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 -***

**GEORGE W. BUSH, *ex officio* as**

**Commander in Chief, *et al.,***

***Respondents.***

**Civil Action No.**
**02-Civ-4445 (MBM)**

# *SUPPLEMENTAL BRIEF*
**of**
# *AMICI CURIAE*
**by**

## THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

**and**

## THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

**DONALD G. REHKOPF, JR,**
***Law Offices of BRENNA & BRENNA***
**31 East Main Street, Suite 2000**
**Liberty Plaza**
**Rochester, New York 14614**
**(585) 454-2000**
**drehkopfjr@brennalaw.com**

**For *Amici Curiae***

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## PREAMBLE

"The basis of a democratic state is liberty."

Aristotle (384 BC - 322 BC), *Politics*

*Amici Curiae* respectfully submits this Supplemental Brief as both clarification of the positions in our initial Brief, and in response to the Respondents' Brief on the merits. We address the following concerns and issues for the Court.

## I. THIS CASE IS ABOUT THE CONSTITUTIONAL RIGHTS OF MR. PADILLA.[1]

This is a *habeas corpus* action where Mr. Padilla, a civilian United States citizen, contends that he is illegally imprisoned by the Respondents in violation of the Constitution and laws of the United States. As *Amici Curiae* read his Amended Petition seeking *habeas* relief, it is nothing more than that. The legality of Mr. Padilla's continued *incommunicado* detention in a United States ***military*** brig as a civilian, is the sole and fundamental issue before the Court. Or, as Chief Justice Marshall has eloquently postulated:

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

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1 As the Supreme Court noted in *Texas v. White,* 74 U.S. 700, at 720 (1868):

> We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, ***under the guidance of the Constitution alone.*** [Emphasis added].

> It is emphatically the province and duty of the judicial department to say what the law is. . . . This is of the very essence of judicial duty. *Id.,* at 177-78.

The seminal holding of *Marbury v. Madison, supra,* must be the lodestar in evaluating Mr. Padilla's *Writ of Habeas Corpus* and its attendant claims. But, the rationale for *Marbury* begins with Article IV, § 4, U.S. Const., which guarantees a "Republican" form of government with its separate but co-equal branches. There are no exceptions to this principle for "enemy combatants," for "national security" concerns, or even for an actual war. In *Texas v. White, supra,* the Court observed with respect to Texas as a Confederate "state" during the Civil War:

> It certainly follows that the State did not cease to be a State, ***nor her citizens to be citizens of the Union.*** If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. *Id.,* at 726 [emphasis added].[2]

A reading of the *Declaration of Independence,*[3] juxtaposed with the very language of the Constitution provides conclusive *constitutional* proof that a "national emergency," or even a formal declaration of war, cannot and does not provide the Commander-in-Chief with the monarchial or autocratic powers that the Respondents claim herein. The Constitution applies *as written*, both in times of peace and in war, to Presidents and to peasants and all citizens in between.

### A. An Analysis of *Ex Parte Milligan* - The Controlling Precedent Herein.

The Supreme Court concluded in *Ex Parte Milligan*:

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2 *Amici* would suggest that it is important to keep in mind two key facts in evaluating this case: first, Texas had formally via its Legislature voted to secede from the Union, *i.e.,* the United States proper; and second, armed conflict was in fact taking place *and on-going* within the territorial limits of the United States, *viz.,* there was no dispute that the "United States" was at war. Thus, the Court's observation that "during this condition of civil war, the rights of the State [of Texas] as a member, and of her people as citizens of the Union, were suspended," [74 U.S. at 727], cannot absent Congressional action in either formally declaring War (which they have ***not*** done) or suspending *habeas corpus* (which they have not done either), be applied to summarily deny Mr. Padilla his constitutional rights as a citizen, ***regardless*** of any individual crimes the Respondents suspect him of committing.

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

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

Thus, the Respondents' arguments of "military necessity" have been expressly rejected by the Supreme Court *when applied to United States citizens*. To understand both the Court's opinion in *Milligan* and its binding effect on the case *sub judice,* one must turn to the specific facts of that case:

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

There simply is *no* factual distinction between Milligan's status and that of Mr. Padilla - something that the Respondents have incredibly failed to address.[4] Nor have they addressed the Supreme Court's instruction on how this issue is to be evaluated, *viz.*:

> The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of *the struggle to preserve liberty* and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. ***By that Constitution and the laws authorized by it this question must be determined***. 71 U.S. at 119 [emphasis added].

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[4] For an analysis of Milligan's activities, *see* Gregory Bresiger, *The Wounds of War,* available on line at: http://www.mises.org/fullstory.asp?control=886 [last accessed, September 10, 2002]. Milligan was charged with the following offenses: (1) "Conspiracy against the Government of the United States;" (2) "Affording aid and comfort to rebels against the authority of the United States;" (3) "Inciting insurrection;" (4) "Disloyal practices;" and (5) "Violation of the laws of war." 71 U.S. at 6.

Notably, the Court did ***not*** hold that it was the Commander-in-Chief's decision. Rather it was a *judicial* matter and resolution ***must*** come from both the Constitution itself (to include the *Bill of Rights*) ***and*** "the laws authorized" by the Constitution, *i.e.,* proper legislative enactments from Congress.[5] The Government in *Milligan* - as herein - based its argument for the legality of the military detention on "the 'laws and usages of war.'" 71 U.S. at 121. The Court summarily rejected any suggestion that somehow the "law of war" could triumph over the liberty of a citizen, yes even a citizen accused of being disloyal, absent a declaration of martial law:

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

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

> If it was ***dangerous***, in the *distracted condition of affairs*, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," ***the law said arrest him***, confine him closely, render him powerless to do further mischief; and then present his case to the ***grand jury***[6] of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, ***the Constitution would have been vindicated***, the law of 1863 enforced, and the securities for personal liberty preserved and defended. 71 U.S. at 122 [Emphasis added].

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5 *See, e.g.,* 18 U.S.C. § 4001(a), to include its specific legislative history. The statute - controlling herein, but undiscussed by Respondents, reads in applicable part:

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

6 The Court can judicially note and *Amici* respectfully suggests such, that Mr. Padilla was initially detained for roughly one month by a Material Witness order issued by this Court pertaining to a pending Grand Jury. As in *Milligan, supra,* for whatever unexplained reason, the Government apparently chose not to submit a case to the Grand Jury. Rather, they reverted to a practice condemned by the Court in *Milligan.*

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

> **The proposition is this**: that in a ***time of war*** the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), ***has the power***, within the lines of his military district, ***to suspend all civil rights and their remedies***, and ***subject citizens*** as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.
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> If this position is sound to the extent claimed, then when war exists, foreign or domestic . . . the commander . . . can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
>
> ***The statement of this proposition shows its importance; for, if true, republican government is a failure***, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'-the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. ***Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.*** 71 U.S. at 124-25 [Emphasis added].

### B. The Respondents' Actions Illegally Establish "Martial Law."

In the early days of the Civil War, President Lincoln unilaterally suspended the privilege of *habeas corpus* - until he could reconvene the Congress and obtain their constitutional authorization. *Cf., Merryman, supra.* He also declared *martial law.*[7] As might be expected, litigation ensued to include civil suits for wrongful imprisonment and *habeas corpus* actions.

