THE UNITED STATES SENATE JUDICIARY COMMITTEE

The Honorable Arlen Specter
Chairman, Pennsylvania

The Honorable Patrick J. Leahy
Ranking Democratic Member, Vermont

September 2, 2005

STATEMENT OF CHARLES B. GITTINGS JR.

CHARLES B. GITTINGS JR., p*ro se*
amicus curiae, *In re* Guantanamo Detainee Cases (D.D.C.) & Hamdi v. Rumsfeld (S. Ct.);
volunteer investigator, analyst, public advocate & web-master,
Project to Enforce the Geneva Conventions (PEGC).

DETAINEE POLICY, HAMDAN v. RUMSFELD, AND THE ROBERTS NOMINATION

My name is Charles B. Gittings Jr.; I am a native citizen of the United States and currently reside in Manson, Washington.

This statement and exhibits are being submitted for the consideration of the Honorable Chairman and Members in the belief that my research and analysis has a direct and significant bearing on several matters of great importance now pending before this Honorable Committee, all of which relate to Guantanamo Bay and the administration's detainee policies. I have worked more than full time on the issues of those policies since November 13, 2001, the date on which the administration issued the Presidential Military Order on Detentions etc ("PMO") in the belief that the PMO was both illegal and dangerous. The exhibits consist of analytical articles and amicus briefs prepared over the last four years. Project to Enforce the Geneva Conventions is so-far unincorporated and consists almost entirely of my own personal efforts. The only purpose of the project is to uphold the Constitution and laws of the United States, and in particular, Hague IV (1907), the London Charter of the IMT (1945), Geneva (1949), and 18 USC 2441 (War crimes).

Exhibit E was written in response to the PMO and submitted to my congressional representative at the time, the Hon. Barbara Lee (D-CA 9th), as a petition (2001.11.26). It was apparent to me that the only real purpose of the PMO was to evade Geneva and every other applicable law in order to commit war crimes against prisoners. The article gives my initial analysis.

Exhibit D is an amicus brief that was filed with the Supreme Court on the merits in *Hamdi v. Rumsfeld* (2004.02.23). It presents my basic analysis of the treaties, 18 USC 2441, and the judicial doctrine concerning self-executing treaty provisions that originated in *Foster v. Nielson*, 27 U.S. 253 (1829) – 18 USC 2441 executes Geneva in exactly that sense.

Exhibit C is a second amicus brief that was with the U.S. District Court for the District of Columbia in the cases coordinated as *In re* Guantanamo Detainee Cases (2004.10.14). It covers key points regarding DOJ's arguments from Eisentrager and Yamashita, DoD's "CSRTs" in relation to Geneva, and states, on information and belief, that there is probable cause to believe the administration is committing crimes pursuant to 18 USC 2441 by policy.

Exhibit B are some notes that were prepared in lieu of filing another amicus brief in the appeal of Al Odah v. United States now pending in D.C. Circuit Court of Appeals. The most important topic it addresses is the 2002.02.07 "order" from President Bush to the Vice President , Secretary of Defense, etc., which directs: "As a matter of policy, the United States Armed Forces shall continue to treat all detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva," George W. Bush, *Humane Treatment of al Qaeda and Taliban Detainee*s, White House policy memorandum (2002.02.07). the notes show that this "order" is merely a smokescreen that literally states we will obey Geneva except when we violate Geneva, because "military necessity" cannot exist in regard to a defenseless prisoner.

Exhibit A is principal reason for submitting this statement to the committee, a commentary on the D.C. Circuit decision in Hamdan v. Rumsfeld, in which Supreme Court nominee John Roberts was a member of the panel and joined in the opinion. The commentary shows that the opinion, like the earlier circuit court decisions in Hamdi III (4th Cir. 2003) and Al Odah (D.C. Cir. 2003), is both erroneous and dishonest to such an extent that it strongly suggests prejudice, or in the alternative, gross incompetence.

The documents speak for themselves, but I also want to briefly summarize my view of their significance in some of the matters before the committee:

1) Sen. Graham has proposed legislation to "clarify" the proper treatment of detainees. The White House has indicated that it would veto such legislation, but in fact there is no need for the legislation in the first place: the congress has already spoken on this matter and there is nothing unclear about it. Detentions are regulated by Geneva, Hague, and IMT, all of which were ratified by the Senate, and 18 USC 2441, enacted by the full congress in 1996 and expanded in 1997. The administration's detainee policies are simply illegal and criminal.

2) Sen. McCain's proposal to require compliance with Geneva is likewise unnecessary, though admirable in and of itself. What is really required is the enforcement of 18 USC 2441 and other existing laws in regard to the deliberate war crimes of the Bush administration.

3) Chairman Specter and Ranking Member Leahy have proposed the formation of an independent commission to fully investigate the detainee policies. While it would be a step in the right direction, here again, what's really required is enforcement by a fully independent prosecutor and a special grand jury. There has been sufficient evidence to establish probable cause since 2002.02.07, and indeed, enough to prove guilt virtually to a logical certainty on the strength of the administration's own public statements since the summer of 2002. There is a great deal more evidence now, and while I'm sure there is still a lot that hasn't come to light, what we have is more than enough, and it is an utter disgrace that so many in this nation have worked so hard for so long to ignore all of it while our highest public officials openly commit heinous crimes behind an immense smokescreen of frauds and cover-ups designed to play on the worst prejudices and inclinations of their political supporters.

4) In regard to the nomination of John Roberts to the Supreme Court, I believe that my commentary on the Hamdan decision shows clearly that the opinion was dishonest and prejudiced, and that it was also a judicial war crime in violation of 18 USC 2441. Judge Roberts is obviously well-qualified on paper, but in my opinion, any lawyer who would concur in a decision so utterly dishonest and unlawful as the one in Hamdan is unfit to practice law, let alone sit on the Supreme Court. We already have an Attorney General and Solicitor General (among others) who are directly implicated in the war crimes against the detainees; we do not need a war criminal on our highest bench.

This matter is not going to go away. There is no form of immunity or statutory limitation for war crimes, and there is nothing political about any of this to me – this is a matter of law, and of a stain on our national honor that can only be removed by punishing those responsible for their crimes. The policies of this administration are a direct threat to the Constitution itself: they have claimed nothing less than the power to act as a Roman dictator, and that is a proposition that is entirely inconsistent with the Constitution.

They have literally claimed that the President has the authority as C-i-C to either kill or imprison without trial anyone at all, at any time, for any reason – and if they deny it, then let them say so, and let them state plainly what law stands in the way of such a claim. I've heard all their arguments and excuses, but I have yet to hear an honest one. Over the past month while I was writing the Hamdan Commentary, there were some new developments in the case of two Uighur detainees from NW China, *Qassim v. Bush* (D.D.C.). They we're "determined" by the military to be "no longer enemy combatants" ("NLEC") almost two years ago, right around the time that George W. Bush was proclaiming: "The one thing I'm sure of is that these are all bad people." Yet they remain prisoners at Guantanamo Bay to this day, because the administration hasn't been able to find a country who would grant them asylum, and more importantly, because the administration would find it inconvenient to simply release them for the sake of decency or justice, and therefore claims yet more unreviewable presidential power to "conclude things in an orderly fashion." The truth appears to be that they were rounded up for the sake of the CIA bounty, then detained purely on suspicion based on an unfounded allegation, as so many others obviously have been. The court proceeding got under way without the government bothering to inform either the judge or counsel for the detainees of their actual status.

These policies are inconsistent with both the Constitution and any rational concept of justice or law. Anyone who would advocate, defer to, condone, or obey such a policy is unfit to hold any position of public trust. This is the stuff that FASCISTS are made of, and the Republican Party should stop supporting these criminals and making excuses for their crimes. This is not a political matter, it is a matter of LAW, and this is a nation of laws, not men: a government that will not obey its own laws is no government at all.

I didn't start this project because I wanted to or had any grudge against Bush and Cheney – it was because I've studied enough history to know fascists and war crimes when I see them, I'd realized that something like 9/11 was virtually inevitable in 1987, and I'd been working on the implications of that understanding as a problem of moral philosophy ever since. I saw the dangers and understood my duty, both as a human and a citizen. So here I am – as tired as I am and as broke as I am – to tell this Honorable Committee that I for one will not rest while these crimes go unpunished, and neither should you. It isn't a matter of being nice to terrorists, or of politics – it's a matter of defending public safety, the Constitution, and the rule of law.

GOD SAVE THE REPUBLIC.

This statement was submitted free of unlawful intent or undue influence, and was prepared by me entirely at my own expense. The facts and opinions expressed herein are my own, and are believed by me to be accurate to the best of my understanding and abilities. The only purpose of my efforts is to uphold the laws of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 1, 2005.

Signed,

___/s/_____

Charles B. Gittings Jr.
pro se
453 Totem Pole Road
Manson, WA 98831

cbgittings@yahoo.com

+1-509-687-7709

SSN: XXX-XX-3461

In memoriam
Elias T. ("Lile") Jacks
(1924 – 1973)

SOME RELEVANT AUTHORITIES

I haven't had time to prepare a proper TOA, but these are some of the articles that I regard as among the most significant in regard to the detainee issues, and my full working table of authorities with links for these and other articles, treaties, statutes, etc., is available on the PEGC web site at:

http://pegc.no-ip.info/jabberwocky.html

Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811 (2005).

Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 Case W. Res. J. Int'l L. 537 (2005).

Scott Horton, *Report to German Prosecutor* (CCR 2005).

Donald G. Rehkopf, *NACDL Amicus Brief in Padilla v. Hanft* (4th Cir. 2005.06.15).

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).

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

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

Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 Colum. J. Transnat'l L. 851 (1999).

Alfred de Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. Rev. 277-341 (2004).

- My own articles are on linked on the PEGC web site at:

  http://pegc.no-ip.info/articles.html

- The archive for PEGC Update (email news digest) is at:

  http://pegc.no-ip.info/PEGC_Update.html

LIST OF EXHIBITS

A. *Commentary on Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

B. Al Odah v. United States (D.C. Cir.), *Notes on the Government's Opening Brief* (2005.05.16).

C. *In re* Guantanamo Detainee Cases (D.D.C.), *Brief of Amicus Curiae Charles B. Gittings Jr. and Cross-Motion for Summary Judgement in Support of Petitioners* (2004.10.14).

