No. 02-5288

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL ***et al.,***
Petitioners / Appellants,

versus

GEORGE WALKER BUSH, ***et al.,***
Respondents / Appellees

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
In Support of *Petitioners / Appellants in No. 02-5288*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

PARTIES and AMICI:

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

RULE 26.1 DISCLOSURES:

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

The 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, public, private and assigned.

RULINGS UNDER REVIEW:

The Ruling of the District Court under review appears in Appellants' Brief.

RELATED CASES:

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

2. *Hamdi et al. v. Runsfeld, et al.,* U.S. Court of Appeals, 4th Circuit, No. 02-6895; appeal from the U.S.D.C., Eastern District of Virginia.

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I. THE DISTRICT COURT'S RELIANCE ON "SOVEREIGNTY" WAS FUNDAMENTALLY MISPLACED.

A. The Court Failed to Consider Applicable *Congressional* Enactments.

Article IV, § 3, cl. 2, U.S. Const., provides *inter alia* that, "The Congress shall have power to dispose of and make ***all*** needful Rules and Regulations respecting the Territory ***or other Property*** belonging to the United States."[emphasis added] This includes *habeas* matters and applies to U.S. military bases overseas, "where the incidents regulated occur under the control, though not within the territorial jurisdiction or sovereignty of the nation enacting the legislation." *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, at 381 (1948) [citing the U.S. Base at Guantanamo Bay, Cuba]. The decision of the Court below is irreconcilable with Article IV, § 3, clause 2's provisions, and the Court's analysis in *Connell, supra.*

The Court below committed plain error by concluding that "sovereignty" was necessary for exercising *habeas corpus* jurisdiction. *See, e.g., Toth v. Quarles,* 350 U.S. 11 (1955)[*habeas* in Korea granted]. As *Connell* held, *if* Congress intends that a statute[1] apply to bases beyond our sovereign borders, "*A fortiori* civil controls may apply . . . even if aliens may be involved." *Id.* Indeed, this is not a unique concept

[1]There, the *Fair Labor Standards Act,* 28 U.S.C. § 201 *et seq.* Congress subsequently legislatively overruled *Connell's,* application, but not the concept. *See,* 28 U.S.C. § 213(f).

for Guantanamo Bay.[2] If "sovereignty" is a determinative factor herein, these statutes could have no *extra-territorial* application at Guantanamo, in spite of the clear intent of Congress, and thus, *Connell, supra,* was "wrongfully" decided.

Such a "sovereignty" limitation for *habeas* jurisdiction, conflicts with the Congressional purpose of the *Military Extraterritorial Jurisdiction Act of 2000,* 18 U.S.C. § 3261, *et seq.*, which specifically authorizes "extraterritorial" jurisdiction for offenses committed at our overseas military bases.[3] From a Constitutional perspective, if Congress can authorize federal "jurisdiction" to be applicable to a non-U.S. sovereign *situs* (or *actus reus*), then there is no Constitutional impediment for the Constitution to "follow the flag" to our Base at Guantanamo.[4] *See, e.g.,United States v. Tiede,* 86 F.R.D. 227 (U.S. Ct., Berlin, Germany, 1979).

In this context, the Court below failed to recognize that its jurisdiction *as defined by Congress*, is ***not*** dependent upon "sovereignty" issues, and therefore totally neglected to address the treaty clause in 28 U.S.C. § 1331, "The district courts

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[2]*See, e.g.,* 42 U.S.C. § 1651(a)(2); applicable to: "lands occupied or used by the United States for military or naval purposes in any territory or possession outside the continental United States (including . . . Guantanamo Bay, Cuba. . . .)"; and 42 U.S.C. § 1701(b)(1) [same].

[3]Section 3261 of the Act is *not* limited to U.S. citizens, at least facially.

