No. 08-1234

# In The
# Supreme Court of the United States

JAMAL KIYEMBA, et al.,

*Petitioners,*

v.

BARACK H. OBAMA,
President of the United States, et al.,

*Respondents.*

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

## AMICUS BRIEF OF 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., who appears as *amicus curiae* by the written consent of both parties under Rule 37.3(a).[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 President Bush issued the "Presidential Military Order (PMO)" of 11/13/2001,[2] I resolved to oppose it in the belief the order was illegal, irresponible, and dangerous. I've worked on the issues surounding that order and its progeny ever since, fully eight years now, and have previously submitted two other amicus briefs in other detainee cases. The first was filed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), hereinafter "*Hamdi Brief,*" available[3] at:

http://tinyurl.com/y8ktd30

The second was filed in *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005), lead dkt. 02-cv-299 (CKK), dkt. no. 139, hereinafter "*Gitmo Brief*," available[4] at:

http://tinyurl.com/yc5bnex

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[1] No party or counsel for a party authored this brief in whole or in part. All costs for the brief have been paid by Amicus at his own expense.

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

[3] Last checked on 12/10/2009.

[4] Last checked on 12/10/2009.

The only purpose of my effort is to uphold the laws of the United States.

## SUMMARY OF ARGUMENT

This brief argues:

- Petitioners are protected by GCiv, the provisions of which require their immediate release.
- Congress has no authority to alter or nullify Geneva by statute, because treaties are creatures of Article II and Article VI, not Article I.
- Petitioners are unlawfully detained, and Respondents have subjected them to war crimes over a period of nearly eight years.
- Congress has no authority to remove the Article III equity jurisdiction of the courts, because statutes cannot override basic constitutional powers.

Weighing all of these together, the brief concludes the Petitioner's release is both required by law and long overdue. The Petitioners should be released without further delay.

## ARGUMENT

### 1) GENERAL PRINCIPLES.

In advance of the brief, Amicus stands FOR habeas as a natural and universal right; FOR the primacy of our Constitution, Congress, and laws with respect to military affairs; and FOR the principles of the U.N. Universal Declaration of Human Rights.

This brief stands FOR the Geneva Conventions of 12 August 1949 (hereinafter "Geneva" collectively), and FOR the Charter of the International Military Tribunal (London, 1945) (hereinafter "IMT"); see TOA for citations. The third Geneva Convention, hereinafter "GPW," protects POWs; the fourth Geneva Convention, hereinafter "GCiv," protects civilians. The first two Geneva conventions protect wounded, sick, and medical personnel, etc., over and above the protections of GPW and GCiv, 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."

With the accessions of Nauru (6/27/2006) and Montenegro (8/2/2006), the Geneva Conventions are now universally recognized by all 194 extant nations.

### 2) PETITIONERS ARE PROTECTED BY GENEVA IV CIVILIANS.

"[Petitioners] are now being housed at Guantanamo Bay in a non-enemy combatant status." *Resp. Opp.* at 2.[5]

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[5] Brief for the Respondents in Opposition [certiorari], hereinafter "*Resp. Opp.,*" *Kiyemba v. Obama*, dkt. 08-1234 (2009.05.29).

Euphemisms like "non-enemy combatant status" have no significance beyond demonstrating the Respondents' habitual disregard for the law, and that they're *still* abusing the Petitioners after eight years of sustained abuse. The detainees in this case are innocent men. Just how many different "non-enemy combatant statuses" should we suppose there are? Status according to what law exactly?

The Petitioners' actual status is no mystery. CA2 states:

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

Petitioners were detained pursuant to the U.S. invasion and occupation of Afghanistan, which began in September 2001 and continues today. GCiv art. 4 is unambiguous:

> "Persons protected by the Convention 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.

> "Persons protected by [GWS, GWS-Sea, or GPW] shall not be considered as protected persons within the meaning of [GCiv]."

The only exceptions under GCiv art. 4 are based on nationality, not the status of individuals or groups. Once they were in U.S. custody, the status of Petitioners was never in doubt and never changed – they are civilians protected by GCiv pursuant to CA2.

### 3) CONGRESS HAS NO AUTHORITY TO ALTER OR NULLIFY GENEVA BY STATUTE.

Respondents argue that the MCA[6] extinguishes any claims under Geneva:

> "As an initial matter, Congress, in the Military Commissions Act of 2006, has barred reliance on the Geneva Conventions as a source of any rights in habeas or other civil proceedings. See Pub. L. No. 109-366, § 5(a), 120 Stat. 2631 ('No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.')."