D. Hamdi v. Rumsfeld (S.C., merits) *Brief of Amicus Curiae Charles B. Gittings Jr. in Support of Petitioners* (2004.02.23).

E. Petition to the Hon. Barbara Lee, *The Bush Military Tribunal Order is Unconstitutional and Illegal* (2001.11.26).

Exhibit A

Commentary on Hamdan v. Rumsfeld

415 F.3d 33 (D.C. Cir. 2005)

By CHARLES B.GITTINGS Jr.
cbgittings@yahoo.com

*"Corruption is the worst crime – worse than robbery, arson, mayhem, worse than rape and murder. By starving law enforcement, it feeds these other crimes; it is the progenitor of lawlessness. More: through its example, it debilitates the conscience. It poisons our society; it poisons our souls. * * * The litigant who uses influence to affect the outcome of a case, and the judge who bends to that influence, are our most heinous criminals. How can we respect the law when we find calculated injustice in our halls of justice? And without regard for justice, without respect for law (brother though not twin), our civilization cannot function. Anyone who tries to fix a traffic ticket is damaging all of us."*

— CHARLES REMBAR, *The Law of the Land* (NY 1980), page 299.

There are seven sections in the Hamdan opinion (RANDOLPH and ROBERTS), plus a short concurring opinion (WILLIAMS). I'll skip some things, but it will be simplest to just take them in order, starting with...

SECTION II

The judges of the Hamdan panel ("the panel") begin by laying out a summary of the familiar administration legal rationale. I'm not going to get into all the details here; the articles cited on the TOA page above (Paust, Wallach, De Zayas, Rehkopf, etc) cover all of that well – but note:

- Neither Congress nor the President have any authority to commit, authorize, or condone war crimes.

- The only actual purpose of the President's "Military Order" of November 13, 2001 ("PMO") was to commit war crimes pursuant to 18 USC 2441 in violation of Geneva 1949, IMT 1945, and Hague IV 1907 – in particular, the improperly constituted ad hoc military commissions at issue in Hamdan.

The panel ends their summary with this:

"[10 U.S.C. § 821] states that court-martial jurisdiction does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by

statute or by the law of war may be tried by military commissions. Congress also authorized the President, in another provision the military order cited, to establish procedures for military commissions. 10 U.S.C. § 836(a)."

Concluding "that through the joint resolution and the two statutes just mentioned, Congress authorized the military commission that will try Hamdan."

But Presidential decrees are NOT statutes, and it's absurd to claim that the laws of war authorize ad hoc procedures which they explicitly prohibit.

Note especially that the panel later (opinion at 18) cites Madsen v. Kinsella, 343 U.S. 341 (1952), for the proposition:

"[M]ilitary commissions [are] our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute."

Now I don't really believe that was true in 1952, because I think that both Hague IV and GPW 1929 set procedural and jurisdictional requirements, and treaties are the equivalent of statutes under the Supremacy Clause of the US Consititution – but it doesn't really matter: GPW 1949 (ratified 1955) clearly does the same, while 18 USC 2441 (enacted by the US war crimes acts of 1996 & 1997) is a federal statute that executes Geneva 1949 and parts of Hague 1907 as domestic law.

A final point here is that customs do not trump statutes:

"Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." U.S. v. Collier, 3 Blatchford 332, as cited in William Winthrop, Military Law and Precedents (1895)(US Army 2001), Ch. IV. "The Unwritten Military Law", footnote 7 (the full chapter is worth reading), available at:

https://134.11.61.26/cd1/Publications/JA/MJ/MJ%20Winthrop%2019200101.pdf

SECTION III

In this section the panel addresses Geneva III POWs ("GPW"). Two things to note throughout are the frequent use of "general" or "generally," and the complete absence of the term "self-executing." They begin by quoting the Supremacy Clause and citing a supposed "tradition" (opinion at 10-11) that is nothing more than dicta from earlier decisions taken selectively out of context in order to misrepresent the precedents:

""Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. "Even so, this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." See Holmes v. Laird, 459 F.2d 1211, 1220, 1222 (D.C. Cir. 1972); Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980)."

There is of course no such understanding in regard to Geneva, which literally has no purpose except protecting the rights of individuals. I don't really think this supposed 'tradition' is anything more substantial than a fallacy of accident, but it doesn't follow that treaties are

always negotiated that way in any case, for the simple reason that what is usual or traditional is not mandatory by definition – there are always exceptions, and exceptions are defined by specifics. Treaties are essentially contracts, and a contract may entail any consideration whatever that lays within the competence and discretion of the parties. The most likely explanation for the 'tradition' seems to be that most treaties deal with issues other than individual rights – and up until fairly recently, most treaties were negotiated by kings who didn't much care about individual rights beyond their own "divine" right to rule. Every valid contract involves some sort of right, and individual rights are clearly within the competence of governments to administer, enforce, and conclude treaties about, and it's impossible to think there could be any general prohibition against the enforcement of individual rights in a court of law when such enforcement is a primary function of the courts and that's the most basic way of doing it.

Such a restriction is also distinctly inconsistent with both the Supremacy Clause and the jurisdiction vested in the federal courts, U.S. Const., art. III, cl. 2; and it is hardly a novel proposition that rights and obligations relating to a contract may sound in a court of law. Where such a restriction is plausible is in regard to national rights, because that's the primary function of the government's diplomatic apparatus, and individuals are generally required to act through the government in such matters by exercising their political rights.

What this is really about is the self-executing treaty doctrine the panel never even mentions. Judge Robertson found, correctly, that the Geneva Conventions are self-executing. The reason the court doesn't mention it specifically is that DOJ knows very well that Judge Robertson was correct, and that even if he was wrong, 18 USC 2441 explicitly executes Geneva in US law. Here the project is to strip away the actual content of the doctrine and enshrine a false, illegal, and un-Constitutional principle grounded on radical conservative political dogmas as a settled precedent by means of fraud and naked judicial activism motivated by pure political prejudice.

The self-executing treaty doctrine originated in one of the precedents the panel cites here, Foster v. Nielsen, and it's a key topic I've tried to address in my amicus briefs. The panel's own citations will suffice here, and they begin with "The Head Money Cases" (Edye v. Robertson):

"As a general matter, a "treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." Head Money Cases, 112 U.S. 580, 598 (1884)."

Note well: "as a general matter," and "primarily a compact." These are judges considering a case at law, and assuming arguendo that these premises have some significant bearing on the issues, it seems both reasonable and necessary to consider what particulars might raise an EXCEPTION to the general case, and also what significant SECONDARY qualities a treaty might have in that regard. There is no such effort in the opinion: they assert this "tradition" again and again as if were unquestionable well-settled law. Yet the Geneva Conventions are a distinctly particular case relative to the mass of other treaties, and the Bush detainee policies and "Global War on Terror" ("GWOT") are highly exceptional situations even by the government's own account. Being a layman, I'm always inclined to look at the context, origin, and previous application of such principles just to make sure I understand how they function, and to make sure I understand them accurately – and given the facts here, it seems to me that any attorney or judge should be asking those same questions. Sometimes it takes some digging, but being a systems analyst, I always like to start at the beginning and read the

precedent in it's original context. If you do that here, it turns out you don't have to look very far:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress[.] * * * A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." Head Money Cases, supra.

That's enough to give someone a pretty fair GENERAL idea all by itself. They aren't citing precedent here, they're selecting fragments of precedents out of context in order to read the precedent for something nearly the opposite of what it actually says.

The panel's next citation merely states the next clause of their selection from the Head Money Cases in isolation as if it were an independent source:

"If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. Id.; see Charlton v. Kelly, 229 U.S. 447, 474 (1913)."

But when we look at Charlton v. Kelley (the case deals with an extradition request from the Kingdom of Italy on a murder charge), we find it's quoting the selection from the Head Money Cases from a law digest:

"In Moore's International Law Digest, Vol. 5, page 566, it is said: "A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

And one authority now appears to be two. The panel next cites Whitney v. Robertson, 124 U.S. 190, 194-95 (1888):

"The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured

party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In Taylor v. Morton, 2 Curtis, 454, 459, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad."

Now we see how the unmentioned self-executing treaty doctrine fits into the larger scheme of things, and we also find out that Whitney v. Robertson doesn't stand for the panel's fake principle either, it stands for a next-in-time rule that neither the government nor the panel mentions.

They wind up by citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306, 314 (1829), overruled on other grounds, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1883) – without comment – as if Foster supported them, but nothing in Foster supports the fake principle the panel is selling here: the Foster doctrine was litigated below, Judge Robertson correctly ruled that Geneva was self-executing, and beyond that, 18 USC 2441 executes Geneva 1949, HR arts. 23, 25, 27 and 28, and Geneva Common Article 3 as federal statutes; see CBG Hamdi Brief at 2-4.

They conclude:

"Thus, "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987)."

But once again they are only quoting part of the citation, which continues:
"...but there are exceptions with respect to both rights and remedies. Whether an international agreement provides a right or requires that remedy be made available to a private person is a matter of interpretation of the agreement."

And the only purpose of the Geneva Conventions is to protect individuals who fall into the hands of an enemy in war. To recapitulate, the panel has misrepresented Foster v. Nielsen, The Head Money Cases, etc., to concoct the proposition:

"As a general matter, a treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If a treaty is violated, this becomes the subject of international negotiations and reclamation, not the subject of a lawsuit. Thus, international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Opinion at 10, paraphrase.