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

The Solicitor of Lincoln's War Department,[8] one William Whiting, Esq., coordinated the Executive Branch's defenses to these cases, and he issued instructions to the various trial attorneys on how to defend them. Those "litigation instructions" were published by Whiting in 1864, in a pamphlet entitled, *Military Arrests in Time of War.* This, along with Whiting's other thoughts has just been republished in, William Whiting, *War Powers Under the Constitution of the United States* (Union, NJ: The Lawbook Exchange, Ltd., 2002) [hereinafter "Whiting"]. Without citing Whiting, *Amici* respectfully submits that the Respondents herein make the exact same arguments first advanced by Whiting, to wit:

- "The aegis of law should not cover a traitor."[9]
- "Necessity arbitrates the rights and methods of war. Whatever hostile military act is essential to public safety in civil war is lawful."[10]
- "[The Commander-in-Chief's] right to seize, capture, detain, and imprison such persons is as unquestionable as his right to carry on the war."[11]
- "The military order is the warrant authorizing arrest . . . in like manner as the judicial order is the warrant authorizing arrest, issuing from a court."[12]
- "[T]he provision that *unreasonable* seizures or arrests are prohibited has ***no application to military arrests*** in time of war." [emphasis added][13]
- "It is, however, enough to justify arrests in any locality, however far removed from the battlefields of contending armies, that it is a *time* of war, and the *arrest* is required . . .to *prevent* an act of hostility . . . ." [emphasis in original][14]
- "While this ample authority is given to the commander-in-chief to arrest the persons of aliens . . . a ***far greater power over the persons of our own citizens*** is . . . given to the President in case of *public danger.*" [emphasis added][15]

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8 Today, this position is the Department of Defense, General Counsel.

9 Whiting, at 167.

10 *Id.*

11 *Id.,* at 168.

12 *Id.,* at 174.

13 *Id.,* at 176.

14 *Id.,* at 192.

15 *Id.,* at 195.

Unfortunately for Mr. Whiting - but, fortunately for America - the Supreme Court firmly rejected these bizarre and unconstitutional arguments in *Milligan, supra.* With the exception of the now discredited Japanese-American internment cases during World War II,[16] - which involved imposition of martial law - Whiting's concept of an absolute and unreviewable Chief Executive is both untenable constitutionally and has been rejected for 140 years;[17] or at least until Mr. Padilla decided to contest his detention on the material witness warrant herein.

*Amici Curiae* respectfully suggests that a close examination of the Respondents' arguments herein, shows that they have in reality, subtly established "martial law" by the stratagem of using the meaningless label, "enemy combatant."[18] Indeed, Respondent Bush via Executive Order has defined "martial law" as follows:

> A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require.[19]

Regardless of the label that the Respondents place on Mr. Padilla[20], he is not and nor is there any suggestion that he was a member of any "military," or engaged in any "combat" [*compare* the

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16 *See, e.g., Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), which set aside Mr. Korematsu's conviction that the Supreme Court had upheld in, *Korematsu v. United States,* 323 U.S. 214 (1944).

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

18 *Compare,* the legal treatment of Mr. Padilla and Mr. Hamdi [*Hamdi v. Rumsfeld,* 296 F.3d 278 (4th Cir. 2002), with that of an *actual* "enemy combatant," *viz.,* John W. Lindh [*U.S. v. Lindh,* Stipulation of Fact, available online at: http://news.findlaw.com/hdocs/docs/terrorism/uslindh71502sof.pdf {last accessed, September 10, 2002}], and the "enemy alien," cases: *United States v. Richard Reid* [the alleged "shoe" bomber]; *see*, Indictment at: http://news.findlaw.com/hdocs/docs/terrorism/usreid011602ind.pdf [last accessed, September 10, 2002]; and *U.S. v. Moussaoui*, [superceding Indictment at: http://news.findlaw.com/hdocs/docs/terrorism/usmouss71602spind.pdf ]. Lindh, Reid and Moussaoui are all detained pursuant to a Court Order as a result of their respective Indictments [Lindh, has entered a plea agreement], and receive the full panoply of Constitutional rights available to all defendants. With respect to Mr. Padilla - especially after his Material Witness detention - the government's actions speak louder than their feeble protestations attempting to justify his continued illegal detention under martial law conditions.

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

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

20 It is ironic that the Government in *Milligan* attempted to defeat the Court's jurisdiction by arguing that *Milligan* was a "Prisoner of War." The Court's assessment of that argument and their response is equally as

*Lindh* case, *supra*] and thus he remains a "civilian" who is by the Respondents own contentions herein, somehow subject to *exclusive* military governance and detention. That too, the *Milligan* Court condemned as illegal, for the same reasons that it is illegal herein: "**Martial law** cannot arise from a threatened invasion. ***The necessity must be actual and present***; the invasion real, ***such as effectually closes the courts and deposes the civil administration***." 71 U.S. at 127 [emphasis added]. The Respondents citation to and reliance upon *Moyer v. Peabody,*[21] - a martial law case - is irrelevant herein, *unless* they are *sub silentio* seeking the *imprimatur* of this Court justifying their actions under martial law.

Here, the Respondents have *de facto*, illegally and selectively implemented "martial law" as applied to Mr. Padilla and apparently also, Mr. Hamdi. In that context, they thus seek to avoid Constitutional and judicial scrutiny, by beating the drum of a phantom Presidential "war power." Again, the Respondents' arguments herein are directly linked to Whiting's:

> [The President] must have the power to hold whatever persons he has a right to capture ***without interference of courts*** during the war, and he has the ***right to capture*** all persons who ***he*** has reasonable cause to believe are hostile to the Union, and are engaged in hostile acts. [emphasis added].[22]

In rejecting Whiting's position, the Court in *Milligan* wisely went on to explain:

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applicable to Respondent Bush's designation that Mr. Padilla is an "enemy combatant" (a term with ***no*** legal meaning):

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

21 212 U.S. 78 (1908); Respondents Brief at 14 *et seq.* Its relevance is suspect in that *Moyer* was a civil damage suit for an alleged illegal detention during a State imposed period of martial law, and specifically addressed the narrow issue of whether an elected official, no longer in government, could be a proper party to the suit.

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

> It follows, from what has been said on this subject, that there are occasions when ***martial rule*** can be properly applied. ***If***, in foreign invasion or civil war, ***the courts are actually closed***, and it is impossible to administer criminal justice according to law, then, on ***the theatre of active military operations, where war really prevails***, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. ***As necessity creates the rule, so it limits its duration***; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. ***Martial rule can never exist where the courts are open***, and in the proper and unobstructed exercise of their jurisdiction. 71 U.S. at 127 [Emphasis added].

This interpretation of martial law was not an aberration, nor are the federal courts barred from reviewing this issue. But, as suggested above,[23] it is imperative to keep in mind the fact that "martial law"*may be* imposed on a selective basis,[24] which is exactly what has been done herein. As one noted scholar observes:

> Where . . . measures of martial rule have been undertaken in a situation which does not involve the existence of necessity, an ***aggrieved person*** is entitled to a remedy then and there. . . . there is ***no doctrine*** which renders the courts impotent until the alleged emergency has vanished. This right to ***immediate redress*** has been upheld by the Supreme Court [citing *Constantin,* 287 U.S. at 403] [emphasis added].[25]

Professor Wiener also concludes:

> Persons detained in custody [by martial law] may seek, by writ of habeas corpus, to be released therefrom, or, after release, to sue those ordering or executing their arrest for damages, alleging an unlawful imprisonment.[26]

Indeed, Colonel Winthrop, the leading and most authoritative military legal scholar of the late 19$^{th}$ and 20$^{th}$ Centuries, came to the following conclusion regarding ***martial law***:

> The most considerable and important part of the exercise of martial law is the ***making of arrests of civilians*** charged with offenses against the laws

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23 *See* text accompanying footnotes 19-20, above.

