
JAMIL EL-BANNA, *et al.*

Petitioners,

v.

GEORGE W. BUSH,
President of the United States, *et al.,*

Respondents.

Civil Action No. 04-CV-1144 (RWR)

FALEN GHEREBI, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH, *et al.,*

Respondents.

Civil Action No. 04-CV-1164 (RBW)

LAKHDAR BOUMEDIENE, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States, *et al.,*

Respondents.

Civil Action No. 04-CV-1166 (R JL)

SUHAIL ABDUL ANAM, *et al.*

Petitioners,

v.

GEORGE W. BUSH,
President of the United States, *et al.,*

Respondents.

Civil Action No. 04-CV-1194 (HHK)

ISA ALI ABDULLA ALMURBATI, *et al.*
Petitioners,
v.
GEORGE WALKER BUSH,
President of the United States, *et al.*,
Respondents.

Civil Action No. 04-CV-1227 (RBW)

MAHMOAD ABDAH, et al.
Petitioners,
v.
GEORGE W. BUSH,
President of the United States, *et al.*,
Respondents.

Civil Action No. 04-CV-1254 (HHK)

GUANTANAMO BAY DETAINEE CASES
assigned for coordination by:
ORDER (GK for CCMC, 8/17/2004),
RESOLUTION (Exec. Sess., 9/15/2004),
and ORDER (JHG, 9/20/2004).

JOYCE HENS GREEN,
United States District Judge,
Managing Judge

**BRIEF OF AMICUS CURIAE CHARLES B. GITTINGS JR.
AND CROSS-MOTION FOR SUMMARY JUDGEMENT
IN SUPPORT OF PETITIONERS**

TABLE OF AUTHORITIES

FEDERAL CASES

Application of Yamashita, 327 U.S. 1 (1946).

Foster v. Neilson, 27 U.S. 253 (1829).

Hamdi v. Rumsfeld (III), 316 F.3d 450 (4th Cir. 2003).

Johnson v. Eisentrager, 339 U.S. 763 (1950).

United States v. Percheman, 32 U.S. 51 (1833)

United States v. Noriega, 808 F.Supp. 791 (S.D. Fl. 1992).

FEDERAL CONSTITUTION AND STATUTES

18 U.S.C. § 2441 (War crimes)

18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States)

U.S. Const. art. VI, cl. 2

U.S. Const. art. II § 3;

INTERNATIONAL TREATIES AND DOCUMENTS

Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12, 1949, 75 U.N.T.S. 31.

Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 U.N.T.S. 85.

Geneva Convention III Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 135.

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 U.N.T.S. 287.

Hague Convention IV Respecting the Laws and Customs of War on Land, with annex of regulations, October 18, 1907, 36 Stat. 2277, 1 Bevans 631.

OTHER AUTHORITIES

Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833 (2001).

Jackson, Robert H., report, International Conference on Military Trials: London, 1945, Department of State Publication 3080, U.S. Govt. Print. Off., Washington, D.C (1949)

Jordan J. Paust, *The Common Plan to Violate the Geneva Conventions*, Jurist (2004), available at: <http://jurist.law.pitt.edu/forum/paust2.php> (last checked 10/12/2004).

Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, ASIL Insights (2003), available at: <http://www.asil.org/insights/insigh102.htm> (last checked 10/12/2004).

Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503 (2003).

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001).

Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677 (2002).

Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, Army Law., November 2003, at 18 (2003).

INTEREST OF AMICUS CURIAE

May it please this Honorable Court, now comes Charles B. Gittings Jr., *pro se*, appearing as *amicus curiae* in support of petitioners. My interest here is that of a U.S. citizen who is deeply concerned about the issues in these cases and has no financial or personal stake in any of them.

The President issued the "*Military Order*", *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 F.R. 57833 (2001) (hereinafter "PMO"), on 11/13/2001. Reading the PMO on the very day was issued, I immediately resolved to oppose it in the belief that the PMO was illegal, irresponsible, and dangerous. Since then I have worked full-time on the issues of that order (including the legal issues of the present detainee cases) for almost three years, at first, full time in my spare time, and after being laid off my job in July 2002, much more than full time.

The only purpose of my effort is to uphold the laws of the United States. I have made a diligent effort to understand both the facts and the law of these cases. Although I am not an attorney, I am reasonably familiar with the Federal Rules of Civil Procedure and the local rules of this court.

No counsel for a party in this case authored this brief in whole or in part. All costs of this brief have been paid by amicus at his own expense.

Consent for this brief was requested of all parties by email, and Petitioners / Plaintiffs in Al Odah, Abdah, and O.K have graciously granted their consent.

Counsel for petitioner Hamdan have indicated that they would be agreeable to amicus filing a brief in the future, but also stated that since their case is presently being briefed separately from the others it would not be appropriate to do so at this time. Amicus has accordingly omitted the Hamdan case from this filing.

None of the other parties in these cases have replied to amicus.