And having adopted these premises nearly verbatim from DOJ's briefs while ignoring the opinion below, the arguments of petitioners, and the actual law of their own citations, they proceed from fallacy to fallacy to arrive at conclusions which display naked dishonesty and prejudice:

"The district court nevertheless concluded that the 1949 Geneva Convention conferred individual rights enforceable in federal court. We believe the court's conclusion disregards the principles just mentioned and is contrary to the Convention itself. To explain why, we must consider the Supreme Court's treatment of the Third Geneva Convention of 1929 in Johnson v. Eisentrager, 339 U.S. 763 (1950), and this court's decision in Holmes v. Laird, neither of which the district court mentioned." Opinion at 11.

"Nevertheless" is a telling choice of words: the court below decided the case the on precisely the law the panel has been working so hard to ignore here. Hamdan briefed on Quirin and Yamashita, and Eisentrager followed the holdings of those decisions on the issues here. The reason that DOJ keeps dredging up Eisentrager is that they are still trying to argue an issue they already lost on in the Supreme Court: the preposterous notion that Guantanamo Bay is a legal black hole subject to no law at all, which was based on nothing BUT a wishful reading of Eisentrager. Holmes v. Laird adds nothing.

The DOJ Eisentrager arguments which the panel adopts are addressed in detail by my Brief of Amicus Curiae Charles B. Gittings, Jr. and Cross Motion for Summary Judgment in Support of Petitioners, In re Guantanamo Detainee Cases (JHG), lead C.A. no. 02-cv-299 (CKK), dkt. 95 (D.D.C. 2004.10.14), at 1-5, available at:

http://pegc.no-ip.info/archive/letters/CBG_gitmo_amicus_20041012_full.pdf

I was unable to submit that brief in Hamdan because it took me too long to figure out what was going on in the various cases (there were 15 at the time; many more now), and Hamdan was being briefed ahead of the others on a separate schedule. I'm not sure if that was a bad thing or good thing even now, but the brief shows plainly that position the panel takes is false and dishonest,.

Once again the panel is selective in what it quotes, and doubly so: they select dicta from a footnote, then call it an ‘alternative holding’ while ignoring the actual holding entirely:

"The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but "responsibility for observance and enforcement of these rights is upon political and military authorities." [Johnson v. Eisentrager, 339 U.S. 763 (1950)], at 789 n.14. * * * This aspect of Eisentrager is still good law and demands our adherence." Opinion at 11.

The real holding was that certain sections of the 1929 Geneva POW Convention ("GPW 1929") applied only to acts committed by a POW after capture, following exactly the holding in Yamashita. As for Eisentrager footnote 14, while I consider Justice Robert Jackson one of the great jurists in the history of the Supreme Court, the footnote is simply mistaken. Nevertheless, the full text is not all bad:

"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." Id.

That’s the good part (which the panel omits), but what follows is incorrect:

"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. (And note well the similarity to: "As a general matter, a treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." supra.)

What Eisentrager FN14 overlooks is that art. 23 of the Hague IV (1907) ("H.IV") Annex of Regulations concerning the Laws and Customs of War on Land ("HR") 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. The "obvious scheme" described in footnote 14 is not so obvious after all – it’s just another instance of "judicial hearsay" based on the Head Money Cases dictum, and it doesn’t matter how many times the courts repeat it when they are trying to evade a treaty, the fact remains that this supposed principle is contrary to both the precedents from which it was derived and the plain meaning of the Supremacy Clause. Much as I respect Justice Jackson, this was not his best moment.

Eisentrager FN14 is also moot, because the laws and treaties are very different now than they were in 1929 or 1950, despite the relentless efforts of DOJ to misrepresent and ignore the last sixty years of domestic legislation and international diplomacy – a project the panel is only too happy to embrace:

"The Court’s decision in Rasul had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had habeas corpus jurisdiction had no effect on Eisentrager’s interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced. Although the government relied heavily on Eisentrager in making its argument to this effect, Hamdan chose to ignore the decision in his brief. Nevertheless, we have compared the 1949

Convention to the 1929 Convention. There are differences, but none of them renders Eisentrager's conclusion about the 1929 Convention inapplicable to the 1949 Convention." Opinion at 11-12

The reason that Hamdan made no mention of Eisentrager isn't hard to guess: the holdings concerning Geneva and military commissions in Eisentrager are based entirely on Quirin and Yamashita, and Eisentrager FN 14 simply doesn't matter here. I haven't bothered to check, but I also suspect it was talked about at least a little by some of the outstanding amicus briefs in the case. Be that as it may, the panel's remark is a precious attempt to convey the impression of impartial deliberation, but the comparison of GPW 1929 and GPW 1949 that follows is anything but impartial – or accurate – and the conclusions they reach are false to an extent that implies either dishonesty or incompetence.

So the panel proceeds to look for significant differences between the 1929 and 1949 versions of GPW and considers only Common Article 1 ("CA1"), GPW art. 8, and 11, Opinion at 12, and in the process of that exercise they state:

"Nevertheless, we have compared the 1949 Convention to the 1929 Convention. There are differences, but none of them renders Eisentrager's conclusion about the 1929 Convention inapplicable to the 1949 Convention. * * * Nothing in the revision altered the method by which a nation would enforce compliance." Id.

This sounds quite matter-of-fact, but the last two sentences are patently FALSE, and the first has a very strong odor of dishonesty. How any honest judge could read the admonition of CA1 to respect and ensure respect for the Geneva Conventions "in all circumstances" and rubber-stamp the fraudulent arguments of DOJ in this case is very difficult to imagine. Be that as it may, in truth, the panel is manifestly ignoring all of the most significant differences between the 1929 and 1949 versions of Geneva, both internal and external –

- GPW (1949) arts. 84 and 85 clearly render moot the holdings of Yamashita and Eisentrager concerning the specific provisions of GPW 1929 at issue in those cases. Indeed, the ICRC Commentary accepts that those holdings may well have been valid at the time (and it's not often I get to disagree with the ICRC about Geneva!) but makes it plain that GPW art. 85 was intended to remove all doubt:

  "The 1929 Convention contained no provision concerning the punishment of crimes or offences committed by prisoners of war prior to their capture. Although Articles 45 to 67 of that Convention do not specifically exclude such acts, it seems probable that the drafters actually had in mind only acts committed during captivity.

  "At the end of the Second World War, this gap in the text of the 1929 Convention gave rise to much discussion until sentences were passed in most of the Allied countries. Among the prisoners of war who were nationals of the vanquished Powers were many persons who were accused of war crimes, and crimes against peace and humanity. During the ensuing trials, a number of the accused asked to be afforded the guarantees provided by the 1929 Convention in regard to judicial proceedings.

  "The International Committee of the Red Cross, while refraining from giving any opinion on the exact status of captured military personnel accused of war crimes, requested that the guarantees afforded by Articles 45 to 67 should be applied to them for, in its view, those guarantees constituted only a minimum standard recognized by the majority of civilized nations. In almost every case the courts of the Allied

countries rejected the requests of the accused. Thus, the United States Supreme Court rejected a request by General Yamashita of Japan on this point (in a judgment dated February 4, 1946). * * *

"The International Committee of the Red Cross followed with some concern the course of justice in the various countries where proceedings were instituted against prisoners of war in respect of offences committed prior to their capture. In its opinion, it was dangerous not to afford to the accused the guarantees provided by an international convention which, as has been seen above, do not exceed those accruing from the procedural laws of most States. The International Committee's concern was increased by the fact that, in most countries, proceedings against war criminals were based on special ad hoc legislation and not on the regular penal legislation of the countries concerned. Furthermore, it seemed illogical and unjust to prejudge the guilt of the accused, since they were deprived of the protection of the Convention before actually having been found guilty of war crimes. Even assuming that the rule of customary law which was cited actually exists, it can only be applicable after a court has given its finding. For under modern law, the accused is presumed innocent until his guilt is proved.

"When the International Committee of the Red Cross undertook the revision of the 1929 Convention, it therefore gave immediate attention to introducing provisions which would afford certain guarantees to prisoners of war, even when accused of war crimes, and remove all ambiguity which had resulted from the earlier text."

Jean Pictet (ed.), ICRC Commentary, Geneva Conventions of 12 August 1949, Convention (III) relative to the Treatment of Prisoners of War, art. 85, at 413-415, available at:

http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5cd83e96981e1ee0c12563cd00427ee4?OpenDocument

- The addition of Geneva IV Civilians ("GC") to the first three conventions. This is of great significance in the later discussion of Hamdan's status under the Geneva Conventions, because it renders the question of whether or not he is entitled to POW status irrelevant to the question of his protection from unlawful ad hoc legal proceedings – he's protected either way.

- The grave breach provisions of all four Geneva Conventions, which requires the parties to enact laws ("if necessary") making grave breaches of the Conventions criminal offenses in their domestic law, and also requires the prosecution of any such violation.

- 18 USC § 2441, the War Crimes Act of 1996, as amended by the Expanded War Crimes Act of 1997, a federal criminal statute which makes Geneva grave breaches, violations of HR arts. 23, 25, 27 and 28, or violations of Geneva Common Articles Hague federal criminal offenses, thereby executing all of these treaty provisions in US law in accordance with the Foster doctrine on non-self- executing treaty, regardless of whether any or all of them are self-executing or not.

- Common Article 3 ("CA3"), which explicitly protects persons involved in non-international conflicts, and also specifically applies to non-signatories: "In the case of armed conflict not of an international character occurring in the territory of one of the

> High Contracting Parties, EACH PARTY TO THE CONFLICT shall be bound to apply, as a minimum, the following provisions–"(emphasis added), CA3.

In short, the panel ignores ALL of the differences between GPW 1929 and GPW 1949 that matter most in deciding the questions presented by the Hamdan case and all of the other detainee cases. That is NOT a pretty picture, and it can only be the result of prejudice or dishonesty unless we are to believe that THREE United States Circuit Court Judges are merely incompetents. Ignoring the grave breach provisions they even go so far as to claim "– there is no suggestion of judicial enforcement," yet 18 USC § 3041 (Power of courts and magistrates) states: "For any offense against the United States, the offender may, by any justice or judge of the United States * * * or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense," and this panel has DOJ committing war crimes pursuant to 18 USC § 2441 right under their noses.