24 *See, e.g.,* Wiener, *op cit.,* as quoted in footnote 19, *supra. Compare, Duncan v. Kahanamoku,* 327 U.S. 304 (1946), and its discussion of the variations and gradations of martial law in Hawaii *after* the Pearl Harbor attack.

25 Wiener, *op cit.,* at 25-26.

26 *Id.,* at 62.

> of war. But to arrest and hold at will . . . is practically to suspend the citizen's privilege of the writ of *habeas corpus.* . . . [Thus] it becomes material to inquire whether, under the provisions of the Constitution relating to the suspension of the privilege of the writ, the President, or a military commander representing him, is authorized to order or effect such suspension.[27] [emphasis added].

*Milligan,* additionally is instructive in that all nine Justices concurred in holding that the federal courts had "jurisdiction of the petition of Milligan for the writ of habeas corpus."[28]

### C. Other Basic Constitutional Provisions Applicable Herein.

The mandate of Article II, § 3, U.S. Const., that the President "***shall*** take Care that the Laws be faithfully executed," raises the issue of whether the Commander-in-Chief can *constitutionally* ignore clear, unambiguous and applicable federal statutes. And, if he in fact does so in a manner that deprives a citizen of his/her Constitutional rights, does the Constitution's "judicial power" stand as a bulwark for Due Process? That is the core issue herein. *Marbury v. Madison, supra,* as quoted on page 1, herein, of course recognizes this fundamental juridical concept.

Article III, § 2, cl. 11, U.S. Const., conferring *judicial* power "to all Cases in Law and Equity, arising under this Constitution," does ***not*** contain an exception clause for "enemy combatants," or even a "war time" exclusion. The ***sole*** Constitutional exception is that given to *Congress* in Article I, § 9, U.S. Const., authorizing the suspension of the "Privilege of the Writ of Habeas Corpus," something that Respondents herein *claim* has not happened. That remains to be seen as *Merryman* unquestionably points out.

Finally, Citizen Padilla - and *Amici Curiae* respectfully note that no Respondent has challenged his citizenship status - cannot be deemed to have forfeited his fundamental "Rights of Man," as Thomas Paine characterized them. Indeed, there is no asterisk, limiting footnote or

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27 Colonel William Winthrop, U.S. Army, *Military Law and Precedents,* 2nd ed. (Washington, DC: Gov't Printing Office, 1920) [Legal Classics Library reprint], at 828.

28 71 U.S. at 132)(concurring opinion of the Chief Justice). Four Justices concurred in the decision of the majority, but disagreed with the rationale.

other exception applicable to Mr. Padilla as a civilian citizen, regarding the prerogatives of his citizenship simply because the Commander-in-Chief applies the label of "enemy combatant" to him - a label that has no legal significance in any event.[29]

**D. The Law "Authorized By" The Constitution That Is Dispositive Herein.**

*Amici Curiae* are concerned that the Respondents collective failure to address what should be a dispositive statute herein, is indeed corroboration of our fear that they have decided to selectively impose martial law. Congress in enacting 18 U.S.C. § 4001(a), could not have been any clearer in either its language or its intent:

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

The legislative history, found at 1971 U.S. Code Cong. & Admin. News 1435, leaves *no doubt* as to Congressional intent, especially in the context of the WW II Japanese-American internments, *viz.:* the House Report [92-116] makes "clear the intent of the measure to prohibit the imprisonment or detention of a citizen ***except pursuant to an Act of Congress.***" [emphasis added], *Id.* Furthermore, in repealing the *Emergency Detention Act,* the Report notes:

> [The Emergency Detention Act] would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense but on mere suspicion that an offense may occur in the future. . . . In a number of ways, also, the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense. *Id.,* at 1438.[30]

The Committee Report concludes with this pertinent observation:

> Repeal [of the Emergency Detention Act] alone might leave citizens ***subject to arbitrary executive action***, with no clear demarcation of the limits of executive authority. *Id.,* at 1438.[31]

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29 This false claim, *i.e.,* that the term "enemy combatant" somehow has some significance other than being synonymous with that of "enemy soldier," is discussed below in greater detail.

30 Indeed, the Respondents have submitted materials to this Court *ex parte* and under seal herein.

31 Congress ultimately agreed to pay reparations to the Japanese-American "detainees." *See,* 50 U.S.C. App. § 1989 *et seq.*, and as noted above, enacted 18 U.S.C. § 4001.

Mr. Padilla has been and continues to be "subject to arbitrary executive action" in clear, unadulterated violation of § 4001(a), a fact that this Court respectfully can neither ignore nor sanction as Respondents demand. Indeed, as one Court has observed in considering this statute, "the courts remain under a duty to guard against the violation of federally protected constitutional and federal statutory rights. . . ." *Tyler v. Ciccone,* 299 F.Supp 684, at 688 (W.D. Mo. 1969).

Congress has spoken in unambiguous terms in its enactment of 18 U.S.C. § 4001(a). While Respondents may chose to ignore or violate that statute, with due respect this Court via Mr. Padilla's petition for a writ of *habeas corpus* cannot. As *Marbury v. Madison, supra,* teaches, this Court's judicial power exists "because the right claimed is given by a law of the United States" [5 U.S. at 174]. And as the Court concluded in *Webster v. Luther,* 163 U.S. 331, at 342 (1896), "[T]his court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute." The writ respectfully should lie on Mr. Padilla's behalf.

## II. RELEVANT AND CONTROLLING DEFINITIONS.

While every sandlot ball team has their own rules and definitions (*e.g.,* "third base is that rock"), Constitutional principles are not so fluid as to allow Respondents to unilaterally define crucial terms, relevant to any proper resolution of the issues herein. In analyzing this issue, *Amici* respectfully suggests that the first or underlying reference must be those textually enumerated grants in the Constitution. Thus, there are the express Constitutional grants to Congress, to wit: Art. I, § 8, Cl. 10, U.S. Const., which 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 for ***definitional*** purposes 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;"[32] the power to declare war; the

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32 Art. I, § 8, cl. 1, U.S. Const.

power to make "Rules concerning Captures on Land and Water;"[33] "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;"[34] makes it clear that with respect to any so-called "war powers" issues, that Congressional definitions are what this Court must both utilize and enforce. Prior to discussing Congressional definitions, *Amici* will first address Respondents mischaracterization and misuse of the phrase, "enemy combatant."

