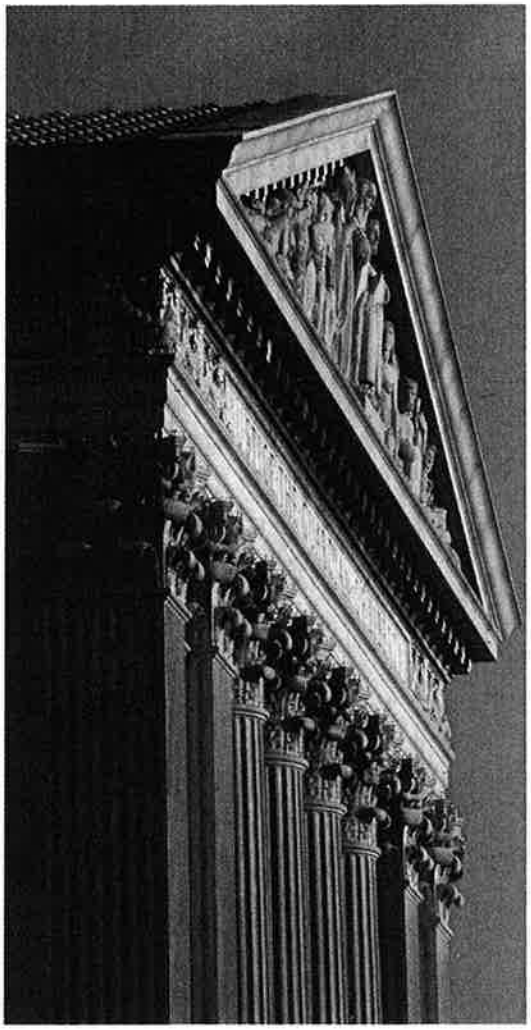
FRIEND OF THE COURT

BY DAVID PORTER



Amicus Update

To regular readers of this column, you'll notice that in place of the photograph of the lovely Lisa Kemler is a considerably less lovely photograph. Alas, our good friend and colleague Lisa Kemler has joined the ranks of the judiciary. Lisa was co-chair of the *amicus* committee for many years and served with great distinction. In that capacity, she worked tirelessly to find authors, edit the *amicus* briefs, and shepherd them through to printing and filing. She also took on much of the committee's administrative work, including submitting budget requests and writing this Friend of the Court column. Last June, Governor John Warner appointed Lisa to be a circuit court judge in Alexandria, the city's first female to be appointed to that position.

The past several months has been a particularly active period for the *amicus* committee, with a tremendous about of time and energy devoted to *Blakely* and its aftermath, and the enemy combatant/*habeas* cases discussed below. Josh Dratel and I, the co-chairs of the *amicus* committee, were very fortunate, therefore, to be joined by Lisa's replacement, Pamela Harris. Pam is counsel in O'Melveny & Myers' Washington, D.C. office, and a member of the litigation department, specializing in Supreme Court practice. Before coming to O'Melveny & Myers, she was a professor at the University of Pennsylvania Law School, worked at the Office of Legal Counsel, Department of Justice, and clerked for Justice John Paul Stevens and Chief Judge Harry T. Edwards. The *amicus* committee also has a terrific group of vice-chairs, with several new vice-chairs who have come on board in the last few months. The committee looks forward to working with Jeffrey Fisher and Jeffrey Green, the co-chairs of the Supreme Court Oral Argument Committee.

Blakely Battlements

NACDL has been at the forefront of efforts to bring some sanity (not to mention the enforcement of the Bill of Rights) to sentencing. The legal tsunami caused by *Blakely v. Washington* was the product of Blakely's lawyer, NACDL member and Ninth Circuit *amicus* committee vice-chair Jeffrey Fisher, and NACDL's *amicus* position, set forth so eloquently by Sixth Circuit *amicus* committee vice-chair Adam Steinman, was highlighted by Justice Scalia in the majority opinion. The ink on that opinion was barely dry when the battle to apply *Blakely* to the federal sentencing system began. Through the crafty reconnaissance of alert member and Third Circuit *amicus* committee vice-chair Peter Goldberger, we were informed — more than a week before the fact — that the government would be filing *certiorari* petitions in two cases, which allowed us to offer timely *amicus* assistance to the parties' lawyers — NACDL members T. Christopher Kelly and Rosemary Scapicchio — helped coordinate the defense response.