They conclude these fallacious deliberations by saying:

"Hamdan points out that [Geneva] protects individual rights. But so did the [GPW 1929], as the Court recognized in Eisentrager, 339 U.S. at 789-90. * * * [GPW 1929] specified individual rights but as we have discussed, the Supreme Court ruled that these rights were to be enforced by means other than the writ of habeas corpus. The Supreme Court's Rasul decision did give district courts jurisdiction over habeas corpus petitions filed on behalf of Guantanamo detainees such as Hamdan. But Rasul did not render the Geneva Convention judicially enforceable. That a court has jurisdiction over a claim does not mean the claim is valid. See Bell v. Hood, 327 U.S. 678, 682-83 (1946)." Opinion at 13.

Of course not, but it doesn't mean the claim is invalid either, and it clearly DOES mean the court has the authority to rule on the matter – assuming it can be bothered to make the effort. But the panel isn't interested in anything that would discomfort their obvious prejudice, and concludes section III by finding exactly what they set out to find:

"We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."

A conclusion which is sufficient by itself to reverse the opinion in Hamdan, to deny Judge Roberts a seat on the Supreme Court, and to indict all three of the judges on the panel for war crimes pursuant to 18 USC § 2441.

SECTION IV

Having reached the spurious conclusion "that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court," Opinion at 13, the panel takes another cue from the DOJ playbook and proceeds to consider how the requirements of Geneva apply to the case anyway – piling fraud upon fraud:

"Even if the 1949 Geneva Convention could be enforced in court, this would not assist Hamdan. * * * One problem for Hamdan is that he does not fit the Article 4 definition of a

"prisoner of war" entitled to the protection of the Convention. * * * Another problem for Hamdan is that the 1949 Convention does not apply to al Qaeda and its members."

Now that isn't two problems, it's two conclusions based on the same problem – a familiar one – namely, the fraudulent and / or mistaken "understandings" of the Geneva Conventions held by DOJ and the panel. Here they ignore GPW art. 5 and GC art 4 entirely, employ DOJ's habitual sophistry to misrepresent CA2 and CA3, and arrive without further ado at conclusions which are both incorrect on the merits and contrary to some very basic principles of law.

When I first began my effort to oppose the PMO and enforce Geneva, one of my first tasks was to study the relevant conventions and laws in detail. The importance of CA2, CA3, GPW arts. 4-5, and GC art. 4 were apparent from the start: setting aside Geneva I & II ("GWS" & "GWS Sea" which protect wounded sick, medical personnel, etc.) for the sake of clarity, these articles set the basic framework for determining exactly which provisions of Geneva apply to any particular person in any particular armed conflict. The basics consist of two simple criteria:

- Is the conflict international or non-international?

  In a non-international conflict, all persons are protected by CA3;
  otherwise, the second criteria applies.

- Is the person in question a POW or a civilian?

  Anyone who meets the criteria of GPW arts. 4-5 is protected as a POW;
  otherwise, they are protected by GC art. 4 as a civilian.

The only other question that might be significant here is "does the conflict involve a nation which is NOT a signatory to Geneva?" – but that's moot because all of the nations involved in the present conflict are parties to Geneva (there are currently 192 independent nations according to the CIA World Factbook; 190 nations are party to the Geneva Conventions according to the ICRC) and, as DOJ is so fond of reminding us, Al Qaeda is not a nation.

Now the panel correctly looks to CA2 for the definition of an international conflict, but they quote only the first clause, "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," Id., ignoring the second, "all cases of partial or total occupation of the territory of a High Contracting Party," Id., both of which are arguably accurate descriptions of the conflict in Afghanistan. Then they proceed to adopt DOJ's fraudulent contention that CA3 does not apply because the "GWOT" against al Qaeda is "international in scope" according to the White House, Opinion at 15, which is plainly fallacious, because Geneva clearly uses the word to mean a conflict BETWEEN two or more nations, not to describe the geographic scope of the conflict. And as is so often the case with DOJ's arguments, this one overlooks the obvious care that went into drafting the Conventions – if the drafters had intended the word to mean what DOJ claims it does, they surely would have said so explicitly. As written, CA3 for all practical purposes means simply an armed conflict not covered by CA2.

So the panel concludes that Hamdan is not protected by Geneva because he is not (according to them and DOJ) a POW under GPW art. 4, but their argument assumes that this is an international armed conflict by the definition of CA2, and ignores the fact that if Hamdan isn't protected by GPW arts. 4-5, he is protected by GC art. 4, which states:

"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. * * * Persons protected by [GWS], or by [GWS Sea], or by [GPW], shall not be considered as protected persons within the meaning of [GC]." Id.

POWs are "privileged belligerents" who may not be prosecuted for ordinary crimes such as murder, assault, etc., in regard to lawful military operations – that being the privilege to which the term refers. Anyone else, including unprivileged belligerents, are civilians protected by GC. Regardless of whether they are protected by GPW or GC, everyone is subject to prosecution for war crimes (including the war crime of unprivileged belligerency) – there being no form of immunity or statutory limitation for war crimes – but in all cases, they may only be prosecuted by procedures which comply with the protections afforded by Geneva to all such accused. The exact protections applicable under GPW and GC differ, but both forbid the unlawful ad hoc military commissions that DoD is attempting to apply to Hamdan

The panel next considers whether CA3 applies to Hamdan, reasoning as follows:

"Hamdan assumes that if Common Article 3 applies, a military commission could not try him. We will make the same assumption arguendo, which leaves the question whether Common Article 3 applies. Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international character"? See INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) (Common Article 3 applies only to armed conflicts confined to "a single country")."

And once again they ignore the CA2 clause regarding "cases of partial or total occupation of the territory of a High Contracting Party," but what's most striking here is their citation of the ICRC Commentary on GPW entry for CA3. There is a separate commentary for each of the four Geneva Conventions, and since the three common articles are common to all four, there is an entry for each of those articles in each commentary. The text varies a bit between the four, and the phrase "a single country" quoted by the panel is an example: it occurs in the entries for CA3 in GPW and GC, which are later variants of the text for GWS (GWS Sea has an abbreviated summary that refers to GWS for detailed discussion). Now CA3 is one of the most significant and important articles in the conventions and the commentary on the article, which begins by calling it "an almost unhoped-for extension of [CA2]," is lengthy and illuminating. The phrase quoted by the panel occurs in a passage that is concerned with the meaning of 'armed conflict' and is worth looking at in detail:

"What is meant by "armed conflict not of an international character"? The expression is so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or – and this would come to the same thing – that a list should be given of a certain number of conditions on which the application of the Convention would depend. The idea was finally abandoned, and wisely so. Nevertheless, these different

conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list drawn from the various amendments discussed; they are as follows:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3) (a) That the de jure Government has recognized the insurgents as belligerents; or

(b) That it has claimed for itself the rights of a belligerent; or

(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.

(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

"Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions? We do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.

"Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." ICRC Commentary GPW, supra, at 35-37.

Note that all of the conditions considered here are "not obligatory" and that the question here isn't whether or not CA3 applies to any particular group in a non-international armed conflict, it's whether or not the hostilities in fact rise to the level of an armed conflict.

There is, unfortunately, no need whatever to wonder in this context "What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?" – the Bush administration has made the answer to that in the present case entirely obvious. The point here is that if this is indeed an armed conflict as the Bush administration claims it is, then CA3 applies whenever CA2 does not, and otherwise, the alleged "terrorists" are merely accused criminals subject to due process under ordinary domestic law. The law of armed conflict either applies or it doesn't, and if it does Geneva and Hague ARE the laws of armed conflict.

The next section of the commentary on CA3 is equally illuminating:

"Obligations of the Parties. The words "each Party" mark a step forward in international law. Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party – a Party, moreover, which was not yet in existence and which need not even represent a legal entity capable of undertaking international obligations. It had not been thought possible to conclude an agreement without reciprocal undertakings and such undertakings would imply that the contracting parties were already in existence. As we have seen, however, the present Convention no longer includes a reciprocity clause. This great step forward cleared the way for the provisions of Article 3, although, it is true, it is offset by the fact that it is no longer the Convention as a whole which will be applicable, but only the provisions of Article 3 itself.

"The obligation resting on the Party to the conflict which represents established authority is not open to question. The mere fact of the legality of a Government involved in an internal conflict suffices to bind that Government as a Contracting Party to the Convention. On the other hand, what justification is there for the obligation on the adverse Party in revolt against the established authority? Doubts have been expressed on this subject. How could insurgents be legally bound by a Convention which they had not themselves signed? But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country. The "authority" in question can only free itself from its obligations under the Convention by following the procedure for denunciation laid down in Article 142.

"If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain, If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right. As for the de jure Government, the effect on it of applying Article 3 cannot be in any way prejudicial; for no Government can possibly claim that it is ' entitled ' to make use of torture and other inhuman acts prohibited by the Convention, as a means of combating its enemies." Id. at 37-38.

The administration arguments that Al Qaeda is not a signatory, that Afghanistan was a failed state, and that to extend the protections of the Geneva conventions to our enemies in the "GWOT" somehow constitutes a reward for "terrorism" are simply false. CA3 is binding on

all parties whether they are signatories or not, and the principles of Geneva are humanity and the rule of law, not reciprocity.

Returning to the panel's opinion, they next lapse into vacuous sophistry:

"President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was "international in scope." The district court disagreed with the President's view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the Taliban. * * * Under the Constitution, the President "has a degree of independent authority to act" in foreign affairs, * * * and, for this reason and others, his construction and application of treaty provisions is entitled to "great weight." * * * While the district court determined that the actions in Afghanistan constituted a single conflict, the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him." Opinion at 15-16

This doesn't matter in the least. Even if the war with al Qaeda is a separate conflict, it's still either a case of total or partial occupation of a party under CA2, or alternatively, a separate non-international armed conflict under CA3 in however many countries it extends to – and it's probably both. What's important here is simply that the "GWOT" is an armed conflict by virtue of the fact that the United States has treated it as one, regardless of whether or not it actually was one at the outset (as opposed to a crime of horrific dimensions).