SUMMARY

This brief stands for the Geneva Conventions of August 12, 1949, and asserts, *contra* Respondents' arguments, that they have full force in the laws of the United States. (Geneva Conventions I-IV (1949), hereinafter "Geneva" collectively; see TOA for citations.)

The first convention, hereinafter "GWS," protects wounded and sick, medical personnel, chaplains, etc. The second convention, hereinafter "GWS Sea," protects wounded and sick, etc., who are at sea or shipwrecked. The third convention, hereinafter "GPW," protects POWs. The fourth convention, hereinafter "GC," protects civilians, defined by GC art. 4 as anyone who is not protected by Geneva conventions I-III.

The first three articles of each convention are identical and are known as Common Articles 1-3, hereinafter CA1-3. There are 190 nations party to Geneva.

The 1907 Hague IV convention (hereinafter "H.IV"), and it's Annex of Regulations Concerning the Laws and Customs of War on Land (hereinafter "HR"), are "complimentary" to Geneva, meaning they remain in effect where they are not directly superceded by Geneva.

The Third Geneva Convention of 1929 (hereinafter “GPW 1929”) was replaced by GPW and is no longer in effect, but figures in some of the precedents that bear on the present cases.

Respondents have gone to absurd lengths over the last three years to circumvent and misrepresent the requirements of Geneva, Hague, the U.S. Code, and the Constitution in a sustained effort to evade and violate both the laws and customs of war, which are expressly codified by the Geneva and Hague Conventions, and the U.S. War Crimes Act, 18 USC 2441. This brief is intended to show that the Respondents are in fact engaged in a criminal conspiracy to commit war crimes by policy under a false color of authority in the PMO, and that the petitioners / plaintiffs in these case are victims of those crimes.

ARGUMENT

1. Yamashita & Eisentrager *contra* Geneva 1949 & Hague 1907

Respondents, in their *Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support* (10/4/2004, hereinafter “*Response*”), state:

“[The law of war] includes treaties such as the Geneva Conventions, which were developed with the exigencies of warfare in mind and address specifically and in detail a nation-state's obligations with respect to detainees seized in combat. * * *

“Even assuming that petitioners are protected by this specialized law of war, including the Geneva Conventions, the Supreme Court has held "responsibility for observance and enforcement" of any such law "is upon political and military authorities," not United States courts. *Eisentrager*, 339 U.S. at 789 n.14 (holding that although "prisoners claim to be and are entitled to" the protections of the Geneva Conventions, these claims are not cognizable in federal court because the rights of aliens "are vindicated under [the Geneva Conventions] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention"). **Although the Supreme Court in *Eisentrager* addressed the 1929 Geneva Convention, not the current conventions, its analysis is fully applicable here.**”

Id. at 67.

That claim is patently false – the actual holdings on Geneva in *Eisentrager*, 339 U.S. 763 (1950), were:

- “Nothing in the Geneva Convention makes these prisoners immune from prosecution or punishment for war crimes.”
- “Article 60 of the Geneva Convention, requiring that notice of trial of prisoners of war be given to the protecting power, *is inapplicable to trials for war crimes committed before capture.*”
- “Article 63 of the Geneva Convention, requiring trial of prisoners of war "by the same courts and according to the same procedure as in the case of persons

belonging to the armed forces of the detaining Power," *is likewise inapplicable to trials for war crimes committed before capture.*

Id. at 764-5, 4.(d)-(f) (emphasis added), following exactly the finding in *Yamashita*, 327 U.S. 1, which held:

“[GPW 1929] part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of chapter 3.” *Id.* at 22-23.

The first of those rulings is certainly true: there is indeed nothing in Geneva or *any other law* that would prevent prosecution or punishment for war crimes, because war crimes exclude any form of immunity. However, such prosecutions must conform to the law, and the *Yamashita* holdings on GPW 1929 arts. 60 and 63 cannot possibly apply to GPW (1949) because they are clearly excluded by arts. 84 and 85, which state:

Article 84.

* * * In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

Article 85.

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

In truth, Geneva 1949 was drafted in part to exclude holdings like *Yamashita*, the Nazi's interpretations of GPW 1929 in regard to Poland, *etc.* Further, the *Yamashita* findings on Geneva were dubious even under GPW 1929, as they failed to take Hague IV (1907) into proper account. The “Martens Clause,” H.IV *preamble*, states:

“It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

“On the other hand, **the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.**

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, **in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations**, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

Id. (emphasis added).

In the present cases, Respondents would have us believe that “the principles of the law of nations” are inapplicable even in cases where they are explicitly defined and required by treaties, regulations, and statutes in force!

Yet HR art. 23(h) prohibits any action “[t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party,” *Id.* Those provisions have even greater significance in the present, because 18 USC § 2441 (war crimes) makes it an offense punishable by life imprisonment or death to commit any violation of HR art. 23(h).