[4] "If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag." *Hirota v. MacArthur,* 338 U.S. 197, at 204 (1948) [Douglas, J., concurring]. However, since the *Hirota* defendants had been convicted under the auspices of an *international* tribunal, the majority concluded that it lacked jurisdiction over the tribunal's judgment and thus lacked jurisdiction for *habeas* purposes.

shall have original jurisdiction of all civil actions arising under . . . treaties of the United States."[5] Finally, the Court below failed to consider the provisions of 28 U.S.C. § 2241(c)(4), which *per se* applies to *aliens.*[6] The implications in footnotes 6 and 12 of the Opinion concerning the Petitioners' ties to the Taliban, gives rise to the logical conclusion that they are "in custody" for acts done "under the commission . . . of any foreign state . . . the validity and effect of which depend upon the law of nations," Congress must have had *some* purpose in mind when it enacted this provision of the *Habeas Corpus Act,* and the plain meaning of the wording of this section *must* apply to non-resident, foreign aliens.[7]

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[5]The Court's failure to discuss this jurisdictional grant is puzzling as footnote 14 of its Opinion recognizes the importance of the United States' treaty with Cuba. Furthermore, the Court's notation at page 2 [slip opn.] that the "case provides no opportunity for the Court" to address the international law issues, fails to consider that the 1949 Geneva Conventions are "treaties of the United States," which cannot be ignored. *See, e.g.,United States v. Noriega,* 808 F.Supp 791 (S.D. Fl. 1992) [dealing with POW status under Convention III]. *Compare, Gutierez de Martinez v. Lamagno,* 515 U.S. 417 (1995)[civil suit by foreign national citizens of Colombia, *i.e.,* "aliens," who claimed that a U.S. citizen, DEA employee, negligently injured them while he was in Colombia].

> [6] "He, being a **citizen of a foreign state *and* domiciled therein** is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, ***the validity and effect of which depend upon the law of nations***;" [emphasis added].

[7]*Consider also,* 8 U.S.C. § 1442(d), which provides that an "alien enemy" ceases to have that status upon the "cessation of hostilities." It does not appear that the Court below addressed the impact of Executive Order # 13268, dated July 2, 2002, declaring that the "national emergency . . .with respect to the Taliban," was terminated. Thus, absent Petitioners' being charged with a violation of the Laws of War, their continued detention by Respondents violates international law. Article 118, of the 1949 *Geneva Convention Relative to the Treatment of Prisoners of War*, [available at:

(continued...)

B. Guantanamo Bay Occupies a Unique Legal Status Which the Court Below Failed to Recognize or Apply to Its Analysis of the Issues.

Whether our base at Guantanamo Bay, Cuba, is within the "special maritime and territorial jurisdiction of the United States," as "lands reserved or acquired for the use of the United States," [18 U.S.C. § 7(3)], was not addressed by the Court below. *Amicus Curiae* would respectfully submit that this key omission merits a summary remand. We present this issue to the Court as the United States in past cases has expressly asserted that Guantanamo Bay was indeed within the "special . . . territorial jurisdiction of the United States."

In *United States v. Lee,* 906 F.2d 117 (4th Cir. 1990), a *Jamaican* national was indicted for sex offenses allegedly occurring on Guantanamo. The Indictment expressly referred to 18 U.S.C. § 7(3). *Id.,* at 118, fn. 1. If the long arm of the law could reach Guantanamo for purposes of indicting and prosecuting (in Virginia) a third-country alien, then *habeas* jurisdiction must at least be co-extensive with the authority to achieve *criminal* jurisdiction, irrespective of "sovereignty" issues. But, under the Court's analysis below, *Lee* could not have been subject to prosecution

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[7](...continued)
http://www.unhchr.ch/html/menu3/b/91.htm (last accessed, September 30, 2002)], requires that such prisoners be "released and repatriated without delay after the cessation of active hostilities." Likewise, Article 133, of the 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* [available at: http://www.unhchr.ch/html/menu3/b/92.htm (last accessed: September 30, 2002)], similarly provides that such, "Internment shall cease as soon as possible after the close of hostilities."

because of the purported lack of sovereignty over Guantanamo Bay.[8] "Jurisdiction," is simply not dependent upon sovereignty, although sovereignty provides jurisdiction.

