

Testimony of
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Mr. Chairman, and Members of the Subcommittee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al-Qaeda. By way of background, I have previously served as Assistant Attorney General for the Office of Legal Counsel, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency. The views I express today are my own.

My remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al-Qaeda and, specifically, on the adequacy of the procedures governing their continued detention as enemy combatants and, in the cases of some detainees, their prosecution before military commissions for violations of the laws of war.

In my view, the criticisms of the Administration's detention policies are without substance. The Administration's detention measures are squarely in accord with the time-honored principles of the law of war and supported by over 230 years of unbroken legal and historical precedent.

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It is important to understand that the United States is taking three different levels of action with respect to the detainees. These are frequently confused in the popular media.

First, as a threshold matter, the United States is detaining all these individuals simply by virtue of their status as enemy combatants. It is well established under the laws of war that enemy forces are subject to capture and detention, not as a form of punishment, but to incapacitate the enemy by eliminating their forces from the battlefield. Captured enemy forces are normally detained for as long as the enemy continues the fight.

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals (“CSRTs”) to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an armed force covered by the protections of the Geneva Convention and hence entitled to POW status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various “privileges” of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination in deciding whether the Convention applies is a “group” decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty, and he was obviously correct in that decision.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. These tribunals are sanctioned by the laws of war. Shortly after the attacks of 9/11, the President established military commissions to address war crimes committed by members of al-Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened

at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military courts.

I would like to address each of these matters, but before doing so I would like to discuss briefly the legal and Constitutional framework that governs our activities.

I. The Constitutional Framework

Most of the carping and criticism I have heard over the Administration's policies are based on a completely false premise – that our operations against al-Qaeda are in the nature of law enforcement activities and therefore that, when our forces seize someone, the government is subject to all the constraints, process-requirements and rules that apply in the criminal justice context. This is a dangerous misconception. This is not “Hawaii Five-0.” We are not “booking them, Danno.” This is a war – not in a figurative, but in a very literal, real sense. We are in an armed conflict with foreign enemy forces who are trying to kill us.

There is a clear and critical distinction between the role the government plays when it is enforcing our domestic laws against members of our body politic, and the role it plays when it is defending the body politic from armed assault by an external enemy. This distinction is critically important because the scope of the government's power and the restrictions we place on the government differ fundamentally depending on which function the government is performing.

When the government enforces law within the community by seeking to discipline an errant member, the Constitution is concerned with dividing, diluting and weakening the government, which it does both by hemming it in with restrictions and by investing those against

whom it is acting with “rights” -- creating, in a sense, a level playing field as between the government and the individuals it is seeking to discipline. But when the government is defending the community against armed attacks by a foreign enemy, the Constitution seeks to unify and strengthen the power of the government. It does not grant rights to our foreign enemies. It is concerned with one thing – preserving the freedom of our political community by destroying the external threat.

To gain a better appreciation of this dichotomy, it is useful to “go back to basics.” What is a Constitution? It is the fundamental agreement by which a certain people bind themselves together as a separate and distinct political community. It sets forth the *internal rules* by which the particular body politic will govern itself. Our Constitution was not written to govern the world as a whole. It was written for “the people” – the American people

There were two chief reasons why the American people decided to establish a federal government – to “insure domestic Tranquillity” and to “provide for the common defence.” To achieve the first purpose, the federal government is given its domestic law enforcement functions; to achieve the second purpose, the federal government is given its war-fighting or national defense powers.

When the government acts in its law enforcement capacity, the government’s role is *disciplinary*. It preserves “domestic Tranquillity” by *punishing* an errant member of society for transgressing the internal rules of the body politic. However, the Framers recognized that in the name of maintaining domestic order an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of “the people.”

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of

virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its *national defense powers* to neutralize the external threat and preserve the very foundation of all our civil liberties. Here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer "rights" on foreign persons confronted in the course of military operations, nor does the Judicial branch sit as a "neutral arbiter" as between our society and our foreign enemies, or a second-guesser of military decisions. Rather, the Constitution is designed to maximize the government's efficiency to achieve victory -- even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

What is this Constitutional framework for fighting a war? In framing the Constitution, the Founders did something that was unimaginable just a dozen years before the Convention. They created a single powerful Chief Executive, vested in that office all "The Executive power," and conferred on that official the power as "Commander-in-Chief." They did this for two reasons. First, from bitter experience in fighting the Revolution, they concluded that, when fighting a foreign war, the Nation's military power had to be maximized by putting directive

authority into a single set of hands. Second, they understood that the kinds of decisions involved in war are inherently “Executive” in character. Like all the classical philosophers, the Founders viewed Executive power as a distinctive type of power quite different from either Judicial or Legislative power. They understood that contingencies arise that are simply not amenable to being handled by a set of hard-and-fast, adopted in advanced by a legislature or applied after-the-fact by judges.