*Resp. Opp.* at 23-24.

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[6] *Military Commissions Act of 2006*, Pub. L. No. 109-366, § 5(a), 120 Stat. 2631.

The truth is that MCA § 5(a) is *ultra vires* and void, and what it pretends to do is in fact a war crime pursuant to 18 U.S.C. § 2441(c)(2) as it refers to the Hague IV (1907) Annex of Regulations, hereinafter "HR," art. 23[h].[7] A treaty is ratified as law by the President with the advice and consent of the Senate under Art. II § 2, cl. 2, not the Art. I legislative powers of Congress, and Art. VI establishes a duly ratified treaty as "*the supreme law of the land.*" It follows that Congress has no authority to alter or terminate the operation of a ratified treaty except where the treaty itself specifically provides such authority. As Chief Justice Marshall explained in *Foster v. Neilson*:

> "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."[8]

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[7] 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.

[8] *Foster v. Neilson*, 27 U.S. 253, 314-315 (1829); overruled on other grounds, *United States v. Percheman*, 32 U.S. 51 (1833).

That was *not* our understanding before the Constitution was adopted. The former rule is still the law of Great Britain and Canada, and the difference is significant:

> "If a treaty cannot by itself modify a statute, is the reverse true? First, if the provisions of a treaty have not been transformed into domestic law by special legislation, a statute can modify the treaty and conflict with its provisions as a consequence of the rule inherited from Britain that a treaty as such is no part of the law of the land. This is the accepted principal in the majority of cases in Canada, chiefly when federal legislation is concerned."[9]

In the United States the Supremacy Clause reverses that principle and makes a duly-ratified treaty the supreme law of the land, and by its own terms, Geneva is non-derogable for the duration of a conflict or occupation. See the identical texts of GCiv art. 158 and GPW art. 142:

> "Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

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[9] Anne Marie Jacomy-Millette, *Treaty Law in Canada*, University of Ottawa Press (1975), 282-283; cited by *Re: Alberta Provincial Employees*, 90 International Law Reports (1992) at 211.

> "The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties. The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.
>
> "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue 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.*

Note that the Constitution is itself an international treaty, one adopted to replace another treaty, the Articles of Confederation, after experience had shown that the earlier charter was ineffective and had dangerous defects. One of the worst problems was how to compel the States to honor the peace treaty with Great Britain, and that problem was solved by the Supremacy Clause. In common with

Geneva and other treaties, the Constitution itself specifies the procedures for amendments in Art. V. Geneva is no different, and cannot be altered in substance, operation, or effect by an act of Congress except where Geneva itself authorizes it.

## 4) PETITIONERS ARE BEING IMPRISONED UNLAWFULLY.

GCiv art. 33 states: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

GCiv art. 42 states: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary."

GCiv art. 132 states: "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."

The ICRC Commentary[10] entry for art. 132 says:

> "Expressed in very general terms, this rule forms the counterpart to the principle stated in Article 42 – i.e., that internment may be

[10] Jean Pictet (*ed.*), *Commentary on Geneva Convention IV*, ICRC (1958).

ordered only if the security of the Detaining Power makes it absolutely necessary.

"Article 15 of the Tokyo Draft[11] tried to limit the cases in which the State would be entitled to intern (where the enemy civilians are eligible for mobilization, where the security of the Detaining Power is involved, where the situation of the enemy civilians makes it necessary). This list of categories was not adopted by the authors of the Convention who preferred to keep to the completely general wording of Article 42. They do help, however, to interpret this paragraph. If, for example, an internee is detained because he is of military age, the reason ceases to be valid as soon as he has passed the age limit for military service in his country of origin."

Any exception to GCiv art. 132 would have to be found in GCiv art. 5:

"Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present

[11] *Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent,* Tokyo Conference (1934).

> Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State."

In this case, all suspicions against Petitioners have been discredited or disavowed, and hence, there is no basis for further imprisonment. The Petitioners are entitled to basic liberty just like anyone else. They didn't come to Guantanamo Bay by choice, they came because the U.S. Government brought them there by force on false charges. Neither the Government's past abuses nor their political discomforts here and now can justify holding the Petitioners as prisoners any longer – not even the security of a military base can justify that. Guantanamo Bay has many civilian residents, including military family members and foreign workers. The Petitioners should be treated no differently.

