . resembles an attorney . . . ." Ms. Newman not only "resembles an attorney," she is and was Petitioner's attorney. The Respondents' objections to Ms. Newman's "next friend" status are not well taken and are clearly not supported by the Supreme Court's precedent.

3. Whitmore Is Not Controlling In Any Event.

If one studies the opinion in *Whitmore,* it is easily seen why it has no applicability nor control over the case *sub judice.* Whitmore, a death row inmate himself, sought "next friend" status for the purported "real party in interest," Simmons, another death row inmate. The underlying problem in *Whitmore* - which the Government also appears to have ignored - was that Simmons was ***not*** a real party in interest for two reasons. First, Simmons had clearly voluntarily and judicially waived *all* appeals of his death penalty, thus mooting any issue as to its appeal, assuming that there was no "next friend" issue. Second, as the facts in *Whitmore* clearly show, Whitmore was the "real party in interest" as he feared the impact of Simmon's death penalty on his own death sentence. There was no showing that Simmons lacked access to the Court system or was mentally incompetent. Indeed, it was to the contrary. Further distinguishing *Whitmore* from the case at bar is the Court's observation that:

> Whitmore . . . does not seek a writ of habeas corpus on behalf of Simmons. He desires to intervene in a state-court proceeding to appeal Simmons' conviction and death sentence. Under these circumstances, there is no federal statute authorizing the participation of "next friends." 495 U.S. at 164.

Here of course, the precise language of 28 U.S.C. § 2242, expressly allows one to act on "behalf" of another.[8] The Government's arguments and reliance on *Whitmore* are so misplaced and out of context, that *Amici* respectfully submit that the Court cannot give them any credence.

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[8] The applicable portion reads: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

D. The Respondents Are Proper Parties Herein.[9]

While *Amici* foster and encourage civility in all aspects of litigation, to include a general abhorrence for *ad hominem* attacks, there is a highly troubling aspect to Respondents' jurisdictional claims. Respondents' counsel have in their *Motion to Dismiss* at page 11, contested *inter alia* the proper status of Respondents' Bush and Rumsfeld, claiming that they are "not proper respondents in this case." There is a substantial body of case law, including cases that the Solicitor General's Office participated in, that strongly suggest otherwise in the arena of *military* habeas corpus cases. *Toth, supra,* for example, had the Secretary of the Air Force, Quarles, as lead Respondent, and if the Respondents' position is correct in the matter *sub judice*, then the Supreme Court should have dismissed Toth's "next friend" petition since Toth was confined in a military brig in Korea.[10]

A long line of Supreme Court cases are consistent with *Toth. Amici* respectfully suggest that where Respondents err on their jurisdictional analysis is their failure to conceptually differentiate the cases that they rely upon[11] — *post*-conviction attacks by *convicted* prisoners who are incarcerated pursuant to a "judgment" of a court, committing them to a prison sentence

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9 *Amici Curiae* take no position as to Respondent Ashcroft, as we are not privy to what the arrangements were between the Attorney General and the Secretary of Defense. It is not germane to our position as *Amici.*

10 *Compare, Goldsmith v. Clinton, et al.,* 48 M.J. 84 (CAAF, 1998), *rev'd Clinton v. Goldsmith*, 526 U.S. 529 (1999). While not a *habeas* action, it was a comparable "extraordinary writ" matter, where *both* the President and Secretary of Defense were named Respondents.

11 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 separately *infra. See also, Monk v. Zelez,* 901 F.2d 885 (10th Cir. 1990) [granting *habeas* relief].

— from the reality of the case at bar. Here, Petitioner is incarcerated *incommunicado*, ***not*** by a valid court order or judgment, *i.e.,* a conviction, but by a purported *military order* of the Commander in Chief. Thus, Respondents' legal authority in not only legally irrelevant, but regrettably misleads the Court. The situation is drastically different in "military" cases — the area of jurisprudence that *Amici Curiae* respectfully submit is both controlling, but also supports the proper exercise of this Court's *continuing* jurisdiction.[12] Respondents' position — if correct — ultimately could result in *no* Court having *habeas corpus* jurisdiction, simply by the *fiat* of the Commander in Chief by confining citizens in United States military prisons overseas.[13] That of course is not the law. *Toth, supra.*

Burns v. Wilson, 346 U.S. 127 (1953) [a plurality, 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 subject to some valid *Congressional* enactment.[14] While a fractured Court denied *habeas* relief

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12 *Amici* note that the Government had no apparent challenge to this Court's jurisdiction over issues originally surrounding Petitioner's arrest and confinement on the Material Witness warrant.

13 *Amici* would note that there is presently pending a *habeas corpus* action in the District Court for the District of Columbia, involving the "detainees" being held at Guantanamo Bay, Cuba's military prison, styled *Rasul et al., v. Bush, et al.,* which is available at: http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html [last accessed on July 1, 2002]. The Government's response contesting the *habeas* action is at: http://www.campxray.net/03.18.02%20Gov't%20Response%20to%20Access%20&%20Notice.PDF [last accessed, July 1, 2002].

14 *Amici* discuss the Congressional authority in detail in Parts III and IV, *infra.*

in *Burns,* it did so based upon the fact that the *habeas* issues had been fully adjudicated within the military legal system, hardly the case herein, as Petitioner has been afforded *no* judicial review, military or otherwise.

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 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 Petitioner to Vietnam].

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 concessions, 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 should be a given.[15] The military order herein by the Commander in Chief,[16] 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

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15 *See*, 10 U.S.C. § 892, Article 92, UCMJ, making it a crime to violate "lawful" orders in the military.

16 That the Commander in Chief and Secretary Rumsfeld have the requisite "contacts," within this Court's territorial jurisdiction, is easily demonstrated by the number of Armed Forces Recruiting Stations within the District. The Second Circuit has upheld an even more tenuous jurisdictional basis 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); accord, *Carney v. Laird, Sec'y of Defense,* 462 F.2d 606 (1st Cir. 1972).

of this *habeas corpus* action. Here, per the Solicitor General's argument in *Parisi, supra,* Respondents Bush and Rumsfeld — as parties herein — can clearly effectuate a *habeas corpus* Order of this Court.

Amici suggest that the *manner* in which this case arose is also relevant to this Court's consideration. Despite knowing that Petitioner had counsel and knowing that counsel was actively contesting the Government's actions, the Government herein proceeded in an *ex parte* fashion, thus totally precluding Petitioner's counsel to seek a stay under *Parisi* concepts. The Government simply lacks "clean hands" in this matter and equitable considerations should not allow them to benefit from such by way of claiming that *their actions* served to *divest* this Court of jurisdiction.

A plethora of other Supreme Court cases demonstrates that it has long been an accepted jurisdictional practice to denominate the *Secretary of Defense* or applicable Service Secretary as a named Respondent, with as in *Burns,* the apparent concession of the Solicitor General's Office. *See, e.g., Strait v. Laird, Sec'y of Defense,* 406 U.S. 341(1972) [minimal contacts for military *habeas* jurisdiction]; *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974) [jurisdictional issue not decided]; *Schlesinger, Sec'y of Defense v. Councilman,* 420 U.S. 738 (1975) [injunctive relief barring court- martial denied]; *Middendorf, Sec'y of the Navy v. Henry,* 425 U.S. 25 (1976) [no jurisdictional impediment noted to "class action" *habeas corpus* action].

Respondents' reliance on *Monk v. Sec'y of the Navy,* 793 F.2d 364 (D. DC 1986), is misplaced. *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[17] 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[18], relies on the faulty logic that federal "civilian" prisoners are similarly situated to "military" prisoners. They are not. Civilian prisoners[19] are in jail pursuant to a Court Order - either pretrial or after

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17 As noted, Monk ultimately obtained *habeas* relief, *see, Monk v. Zelez, supra.*

18 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 doctrine of our "seat of government," found in Article I, § 8, cl. 17, to wit:

> To exercise exclusive Legislation in all Cases whatsoever, . . . as may, by Cession of Particular States, and the Acceptance of Congress, become the ***Seat of the Government*** of the United States. . . . [Emphasis added].

See, e.g., Crandall v. Nevada, 73 U.S. 35, at 44 (1867), which noted:

> The people of these United States constitute one nation. They have a government in which all of them are deeply interested. ***This government has necessarily a capital established by law, where its principal operations are conducted***. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. ***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. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. [emphasis added].

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

19 *Amici* distinguish immigration cases from this category since as by definition, they are ***not*** U.S. citizens.

conviction.[20] 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. As *Toth* holds, the legality of that order and subsequent detention is indeed subject to challenge via *habeas corpus.*[21] *See generally, Parisi v. Davidson, supra,* and *Arlen v. Laird, supra.*

Finally, *Amici* would draw the Court's attention to *Ex Parte Hayes v. Sec'y of Army,* 414 U.S. 1327 (1973), a decision in Chambers by Justice Douglas. Hayes, on active duty with the U.S. Army and stationed in 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). Respondents' herein have "suggested" that were this Court so inclined to transfer jurisdiction, that such should be to the appropriate district in South Carolina. Respondents however, neglect to advise this Court how the jurisdictional issues they raise herein pertaining to Respondents' Bush and Rumsfeld, would not also plague the federal court in South Carolina.

