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Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)- Case Summary

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CASE SUMMARY

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This case involves a challenge to the legality of the United States military commissions convened to try alien combatants detained in the course of the war on terror. Salim Ahmed Hamdan's petition is the first to challenge the constitutionality of such commissions since World War II.[1] Hamdan was captured during hostilities in Afghanistan and detained as an enemy combatant. He petitioned for a writ of habeas corpus, challenging, among other things, his pretrial detention at Guantanamo Bay Naval Base and the validity of trial by military commission. The United States District Court for the District of Columbia heard and granted Hamdan's petition on November 8, 2004, finding that the military commission violated the laws and treaties of the United States.[2] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the judgment and upheld the legality of the military commissions.[3]

The United States has been waging a war against terrorism since September 11, 2001.[4] In response to the devastation caused by the al Qaeda attacks, Congress enacted the Authorization for Use of Military Force (AUMF) which granted the President the use of "all necessary and appro-

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1. Petition for Hearing En Banc at 6, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (noting that the Supreme Court's landmark decisions in *Ex Parte Quirin*, 317 U.S. 1 (1942) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), altered the legal landscape and defined the roles of the judiciary and the executive in trying military offenses). In both *Quirin* and *Eisentrager* the Supreme Court denied the alien enemy detainee petitions for habeas relief and firmly established the power of the executive to create and administer military tribunals for the purpose of trying enemy combatants. Note that all briefs related to this case are available at http://www.hamdanvrumsfeld.com/briefs (last visited Mar. 3, 2006).

2. Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 155 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted mem.*, 126 S. Ct. 622 (2005) (No. 05-184). Prior or subsequent history is omitted hereinafter.

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

4. George W. Bush, U.S. President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html.

priate force"[5] against any person or organization suspected of terrorism. On November 13, 2001, President Bush, acting pursuant to his Commander-in-Chief power, the AUMF, 10 U.S.C. §§ 821[6] and 836,[7] and the Uniform Code of Military Justice (UCMJ),[8] issued a Military Order concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"[9] empowering military commissions to hear war crimes charges brought against those suspected of participating in or aiding al Qaeda.[10]

Under the AUMF, the United States commenced an armed conflict against Afghanistan to subdue the al Qaeda network and supporting Taliban regime.[11] In the course of these ongoing operations, numerous persons have been detained. In late November 2001, Salim Ahmed Hamdan, a Yemeni citizen, was captured by Afghani militia forces as he

5. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. The AUMF, approved by Congress on September 18, 2001, states that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ."

6. 10 U.S.C.A. § 821 (2005) provides that the jurisdiction of courts-martial are not exclusive and "do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

7. 10 U.S.C.A. § 836 (2005) provides that the President may provide applicable rules governing courts-martial: "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

8. The Uniform Code of Military Justice (UCMJ) is the bedrock of military law and was enacted by Congress in 1950 in response to a demand for a uniform system of courts-martial for the military services. The UCMJ superseded the "Articles of War" and imposed strict rules of conduct and responsibility on military servicemen and women. Most importantly, it provided a set procedure to prosecute and try military offenders through federally regulated courts-martial. *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000), *available at* http://www.loc.gov/rr/frd/Military_Law/UCMJ_1950.html (last visited Apr. 24, 2006) [hereinafter UCMJ].

9. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html (last visited Apr. 24, 2006) [hereinafter "Military Order" or "November 13, 2001 Military Order"]. The Military Order states that any person subject to the order, including members of al Qaeda, shall, "when tried, be tried by [a] military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed . . . ." *Id.* § 4.

10. Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Respondents-Appellants at 2, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393).

11. Notice of Motion and Respondents' Cross-Motion to Dismiss at 5, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) (No. C04-0777RSL) (originally filed with the United States District Court for the Western District of Washington on August 6, 2004, before the case was transferred to the District of Columbia); *see also* Petition for Writ of Certiorari at 1, Hamdan v. Rumsfeld, No. 05-184 (U.S. Aug. 8, 2005).

attempted to flee Afghanistan with his family.[12] After transfer to American military custody, Hamdan was eventually taken to Guantanamo Naval Base and placed in the general detainee population at Camp Delta.[13]

On July 3, 2003, President Bush found that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States."[14] This finding made Hamdan subject to trial by military commission as prescribed in the President's November 13, 2001 Military Order.[15]

In December 2003, Hamdan was transferred from the general detainee population to solitary confinement at Camp Echo.[16] On December 18, 2003, Lieutenant Charles Swift was appointed to serve as Hamdan's counsel, initially for the restricted purpose of a plea negotiation.[17] However, on February 12, 2004, Lieutenant Swift filed a demand for charges and speedy trial rights as provided under the UCMJ.[18] Hamdan's demand was rejected on February 23 due to the finding that the UCMJ did not apply to his detention.[19] On April 6, petitioned for mandamus or, alternately, habeas corpus, in the U.S. District Court for the Western District of Washington.[20]

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12. Hamdan v. Rumsfeld (*Hamdan II*), 415 F.3d 33, 35 (D.C. Cir. 2005); *see also* Petition for Writ of Certiorari, *supra* note 11, at 2. Charles Swift, Hamdan's military counsel, revealed in an exclusive interview with *The Miami Herald* that at the time of his capture, Hamdan was alone and driving a borrowed car in a mountainous region of Afghanistan, after just evacuating his daughter and pregnant wife in the safety of Pakistan. According to Swift, Hamdan was returning the borrowed car when he was captured by Afghani forces. Carol Rosenberg, *Driver for bin Laden in a Guantanamo Cell*, MIAMI HERALD, Feb. 11, 2004, at 1A, *reprinted in* Declaration of Lieutenant Commander Charles Swift at 55-56 (Ex. G), *Hamdan I*, 344 F. Supp. 2d 152 (No. CV04-0777).

13. Petition for Writ of Certiorari, *supra* note 11, at 2.

14. *Hamdan II*, 415 F.3d at 35. Relying on the authority granted him by the AUMF, President Bush determined that al Qaeda is a nation that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and as a result authorized the use of force against al Qaeda and its operatives. In coordination with the November 13, 2001 Military Order authorizing the establishment of military commissions to hear war crimes charges, the President determined that Hamdan was subject to trial pursuant to this order, based on his determination that Hamdan was a member of al Qaeda or was otherwise involved in terrorism against the United States. Brief of Washington Legal Foundation, *supra* note 10, at 2-4.