## 5) RESPONDENTS ARE VIOLATING 18 U.S.C. § 2441.

"*Ye shall know them by their fruits. Do men gather grapes of thorns, or figs of thistles?*"[12]

The grave breaches of GCiv are listed by art. 147:

> "Grave breaches [of GCiv] shall be those involving any of the following acts, if committed against persons or property protected by [GCiv]: [a] wilful killing, [b] torture or

[12] Matthew: 7:16.

> inhuman treatment, including biological experiments, [c] wilfully causing great suffering or serious injury to body or health, [d] unlawful deportation or transfer or unlawful confinement of a protected person, [e] compelling a protected person to serve in the forces of a hostile Power, or [f] wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, [g] taking of hostages and [h] extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."
>
> *Id.*

Any grave breach of Geneva is a federal offense pursuant to 18 U.S.C. § 2441(c)(1). *On information and belief,* there is probable cause to believe Respondents have committed numerous and diverse offenses against the Petitioners pursuant to GCiv art. 147 [b], [c], [d], and [f] dating back to late 2001. My brief in the district court observed that much five years ago.[13] Conditions for the detainees have improved under the new administration, they just haven't improved enough to actually be lawful.

For example, *Resp. Opp.* claims Petitioners are being housed "under the least restrictive conditions practicable," *id.* at 11. That claim is an obvious falsehood: there are many civilians who live at

[13] See *Gitmo Brief* at 7-10.

Guantanamo Bay, including both military dependents and foreign workers, but the detainees are the only ones being held prisoner behind a barbed-wire fence. It's impossible to imagine why it wouldn't be practicable to release men who are neither convicted nor accused of a crime. Petitioners were detained in Pakistan, sold to the U.S. Government for a bounty, and imprisoned for seven years under a calculated regimen of criminal abuse – most of it by policy.

The President has no authority to commit war crimes (see IMT arts. 6-8), and Congress has no power to authorize war crimes. Any violation of HR arts. 23, 25, 27 or 28 is an offense pursuant to 18 U.S.C. § 2441(c)(2). HR art. 23[h] has particular relevance in this and the other detainee cases:

> "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."
>
> *Id.*

The plain meaning of this is that once hostilities commence, the law may not be altered to the detriment of any detainee. Respondents have been trying to do exactly that in every detainee case since the first one was filed in 2002, and they're attempting it once again here. Amicus began the project that led him to file this brief because it was clear from reading the text of the PMO that it was intended to facilitate and shield war crimes against detainees: the PMO

could have no other purpose because it had no other use. The same is true of the DTA[14] and MCA: both attempt to nullify decisions of this Court, evade the Laws of War, and authorize, after the fact, criminal (but politically useful) misconduct by the White House, DoD, CIA, and DOJ, all of whom have participated in war crimes against detainees since 2001. Their crimes under Titles 10 & 18 U.S.C. are diverse, and include assault, kidnapping, torture, murder, war crimes, and obstruction of justice, among others. That these crimes have continued in plain sight for eight years without provoking a serious effort to prosecute them to the full extent of the law is a shameful commentary on the integrity of our government.

## 6) CONGRESS CANNOT REMOVE ARTICLE III EQUITY JURISDICTION.

> "A fortiori, *Mezei* controls here. Petitioners are outside the United States – not even on United States soil, as in *Mezei.* And also unlike in *Mezei,* petitioners have never previously been in this country, have never been issued an immigrant visa, and have never applied for admission to the United States, which would trigger the statutory processes for seeking entry."
>
> *Resp. Opp.* at 16, discussing *Shaughnessy v. U.S. ex rel. Mezei,* 345 U.S. 206 (1953).

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[14] Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005).

The Petitioners are *prisoners*, not immigrants, while Mezei was a free man. Petitioners were brought to U.S. territory *by force*, Mezei came of his own free will. Petitioners are *protected* by GCiv, Mezei was not. The cases are entirely different. Geneva controls the treatment of prisoners whenever an armed conflict or occupation begins, and cannot be set aside or changed for the duration plus one year, as explained *supra*. All parties are obligated by CA1 "*to respect and to ensure respect for [Geneva] in all circumstances.*"

> "At most, habeas provides a right of release from custody on the *basis of their status as asserted enemy combatants.*" [emphasis in original]
>
> Reply in Support of Motion for Stay Pending Appeal and for Expedited Appeal, *Kiyemba v. Bush* (CAD 2008.10).

This must be an example of "*a non-enemy combatant status*" – presumably they mean the detainees' former *assumed* status, which, being erroneous as to both the facts and the law, was never their true status. The opinion below asked a question that betrays prejudice:

> "The critical question is: what law "expressly authorized" the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States and released in Washington, D.C.? The district court cited no statute or treaty authorizing its order, and we are aware of none."
>
> *Kiyemba v. Obama,* 555 F.3d 1022 (CAD 2008.02.18) (Randolph *per curiam*), at 8.