### A. The Term "Enemy Combatant" is Meaningless to This Litigation.

*Ex Parte Quirin,* 317 U.S. 1, at 31 (1942), used the term "enemy combatant" synonymously with that of "enemy soldier,"[35] in the context of discussing "belligerents" in a formal, declared war. The Court gave no indication that it was creating a new jurisprudential concept in either international law or the Law of War [now generally referred to as "The Law of Armed Conflict" {LOAC}]. Nor did the phrase find its way into any of the 1949 Geneva Conventions or subsequent usage within international law. That the term "enemy combatant" has ***no other*** accepted meaning or legal definition than being synonymous with that of "enemy soldier," is easily ascertained by the Supreme Court's next usage of the phrase in, *In re Yamashita,* 327 U.S. 1, at 7 (1946). But, as the *Yamashita* Court clearly recognized, General Yamashita was a *bona fide* "Prisoner of War," [327 U.S. at 5] - who had been an enemy soldier engaged in combat, *viz.,* an "enemy combatant," with no special military, legal or other significance.[36]

Indeed, even the United States military, to include Respondent Bush, does not elsewhere - other than herein and in the *Hamdi* case - use the term "enemy combatant" to mean anything

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33 *Cf.,* 18 U.S.C. § 4001.

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

35 In the context of military "political correctness," *Amici* respectfully suggests that the term "combatant" generically refers inclusively to *soldiers, sailors, airmen and Marines, i.e.,* our "combatant" Armed Forces.

36 A *LexisNexis* search of the Second Circuit, including District Court cases, shows as of September 20, 2002, no "hits" when using "enemy combatant" as the search term/phrase.

***other than*** a reference to an enemy soldier.[37] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant."[38] Perhaps most damning to the Respondents' assertion in this regard is that the *Department of Defense Dictionary of Military Terms,*[39] nowhere lists or defines the term "enemy combatant." Finally, the phrase "enemy combatant" is ***not*** used in either Convention III, *Treatment of Prisoners of War,* or Convention IV, *Protection of Civilian Persons in Time of War*, of the 1949 Geneva Accords.

Thus, Respondents' claims in this regard, to wit:

> The legality of Padilla's military detention as an ***enemy combatant*** is confirmed by historical tradition, by the established practice of the United States in times of war, and by longstanding decisions of the Supreme Court and other courts. Respondents, Brief, page 2 (August 27, 2002) [emphasis added].

are either blatantly false or intentionally misleading to this Court ***in the context*** that Mr. Padilla's *status* as an "enemy combatant"[40] has some relevance to his being illegally detained, *incommunicado*. There simply are no "historical tradition(s)," no "established practice(s),"[41] and no "decisions of the Supreme Court and other courts" *(nor have Respondents cited any)* that could rationally allow this Court to conclude that (a) such a status even exists or is recognized in

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

38 In military jurisprudence, it is beyond cavil that for the military to exercise "jurisdiction" over an individual, one must first possess military "status." *See, Solorio v. United States,* 483 U.S. 435 (1987). But, as the Court noted in *Solorio,* that is a function textually committed to *Congress,* not the Commander-in-Chief pursuant to Article I, § 8, 483 U.S. at 440-41. But, even Congress cannot "militarize" the status of civilians for purposes of exercising military jurisdiction over them. *Cf., Reid v. Covert,* 354 U.S. 1 (1957), and *Kinsella v. Singleton,* 361 U.S. 234 (1960). Thus, Respondent Bush can hardly claim such power herein.

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

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

41 *Amici* limits this to United States citizens; not aliens or members of foreign armed forces, *e.g.,* General Yamashita. *Territo* is inapposite as noted *infra*, as he was held simply and solely as a "Prisoner of War [POW]" not as an unlawful belligerent or "enemy combatant."

the law; or (b) legally justifies the imprisonment of a U.S. citizen under the circumstances applicable to Mr. Padilla.

*Amici Curiae* submits that, in addition to the governments failure to label Mr. Lindh an "enemy combatant," an analysis of the U.S. military's treatment of PFC Robert Garwood, USMC, and his 14 *year* odyssey in Vietnam is instructive.[42] In 1965, Garwood, a U.S. Marine, was either captured by the Viet Cong, or defected - the record is not clear. However, as subsequent events unfolded over the years, primarily from other American servicemen who had been POW's, Garwood had "gone over" to the side of the enemy, to include allegedly helping the North Vietnamese forces "target" American combat troops, as well as assisting them with other American POW's. In 1979, 14 years after his disappearance from his unit, Garwood returned to the United States and was court-martialed for his offenses *after* leaving U.S. military control in 1965. Assuming that Respondents' claim herein that the term "enemy combatant" has some ***legal*** meaning or status, anyone with a rudimentary familiarity with U.S. military law would conclude that Garwood had likewise earned the title of "enemy combatant." It was ***not*** used. Garwood was convicted of numerous offenses and a review of the appellate proceedings, first at the U.S. Navy-Marine Corps Court of Military Review,[43] and then at the U.S. Court of Military Appeals,[44] both of which affirmed his convictions, shows that the phrase "enemy combatant" was never used - presumably as *Amici* suggests to the Court because it is a meaningless concept in military law, and thus is just as meaningless herein..

Equally as mystifying to *Amici* in this regard, is Respondents continued citation to and reliance on *In re Territo,* 156 F.2d 142 (9th Cir. 1946)[45], as *somehow* constituting legal authority that Mr. Padilla is an "enemy combatant," ***and*** that he can be detained *incommunicado*. A

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42 *See generally,* G. Solis, *Marines and Military Law in Vietnam: Trial By Fire,* (Washington, DC: Superintendent of Documents, 1989), for a comprehensive look at the Garwood case.

43 *U.S. v. Garwood,* 16 M.J. 863 (N-MC CMR, 1983).

44 *U.S. v. Garwood,* 20 M.J. 148 (CMA 1985).

45 Also of relevance herein, is the fact that in *Territo,* one "Frances Territo Maria" acted as "next friend" for Mr. Territo; "Through the interposition of Frances Territo Maria, Territo petitioned the District Court to issue the writ of habeas corpus. . . ." 156 F.2d at 142.

simple reading of the *Territo* opinion shows that he was a *bona fide* **Prisoner of War** under any accepted definition of that term (captured in uniform on the battlefield during a declared war), and was not characterized as some mythical "enemy combatant." *Territo* simply has no applicability to any issues *sub judice.*

Respondents repeated use of the label[46] "enemy combatant" as if it has some pertinent impact on Mr. Padilla's detention, is respectfully nothing more than verbal camouflage - an attempt to shift the Court's focus away from the serious issues of *martial law* and *habeas corpus.*

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

In this regard, there is a clear textual commitment in Article I, § 8, giving Congress the power "***To define and punish*** Piracies and Felonies committed on the high Seas, and ***Offences against the Law of Nations.***" That express grant, along with the other Article I, § 8, powers given to Congress, coupled with the *absence* of any similar powers in Article II, for the President, simply defeats any claim by Respondents herein that this Court must somehow grant "deference" to the Commander-in-Chief's defining and declaring Mr. Padilla to be an "enemy." Congress has indeed spoken in this regard, and in view of the express textual commitment to Congress, it is respectfully submitted that *both* the Respondents and this Court are obligated to utilize the Congressional definition. In 50 U.S.C. § 21, Congress provides such a definition - limited *first* to "a declared war;" and *second*, to "all natives, citizens, denizens, or subjects *of the hostile nation or government. . . .*" That statute, under those circumstances *does* allow an "enemy" to be confined by the Executive Branch, but it is clearly and expressly limited to *aliens* - not citizens such as Mr. Padilla. Thus, if Mr. Padilla is not and cannot be an "enemy," logically he cannot be an "enemy combatant," even if such a term had any specific legal meaning.