15. *Hamdan II*, 415 F.3d at 35.

16. *Id.*; *see also* Petition for Writ of Certiorari, *supra* note 11, at 2 (noting that Hamdan was kept in solitary confinement for eight months and was released only four days before the start of the district court hearing).

17. *Hamdan II*, 415 F.3d at 35; *see also* Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

18. *Hamdan I*, 344 F. Supp. 2d at 155. The Military Order authorizes the Secretary of Defense to designate an "Appointing Authority" to issue orders regulating the military commissions. Lieutenant Swift filed the speedy trial demand with the Appointing Authority, John D. Altenburg. *Id.*

19. *Id.* Rejection of Hamdan's demand was premised on the President's finding that Hamdan was triable by the military commissions and was not entitled to trial by the regularly constituted courts-martial or military tribunals. Brief of Washington Legal Foundation, *supra* note 10, at 3.

20. *Hamdan I*, 344 F. Supp. 2d at 155. Lieutenant Charles Swift is legally domiciled in the Western District of Washington and thus argued that he was entitled to seek relief in Washington as Hamdan's "next friend." The government challenged Swift's standing as "next friend," and on September 14, 2004, the petition was amended to be in

In light of the Supreme Court's decision in *Rasul v. Bush* and the Ninth Circuit's decision in *Gherebi v. Bush*, the case was transferred to the United States District Court for the District of Columbia in August 2004.[21]

In July 2004, while his habeas petition was pending before the District Court in Washington, and approximately thirty-two months after the inception of his detention, the government formally charged Hamdan with conspiracy to commit attacks on civilians, murder by an unprivileged belligerent, and terrorism.[22] The charges against Hamdan arose from his position as Osama bin Laden's personal driver in Afghanistan between 1996 and November 2001, a post Hamdan admitted holding.[23] The charges also asserted that Hamdan served as bin Laden's personal bodyguard and delivered weapons and ammunition to al Qaeda members.[24] Hamdan adamantly insists that he is a civilian, has never been a member of al Qaeda, is not a terrorist, and committed no crimes.[25]

Hamdan's habeas petition consists of eight counts and alleges the denial of Hamdan's speedy trial rights as provided by UCMJ (count 1); challenges his pretrial detention as violative of the Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention" or "Convention") as a whole (count 2), and article 3 particularly (count 3);[26]

Hamdan's name only. *Id.* at 156; *see also* Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus at 2-3, *Hamdan I*, 344 F. Supp. 2d 153 (No. CV04-0777L) (brief filed with the United States District Court for the Western District of Washington on April 6, 2004, before the case was transferred to the District of Columbia).

21. *Hamdan I*, 344 F. Supp. 2d at 156 (noting that *Rasul v. Bush*, 542 U.S. 466 (2004) recognized federal district courts' jurisdiction of habeas petitions filed by Guantanamo Bay detainees and that *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2003) required all such cases be heard in the District of Columbia); Petition for Writ of Certiorari, *supra* note 11, at 2.

22. *Hamdan II*, 415 F.3d at 35; Petition for Writ of Certiorari, *supra* note 11, at 2.

23. *Hamdan II*, 415 F.3d at 35.

24. *Id.* at 35-36; Brief for the Respondents in Opposition at 4, Hamdan v. Rumsfeld, No. 04-702 (U.S. Dec. 2004).

25. Brief of Washington Legal Foundation, *supra* note 10, at 3.

26. The Geneva Conventions were promulgated in an effort to codify and regulate the rules of appropriate military conduct and are the principal instruments of humanitarian law. The basic tenets of the conventions are drawn from the seven fundamental rules of international humanitarian law in armed conflicts. Such customary law is "widespread, representative and virtually uniform" among parties to the main international humanitarian law treaties and include humane treatment for combatants, the sick, wounded and captured, fundamental judicial guarantees, rules governing means of warfare, and prohibitions against targeting civilians and torture. *See generally* Int'l Comm. of the Red Cross (ICRC), Treaties and Customary International Humanitarian Law, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_treaties_and_customary_law (last visited Apr. 24, 2006).

Generally, the conventions and supplementary protocols draw a distinction between civilians and combatants, requiring the latter to be clearly distinguishable on the field of battle. Combatants who fall within the guidelines of the Geneva Conventions enjoy various protections, including, but not limited to, humane treatment and immunity from punishment for most acts committed during fighting. The conventions also provide grievance procedures, under which human rights violations are addressed. The Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention" or "Convention") deals specifically with the treatment of prisoners of war (POW). It is

argues that the presidential order establishing the military commissions violates separation of powers principles (count 4) and invests the commission with authority exceeding the laws of war (count 7); asserts that the commission violates the equal protection clauses of the Fifth Amendment (count 5) and 42 U.S.C. § 1981[27] (count 6); and argues that the Military Order does not apply to him (count 8).[28] Petitioner Hamdan does not challenge the courts-martial or civilian criminal systems; rather, he seeks to benefit from the preexisting rules governing congressionally authorized military tribunals and requests direct oversight of his trial by the federal courts.[29] Hamdan's petition seeks, inter alia, an order directing his release from solitary confinement at Guantanamo Bay and preventing his trial before a military commission.[30]

On November 8, 2004, the district court partially granted Hamdan's petition and denied Respondent Rumsfeld's motion to dismiss.[31] Judge James Robertson of the D.C. District Court granted Hamdan's petition for habeas corpus to the extent that unless a competent tribunal determined that he was not entitled to prisoner of war (POW) status, he could only be

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this convention to which both the district and appeals courts refer in Hamdan's case. The provisions of the Third Geneva Convention define the types of conflicts covered (article 3), the definition of POW (article 4), and provide procedures for review of combatant status (article 5 and article 102). The remaining articles of the convention deal more specifically with the rights and duties of "High Contracting Parties" (signatory nations) and more fully outline the rules governing general protections, captivity, internment, and treatment of POWs. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* http://www.unhchr.ch/html/menu3/b/91.htm [hereinafter Third Geneva Convention].