All of these arguments are just an exercise in making 1 + 1 add up to zero, three, or any old value at all, just as long as it isn't TWO – and it's old news to anyone who's been reading DOJ's briefs in the detainee cases the last three years. The source of the willful, systematic dishonesty at work here is readily apparent in a memo prepared by the DOJ Office of Legal Counsel for the DoD General Counsel at the outset; see: John C. Yoo and Robert J. Delahunty, Application of Treaties and Laws to al Qaeda and Taliban Detainees (DRAFT), DOJ Office of Legal Counsel (2002.01.09), available at:

http://pegc.no-ip.info/archive/DOJ/20020109_yoomemo.pdf

I won't belabor the details – the intent to evade Geneva, Hague, and every other relevant law has become very clear since Abu Ghraib; see, e.g.: Jordan Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811 (2005); and Evan Wallach, The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib, 36 Case W. Res. J. Int'l L. 537 (2005). What's important to note here is that the OLC memo is all about 18 USC § 2441 (War crimes), and that the relevance of the statute was not lost on the authors, who state:

"We believe it is most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 USC § 2441 (Supp. III 1997)("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code." Id., at 1.

The first three sections of the memo are concerned with finding reasons to suppose that none of the relevant treaty provisions incorporated by 18 USC 2441 actually apply to the invasion of Afghanistan or the "GWOT" (a project that DOJ is still furiously working at today). In the

fourth and final section of the memo, which looks at the customary international law of armed conflict, the authors conclude:

"[C]ustomary law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution." Id., at 2.

Here again I'll defer the gory details to the authoritative analysis of Paust and Wallach, supra, but note well that this claim is distinctly at odds with the Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945)("IMT"), which served as the legal basis for the Nuremberg and Tokyo war crimes trials; and also that IMT, Geneva, and Hague are each duly ratified treaties recognized by the Supremacy Clause.

Yet the panel claims this is just a "political-military decision constitutionally committed to [the President]," and concludes:

"To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail." Opinion at 16.

That holding is egregiously in error. The power to judge the content of the law, and especially international law, is vested in the federal judiciary by a fundamental grant of Constitutional authority: "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, [etc.]," Const. art. III § 2, cl. 1. IHL ("International Humanitarian Law," a.k.a. the Laws of War or Armed Conflict), has been developed and codified by the Geneva and Hague conventions over a period of 150 years, and the United States has played a leading role in that process from the outset, beginning with the Lieber Code issued to the Union armies as General Order No. 100 by President Lincoln in 1863. The IMT Charter enacted by the United Nations in 1945 established a clear and binding precedent that henceforth there would be no immunity of any sort for crimes against peace, crimes against humanity, or war crimes. Geneva, Hague, and IMT have the full force of law under the US Constitution (which is a binding treaty in and of itself after all), and the legal meaning of those treaties and the customary law from which they were developed are quintessentially legal questions, not political, military, or foreign policy decisions at the discretion of the executive branch. The Martens Clause makes the matter plain:

"[T]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."
"They declare that it is in this sense especially that Articles 1 and 2 [which defined POW status under Hague] of the Regulations adopted must be understood." H.IV preamble.

And those principles are fully consistent with the law of the United States: "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and

duties of enemy nations as well as of enemy individuals." Ex parte Quirin, 317 U.S. 1 (1942), 27-28; "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677 (1900), 700, Hilton v. Guyot, 159 U.S. 113 (1895), 163; see also Paust, supra, 855-61.

The panel ignores all of this, but that is by no means the worst of their errors. They claim "the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political- military decision constitutionally committed to him" and conclude "[t]o the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail" Opinion at 15-16. That view parrots DOJ's sweeping claims in this and the other detainee cases, as, for example, in a recent supplemental brief DOJ filed in Al Odah v. United States, where they refer to the President's decision as to the applicability of Geneva as "that manifestly correct foreign policy judgment of the Commander-in-Chief", see, at 7:

http://pegc.no-ip.info/archive/In_re_Gitmo/govt_supp_20050802_al-odah.pdf

There is a very fundamental error here. Setting the questions of how 18 USC § 2441 might be enforced and the President's fundamental duty to OBEY THE LAW entirely to the side, it is absolutely clear that the legal meaning of the Geneva grave breach provisions, HR arts. 23, 25, 27, and 28, and CA3 are all INTRINSIC to the meaning of 18 USC § 2441 as a CRIMINAL STATUTE in the United States Code, because the statute incorporates all of these provisions by direct reference.

It is impossible to suppose that the meaning of a criminal statute is subject to the political, foreign-policy, or military discretion of the president.

It is impossible to suppose that the meaning of a federal criminal statute is not squarely within the jurisdiction vested in the courts by the Constitution.

And it is equally impossible to think that the President's discretion is what determines whether or not his own acts are crimes, or that the Congress thought there was any ambiguity about the meaning of these provisions when they enacted a statute making violations potential death penalty offenses – and twice no less, by the War Crimes Act of 1996 and the Expanded War Crimes Act of 1997.

QED, there can be no doubt: this is PLAIN ERROR, and in the context of a judicial opinion, reasoning such as the panel employed to reach it can only be a manifestation of prejudice unless we are to believe that three United States Circuit Court judges are merely incompetents who are unfit for their high and honorable office; as was also the case in Hamdi v. Rumsfeld ("Hamdi III"), 316 F.3d 450 (4th Cir. 2003), vacated and remanded, 124 S. Ct. 2633 (2004), and Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), reversed and remanded, Rasul v. Bush, 124 S. Ct. 2686 (2004) – Al Odah having been decided by a D.C. Circuit panel which included two of the three judges here, Randolph and Williams. Judge Randolph wrote the opinions in both Al Odah and Hamdan, and in the former case, he also issued a concurring opinion where, just as he does in Hamdan, he went fishing for extra reasons not to obey the Geneva Conventions.

There is no basis for any court to abstain or defer to presidential authority here: 18 USC 2441 is a criminal statute, and both the President and the courts have a basic duty to obey and

enforce the law. The Hamdan decision is a clear violation of the Geneva grave breach provisions, HR art. 23(h), and CA3, and thereby constituted an offense pursuant to 18 USC § 2441.

The panel did not merely decide the Hamden case erroneously, they committed a judicial WAR CRIME, and this nation has tried and convicted people for committing such crimes, as in the Alstoetter case at Nuremberg, and the Uchiyama case in the Far East after WW2.

SECTION V

The panel compounds the offense with further errors in the remaining sections. Here, having already found that CA3 is either unenforceable or inapplicable, they consider Hamdan's claim that the "military commissions" violate the due process requirements of CA3, and once again, they resort to sophistry:

"[The issue] raised is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront the witnesses against him raises a jurisdictional objection. Hamdan's claim therefore falls outside the recognized exception to the Councilman doctrine."

But these "military commissions" are NOT a United States District Court, and no one would say that a lynch mob had jurisdiction under any circumstances no matter how "full and fair" it's procedures here. The real issue here is that an improperly constituted court has no jurisdiction of any sort, and the panels conclusion that they must defer to the "ongoing military proceedings" is wrong for all the reasons stated previously. It is unlawful to either issue or obey an unlawful order under military law, the military commissions constitute a war crime pursuant to 18 USC § 2441, and to defer to a criminal offense is to aid and abet it.

Prof. Anthony D'Amato (Northwestern U. School of Law), made some pertinent comments on the blog Opinio Juris concerning the panel's argument:

"This is just the sort of ersatz law-school reasoning that should be suppressed whenever it rears its ugly head. "The issue thus raised is not whether but how." Indeed! Just who is the court kidding here? (Themselves is probably the right answer.)

"One simply cannot separate entirely the question of procedural fairness from jurisdiction. Suppose the military commission was well known for reaching its decisions in less than one minute per defendant. Suppose further that its members prided themselves on never reading any briefs. Suppose the commission barred oral argument. Indeed, let's go to the extreme: suppose the only issue the commission debates is whether the defendant had an Arabic-sounding name. If he did, then he was guilty. Could our court of appeals, in of all things a habeas corpus proceeding whose pedigree extends back to the Magna Carta, say without tongue-in-cheek that even this extreme level of procedural unfairness would be irrelevant to the question of jurisdiction?

"If Judge Roberts, or his two colleagues, or the lawyers defending Hamdan, had had any knowledge of international law, they surely would have known of the Hague Tribunal's milestone decision in the Tadic case (Dusko Tadic, IT-94-1). Tadic had raised some strong

arguments to the effect that the International Criminal Tribunal for Former Yugoslavia was not a legally constituted tribunal and hence lacked jurisdiction over him or any other accused person. The Tribunal answered these arguments as best it could. Then the President of the Tribunal, Antonio Cassesse, memorably added that the test of the legality of the Tribunal's jurisdiction will ultimately be the fairness of its procedures."
Anthony D'Amato, Mr. Roberts (The nominee, not the movie), Opinio Juris (2005.08.08), available at:

http://lawofnations.blogspot.com/2005/08/mr-roberts-nominee-not-movie.html

SECTION VI

Concerning this section of the opinion it needs only be said that there is no question it would be possible for the President to properly constitute a military commission or tribunal under the UCMJ, but he has not done so here: the commissions in question violate Geneva, Hague, and 18 USC § 2441 because they are ad hoc and improperly constituted

SECTION VII

In the last section of the opinion the panel considers Hamdan's claims based on the pre-existing U.S. Army regulations concerned with detainees, arriving once more at a fallacious conclusion:

"We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a "competent tribunal" within the meaning of Army Regulation 190-8."

Hamdan has been denied POW status for almost four years; it is a grave breach of Geneva to unlawfully deny POW status; and any trial of Hamdan before one of DoD's illegal "military commissions" would also be a grave breach of GPW, hence the panel holding here would put the "military commission" in the position of declaring themselves to be war criminals if they were to rule in Hamdan's favor on the question of his status.

That is about as clear a conflict of interest as there is. Worse, the question is entirely moot: the "military commissions" are also a grave breach of GC and a violation of CA3, hence, Hamdan's actual status doesn't matter: the commissions are illegal in any case.

