Center for Constitutional Rights
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Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

September 6, 2005

Dear Honorable Members of the Senate Committee on the Judiciary:

The Center for Constitutional Rights has a special relationship to the detentions at Guantánamo, having brought the *Rasul* case before the United States Supreme Court and currently coordinating the representation of many Guantánamo detainees. We are concerned about Judge Roberts' nomination because his most recent opinion demonstrates his disregard for international law and United States treaty obligations according fundamental protections to these detainees. Further, his role in this decision is disconcerting in its rejection of his legal and ethical obligations as a federal judge.

The application and enforceability of the Geneva Convention is of critical importance at this moment in history because it limits a nation's ability to flout human rights norms and laws. The Convention provides basic protections to those captured by the United States and preserves the United States position as a country founded on the rule of law. The Geneva Convention also protects United States military personnel and cannot be lightly or easily shorn.

On May 15, 2005, four days before his official nomination to be a Supreme Court Justice and on a day in which he met with President Bush to discuss the position, Judge Roberts decided a case that dramatically expanded the President's authority and curtailed the minimal rights accorded by international law to detainees held for over three years by the United States military. Judge Roberts' role in this case was both unethical and illegal under 28 U.S.C. §455 and the Judicial Code of Conduct. Moreover, his opinion in the case demonstrates his readiness to undermine United States treaty obligations and international law in favor of the expansion of executive authority. For these reasons, the Center for Constitutional Rights expresses our concern that Judge Roberts is an inappropriate choice to be Chief Justice on the nation's highest court.

1. **IN HIS DECISION IN *HAMDAN V. RUMSFELD*, JUDGE ROBERTS DENIED GUANTÁNAMO DETAINEES THE MINIMAL FUNDAMENTAL RIGHTS RECOGNIZED BY THE INTERNATIONAL COMMUNITY, AND REQUIRED BY UNITED STATES TREATY OBLIGATIONS. HE EXPANDED EXECUTIVE AUTHORITY AT THE EXPENSE OF LONG-RECOGNIZED LAW.**

The central question in *Hamdan v. Rumsfeld* was the constitutionality of a Presidential order.[1] In sanctioning the President's military commissions for Guantánamo detainees, Judge

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

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Roberts supported the expansion of the President's authority to act outside of recognized international law and treaty obligations.

The 1949 Geneva Convention to the Treatment of Prisoners of War applies to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *dehors* the combat by sickness, wounds, detention or any cause ..." Article III of the Convention guarantees basic protections against violence, mutilation, murder, cruel treatment, torture, outrages upon personal dignity, and hostage taking. Article III further protects against the "passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the guarantees which are recognized as indispensable by civilized peoples."

The *Hamdan* court unanimously denied the right of individuals to present claims founded on the Geneva Convention in United States courts. Judge Roberts went even further. He was part of the 2-1 majority that held that even the most basic Geneva Convention protections did not apply to Al Qaeda. In a concurring opinion, Judge Williams countered this view and asserted that the "modest requirements of 'humane[]' treatment and 'the judicial guarantees which are recognized as indispensable by civilized peoples'" apply in this context to the United States as a signatory to the Geneva Convention.[2]

In the majority opinion, Judge Roberts affirmed President Bush's much-criticized decision to declare al-Qaeda detainees beyond the scope of the Geneva Convention. During the development of this controversial policy, Colin Powell, then Secretary of State, asserted that not applying the Geneva Convention in this case would "reverse over a century of United States policy and practice."[3] President Bush chose instead to embrace the advice of then White House Counsel Alberto Gonzales, who characterized some of the Geneva protections as "obsolete" and "quaint" in this context.[4] The decision reached in *Hamdan* was thus central to the administration's claims of executive power and its entire structure of capturing, detaining, interrogating and trying so-called enemy combatants.

In a period in which it is important to consistently recognize national and international norms and laws, Judge Roberts has weakened them. His analysis of the President's order to create military commissions supported an executive decision that has increasingly exposed the United States as a country where ideology reigns above the law. The *Hamdan* opinion justified

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[2] *Hamdan* at 44.

