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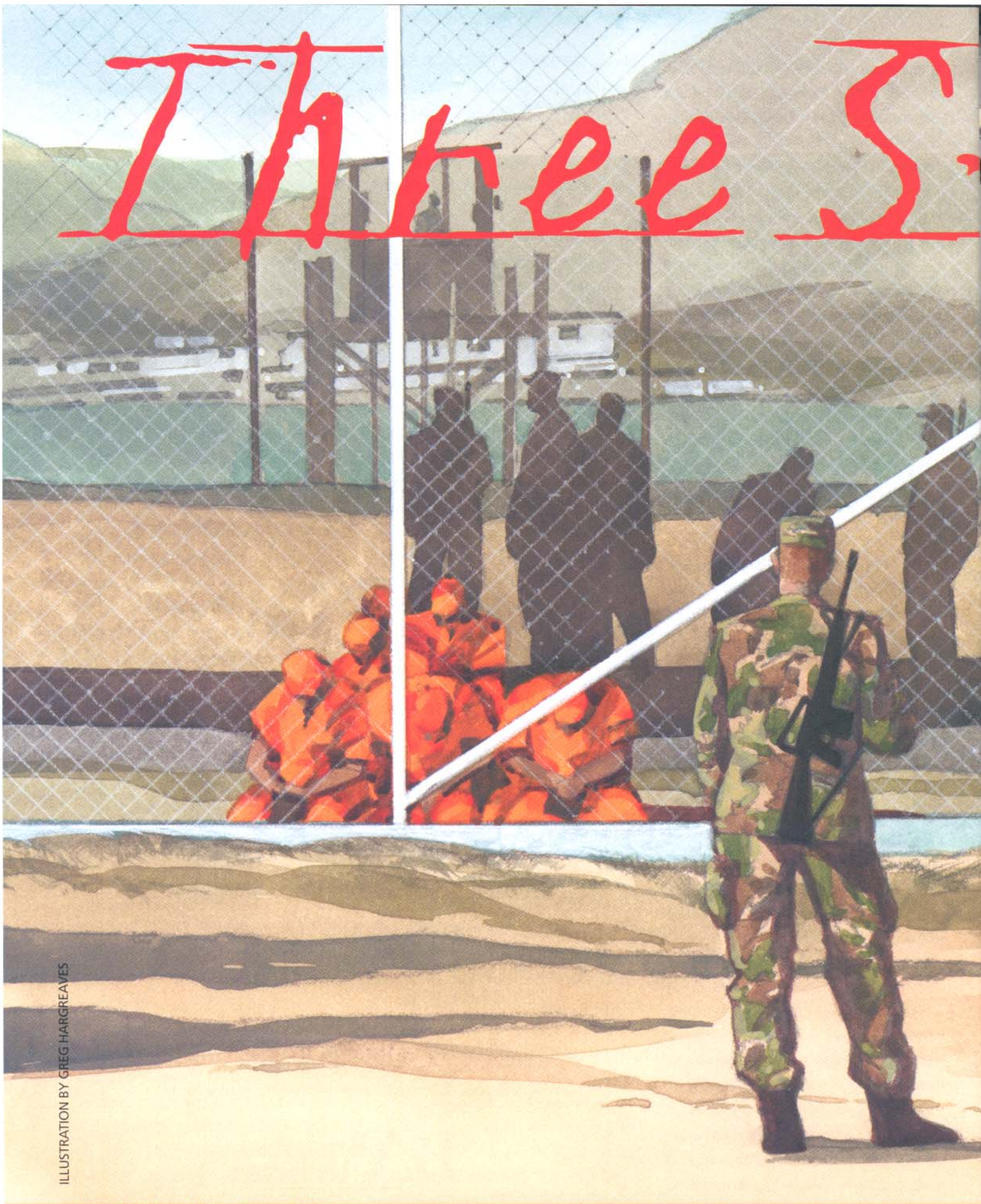


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Will the Guantanamo Bay Alien Detainees
Be Granted Fundamental Due Process?