The *Response*, as quoted *supra*, ignores all this and instead relies on *Eisentrager* footnote 14, which in full states:

We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by [GPW 1929], concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be ***and are*** entitled to its protection. It is, however, the obvious scheme of the Agreement that ***responsibility for observance and enforcement of these rights is upon political and military authorities.*** Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.
Id. (emphasis added).

Respondents then falsely claim that this footnote is a “fundamental principle of international law” which “has been distilled to a general rule that international treaties do not create rights that are privately enforceable in federal courts;” recite their familiar litany of sweeping generalizations concerning “self-executing treaties” and “private rights of action;” and conclude by misrepresenting the source text of the “self-executing” treaty doctrine they are so eager to falsify and misapply, to wit:

“[S]ee also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (holding that a non-self-executing treaty “addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court”)...”

But *Foster* refers to treaty *stipulations* which require legislative action, not to the treaty as a whole. The point is quite obvious if one considers the issues of *Foster* itself. There the question turned on the status of Spanish land grants under the terms of a treaty between the United States and Spain:

“A ‘treaty of amity, settlement, and limits, between the United States of America and the king of Spain,’ was signed at Washington on the 22d day of February 1819. By the 2d article ‘his catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida.’

“The 8th article stipulates, that ‘all the grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.’”
Foster v. Neilson, 27 U.S. 253 (1829) (Marshall, C.J.), 310, *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51, 64 (1833).

The stipulation on which the court based its ruling was the language “*shall be ratified and confirmed*” in the 8th article, but clearly the fact that this stipulation had not been executed had no bearing on the principle object of the treaty, the transfer of West Florida from Spain to the United States.

Contracts and treaties stipulate exactly what they *do*, no more and no less. Amicus believes it is fundamental in such matters that the parties to an agreement endeavor to specify the terms with the greatest possible precision in a good faith effort to realize the object of it. There is only one significant requirement for legislation in the Geneva Conventions, namely the requirement that all parties enact laws making grave breaches of Geneva punishable as offenses under their domestic criminal laws, a requirement that occurs in the sections of GPW and GC entitled “execution of the treaties,” which provision is explicitly executed in the U.S. code by 18 USC § 2441. See Charles B. Gittings Jr., *Brief of Amicus Curiae Charles B. Gittings Jr. In Support of Petitioners, Hamdi v Rumsfeld*, No. 03-6696, *On writ of cert. to the 4th Cir.* (2/23/2004), attached here as Exhibit A, at 5-7.

Self-execution is strictly moot herein: the Geneva Conventions have been executed as law for the United States by 18 USC 2441 regardless of Respondents disingenuous arguments concerning the self-execution of treaties. Respondents are attempting to infer an unconstitutional requirement that treaties require a second ratification by the full Congress, and moreover, in regard to a treaty which the full Congress has already explicitly executed by law. Against all their prolific sophistry the Constitution and the Geneva Conventions speak with telling clarity: treaties “*shall be the supreme Law of the Land,*” *U.S. Const.* art. VI, cl. 2; the President “*shall take Care that the Laws be faithfully executed,*” *U.S. Const.* art. II § 3; and “[*t*]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances,” CA1.

Respondents have a clear and fundamental duty to obey and enforce the laws of the United States, yet they would have the court believe they need not obey the laws because the laws need not be enforced. But neither the Congress nor President have any authority to nullify the laws, and in military law it is a fundamental breach of military discipline and law to either issue or obey an unlawful order.

The Geneva Conventions *are* the law of war, and Respondents are arguing that they are at liberty to violate those laws with impunity. This honorable court should teach them a better understanding of their responsibilities.

2. CSRTs *contra* GPW Articles 4 and 5

Respondents would have this court believe that the “CSRTs” now in progress at Guantanamo Bay fully satisfy the requirements of any legal rights the Petitioners might have (in the event the court declines to adopt Respondents’ preposterous claims that they have absolutely no legal rights at all), by falsely asserting that the CSRTs are “modeled” on GPW art. 5:

“At the outset, one powerful indication that the CSRTs satisfy constitutional due process **is that they are modeled directly on the very Article 5 Tribunals cited approvingly by the Hamdi Plurality.**”

Response at 32.

That claim is true only in the trivial sense that counterfeit money is “modeled” on legal tender. In truth, the CSRTs are a sham intended to rubber stamp an inherently unlawful process with a false veneer of legitimacy. GPW art. 5 states:

“The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

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

Id. (emphasis added).

Note that the fact of a prisoner actually being a combatant by virtue of “having committed a belligerent act” is *assumed* in GPW art. 5, and that by claiming these POWs do not satisfy GPW art. 4 Respondents have raised a doubt as to the application of art. 4 within the article’s meaning. The status determination which art. 5 calls for is not a determination of the facts *per se* as Respondents would have the court believe, but rather, it is principally a determination of how the law *applies* to the facts.