The pre-eminent example is military decision making, which calls for judgments that cannot be reduced to neat objective tests, but rather requires the exercise of prudential judgment. Warfare requires that certain decisions be made on an ongoing basis: how, and *against whom*, should military power be applied to achieve the military and political objectives of the campaign. The Framers created one office – a President, elected by all the people of the country and alone accountable to all the people – to make these decisions. If the concept of a Commander-in-Chief means anything, it must mean that the office holds the final and conclusive authority to direct how force is to be used.

It is simply inarguable that, in confronting al-Qaeda, the United States is fighting a war. Al-Qaeda is a highly organized foreign force that has openly declared war on the United States and launched a series of carefully coordinated attacks, here and abroad, for the purpose of imposing its will on our country. These are organized armed attacks to achieve political objectives. *That is the very essence of war.* The fact that al-Qaeda does not formally control a nation state does not make our contest with them any less a war. We have fought foreign political factions before. The fact that al-Qaeda seeks to operate in secret, disguising itself among civilians, and striking out in violation of the laws of war, does not change the essential character of their acts. We have fought irregular enemies before.

I think the American people fully understand that this is a real war. We can apply a common sense test to see that this is so. Suppose that tomorrow we were to determine that we had located Bin Laden in his hideout. Would the American people think it legitimate for us to peremptorily drop a bomb on the location to kill him? Or do you think that the American people would think that Bin Laden (as he sits in his lair) has rights under our Constitution and that we would have to give warning and try to capture him alive for trial? Do we really think that we could only deal with Bin Laden as a criminal suspect and could only use lethal force to the extent permitted against such suspects? The overwhelming majority of Americans clearly understand that, when we locate them, it would be perfectly appropriate for us to use peremptory force against Bin Laden and his associates solely for the purpose of destroying them. That is because they understand this is a war.

I hear a lot of hand-wringing about civil liberties in connection with the Guantanamo detainees. I fail to see how our holding of those detainees raises legitimate civil liberties issues. It seems to me there are two respects in which fighting a war against a *foreign* enemy can be said to raise “civil liberties” concerns, and neither apply to the Guantanamo detainees. First, even where the government is using military power only against foreign persons who have no connection with the United States, there is the danger that, the government might impose domestic security measures that trench upon the liberties of our own people. For example, the government might assert rights of censorship, rationing, or broader search powers. The government’s claim in such cases is not that the people are the “enemy,” but that the exigencies of war require greater imposition on the people. This is allegedly the kind of issue raised by the Patriot Act. But this is not what we are discussing today.

The second type of civil liberty concern arises where the government directs its military power against its own people. In many of our foreign wars, there have been American citizens who have fought with the enemy. In World War II, for example, there were hundreds who did so, including some natural born citizens. As the Supreme Court recently ruled in the Hamdi case, the government can legitimately use military power against citizens who are part of enemy forces and can detain them as “enemy combatants.” But, in such cases involving *our own citizens*, civil liberties concerns naturally arise. In theory, there is a risk that the government might oppress the body politic, and bypass law enforcement procedures, simply be using war as a pretext for labeling innocent citizens as enemies. Thus, the Administration has always acknowledged that citizens have the right to habeas corpus and that some level of judicial scrutiny is required to ensure that the government is not just acting pretextually. Thus, as the Hamdi court ruled, some unspecified due process rights may apply when the government seeks to hold its *own* citizens as foreign enemies. None of this applies here, however. As far as I am aware, none of the detainees at Guantanamo are American citizens.

II. The Propriety of the Administration’s Determinations

With foregoing basic principles in mind, let us turn to the various issues that have been raised – namely: (1) whether the detainees at Guantanamo can be held without greater process than they are already being afforded; (2) whether these al-Qaeda or Taliban forces are entitled to the protections of the Geneva Convention; and (3) whether some of the detainees may be tried for war crimes before the military commissions established by the President.

A. The Detention of the Guantanamo Captives as “Enemy Combatants”

As I stated at the outset, and as the Supreme Court just reaffirmed in Hamdi, an inherent part of war is capturing and holding enemy forces for the duration of hostilities. While Hamdi teaches that American citizens cannot be so held without some process, there has never been a requirement that our military engage in evidentiary proceedings to establish that each foreign person captured is, in fact, an enemy combatant. On the contrary, the determination that a particular foreign person is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces.