NACDL, together with the National Association of Federal Defenders, called on Thomas Goldstein of Goldstein and Howe, to write the *amicus* brief. Tom is a highly effective Supreme Court litigator and he filed an excellent brief under a severely truncated briefing schedule, urging the Court to grant *certiorari* in a case that involved a guilty plea and did not arise out of a drug conviction, *Bijou v. United States*, No. 04-5272, in place of *United States v. Fanfan*, No. 04-105, and in addition to *United States v. Booker*, No. 04-104. The brief also urged the Court to reframe the questions presented.

After the Court granted *certiorari* in *Booker* and *Fanfan*, NACDL continued to play an active role in coordinating the defense response. Joining Tom were Samuel Buffone, David Stewart, Robert Kovacev, Laura Hoey, and Peter Goldberger. After innumerable conference calls and valuable guidance by the NACDL Executive Committee, counsel filed a compelling *amicus* brief on the merits. The first question presented in *Booker* and *Fanfan* asks essentially whether *Blakely* applies to the federal sentencing system. On this point, the *amicus* brief argues that there is no meaningful distinction between the federal guidelines and the Washington sentencing law the Court examined in *Blakely*:

> The government's primary argument distinguishing *Blakely* is that the federal Sentencing Guidelines are judicial rather than legislative in character. This distinction is constitutionally irrelevant and also inaccurate. As a long line of cases in this Court and others applying the Ex Post Facto Clause to sentencing guideline schemes confirms, the Guidelines are fundamentally legislative in character.
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> Furthermore, the guidelines' content and application are closely controlled by Congress, as reflected in legislation that dramatically altered the Guidelines by congressional fiat, the PROTECT Act. An essential component of the Guidelines was the preservation of limited judicial discretion in the form of reserved judicial authority to depart from the Guidelines in atypical cases. This departure authority is critical to the balance Congress struck in the Sentencing Reform Act between the need to eliminate disparity in sentencing while still providing individualized consideration to offenders' cases. In *Koon v. United States*, this Court accordingly recognized sentencing judges' discretion to depart on grounds that were not enu-

merated in the guidelines themselves; it also applied a deferential abuse-of-discretion standard of review to departure decisions. The PROTECT Act narrowly circumscribed the departure powers of judges and abrogated this Court's decision in *Koon*, requiring *de novo* review of all departure decisions and also drastically limiting downward departures in certain sexual offense cases to grounds specifically approved in the Guidelines. The PROTECT Act further directed the U.S. Sentencing Commission ("Commission") to enact amendments to the Guidelines that "ensure that the incidence of downward departures are substantially reduced."

Nor did the PROTECT Act merely curtail sentencing judges' departure authority. Congress also drafted specific guidelines for certain sexual offenses, and even wrote commentary in the Commission's name for those guidelines. The Act also repealed the requirement that at least three members of the Commission be federal judges; there is now no requirement that the Commission include any judges at all. Ominously, it also directed the collection of sentencing decisions by individual judges for review by the executive branch and Congress.

Even before the PROTECT Act, Congress had repeatedly dictated the form and content of specific Guidelines. More than sixty times since the Guidelines were first enacted, Congress has issued directives to the Commission that essentially dictated amendments to the Guidelines, sometimes directly specifying those amendments' language; mandated enhancements for certain types of crimes; and rejected amendments proposed by the Commission. Just as significant is Congress's creation of mandatory minimums, which shortcircuit the Commission's role in determining appropriate punishments for conduct and distort the application of the Guidelines. By contrast, federal judges, individually or collectively, have no special voice in the Commission's policymaking role. In short, the proposition that the Guidelines reflect the "collective wisdom" of the judiciary, however valid at the inception of the Guidelines, has been disproven by years of legislative encroachment.