CONCLUSION

Judge Williams filed a concurring opinion where he correctly states that CA3, at the minimum, applies to al Qaeda; but then he fails to understand the implications of that view and states:

"Because I agree that the Geneva Convention is not enforceable in courts of the United States, and that that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court's judgment."

Thereby joining the crime.

I have been absolutely astounded by the lack of criticism directed at this outrageous travesty of prejudice masquerading as a judicial opinion. I don't like saying such harsh things about judges – if this project has taught me anything, it's how difficult and demanding the work of a judge can be – but the issues at stake here are vast: the administration's policies are nothing less than a disgraceful and nearly treasonous assault on the US Constitution and the rule of law. The ugly truth of the matter is that the President, Vice President, the Secretary of Defense, the Secretary of State, the Attorney General, and the Solicitor General (plus a great many other U.S. officials, both civilian and military) are WAR CRIMINALS – and so are the judges of the Hamdan Panel.

We do not need a war criminal sitting on the Supreme Court bench.

Lake Chelan
2005.08.31

PROJECT TO ENFORCE THE GENEVA CONVENTIONS

http://pegc.no-ip.info

Exhibit B

Al Odah v. United States, D.C. Cir. 2005
On appeal from *In re Guantanamo Detainee Cases*
355 F. Supp. 2d, 443 (D.D.C. 2005)

NOTES ON THE GOVERNMENT'S OPENING BRIEF

By Charles B. Gittings Jr.

INTRODUCTION

These notes are a continuation of my amicus effort in the coordinated cases *In re Guantanamo Detainee Cases*. Personal matters are now pressing to the point where I'm not in a position to undertake another brief on my own, and the circuit rules require that amici coordinate. Counsel for petitioners may use these notes however they wish..The three briefs that I've filed in the detainee cases are available at:

http://f2.pg.briefcase.yahoo.com/bc/cbgittings/lst?.dir=/CBG+Amicus

See the files "CBG Brief & Cross Motion" and "CBG Reply Brief." These notes continue from there and look at the government's opening brief in *Al Odah v. United States* (hereinafter "*US Brief*") where it discusses Geneva and Law of War issues at 49-64.

ENEMY COMBATANTS

"The detention of members or supporters of [enemy] forces is an established part of the laws of war. * * * The district court erred in suggesting that the exercise of this traditional power creates concerns of vagueness or overbreadth. * * * T]hese are quintessentially military judgements. * * * [T]he capture and detention of members or supporters of hostile forces is an important and traditional element of the President's warmaking powers." *Id*. at 49-51.

- A new paper by ICRC legal advisor Gabor Rona covers these issues well; see Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 Chi. J. Intl. L. 499 (2005). (There are also some articles in 5 Chi. J. Intl. L. by the likes of Yoo and Posner, see – http://cjil.uchicago.edu/win05.html).
- Geneva 1949, Hague 1907, and IMT 1945 codify the laws of war – the traditions are moot. Would they propose to adopt the ancient tradition of slaughtering all the men and selling everyone else into slavery? As Mr. Rona's article explains, anyone not protected as a POW by GPW art. 4 is protected as a civilian by GC art. 4.

- Customs do not trump statutes: "Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." *U.S. v. Collier*, 3 Blatchford, 332, cited in William Winthrop, *Military Law and Precedents* (1895)(US Army 2001), Ch. IV. *The Unwritten Military Law*, footnote 7 (the full chapter is worth reading), available at:

https://134.11.61.26/cd1/Publications/JA/MJ/MJ%20Winthrop%2019200101.pdf

- The adjudication of legal matters is a quintessentially *judicial* function, not a military one, and the President has no authority to violate the law or make judicial "determinations" of law.

- The war power of the President is simply the command of the armed forces: he has no inherent legislative or judicial authority, nor any authority to nullify the laws – both the Presidency and the nation itself are purely legal institutions and have no function or existence outside the law. The power to detain resides in the nation and its laws, not the person or office of the President – the fundamental purpose of the *executive* branch is to *execute* the law.

CSRTs

"If there were a defect in the current CSRT process, the proper remedy would be to vacate the CSRT rulings in question and permit that process to be conducted under corrected procedures." *US Brief* at 54.

- Ad hoc legal procedures are prohibited by GPW arts. 99 and 102, GC arts. 65-67, etc., and constitute grave breaches pursuant to GPW art. 130 and GC art.147.

- As discussed in my amicus briefs, HR art. 23(h), IMT arts. 6-8, and 18 USC § 2441 apply here: the CSRTs represent criminal violations of US law.

JUDICIAL ENFORCEMENT

"The Geneva Convention creates no judicially enforceable rights. * * * Judicial enforcement of treaties is not presumed. Rather, absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." [Citing *The Head Money Cases*, 122 U.S. 580, 597 (1884), etc.]" *US Brief* at 55-56.

- The intent of Geneva is clear from CA1, the grave breach provisions requiring criminal sanctions in domestic law, the requirement to suppress lesser violations, etc.

- "No right without a remedy." It must be the case that all rights are ultimately enforceable in the courts as a matter of law, and anything which isn't is no right. Criminal statutes purport to represent *universal* rights:

> "Wrongs also are divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors."
> Sir William Blackstone, *Commentaries on the Laws of England,* 1st ed., Oxford (1765-1769), Bk. I, Ch. 1, at 118; available at:
> http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm

- That enemy nationals must possess some rights is obvious from HR art. 23(h), which 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." 18 USC § 2441 (c)(2) makes it an offense punishable by life imprisonment or death to commit any violation of HR art. 23(h).

EISENTRAGER

"In *Eisentrager,* the Court held that German prisoners challenging the jurisdiction of the military tribunal that convicted them could not invoke the 1929 Geneva Convention because the rights afforded under it are not judicially enforceable by the captured party. 339 U.S. at 789." *Id.* at 56.

"As was the case with the 1929 [Geneva] Convention, the 1949 Convention itself does not provide judicially enforceable rights to individuals. * * * Hamdan's rationale for concluding that the Convention provides judicially enforceable rights is that that the treaty protects the rights of individuals. But if that were the case, it would have been equally true of the 1929 version of the treaty, which the Supreme Court held did not create judicially enforceable rights." *US Brief* at 59.

- The first quote is a bald lie: the Court held that the provisions of GPW 1929 at issue in *Eisentrager* (due process guarantees) were only applicable to acts committed after capture, following *Yamashita*. This was one of the major points addressed in my *Gitmo Amicus*. It's a critical issue, they're flat-out lying about it, and they should be pounded on it – *Eisentrager* and *Yamashita* are moot under Geneva 1949.

- The second quote is a non-sequitur, and it also ignores the very substantial differences between the 1929 and 1949 versions, including the grave breach provisions, the due process guarantees in regard to acts committed prior to capture, and the addition of the

fourth convention to protect civilians. See the historical discussion of GPW art. 85 in *ICRC Commentary III Geneva* (GPW) and note especially the reference to *Yamashita*:

http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5cd83e96981e1ee0c12563cd00427ee4?OpenDocument

COMMON ARTICLE 1

"The first article of the treaty explains that the parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." This was an important revision of the 1929 convention because it explained that it was the duty of all parties to the convention not only to adhere to the Convention, but also to ensure compliance by every other party to the convention.

"Instead, the terms and history of the revised Convention show that, as with the 1929 version, vindication of terms of the treaty is a matter of state-to-state relations, not domestic court resolution." *US Brief* at 57.

- Here they misrepresent the changes. GWS 1929 art. 25 and GPW 1929 art. 82 stated: "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto." The first sentence was moved to CA1 with the added language "and to ensure respect for," and the second was moved to CA2. The entry for CA1 in *ICRC Commentary I Geneva* (GWS) shows the dishonesty of the government's spin clearly:

> "[p.25] The Conventions of 1864 and 1906 had no similar provision. The 1864 Convention (Article 8) merely said: "The implementing of the present Convention shall be ensured by the Commanders-in-Chief of the belligerent armies, following the instructions of their respective Governments, and in accordance with the general principles set forth in this Convention." The 1906 Convention (Article 25) reproduced this provision in approximately the same terms.
>
> "The provision did not mean that the entire responsibility for the execution of the Conventions was left to the Commanders-in-Chief. The ratification by two States of a treaty in itself constitutes an obligation to respect its terms. It was in 1929 that the need for making the provision more explicit was first felt. Article 25 of the 1929 Convention said that "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances". The idea was to give a more formal character to the mutual undertaking by insisting on its character as a general obligation. It was desired to avoid the possibility of a belligerent State finding some pretext for evading its obligation to apply the whole or part of the Convention.
>
> "The provision adopted in 1949 has the effect of strengthening that of 1929. This is due both to the prominent position which it is given at the beginning of the Convention and to its actual wording. By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party

observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-à-vis' itself and at the same time 'vis-à-vis' the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one's opponent, and perhaps even more for the former reason than for the latter.

"The Contracting Parties do not undertake merely to respect the Convention, but also to 'ensure respect for' it. The wording may seem redundant. When a State contracts an engagement, the engagement extends eo ipso to all those over whom it has authority, as well as to the [p.26] representatives of its authority; and it is under an obligation to issue the necessary orders. The use of the words "and to ensure respect" was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention."

ICRC Commentary I Geneva (GWS), entry for art. 1, available at:
http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/3dab115d29dffdcac12563cd0041fa3d?OpenDocument

- Note that "state-to-state relations" is secondary to domestic enforcement here. The government's spin ignores all this and essentially argues for the understanding stated by the 1864 or 1906 versions of Geneva.

- Why should diplomatic efforts by other nations be required in order for the United States government to obey or enforce its own laws? CA1 requires respect for Geneva in *all* circumstances, and 18 USC § 2441 makes it a federal offense to commit a grave breach of Geneva under any circumstance.

GPW ARTICLE 5

"The district court relied on Article 5 of [GPW], which provides that certain detainees are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." * * * That provision only applies, however, if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of an enemy," meet the convention's definition of prisoners of war. Petitioners have never explained why their status would be doubtful under Article 5, which

contemplates that a detainee who challenges his status must provide some basis for doubt." *US Brief* at 63.