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20 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 provided for civil commitment as sex offender]; 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 - a fact that the Government basically claims is irrelevant!

21 *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, they did not dismiss it for jurisdictional grounds, as in *Johnson v. Eisentrager,* 339 U.S. 763 (1950) [*habeas* jurisdiction denied to German POW's, captured and tried by a military commission in China, and confined in Germany. As "enemy aliens," they had no right to access American courts, especially when they had never been in the United States].

Amici respectfully submit that the "suggestion" of the Solicitor General in *Hayes, supra,* (assuming this Court is inclined to transfer, which *Amici* do ***not*** advocate for the reasons stated herein) that since the underlying "order" confining Petitioner originated with Respondent Bush, that such order transferred control to "the United States military" [*Motion to Dismiss*, p. 5], of which Respondent Rumsfeld is the Secretary of Defense and therefore, the senior civilian in charge of all U.S. Armed Forces personnel, facilities ***and*** Prisoners of War and other military "detainees." That is no doubt why the Government admits that the "military" transported Petitioner out of New York [*Motion to Dismiss*, p. 5][22] Thus, *Amici* would alternatively argue that assuming *arguendo* that a judicial transfer is warranted, that the correct and proper jurisdiction herein must be the District of Columbia.[23]

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22 This "contact" would seem sufficient for "long arm" jurisdiction, although as *Amici* suggest, such is not necessary for this Court's jurisdiction herein.

23 *Amici* will demonstrate in the next section why Respondent Marr, as a subordinate to both Respondents Bush and Rumsfeld, has ***no*** lawful authority to release Petitioner. Indeed, that was the military's position in *Ex Parte Merryman,* 17 Fed.Cas. 144 (C.C.D. Md. 1861).

E. Commander Marr's Status.

Petitioner was required by Rule 81(a)(2), F.R.Civ.P., to name Commander Marr[24] as a Respondent. But, it is disturbing to read Respondents' argument:

> There is only one proper respondent for a habeas petition filed to challenge the detention of Padilla, and that is the commanding officer of the Naval Brig in South Carolina, Commander Melanie A. Marr, United States Navy. [*Motion to Dismiss,* p. 11].

because that argument is quite wrong. Counsel for Respondents 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,*[25] which at paragraph 3.3, clearly states:

> 3.3. Captured or detained personnel shall be accorded an appropriate legal status under international law.[26] Persons captured or detained may be transferred to or from the care, custody, and control of the U.S. Military

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24 Ms. Marr is both a "Commander" by virtue of her military rank [0-5], as well as her position. She is ***not*** however, at least 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.

25 Available at: http://www.dtic.mil/whs/directives/corres/pdf/d23101_081894/d23101p.pdf [Adobe ".pdf" format] [last accessed, July 1, 2002].

26 There is no evidence that this has been done. "International law" states that once captured, that POW status where disputed, must be decided by an "appropriate tribunal," such as this Court. *See, The 1949 Geneva Convention Relative to the Treatment of Prisoners of War,* 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, June 20, 2002].

> 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, *viz.,* Respondents' Bush and Rumsfeld. Furthermore, DODD 2310.1, paragraph 4.2, designates the Secretary of the *Army* [not the Navy, which Commander Marr is in] as the "DoD Executive Agent for the administration of the DoD EPOW Detainee Program. . . ."[27]

It is abundantly clear that Respondent Bush, as Commander in Chief, and Respondent Rumsfeld, as Secretary of Defense are indeed proper respondents, while Commander Marr lacks any authority or discretion to do anything but "follow orders." As Chief Justice Taney discovered in *Merryman, supra,* a "brig" commander upon an order from the Commander in Chief, may not comply even with a valid *writ of habeas corpus.*[28]

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27 *Amici* find it curious that in view of this language that both "civilian detainees" who are U.S. citizens — Padilla and Hamdi (cited in *Motion to Dismiss* herein) — are imprisoned in ***Navy***, not Army Brigs, which both happen to lie with the federal Fourth Circuit's jurisdiction.

28 What was not however addressed in *Merryman, supra,* was the Court's contempt power.

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*[29] and the *Manual for Courts-Martial*[30] — 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
>
> (3) is derelict in the performance of his duties;
>
> 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, or who through neglect or design suffers any such prisoner to escape, shall be

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[29] 10 U.S.C. § 801 *et seq.*

[30] The *Manual for Courts-Martial (2000 ed),* is an Executive Order, promulgated pursuant to 10 U.S.C. § 836. It may be accessed at: http://www.usapa.army.mil/pdffiles/mcm2000.pdf [last accessed, July 1, 2002].

punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

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:

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, 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 or officer is subject may order pretrial restraint of that civilian or officer.

* * * * *

(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.*** Pretrial restraint shall

terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed. [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.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

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

* * * * *

(g) *Who may direct release from confinement.* Any commander of a prisoner[[31]], an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused

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[31] Commander Marr is ***not*** Petitioner's "commander" even though she may be the Brig Commander. For *pre-conviction* purposes, Petitioner as a ***civilian*****,** U.S. citizen has no commander. Absent declaring Petitioner a formal POW, both common sense and military law require 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).

> have been referred, may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation[[32]] 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, U.S. citizen, even if he is ultimately adjudicated an "enemy combatant," 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 Respondent Bush or Respondent Rumsfeld. And, as Rule 305(g), RCM, teaches, Commander Marr may not direct his release.

Amici would note that for persons subject to military law, *i.e.,* the UCMJ,[33] does not specifically provide for direct *habeas corpus* applications. Indeed, the Supreme Court has indicated that such relief must be sought from what is now, the United States Court of Appeals

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[32] Even if the Government's logic were correct, Commander Marr here still would not be authorized to "release" Petitioner as even 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].

[33] *Amici* note that since the Government contests Petitioner's POW status, that if one reviews Article 2(a), UCMJ, 10 U.S.C. § 802(a), ***no category*** of detention is recognized by Congress for Petitioner's confinement.

for the Armed Forces [US CAAF][34], and formerly called the United States Court of Military Appeals [CMA]. *See, Boyd v. Bond,* 395 U.S. 683, at 693 *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). Absent a concession by the Solicitor General's office herein, in view of Petitioner's ***non-military status,*** *Amici* do not believe that the U.S. Court of Appeals for the Armed Forces would have jurisdiction to entertain an "extraordinary writ" in the nature of *habeas corpus,*[35] especially in view of the restrictive interpretation given by the Supreme Court in *Clinton v. Goldsmith, supra.* If however, Petitioner is accorded *Prisoner of War* status[36], arguably that Court *might* have jurisdiction — no case is known to *Amici* that has ever presented this issue — as Petitioner would at least be subject to the UCMJ for misconduct as a prisoner. Absent that however, *All Writ's* jurisdiction by the CAAF, is very problematic and is not a substitute for an Article III, Court's plenary consideration of Petitioner's *habeas corpus* application herein.

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34 Review of that Court's decisions is to the Supreme Court through *certiorari.* Article 67a, UCMJ, 10 U.S.C. § 867a. The CAAF is a five judge, civilian court that sits in Washington, DC. It is an Article I, Court however, and thus its jurisdiction is limited. *See,* Article 141 *et seq.,* UCMJ, 10 U.S.C. § 941 *et seq.*

35 *Compare, Waller v. Swift,* 30 MJ 139 (CMA 1990) [*habeas* relief granted]; *Wakin v. Carns,* 24 MJ 407 (CMA 1987) [show cause order issued to government on *habeas* issue]. "MJ" is a WestLaw™ data base for West's *Military Justice* Reporter system.

36 *Amici* address that issue in Part V, *infra.*

II. JUSTICIABILITY.

Amici Curiae anticipate an issue as to the Court's authority to adjudicate the controversy herein. Simply put, that is whether or not Petitioner's current and continued military confinement is Constitutionally authorized. That is not and never has been a "political question." Again, *Amici* would note that the issue does *not* involve the President as Chief Executive and the general powers of such under Article II, U.S. Const. Rather it is limited to the expressly delineated Constitutional grant conferring "Commander in Chief" status upon the President over the Nation's military forces -- the authority used to confine Petitioner.

Analysis of the "justiciability" issue begins with the seminal case of *Baker v. Carr,* 369 U.S. 186 (1962). There the Court noted:

> The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, ***is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court*** as ultimate interpreter of the Constitution. 369 U.S. at 210-11 [emphasis added]

The "War Powers" at issue herein - the power to militarily arrest and confine the Petitioner - are given to Congress, *not the President*, in Article I, § 8. Absent a Congressional delegation in this area to the Commander in Chief (which there has not been), the issue is more appropriately focused as whether the instant actions of the Commander in Chief against the Petitioner, are *ultra vires*? Judicial standards for evaluating claims under the Fourth and Fifth Amendments are well

settled, and clearly within the province of the Judiciary. Indeed, historically the Judiciary has ruled on, for lack of a better term, "political" confinement cases. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168, at 196 (1881) [imprisonment for "contempt" of House of Representatives illegal as "without any lawful authority."]