That is a fundamentally judicial task, and what is meant by a “competent tribunal” is not ambiguous in the least: it means simply a lawfully constituted panel with the competence to adjudicate questions of law. Art. 5 establishes both a rebuttable presumption that a captured combatant is a POW protected by GPW, and a rebuttable presumption that “having committed a belligerent act,” the individual is in fact a combatant. The President acting as commander-in-chief has no authority to make judicial determinations on questions of law: that is both a violation of the Constitutional separation of powers, and a violation of the Martens Clause and HR art. 23(h), *supra*.

Yet Respondents shamelessly argue:

“It would be anomalous for the Hamdi Plurality to have cited the Article 5 Tribunals as an exemplar of an “an appropriately authorized and properly constituted military tribunal” that could provide “such process” meeting “the standards we have articulated” if there were any serious constitutional problem with them. Hamdi, 124 S. Ct. at 2651. And it necessarily follows that procedures for the CSRTs, which as discussed below are patterned after the Article 5 Tribunals and in fact exceed them in the degree of process given, do not fall constitutionally short of what is required.”

Response at 32-33.

As if it were not even more anomalous to substitute a unlawful ad hoc pretence in the place of the due process required by law! We may be glad at least that they have finally (if unwittingly in their eagerness to prove that $1 + 1 = 0$) conceded that there are no serious constitutional problems with the Geneva Conventions. Amicus hopes accordingly that they will now desist from further argument to the contrary, and prays that this honorable court will dismiss any such further arguments by Respondents with prejudice.

It should also be noted that the actual status of the detainees is largely irrelevant herein: if they are not protected as POWs by GPW, in all other cases they are protected by GC and CA3. In any

case, the Respondents' treatment of the detainees is in flagrant violation of both the Geneva and Hague conventions as well as 18 USC § 2441. The definition of a protected person within the meaning of GC is stated by GC art. 4:

Persons protected by [GC] are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

The only exceptions are those who are "protected by [GWS], or by [GWS Sea], or by [GPW]", *Id.*; nationals of nations who are not a party to the convention, and the nationals of neutrals in a declared war who have normal diplomatic relations with the detaining power.

3. Respondents *contra* 18 USC § 2441

Amicus will here depart from the usual form of an amicus brief because it would require many hundreds of pages to cover all of the issues here. The court has the basic account of the facts offered by Respondents and Petitioners / Plaintiffs, and there does not appear to be any substantial dispute in that regard outside the particular details of the treatment and activities of particular detainees. It is the law which is principally in dispute here, not the facts.

As stated *supra*, the interest of Amicus in these cases began on November 13, 2001, upon first reading the PMO, it being immediately apparent that the intent of that order was to circumvent compliance with the Geneva conventions and other laws enacted since the end the Second World War. I began with nothing more than a general commitment to advocate opposition to the PMO, but when the White House issued the "Fact Sheet" on detainees of February 7, 2002 it was apparent to me that the government was in fact violating the Geneva Conventions, and from that point forward I have considered my effort a volunteer criminal investigation to uphold the laws of the United States in the public interest.

I claim no powers beyond those of a citizen of the United States, nor any authority beyond that which reason confers, but those suffice. Realizing that I would have to be absolutely on the level to have any chance of success, I voluntarily swore myself to defend the Constitution and laws of the United States, to be strictly impartial with regard to the facts and the law, and to act only in the public interest to the very best of my abilities. I have endeavored to live up to that oath ever since.

From the beginning, I approached the project as a full-time task, and after being laid off my job in July 2002, more than a full-time task. It is entirely possible and even probable that I literally have spent more time investigating the facts and issues of the Respondents' detainee policies than anyone else on the planet. The quality of my efforts is another matter, but I can state without reservation that I have applied myself to the task with every ounce of diligence I could muster. Of necessity, I've had to act partly as a reporter, partly as my own legal counsel and researcher, and partly as a public advocate, writer, and publisher – and at every step, simply doing whatever seemed most likely to move the task even an inch forward.

My effort has centered on 18 USC § 2441 almost from the beginning. For much of that time, the mere fact the statute even existed was largely ignored by both the press and the legal community, despite the obvious bearing it has on the government's policies in regard to the Geneva Conventions, Guantanamo Bay, etc. The Hamdi III decision in the 4th Cir. (as well as the

decision in the D.C. Cir. which adopted that decision by reference in the Al Odah and Rasul (Hicks) cases now pending before this court) failed to notice it at all. The statute was first mentioned in the mainstream press by the Miami Herald in a passing reference August 2003. The first mention in one of the habeas cases appears to have been the appeal of Padilla to the 2nd Cir. in July 2003, but only as a possible charge against Padilla himself.. Such was the situation that led me to undertake the very daunting task of attempting to file an amicus brief in the Supreme Court as a layman acting *pro se*.

It was only after the Abu Ghraib scandal broke that the full implications of the statute began to be reported in any detail, but even then the focus centered on the specific allegations of torture while minimizing the conditions of detention, which were just as clearly illegal.