Hamdan's petition essentially asserts that the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there and, as such, he claims that he qualifies for POW status and the protections accorded therewith, namely immunity from trial by commission. Under article 3, Hamdan alleges violations of the treatment required for persons captured during hostilities between High Contracting Parties--article 3 prohibits cruel treatment and torture and forbids "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court." Third Geneva Convention art. 3, *supra*. Thus, Hamdan argues that the military commission is not a sanctioned procedure under either article 3 or article 102 of the convention, and is therefore void. Furthermore, he claims that where doubt exists as to a detainee's status, article 5 of the Third Geneva Convention requires that the detaining authority provide an individualized status hearing by a competent tribunal, and until the tribunal makes a determination, he must be regarded as a POW. *Hamdan I*, 344 F. Supp. 2d at 160-65; *see also* LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 49-52 (2003), *available at* http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (describing the use of parallel systems of criminal law enforcement and military jurisdiction against suspected terrorists). Note that Lawyers Committee for Human Rights is now Human Rights First.

27. 42 U.S.C.A. § 1981 (2005) provides for "equal rights under the law."

28. *Hamdan I*, 344 F. Supp. 2d at 156. Hamdan essentially argues, in counts 4 and 5, that the Military Order authorizing the creation of military commissions violates constitutional separation of powers principles and violates the Fifth Amendment because it isolates aliens for adverse treatment.

29. *Hamdan II*, 415 F.3d at 37.

30. Brief of Washington Legal Foundation, *supra* note 10, at 4.

31. Petition for Writ of Certiorari, *supra* note 11, at 2.

tried by court-martial.[32] The district court decided four issues central to the disposition of Hamdan's habeas petition: (1) whether the court must abstain from interfering in military proceedings where the jurisdiction of the military commission is challenged; (2) whether the Third Geneva Convention and attendant protections are judicially enforceable and whether the petitioner may claim POW protections until a "competent tribunal" considers and decides his legal status; (3) whether the military commission procedures are "fatally inconsistent" with the UCMJ and international and human rights law; and (4) whether Hamdan's pretrial detention was "unlawful and inhumane."[33]

Judge Robertson considered three undisputed "facts" central to the petition: (1) Hamdan was captured in Afghanistan during hostilities following September 11, 2001; (2) he claimed POW status under the Third Geneva Convention; and (3) a competent tribunal did not determine whether Hamdan is entitled to such status.[34]

In order to proceed, Judge Robertson first had to declare that the "well-established doctrine that federal courts will 'normally not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted'" was not applicable.[35] Essentially, Robertson avoids the "exhaustion principle"[36] by distinguishing prior precedent and finding that Hamdan's jurisdictional claim denying the right of the military to try him at all, falls within an exception that "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him."[37] As a result, Judge Robertson holds that abstention is not appropriate where a petitioner challenges the jurisdiction of a specially convened military commission and disputes the lawfulness of the plan to try him for

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32. *Hamdan I*, 344 F. Supp. 2d at 173; *see also* Petition for Writ of Certiorari, *supra* note 11, at 3.

33. *See generally Hamdan I*, 344 F. Supp. 2d at 157-73.

34. *Id.* at 156.

35. *Id.* at 157 (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975), which held that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to the resolution of his case . . . the federal district courts must refrain from intervention"). Judge Robertson states that despite this general principle, the *Councilman* court noted that it is "especially unfair to require exhaustion . . . when the complainants' raised substantial arguments denying the right of the military to try them at all." *Hamdan I*, 344 F. Supp. 2d at 157. It is within this jurisdictional exception that Judge Robertson places Hamdan's argument. *Id.*

36. This principle is also referred to as the abstention principle. In essence, both terms refer to the notion that the courts should not interfere with pending or commenced military proceedings. However, the district court notes that in *Parisi v. Davidson*, 405 U.S. 34 (1972), the Supreme Court stated that although the rule is often "framed in terms of 'exhaustion' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems." *Hamdan I*, 344 F. Supp. 2d at 157. The district and appeals courts in *Hamdan* do not find any of the policy factors supporting the doctrine of comity applicable here. Hamdan v. Rumsfeld (*Hamdan II*), 415 F.3d 33, 36-37 (D.C. Cir. 2005); *Hamdan I*, 344 F. Supp. 2d at 157-58.

37. *Hamdan I*, 344 F. Supp. 2d at 157 (citing *New v. Cohen*, 129 F.3d. 639 (D.C. Cir. 1997), which created an exception to the general exhaustion rule where the petitioner raises a jurisdictional argument denying the right of the military to try him).

alleged war crimes.[38]

As to Hamdan's assertions in counts 4 and 7, the district court refuses to accept the government's assertion that the President has "untrammeled power to establish military tribunals,"[39] and holds that according to *Youngstown Sheet & Tube Co. v. Sawyer*, the President's inherent power in this realm is quite limited.[40] This analysis relies primarily on the Supreme Court's holdings in *Ex Parte Quirin* and *Application of Yamashita*,[41] which outlined the scope of presidential power to appoint military commissions. These cases establish that the "President's authority to prescribe the procedures for military commissions" was conferred by Congress through the Articles of War (a predecessor to the Uniform Code of Military Justice).[42] Robertson concludes that because Congress exercised its constitutional power to "define and punish . . . [o]ffenses against the Law of Nations" pursuant to Article I, Section 8, Clause 10 of the Constitution, Congress has preserved its traditional jurisdiction over the establishment of military commissions and that any additional jurisdiction would have to descend from inherent executive authority.[43] On this point Robertson states that because Congress has acted in this realm, any inherent presidential power is severely restricted.[44]

Judge Robertson next considers count 2, which implicates the content of the "law of war" and the protections afforded to POWs.[45] He concludes that the "law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt."[46] Robertson notes that according to the plain language of the Third Geneva Convention, acknowledged to be part of the law of war,[47] the Convention

38. *Hamdan I*, 344 F. Supp. 2d at 158.

39. *Id.* at 158.

40. *Id.* at 159-60 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which held that the President's power has three levels: (1) where he acts according to his constitutional power and under authorization of Congress, (2) where he acts according to inherent constitutional power, and (3) where his power is "at its lowest ebb" where "the President takes measures incompatible with the expressed or implied will of Congress"); *see also* Petition for Hearing En Banc, *supra* note 1, at 5.