Now obviously the military has procedures for reviewing whether persons being detained deserve to be held as “enemy combatants.” In the case of the Guantanamo detainees, their status has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces in the course of military operations have a Due Process right under the Fifth Amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. We have taken and held prisoners in war for over 230 years, and the suggestion that, as a legal matter, we owed each foreign detainee a trial is just preposterous.

Now the easy and short answer to this particular criticism about the Guantanamo detainees is that the claim has been totally mooted by the military’s voluntary use of the CSRT process. Under these procedures, each detainee is given the opportunity to contest his status as an enemy combatant. To my knowledge, we have provided more “process” for these detainees than for any group of wartime prisoners in our history. While clearly not required by the Constitution, these measures were adopted by the military as a prudential matter. They were modeled on those that the Hamdi decision indicated would be sufficient for holding an *American citizen* as an

enemy combatant.¹ Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Indeed, most of the process embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's prisoner-of-war status, pursuant to the Geneva Convention,² could satisfy the core procedural guarantees owed to an American citizen.³ In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel.⁴ Furthermore, the United States has voluntarily given all detainees rights that are not found in *any* prisoner-of-war status hearing, including procedures to ensure the independence of panel members and the right to a personal representative to help the detainee prepare his case.⁵

Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in military operations have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth

¹ Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

² The procedures are created under Army Regulation 190-8. Opening Brief for the United States, Odah v. United States, at 31.

³ Hamdi, 124 S.Ct. at 2651.

⁴ Opening Brief in Odah at 33-34.

⁵ Id. at 34-35.

Amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the Fifth Amendment does not have extra-territorial application to foreign persons outside the United States.⁶ As Justice Kennedy has observed, “[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory.”⁷ Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. And finally, the nature of the power being used against these individuals is not the domestic law enforcement power – we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws – rather, we are waging war against them as foreign enemies. As I have already explained, this is a context in which the concept of Due Process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decision-making. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a “neutral” arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this – an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

⁶ Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining that “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”); Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Eisentrager and Verdugo for the proposition that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”).

⁷ Verdugo-Urquidez, 494 U.S. at 275 (Kennedy, J., concurring).

Let us make no mistake about it. Any extension of due process rights to foreign adversaries in war would effectuate probably the most profound shift in power in our Constitutional history. Any decision that affected the life or liberty of the foreign persons being confronted by our armed forces would be subject to judicial review. Either before or after military actions are taken, judges, purporting to balance all the competing interests, would pronounce whether the actions passed legal muster. This would make the judges the ultimate decision makers. For the first time in our history, judges would be in charge of superintending the fighting of wars.

These are not the “Men in Black” we should want to see in charge of fighting our wars. A moment’s reflection should tell us that courts and judges lack both the institutional capacity and the political accountability for making these types of decisions. As I observed above, at the heart of a commander’s military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person – detaining him – unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team.

Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them – i.e., deprive them of life – could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts as a basis for judicial supervision of our military operations would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would radically alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission – the rapid destruction of the enemy by all means at their disposal – to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war – especially irregular warfare – vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual “fault” of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

In sum, the claim that the Guantanamo detainees are not getting adequate process is totally without substance. As foreign persons confronted by U.S. troops on the battlefield, they have no legal right to Constitutional due process. They are being properly held under the laws of war. And they have, in fact, received the same process that American citizens would get under the circumstances.

I have heard some additional suggestion that it would be useful at this juncture for Congress to adopt a precise definition of the category of persons who can be detained as “enemy combatants.” I disagree. The existing definition that is now part of the common law of war is fully adequate and sensible. Any attempt by Congress to codify a more specific definition is unnecessary and would end up unduly hamstringing our military forces. Moreover, trying to frame a more specific statutory definition would be incompatible with the law of war as an evolving body of “common law” – one that develops with experience and can adapt to meet new and changing circumstances. Especially given the state of affairs we face today and the type of enemy we are confronting, I think trying to lock in any particular verbal formulation would be extremely unwise.

Certainly no legislative action is necessary to ensure that the President has adequate detention authority. The President’s power does not come from Congress in the first place; it

comes directly from Article II of the Constitution. After all, since the country's inception, our military forces have engaged in at least 10 major wars and literally hundreds of military expeditions in which we have faced a broad range of opposing forces, ranging from regular armies to irregular forces, including Barbary pirates, hostile Indians, Mexican guerillas, Chinese Boxers, Villa's banditti, Philippine Insurrectionists, and the Viet Cong, just to name a few.