With the release of the now infamous Yoo and Bybee memos, originating from the DOJ Office of the Legal Counsel (OLC), and the White House memo on which the 2/7/2002 “Fact Sheet” was based (signed by Alberto Gonzales, counsel to the President, but in fact authored by David Addington, counsel to the Vice President), my analysis of the events was fully confirmed, namely, that the Respondents herein have been engaged in a conspiracy to violate Geneva 1949, Hague 1907, and 18 USC § 2441 from the beginning, and that from the beginning, they have been operating under a false color of authority in the AUMF and PMO.

In the interests of brevity, I will not explore the full details of the conspiracy here. Instead, I suggest that the court familiarize itself with the following authorities:

Jordan J. Paust, *The Common Plan to Violate the Geneva Conventions*, Jurist (2004), available at: <http://jurist.law.pitt.edu/forum/paust2.php> (last checked 10/12/2004).

Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, Army Law., November 2003, at 18 (2003).

Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, ASIL Insights (2003), available at: <http://www.asil.org/insights/insigh102.htm> (last checked 10/12/2004).

Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int’l L.J. 503 (2003).

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int’l L. 1 (2001).

Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int’l L. 677 (2002).

That is only a partial list of the authorities which amicus has consulted in forming the opinions expressed here, and amicus stands ready to amend this brief with a fuller account as the court may direct. Amicus has no power to file a criminal complaint, but this honorable court has the authority to enforce the criminal laws of the United States pursuant to 18 U.S.C. § 3041.

Therefore, and may it please this honorable court, *on information and belief*, and subject to the penalties for perjury in the U.S Code, amicus hereby solemnly affirms:

- (a) That there is probable cause to believe that Respondents are engaged in a conspiracy to commit war crimes pursuant to 18 USC § 2441 (War crimes), 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States), GPW, GC, CA3, and HR.
- (b) That the petitions in these cases exhibit prima facie evidence of those crimes, including, but not limited to, unlawful detention, inhumane and degrading treatment, extra-judicial punishments, denial of lawful due process, unlawful coercive interrogations, unlawful deportations, and trials before unlawfully constituted tribunals.
- (c) That the only purpose of the Respondents and counsel for Respondents in these cases is to deny the Petitioners / Plaintiffs their lawful rights and due process, which constitutes an offense pursuant to 18 USC 2441(c)(2) per HR art. 23(h).
- (d) That in addition to the Respondents named herein, Richard Cheney, the Vice President of the United States, and John Ashcroft, the Attorney General of the United States are principals or co-conspirators in these crimes.
- (e) That all of the criminal acts alleged were committed under a false color of authority in the PMO by the direct authorization of the President..

The Supreme Court decisions in Hamdi and Rasul repudiated the two major legal premises of the Respondents' unlawful detainee policies, namely, that the President might properly exercise the powers of a Roman dictator when acting as Commander-in-Chief, and that Guantanamo Bay is a jurisdictional "black hole" beyond the reach of the law. Now respondents are reduced to the extremity of arguing that the laws of the United States are unenforceable in the courts of the United States, and that ad hoc procedures in direct violation of those laws constitute due process of law.

I do not address the Hamdan (Swift) v. Rumsfeld case here, but the Respondent's pending *Cross-Motion to Dismiss* (8/6/2004) in that case makes arguments which have a direct bearing here and should be carefully noted:

"The Fourth Circuit [in Hamdi III] alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. See Article 129 (GPW) ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]."); Article 130 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against person or property protected by the Convention: * * * wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."). Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but obviously does not create any privately enforceable rights. *The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty.* In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided prisoners of war, let alone unlawful combatants such as Hamdan, with private rights of action."

Id. at 31 (footnotes omitted and emphasis added).

That is the last refuge of the Respondents in all of these cases: the gratuitous notion that they are at liberty to commit war crimes with impunity because they are responsible for enforcing the laws, and that no one has any “private right of action” to the contrary.

They claim entirely too much.

When has it ever been necessary to file a civil action in order to report a crime or call upon the authorities to enforce the law against the perpetrator of a crime? And when has any lawful authority been able to exercise prosecutorial discretion over their own crimes? Prosecutorial discretion exists to serve the interests of justice, not to enable officials to commit crimes with impunity – and there is no form of immunity for war crimes.

As for habeas, the Great Writ is not precisely a “private right of action” either – it is the principal defense of a person when the government initiates an unlawful action against them: it is a right of response inherent in the governments power to detain, for in it’s absence no government can have any lawful authority at all. (The suspension clause *suspends*, it’s does not and cannot *deny*.)

It is the Respondents who have necessitated the actions in these cases: had they merely obeyed the law in the first place, it is unlikely that any of these cases would ever have been brought, let alone dragged on for nearly three years with no end in sight.