The United States Supreme Court has agreed to take up its first case arising from the "War on Terror" by consolidating the appeals of two groups of foreign aliens currently detained at the United States' Guantanamo Bay Naval Base, Cuba: *Rasul v. Bush* (No. 03-334) and *Al Odah v. United States* (No. 03-343). The Court will decide "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."

The answer to that question will not only affect the rights afforded to the estimated 660 alien prisoners at Guantanamo Bay, but will surely touch more generally upon the many nettlesome questions surrounding the tension between the President's Article II powers as Commander in Chief and the Supreme Court's Article III powers to interpret the law relating to the worldwide battle against terrorism.

The case stems from the United States' capture of several hundred prisoners in Afghanistan and Pakistan and their subsequent imprisonment at Guantanamo Bay. Charles Lane, *Justices to Rule on Detainees' Rights*, Wash. Post, Nov. 11, 2003, at A1. The prison began operation in January 2002, but by November 24, 2003, only 88 detainees had been released. Reuters, *U.S. to Release 140 From Guantanamo*, Washington Post, December 1, 2003, at A7. Others have been housed and interrogated there for months, and they face the prospect of imprisonment for the duration of the "War on Terrorism" without access to a "competent tribunal" to determine their status. Among the detainees are three juveniles between the ages of 13 and 15. Tania Branigan, *3 Likely to be Freed from Guantanamo*, Wash. Post, Aug. 23, 2003, at A18.

The Bush Administration has claimed that the Guantanamo detainees are being treated humanely and it has vowed that they "will not be subjected to physical or mental abuse or cruel treatment." Press Release, White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter White House Press Release]. On January 11, 2002, however, the Pentagon released a now infamous photo of the detainees that stirred international concern: detainees were "kneeling before US soldiers, shackled, handcuffed, and wearing blacked-out goggles over their eyes and masks over their mouths and noses." Amnesty Int'l, *The Threat of a Bad Example Undermin-*

ing International Standards as "War on Terror" Detentions Continue 16 (2003). Amnesty International later learned through interviews of former Guantanamo detainees, that during their transfer from Afghanistan to Guantanamo, they were bound and gagged, and otherwise mistreated. *Id.*

In addition, the International Committee of the Red Cross recently issued an unprecedented public statement citing growing concerns over the detainees, specifically a decline in their mental health purportedly caused by the prospect of indefinite incarceration. Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. Times, Oct. 10, 2003, at A1. It also is reported that 21 detainees have attempted suicide 32 times within the prison's walls. *Id.*

Regardless of the government's promise to treat the Guantanamo detainees well, President Bush has determined that the terms of their detention are not governed by the Geneva Convention's Prisoner of War (POW) provisions, because they are "unlawful combatants." White House Press Release, *supra*; Forsaken at Guantanamo, N.Y. Times, Mar. 12, 2003, at A24. Although the White House has promised that detainees would be treated "in a manner consistent with the principles of the Third Geneva Convention of 1949," White House Press Release, *supra*, they have not been granted a review of their status by a "competent tribunal" as is required by that treaty. Even if the constitutionally criticized military commissions created by President Bush were recognized to be an appropriate tribunal for treaty purposes, none of the detainees have been brought before one. See generally American Bar Association Task Force on Terrorism & the Law, Report and Recommendations on Military Commissions (2002), available at <http://www.abanet.org/leadership/military.pdf> (last visited Nov. 21, 2003) (discussing the legitimacy of the Bush Administration's military commissions).

