

# Commentary on Hamdan v. Rumsfeld

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

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*"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

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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 Constitution – 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:

[http://www.justicescholar.org/pegc/\\_LAW\\_/Winthrop\\_Military\\_Law.pdf](http://www.justicescholar.org/pegc/_LAW_/Winthrop_Military_Law.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

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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" (*Edey 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

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precedent in its 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

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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."

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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://www.justicescholarship.org/pegc/archives/letters/CBG\\_gittmo\\_ami\\_cus\\_20041012\\_full.pdf](http://www.justicescholarship.org/pegc/archives/letters/CBG_gittmo_ami_cus_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.

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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

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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

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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

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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

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"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:

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"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 un hoped-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

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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.

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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

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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://www.justicescholarship.org/pegc/archive/DOJ/20020109\\_yoomemo.pdf](http://www.justicescholarship.org/pegc/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

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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]he 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

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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://www.justicescholarship.org/pegc/archive/In\\_re\\_Gimo/govt\\_supp\\_20050802\\_al-odah.pdf](http://www.justicescholarship.org/pegc/archive/In_re_Gimo/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

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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

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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 Cassese, 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:

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"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**

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## 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://www.justicescholarship.org/pegc/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://www.justicescholarship.org/pegc/articles.html>

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

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