[3] A January 26, 2002 memo from Secretary of State Colin Powell stated that the position proposed by the White House Counsel would "reverse over a century of U.S. policy and practice."

[4] In this January 25, 2002 memo from Alberto Gonzales to President Bush, Gonzales recognized that significant negative ramifications that would arise from this position, including "widespread condemnation" internationally; diminished protections for captured United States troops; the introduction of "an element of uncertainty" in the status of opponents; and the bestowal of legitimacy on other countries to create "'loopholes' in future conflicts" to renege on their international obligations. Despite these recognized ramifications, the memo rejected the application of the Geneva Convention protections in order to preserve "flexibility" and minimize the likelihood of future prosecution for detainee treatment. Draft Memorandum to the President January 25, 2002, p. 2. February 7, 2002, President George W. Bush stated that the Geneva Conventions do not apply to the United States conflict with al-Qaeda. Bush claimed that the United States would treat detainees "in a manner appropriate with the Geneva Conventions" where "appropriate and consistent with military necessity."

the President's creation of loopholes in a rare legal document that has been widely agreed upon by international actors and reliably upheld by the United States in all past conflicts. In a system of checks and balances, the judiciary needs to be relied on to curb executive authority when it acts outside of the law. Judge Roberts has instead shown his willingness to bestow excessive authority on an executive consciously acting to undercut recognized law.

2. JUDGE ROBERTS VIOLATED 28 USC §455 AND THE JUDICIAL CODE OF CONDUCT BY CHOOSING NOT TO RECUSE HIMSELF FROM THE *HAMDAN* OPINION DESPITE HIS ONGOING COMMUNICATION WITH MEMBERS OF THE BUSH ADMINISTRATION ABOUT HIS POTENTIAL NOMINATION TO THE SUPREME COURT.

Judge Roberts heard and decided *Hamdan* at the same time as he had a series of conversations with high-ranking officials of the Bush administration regarding his potential nomination to be a Supreme Court Justice. This was neither an ordinary case nor an ordinary appointment. The question in *Hamdan* was squarely about the President's authority. Because of this clear conflict of interest, Judge Roberts was obligated by law to recuse himself in order to maintain the integrity of the opinion and, more importantly, of the judiciary. 28 U.S.C. §455 and the Judicial Code of Conduct prohibits a judge from sitting in a case in which his or her "impartiality might reasonably be questioned." In not recusing himself from *Hamdan*, Judge Roberts acted outside of his legal and ethical obligations.

The basic rule governing the recusal of appellate judges is 28 U.S.C. §455. The standard is deliberately generous in order to "promote public confidence in the integrity of the judicial process."[5] A judge should "disqualify himself in any proceeding in which his impartiality might reasonably be questioned,"[6] or where "he has a personal bias or prejudice concerning a party..."[7] This provision is almost identical to Canon 3(C) of the Code of Conduct for United States Judges. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."[8] Even if "no *actual* partiality exists" in this case, "the close coupling" of his decision to the President's nomination of him to the position "does create the appearance that he may have been pursuing employment...while he was presiding over the case."[9] It is this appearance of partiality, and not actual partiality, which 28 U.S.C. §455 and the Judicial Code of Conduct prohibits.

The *Hamdan* case had been assigned to Judge Roberts some time prior to April 2004; it was to be argued on April 7. On April 1, six days before argument, Judge Roberts met with Attorney General Alberto Gonzales to discuss his possible nomination to the Supreme Court—one of the most important and prestigious legal jobs in the country. Judge Roberts continued

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[5] *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 858 (1988).
[6] 28 U.S.C. §455(a).
[7] 28 U.S.C. §455(b)(1).
[8] *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers), *cited in Liljeberg* at 869-70, *supra*.
[9] *See Continental Airlines*, 901 F.2d 1259 (5th Cir. 1990). "The goal of section 455(a) is to avoid even the appearance of partiality...Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljeberg* at 860-61, *supra*, *citing Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986).