4. Conclusion

The Respondents in these cases are engaged in an on-going conspiracy to commit heinous crimes, and this honorable court should act with all possible dispatch to uphold the laws. To that end, amicus moves this honorable court as follows:

- (a) That Respondents be enjoined to immediately cease and desist from all unlawful treatment of these and all other detainees, and to comply fully with the Geneva Conventions in all circumstances and all places.
- (b) That the Department of Justice be ordered to appoint forthwith an independent counsel to investigate and prosecute the Respondents for war crimes pursuant to 18 USC § 2441, etc.
- (c) That the Respondents’ pending motions to dismiss are dismissed with prejudice.
- (d) That the court issue a finding of summary judgement in favor of petitioners and grant them all appropriate relief.

Amicus believes that justice demands no less.

May it please the court, amicus omits to file a proposed order as he believes it would be better for the court to draft it in consultation with counsel for Petitioners / Plaintiffs.

Respectfully Submitted,

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In memoriam,
ELIAS T. ("LILE") JACKS
(1924-1973)

DATED:

October 12, 2004

BRIEF OF AMICUS CURIAE CHARLES B. GITTINGS JR.
AND CROSS-MOTION FOR SUMMARY JUDGEMENT
IN SUPPORT OF PETITIONERS

EXHIBIT A

No. 03-6696

In The
Supreme Court of the United States

YASER ESAM HAMDY and
ESAM FOUAD HAMDY, as
Next Friend of YASER ESAM HAMDY,

Petitioners,

v.

DONALD H. RUMSFELD,
Secretary of Defense, et al.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

**BRIEF OF *AMICUS CURIAE*
CHARLES B. GITTINGS JR.
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*

May it please this Honorable Court, now comes Charles B. Gittings Jr., *pro se*, who appears as *amicus curiae* under Rule 37.3(a) by written consent of both parties.¹

My interest here is that of a U.S. citizen who is deeply concerned about the issues in this case and has no financial or personal stake in it. When the President issued the “Military Order” of 11/13/2001,² I resolved to oppose it in the belief the order was illegal, irresponsible, and dangerous. Since then I have worked full-time on the issues of that order (including the legal cases of Hamdi and the other detainees) for over two years.

The only purpose of my effort is to uphold the laws of the United States. I have made a diligent effort to understand both the facts and the law of this case, and have read and understand the rules of the court.

**SUMMARY OF ARGUMENT**

This brief will show that the Geneva Conventions are binding on the United States, and that the ruling of the court below that the treaties were, in essence,

¹ Counsel for both parties have granted written consent to this brief and filed copies with the Clerk. No counsel for a party in this case authored this brief in whole or in part. All costs of this brief were paid by *amicus* at his own expense.

² Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 F.R. 57833 (Nov. 16, 2001).

unenforceable because they are not “self-executing,” was incorrect. The contention here is that the conventions are in fact self-executing and that the reasoning of the court below was unsound, but that even if they were correct about the conventions not being “self-executing,” there is other law which explicitly executes the conventions as law for the United States.

Having established that the Geneva Conventions are in force, the brief then turns to their requirements, shows that Hamdi has been denied the protection of his rights in violation of the law, and concludes that the opinion below should be reversed and the case remanded to the district level for a full review of Hamdi’s rights.



ARGUMENT

1. General Principles

In advance of the brief, *amicus* stands FOR *habeas* as a natural and universal right; FOR the primacy of our laws and our Congress with respect to military affairs; and FOR the principles of the U.N. Universal Declaration of Human Rights. Those matters have been ably addressed by a distinguished and admirable array of *amici* in this and related cases, and will not be addressed here except where they bear directly.

This brief stands FOR the Geneva Conventions of August 12, 1949, and asserts, *contra* the opinion of the court below, that they have full force in the laws of the United States. (Geneva Conventions I-IV (1949), hereinafter “Geneva” collectively; see TOA for citations. The third convention, hereinafter “GPW,” protects POWs; the fourth,

hereinafter “GC,” protects civilians. The first two protect wounded and medical personnel over and above the basic protections of GPW and GC and are not relevant here. The first three articles of each convention are identical and are known as Common Articles 1-3, hereinafter CA1-3. There are 190 nations party to Geneva.)

2. The Fourth Circuit *contra* Geneva

In the proceedings below, Hamdi asserted that his detention was unlawful because he had been denied POW status and a fair hearing on the question of his status in violation of GPW arts. 4 and 5. The court below rejected that claim:

“This argument falters also because [GPW] is not self-executing. “Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.” *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). [GPW] evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations.” *Hamdi v. Rumsfeld (III)*, 316 F.3d 450 (4th Cir. 2003), 480-481.