No one has had the temerity to suggest that our forces in all these campaigns lacked authority to capture the enemy, or that they needed some carefully-crafted statute to do so. Nor, as far as I know, have we ever found it necessary or prudent to define in advance with any statutory detail the class of persons who could be detained in connection with our military operations. On the contrary, when Congress has authorized force – either in declarations of war or otherwise – it has done so in the most general terms in way that reinforces and augments the President's inherent war fighting powers, not in a way that seeks to curtail them.

In dealing with foreign persons, the proper scope of military detention authority is governed by the body of customary international law commonly referred to as “the law of war.” This body of law is in the nature of a “common law” that reflects the usages of civilized nations. It is this “law of war” that has traditionally defined the class of persons that may be detained and held in connection with military operations. That traditional definition is perfectly serviceable and has proven neither too sweeping, nor too crabbed. There is simply no good reason to impose on our military any greater constraint than already exist under those time-honored law-of-war principles. And there are obvious reasons why imposing greater limits on our armed forces would be foolhardy.

Under the traditional law of war, the core principle is that military authorities may capture and hold persons who are part of the enemy's forces, as well as those who directly

support hostilities in aid of enemy forces. By necessity, that definition is cast in general terms. Even in classic warfare between regular armies, gray zones can arise at the margin in determining who is directly supporting hostilities in aid of enemy forces to a degree to make them subject to detention. Over time, those subject to detention has been found to include not only the actual armed fighters, but also “*civil* persons . . . in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transport and military railways” W. Winthrop, Military Law and Precedents 789 (2nd ed. 1920) (emphasis added).

As with any effort to classify an area as complex as war, definitions must retain some generality. The fact that difficult judgment calls will inevitably arise on the margin does not mean that any more precise definition makes sense or that the general definition is faulty. These are not the kinds of activities that lend themselves to exhaustive codification in advance. The genius of a common law system is that it allows the law to develop guided by experience. I think any effort to codify “enemy combatant” status with greater specificity will simply create a new set of gray zones, arrest the rational development of the law of war based on real experience, and end up unwisely putting our military in a statutory straightjacket.

B. Determination of Status under the Geneva Convention

The President has determined that neither members of al-Qaeda nor Taliban fighters are entitled to the protections of the Geneva Convention. While some lower courts and critics have carped about this decision, there can be no doubt that al-Qaeda and the Taliban fail to meet the Geneva Convention’s eligibility criteria.

It must be borne in mind that the choice here is not between applying the Geneva Convention versus applying no law at all. Under the common law of war, military detainees must be held under humane conditions -- that is the general rule in the absence of specific treaty agreement. The Geneva Convention establishes an *additional* level of special “privileges” that are to be enjoyed by the forces of those countries that conduct their military operations in accord with civilized norms, and that agree to treat their own prisoners in like manner. The whole purpose for offering these “privileges” is to promote adherence to the laws of war by rewarding those countries that comply.

It is perverse to suggest that we should extend the privileges of the Geneva Convention to al-Qaeda or Taliban fighters – groups who have flagrantly flouted all civilized norms and are among the most perfidious and vicious in history. As one leading treatises in this area notes, “the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status.” Rosas, The Legal Status of Prisoners of War 344. In 1987, when the Reagan Administration rejected a proposed protocol that would have extended POW rights to captured terrorists, his decision was almost universally hailed, with both the *New York Times* and the *Washington Post* weighing in with approving editorials.

If we did grant privileged status to al-Qaeda and Taliban captives they would enjoy the right to be held in essentially the same billet conditions as the capturing country’s own forces; the right to be immune from the full range of coercive interrogation that would otherwise be permissible under the laws of war; and, if tried for offenses, the right to be tried before the same kind of tribunal that would apply to the capturing country’s own troops. Voluntarily granting these rights to al-Qaeda operatives would make no sense; subvert the very goals the Convention

is intended to promote; and gravely impair our ability to break down al-Qaeda as an organization and to collect the intelligence essential to accomplish this.