Guantanamo Detainees Fight For Rights

In February and May of 2002, fifteen detainees filed two separate lawsuits challenging their detentions. *Rasul v. Bush*, 215 F. Supp. 2d 55, 56-58 (D.D.C. 2002). The two cases, one bearing the name of Shafiq Rasul and the other of Fawzi Al Odah, were consolidated and heard before Judge Colleen Kollar-Kotelly in the United States District Court for the District of Columbia. *Id.* at 59. The Rasul petitioners — two Britons and an Australian — and the *Al Odah* plaintiffs — twelve Kuwaiti nationals—sought relief under a number of different theories, but the court treated both groups as seeking a writ of habeas corpus. *Id.* at 62, 64. The Rasul petitioners, who were captured in Afghanistan, maintained that they never voluntarily joined a terrorist force and were in Afghanistan before their capture "to facilitate humanitarian assistance to the Afghani people." *Id.* at 60. The Kuwaiti detainees maintained that they were in Afghanistan and Pakistan to provide humanitarian aid to the people of those countries when bounty-seeking villagers apprehended them and turned them over to U.S. forces. *Id.* at 61. Although we do not know exactly how much the bounty hunters were paid for the Kuwaiti detainees, Pakistani intelligence reported that Northern Alliance leaders in Afghanistan have been offered as much as \$5,000 for Taliban prisoners and \$20,000 for al Qaeda prisoners. Jan McGirk, *Fighting Terror/Tracking Down the Network*, Boston Globe, Nov. 17, 2002, at A30.

Strike One: District Court Dismisses The Case

The district court dismissed both cases for lack of jurisdiction. *Id.* 72-73. Judge Kollar-Kotelly restated the well-accepted constitutional doctrine that aliens detained outside the sovereign territory of the United States are not permitted access to the courts of the United States. *Id.* at 66. If those aliens had been detained inside the sovereign territory of the United

States, she explained that courts would have had jurisdiction over their claims, and the aliens would have the protections of the Fifth Amendment's Due Process Clause. *Id.* at 66-67. She then found that the lease from Cuba by the United States of Guantanamo Bay did not create a sovereign U.S. Territory. *Id.* at 72. Thus, even though the alien detainees had been brought half-way around the world to an American naval base only 90 miles from the U.S. border, U.S. courts could not hear their claims. Judge Kollar-Kotelly noted that while the government recognizes that international law does apply to the detainees, it feels that "the scope of those rights are for the military and political branches to determine." *Id.* at 56. By combining the government's reasoning with the district court's ruling, the detainees found themselves in a legal "black hole," where they had rights, but no court within which to exercise them. *See id.* at 56-57.

In reaching her conclusion, Judge Kollar-Kotelly relied heavily on the U.S. Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Rasul*, 215 F. Supp. 2d at 65. *Eisentrager* involved a habeas corpus petition filed by twenty-one German citizens who were captured in China and accused of engaging in espionage activity against the United States during a time of peace between the United States and Germany. *Eisentrager*, 339 U.S. at 766. The Supreme Court held that "a court was unable to extend the writ of habeas corpus to aliens held outside the sovereign territory of the United States." *Rasul*, 215 F. Supp. 2d at 65 (citing *Eisentrager*, 339 U.S. at 778).

The detainees relying on *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), asserted that the United States has *de facto* sovereignty over Guantanamo Bay due to the "unique nature of the control and jurisdiction the United States exercises over [the] military base." *Rasul*, 215 F. Supp. 2d at 69. *Ralpho* involved a claim under the Micronesian Claims Act of 1971 — an act established to fund Micronesians for losses incurred during World War II. *Id.* Although the

plaintiff in *Ralpho* was a citizen of Micronesia, and the United States did not have technical sovereignty over that country, the court determined that the plaintiff was entitled to due process protections of the United States. *Rasul*, 215 F. Supp. 2d at 69 (citing *Ralpho*, 569 F.2d at 618-19).

Judge Kollar-Kotelly, however, distinguished *Ralpho* by reasoning that the case presented a “limited exception” to the sovereignty requirement, because Micronesia was a “Trust Territory” of the

United States for which the American government was accountable to the United Nations. *Rasul*, 215 F. Supp. 2d at 70. She interpreted *Ralpho* to mean that the Micronesia-United States relationship was sufficiently akin to that of the United States and its official territories, such as Guam or Puerto Rico, where aliens are entitled to “certain basic constitutional rights.” *Id.* In contrast, Judge Kollar-Kotelly reasoned that the Guantanamo Bay Naval Base arose from a lease between Cuba and the U.S., and as such, did not approach sovereign territory status. As a result, the court rejected the *de facto* sovereignty test and ruled that the United States did not have jurisdiction to hear the Guantanamo detainees’ habeas petitions. *Id.* at 71, 73.