That ruling is incorrect on a number of grounds. First, as other *amici* and authorities have shown, Geneva is in fact either self-executing or effectively so,³ and while not

³ See for example: Brief of *Amici Curiae* Former Prisoners of War, *et al.*, in Support of Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696, On (Continued on following page)

binding as precedent for the Fourth Circuit, *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fl. 1992), was a case of national import that gives a well-reasoned analysis on that point, *Id.* at 797-799. Second, the true intent of Geneva is plainly expressed by CA1, which requires all parties “to respect and to ensure respect for [Geneva] in all circumstances.” Third, CA3 applies Geneva to any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” and it cannot be supposed that diplomatic enforcement was anticipated in a non-international conflict. Fourth, Geneva requires all parties to enforce the conventions by both administrative and judicial means: GPW art. 129 and GC art. 146 require each party to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach⁴] of [Geneva],” to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts,” and to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches.”

Clearly, the primary means of enforcement envisioned by Geneva is not diplomacy as the court below would have it, but criminal sanctions imposed by the domestic laws of

Pet. for Cert., *passim* (12/3/2003); and Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, section III. A. *The Applicability of International Law as Law of the United States*, 44 Harv. Int'l L.J. 503, 514-517 (2003).

⁴ Grave breaches are defined in GPW art. 130 and GC art. 147.

the parties acting under the positive obligation of CA1 to “to respect and to ensure respect for [Geneva] in all circumstances.” Just as clearly, the United States stated in no uncertain terms during the invasion of Iraq that it expected Iraqi forces to obey Geneva to the letter, yet here the court below has seen fit to ignore Geneva entirely on the doctrinal ground that it is not “self-executing.” *Amicus* believes them mistaken, but even if they were correct on that point, there is other law which renders the question moot and their conclusion incorrect.

3. Execution of Geneva under *Foster v. Neilson*

GPW art. 129 and GC art. 146 require all parties to enforce Geneva, and each occurs in Part IV of the two conventions, entitled “Execution of the Convention.” The doctrine on “self-executing” treaties applied by the court below to Geneva derives ultimately from *Foster v. Neilson*, 27 U.S. 253, 314-15 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833), and was established by Chief Justice Marshall, writing for the court:

“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the Court.” *Id.* at 314.

Hence, if Geneva is not self-executing, the legislature must act to execute it. As shown in the preceding section, the court below appears to have been so eager to deny Hamdi any private right of action that they largely ignored what Geneva actually requires. Considered in terms of what Foster requires, Geneva has only one significant provision requiring legislation, namely the requirement in GPW art. 129 and GC art. 146 that all parties “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach] of [Geneva].” Note the language “any . . . necessary”; in practice, it has long been U.S. policy that no special legislation was required. Be that as it may, having reached the conclusion that Geneva was not “self-executing,” the court below failed to ask: what exactly would be needed to execute Geneva, and what if any action has Congress taken in that regard?

Had they asked those questions, the answer was obvious: **18 U.S.C. § 2441**, “*The War Crimes Act of 1996*,” H.R. 104-698 (1996), as amended by “*The Expanded War Crimes Act of 1997*,” H.R. 105-204 (1997), which clearly executes Geneva in exactly the sense of *Foster*. This statute makes it a federal crime to commit any grave breach of Geneva, any violation of CA3, or any act prohibited by arts. 23, 25, 27 or 28 of the Annex to the Hague Convention IV (1907), Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 1 Bevans 631 (hereinafter, “HR” denotes the annex of regulations, “H.IV” the convention proper). The statute applies to anyone who commits a war crime “whether inside or outside the United States,” whenever “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.” It

is impossible for the ruling of the court below regarding Geneva to be reconciled with the plain meaning of this statute.

4. Geneva is Law for the United States

By the light of *Foster* and 18 U.S.C. § 2441 there can be no doubt that Geneva is the law of the United States. The United States is obligated to “respect and ensure respect for [Geneva] in all circumstances,” CA1, and to prosecute any grave breach of Geneva, GPW art. 129, GC art. 146.

Further, there is no form of immunity for war crimes. GPW art. 131 and GC art. 148 state: “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches].” The (London) Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945) (hereinafter “IMT”), which governed the Nuremberg trials, also speaks here: “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility,” IMT art. 7, and “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility,” IMT art. 8. In regard to this principle, Justice Robert Jackson made some illuminating remarks in the preface to his report on the conference that negotiated the IMT:

“The most serious disagreement, and one on which the United States declined to recede from its position even if it meant the failure of the Conference, concerned the definition of crimes.

The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all.”⁵

Geneva is our law by the direct exercise of fundamental constitutional powers by the Congress and President: Geneva was signed under Truman (1949), ratified with the advice and consent of the Senate by Eisenhower (1955), and explicitly executed (1996) and reinforced (1997) by acts of Congress under Clinton. Geneva may be “denounced” only by notification to the Swiss Confederation one year in advance, after which Geneva remains in force until the cessation of hostilities, including the repatriation of all prisoners, GPW art. 142, GC art. 158.