While not addressing the 18 U.S.C. § 7(3), issue, the Court in *United States v. Rogers*, 388 F.Supp 298 (E.D. VA, 1975), [a criminal case at Guantanamo] considered the Base's status and the Lease Agreements, and concluded:

> By the lease, Cuba agreed that the United States should have ***complete control*** over criminal matters occurring within the confines of the base. It is clear to us that under the leasing agreement, United States law is to apply. Our conclusion is bolstered by the fact that the United States no longer diplomatically recognizes Cuba. . . . *Id.,* at 301. [emphasis added].

Legal commentators have long recognized the "special status" of Guantanamo:

> At times one state has acquired by lease, rights corresponding more or less closely to territorial sovereignty over parts of the territory of another state. Under 1903 agreements, Cuba leased to the United States an area at Guantanamo for a naval base, the lease providing that . . . "the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States ***shall exercise complete jurisdiction and control over*** and ***within*** said areas." [emphasis added; footnotes omitted].[9]

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[8] *Cf., United States v. Erdos,* 474 F.2d 157 (4th Cir. 1973) [specifically addressing and finding 18 U.S.C. § 7(3), jurisdiction]; *accord, United States v. Corey,* 232 F.3d 1166 (9th Cir. 2000), *cert. denied,* __ U.S. __ 2001 U.S. LEXIS 6530 (2001). *Contra, United States v. Gatlin,* 216 F.3d 207 (2nd Cir. 2000); and cases cited therein. *Amicus* notes that these cases involved U.S. citizens. For cases involving criminal jurisdiction over aliens and crimes committed beyond the "sovereign" limits of the United States, *see generally, United States v. Benitez,* 741 F.2d 1312 (11th Cir. 1984); and *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D. NY 2000). For the concept of "dual sovereignty," *see generally, United States v. Flores,* 289 U.S. 137, at 157-59 (1933), to include the recognition that treaty provisions may control. *Id.,* at 159.

[9] William W. Bishop, Jr., *International Law: Cases and Materials*, 3rd ed. (Boston: Little, Brown (continued...)

Professor Paust notes that Guantanamo Bay is "*sui generis*" and he further states:

> Guantanamo is a territory ***specially occupied*** during the Cold War with Cuba, in a context where the U.S. government has refused to recognize the Cuban regime, has engaged in acts of war with Cuba since the Bay of Pigs invasion, and has retained the territory as a military occupier.[10]

Under any interpretation of international law, Professor Paust is clearly correct - our Base at Guantanamo and its ***legal status*** is indeed *sui generis.* Thus, the Court's cursory treatment of this and its failure to recognize the unique jurisprudence applicable to our base at Guantanamo, respectfully merits a remand for that purpose.

C. The Court's Reliance on *Johnson v. Eisentrager* Was Plain Error.[11]

Eisentrager is a relic of a by-gone era of jurisprudence and has absolutely no impact on this (or any other) case. Fundamental constitutional law mandates that:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted.[12]

The *International Covenant on Civil and Political Rights*,[13] ["ICCPR"] of

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[9](...continued)
& Co., 1971), at 458.

[10]Jordan J. Paust, *Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States,* 24 Yale J. Int'l L. 305, at 327 *et seq.,* (1999). He goes on to distinguish Guantanamo Bay due to the unique language of its lease agreement. *Id.,* at 328. [emphasis added].

[11]339 U.S. 763 (1950).

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

[13]G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999
(continued...)

which the United States is a signatory, supercedes any efficacy *Eisentrager* ever had in the context of creating distinctions between "aliens" and citizens for *habeas corpus* purposes. During the Senate's "advice and consent" debate prior to ratification in 1992, Senator Pell observed, "The covenant is rooted in Western democratic traditions and values. It guarantees basic rights and freedoms ***consistent with our own Constitution and Bill of Rights***." [emphasis added][14] Senator Moynihan expressed the same view, "This covenant reflects the principles articulated in our own Bill of Rights."[15] While the United States entered a number of "reservations"[16] ***no reservations*** were given to the following provisions of the ICCPR:

> ***Article 2, Section 1:*** "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and ***subject to its jurisdiction*** the rights recognized in the present Covenant, without distinction of any kind, such as race . . . ***national or social origin***, property, birth or other status." [emphasis added].