41. *Hamdan I*, 344 F. Supp. 2d at 159 (citing *Ex Parte Quirin*, 317 U.S. 1 (1942), *In re Yamashita*, 327 U.S. 1 (1946), and *Madsen v. Kinsella*, 343 U.S. 341 (1952), noting that the *Quirin* and *Yamashita* cases "make it clear that [the UCMJ] represents Congressional approval of the historical, traditional, non-statutory military commission. . . . [T]hat approval, however, does not extend past 'offenders or offenses that by statute or by the law of war may be tried by military commissions'").

42. *Hamdan I*, 344 F. Supp. 2d at 158.

43. *Id.* at 159.

44. *See supra* note 39 and accompanying text.

45. *Hamdan I*, 344 F. Supp. 2d at 160-65.

46. *Id.* at 160.

47. *Id.* (citing Military Commission Instruction No. 2, § (5)(G) (Apr. 30, 2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf, and 32 C.F.R. § 11.5(g) (2004)). In the United States, the executive may detain and prosecute those suspected of violent acts, using a limited and specific set of legal tools such as criminal, civil, and military statutes. The executive's power is further defined by international law. A number of international human rights treaties--for example, the International Covenant on Civil and Political Rights and the American Convention on Human Rights--protect the rights of detainees, constraining executive detainment

applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."[48] This language, holds Robertson, thus covers the hostilities in Afghanistan when Hamdan was captured, since both the United States and Afghanistan have accepted the Convention.[49] He continues that if Hamdan is entitled to POW protections afforded under the Convention, he cannot be tried by a military commission because the applicable procedures violate the express requirements of the Convention.[50]

Judge Robertson rejects the position that Hamdan is not entitled to the protections of the Convention or to POW status. On the first point, the government argues that Hamdan was captured "in the course of a separate conflict with al Qaeda," rather than in the course of hostilities between Afghanistan and the United States.[51] Notwithstanding the fact that this determination was made pursuant to a presidential "finding," Robertson refutes this argument, noting that the notion of a "separate" conflict is contrary to "public understanding" and "finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with."[52] He concludes that at some level, the "Third Geneva Convention applies to all persons detained in Afghanistan" because the hostilities undoubtedly implicate the "international human [rights] norms" offered by the Convention.[53]

Next, Judge Robertson concludes that both the Geneva Conventions

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power, and apply even in cases involving terrorism. Moreover, in the context of international armed conflict, the United States must abide by international humanitarian law, otherwise known as the "law of war." The primary instruments of international humanitarian law are the Geneva Conventions, which the United States has signed and ratified. Under this system, "every person in enemy hands must have some status under international law" and is afforded basic rights and protections. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 26, at 50; *see also* Int'l Comm. for the Red Cross, *supra* note 26.

48. *Hamdan I*, 344 F. Supp. 2d at 160 (citing article 2 of the Third Geneva Convention).

49. *Id.*

50. *Id.* (noting that article 102 of the Third Geneva Convention requires that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power" and that the military commissions do not satisfy such strictures).

51. *Id.* at 160.

52. *Id.* at 160-61 (noting that the presidential finding stated that the Geneva Convention applies to Taliban, but not al Qaeda, detainees captured in Afghanistan and that the government claimed the finding to be "not reviewable").

53. *Id.* at 161-63 (drawing a distinction between the full protections offered by POW status and the limited protections offered under Common Article 3). All four of the Geneva Conventions share the same article 3, "Common Article 3," which provides that:

> [i]n 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 found to apply, as a minimum, the following provisions . . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court afford-

and applicable Army Regulations[54] provide that "whenever a detainee makes . . . a claim [of entitlement to POW status,] his status is 'in doubt'"[55] and that a detainee "shall enjoy the protection of the Convention until such time as [his] status has been determined by a competent tribunal."[56] Robertson further holds that Hamdan's review before the Combatant Status Review Tribunal (CSRT)[57] does not address a detainee's status under the

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ing all the judicial guarantees which are recognized as indispensable by civilized peoples.

Id. at 162-63 n.8. Judge Robertson rejects the government's argument that Common Article 3 does not apply because it was meant to cover local, not international, conflicts, holding that the provision must apply as a "minimum yardstick . . . [applicable] to international conflicts . . . [as] 'elementary considerations of humanity.'" *Id.* at 163 (quoting the International Court of Justice). Robertson goes on to state that the position of the government limiting the application of the Geneva Convention protections, only "weaken[s] the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad." *Id.* at 163; *see also* Brief for General David M. Brahms et al. as Amici Curiae Supporting Petitioner-Appellee at 3, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (stating that

> [t]he United States ratified the Geneva Conventions to protect Americans captured in armed conflict. For more than 50 years, the United States has insisted on a broad, generous interpretation of the Conventions to assure the welfare of captured U.S. troops. If Appellants are permitted to deny the detainees the Conventions' protections, tyrants will hide their oppression under U.S. precedent and our servicemen and women will pay with their lives).

The position of the government in this case is starkly different from the position and behavior of the United States in previous conflicts and will only weaken its ability to demand application of the Geneva Conventions. The Lawyers Committee for Human Rights (now Human Rights First) has noted that the erosion of human rights protections in the United States following September 11 has had a profound effect on human rights standards around the world. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 26, at 73. The United States' selective enforcement of international human rights treaties to which it is bound has caused other governments to disregard domestic and international laws governing human rights. *Id.* Prior to September 11, the United States was a leader in promoting the development of international human rights law and often took the lead in enforcing such standards. However, the development and implementation of aggressive counterterrorism laws have undermined established norms of due process and threaten detainees' access to counsel and judicial review. *Id.* at 75-76 (including a lengthy discussion of various opportunistic governments around the world which have co-opted the U.S. "war on terror" as an endorsement of their own longstanding practices that violate human rights).

54. Hamdan claims that Army Regulation 190-8, § 1-6(a) applies to his case and requires that "whenever a detainee makes [ ] a claim [that he is entitled to POW status] his status is in 'doubt.'" *Hamdan I*, 344 F. Supp. 2d at 162. Army Regulation 190-8 establishes "policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Personnel, and Other Detainees." Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, at i (Oct. 1, 1997), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf. The regulation expressly incorporates domestic and international laws and treaties, including the Geneva Conventions, to regulate the treatment of detainees. *Id.* at 1.

55. *Hamdan I*, 344 F. Supp. 2d at 162.

56. *Id.* at 161 (quoting article 5 of the Third Geneva Convention).