Finally, *United States ex rel. Zdunic v. Uhl,* 137 F.2d 858 (2nd Cir. 1943), is instructive. Zdunic was arrested and detained pursuant to the *Alien Enemy Act*, 50 U.S.C. § 21. He

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46 *Compare, NAACP v. Button,* 371 U.S. 415, at 429 (1963); the government "cannot foreclose the exercise of constitutional rights by mere labels."

challenged the Executive Branch's ***factual*** determination that he was an "enemy alien." The District Court [S.D. NY], denied his petition for a writ of *habeas corpus*, but on appeal, the Second Circuit noted that he was entitled to a hearing on the "disputed facts" *before* the Court made a determination as to his legal status and remanded the matter for a hearing. *Amici* would point out that conceptually, *Zdunic's* challenge to the Executive's determination that he was an "enemy alien" is no different than Mr. Padilla's challenge to Respondents' claim that he is an "enemy combatant." But to say, as the Respondents do, that Mr. Padilla cannot challenge his labeling by the Executive Branch (but an alien can), is the height or arbitrariness and a gross denial of due process.

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

The Respondents' rhetoric claiming justification for their actions as occurring "during wartime,"[47] is just that - rhetoric. Under both international and domestic law (to include military law), "war" is a term of art. Indeed, it is elementary constitutional law that Congress is given the power to "declare war,"something it has not done. Art. I, § 8, U.S. Const. *See generally, Bas v. Tingy,* 4 U.S. 37 (1800). While *Amici* recognize that "wars" do not have to be formally declared, *e.g.,* Korea, Vietnam, the distinguishing feature is that it constitutes armed hostilities *between* nations.[48] That is *not* presently the case, and even if it was so, it is clear that by Executive Order 13268, July 2, 2002, any purported state of war with the Taliban regime in Afghanistan, was terminated on that date "given the success of the military campaign. . . ." The reality is however, that the United States was ***not*** "at war" with Afghanistan - we were engaged in a lawful act of belligerent reprisal under international law.[49]

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47 *Cf.,* Respondents' Brief, at 8, *passim.*

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

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

When it comes to exercising *military* jurisdiction over ***civilians***, three separate federal appellate courts have concluded that it is simply unconstitutional *absent* a formal declaration of war.

*See, Robb v. United States,* 456 F.2d 768, at 771 (Ct. Cl. 1972)["time of war" refers to "war formally declared by Congress"]; *United States v. Averette,* 41 CMR 363 (CMA 1970)[same];[50] and *Latney v. Ignatius,* 416 F.2d 821 (DC Cir. 1969) [*habeas corpus* granted to civilian confined by military].

Congress has defined the term "period of war" as *inter alia* "the period beginning on the date of any future ***declaration of war*** by the Congress. . . ." [38 U.S.C. § 101(11); emphasis added][51] Thus, *Amici Curiae* respectfully submit that with respect to American citizens who are *civilians*, *viz.,* Mr. Padilla, it is simply and plainly unconstitutional for the military to exercise *any* jurisdiction under the facts and circumstances pertaining to him absent a formal declaration of war by Congress.

Finally, even assuming *arguendo* that we are in a state of war, that does ***not*** turn off the application of the *Bill of Rights* like a light switch, contrary to the assertions of both Whiting and Respondents herein. As the Supreme Court specifically held in *United States v. Cohen Grocery Co.,* 255 U.S. 81, at 66 (1921):

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

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

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50 Congress has renamed the Court of Military Appeals, the U.S. Court of Appeals for the Armed Forces. *See,* 10 U.S.C. § 941.

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

## III. THE *DE FACTO* SUSPENSION OF THE *WRIT OF HABEAS CORPUS.*

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

Respondents' position at page 26 of their Brief, to wit: "The President's determination that Padilla is an enemy combatant did not effect a Suspension of the Writ." comes close to sophistry - especially considering the Respondents' Motion to Dismiss herein and their arguments as to non-reviewable Presidential actions. However, as one noted scholar cogently puts it:

> The important point is that where there is no suspension of the privilege of the writ the prisoner is able at ***all times*** to secure ***judicial inquiry*** as to the reasons for his being in custody. [emphasis added][52]

The ***process*** involving a *Writ of Habeas Corpus* is three-fold: the first is having a court ***entertain*** a Petition for such;[53] the second, involves the Court actually issuing the *Writ*[54]*;* and third, assuming *arguendo* that the Court *grants* the *Great Writ,* being able to enforce the Petitioner's release. It is at this *third* prong, that not only the precise constitutional tension exists, but is respectfully in the opinion of *Amici* herein, the crux of this litigation.

One question and one question only, brings this litigation to its head: Will the Respondents ***comply*** with an Order of this Court, granting a *Writ of Habeas Corpus* to Mr. Padilla?[55] That was the dilemma that Chief Justice Taney faced in *Ex Parte Merryman,* 17

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52 Wiener, *op cit.,* at 70.

53 *Amici Curiae* would agree that at least until now, the Courthouse doors have not been closed to the physical filing of *Habeas Corpus* petitions, as indeed this case demonstrates - but, this is only part of the equation. But, Respondents' arguments to the effect that a federal court lacks "jurisdiction," [*compare,* Respondents' *Motion to Dismiss* herein], sure appears to be leaning heavily on the door to prevent its being opened. *Compare,* the prohibition on even filing such a *writ* in *Duncan v. Kahanamoku,* 327 U.S. 304, at 309 (1946):

> "The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney."

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

55 This - if press reports are accurate - is not speculative. In the recent Buffalo, NY cases [*U.S. v. Goba, et al., see*: http://news.findlaw.com/hdocs/docs/terrorism/usgoba091302cmp.pdf (last accessed, September 22, 2002), agents of the Respondents herein are reported to have commented on the "detention hearing" conducted September

Fed.Cas. 144 (C.C.D. Md. 1861). He issued the *Writ* but the federal Marshall was unable to serve it, as Merryman was confined within the bowels of a secure, military installation (as is Mr. Padilla, and presumably Mr. Hamdi), and President Lincoln simply chose to ignore it.[56]

If, as Respondents claim herein, "The capture and ***detention*** of enemy combatants during wartime falls within the President's core constitutional powers as Commander in Chief," [Respondents' Brief at 8; emphasis added], it is not unreasonable to assume that the Respondents will continue their argument that "The president's determination that Padilla is an enemy combatant is proper and is entitled to be given effect," [Respondents' Brief, at 9], and as the case of President Lincoln in *Merryman,* simply refuse to enforce any ensuing Court Order.[57] Thus, while the actual "privilege" seeking the *Great Writ* might itself not be suspended, that becomes a meaningless concept absent a practical means to enforce a *Writ* subsequently granted. *Cf., Merryman, supra.*

*Amici* respectfully submits, that with one notable constitutional exception, the actions of the Respondents herein track exactly the actions of Lincoln's suspension of the *Writ* during the Civil War. Lincoln had the benefit of an Act of Congress on March 3, 1863, [12 Stat. 755][58] Respondents herein do *not*. As can be seen from Lincoln's actual suspension of *habeas corpus,*[59] this was not done in a geographic sense such as would follow territorial martial law, but rather was done on an *ad hoc* basis. As *Milligan, supra,* and *Kahanamoku, supra,* hold, if the

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18-20th, noting that Respondent Bush is apparently prepared to defy a U.S. District Court if the Court's decision is not in favor of the government, by declaring those defendants "enemy combatants," and ordering them taken "into indefinite military custody." Rochester (NY) *Democrat and Chronicle,* Saturday, September 21, 2002, page 8A.