"The district court also relied on Army regulations that, in it's view, require that detainees be treated as if their status is "in doubt" under Article 5. Even if the court's interpretation of the regulations were correct, those regulations would not serve to override the determination of the Commander-in-Chief that Taliban detainees are not entitled to "prisoner of war" status under the Geneva Convention." *Id.* at 64.

- Here the government is pretending GPW art. 5 means exactly the opposite of what it says. This was another major topic in my *Gitmo Amicus*: captured belligerents are assumed to be POWs until such time as a competent tribunal determines otherwise, in which case they're civilians protected by GC. GPW art 5 says "any doubt," not that the detainee must raise it himself – the government's fraudulent "determination" that no detainee is entitled to protection under Geneva is precisely such a doubt.
- The pre-Bush administration US military regulations are merely an honest reflection of the conventions – 18 USC § 2441 and the conventions themselves are the controlling law. The Bush administration has been lying about this for over three years now, and the lies are obvious from the plain text of GPW art. 5.

WHITE HOUSE POLICY

On February 7, 2002 the White House issued a "fact sheet" concerning the treatment of detainees in the "global war on terror" which was based on a memo of the same date from Bush to Cheney, Rumsfeld, and Ashcroft, etc. The memo was publicly released in the aftermath of the Abu Graib, and was drafted by David Addington, counsel to Cheney. It states a "policy" which DoD and the White House have repeatedly used to deny that the administration has authorized the abuse of prisoners:

> "As a matter of policy, the United States Armed Forces shall continue to treat all detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."
> George W. Bush, *Humane Treatment of al Qaeda and Taliban Detainees*, White House policy memorandum (2/7/2002).

That statement is a smokescreen –

- The stated policy requires an exact understanding as to "appropriate and consistent with military necessity," and likewise, "the principles of Geneva."
- No "military necessity" can exist outside of combat operations.
- Unarmed civilians, wounded, and prisoners are not subject to attack.

- Hence, the stated policy amounts to saying that we will respect Geneva unless we violate Geneva. I raised this point with Rear Admiral John D. Hutson (USN ret.), Dean of the Franklin Pierce Law Center, during a conference call Q & A held by *Human Rights First*, and he strongly agreed. An audio file is available at:

http://www.humanrightsfirst.org/us_law/etn/lawsuit/index.asp#

- The conditions of detention at Guantanamo Bay, the "military commissions," and the "CSRTs" are all facially inconsistent with Geneva and constitute grave breaches of the conventions. All of it is clearly the result of deliberate administration policy, and none of it entails any legitimate military necessity: it is a policy of deliberate abuse which constitutes a conspiracy to commit war crimes pursuant to 18 USC § 2441. Yet the administration hides behind the 2/7/2002 memo and the fallacious claim that interrogations are of unprecedented importance in the GWOT because it's the only way to prevent future acts of terrorism. Given those claims, it's difficult to believe the abuse is merely the result of ignorance, poor training, and / or individual misconduct when the US military is clearly the most professional in history. Phillip Carter has some pertinent observations about all of this on his blog, *Intel Dump*. See the entry "Just Following Orders?" (May 13, 2005) at:

http://inteldump.powerblogs.com/archives/archive_2005_05_08-2005_05_14.shtml#1116042298

- Also relevant is US Army FM 6-0, Mission Command: Command and Control of Army Forces (2003), available at:

http://www.globalsecurity.org/military/library/policy/army/fm/6-0/index.html

Lake Chelan
May 16, 2005

* * *

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, *Petitioner*, v. GEORGE W. BUSH, President of the United States, *et al.*, *Respondents.*	Civil Action No. 02-CV-0299 (CKK)
FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.* *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants.*	Civil Action No. 02-CV-0828 (CKK)
MAMDOUH HABIB, *et al.* *Petitioners*, v. GEORGE WALKER BUSH, President of the United States, *et al.*, *Respondents.*	Civil Action No. 02-CV-1130 (CKK)

MURAT KURNAZ, *et al.* *Petitioners,* v. GEORGE W. BUSH, President of the United States, *et al.,* *Respondents.*	)	Civil Action No. 04-CV-1135 (ESH)
O.K., *et al.* *Petitioners,* v. GEORGE W. BUSH, President of the United States, *et al.,* *Respondents.*	)	Civil Action No. 04-CV-1136 (JDB)
MOAZZAM BEGG, *et al.* *Petitioners,* v. GEORGE W. BUSH, President of the United States, *et al.,* *Respondents.*	)	Civil Action No. 04-CV-1137 (RMC)
RIDOUANE KHALID, *et al.* *Petitioners,* v. GEORGE W. BUSH, President of the United States, *et al.,* *Respondents.*	)	Civil Action No. 04-CV-1142 (RJL)

JAMIL EL-BANNA, *et al.*

Petitioners,

v.

GEORGE W. BUSH,
President of the United States, e*t 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 (RJL)

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

FEDERAL CONSTITUTION AND STATUTES

INTERNATIONAL TREATIES AND DOCUMENTS

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 it's 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 a 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 irrellevent 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 or 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,

_____

CHARLES B. GITTINGS JR.,
pro se
453 Totem Pole Road
Manson, WA 98831

SSN: XXX–XX–3461
Email: cbgittings@verizon.net
Phone: 509-687-7709

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

DATED:

October 12, 2004

Exhibit D

No. 03-6696

In The

Supreme Court of the United States

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

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**

DONALD G. REHKOPF, JR.
Counsel of Record
LAW OFFICE OF BRENNA & BRENNA, PLLC
31 East Main Street, Suite 2000
Rochester, New York 14614
585-454-2000 x12

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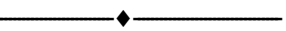
INTEREST OF *AMICUS CURIAE*

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 breach[4]] 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

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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

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[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,

DONALD G. REHKOPF, JR.
Counsel of Record
LAW OFFICE OF BRENNA &
BRENNA, PLLC
31 East Main Street, Suite 2000
Rochester, New York 14614
585-454-2000 x12

Charles B. Gittings Jr.
pro se
770 Kingston Ave. #304
Oakland, CA 94611
510-923-1688

In memoriam
Elias T. "Lile" Jacks (1924-1973)

Revision Notes – This brief was filed 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, 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.

This PDF has the original text with the information for Mr. Rehkopf added. I am very grateful for his generous and timely assistance.

Charles B. Gittings Jr.
March 30, 2004

Exhibit E

26 November 2001

The Honorable Barbara Lee
9th Congressional District of California
United States House of Representatives
Washington, DC 20515

Dear Ms. Lee,

I am writing to you in regard to the order signed by President Bush on 13 November 2001 entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". It is my belief that this order is both unconstitutional and illegal under international law, and that it represents a grave threat to the safety and well being of both the nation and the world.

Furthermore, while I recognize the political realities implicit in the current composition of the Congress, and of public opinion in the present crisis, it is also my belief that by the very act of signing this illegal order the President has committed high crimes and misdemeanors such as would warrant his immediate impeachment and removal from office, together with any and all members of his cabinet or administration having complicity in these crimes.

Enclosed is a document which sets forth in detail my reasons for holding these beliefs. Pursuant to the First Amendment of the United States Constitution, I am invoking my right as a citizen of the United States to petition the Congress in this matter. I respectfully and urgently request that you convey copies of this letter and the enclosed document to the leadership of both parties in both the House and the Senate, and to the Chief Justice of the United States Supreme Court. I urge all of them to take immediate action by every avenue available to them under the law to prevent the executive branch from acting on this order.

Human lives and fundamental human rights are at stake here, together with the honor, integrity, and safety of our nation. Speed is of the utmost essence.

Sincerely,

/s/

Charles B. Gittings, Jr.
770 Kingston Ave. #304
Oakland, CA 94611
(510) 547-3408

THE BUSH MILITARY TRIBUNAL ORDER IS UNCONSTITUTIONAL AND ILLEGAL

By Charles B. Gittings Jr.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."

— James Madison, The Federalist Papers, #47

There are no legitimate grounds for the Bush presidential order authorizing military tribunals (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; 13 November 2001); neither in the Constitution, nor law, nor precedent, nor any rational concept of moral philosophy. The order is manifestly unconstitutional, unnecessary, dangerous, and illegal under existing international law.

To wit:

(1) The presidential oath requires the President to faithfully execute his office and to PRESERVE, PROTECT, AND DEFEND the Constitution. To circumvent or suspend the Constitution, or to obstruct the legitimate powers of the legislative and judicial branches of the federal government are all obvious breaches of that oath.

[Article II. Section I

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."]

(2) As Commander in Chief, the president may direct the military operations of the armed forces. This does not exempt him from obeying the law. Further, he is expressly granted the power to pardon or commute an offense, which carries with it the clear implication that had it been it intended he should have the power of life and death in the manner of a Roman emperor, such would have been stated explicitly.

[Article II. Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their

respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.]

(3) The Congress has the sole power to define the rules of the military, including the Universal Code of Military Justice (UCMJ).

[Article I. Section 9.

To make Rules for the Government and Regulation of the land and naval Forces;]

(4) There is no provision in the Constitution for amending the Constitution by executive or legislative fiat, nor any provision for suspending the Constitution. Further, the Congress has no power to suspend or modify the Constitution except by the amendment process.

(5) The Constitution explicitly states that the judicial power of the United States is vested in the Supreme Court, and that the power to "ordain and establish" inferior courts resides in the Congress.

[Article III. Section. 1. 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. (...)]

(6) The Constitution explicitly states that ALL crimes are subject to judicial jurisdiction except cases of impeachment; that judicial jurisdiction extends to both crimes committed outside US territory and crimes committed by non-citizens; and that only Congress may authorize exceptions. The Bush order attempts to usurp all of these powers by executive fiat.

Further, the Constitution expressly includes Treaties within this jurisdiction, which extends to the UN Charter and Geneva Convention as they touch upon the affairs of the United States.