Strike Two: Court Of Appeals Affirms

The D.C. Circuit affirmed the lower court’s decision. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). In addressing the question of jurisdiction, the D.C. Circuit concluded, “[N]o court has jurisdiction to grant habeas relief to the Guantanamo detainees,” because Guantanamo Bay was not a sovereign territory of the United States. *Id.* at 1141 (citation omitted). The court reached this conclusion largely by focusing on the plain language of the 1903 lease between the United States and Cuba for the area of Guantanamo, which states, “[T]he United States recognizes the continuance of the **ultimate sovereignty** of the Republic of Cuba.” *Id.* at 1142 (emphasis added.) The detainees countered by arguing that the United States has “control and jurisdiction” over the territory, but the D.C. Circuit did not find this persuasive. Instead, it opted for the lease’s “ultimate sovereignty” language. *Id.* at 1142-43.

The D.C. Circuit also considered arguments that past criminal cases concerning aliens and United States citizens at Guantanamo Bay demonstrated that the

Naval Base should be considered a sovereign territory of the U.S. However, the court distinguished those cases as invoking special maritime and territorial jurisdiction and concluded that they did not suggest that the United States has sovereignty over Guantanamo Bay. *Id.* at 1142-43.

Strike Three ... Or Is It?

In their petitions to the Supreme Court, the *Rasul* and *Al Odah* Petitioners continued to assert, *inter alia*, that only the Judiciary has the power to determine U.S. jurisdiction and that the “ultimate sovereignty” requirement of the D.C. Circuit is inappropriate. The Solicitor General in his brief in opposition to certiorari rejected any theory of *de facto* sovereignty. Brief for the Respondents in Opposition, *Al Odah v. United States* (03-343) and *Rasul v. Bush* (03-334), ___ U.S. ___ (20___). He urged the Court not to intervene, because it “would interfere with the President’s authority as Commander in Chief.” *Id.* at 11. Furthermore, the brief in opposition stated, “determination of sovereignty over an area is for the legislative and executive departments,” not for the judiciary. *Id.* at 16 (quoting *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)).

Certainly, the Supreme Court’s ruling on the jurisdiction question presented to it will not specifically address the merits of whether the detainees’ detentions should continue. If, however, the Court decides that U.S. courts do have jurisdiction over Guantanamo Bay, the detainees will have the protections of the Fifth Amendment’s Due Process Clause because they will be aliens within sovereign United States territory. As some of the **amici curiae** in support of the certiorari petition have urged, the courts should then interpret that constitutional due process requirement in light of international law and allow the detainees to challenge their status. While international law is not binding precedent, and may not be even enforceable in U.S. courts, it does have a normative value in understanding



the meaning of the Due Process Clause. In fact, the Court has used international law recently to influence such a decision. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (surveying international law before ruling that a Texas law criminalizing “deviate sexual intercourse” between same sex partners violated liberty and privacy due process rights under the Fourteenth Amendment).

In its *amicus* brief, the International Bar Association (IBA) asserted that international law has changed since the 1950 *Eisenstrager* decision, thereby contending that *Eisenstrager* may not be appropriate precedent for the Court to follow in the Guantanamo case. The IBA provides one international covenant ratified by the U.S. in 1972 that should be considered when deciding what process is due to the Guantanamo detainees: the International Covenant on Civil and Political Rights (ICCPR). Brief of *Amicus Curiae* Human Rights Institute of the International Bar Association at 6-7, *Al Odah v. United States and Rasul v. Bush*, ___ U.S. ___ (20__). ICCPR states that “[n]o one shall be subjected to arbitrary arrest or detention,” and that those deprived of liberty “shall be entitled to take proceedings before a court.” *Id.* at 8-9.