The Court in *Powell v. McCormack*, 395 U.S. 486 (1969), again confronted the "justiciability" doctrine, and set forth a two-pronged analytical test:

> [W]e turn to the question whether the case is justiciable. Two determinations must be made in this regard. First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a "political question" - that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution. 395 U.S. at 516-17.

First, the "claim presented and the relief sought" - that Petitioner is illegally confined and his release is warranted via *habeas corpus* - are classic judiciary issues. Thus, the focus must turn to the "political question" concept. *Powell* again concisely addresses this matter:

> In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, ***we must first determine what power the Constitution confers . . . before we can determine to what extent, if any, the exercise of that power is subject to judicial review***. 395 U.S. at 519 [emphasis added].

Amici Curiae would note that Art. I, § 8, Cl. 10, U.S. Const., gives ***Congress*** the power "***To define and punish*** Piracies and Felonies committed on the high Seas, and ***Offences against the***

Law of Nations." This *express* Constitutional grant, the so-called "textual commitment," to Congress — not the President — along with the other Article I powers granted to Congress, *viz.,* the power to "provide for the common Defence . . . of the United States;"[37] the power to declare war; the power to make "Rules concerning Captures on Land and Water;" "to raise and support Armies;" "To provide and maintain a Navy;" and "To make Rules for the government and Regulation of the land and naval Forces;"[38] raises significant constitutional concerns about the legal authority and constitutional scope of the confinement order herein. Chief Justice John Marshall's early analysis bears noting:

> ***The whole powers of war being***, by the constitution of the United States, ***vested in congress***, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed. *Talbot v. Seeman,* 5 U.S. 1, at 28 (1801). [Emphasis added].

Consistent with this express Constitutional power, Congress has definitively spoken precisely on the underlying issue before this Court. Specifically, in 10 U.S.C. § 809,[39] Congress mandates "probable cause" as the standard for military confinement. Any present issue as to "justiciability" is perhaps best resolved by the *Powell* Court's words:

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37 Art. I, § 8, cl. 1, U.S. Const.

38 Art. I, § 8, cl. 11-14, U.S. Const.

39 Article 9, UCMJ, ***Imposition of Restraint.*** Article 9(a), explains the differences in military terminology between "arrest" and "confinement," while Article 9(e), mandates a "probable cause" determination.

> Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. 395 U.S. at 549.

The justiciability doctrine was used in an attempt to insulate Presidential conduct from judicial scrutiny in *United States v. Nixon,* 418 U.S. 683, at 692 (1974). The Court of course rejected that argument. Clearly, if the content of a *subpoena duces tecum* issued to the President by a *prosecutor* is justiciable, then similarly, resolution of whether or not the Commander in Chief is illegally confining a U.S. citizen *and* denying him access to his counsel,[40] absent any "probable cause" determination, must likewise be justiciable.

In *Clinton v. Jones,* 520 U.S. 681 (1997), the Court unanimously resolved the "separation of powers" question presented in a private, civil suit against a sitting President. The Court quickly noted that rather than being barred from hearing the case by that doctrine, it merely was being tasked to exercise its core constitutional jurisdiction, to decide "cases or controversies." The Court emphatically rejected any *deference* argument by noting that prior cases had significantly burdened *official* Presidential conduct, citing *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); and *United States v. Nixon, supra.*[41]

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40 Factually, it must be remembered that an *existing* and on-going attorney-client relationship exists between Petitioner and his counsel herein, and that such existed *prior to* the actions of the Respondents, thus making their actions complained of even more constitutionally suspect.

41 *Amici* as will be discussed in greater detail below, submit that *Youngstown* is both controlling and dispositive herein.

Finally, questions as to the justiciability pertaining to the ***legality*** of a Commander in Chief *order*, were resolved long ago by Chief Justice Marshall. In *Little v. Barreme*, 6 U.S. 170 (1804), the Court was squarely confronted with this issue - Congress passed a statute[42] during a maritime "war" with France, specifically delegating to the President as Commander in Chief, powers to seize (and forfeit) certain ships and cargoes. The President issued an order, ostensibly consistent with the statute. U.S. Navy Captain Little seized a ship pursuant to the Commander in Chief's *order* and was promptly sued by the ship's owner's for damages. Little defended on the ground that he was following an express order from the Commander in Chief, while the ship's owners argued that the order was illegal, *i.e.,* it exceeded the scope of the Congressional statutory authorization. The Court speaking through Chief Justice Marshall, held that the Commander in Chief's *order* was indeed illegal, and noted that such an order could never "legalize" an otherwise illegal act.

Two points from *Little, supra*, bear noting. First, the Court was called upon to consider the legality of an order of the Commander in Chief that was clearly premised on a valid Congressional exercise of its "war powers." Second, for the Court's decision to have any logical meaning, it must be read to mean that the Commander in Chief cannot *sua sponte* increase his power as Commander in Chief beyond that which Congress - the holder of the expressly enumerated "war powers" - delegates to him. Thus, the matter herein is clearly justiciable and resolution is dependant, not upon the Commander in Chief's views of the Constitution, but rather the Judiciary's views consistent with specific, textually committed Congressional authority.

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42 In the matter *sub judice* there is ***no*** statute authorizing the Commander in Chief to summarily confine and hold incommunicado (including from his own attorney), a United States citizen. Furthermore, *Amici Curiae* will demonstrate below that such actions directly ***contravene*** specific Congressional enactments.

III. THE ILLEGAL DETENTION OF THE PETITIONER.

> *[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions.*

— Alexander Hamilton, *The Federalist, Number 80.*

A. Overview.

Our Republic and the democracy that we enjoy*, i.e.,* a government "of the People, by the People, and *for* the People," - did not come easily. As history shows, the United States of America was conceived in terroristic acts that evolved into a full-scale, military revolution. The "wars" with Native Americans, the Boston Massacre, Lexington and Concord and the ensuing siege of Boston all contributed to our Revolutionary War against Britain. Indeed, one of the chief complaints of the "Colonists," 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. . . ."[43] *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

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43 *See,* http://www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html [last accessed, June 20, 2002], for the complete text.

full-scale war. The military presence and oppression of King George III's armies was a precipitating factor leading to war.[44] 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***."[45]

It was with this background that our Constitution was born and from which it must be interpreted.

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 (civilians) regulates the military, declares war, etc.;
- Article II, § 2: The President (a civilian) is the Commander in Chief of the military;
- Third Amendment: Citizens cannot be forced to "quarter" the military during peacetime, and only in a manner prescribed by law during war;

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44 *See, e.g.,* ". . .He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures;" ". . .For Quartering large bodies of armed troops among us:" "For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:" "He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people." "He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation." *Ibid.*

45 *Ibid.* [emphasis added].

- Fifth Amendment: The right to indictment by Grand Jury applies to all citizens "except in cases arising in the land or naval forces. . . ." *i.e.,* the military.

Thus, the core constitutional concept is one of civilian control over the military. Or, as the Supreme Court stated: "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, of the Constitution, to interpret the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803), both addresses and 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.,* ["UCMJ"] that the President as *Commander in Chief* is Constitutionally bound to follow and obey such statutes. Finally, it is long- settled that as Commander in Chief, 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." Thus, the *Great Writ of Habeas Corpus* respectfully lies:

> 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 scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. ***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.

The Petitioner - a civilian and United States citizen - is incarcerated *incommunicado* in a United States *military* confinement facility, *i.e.,* the U.S. Navy Consolidated Confinement Facility at Charleston, S.C. On information and belief, the source being Petitioner's counsel, no criminal charges - civilian or military - are presently pending against Petitioner. *Amici Curiae* begin with these facts, because of the Constitutional issues that such *military* confinement implicates. Furthermore, this Court may judicially note per Rule 201, F.R.Ev., that Congress has

not suspended the *Writ of Habeas Corpus* pursuant to its Article I, § 9, cl. 2, power,[46] nor has it exercised its prerogative to declare "war."

The Fourth Amendment provides in pertinent part:

> 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, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized

Or, as the Supreme Court has observed, "it is recognized that the Fourth Amendment protects people - and not simply "areas" - against unreasonable searches and seizures. . . ." *Katz v. United States*, 389 U.S. 347, at 353 (1967). No "warrant" is known to exist supporting the seizure of the Petitioner, although counsel for Petitioner has been orally advised that a military "confinement" order, issued by the President in his capacity as Commander in Chief exists. Neither counsel for Petitioner nor *Amici* has received a copy of that confinement order.

Perhaps the seminal case today is *United States v. United States District Court,*[47] where a "terrorist" by the name of Plamondon was accused of a dynamite bombing of a C.I.A. office in Ann Arbor, Michigan. When the defense in Plamondon's criminal trial moved for disclosure of

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46 While it would seem obvious that since this "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,* 17 Fed.Cas. 144 (C.C.D. Md. 1861). Congress later in fact, acted to ratify Lincoln's actions. Act of March 3, 1863, 12 Stat. 755.

47 407 U.S. 297 (1972).

various “wiretap” evidence, Attorney General John Mitchell, 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 began:

> We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. 407 U.S. at 310.