[Article III. Section. 2. 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;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases

affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.]

It may be noted in passing that conservatives such as Mr. Ashcroft or Mr. DeLay, et al, have long maintained that international law should not take precedence over the Constitution, despite the obvious intent of the Framers that we should faithfully adhere to all treaties duly ratified by Congress.

(7) The Fifth Amendment protects all PERSONS (and NOT just citizens) "...except in cases IN the land or naval forces, or IN the militia, WHEN IN ACTUAL SERVICE. The UCMJ applies to our own forces exclusively, not to enemies or civilians in the power of our forces; in all other cases, all persons enjoy the protection of due process as defined by the Constitution. Further, the power to define or modify the UCMJ rests with the Congress, not the President.

[Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.]

One might grant that in cases of military occupation where no competent court is available the military might rightly assume the judicial function locally, but even then, only in accordance with relevant international law. And one must question whether it could conceivably be the case that a competent court could ever be thought unavailable given the fact of global air transport in the modern era, the US military being fully capable of providing air transportation to and from anywhere in the world in less than a day, weather permitting.

(8) The executive branch has the discretion to not prosecute a crime under US law. The executive branch also has the discretion to prosecute a crime under international law, in which case the relevant authority resides in the United Nations Charter, the Geneva and Hague Conventions, and all other existing international agreements to which the United States is a party.

In each case, the relevant legal corpus constitutes a WHOLE which applies to the ensuing judicial process IN TOTO. The notion that any executive or prosecuting official may

pick and choose which parts of the legal corpus shall apply or not apply in any particular case at law is absolutely contrary to rational concepts of justice, and exhibits an absolute contempt for legitimate judicial authority: such are exclusively the methods of TYRANTS.

When the Bush administration claims that this order is "absolutely necessary" to afford them an urgently required procedural option, they ignore the plain fact that they already have two obvious procedural options, namely to proceed under either US or international law.

In truth, the various claims set forth in the order are a web of false assertions and fallacious argument, which, whether by intent or delusion or some combination, are aimed at concealing or falsely justifying the various elements of an agenda which entails:

a) Legitimizing the selective application of fragments of both US law and international law to individual cases in an egregiously prejudicial manner for the purpose of predetermining and/or manipulating the verdicts.

b) Asserting the necessity of assuming tyrannical powers that are expressly and absolutely excluded under both US and international law.

c) Acting to usurp the legitimate authority of both the Congress and the Supreme Court in a manner that has the character of a coup.

d) Openly conspiring to commit crimes against humanity as specified by the accepted definitions of international law.

This being the case, the President is guilty of a flagrant violation of his oath of office that warrants impeachment on the grounds of usurpation and frustration of the lawful powers of Congress and the Supreme Court. An examination of the UCMJ concerning the duties of military personnel in time of war and in the presence of an armed enemy will show that there are also substantial grounds on which the President might be held to be in dereliction of his duties as Commander in Chief.

(9) International law makes it absolutely clear that the order is illegal.

The UN Charter states:

> **Article 55.**
>
> **With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (...)**

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

And the Universal Declaration of Human Rights is decisively explicit:

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

(10) The precedents that the Bush administration cites are without merit.

In the first place, all of the precedents they cite date to 1942 or earlier. Since that date is prior to the ratification of the UN Charter (1945), the Geneva Convention (1949), and the vast majority of relevant international law, all are presumptively superceded by those treaties, which were negotiated and agreed by Presidential authority and ratified by Congress, pursuant to the Treaty provisions of the Constitution.

One of them took place prior to 1787, and may be presumed to have been superceded by the Constitution itself. Further, in that instance, Washington was acting not as president, but as Generalissimo of a force engaged in an insurrection.

In the second place, all of them involve cases where agents of an enemy state entered the territory or military precincts of the United States in civilian clothing in the course of a declared war between states.

Finally, all these precedents speak to the Law of War, which is customary rather than statutory or based on effective international agreements, this being much the same manner that the common law is customary rather than statutory. But where the common law is based on hundreds of years of judicial precedent and custom in the course of jurisprudence based on the concepts of reason and reasonable conduct, the law of war is based on the basest of all human institutions, war, which is expressly outlawed by the UN charter. That being the case, the law of war is a dead letter.

An adjunct of incidental interest is that the law of war is largely grounded in the customs of European nations, having grown up mainly during the 500 or so years in which they were about the business of global aggression and colonial exploitation which was the primary source of the geopolitical nightmares we are facing today. And note well that the customs of Islam are by no means identical.

(11) A precedent that the Bush Administration ignores entirely is the Declaration of Independence, with its list of specific charges against the English Crown. Several of these have a direct bearing on the order:

> **He has refused his Assent to Laws, the most wholesome and necessary for the public good.**
>
> **He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.**
>
> **He has affected to render the Military independent of and superior to the Civil power.**
>
> **For depriving us in many cases, of the benefits of Trial by Jury:**

> **For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:**
>
> **For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.**

One must also ask how it is possible to reconcile the famous preamble with the notion that it is proper to have one set of rights for US citizens, and yet another wholly inferior set of rights for the rest of the world. The language is plain on this point:

> **We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.**

This is especially significant when it is remembered that this was written by men who were engaged in the practices of slavery and genocide. Should we not to aspire to better conduct rather than worse?

How far back into the gruesome past would the Bush administration have us retreat? To Andrew Jackson's forced removal of the Cherokees from their lands in contempt of an order of the Supreme Court? To the French and Indian War? Shall we pay bounties for scalps as we did then? So much for a man, so much for child, a woman, etc? Or to the sack of Carthage perhaps? Shall we slaughter all the men, sell all the women and children into abject slavery, and sow the ground with salt?

Expedience and tyrannical power are to politicians as heroin is to a junky.

The mere fact that the Bush administration has advanced such arguments as they have is a very telling reflection of their true character: the most charitable inferences being panic, intellectual impotence, and sheer moral degeneracy. Their arguments are an insult to the intelligence of anyone that has not been misled, or terrorized into a frenzy by selfish agendas, fear, rage, and opinion polls. Be not deceived: the policies of this administration are woefully misguided and malevolent. They are acting the part of a lynch mob.

All the precedents that the Bush administration cites are bad ones. The President has no implied or expressed power to cut corners from or omit either the law or the Constitution in the name of convenience. In every prior instance where such expedients have been employed, the action was grounded in willful ignorance, political malfeasance, lazy thinking, financial greed, and public hysteria.

That the Congress and the Courts have from time to time acquiesced to such practices in the heat of the moment is merely a reflection of how much those institutions are themselves prone to the corrupt influences of politics and wealth. Far from supporting the notion that such precedents legitimize the practice of Presidential Fiat, they compellingly

demonstrate the urgent need for the Courts and the Congress to oppose such actions resolutely.

Why do they need to kill Osama Bin Laden or any other captive without a fair trial? And why fear him communicating with anyone? I could see our way clear to giving him a comfortable cell complete with a telephone. In war it is often better to listen and LEARN than it is to charge blindly in rage. Perhaps if that had been better understood by our leaders over the past 20 years we wouldn't be in this mess now.

What threat could any captive pose to us that would require execution without a fair trial or the protections of just laws and due process? The Bush administration aims to convict and punish on suspicion alone, and the logical end result of such thinking is the preventative extermination of entire populations. "The only good Indian is a dead Indian" was once a common sentiment in this country. Hitler said no less of the Jews. "Kill them all and let God sort them out" is a popular sentiment in certain quarters of the far right. No one can pretend that such things represent anything civilized or just or necessary.

The Administration pretends to want options, even as they ignore the valid options they have. One that they seem not to have given the slightest thought is to simply recognize the enemy as a legitimate belligerent and proceed with level headed resolve. That worked fairly well in WW2 with a few notable exceptions like the treatment of the German saboteurs and the internment of US citizens of Japanese descent. If they are so incompetent that they cannot handle their jobs they should simply resign and be gone from the public trust. Their policies betray their impotence: never in history has any great power had so many resources at its disposal, yet they bewail their incapacity to meet the challenges before them.

The UN Charter, the Universal Declaration of Human Rights, and the Geneva Conventions are clear enough if one only takes the time to give them an honest reading. All of them specify that basic human rights are to be respected, and specify what those rights are. Yet the Bush administration turns them a blind eye-- not because they hinder any legitimate purpose of national security, but because they expose the actions of the administration to public scrutiny and criticism. They are afraid to expose their hypocrisy, greed, dishonesty, and sheer incompetence to the light of day. The basic methodology of the Bush administration is fraud, deceit, and back room manipulation of the political process. That's how they ran their election campaign, it's been their approach to domestic policy, and it is how they are managing our foreign relations in the present crisis.

The truth of the matter is that the enemy has legitimate grievances and delivered a brilliantly effective attack. How much conventional war making would have been required to inflict similar damage on us? The advantage of recognizing them is that we would then have the OPTION of negotiation. We have 4,000 years of history that shows how utterly ineffective revenge and retribution are. That's not to say we should be timid or weak; but flexible, objective, smart, progressive, open, and above all else, just.

During the Second World War both sides sent thousands of aircrews on bombing missions which killed civilians in vast numbers far in excess of the 4,000 or so who lost their lives on 11 September 2001. Many of those aviators were captured, but relatively few were executed, and most were simply interned as POW's.

The administration has assumed the character and powers of a Junta. This tendency was manifest well before 11 September 2001, and has become ever more blatant since. The order of 13 November claims to make the entire population of the World, excepting only US citizens (for the time being at least), subject to the absolute will of the President acting in the guise of a dictator meting out life or death however he pleases, under the pretence of fighting a war on evil itself; yet it is they themselves who represent the greatest evil confronting us today. That the greatest power in the history of the world should fall into the hands of a tyrant is a danger far greater than Osama Bin Laden and Al Qaeda. The Bush Junta must be brought to heel within the law if we are to have any hope of sustaining the principles we claim to hold dear, and not be made to appear as abject hypocrites in the eyes of the entire world.

May God preserve us from such tyranny.

Oakland, California
26 November 2001