As to the second question — the proper "remedy" should *Blakely* be held to apply to the federal sentencing system — the brief argued that the provisions of the Sentencing Reform Act and the guidelines inconsistent with *Blakely* are severable and that, at least in the cases of defendants such as Booker and Fanfan who have already been tried, the only constitutionally permissible sentence is one based solely on the facts found by the jury:

> This Court should hold that [unless and until Congress reconstructs the sentencing system to conform to *Blakely*] sentencing must follow the process already employed by the Department of Justice. The government must allege in indictments those facts that give rise to enhanced sentences under the Guidelines. In those few cases that do not result in a plea bargain, the same jury that determined guilt must decide the facts relevant to the enhancement in a bifurcated proceeding under the traditional "beyond a reasonable doubt" standard. The jury would itself have no sentencing authority. Instead, judges must exercise their discretion to impose sentences in the range determined by the Guideline provisions applicable to the facts found by the jury.
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> This Court should reject the Solicitor General's contrary view that the Guidelines are rendered "advisory" in — but only in — cases implicating the *Blakely* rule, such that the jury has no role to play and district judges have discretion to impose any sentence within the range set by the statute of conviction. That proposal is profoundly illogical as it, in fact, relies on a selective severing of portions of the SRA that Congress could never have imagined, and it furthermore flies in the face of Congress's determination to promulgate a binding guidelines scheme that would rationalize federal sentencing.
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> We note, however, that, even if this Court applies the *Blakely* rule retroactively, the Constitution's *Ex Post Facto* and Due Process Clauses prohibit the retroactive application of either the government's discretionary sentencing proposal or the use of juries to find sentencing facts to the cases of respondents and similarly situated defendants. For these defendants, the only constitutional solution is to reduce their sentences to the maximum permitted under applicable statutes and the Guidelines based on the existing jury verdict.

The *amicus* briefs are both available at the NACDL Web site at: http://www.nacdl.org/public.nsf/newsissues/blakely?opendocument (click on "Case Materials").

Terrorism Front

NACDL has also taken an active role in opposing the administration's efforts to seize and detain a United States citizen in the United States based on a determination by the president that the person is an enemy combatant and to detain indefinitely at Guantanamo Bay Naval Base persons captured abroad. In *Rumsfeld v. Padilla*, No. 03-1027, Donald G. Rehkopf, Jr. authored an eloquent *amicus* brief on behalf of NACDL and the New York State Association of Criminal Defense Lawyers, arguing that there is no legal authority for the commander-in-chief to imprison a civilian citizen in a military prison, absent martial law:

> From the founding of our Country, military control over the civilian populace has been an anathema to our Constitutional system. The composite structure of the Constitution, to include the Bill of Rights, supports the basic concept of "civilian supremacy." The military order of the Commander in Chief confining Mr. Padilla — a civilian — indefinitely in a military brig, violates this basic principle.
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> Not only has Mr. Padilla been imprisoned for almost two years as a military prisoner, he remains at all times uncharged with any crime, civilian or military. As a civilian, Mr. Padilla cannot con-

stitutionally have military law applied to him. The only exception — legally and historically — would be the application of martial law to Mr. Padilla. Martial law however has not been declared, nor does any factual exigency or emergency exist such as to justify or necessitate it.

The Authorization for the Use of Military Force enacted by Congress on September 14, 2001, was a limited delegation of Congressional war power to the Commander in Chief. That delegation did not however, authorize the Commander in Chief to either designate a U.S. citizen, not a member of the armed forces of any country, as an "unlawful combatant," nor did it authorize the indefinite military detention of a U.S. citizen without charges.

Rather, the scope of the Joint Resolution which Petitioner relies on for justification, must be evaluated within the broad parameters of other Congressional enactments, specifically precluding the actions of the Petitioner herein and prohibiting the use of our military against our citizens domestically. The Posse Comitatus Act of 1878, 18 U.S.C. § 1385, was not repealed or excepted. Title 18, U.S.C. § 4001(a) [prohibiting "preventive detention" of citizens], was not modified, nor was 10 U.S.C. § 375 [prohibiting "direct participation" by military forces of "seizure, arrest or other similar activity" in law enforcement actions].

Both the Constitution and statutory authority — authority with specific lineage to Article I, § 8, U.S. Constitution — forbid the indefinite military detention of a civilian, U.S. citizen without charges for almost two years. There is no authority, express or implied, in Article II of the Constitution, that sustains Petitioner's arguments. Habeas corpus is and respectfully must be, the remedy.