56 *Merryman* was decided before Congress acted to suspend the *Writ* in 1863. *Amici Curiae* would also respectfully suggest that the governments continued insistence - in spite of considerable precedent to the contrary - that "only" Commander Marr is a proper respondent herein, is a prelude to the *Merryman* dilemma.

57 *Merryman, supra,* did not address the Court's contempt power. *See generally, Morrison v. Olson,* 487 U.S. 654 (1988).

58 Prior to this statutory authorization however, pursuant to Article I, U.S. Const., *Amici* would submit that *Merryman, supra,* is the correct construct for this power with one exception. That is if there was a *bona fide* territorial declaration and imposition of *martial law*. *Ex Parte Milligan, supra.*

59 The complete Executive Order is attached hereto as Appendix "A."

civilian courts are open and functioning, at least with respect to civilians, it is unconstitutional to deny the Great Writ.

Yet, a distillation of Respondents' arguments herein continues to advance the so-called "Whiting" arguments, *i.e.,* that it is the Commander-in-Chief, not the Judiciary, who determines what the federal courts can do when there is no impediment to their functioning in relation to a United States citizen. *Milligan* and its progeny show the continued error of that legal position, and if there is *any* doubt, Winthrop resolves it:

> Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and the weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is ***not*** empowered of his own authority to suspend the privilege of the writ of *habeas corpus. . . .*[60]

The Commander-in-Chief - if Respondents' arguments are followed - will have effectively suspended the privilege of *habeas corpus* on an *ad hoc* basis against Mr. Padilla today, Mr. Hamdi tomorrow, and thereafter, unknown and unchecked other citizens who do not meet Respondents criteria for "good" citizens. Such then is the end of liberty[61] and a repudiation of the *Magna Carta:*

> "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." *Magna Carta* (1297)[62]

## IV. THE RESPONDENTS' ARGUMENTS ARE BASED UPON FOUR FALLACIES.

The totality of Respondents' positions, are based upon four fundamental fallacies, to wit:

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60 Winthrop, *op cit.,* at 830.

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

62 The *Magna Carta* of 1215 went through many re-affirmations and slight revisions. This edition is used as it is part of the *National Archives and Records Administration,* available on the Internet through NARA's website by linking to: http://www.archives.gov/exhibit_hall/featured_documents/magna_carta/magna_carta_history.html [last accessed, September 8, 2002].

1. The label "enemy combatant" imposes some extra-constitutional status on a citizen;
2. The United States is legally at "war;"
3. American constitutional history supports the military detention of citizens even in the absence of *martial law;* and
4. Complete judicial deference is mandated to the Commander-in-Chief.[63]

As demonstrated above, numbers one through three are both factually and legally false. *Amici* will likewise demonstrate why *no* deference is due the Commander-in-Chief in this limited *habeas corpus* action.

**A. Factual Reasons Why No Deference Is Due.**

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[64]

The Respondents ignore as they violate 18 U.S.C. § 4001(a), the rule of law and inferentially urge this Court to also ignore the plain provisions and legislative history of § 4001. No deference is due to what amounts to *at a minimum,* a tortfeasor.[65]

The United States never recognized the Taliban government of Afghanistan and everyone appears to agree on the fact that *al Qaeda* has no international "legitimacy" such as the International Committee of the Red Cross. Thus, it defies credibility to suggest that Mr. Padilla as a United States citizen has had or could have any impact on our "foreign relations," nor have the Respondents any evidence consistent with *Federal Rules of Civil Procedure* standards that would remotely suggest such was possible. Thus, no deference is warranted in this aspect.

The allegations contained in Respondent Bush's June 9, 2002, "Declaration," - even if true, are clearly matters which on their face only apply to the United States, not her "foreign relations." Conversely, the so-called Mobb's Declaration on its face disputes any clear and

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63 *Amici Curiae* would incorporate by reference, Point IV, of our original Brief herein.

64 *Olmstead v. United States,* 277 U.S. 438, at 479 (1928) [Brandeis, J., dissenting].

65 *See, e.g., The Federal Tort Claims Act,* 28 U.S.C. § 2671 *et seq.*

present danger to U.S. "National security." Again, the Court is not provided "evidence" justifying any deference, much less "due deference" herein.

It defies credibility for the Respondents to claim herein that the "military" has "designated" Mr. Padilla an "enemy combatant," since it is not a cognizable status under U.S. military jurisprudence of the United States' interpretation of the Laws of Armed Conflict, to include the Laws of War. Nor have Respondents cited this Court to anything that could remotely suggest this, thus minimally justifying some level of deference. It simply does not exist and no deference is warranted.

The Respondents appear to be misrepresenting facts to this Court when they first claim at page 11, of their Brief that it was a "specific military judgment in this case" to label Mr. Padilla an "enemy combatant," when a simple reading of the Mobb's Declaration shows this to be untrue. There is no hint or suggestion that the U.S. military had *anything* to do with either Mr. Padilla physically or legally ***prior to*** the President's June 9th decision to transfer Mr. Padilla from Justice Department custody, to that of the Defense Department. Indeed, the Respondents continued reference to Mr. Padilla as an "enemy combatant" - a term that is not even in the Department of Defense's on-line dictionary - belies this entire assertion, and rejects any suggestion of deference.

No evidence has been provided in an admissible format or otherwise, nor has any even been alluded to, that Mr. Padilla was a "combatant," *i.e.,* he participated in combat against anyone, much less the United States, such as Mr. Lindh. No deference is due to rank speculation.

Respondents refuse to acknowledge that there is a *bona fide* dispute as to Mr. Padilla's actual status, and that treaties which are the supreme "law of the land," provide for a judicial determination of that status in this Court. *See, United States v. Noriega,* 808 F.Supp 791 (S.D. Fl. 1992). No deference is due to an implied suggestion that this Court abdicate its responsibilities under Article V, Geneva III [the POW Convention] (assuming of course that 18

U.S.C. § 4001 does not resolve the issue herein), especially when Respondents continue to ignore their own regulations, *viz.,* Department of Defense Directive [DODD] 2310.1 (1994), entitled, *DoD Program for Enemy Prisoners of War (EPOW) and other Detainees,*[66] which at paragraph 3.3, clearly states:

> 3.3. Captured or detained personnel shall be accorded an appropriate legal status under international law.[[67]] Persons captured or detained may be transferred to or from the care, custody, and control of the U.S. Military Services ***only on approval of the Assistant Secretary of Defense*** for International Security Affairs (ASD(ISA)) ***and as authorized by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War*** (references (d) and (e)). [emphasis added].

No deference is due an entity that fails to acknowledge, much less follow its own regulations.