57. CSRTs were instituted pursuant to a July 7, 2004 Department of Defense order. According to this order, the CSRT applies only to foreign nationals under the control of the Department of Defense at Guantanamo Bay and provides the detainees an "opportunity to contest designation as an enemy combatant . . . [and] to consult with and be assisted by a personal representative . . . and [ ] the right to seek a writ of habeas corpus

Geneva Conventions and that the CSRT is not a "competent tribunal."[58] Additionally, Robertson rejects the government's position that the President's decision to withhold POW status for members of al Qaeda is binding, declaring that the President may not be considered a "competent tribunal" and that Hamdan must be accorded the full protections of a POW until a specific status determination has been made.[59]

In response to the government's claim that even if Hamdan has rights under the Third Geneva Convention, they are not judicially enforceable,[60] Judge Robertson concludes that the Convention is "self-executing."[61] Treaties are "non-self-executing" when they do not become effective as domestic law without implementing legislation.[62] By considering the "intent of the signatory parties as manifested by the language of the treaty" and the legis-

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in the courts of the United States." The CSRT consists of three commissioned officers of the U.S. Armed Forces. If the Tribunal determines that the detainee should no longer be classified as an enemy combatant, the detainee is released to his country of citizenship. *See generally* Memorandum from Department of Defense Deputy Secretary Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (last visited Feb. 27, 2006).

58. *Hamdan I*, 344 F. Supp. 2d at 162.

59. *Id.*

60. *Id.* at 163-64 (recognizing the government's argument that the Convention is "non-self-executing" and that Hamdan has failed to state a claim upon which relief can be granted because the Convention does not give rise to a private cause of action, but holding that "as an initial matter . . . Hamdan has not asserted a 'private right of action'" and that the "Convention is implicated . . . by operation of the statute [10 U.S.C.A. § 821] that limits trials by military tribunal to 'offenders . . . triable under the law of war'"). See also Brief for General David M. Brahms et al., *supra* note 53, at 15, noting that

> Hamdan has not asserted a private right of action under the GPW [Third Geneva Convention]. Rather, he has sought federal habeas relief on the ground that he has been held in "custody in violation of the Constitution or laws or *treaties* of the United States." Thus, even if the Conventions are deemed not to be self-executing, 'the non-self-executing nature of a treaty is not fatal to an assertion of jurisdiction under it, provided that the cause of action over which jurisdiction is asserted already exists in some other statute--as is the case for habeas petitions.

Id. (internal citations omitted) (emphasis in original).

61. *Hamdan I*, 344 F. Supp. 2d at 165 (stating that U.S. courts are bound to give effect to international law and to international agreements of the United States unless such agreements are non-self-executing).

62. *Id.* Robertson states that a treaty is "non-self-executing if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required." *Id.* at 164. The controlling law on the subject of whether or not treaties are self-executing is *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976) which instructs a court interpreting a treaty to "look to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the treaty." *Hamdan I*, 344 F. Supp. 2d at 164. Under this precedent, Judge Robertson concludes that "it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed 'required to give effect to the provisions contained in the four conventions,' [ ] and found that only four provisions required implementing legislation." *Id.* (internal citation omitted).

lative history, Robertson concludes that only four provisions of the Third Geneva Convention require implementing legislation and that none of these apply to Hamdan's case.[63] As a result, Hamdan may not be tried for war crimes except by a duly convened court-martial.

Judge Robertson abstains from considering Hamdan's rights under Common Article 3 (count 3)[64] because the requirement of "trial before a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples' has no fixed, term of art meaning" and "[o]nly Hamdan's right to be present at every phase of his trial . . . is of immediate pretrial concern."[65] Accordingly, Robertson holds that because the military commission procedures allow Hamdan to be excluded from portions of the trial and deny confrontation rights, they are inconsistent with the requirements of the UCMJ and are thus void.[66] Although noting that the procedures represent a "dramatic deviation from the confrontation clause [and] could not be countenanced in any American court" and the right to be present at one's own trial is "established as a matter of international humanitarian and human rights law,"[67] Robertson does not reach the issue of whether Hamdan may rely on constitutional notions of fairness. Instead, he finds the procedures unlawful because they are inconsistent with the UCMJ and because the government's argument for procedural "flexibility" in military commission proceedings has no sup-

63. *Hamdan I*, 344 F. Supp. 2d at 164. Robertson notes that while articles 129 and 130, providing for additional criminal penalties imposed on "those who engaged in 'grave' violations of the Conventions, such as torture . . . [or] medical experiments," required additional implementing legislation, articles 5 and 102, which are dispositive in Hamdan's case, do not:

> [b]ecause the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Id. at 164-65.

64. *See supra* note 53 and accompanying text.

65. *Hamdan I*, 344 F. Supp. 2d at 165-66.

66. *Id.* at 166-68. Robertson's voiding of the military commission procedures does not go so far as to declare final review by the President "inconsistent with" the UCMJ.

67. *Id.* at 168. Judge Robertson notes that the problem with the commission rules is neither "remote nor speculative" as the government has already admitted that for two days of the trial Hamdan will be excluded from the proceedings. *Id.* at 171. He also states that a provision that excludes the "accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the . . . right to be present." *Id.* at 172. On this basis, Robertson holds that the military commission cannot try Hamdan. *Id.*; *see also* Brief for Petitioner-Appellee at 6, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (noting that the commission rules permit Hamdan to be excluded from portions of the trial and that "[t]hese actions violate the longstanding guarantee of confrontation, one 'founded on natural justice'").

port in the evidence.[68]

Finally, Judge Robertson holds that Hamdan's claim of inhumane pretrial detention (count 2) is moot because two days before oral argument, Hamdan was moved back to the general detainee population at Guantanamo Bay.[69] Robertson also states that Hamdan's speedy trial (count 1) and equal protection claims (count 5) need not be ruled upon.[70] He then grants Hamdan's petition for habeas corpus in part and orders:

> (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the [UCMJ]; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion . . . is amended so that it is consistent with and not contrary to [the] UCMJ . . . Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing [ ] and returned to the general population of detainees . . . .[71]

In so holding, Judge Robertson invokes several provisions of the UCMJ and the Third Geneva Convention to enjoin the military commission proceedings against Hamdan.[72]

In response to Judge Robertson's order granting Hamdan's habeas petition and invalidating the military commissions, on November 16, 2004, Respondent Rumsfeld filed a notice of appeal.[73] The United States Court of Appeals for the District of Columbia Circuit reversed the district court on July 15, 2005 in an opinion written by Judge Randolph and joined by Judge Roberts (in full) and Judge Williams (in part).[74] The appellate court agrees with the district court that the petitioner's claims fall within

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68. *Hamdan I*, 344 F. Supp. 2d at 168-69. Robertson states that the government has failed to make an adequate showing of "need" which would justify excluding Hamdan from trial. *Id.* at 170. Such "need" is often demonstrated by military exigencies, including the obligation to protect confidential information. *Id.* at 171.