The brief is available at: *http://www.wiggin.com/practices/areainfo.asp?groupid=5&areaID=231.*

In *Rasul v. Bush*, Nos. 03-334, 03-343, Jonathan M. Freiman and Christian Turner of Wiggin and Dana LLP, and Michael H. Posner, Deborah Pearlstein, and Fiona Doherty, of the Lawyers Committee for Human Rights, authored a compelling brief on behalf of an impressive bipartisan coalition of national and international non-governmental organizations, including NACDL:

> The Petitioners in this case claim that they never "engaged in hostilities against America." They say they are innocents caught up in the fog of war, and they have now been imprisoned for more than a year and a half. Yet according to the Court of Appeals, no court has jurisdiction to hear their claims. The Court of Appeals did not base its decision on the principle that courts must shy from the battlefield, since the Petitioners were moved far from the fields of war long ago. According to the Court of Appeals, the principle is simpler: the Executive can do what it wishes to aliens abroad — even innocent aliens — because no law protects them and no court may hear their pleas.
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> That is a stunning proposition, and Amici emphatically reject it. As this Court taught in *Ex Parte Quirin*, "the duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."
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> The Court of Appeals' decision suffers from three major flaws. First, it wrongly concludes that "if the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the . . . legality of restraints on their liberty." The writ of habeas corpus is not so limited. It provides a means to challenge Executive detention on the basis of any law of the United States — not just the Constitution. The Geneva Convention Relative to the Treatment of Prisoners of War, ratified by the United States, is one such law, and Petitioners have non-frivolously claimed that their detention violates the terms of that convention.
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> Second, the Constitution does entitle the Guantanamo detainees to due process. The flexible standard of due process enunciated in *Mathews v. Eldridge*, provides a context-sensitive means to balance the real concerns of national

security with the equally real possibility of an erroneous deprivation of freedom. Mathews makes clear that courts can protect national security without blinding themselves to the claims of those aliens held abroad by U.S. officials. Furthermore, any number of this Court's cases make clear that even those extraterritorial aliens with no property or presence in this country have some due process rights. If the Due Process Clause protects an alien corporation with no presence in this country from having to defend itself in a U.S. court, it would be perverse to think that the clause does not protect an alien individual from indefinite detention without any court review at all.

Were the Due Process Clause inapplicable to U.S. actions in Guantanamo Bay, then the Constitution would allow the summary execution or torture of prisoners detained there. Indeed, the government has conceded this in open court. Of course, there are forces external to the Constitution that might moderate such atrocities. But the very idea that the Constitution would have nothing to say about such matters is inimical to the principle of fair treatment at the heart of the Due Process Clause.

Third and finally, the Court of Appeals' construction of both the habeas statute and the Due Process Clause flouts the "values we share with a wider civilization." The very decision that the Court of Appeals most frequently cites was based in good part on comparative and international law. In the more than half-century since, that law has changed dramatically. Democratic allies around the world that have confronted ongoing terrorist threats, as well as the international treaties that the United States has ratified, provide for judicial review of the legality of Executive detention.

This shared practice of reviewing detentions, mirrored in our own *habeas* statute, is the surest guarantee of the protection of innocents. As Respondent Secretary of Defense Rumsfeld has acknowledged, soldiers in wartime sometimes make mistaken captures. History more than supports the Secretary's acknowledgment. When U.S. soldiers captured presumed belligerents in the conflicts in Vietnam and Iraq, competent tribunals were quickly convened to determine whether those caught were truly combatants — and if so, whether they were entitled to prisoner-of-war status. Many were released.

Convening those tribunals was both legally proper and wise. As Justice Jackson noted review of governmental action "is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice." This nation's courts must have jurisdiction to protect our system of justice from those "lasting stains."

The brief is available at: *http://www.appellate.net/guantanamo_bay/*

In future Friend of the Court columns, we'll provide updates on *amicus* briefs filed in other areas and discuss *amicus* strategies in the wake of *Booker* and *Fanfan*.

Editor's Note: This column was written prior to the Supreme Court decision in Booker.

About the Author

David M. Porter is an Assistant Federal Defender in the Eastern District of California, where he supervises the Habeas and Appeals Unit. He is co-chair of the NACDL *Amicus Curiae* Committee. Future columns will provide updates on *amicus* briefs filed elsewhere and will discuss *amicus* strategies in the wake of *Booker* and *Fanfan*.

David M. Porter
Federal Public Defender Office
801 I Street, 3rd Floor
Sacramento, CA 95814
916-498-5700
Fax 916-498-5770
E-MAIL david_porter@fd.org