meeting with administration officials after the oral argument in *Hamdan*, and while the case was under submission. He met again with Gonzales, the Vice President, Chief of Staff Andrew Card, Counsel to the President Harriet Miers, Deputy Chief of Staff Karl Rove and the Vice-President's Deputy Chief of Staff, Lewis Libby; he had telephone conversations with Deputy Counsel to the President, William K. Kelly; and he met with the President on the day the decision was announced. Although the *Hamden* case concerned the legality of policies authored by some of these very officials, and the President who nominated him for the Supreme Court was a defendant in the case, Roberts did not recuse himself. Nor did he ever inform Mr. Hamdan's lawyers of the meetings so they could argue that it was improper for him to continue on the case.

The law is clear as it applies to this case. 28 U.S.C. §455 and the ABA's Judicial Code of Conduct Canon 3(C) compelled Judge Roberts to recuse himself from the *Hamdan* case either before or after the decision was reached. A reasonable person might question his impartiality when he sat on an appellate panel that directly and widely expanded the President's powers while he was simultaneously being seriously considered by the President to fill a prestigious Supreme Court vacancy. If he did not realize at the time that his recusal was necessary, or if he was sworn to secrecy about the negotiations, he should have recused himself after the judgment was reached and his nomination was announced.

In related cases, courts found glaring judicial error when judges chose not to recuse themselves from cases in which the judge was in communication with one of the sides of the case about potential future job offers.

- In *Pepsico v. McMillen*, Judge Posner directed a federal judge to recuse himself after a headhunter he hired to approach law firms as he planned for his post-retirement employment mistakenly contacted two opposing firms in a case pending before him.[10] "All concerned were aware that it would be unethical for a law firm that had a case pending before a judge to be at the same time negotiating with him over possible future employment at the firm."[11] Neither firm agreed to employ him, but an "asymmetrical" relationship existed in the responses of the firms; one rejected him outright and the other was less definitive in its rejection.[12] While Judge Posner insisted that the judge in question was "a judge of unblemished honor and sterling character" and that "the motion to recuse him did not and could not have alleged any actual impropriety [because both firms rejected him and conditions were attached to his searching for post-judicial employment]," the Fifth Circuit nevertheless concluded that §455(a) "required" his recusal "because of the appearance of partiality that would be created by [his] continuing to preside in this case."[13] Judge Posner wrote that "the dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under

[10] *Pepsico v. McMillen*, 764 F.2d 458 (7th Cir. 1985).
[11] *Pepsico* at 460.
[12] *Pepsico* at 461.
[13] *Pepsico* at 460. The Fifth Circuit standard for a violation of §455(a), when a judge's "impartiality might reasonably be questioned", is when "there is a 'reasonable basis' for a finding of an 'appearance of partiality under the facts and circumstances' of the case." *Pepsico* at 460, *citing SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977).

such conditions will be decided in accordance with the highest traditions of the judiciary."[14]

- Similarly, in *In re Continental Airlines*, the Fifth Circuit found a violation of §455(a) when a bankruptcy judge took a position with a law firm representing the debtor soon after entering judgment in a bankruptcy case.[15] Even if "no *actual* partiality exists" in this case, "the close coupling" of the judge's decision with the party's employment offer and the judge's acceptance of the offer "does create the appearance that he may have been pursuing employment...while he was presiding over the case."[16]

- The D.C. Circuit relied on Canon 3(C) of the ABA Code of Judicial Conduct to find that a judge should have recused himself after he failed to disclose employment negotiations with the Executive Office for United States Attorneys in the Department of Justice contemporaneous with ruling on an intent-to-kill case prosecuted by the United States Attorney for the District of Columbia, part of the Department of Justice.[17] During the trial, the judge was engaged in employment discussions with the Department of Justice that included two meetings and a conditional job offer.[18] The defendant only learned of the employment negotiations after he was sentenced.[19] As with a violation of §455(a), "neither bias in fact nor actual impropriety is required to violate the Canon."[20] The court found that "the circumstance presents the specter of partiality that the Canon and the Supreme Court entreat all judges scrupulously to avoid."[21]