69. *Id.* at 172.

70. *Id.* at 172-73. Robertson states that until a few days before oral argument, Hamdan's most urgent claims were: (1) that he had been unlawfully and inhumanely detained in isolation since December 2003; and (2) that he was entitled to the protections of the UCMJ's speedy trial rule and that he had been detained for more than the maximum 90 days permitted by article 103 of the Third Geneva Convention. *Id.* at 172. On the first claim, Robertson acknowledges that on the Friday afternoon before the oral argument held on Monday, October 25, 2004, Hamdan was moved back to Camp Delta. He further notes that while the change in status "may not exactly moot Hamdan's claim about his confinement in isolation," a concern with Hamdan's treatment in the future is "not susceptible to review on a writ of habeas corpus." *Id.* On the second claim, Robertson states that the speedy trial concerns were more urgent before Hamdan's transfer out of Camp Echo, and, moreover, by virtue of the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), he may be detained for the duration of the hostilities and that the UCMJ speedy trial rule does not specify a number of days that will require dismissal of a suit. *Hamdan I*, 344 F. Supp. 2d at 172-73.

71. *Hamdan I*, 344 F. Supp. 2d at 173. Based on part three of his order, it appears that Judge Robertson considered Hamdan's removal from isolation in Camp Echo to the pre-Commission detention wing of Camp Delta insufficient and required the government to place Hamdan in the general population of detainees at Camp Delta.

72. Brief for the Respondents in Opposition, *supra* note 24, at 17-21.

73. *See* Hamdan v. Rumsfeld (*Hamdan II*), 415 F.3d 33 (D.C. Cir. 2005).

74. *Id.*

an exception to the abstention doctrine,[75] but holds that, through the AUMF, Congress authorized presidential creation of military commissions,[76] that the Third Geneva Convention is not judicially enforceable,[77] and that to the extent "there [is] ambiguity about the meaning" and applicability of the Convention, the President's view prevails.[78]

On appeal the court considers (1) whether the district court erred in refusing to abstain from considering Hamdan's claims; (2) whether the President may unilaterally to create military commissions; (3) whether the Third Geneva Convention confers a right to judicial enforcement; (4) whether the Third Geneva Convention applies to members of al Qaeda; (5) whether the district court erred in declaring that the military commission procedures must be coextensive with the procedures contained in the UCMJ; and (6) whether the district court erred in holding that, until a competent tribunal determines that Hamdan is not a POW, he may only be tried by court-martial.[79]

The appellate court begins by rejecting the government's argument that the court should abstain from exercising jurisdiction over Hamdan's habeas petition.[80] In agreement with Judge Robertson's holding, the court simply states that because Hamdan "contend[s] that a military commission has no jurisdiction over him . . . [h]is claim . . . falls within the exception to *Councilman* . . . ."[81]

Next, the court quickly dismisses Hamdan's argument that the President violated the constitutional principle of separation of powers when he established the military commissions by ruling that the President's Novem-

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75. *Id.* at 36-37.

76. *Id.* at 38; *see also* Petition for Writ of Certiorari, *supra* note 11, at 4.

77. *Hamdan II*, 415 F.3d at 40.

78. *Id.* at 42. Arguably, the appellate court condones the violation of traditional international law obligations, such as the minimum due process and human rights standards contained within various international treaties including the International Covenant of Civil and Political Rights, the Universal Declaration of Human Rights, and the Third Geneva Conventions. The United States, as a signatory, is legally bound to meet the requirements and standards included therein. The military commission process at issue in this case does not satisfy the various international legal standards and should be declared void. *See generally* Amicus Curiae Brief of 422 Current and Former Members of the United Kingdom and European Union Parliamentarians in Support of Petitioner, Hamdan v. Rumsfeld, No. 05-184 (U.S. Jan. 6, 2006) (arguing that international law is a part of the law of the United States, that respect for international law reflects the United States' tradition and serves U.S. interests, and that international law applies to detainees at Guantanamo Bay in order to preserve fundamental human rights). See also Brief for General David M. Brahms et al., *supra* note 53, at 3, stating

> [f]or more than 50 years, the United States has insisted on a broad, generous interpretation of the Conventions to assure the welfare of captured U.S. troops. If Appellants are permitted to deny the detainees the Conventions' protections, tyrants will hide their oppression under U.S. precedent and our servicemen and women will pay with their lives.

Id.

79. Petition for Hearing En Banc, *supra* note 1, at 1-2; *see Hamdan II*, 415 F.3d 33.

80. *Hamdan II*, 415 F.3d at 36-37.

81. *Id.* at 37; *see also supra* notes 35-38 and accompanying text. The *Councilman* exception to the exhaustion principle applies when the petitioner raises a jurisdictional argument denying the right of the military to try him.

ber 13, 2001 Military Order was authorized by Congress.[82] The court initially expresses doubt as to whether "someone in Hamdan's position is entitled to assert such a constitutional claim,"[83] but holds that regardless of the petitioner's status, there is little merit to the claim.[84] When the President issued the Military Order subjecting members of al Qaeda to trial by military commission, he relied on "four sources of authority: his authority as Commander in Chief of the Armed Forces[;] . . . [the AUMF;] 10 U.S.C. § 821; and 10 U.S.C. § 836."[85] Because the last three sources of authority are acts of Congress, the court finds it "impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions."[86] As a result of this finding, the court notes that it need not address the question of whether the President has unilateral power to create the commissions.[87]

The court next overturns the decision of the district court that the Third Geneva Convention may be judicially enforced.[88] The court states that while the Constitution proclaims that treaties "shall be the supreme Law of the Land," the United States "has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights."[89] Rather, the court characterizes treaties as a "compact between independent nations" where enforcement is achieved according to the "interest and honor of the governments which are parties to it."[90] The court asserts that the district court decision "disregards the principles" of treaty enforcement and "is contrary to the Convention itself."[91] The court's interpretation of the holdings in *Johnson v. Eisentrager* and *Holmes*

82. *Hamdan II*, 415 F.3d at 37-38.