According to the Government, there had been “1,562 bombing incidents in the United States from January 1, 1971, to July 1, 1971, most of which involved Government related facilities.[48]

[48] 407 U.S. at 311, footnote 12.

Even assuming those figures to be true, the Court refused even in the claims of "national security," to ignore the Fourth Amendment and its principles:[49]

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . ***History abundantly documents the tendency of Government*** — however benevolent and benign its motives — ***to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.*** The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty in defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. 407 U.S. at 313-14. [emphasis added].

The Court continued its lecture to the Chief Executive and Attorney General by observing:

> 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***

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49 A year earlier in the seminal *"Pentagon Papers"* case, *New York Times v. United 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 (but mostly embarrassing) study of U.S. involvement in the war in Vietnam. First Amendment issues are also implicated herein in the context of the total interference with Petitioner's ***Sixth*** Amendment right to counsel, a right also statutorily conferred via Article 31(c), UCMJ, 10 U.S.C. § 831(c).

> ***obtain incriminating evidence and overlook potential invasions of privacy and protected speech.*** 407 U.S. at 316-17 [emphasis added].

Finally, in language that will certainly be revisited in the near future, the Court concluded:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. . . . ***If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.*** 407 U.S. at 320 [emphasis added].

The Fifth Amendment is also implicated herein, to wit:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

However, by virtue of the fact that Petitioner is confined at a military confinement facility pursuant to a ***military*** order of the Commander in Chief,[50] 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.

Thus, the initial constitutional uncertainty herein is *not* whether or not the Congress possesses the constitutionally enumerated "War Powers," because they clearly do, 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 perhaps more importantly, specific Amendments to the Constitution? *See,* John H. Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NY: Princeton Univ. Press, 1993).[51]

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50 *Amici Curiae* would note 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 as will be shown, 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 pursuant to the express terms of Article I.

51 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. Indeed, that is the thrust of Chief Justice Marshall's opinion above. That the President's role was conceived to be restricted, is best shown by the "Anti-Federalist's" position on the then proposed Constitution, as advocated by Patrick Henry:

> If your American chief be a man of ambition, and abilities, how easy is it for him to render himself absolute: the army is in his hands, and, if he be a man of address, it will be attached to him; and it will be the subject of long mediation with him to seize the first auspicious moment to accomplish his design . . . . But, the President, in the field, at the head of his Army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke.

Ralph Ketcham, ed. *The Anti-Federalist Papers and the Constitutional Convention Debates,* (NY: Mentor Books, 1986) at 214.

> *[T]he existence of an emergency does not redistribute the powers of government allocated by the Constitution.*[52]

Chief Justice Warren in *United States v. Robel,* 389 U.S. 258 (1967), as late as 1967 forcibly rejected a government argument that its "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 Chief Justice went on to observe:

> [The] concept of "national defense" cannot be deemed an 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***. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. ***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].

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52 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.

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

C. "MILITARY" LAW.

For most lawyers, especially those who have never dealt with the arcane intricacies of the law as applied to the military or military situations, numerous misconceptions and semantical inaccuracies exist. Similarly the phrase, "military justice" is a term of art referring to practice under the *Uniform Code of Military Justice* [UCMJ], and is likewise misused by the press and politicians.[53] Thus, just what are we talking about? The following definitions should suffice:

1. Military Law.

> "[T]he exercise of that branch of the municipal law which regulates its military establishment."[54] In the United States, it is the UCMJ, and its implementing regulations.

2. Martial Law.

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53 *Compare,* remarks attributed to Vice President Cheney, who is reported to have "told a cheering audience of conservative lawyers. . . ., 'This is a war against terrorism. Where military justice is called for, military justice will be dispensed.'" Robin Toner, *Despite Some Concerns, Civil Liberties are Taking a Back Seat,* NY Times, Digital Ed., Nov. 18, 2001.

54 Paragraph 2, page I-1, *Manual for Courts-Martial (2000 Edition)* [Washington, DC: GPO].

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

A fortiori the Petitioner a United States citizen who is not a member of the United States military, cannot Constitutionally have *military law* applied to him under the present circumstances, ***unless*** the Respondents admit that he is a *bona fide* Prisoner of War, subject to United States jurisdiction.[56] Furthermore, since “martial law” has not been declared (nor could it be at this juncture),[57] no ***military*** authority constitutionally exists to confine the Petitioner. In fact Congress acting under its enumerated “war powers” under Article I, §, U.S. Const., has spoken in a dispositive fashion. Recognizing as it must, the provisions of both the 4th and 5th Amendments quoted above, Congress as part of the *Uniform Code of Military Justice*, enacted Article 9, UCMJ,[58] which states in relevant parts:

> (a) ***Arrest*** is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. ***Confinement*** is the physical restraint of a person.

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55 *Id.*

56 Art. 2(a)(9), UCMJ, 10 U.S.C. § 802(a)(9).

57 *See, Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

58 10 U.S.C. § 809.

* * * * *

> (d) ***No person*** may be ordered into arrest or confinement except for probable cause. [emphasis added].

Congress continues its limitations in Article 10, UCMJ, 10 U.S.C. § 810:

> **Restraint of persons charged with offenses:**
>
> **. . .** When any person subject to this chapter is placed in arrest or confinement prior to trial, ***immediate steps shall be taken to inform him of the specific wrong of which he is accused*** and to try him ***or to dismiss the charges and release him.*** [emphasis added].

It is clear just from the title that "preventive detention," *viz.,* incarceration without charges was *not* something that Congress envisioned. Equally as fundamental is the clause, "any person subject to this chapter." Article 2(a)(9), UCMJ, 10 U.S.C. § 802(a)(9), provides the only *possible* basis for the military to acquire "jurisdiction" over the Petitioner, *i.e.,* he is a "Prisoner of War."[59] But, if he is not charged, he must be released, period.

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59 If he is a *Prisoner of War,* then Petitioner is entitled to the various protections provided by the 1949, Geneva Conventions and Protocols, *see, e.g.,The 1949 Geneva Convention Relative to the Treatment of Prisoners of War,* 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, June 20, 2002].

Article 11(b), UCMJ, 10 U.S.C. § 811(b), also carries the requirement that "uncharged" persons are not to be confined, to wit:

> (b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, ***the offense charged against him***, and the name of the person who ordered or authorized the commitment. [emphasis added]

Thus, the Respondents, knowing that no charges have been brought against the Petitioner, are clearly holding him illegally.[60] Indeed, such conduct is *per se* criminal and it is abhorrent to think that the Respondents would seek to have this Court either condone or ignore such illegal conduct.[61]

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60 This itself is a crime under military law as Article 98(2), UCMJ, 10 U.S.C. §898(2), states:

> Any person subject to this chapter who -
>
> * * * * *
>
> (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

61 Arguably, the Commander in Chief's refusal to prosecute a clear violation of military law, violates his oath to ". . . preserve, protect and defend the Constitution of the United States." Art. II, § 1, U.S. Const. That *Amici Curiae* concede would be a "political question." The "prosecution" function is vested exclusively within the Executive Branch, subject to Congressional impeachment. Art. I, §§ 2 and 3, U.S. Const.

Finally, the Respondents are illegally confining the Petitioner as (in their terms) an "enemy combatant."[62] Article 12, UCMJ, 10 U.S.C. § 812, states:

> **Article 12: Confinement with enemy prisoners prohibited**
>
> No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

Amici Curiae would represent that the Consolidated Naval Brig at Charleston is a *military* prison, with (other than Petitioner) military prisoners.[63]

If the old adage, "actions speak louder than words," has any meaning, then the acts of the Respondents herein are contemptuous. Contemptuous in the context of disregarding the rather clear Congressional mandates noted above, and contemptuously disregarding the rights of the *military* prisoners confined in the Charleston Brig. One is hard pressed to claim that the Respondents are contemptuous of *Petitioner's* rights, since they claim that he is a *persona non grata* without *any* fundamental or constitutional rights. Indeed, by *fiat* the Commander in Chief has created a classic *Bill of Attainder* against the Petitioner herein. While the Constitutional prohibition against such Bills of Attainder is directed to Congress in Article I, § 9, cl. 3, the so-called "Limitation Article," it can hardly be claimed that the Commander in Chief can do

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62 It is disingenuous at best to arbitrarily claim that Petitioner is an "enemy combatant," but that he is therefore, somehow ***not*** a *bona fide* Prisoner of War.

63 The undersigned counsel, as an officer of the Court, represents that he personally has a client who was convicted and sentenced by a U.S. Air Force, General Court-Martial, confined at the Charleston Brig.

militarily what the Constitution otherwise forbids to be done to a United States citizen. *Compare, United States v. Brown,* 381 U.S. 437 (1965). Or, as the Court observed in *South Carolina v. Kazenbach,* 383 U.S. 301, at 324 (1966):

> [C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as ***protections for individual persons*** and private groups, ***those who are peculiarly vulnerable to nonjudicial determinations of guilt.***[64]

D. *Due Process* Illegality.

Amici respectfully suggest that the Government's arguments as to Petitioner's *lawful* detention are legally absurd and must fail in light of *Zadvydas v. Davis,* 533 U.S. 678 (2001). First, *Davis* clearly stands for the proposition that *habeas corpus* is the proper vehicle to contest illegal confinement by the Government. 533 U.S. at 687. If, as the *Davis* Court said, "A statute permitting indefinite detention of an alien would raise a serious constitutional concern," 533 U.S. at 690, then surely, a "military order" "permitting indefinite detention" of a U.S. citizen must also raise "a serious constitutional concern." The Government cannot seriously argue that a deportable alien, has more constitutional rights and protections than does a United States citizen - regardless of how the Commander in Chief designates Petitioner, yet that is the fundamental *effect* of their *Motion to Dismiss* in Petitioner's case.