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

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[13](...continued)
U.N.T.S. 171, *entered into force* March 23, 1976; available on-line at: http://www1.umn.edu/humanrts/instree/b3ccpr.htm [last accessed, September 30, 2002].

[14]Congressional Record [CR], S4781, April 2, 1992.

[15]*Id.,* at S4783.

[16]*Id.*

> ***Article 14, Section 1:*** "***All persons shall be equal*** before the courts and tribunals. . . ." [emphasis added].
>
> ***Article 26:*** "***All persons are equal before the law*** and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and ***guarantee to all persons equal and effective protection against discrimination on any ground*** such as race. . . ***national or social origin*** . . ." [emphasis added].[17]

Amicus Curiae anticipate that Respondents will now argue that the Senate's "Understanding" permits them to declare that *equality* may be excepted here. However, in the absence of a formal "Reservation," such a declaration cannot destroy an individual's rights under Articles 9 and 14 above, *viz.,* that the Courts of the United States *must* consider Petitioners' *habeas corpus* applications. The ICCPR, as the "supreme law of the land" ***overruled*** *Eisentrager's* notions of citizen superiority - at least with respect to access to the Courts where illegal "detention" is alleged.

As noted above, due to the unique territorial aspects of our leasehold at Guantanamo Bay, coupled with the clear provisions of the ICCPR cited above, the Court below clearly erred in its determination that "sovereignty" considerations

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[17] While as noted above, no "Reservations" were lodged by the Senate, the following "understanding" was given:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status--as those terms are used in Article 2, paragraph 1 and Article 26--to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective." Id., at S4783.

deprived it of jurisdiction over the Petitioners' claims of illegal detention. *Amicus* does not suggest that the ICCPR automatically mandates the Petitioners' release herein, because it is clear that such a function is reserved to the Judiciary *after* ascertaining the legality of the detention. Thus, by virtue of the ICCPR, the Court below unquestionably had "jurisdiction" pursuant to 28 U.S.C. § 1331; and § 2441(c) (1), (3) and (4), and its decision to the contrary respectfully should be reversed.

II. The Term "Enemy Combatant" is Meaningless to This Litigation.

While the Court below properly declined to judicially note that the *Petitioners* were "enemy combatants,"[18] the Respondents have advocated such a concept in the case below and in the related cases of *Padilla* and *Hamdi.* *Amicus Curiae* respectfully submits that any further argument as to that issue, is both unwarranted procedurally and meaningless substantively.

Ex Parte Quirin, 317 U.S. 1, at 31 (1942), used the term "enemy combatant" synonymously with that of "enemy soldier,"[19] 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.

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[18] *See,* footnote 12, page 20 [Slip Opinion].

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

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 legal meaning than being synonymous with that of "enemy soldier," is easily ascertained by the Supreme Court's next usage of the phrase in, *In re Yamashita,* 327 U.S. 1, at 7 (1946). But, as the *Yamashita* Court recognized, General Yamashita was a *bona fide* "Prisoner of War," [327 U.S. at 5] - who had been an enemy soldier engaged in combat, *viz.,* an "enemy combatant," with no special military, legal or other significance.

Indeed, the United States military does not elsewhere - other than herein and in the *Padilla* and *Hamdi* cases - use the term "enemy combatant" to mean anything ***other than*** a reference to an enemy soldier.[20] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant."[21] Perhaps most damning to the Respondents' assertion in this regard is

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[20]*See, Manual for Courts-Martial, 2000 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.

[21]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.

that the *Department of Defense Dictionary of Military Terms,*[22] nowhere lists or defines the term "enemy combatant."[23] 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.

Amicus Curiae submits that, in addition to the governments failure to label John W. Lindh, the ballyhooed "American Taliban," as an "enemy combatant," an analysis of our treatment of PFC Robert Garwood, USMC, and his 14 *year* odyssey in Vietnam is instructive.[24] In 1965, Garwood, a U.S. Marine, was either captured by the Viet Cong, or defected - the record is not clear. However, as 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, Garwood returned to the United States and was court-martialed for offenses *after* leaving U.S. military

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

[23]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.