83. *Id.* at 37 (noting that because Hamdan is not a U.S. citizen, he may lack standing to allege a claim based on a constitutional right or protection and citing *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) and *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) in support of the proposition that Hamdan, as an enemy combatant, is denied such rights because "aliens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country").

84. *Hamdan II*, 415 F.3d at 37. Hamdan's argument is that "Article I, Section 8 of the Constitution gives Congress the power to 'constitute tribunals inferior to the Supreme Court,' that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II." *Id.* (citing Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002)).

85. *Hamdan II*, 415 F.3d at 37; *see also supra* notes 5-7 and accompanying text.

86. *Id.* at 38.

87. The district court explicitly held that the President acted without congressional authorization, finding that Congress intended to preserve its "traditional jurisdiction over enemy combatants." Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 159 (D.D.C. 2004) (quoting from *In re Yamashita*, 327 U.S. 1, 20 (1946)); *see also supra* note 40 and accompanying text. By reaching this conclusion, the district court had to address the question of whether inherent constitutional presidential power provided the authority to create military commissions, a problem of constitutional interpretation the appellate court avoided by finding congressional authorization for the commissions.

88. *Hamdan II*, 415 F.3d at 38-40.

89. *Id.* at 38 (quoting U.S. CONST. art. VI, cl. 2).

90. *Id.* at 38.

91. *Id.* at 39.

v. *Laird*[92] provides support for this position and allows the court to conclude that the Third Geneva Convention "does not confer upon Hamdan a right to enforce its provisions in court."[93]

The court additionally holds that even if the Third Geneva Convention is judicially enforceable, Hamdan is still not eligible for its protections.[94] Hamdan contends that trial by military commission violates his rights under the Convention, which provides that a "[POW] can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[95] However, the court holds that Hamdan does not fit the definition of a POW,[96] identifying two problems which preclude Hamdan's claim to these protections.

First, the court concludes that because Hamdan "does not purport to be a member of a group who displayed 'a fixed distinctive sign recognizable at a distance' and who conducted 'their operations in accordance with the laws and customs of war,'" he does not fall within the definition of a POW outlined by the Third Geneva Convention.[97] Second, the court holds that the Convention does not apply to members of al Qaeda.[98] According to the appeals court, the Convention contemplates only two types of armed conflicts: an international conflict between two or more signatory nations, and civil war occurring within the territory of a signatory nation.[99] The first type does not apply to the facts of the case, says the court, because al Qaeda is neither a state nor a "High Contracting Party."[100] As to the provision concerning civil war, the appeals court acknowledges that Afghani-

92. *Id.* at 39-40 (noting that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) held that the Convention was not judicially enforceable and that while the Convention specifies rights of POWs, responsibility for enforcement is placed in military and political authorities, thus implicating the need for implementing legislation; further noting that *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972) applied the *Eisentrager* holding to deny judicial enforcement of another international treaty, the NATO Status of Forces Agreement).

93. *Hamdan II*, 415 F.3d at 40. The court also stated that the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004) did not render the Geneva Convention judicially enforceable merely because the federal district courts were given jurisdiction over habeas corpus petitions filed on behalf of Guantanamo detainees: "[t]hat a court has jurisdiction over a claim does not mean the claim is valid. . . . The availability of habeas may obviate a petitioner's need to rely on a private right of action, but it does not render a treaty judicially enforceable." *Hamdan II*, 415 F.3d at 39-40 (internal citations omitted).

94. *Hamdan II*, 415 F.3d at 40.

95. *Id.*

96. *Id.*

97. *Id.* (citing the Third Geneva Convention, *supra* note 26, arts. 4A(2)(b), (c) & (d)).

98. *Hamdan II*, 415 F.3d at 41.

99. *Id.* (citing JEAN DE PREUX, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) which notes that Common Article 3 applies only to armed conflicts that "take place within the confines of a single country"). The appellate court goes on to note that President Bush determined that the armed conflict with al Qaeda was "international in scope," and overturns the district court's determination that the United States was not engaged in a separate conflict with al Qaeda distinct from its conflict with the Taliban. *Hamdan II*, 415 F.3d at 41-42.

100. *Hamdan II*, 415 F.3d at 41.

stan is a "High Contracting Party" and that Hamdan was captured during hostilities there. Nonetheless, it affirms the President's determination that the United States is engaged in a separate conflict with al Qaeda and that consequently, the Third Geneva Convention does not apply.[101] In so holding, the appellate court expressly overturns the district court's ruling on this matter, noting that

> the President 'has a degree of independent authority to act' in foreign affairs . . . [T]he 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. . . . [T]he President's reasonable view . . . must therefore prevail.[102]

The court extends this deferential posture by holding that even if Geneva Convention protections covered members of al Qaeda, the court would abstain from testing the procedures of the military commission.[103] The court bases this ruling on the principle of comity--although Hamdan argues that the military lacks jurisdiction, his demand for Geneva Convention protections goes to *how*, and not *whether*, the commission may try him.[104] Hamdan's claim, structured in this manner, falls outside the exception to the *Councilman* doctrine[105] and requires that the court defer to the military proceedings.[106]

The court then holds, based on a close reading of the plain language of the UCMJ, that the district court's interpretation, requiring the military commissions to comply in all respects with the provisions pertaining to courts-martial, was erroneous.[107] Noting that the UCMJ consistently distinguishes between courts-martial and military commissions, the court states that the interpretation of the district court eliminates the meaningful distinction between the terms.[108] The more reasonable reading, argues the court, is that in establishing the tribunals, the "President may not adopt procedures [. . .] contrary to or inconsistent with the UCMJ's provisions governing military commissions."[109] Therefore, because the right to be present at all stages of the trial is assured pursuant to an UCMJ rule governing only courts-martial, Hamdan's trial by military commission is not

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101. *Id.* at 41-42.

102. *Id.* at 42. Judge Robertson expressly stated that the conflict with al Qaeda was inseparable from the conflict in Afghanistan and that the protections of the Geneva Convention were triggered by the location of the conflict rather than by the combatant's affiliation. Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 161 (D.D.C. 2004).