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64 *See also, Nixon v. Administrator of General Services,* 433 U.S. 425, at 468 *et seq.* (1977).

Davis was not a criminal case - it was a deportation proceeding brought pursuant to our immigration laws, that resulted in a *de facto* indefinite detention of an *alien*.[65] But, as in other, non- criminal detention matters,[66] due process still protects against *illegal* detention. 533 U.S. at 693 ["the Due Process Clause applies to all 'persons' within the United States. . . ."]. As herein, the Government in *Davis* argued that the Judiciary "must defer to executive . . . decision making . . . ." 533 U.S. at 695. But, as *Davis* held, "that power is subject to important constitutional limitations." (citations omitted) *Id.*

Petitioner's situation is *not* such as where Congress — which as noted above, possesses the Constitutional "war power" and power to regulate the military — has spoken, or even as in *Davis,* delegated power to the Executive Branch. Congress simply has not spoken in this regard and Petitioner's detention is *ultra vires.* Congress *has* however spoken on the issue of military confinement in general, requiring a "probable cause" determination.[67] That has not been accomplished in Petitioner's case.

Simply put, Respondents would have this Court find that they can indefinitely confine Petitioner pursuant to a military order under military authority after transporting him by military aircraft, and then turn around and deny that military law as Constitutionally enacted pursuant to Congressional power, applies to Petitioner's detention. *Amici* respectfully suggest that this

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65 *See* 8 U.S.C. §1231(a)(6).

66 *See* cases cited in footnote 20, *supra.*

67 *See* Article 9(d), UCMJ, 10 U.S.C. § 809(d), and the discussion of this issue in Part III, C, *supra.*

Court can and must give Congressional enactments, statutes textually committed by the Constitution to Congress, due deference and apply them in Petitioner's case. Surely, if the petitioners in *Davis* were entitled to relief from illegal confinement, so is Petitioner.

Finally, *Amici* would suggest that Congress in enacting the UCMJ, must have been mindful of the two 1949 Geneva conventions, the one pertaining to POW's and the other to civilians cited above. The UCMJ was enacted in 1950 and if Congress had any qualms about the Geneva Conventions, they certainly have had ample time through numerous amendments to the UCMJ, to have either excluded "enemy combatants," or others from its provisions. *Compare, Solorio v. U.S., supra. Amici* would point to the words of the Court in *Schneiderman v. United States,* 320 U.S. 118, at 120 (1943):

> We should let our judgment be guided so far as the law permits by the spirit of freedom and tolerance in which our nation was founded, and by a desire to secure the blessings of liberty in thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native born. And we certainly should presume that Congress was motivated by these lofty principles.

That the Government's position relative to Petitioner is both misguided and misplaced, is the Government's reliance on *Ex Parte Quirin,* 317 U.S. 1 (1947).[68] Whatever the application of *Quirin* is to this case, one thing is certain — it did not involve *any* issues of U.S. citizenship. The Court's language to that effect is pure *dicta* and is proven by the Government's own actions. The "civilian" citizen "co-conspirators," were tried in United States District Courts. *See, e.g.,*

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68 *Quirin* is addressed in detail in Part V, *infra.*

Cramer v. United States, 325 U.S. 1 (1945); and *Haupt v. United States*, 330 U.S. 631 (1947).[69] They were not labeled as "enemy combatants," much less detained as such. They were criminally charged with treason and prosecuted (during wartime no less) in the normal course of federal criminal proceedings.

Davis confirms that Petitioner is entitled to his Fifth Amendment right of liberty. *Amici* do not suggest that the Government cannot criminally prosecute Petitioner, but the Fifth Amendment also governs that. Petitioner has been afforded *no* Due Process since being turned over to the military, and that simply is unconstitutional.

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69 This "Haupt" was the father of one of the *Quirin* defendants and was a U.S. citizen. As noted in *Amici'* discussion of *Quirin, infra,* the younger Haupt had forfeited any claim to U.S. citizenship when he enlisted in the German Army and swore allegiance to Germany. This was conceded by Haupt's Defense Counsel during oral argument in *Quirin.*

IV. THE CONSTITUTION DOES NOT GIVE EITHER PLENARY OR UNREVIEWABLE POWERS TO THE *COMMANDER IN CHIEF* IN THE ABSENCE OF A DECLARATION OF WAR OR THE LAWFUL IMPOSITION OF MARTIAL LAW.

> *An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.*

--James Madison, *The Federalist, Number 48*.[70]

A. No Deference is Due a Commander in Chief on Constitutional Interpretation.

The Commander in Chief is ***not*** a co-equal, constitutional branch of our Republic. Thus, the actions of the Commander in Chief must be viewed through the constitutional limitations placed on that office, versus that of the Chief Executive in general.[71] The "power" of the President is simply not at issue in this case because the illegal confinement has as its basis a *military* order of the Commander in Chief. Consequently as Chief Justice Marshal observed 200 years ago, "The whole powers of war being, by the constitution of the United States, vested in Congress, ***the acts***

70 The complete *Federalist Papers* are available on-line at: http://memory.loc.gov/const/fed/fedpapers.html [last accessed, June 21, 2002].

71 *Cf. The War Powers Resolution,* 50 U.S.C. § 1541 *et seq. See also,* Ely, *op cit.*

of that body alone can be resorted to as our guides. . . ." *Talbot v. Seeman,* 51 U.S. 1, at 28 (1801) [emphasis added].

If one looks to the "original intent" theory of Constitutional Law,[72] Chief Justice Marshall's interpretation must be persuasive authority that the "war powers" belong to the Congress, pure and simple. The Government's position herein, *viz.,* that the Commander in Chief has unfettered ***and*** unreviewable authority simply by issuing a *military* order, is simply wrong. It is also unconstitutional as *Little v. Barreme,* 6 U.S. 170 (1804), makes clear. Indeed, the Government's position herein ignores *Little* as precedent.

Finally, when it comes to interpreting and applying the Constitution, especially the imprisonment of a citizen, as *Marbury v. Madison, supra*, and its progeny teach, it is the duty of the Judiciary - not the Commander in Chief - to do so. And, as *United States v. Nixon, supra,* illustrates, no man - to include the President - is above the law. *See, Sterling v. Constantin,* 287 U.S. 378 (1932).

B. There is No Historical, *United States* Precedent for the Government's Position that the Commander in Chief's Decision Herein is Beyond the Reach of the Federal Judiciary.[73]

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72 *See, e.g., Atwater v. City of Lago Vista,* 533 U.S. 924 (2001).

73 Adolph Hitler as *Führer*, however made the same claims. *See,* H.W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany,* (Barnes & Noble, NY 1997 ed.)[Hereinafter "Koch"]. Hitler felt that "there is no room in this concept of the state for the separation of powers." Koch, at 71. *Compare*, Koch at 72: "Freislar [a NAZI Justice Department official and later Judge] argues that Hitler acted in a state emergency and therefore what he did was not only necessary but legal." As Koch notes at 160: "In February 1943 the ruling was made that in VGH ["Volksgerichthof," a special "national security" court] cases involving citizens of occupied states it would be a matter of discretion as to whether the defendant would be represented by defence (*sic*) counsel."

Absent a formal, Congressional declaration of war,[74] or the lawful imposition of martial law, the Commander in Chief's military authority is limited by the Constitution. The *Federalist Papers* conclusively show that the drafters and framers of our Constitution, firmly rejected the concepts claimed and envisioned by the Commander in Chief herein. In *Federalist, No. 48,* Madison says:

> A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. . . . In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, ***the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.*** [Emphasis added].[75]

Hence, a suspicion of Executive encroachment - both as to power and as to liberty - was clearly of prime concern to the Drafters. Indeed, while providing for a system of government with a "separation of powers," it also wisely provided for a Constitutional system of "checks and balances."

> For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person

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74 The Joint Congressional "Authorization for Use of Military Force," [H.J. Res. 64, September 14, 2001], is *not* a Declaration of War, nor does it suspend *habeas corpus.* It offers no authority for the Government herein.

75 http://memory.loc.gov/const/fed/fed_48.html [last accessed, June 23, 2002].

> should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS. [emphasis in original].[76]

This concept of Constitutional "Checks and Balances," was the subject of *Federalist, No. 51,* which was entitled: "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments:"

> TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.[77]

It is thus clear that the Commander in Chief cannot *sua sponte* assume powers neither enumerated within the text of the Constitution, nor delegated by the Congressional "War Power."

> Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, ***or until liberty be lost in the pursuit.*** [Emphasis added].[78]

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76 *Id.*

77 http://memory.loc.gov/const/fed/fed_51.html [last accessed, June 23, 2002].

78 *Id.*

Alexander Hamilton, the author of *Federalist, Number 69,* entitled, *The Real Character of the Executive,* stated:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, ***but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy;*** while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, ***all which, by the Constitution under consideration, would appertain to the legislature.*** [Emphasis added].[79]

It is therefore abundantly clear that the Framer's view of the Commander in Chief's power was limited and again, the War Power clearly resided and remained with the Congress.

In 1792, Congress passed the *Militia Act*, authorizing the President to federalize the State Militias in the event of certain domestic contingencies. In 1794, the so-called *Whiskey Rebellion* in Western Pennsylvania, required action. Pursuant to the Congressional authority (which required a form of "probable cause" by a jurist), Washington implemented the Act and ordered the mobilization of the Militia to suppress the insurrection. Yet, in his "Military Order" he made no effort to interfere with the Judiciary, indeed he commanded the troops:

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79 http://memory.loc.gov/const/fed/fed_69.html [last accessed, June 23, 2002].

> You are to exert yourself by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the civil magistrates . . . .[80]

Washington clearly understood that his power as Commander in Chief was limited and depended upon Congressional authority. While the military made numerous arrests, detentions and prosecutions were handled by the civilian court system.

As early as 1807, the Supreme Court addressed this issue in *Ex Parte Bollman,* 8 U.S. 75 (1807). Bollman and others were arrested by the Army and charged with treason. The military, on orders from President Thomas Jefferson, turned the prisoners over to the jurisdiction of the federal court in the District of Columbia, who then found "probable cause" to detain them. The prisoners sought relief via *habeas corpus*, which the Government opposed on numerous grounds. The Court granted the *writs* and specifically noted that only Congress could order the suspension of the writ of *habeas corpus.* Absent that, it was up to the Court to decide the merits of the petition for *habeas* relief - the very issue herein.

One of the earliest legal commentators on "military law," in 1846, rejected the Government's position advanced herein - and he was a military officer!

> ***The substitution of this power [martial law] for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period, or trial by a military body.*** Of such high importance to the

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80 As quoted in Frederick B. Wiener, *A Practical Manual of Martial Law,* (Harrisburg, PA: The Military Service Pub. Co., 1940), at 103. Indeed, Washington also sent the federal district judge and the United States Attorney along, *id.,* at 55.

> public is the preservation of personal liberty, that it has been thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the citizen.
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> Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus* . . . ***and the intervention of congress is necessary before such suspension can be made lawful***. . . . In commenting upon this part of the laws of England, Mr. Justice Blackstone says, "but the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure (the arbitrary imprisonment of a person) expedient, for it is the parliament only . . . that whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act . . . to imprison suspected persons without giving any reason for so doing" [quoting Blackstone's Commentaries, at 135]. [Emphasis added][81]

In May of 1861, one Merryman (a civilian) was awakened in his house and arrested by forces of the U.S. Army. He was placed in military confinement at Fort McHenry. No charges - civilian or military - were lodged against him, and a "copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused . . . ." *Ex Parte Merryman,* 17 Fed. Cas. 144, at 147 (C.C. D. Maryland, 1861). His attorney filed for a writ of *habeas corpus* and Chief Justice Taney, as Circuit Judge heard the case. The Commander of the Fort, refused to comply with the writ, citing President Lincoln's *unilateral* decision to suspend the writ. In his decision ordering Merryman's release, Chief Justice Taney first noted that the

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81 William C. DeHart, Captain, U.S. Army (Acting Judge Advocate of the Army), *Observations on Military Law* (NY: Wiley & Halsted, 1859 ed, copyrighted 1846) [reprinted in 18 *Classics in Legal History*, Wm. S. Hein & Co, Buffalo, NY, 1973], at 17-18.

specific language of Article I, § 9, of the Constitution, gives Congress alone the power to suspend the writ. He continued by noting:

> [I]f the high power over the liberty of the citizen now claimed was intended to be conferred on the president, it would undoubtedly be found in plain words in this [Second] article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power. *Id.,* at 149.
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> He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.
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> ***Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers***. . . . *Id.* [Emphasis added]
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> And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown. *Id.,* at 150.
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> If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day. . . *Id.* at 151.

Justice Taney concluded his constitutional exposé, as follows:

> Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, ***the right to suspend it is expressly confined to cases of rebellion or invasion***, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. ***It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body***." 3 Story, Comm. Const. § 1336. *Id.* at 151-52. [Emphasis added].

Two years after *Merryman, supra,* the Supreme Court decided the *Prize Cases,* 67 U.S. 635 (1863). That opinion is frequently *miscited* for the erroneous proposition that the Court would defer to military decisions of the Commander in Chief. There, the case involved a naval blockade of Confederate ports and the seizure of foreign vessels. What is generally overlooked is that President Lincoln had sought and received Congressional ratification for his initial blockade order. 67 U.S. at 670-71; 12 Stat. 326 (1861). Thus, the “war power” of the Commander in Chief ultimately flowed from Article I, and the Congress.

Ex Parte Milligan, 71 U.S. 2 (1866), resolves the question *sub judice.* Absent express *Congressional* action, a United States citizen cannot be detained or imprisoned by the U.S. military, absent a *bona fide* existence of martial law. Milligan, a civilian was granted *habeas*

corpus. While much is made of the opinions of the majority and dissent [which did not argue against the writ, only the reasoning of the Court], it is perhaps more instructive to look at the *arguments* of Milligan's counsel, which the majority adopted:

> This brings up the true question now before the court: ***Has the President, in time of war, upon his own mere will and judgment, the power to bring before his military officers any person in the land, and subject him to trial and punishment, even to death?*** The proposition is stated in this form, because it really amounts to this.
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> If, the President has this awful power, whence does he derive it? ***He can exercise no authority whatever but that which the Constitution of the country gives him. Our system knows no authority beyond or above the law***.[82]

He continued by noting:

> The power exercised through these military commissions is not only unregulated by law but it is incapable of being so regulated. ***It asserts the right of the executive government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that government or its paid dependents may choose to impute an offence.*** This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It operates in different ways; the instruments which it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form. But in all its mutations of outward appearance it is still identical in principle, object, and

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[82] 1866 U.S. LEXIS 861, at 48.

> origin. It is always the same great engine of despotism which Hamilton described it to be.[83] [emphasis added]

The Court agreed with Milligan in its holding:

> 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.[84] [emphasis added]

That *Milligan* was interpreted as the correct application of the Constitution, is implicit from the writings of that century's greatest military law scholar, Colonel William Winthrop, U.S. Army. In his seminal work, *Military Law and Precedents,* 2nd ed. (Washington, DC: Gov't Printing Office, 1920) [Legal Classics Library reprint], at 891; he notes the following:

> Where . . . an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States,* he will make full return of the same . . . and on the return day will appear with the body of the petitioner before the court ***to abide by its order thereupon.*** [emphasis added in bold].

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83 *Id.,* at 142-43.

84 71 U.S. at 124-25.

That concept was followed by the military through the beginning of World War II. In a treatise, Lee S. Tillotson, Colonel, Judge Advocate General's Department, U.S. Army (ret.), *The Articles of War Annotated,* (Harrisburg, PA: The Military Service Pub. Co., 1942), the author notes in a section headed, "HABEAS CORPUS:"

> "34. **In a case of disputed jurisdiction over a person subject to military law, as between the civil and military courts, the question should be raised by writ of *habeas corpus* in a Federal Court**. The military authorities must recognize such writ and surrender the body of the person wanted in response thereto, ***leaving the whole question to be decided by the court from which the writ issued."*** *Id.,* at 163 [Emphasis added].
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> "38. When, by writ of *habeas corpus* issued by a Federal court, a military prisoner is required to be produced in court, regular military travel orders may be issued entitling the officer in charge, the prisoner, and a suitable guard, to the authorized travel allowances." *Id.,* at 164.

Rather than any "due deference" argument to the Commander in Chief, it is quite clear that the military itself was under the correct constitutional construct that they, the military, must give "due deference" to the jurisdiction of the federal courts, and indeed, that such courts were the proper forum to decide "disputed jurisdiction."

One of the great Constitutional anomalies ***and frauds*** perpetrated on the Courts, were the Japanese Evacuation and Internment Cases from the West Coast, shortly after the Pearl Harbor attack. On February 14, 1942, the President issued Executive Order # 9066, essentially forcing West Coast Japanese Americans into concentration camps unless they voluntarily "relocated." However, before the Constitutionality of this Order could be challenged, Congress ratified it.

See, 56 Stat. 173 (1942). A number of cases ultimately reached the U.S. Supreme Court, which generally upheld these actions as proper due to the war. *See, e.g., Hirabayashi v. United States,* 320 U.S. 81 (1943); and *Korematsu v. United States,* 323 U.S. 214 (1944).