Some have argued that Judge Roberts could not have excused himself from every government case pending before the circuit court while he was in the midst of discussions with the executive about a potential Supreme Court nomination, and that he was thus not required to recuse himself from this one. However, this appeal was not ordinary government litigation or agency review. At issue were sweeping and temporally undefined powers claimed by the executive. The government requested expedited consideration of this appeal asserting that the ruling below "...had dangerous ramifications," contradicted "important military determinations

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[14] *Pepsico* at 461.
[15] *In re Continental Airlines*, 901 F.2d 1259 (5th Cir. 1990).
[16] *In re Continental Airlines* at 1262. "[T]o hold that § 455(a) was violated in the present case does not mean that Judge Roberts was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of $700,000 in legal fees to the firm making the offer, Judge Roberts was 'required to take the steps necessary to maintain public confidence in the judiciary.' In the circumstances of this case Judge Roberts should either have rejected the offer outright, or, if he seriously desired to consider accepting the offer, stood recused and vacated the rulings made shortly before the offer was made. Although we are confident that Judge Roberts committed no substantive impropriety in his handling of the motions in this case, we nevertheless conclude that recusal was mandated by the appearances of the situation which we have described." *In re Continental Airlines* at 1262-63.
[17] *Scott v. U.S.*, 559 A.2d 745 (D.C. Cir. 1989) (*en banc*).
[18] *Scott* at 747.
[19] *Scott* at 748.
[20] *Scott* at 749.
[21] *Scott* at 750. The court emphasized that the governmental nature of the judge's prospective employer does not alter the Code's requirement that the judge disqualify himself from a case in which employment negotiations might cause his impartiality to be questioned: "the negotiations at issue for employment with a unit directly linked to the prosecutor's office are ethically analogous to negotiations for employment with a large private law firm." *Scott* at 750.

of the Commander-in-Chief during a time of active armed conflict...," and further represented an "unprecedented judicial intrusion into the prerogatives of the President."[22] It was argued by the Assistant Attorney General for the United States and the court expedited consideration. And in sanctioning the President's military commissions for Guantánamo detainees, the *Hamdan* court held that the President had absolute authority to find that Mr. Hamdan was not a prisoner of war, and that "[the President's] construction and application of treaty provisions [was] entitled to 'great weight.'"[23] While Judge Roberts may not have been required to recuse himself from every government case that appeared before his court in the preceding months, he was certainly required to recuse himself from this extraordinary one.

Even if Judge Roberts did not realize his obligation to recuse himself during the appeal and decision, he should have realized his obligation, and remedied his nondisclosure and nonrecusal, by disclosing the conflict of interest and recusing himself from the opinion after the announcement of his Supreme Court nomination.[24] A post-judgment review would have been particularly necessary given that Judge Roberts did not disclose the conflict of interest that would have allowed Mr. Hamdan to challenge Judge Roberts' role in this case prior to the decision and the announcement of his Supreme Court nomination. In not recusing himself either before or after the announcement of his nomination to the Supreme Court, Judge Roberts showed he lacks the highest respect for the law and judicial ethics necessary for a Justice.

CONCLUSION

The Center for Constitutional Rights expresses our deep concern about the nomination of Judge Roberts to the Supreme Court. Within the limited collection of court opinions which bear his name, the recent *Hamdan* opinion should present a strong warning to the Judiciary Committee and the nation. While in the midst of discussions with the executive, when he knew that his Supreme Court nomination was potentially at stake, Judge Roberts decided to undermine recognized international law and treaty obligations; deny even minimal protections to detainees held incommunicado for three years; and not acknowledge a glaring conflict of interest that was both illegal and unethical. Judge Roberts should not be confirmed to the Supreme Court; the risk is too great.

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[22] Motion for Expedition of Appeal, at 4.
[23] *Hamdan* at 41, 43.
[24] "[T]o the extent [28 U.S.C. §455(a)] can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." *Liljeberg* at 861.