The Respondents continue to supply fiction to this Court - in spite of their own Mobb's Declaration to the contrary - that the *military* "captured" Mr. Padilla. He, according to their "evidence" if it is to be believed, got off of an international flight in Chicago, voluntarily went with federal agents - not soldiers - and was arrested by virtue of a warrant from this Court. He was then detained in a federal detention facility, not a military brig, for roughly one [1] month on that Grand Jury, material witness warrant. No credence is warranted for such fiction.

If one takes the Respondents' arguments about capturing and detaining "enemy combatants" [Respondents' Brief, at 18-20], and actually apply it to known facts, one quickly sees the incongruity of their position here. Specifically the capture last year in Kala Jangi,

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66 Available at: http://www.dtic.mil/whs/directives/corres/pdf/d23101_081894/d23101p.pdf [Adobe ".pdf" format] [last accessed, September 24, 2002].

67 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, September 24, 2002].

Afghanistan, of American John Walker Lindh, the alleged "American Taliban."[68] Mr. Lindh's subsequent plea agreement left little doubt that using Respondents' term, "enemy combatant," Mr. Lindh qualified as the prime example. Yet, Mr. Lindh was promptly indicted and his case processed through the criminal court system, to include the attendant Constitutional protections for such defendants. Thus, the complete failure of the Respondents herein to rationally and consistently apply their label, "enemy combatant," (or to even claim that he was an unlawful belligerent)[69] to Mr. Lindh under their own definition, forfeits any claim to "deference" in evaluating their conduct herein. Respondents position is illogical in the extreme and does not merit any deference.

**B. The Legal and Constitutional Basis for Declining Deference Herein.**

***1. General Considerations.***

This is *not* a case governed by the *Administrative Procedures Act,* 5 U.S.C. § 706, involving a "high degree of technical expertise." But, even if it were, courts must "ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, at 378 (1989). Nor is any deference due in the context that the Respondents' decisions affecting Mr. Padilla herein, result from their interpreting and applying their own regulations - indeed, as noted above, their *failure* to comply with their own regulations is a fundamental factual issue herein. *Cf., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

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68 This episode and resulting tragedy was widely reported in the international and United States media, and can be found at: http://www.msnbc.com/news/668588.asp?0cb=-41745341 [last accessed, September 24, 2002].

69 *See generally* the testimony of Timothy Lynch of the CATO Institute before the Senate Judiciary Committee, on December 4, 2001; available at: http://www.cato.org/testimony/ct-tl120401.html [last accessed, September 24, 2002]. For a comprehensive analysis of this concept, *see* Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions,*(Congressional Research Service, The Library of Congress, December 11, 2001); available at: http://fpc.state.gov/documents/organization/7951.pdf [last accessed, September 24, 2002]. *Amici* would submit two *caveats* to the Elsea article: *first,* it does not adequately address the issue where as here, an individual challenges his "status," *see, e.g., Zdunic, supra,* and *Noriega, supra. Second,* it fails to address domestic "due process" rights guaranteed to citizens who are civilians and who have committed no overt act of belligerency, under Constitutional concepts, *cf., Milligan, supra, Kahanamoku, supra,* and *Kinsella, supra.*

Furthermore, there is no law or judicial principle requiring an Article III Court to give any deference to the Commander-in-Chief or his subordinates in interpreting the Constitution or the precedents of the Supreme Court - that is a quintessential judicial function. *See, e.g.,Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution"); and *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969) ("The federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution.").

***2. Specific Reasons Deference is Inappropriate Herein.***

While Respondents rely almost exclusively on *Quirin, supra,* for their arguments herein, it is important to keep in mind just what that case was about. It was a death-penalty case, where the defendants were more than just "detained." They were criminally charged and tried via a military tribunal, and it was in that context that they sought *habeas* relief. 317 U.S. at 25. They had counsel, access to counsel, and obviously had access to the federal courts. And, with respect to a suggestion of deference, *Quirin* held: "And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.*

Contrary to the Respondents' positions herein, and thus defeating their claim of deference, it is Congress that possesses the *primary* "war powers" and powers over foreign affairs, not the Chief Executive or the Commander-in-Chief.

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

But, as *Kennedy* shows, the Respondents' argument is simply irrelevant - there is no "national security" exception to the Constitution and *neither* the Commander-in-Chief nor the Congress can "dispense with fundamental constitutional guarantees."

The inherent evil of the Respondents' arguments are their effect: the consummate deprivation of liberty and the concomitant exclusion of judicial review. Justice Bradley once observed:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that ***constitutional provisions for the security of person and property should be liberally construed.*** . . . ***It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.*** *Boyd v. United States,* 116 U.S. 616, at 635 (1886) [emphasis added].

Deference is additionally inappropriate herein in the context of applying 18 U.S.C. § 4001(a), even where such may "affect" the other branches of government. As the Court noted in *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, at 230 (1986), "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." Clearly the rights and liberty of Mr. Padilla are more compelling than the rights of whales, negating any inference of deference herein.

*Amici* would finally urge this Court to adopt the analysis and rationale of the Court in *Hammond v. Lenfest,* 398 F.2d 705 (2nd Cir. 1968). *Hammond* was a military *habeas corpus* action, although in a slightly differing context - Hammond sought to be discharged from the Navy. There as in the matter *sub judice,* the military had established a comprehensive system of regulations. There as herein, the parties argued that the government failed to follow and comply with its own regulations,[70] while the government similarly responds that their decisions are "not

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

subject to judicial review." 398 F.2d at 715. Or, as the *Hammond* Court cogently phrased it, "As we understand the government's position, it contends that ***no matter how arbitrary and capricious the denial, we are without power to afford a remedy. . . .*** " *Id.* The Court rejected that contention, as respectfully, so should this Court herein.

The Second Circuit again dealt with a military *habeas* case in *Smith v. Resor,* 406 F.2d 141 (2nd Cir. 1969). Again the Court held:

> Our reluctance, however, to review discretionary military orders does not imply that any action by the Army, ***even one violative of its own regulations***, is beyond the reach of the Courts. [citing *Hammond, supra*]. . . . [T]he courts have . . . insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves ***even where discretionary decisions are involved.*** 406 F.2d at 145 [emphasis added].

It is respectfully beyond cavil herein that Respondents are ***not*** due any deference in depriving Mr. Padilla of his liberty, his Constitutional rights[71] and access to counsel. As *Marbury* and its progeny command, it is the duty of the judiciary to "say what the law is."

## V. THE APPROPRIATE CONSTITUTIONAL BALANCE.

*Amici Curiae* recognize that this case arises and appears before this Court in an "adversarial" perspective. But, that posture is virtually unique in our constitutional system. It is *not* simply, plaintiff versus defendant; petitioner versus respondent. It is unique in that it is a lone citizen who claims that his government has abandoned and imprisoned him, and via the Great Writ, he seeks access to judicial review of the harsh consequences such entails. It is the duty of any legitimate government to not only protect the society it governs in general, but to also specifically protect the fundamental human rights of its individual citizens. The one *constitutional* exception, the one *legal* excuse for a government to abandon the rights of a citizen, is when that citizen is *charged* with violating the norms of society, *i.e.,* charged with committing a crime.

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71 In addition to depriving Mr. Padilla of his liberty, holding him *incommunicado* herein obviously deprives him of his right "to petition the Government for a redress of grievances." U.S. Const., Amend. I.