[24]*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.

control in 1965. Assuming that Respondents' continue their claim 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. A review of the appellate proceedings for Garwood's convictions, first at the U.S. Navy-Marine Corps Court of Military Review,[25] and then at the U.S. Court of Military Appeals,[26] both of which affirmed his convictions, shows that the phrase "enemy combatant" was never used - presumably as *Amicus* suggests, because it is a meaningless concept in military law, and thus is just as meaningless herein.

Equally as mystifying is Respondents citation to and reliance on *In re Territo,* 156 F.2d 142 (9th Cir. 1946), as *somehow* constituting legal authority that Petitioners herein are "enemy combatants," ***and*** that they can be detained *incommunicado.* A 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.*

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

[26]*U.S. v. Garwood,* 20 M.J. 148 (CMA 1985).

Respondents repeated use of the label[27] "enemy combatant" as if it has some pertinent impact on the Petitioners' case, is respectfully nothing more than verbal camouflage - an attempt to shift the Court's focus away from the serious issue of *habeas corpus.* Respondents refuse to acknowledge that there is a *bona fide* dispute as to Petitioners' actual status, and that treaties which are the supreme "law of the land," provide for a judicial determination of that status. *See, United States v. Noriega,* 808 F.Supp 791 (S.D. Fl. 1992). No deference is due to an implied suggestion that the Judiciary ignore its responsibilities under Article V, Geneva III [the POW Convention], (or the ICCPR) 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,*[28] which at paragraph 3.3, clearly states:

> **3.3.** Captured or detained personnel shall be accorded an appropriate legal status under international law.[[29]] 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***

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

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

[29] 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. *Cf., Noriega, supra.*

> ***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.[30]

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

CONCLUSIONS

Amicus Curiae respectfully submits that the Court below *misconstrued* the concept of sovereignty, and thus failed to properly analyze and apply the correct jurisdictional basis for *habeas corpus* cases. Under the *sui generis* status of our base at Guantanamo, and the fact that the ICCPR, ***not*** *Eisentrager*, is the controlling law, this Court respectfully should remand this case with directions to entertain the merits of Petitioners' claims. If there is a legitimate *factual* basis under United States and

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

international law for the detention of the Petitioners, let the Respondents "make their case," to include using the *Classified Information Procedure Act.*[31] If not, then the Great Writ must lie.

Petitioners are being held by U.S. troops, on a U.S. military installation, by and under orders of U.S. officials [the Respondents], on "territory" where there are no "sovereign" courts available,[32] and where the Treaty itself plainly says that the *United States* "***shall exercise complete jurisdiction and control over*** and ***within*** said areas." Jurisdiction thus properly existed in the District Court below.

Dated: October ___, 2002.

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[31] 18 U.S.C. App. § 1 *et seq.*

[32] One *implication* of the "sovereignty" issue in the Decision below, is that Petitioners should seek *habeas* relief in the Cuban Courts, if sovereignty really does matter. But, pursuant to the Treaty, any relief by the sovereign courts of Cuba, would be unenforceable on Guantanamo.

CERTIFICATE OF COMPLIANCE

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

2. ***EXCLUSIVE*** of the Statement of Interest by *Amicus Curiae*, Table of Contents, Table of Authorities, any Addendum containing statutes, rules or regulations, and the Certificate of Service, this Brief contains ***15 pages.***

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

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Brief of Amicus Curiae,* National Association of Criminal Defense Lawyers, was sent via both first-class mail and electronically [e-mail] to:

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AMICUS CURIAE STATEMENT OF INTEREST
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
By Consent of the Parties in *Rasul v. Bush,* No. 02-5288

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 NACDL's interest in this case is two-fold. First, the proper and fair administration of justice requires that those persons imprisoned without charges, have the assistance of counsel to determine the validity of such detention. Second, the unique jurisdictional issues that apply to the U.S. Naval Base at Guantanamo Bay, Cuba, raise significant concerns - both as a matter of our *habeas corpus* jurisprudence, and also as a matter of international law, to include the Law of War. *Amicus* herein has an interest in seeking a judicial resolution that will provide appropriate guidance to defense counsel and to Respondents to insure that these matters are appropriately addressed and that Petitioners, and those similarly situated, receive whatever process is due them under domestic and international law.