American former POW *amicus* took a bolder stance and argued that the Geneva Convention, ratified by the U.S. post-*Eisenstrager* in 1955, requires a “competent tribunal” to determine the status of the Guantanamo detainees because there is no category of captured enemies that are outside the law. Brief of *Amicus* Former American Prisoners of War at 8, *Al Odah v. United States and Rasul v. Bush*, ___ U.S. ___ (20__) [hereinafter POW Brief]. Captured persons are either POWs protected under the Third Geneva Convention, civilians protected under the Fourth Convention, or medical personnel protected under the First Convention. *Id.* (citing Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27-Fall Fletcher F. World Aff. 55, 66 n.49 (2003)).

They further assert that, according to Article 5 of the Third Geneva Convention, if there is “any doubt” whether an individual should be classified as a prisoner of war, then that individual should receive the protections of the Geneva Convention until a “competent tribunal” determines the individual’s status. *Id.* at 7.

Even if the American former POWs are wrong and the Guantanamo detainees are not specifically covered by the Geneva Convention, a “competent tribunal” should be equated with due process as IBA *amici* suggest, and a court should construe the Due Process Clause to include access to a “competent tribunal” in this case. An interpretation of the Fifth Amendment’s Due Process Clause in light of these widely accepted international standards would likely allow the detainees a chance to have their status determined.

Implications Of American Actions At Guantanamo

The Supreme Court’s decision could have far-reaching effects in the realm of international relations. America has much at stake as a standard-bearer for human rights. It has always demanded that American POWs be treated in accordance with the Geneva Conventions. *Id.* at 11-13. Because the U.S. itself has complied with these Conventions in the past, many experts have asserted that we have helped our POWs’ chance of survival when captured by our enemies. Brief of *Amicus* Retired Military Officers at 15-16, *Al Odah v. United States and Rasul v. Bush*, ___ U.S. ___ (20__) [hereinafter Retired Military Officer’s Brief]. Moreover, giving the Guantanamo detainees a status hearing may prevent future U.S. POWs from being “creatively” denied POW status by enemy captors. *Id.* at 16. The government’s actions not only challenge the legitimacy of the United States as a nation dedicated to the rule of law, but they also send an unintended message to friendly and enemy nations that such treatment of non-citizens during times of conflict is

justified. See POW Brief at 15. This places U.S. citizens and military personnel at greater danger during this ongoing war on terrorism and future conflicts. *Id.* The legal distinctions and “War on Terror” justifications for the government’s actions in Guantanamo will undoubtedly be lost on some foreign governments. Brief of Diego C. Asencio et al. at 9-10, *Al Odah v. United States and Rasul v. Bush*, ___ U.S. ___ (20__) [hereinafter Retired Diplomat’s Brief]. Other countries have already pointed to Guantanamo Bay as justification for jailing certain people without charge (Eritrea) or without trial (Malaysia). Retired Military Officers Brief, *supra* at 14 (citing Fred Hiatt, *Truth-Tellers in a Time of Terror*, Wash. Post, Nov. 25, 2002, at A15); Retired Diplomats Brief, *supra* at 9-10 (citing Sean Yoong, *Malaysia Slams Criticism of Security Law Allowing Detention Without Trial*, Assoc. Press, Sept. 17, 2003).

The United States prides itself on individual liberty and freedom. The intense international scrutiny brought to bear on the Guantanamo detainees resulting from the Supreme Court’s consideration of their case should cause the Administration to reconsider its current stance at Guantanamo. It is has always been tempting to sacrifice civil liberties for the sake of ensuring national security, but much of the world rightly criticizes the U.S. for failing to provide the Guantanamo detainees access to any kind of tribunal to decide their status. If the United States can create a legal “black hole” in Cuba, there is nothing to stop other countries from following our lead. *Washington in Brief*, Wash. Post, Nov. 12, 2003, at A4 (quoting former President Carter as stating that the Guantanamo Bay situation has “given a blank check to nations who are inclined to violate human rights already.”) The Bush Administration should put a stop to such a self-defeating and harmful policy by promptly affording the detainees the meaningful “status” hearings contemplated by our treaty obligations without waiting for further Supreme Court review.