But, even then the citizen is cloaked with the presumption of innocence and the government is constitutionally obligated to respect those rights our Constitution, Bill of Rights, and laws graciously bestow on one accused. Absent the imposition of *martial law* - and the concomitant *de facto* admission of such that the government has failed or is incapable of protecting society and our Republic, thus requiring the *military* to perform the ordinary duties of our government - the lone citizen is constitutionally entitled to invoke *habeas corpus* proceedings. That, absent *martial law* and the suspension of the privilege of seeking the Great Writ, requires judicial intervention as in any other lawsuit. While the government may make moral judgments regarding its citizens, the role of the judiciary, while constitutionally sacred, is the rule of law - not politics or morality.

The lone citizen here is of course Mr. Padilla, and his government has done more than abandon him. For three and a half months, it has subjected him to the debilitating effects of martial law - military imprisonment, without charges, denial of liberty without judicial or grand jury "probable cause," and in a totally *incommunicado* status. The government has not only abandoned him, it has presumed him to be guilty of uncharged crimes. And, unlike an ordinary litigant before this Court, the government is using its military power to preclude him from *continuing* his attorney-client relationship. But, that is not all. The government even in this posture challenges ***both*** the right of his attorney to advocate on his behalf, but also objects to this Court's judicial intervention to adjudicate this citizen's constitutional claims, arguing instead that "military" judgment, *i.e.,* ***martial considerations*** have superceded the Constitution. In other words, Mr. Padilla is, in the eyes of the Respondents herein, guilty of "constructive treason" as they, and they alone have defined, charged and sentenced. The time-honored words of Justice Brandeis bear repeating:

> The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most

> virtuous fellow citizen; no record of crime, however long, makes one an outlaw.[72]

This case pits — ***not*** the *actions* of Mr. Padilla, for he has been charged with no crime — but the actions of the *Respondents*, against the Constitution that governs our society, our government and our citizens, to include Mr. Padilla. That is the sole constitutional "balance" required herein. Petitioner's application does not seek judicial involvement with or interference with the Commander-in-Chief's roles in either directing combat activities or foreign relations. Mr. Padilla merely seeks judicial intervention over his being subjected to imprisonment under martial law. He seeks judicial review of his situation via the Great Writ, in conjunction with the commands of 18 U.S.C. § 4001(a). In the four and a half months that he has been incarcerated, if Respondents do not yet have sufficient evidence to establish "probable cause" that Mr. Padilla has committed *any* crime, then the writ must lie. There, respectfully, is no other option for this Court to consider.

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

History shows that this is not a unique scenario. Anarchism and terrorism have plagued our Country in the past, and the Judiciary honorably met its constitutional obligations. *Dennis v. United States,* 341 U.S. 494 (1951), dealt with an indictment designed to protect our Government "from change by violence, revolution and terrorism." 341 U.S. at 501. Yet, as Justice Frankfurter noted in his concurring opinion, "Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency. . . ." 341 U.S. at 520. He also warned:

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

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

The communist "revolutionaries" in *Dennis* - in the midst of the Korean conflict - were dealt with according to law and in a *constitutional* manner. Yet, affirming the convictions in *Dennis* provoked spirited dissents amongst the Justices. Justice Douglas, examining history, noted:

> There was a time in England when the concept of ***constructive treason*** flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here.[73] [emphasis added]

Dennis and his co-defendants were not tagged "enemy combatants," nor held *incommunicado* under martial law conditions, they were charged, indicted and tried within constitutional parameters. Nor was the defendant in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), a KKK leader, convicted *inter alia* during Vietnam of advocating "unlawful methods of terrorism," labeled such or held under martial law conditions.

*Dennis, Brandenburg* and the cases they relied upon show that the Constitution does not deny the Respondents the tools to fight terrorism or to prosecute terrorists. That battle may indeed be difficult, but expediency — the *real* argument of the Respondents herein — is not an option in our democracy. The Constitution injects the Judiciary as the fortress of freedom, to protect the rights of the citizen consistent with those rights the blood of patriots past, incorporated into *our* collective Constitution and its attendant *Bill of Rights*. And, as Justice Brandeis observed:

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

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73 341 U.S. at 583 (Douglas, J., dissenting).

"Produce the body" commands *habeas corpus;* justice, not the military must decide Mr. Padilla's fate herein.

## CONCLUSIONS

Jose Padilla's place in the history of the United States is as yet uncertain. But, the case of *Padilla v. Bush*, stands to define as Chief Justice Marshall observed, "The very essence of civil liberty" in our jurisprudence. If the arguments of the Respondents are correct, *viz.,* that the liberties of our citizenry are or can be determined solely by the Commander-in-Chief, then *Amici Curiae* respectfully submit that 215 years of constitutional law have been in error, and the concept of an independent judiciary a false premise of our Founding Fathers.

Dr. Martin Luther King, Jr., in his immortal "I Have a Dream" speech,[74] also quoted the words of a familiar song, relevant herein:

> "'My country, 'tis of thee, sweet land of liberty, of thee I sing. Land where my fathers died, land of the pilgrim's pride, from every mountainside, let freedom ring.'[[75]] ***And if America is to be a great nation, this must become true.***"

That prophetically is the ultimate question here - are we a "great nation" of liberty and freedom?

Respectfully submitted,

Dated: September ____, 2002.

______________________________________
**DONALD G. REHKOPF, JR.**
*Law Offices of BRENNA & BRENNA*
31 East Main Street, Suite 2000
Liberty Plaza
Rochester, New York 14614
(585) 454-2000

On behalf of *Amici Curiae,* the New York State Association of Criminal Defense Lawyers; and The National Association of Criminal Defense Lawyers

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[74] Delivered at the Lincoln Memorial on August 28, 1963, Washington, DC. The compete text is available at: http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf

[75] Words: Samuel Francis Smith, 1832.

## APPENDIX "A"

### By the President of the United States of America: *A Proclamation.*

*Whereas* the Constitution of the United States has ordained that the privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it, And whereas a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and

*Whereas* by a statute which was approved on that day, it was enacted by the Senate and House of Representatives of the United States in Congress assembled, that, during the present insurrection, the President of the United States, whenever, in his judgment, the Public safety may require, is authorized to suspend the privilege of the Writ of Habeas Corpus in any case throughout the United States or any part thereof; and

*Whereas* in the judgment of the President the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval and civil officers of the United States or any of them hold persons under their command or in their custody either as prisoners of war, spies, or aiders or abettors of the enemy; or officers, soldiers or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States or as deserters therefrom or otherwise amenable to military law, or the Rules and Articles of War or the rules or regulations prescribed for the military or naval services by authority of the President of the United States or for resisting a draft or for any other offence against the military or naval service.

*Now, therefore*, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the Writ of Habeas Corpus is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked.

And I do hereby require all magistrates, attorneys and other civil officers within the United States, and all officers and others in the military and naval services of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly and conformity with the Constitution of the United States and the laws of Congress in such case made and provided.

In testimony whereof, I have hereunto set my hand, and caused the Seal of the United States to be affixed, the Fifteenth day of September, in the year of our Lord one thousand eight hundred and sixty three and of the Independence of the United States of America the Eighty-eighth.

By the President: **ABRAHAM LINCOLN** WILLIAM H. SEWARD, Secretary of State.