103. *Hamdan II*, 415 F.3d at 42.

104. *Id.*

105. *See supra* note 35 and accompanying text.

106. *Hamdan II*, 415 F.3d at 42.

107. *Id.* at 42-43.

108. *Id.* at 42.

109. *Id.* at 43; *see also* Reply Brief for Respondents-Appellants at 26, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. Jul. 15, 2005) (No. 04-5393) (stating that if the UCMJ is read to require military commissions to comply with all UCMJ rules, which by their terms apply only to courts-martial, "the language in other UCMJ provisions extending a particular rule to military commissions would be superfluous").

invalidated if it lacks this procedural protection.[110] The court expressly rejects the district court's holding that the military commission procedures are illegal because they are "fatally contrary to or inconsistent" with the UCMJ,[111] and authorizes broad presidential power to create and convene military tribunals, stating that the UCMJ imposes only "minimal restrictions upon the form and function of military commissions."[112]

Finally, the court rejects Hamdan's argument,[113] and the district court's finding, that he is entitled to POW protections under the Third Geneva Convention until "some other legal status is determined by [a] competent *authority*."[114] Because the President found that Hamdan was not a POW under the Convention, and because "nothing in the regulations, and nothing Hamdan argues, suggests that the President is not a 'competent authority,'" Hamdan's legal status has been sufficiently determined.[115] Furthermore, the court holds that the military commission may satisfy Hamdan's demand that a "competent tribunal" determine his status.[116] According to army regulations, a "competent tribunal" must be composed of three commissioned officers; because the military tribunal to try Hamdan is composed of three colonels, the court "see[s] no reason why Hamdan could not assert his claim to [POW] status before the military commission at the time of his trial and thereby receive the judgment of a 'competent tribunal' . . . ."[117]

Judge Williams' brief concurring opinion affirms all aspects of the majority opinion, "except for the conclusion that Common Article 3 does not apply to the United States' conduct toward al Qaeda personnel captured in the conflict in Afghanistan."[118] Judge Williams fully endorses the court's judgment, however, because he agrees with the court's holding that the Third Geneva Convention is not judicially enforceable and that any claims under Common Article 3 are precluded until military proceedings against Hamdan are concluded.[119] He argues only that Common Article 3 "fills the gap" between those Convention protections extended to signatory powers and those withheld from non-signatory nations; thus, he asserts, the words "'not of an international character' are sensibly understood to

110. *Hamdan II*, 415 F.3d at 43.

111. Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 166 (D.D.C. 2004).

112. *Hamdan II*, 415 F.3d at 43.

113. *Id.* at 43.

114. *Id.* Hamdan argues that even if the Geneva Convention is not judicially enforceable, Army Regulation 190-8, *supra* note 54, provides relief because it requires that prisoners receive the protections of the Convention until their legal status is determined by a "competent authority."

115. *Id.* Essentially, the court agrees with the government that the President, acting pursuant to congressional authorization, has the power to unilaterally determine the legal status of an enemy combatant such as Hamdan.

116. *Id.*

117. *Id.*

118. *Id.* at 44 (Williams, J., concurring); *see also supra* note 53 and accompanying text (summarizing Judge Robertson's analysis of the applicability of Common Article 3).

119. *Hamdan II*, 415 F.3d at 44.

refer to a conflict between a signatory nation and a non-state actor."[120] The language and structure of Common Article 3, therefore, encompass the conflict between al Qaeda (a non-state actor) and the United States (a signatory nation).

By holding that (1) Congress authorized the creation and implementation of the military commission that was to try Hamdan, (2) the Third Geneva Convention is not judicially enforceable, (3) the President's view of the applicability of the Third Geneva Convention to members of al Qaeda prevailed, and (4) Hamdan could only contest the judgment of the commission in federal court after he exhausted his military remedies,[121] the appellate court broadly defined presidential power to detain and try enemy combatants and completely disagreed with the district court on the same questions of law and fact.

As is clear from the foregoing summary of the district and appellate courts' opinions, this case implicates serious issues concerning the powers of the President in time of military conflict, the proper role of the three branches of government, the meaning and impact of international treaties and laws, and the availability of review for judgments and punishments meted out by military tribunals.[122] In resolving these issues in favor of the government, the Court of Appeals wholly endorsed the use of military commissions as a lawful means of prosecuting and punishing alien detainees. The appeals decision supported full presidential power to create, convene, and structure military tribunals, unbound by the traditional strictures of longstanding constitutional, international, and statutory law.[123] The ruling completely forecloses Third Geneva Convention and Army Regulation protections and will require terrorism cases to be tried by commission, with procedures limited only by "minimal restrictions."[124] The impact of the appellate court's holding on the ability of Guantanamo detainees to obtain meaningful review is likely to be significant, consider-

120. *Id.* (citing the text of Common Article 3, which provides minimal protection for non-state parties in "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties").

121. *See generally Hamdan II*, 415 F.3d 33.

122. *See generally* Petition for Hearing En Banc, *supra* note 1.

123. The military commissions created to try detainees held at Guantanamo Bay operate outside the substantive and procedural rules applicable in U.S. criminal courts or U.S. courts-martial and outside international law governing the detention of POWs under the Geneva Conventions. This extra-legal measure seems to place the decision of whether a detainee is to be held indefinitely or tried by military commission "entirely within the discretion of the executive branch." LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 26, at 49-52.

124. *Hamdan II*, 415 F.3d at 43; *see also* Reply Brief of Petitioner to Government's Opposition to Certiorari app. C at 11a, Hamdan v. Rumsfeld (U.S. Sept. 12, 2005) (No. 05-184) (a brief filed in another case to address the effects of the *Hamdan* decision). Moreover, the government's efforts to address the threat posed by al Qaeda have produced a complex situation. By using military jurisdiction to preclude constitutional due process and applying criminal labels to enemy combatants to sidestep international law protections, the executive's approach, which demands an "unprecedented level of deference" from the courts, has transformed the "bedrock principles of the rule of law . . . into little more than tactical options." LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 26, at 49.

ing the large number of detainees held at Guantanamo, but the breadth of this impact remains to be seen.[125]

125. The United States Supreme Court granted Hamdan's petition for certiorari on November 7, 2005. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005). The Court will be faced with the questions of the proper scope of presidential power to create and regulate military commissions, the content of the law of war, and the legal rights of alien combatants.