Geneva and Hague specifically codify the laws and customs of war, H.IV preamble, GPW art. 135, GC 154. The Constitution delegates the command of our armed forces to the President, but reserves to Congress the power to create, equip, and regulate such forces. U.S. Const., art. I, § 8, cl. 10-16, 18, U.S. Const., art. II, § 2, cl. 1. The

⁵ Report of Robert H. Jackson, *International Conference on Military Trials: London, 1945*, Department of State Publication 3080, U.S. Govt. Print. Off., Washington, D.C. (1949), preface.

President “shall take Care that the Laws be faithfully executed,” U.S. Const., art. II, § 3, and the conduct of military operations by the U.S. has been governed by statute from the beginning.⁶

5. The Detention of Yaser Hamdi Violates 18 U.S.C. § 2441

Amicus does not dispute the government’s authority to detain a suspected criminal or an enemy in war time, but all such detentions must conform to the law. As the parties and *amici* in this and other detainee cases have shown, the detention of Hamdi fails to comply with GPW arts. 4-5, *etc.*, and is therefore in violation of 10 U.S.C. § 897 and 18 U.S.C. § 4001.

Grave breaches of GPW are defined by GPW art. 130 and include: “wilfully causing great suffering or serious injury to body or health, * * * or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Grave breaches of GC are defined by GC art. 147 and include: “wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, * * * or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention * * * .”

If Hamdi is a combatant as alleged by the government, then depriving him of a fair hearing on the question

⁶ See Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Law., November 2003, at 1, 2.

of POW status is a grave breach of GPW; if he is a civilian, his detention, deportation, and deprivation of due process are grave breaches of GC.⁷ In either case, it appears that his detention, in conditions which are harsh even by the standards of a maximum security prison, inflicts great suffering.⁸ Grave breaches of Geneva are violations of 18 U.S.C. § 2441(c)(1).

Any violation of CA3 is prohibited by 18 U.S.C. § 2441(c)(3), which includes: “cruel treatment,” CA3(a), “humiliating and degrading treatment,” CA3(c), and “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” CA3(d). The parties and other *amici* explore these particulars at great length. The point here is that detention and legal process in an armed conflict must conform to Geneva, and serious violations are war crimes punishable under 18 U.S.C. § 2441.

Finally, 18 U.S.C. § 2441(c)(2) defines as a war crime any conduct prohibited by arts. 23, 25, 27, or 28 of HR. Regarding due process, HR art. 23 states in significant part: “In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.” The court below went to extreme lengths to deny Hamdi

⁷ See Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, *Army Law.*, November 2003, at 18, 21-29.

⁸ See Paust, *supra*, 530-531.

any meaningful protection of his rights, and unless he has absolutely no rights at all, their decisions were not merely incorrect, they were violations of 18 U.S.C. § 2441.⁹

◆

CONCLUSION

There is nothing appropriate about evading or violating the law, nor anything necessary in abusing a prisoner who is *hors de combat*. There is nothing new here: the value of intelligence and the infliction of atrocities on ones enemies are as old as war itself. The President might plausibly suppose there was some advantage to be had by roasting a few of these “detainees” alive over an open fire, thinking it might lead others to cooperate – such “time-honored” practices are as common in history as wars are. Would the Fourth Circuit defer to that as well? And if not, why not? Are we to understand that some of our laws are better than others, and our judges and elected officials are at liberty to choose which to obey according to their personal sensibilities?

The government has gone to great lengths to avoid any accountability to the law here, and all their arguments reduce to a single theme: that in a war the President may do whatever he pleases as long as the Congress is willing to go along with him. But the Congress is not the Roman Senate, the President is not a Roman *Imperator*, and it is precisely this sort of arbitrary and absolute exercise of power unrestrained by the rule of law that our

⁹ See also Wallach, *supra*, 42-47.

Constitution, our laws, and the Geneva Conventions are intended to prohibit and prevent.

The Geneva Conventions ARE the law of war, and they ARE the law of the United States. Their only purpose is to protect both combatants and civilians in order to ameliorate suffering in war. No just resolution of this or any other detainee case is possible without strictly observing the requirements of the Geneva Conventions and 18 U.S.C. § 2441. The decision of the court below should be reversed and the case of Yaser Hamdi remanded to the U.S. District Court for Eastern Virginia for a thorough and searching review of his rights.

Respectfully submitted,

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In memoriam

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[**Revision Notes**]

This brief was filed on February 23, 2004, by Gittings, *pro se*, whereupon the Office of the Clerk declined to docket the brief without a member of the Bar of the Court appearing as Counsel of Record per Rule 9. Their reasons remain unclear since the rules appear to contradict them, but the matter was resolved on March 18, 2004, when Mr. Rehkopf notified the Clerk and parties that absent objections, he was willing to appear as Counsel of Record *pro bono publico*, the Court approving. Labels were then submitted to modify the cover and last page of each copy of the brief to reflect the change.

I am deeply grateful to Mr. Rehkopf for his generous and timely assistance.

Charles B. Gittings Jr.
March 30, 2004

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