The decisions however, were procured by outright fraud on the Court from the Government and their ***only*** relevance today is that Courts should be highly skeptical of any claims from the Commander in Chief arguing "military necessity." Indeed, in *Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), the Court granted a writ of *error coram nobis* and reversed Korematsu's conviction. The basis was the Government's misrepresentation throughout the case of the existence of "intelligence" justifying or providing a clear, military necessity for the evacuation orders in the first place. It simply existed only in the minds of the Government's lawyers and some military officers.[85] *See also, Hirabayashi v. United States,* 627 F.Supp 1445 (W.D. Wash. 1986) [reversing in part some of his convictions].[86]

The Court next visited this area in *Ex Parte Quirin,* 317 U.S. 1 (1942) [the "Nazi Saboteur" case]. Indeed, that is the judicial drum that the Government is beating loudest, for that is their

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85 For a comprehensive review of this sordid process, *see* Peter Irons, *Justice at War* (NY: Oxford Univ. Press, 1983), where the author - an attorney and professor - documents and traces the government's misconduct; *e.g.,* "[P]resenting to the Supreme Court a key military report that contained 'lies' and 'intentional falsehoods.' [F]iles that disclose the alteration and destruction by War Department officials of crucial evidence in these cases." *Id.* at ix. During the "Watergate" affair, according to U.S. District Court Judge John Sirica, *false* claims of "national security" were proffered to the Court as a basis to avoid complying with Grand Jury subpoenas. John Sirica, *To Set the Record Straight,* (NY: W.W. Norton & Co., 1979), at 155.

86 The misrepresentations of various Commanders in Chief exercising their purported "war power," has been extensively documented. *See, e.g.,* H.R. McMaster, Major, U.S. Army, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam* (NY: HarperCollins, 1997); Sirica, *op cit.*

stated basis for categorizing the Petitioner as an "unlawful combatant." However, even that claim is not historically accurate from a military perspective.

Tracing history and Army records back to 1862, while the Civil War raged in the Country, the so-called "Indian Wars" were also escalating - a fact overshadowed by the significance of the Civil War. That year a portion of the Sioux tribe in Minnesota, the Santee Sioux, rebelled and declared "war" on the white settlers. They attacked and President Lincoln ordered the Army to respond in kind.

> A short "war" ensued, with Lincoln putting one of his favorite generals, General John Pope, in charge of federal forces in Minnesota. Pope announced that "It is my purpose to utterly exterminate the Sioux . . . . They are to be treated as maniacs or wild beasts, and by no means as people with whom treaties or compromise can be made."[87]

After a battle that defeated the Sioux forces, the Army had captured roughly 400 of their "warriors." What to do with them and how to treat them became the question then - and ultimately provides some guidance here.

In spite of "sovereignty" issues attaching to the Native Americans,[88] and the fact that they had declared war, the Army refused to accord them "POW" status, and indeed classified them as

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87 http://www.lewrockwell.com/dilorenzo/dilorenzo9.html. [Last accessed, June 24, 2002]. Historically, Washington issued a similar order against the Iroquois. This sounds strangely familiar to the current Administration's characterizations of the Cuban prisoners - they are so "dangerous" that even in the unlikely event that a Military Commission might acquit them, they will still be detained.

88 *See generally, Cherokee Nation v. Georgia,* 30 U.S. 1 (1831)(Marshall, C.J.). Lincoln seemed to fear that by granting POW status, it somehow could confer "sovereignty" and hence, an indicia of legitimacy to the Sioux.

unlawful combatants.[89] Thus, a Military Commission was created to try the prisoners. "Critics of the trials also have argued that the commission was wrong to treat the defendants as common criminals rather than as the legitimate belligerents of a sovereign power."[90] After truly "summary" trials by this Military Commission, 303 were sentenced to death. President Lincoln exercised his prerogative to review the cases and sentences, and commuted all but 38 death sentences. Other than that review, there was no appeal - indeed, ***the prisoners had not even been furnished counsel***!

Colonel Winthrop recognized what he termed, "uncivilized combatants," those who do not respect the laws of war. Thus,

> Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, liable to be shot, imprisoned or banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Winthrop, *op cit.,* at 784.

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89 P. Maguire, *Law and War: An American Story,* 32 (Columbia Univ. Press, NY, 2000) ["Maguire"].

90 http://jurist.law.pitt.edu/trials23.htm [last accessed, June 24, 2002].

Winthrop's observations however must be kept in the context of what he was describing - combatants who either were captured or surrendered on the battlefield, *i.e.,* "caught in the act" guilty, ***could be*** dealt with *summarily* - otherwise they were tried.[91]

It is thus clear that the concept espoused in *Quirin* and argued here, *viz.,* that the incantation of "unlawful enemy combatants," is of judicial origin, is again, simply false. Rather than acknowledge "sovereignty" issues, the Commander in Chief and his military subordinates used the euphemism of "unlawful enemy combatants" to justify a deprivation of fundamental rights, to include rights guaranteed under the Laws of War.

Quirin is a judicial anomaly and of limited value once one actually understands the case.[92] First, while there were eight defendants, only seven were involved in the *habeas* action at the Supreme Court. All were defended by military counsel, but counsel for one of the Defendants, Dasch, felt that he had no legal authority to challenge the process because he had been ordered not to![93] Second, it was undisputed that (a) the United States was at war with Germany; (b) that

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91 George Washington set the precedent for trying spies, rather than summarily executing them. When British Major Andre (the collaborator with Benedict Arnold) was captured behind American lines, in civilian clothes, Washington ordered a military trial. This is discussed in *Ex Parte Quirin,* 317 U.S. 1, at 31, fn. 9 (1942).

92 For the most comprehensive and recent legal analysis of the case see, Louis Fisher, *Military Tribunals: The Quirin Precedent* (Congressional Research Service - The Library of Congress, March 26, 2002) available on-line at:

http://fpc.state.gov/documents/organization/9188.pdf [last accessed, June 24, 2002] [Note, this is in ".pdf" format]. [hereinafter "Fisher"].

93 Fisher, at 12.

all eight defendants were members of the *uniformed* German military; and (c) they were on a military mission (having been brought to the U.S. via German U-Boats).

The Government's case was presented by the Attorney General himself, Francis Biddle. Biddle's argument that the Commander in Chief have "absolute" power over the "enemy," was ***not*** adopted by the Court.[94] The Government today cites *Quirin* for the proposition that even U.S. citizens could be held as "unlawful enemy combatants," but of course a closer reading does not support that and to the extent that the Court's opinion comments on it, it is clearly *dicta.* Defense Counsel for the seven defendants, Colonel Royall, "conceded that Burger had lost his citizenship by joining the Nazi Army, while Biddle maintained that Haupt forfeited his citizenship as well. To Biddle, the ***essential issue was not U.S. citizenship*** but the status of the defendants as enemies of the United States."[95] As enemy aliens during wartime, they had no legal rights to access the civilian courts. None of this has any relevance to the case herein and therefore, *Quirin* stands for nothing when there is no declared war, when there is no question as to "citizenship," indeed, when there are no charges period pending against the Petitioner.

Quirin also suffers from some additional problems - first, Congress in passing the *Uniform Code of Military Justice* [UCMJ],[96] in 1950, engaged in a comprehensive overhaul of military law, something Article I, § 8, clearly gives them the power to do. Second, the 1949 Geneva

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94 Fisher, at 19.

95 Fisher, at 24-25 (internal citations omitted) [emphasis added].

96 10 U.S.C. § 801, *et seq.*

Conventions[97] were obviously adopted post-*Quirin*, so that court never considered them or their impact on domestic law here in the United States. In reality, the Government seems just to have ignored Article 5, of the 1949, *Convention Relative to the Treatment of Prisoners of War*:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, ***such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*** [emphasis added].

Regardless of what status the Petitioner ultimately finds himself in, since there is clearly a *bona fide* dispute over his status, he is entitled to judicial review in spite of the Government's objections. Regardless of the Government's thoughts, the fact remains that treaties are the "supreme law" of the land. *Breard v. Greene,* 523 U.S. 371 (1998).

Duncan v. Kahanamoku, supra, is like *Milligan*, the controlling precedent. A civilian convicted long after the need for martial law expired (*e.g.,* the Courts were open and functioning), it was thus under the precedent of *Milligan*, unconstitutional to try a U.S. citizen by a military tribunal. Therefore, *habeas corpus* properly was granted as the military had no authority to hold the "prisoner."

Finally, the core reason that the Government's arguments must fail stems from *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). This is the seminal case discussing the

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97 Available at: http://www.icrc.org/ihl.nsf/WebCONVFULL?OpenView [last accessed, June 24, 2002].

limitations on the President's perceived "War Power." The Court itself held that even in times of a national emergency, the President lacked any independent legal basis to seize corporations for the "war effort." Clearly, if the President cannot seize a corporation even as Commander in Chief, he cannot invest himself with the authority to seize and detain a U.S. citizen, contrary to the Fourth and Fifth Amendments.[98]

Justice Jackson's concurring opinion is instructive for two reasons. First, it must be remembered that he was the Chief United States Prosecutor at the Nuremberg Military Tribunals, so he had some modicum of knowledge as to that process. Second, he traces the history of the Chief Executives power - in war and peace - which provides considerable guidance here:

> There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. ***He has no monopoly of "war powers," whatever they are.*** While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.
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> ***That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.*** Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in

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98 This interpretation is consistent with *Henkels v. Sutherland,* 271 U.S. 298, at 301 (1926), where the Court held, "With enemy-owned property . . . the United States may deal as it sees fit [citation omitted]; ***but it has no such latitude in respect of the property of an American citizen.*"** [Emphasis added]. Again, if the enumerated "war power" of Congress cannot be used to seize ***property*** of a civilian citizen, surely it cannot be used to *seize* the Person of the Petitioner herein.