That question stands the case on its head. The real question is: By what authority do Respondents continue to imprison blameless men?

They have no such authority, and the Petitioners have committed no crime. On the contrary, Petitioners have themselves been the victims of innumerable crimes committed by Respondents in violation of our own laws, dating back to 2001.

> "No bill of attainder or ex post facto Law shall be passed."
>
> *Const. Art. I § 9, cl. 3.*

The AUMF[15], DTA, and MCA all function as blank-check bills of attainder inasmuch as each applies *only* to persons who the President "determines" *by decree* to have committed some criminal act. This is plainly unconstitutional. Equally, the AUMF functions as a blank-check declaration of war, effecting an improper delegation of the Art. I authority of Congress to declare war.[16]

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."
>
> *Const. Art. III § 1, cl. 1.*

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[15] Authorization for the Use of Military Force, 115 Stat. 224 (11/18/2001).

[16] Art. I § 8, cl. 11.

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[.]"
>
> *Const. Art. III § 2, cl. 1.*

No act of Congress can remove the basic Constitutional authority of the courts to administer all cases in law and equity. One might suppose Congress could pass an act which confined all such jurisdiction to the Supreme Court by abolishing the lower courts entirely, but the DTA and MCA are clearly intended to deny both due process and Geneva requirements selectively by executive fiat, and that cannot be a legitimate exercise of Constitutional authority by either Congress or the President.

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
>
> *U.S. Const. Art. VI, cl. 2* (the Supremacy Clause).

A duly ratified treaty is the supreme law of the land. As shown *supra*, the Geneva Conventions are, by their own terms, non-derogable during an armed conflict, and cannot be "denounced" until peace is

restored. HR art. 23[h] states: "*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.*" Any violation of that provision is a federal offense pursuant to 18 U.S.C. § 2441(c)(2). In the District Court five years ago, Senior Judge Joyce Hens Green found that all of the detainees were protected by the Fifth Amendment:

> "[T]he Court concludes that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are 'enemy combatants' subject to indefinite detention violate the petitioners' rights to due process of law."
>
> *In re Guantanamo Detainee Cases,*
> 355 F.Supp.2d 443 (D.D.C. 2005), 481.

This case isn't a matter of the detainees proving their right to basic personal liberty, but of the Government demonstrating some actual authority for their detention — something the Government has failed to do for eight years running. We hold that *all* men are created equal and have certain *unalienable* rights, or so we are told by the Declaration of Independence. Add it all up, and the Petitioners in this case are simply innocent refugees with a compelling claim on our hospitality. They didn't do this to us, we did it to them. They shouldn't bear the

consequences of *our* mistakes or crimes, yet Respondents argue exactly that in effect, and eight years of unlawful imprisonment are a heavy consequence indeed. Geneva permits detention when a detainee "is definitely suspected of or engaged in activities hostile to the security of the State," GCiv art. 5, but false assumptions aren't suspicions, and Respondents have less than that today. Habeas goes wherever it needs to go to have effect, and a court must have power to enforce an order when and where it has the jurisdiction to issue one.

It is said that Habeas is equitable relief, and that Equity will suffer no wrong to be without a remedy, nor require an idle gesture. The purpose of the Writ is to effect the release of persons who are unlawfully detained, and this Honorable Court should see it done here.

## CONCLUSION

The immigration laws are subject to the Suspension Clause no less than any other law or executive order, and Courts must have power to enforce a Writ where they have jurisdiction to issue one. There is no reason to hold the Petitioners in a prison. They are innocents, it is inhumane, and the Respondents continue to commit war crimes against them in violation of our own laws. It's disgraceful that our national government has allowed this to continue for so long, and it's time for it to stop.

In agreement with the *In re Guantanamo Detainee Cases* opinion by Sr. Judge Joyce Hens Green, Justice Wiley Rutledge closed his great dissent in *Yamashita* with this:

> "I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute."
>
> *Application of Yamashita,* 327 U.S. 1 (1946) (Rutledge, J., dissenting), 81.

Amicus believes that the authority of this Honorable Court to wind-up an injustice far exceeds the authority of the Respondents to prolong the needless imprisonment of the Petitioners. The opinion below should be reversed and remanded, and the

orders of the District Court for the District of Columbia affirmed and given effect.

Respectfully submitted,

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*In memoriam*
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