> any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." ***Thus, even in war time, his seizure of needed military housing must be authorized by Congress.*** It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." ***Such a limitation on the command power***, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, ***underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.*** Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand. Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.
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> His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. ***The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office.*** No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. ***What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.*** 343 U.S. 643-46.

Justice Jackson next addressed the so-called "emergency" doctrine:

> The appeal, however, that we ***declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be***

> ***wise, although it is something the forefathers omitted***. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of *habeas corpus* in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. ***Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.*** 343 U.S. at 650-51 [Emphasis added].
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>
> This contemporary . . . experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. ***But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.*** That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience. [footnotes omitted; emphasis added] 343 U.S. at 652

In a *habeas corpus* case involving a *former* member of the military, but a civilian at the time of his arrest, the Court in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), held that the military could *not* exercise any jurisdiction over civilians, even for crimes committed by that person while serving on active duty. In striking down a provision of the *Uniform Code of Military Justice*, the Court also noted that, "this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."

350 U.S. at 14 [citing *Milligan*]. Plainly, if neither Congress nor the Commander in Chief can lawfully obtain jurisdiction over a civilian, albeit a former member of the military for specific criminal acts, that cannot under any interpretation or extrapolation of the law confer any "jurisdiction" to the Commander in Chief over Petitioner herein.

Thus, the Government is faced with the dilemma of *Reid v. Covert,* 354 U.S. 1 (1957). *Reid* dealt with the trial by courts-martial of two military wives who had killed their husbands while stationed at overseas bases. They were charged with capital murder and tried by the military at their respective bases by General Court-Martial, as authorized by a statutory provision in the UCMJ. After conviction and direct appeals, they sought *habeas* relief on the grounds that the military had no *criminal* jurisdiction over them as *civilians*. The Supreme Court agreed. Their analysis began with a reassertion of the civilian-supremacy doctrine:

> The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. 354 U.S. at 23-24.

The Court went on to look at its own precedents:

> On several occasions this Court has been faced with an attempted expansion of the jurisdiction of military courts. *Ex Parte Milligan*, 4 Wall. 2, one of the great landmarks in this Court's history, held that military authorities were without power to try civilians not in the military . . . by declaring martial law in an area where the civil administration was not deposed and the courts were not closed. 354 U.S. at 30-31.

* * * * *

> The *Milligan, Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. ***In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.*** 354 U.S. at 33.

Amici respectfully suggest that the situation herein is more egregious. Respondents have detained and imprisoned, *i.e.,* deprived Petitioner of his liberty, without *any* charges and now incredibly suggest that a U.S. citizen - regardless of what he may be *suspected* of - can be denied both access to his counsel as well as the Judiciary, simply by labeling him an "enemy combatant," and confining him *incommunicado* in a military Brig.[99]

The wisdom of the *Reid* Court should be heeded: "We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly rooted in the Constitution." 354 U.S. at 40.

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99 *Amici* are not implying any misconduct by specific *military* officials - they are merely following the Orders of their superiors, the Commander in Chief and Secretary of Defense. Ironically, the Commander of the "detainees" in Cuba, in a speech to them in April of 2002, stated:

> Whether You Are Here at this Camp, or Elsewhere, as Long as I Am Responsible for You, Be Assured That You Will Be Treated Humanely, and ***in Accordance with the Reputation of the United States as a Nation of Laws.*** [Emphasis added]

At: http://www.nsgtmo.navy.mil/jtf-160/Commander/april_7.htm [last accessed, June 25, 2002].

V. PETITIONER IS EITHER ENTITLED TO *PRISONER OF WAR* STATUS OR A JUDICIAL HEARING TO DETERMINE SUCH.

There can be no argument that the United States is bound by the 1949 Geneva Conventions; indeed the Government acknowledges such in DODD 2310.1, discussed previously. Nor is this uncharted ground for a District Court. In 1989, General Manuel Noriega of Panama, declared "war" against the United States, *United States v. Noriega,* 746 F.Supp 1506 (S.D. Fl. 1990). Considerable litigation ensued about General Noriega's status, to include whether or not he was a POW and whether or not the District Court had the authority to adjudicate such. The District Court in a comprehensive opinion at 808 F.Supp 791 (S.D. Fl. 1992), held as follows:

- Geneva III [the POW Convention] "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 *not* a function of "neutral third parties" to determine POW status, *id.,* at 796;

- 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.*

The Court examined this issue at length and *Amici* respectfully submit that it is persuasive authority herein. In closing, the *Noriega* Court offered this sage observation:

> [T]hose charged with that determination [Noriega's confinement location and status] must keep in mind ***the importance to our own troops*** of faithful and, indeed, ***liberal adherence to the mandates of Geneva III.*** Regardless of how the government views this Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.
>
> In the turbulent course of international events . . . the relatively obscure issues in this case may seem unimportant. They are not. ***The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented.*** 808 F.Supp at 803. [Emphasis added].

Amici Curiae respectfully urge this Court to follow the teachings of *Noriega*, to liberally consider Petitioner's status — even as the Government claims as an "enemy combatant,[100]" — and to provide him with the protections that both our Constitution and the Geneva Convention on Prisoners of War mandates. It is the supreme law of the land, and Respondents are obligated to follow it.

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[100] *Amici* have grave concerns whether this alleged *status, viz.,* "enemy combatant" is recognizable under either international law or U.S. domestic law. As noted above, DODD 2310.1, does ***not*** employ this label, and perhaps more importantly, neither does Army Regulation [AR] 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997); available at: http://www.army.mil/usapa/epubs/pdf/r190_8.pdf [last accessed, July 8, 2002]. AR 190-8, is a "Joint Service" Regulation, meaning that it applies to *all* branches of the U.S. military. Its stated *purpose* is to provide "policy, procedures, and responsibilities for the administration, treatment . . . of enemy prisoners of war (EPW), . . . civilian internees (CI) and other detainees in the custody of U.S. Armed Forces." AR 190-8, paragraph 1-1(a). This regulation is still in effect, provides specific rights to Petitioner and yet, Respondents have inexplicably chosen to ignore its requirements. Chapter 5, dealing with "Civilian Internees" would seem to control.

CONCLUSIONS

Regardless of what the Commander in Chief may be directing our Armed Forces to do elsewhere in the world, the simple fact remains that martial law does not exist in the United States. Thus, both the Commander in Chief as well as his subordinates are subject to the provisions of the Constitution when it comes to Petitioner's legal rights. The Judiciary has a time honored and constitutionally commanded role to play in adjudicating Petitioner's rights. Just as King George III attempted to use his military to subvert civilian rule, so are the Respondents overtly saying that their military judgment - not the Constitution - suffices "to render the Military independent of and superior to the Civil Power." Our *Declaration of Independence* showed that to be an unacceptable concept then, and it must remain so today.

The time honored words of Martin Niemoeller, bear repeating:

> In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist;
>
> Then they came for the Jews and I didn't speak up because I wasn't a Jew;
>
> Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist;
>
> Then they came for the Catholics and I didn't speak up because I wasn't a Catholic;

Then they came for me, and by that time there was no one left to speak up.[101]

Having just celebrated our Country's independence on the Fourth of July, *Amici Curiae* must "speak up" against the illegal detention of Petitioner, as well has his being held *incommunicado*. *Amici Curiae* respectfully submit that the Court herein is bound by the Constitution as *Marbury v. Madison* teaches, and respectfully, should grant the writ of *habeas corpus* sought herein. Many members of the NYSACDL and NACDL suffered horrifically as a result of the tragedies of last September 11th and we as members of society cannot tolerate terrorism in any form or fashion. But, regardless of what the Government suspects Petitioner of, the lessons of history command that we object to his illegal and *incommunicado* confinement herein.

Indeed, as Respondents note, vast numbers of our citizenry have mobilized militarily to engage in combat in locations far from home. But, what Respondents' forget is that each person in uniform has taken an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic. . . ." 10 U.S.C. § 502. Those in uniform now and in times past who have paid the ultimate sacrifice, did so to "defend the Constitution of the United States." Doing that is the ultimate fight for "national security" and *Amici Curiae* respectfully

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101 Niemoeller was a decorated German U-Boat commander in WW I. He subsequently became a Lutheran minister who campaigned against Hitler. He was placed in a concentration camp in 1938 at Dachau, Germany, and remained there until liberated by the Allies in 1945. This quotation is at: http://www.nehm.com/contents/niemoller.html [last accessed, July 1, 2002].

urge this Court to recognize just what our veterans have fought, sacrificed and died for - the collective rights of all.

Respectfully submitted,

Dated: July ____, 2002. ____

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