The Geneva Conventions award protected POW status only to members of “High Contracting parties.”⁸ Al-Qaeda, a non-governmental terrorist organization, is not a High Contracting party.⁹ This places al-Qaeda – as a “group” – outside the laws of war. Furthermore, al-Qaeda and the Taliban fail to meet the eligibility criteria set forth in Article 4 of the Geneva Convention. To qualify for protected status, the entity must be commanded by a person responsible for his subordinates, be outfitted with a fixed distinctive sign, carry its arms openly, and conduct its operations in accordance with the laws of war.¹⁰

Al-Qaeda and the Taliban fail to satisfy even one of these four bedrock requirements. These enemies our armed forces face on the battlefield today make no distinction between civilian and military targets and provide no quarter to their enemies. They have no organized command structure and no military commander who takes responsibility for the actions of his subordinates. Al-Qaeda and the Taliban wear no distinctive sign or uniform and violate the laws of war as a matter of course. Consequently, these organizations do not qualify for the POW protections available under the Geneva Convention.

For these reasons, the President rightly concluded that al-Qaeda and the Taliban do not qualify for POW status under Article 4 of the Geneva Convention.¹¹ The President’s

⁸ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2.

⁹ See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

¹⁰ Id. at art. 4A(2).

¹¹ See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

determination that the Geneva Convention does not apply to al-Qaeda and Taliban members is conclusive. This determination was an exercise of the President's war powers and his plenary authority over foreign affairs,¹² and is binding on the courts.¹³ Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts.¹⁴ Accordingly, "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW."¹⁵

As far as I can tell, none of the President's critics have advanced any set of facts that would call into question the merits of the President's decision. I have heard no serious argument that either al-Qaeda or the Taliban fall within the requirements of Article 4 and thus are entitled to protection under the Convention. Instead, what we see is a lot of sharp "lawyer's" arguments that the President is somehow precluded from making a group decision and that the eligibility of detainees must be determined through individualized hearings before "competent tribunals." These arguments largely rest on a misreading of Article 5 of the Convention.

Article 5 of the Convention provides that:

[t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the

¹² United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

¹³ Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

¹⁴ See, e.g., Howard S. Levie, Prisoners of War in International Armed Conflict, 59Int'lStud. 1, 61 (1977); Adam Roberts, Counter-terrorism, Armed Force, and the Laws of War, 44 Survival no. 1, 23-24 (Spring 2002).

¹⁵ W. Thomas Mallison and Sally V. Mallison, The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict, 9 Case W. Res. J. Int'l 39, 62 (1977).

present Convention until such time as their status has been determined by a competent tribunal.¹⁶

There is nothing in this Article that forecloses the President from reaching a threshold decision that a particular military formation does satisfy the Treaty standards. Since the Convention's coverage depends, in the first instance, on whether a group in which the detainee participated has the requisite attributes, it necessarily calls for a "group" decision. Certainly, Article 5 does not mean that a group's eligibility can be relitigated through a series of individualized proceedings. By its terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualified for POW status. I am not aware that any detainee has raised any "doubt" as to his status. On the contrary, the principal argument of critics has been that a detainee can successfully raise doubt, within the meaning of Article 5, simply by asserting he is eligible. But the United States has expressly refused to adopt a modification of the Treaty that sought to establish that regime.

It seems to me that, once a particular organization has been found not to qualify under Article 4, no individualized inquiry under Article 5 is appropriate or necessary unless a detainee is raising a plausible claim that he belongs to another category that does qualify under Article 4. The classic example is the case of a pilot who, after conducting his mission, is shot down, sheds his uniform trying to escape, and is later apprehended and accused of sabotage. The evident purpose of Article 5 is to allow the pilot to make the claim that he is covered by the Geneva Convention because he carried out his belligerent acts as a member of the regular armed forces of a signatory power. Here, the detainees have raised no colorable claims that they are members of a force that falls within the categories set forth in Article 4.

¹⁶ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 5.

C. The Propriety of Military Tribunals

I would like to turn, finally, to that group of detainees whom the United States is accusing of committing violations of the laws of war. The President has, by order, established military commissions to try these individuals for their offenses. While the law of war once permitted summary execution for certain war crimes, the use of military commissions has now emerged as the norm, affording a more regular mechanism by which military commanders can impose punishment on enemy forces. Ever since the Revolution, the United States has had a consistent practice of using military commissions to try members of foreign forces for violations of the laws of war.¹⁷ Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals,¹⁸ and the courts have specifically upheld their use.¹⁹

In one sense we seem to be making progress. Originally, when the President promulgated his military tribunal order, there was a hue and cry in some quarters that this was an end run around Article III courts and that all proceedings belonged in our civilian court system. But at this stage there does not appear to be any real argument that these trials belong in civilian courts. It now seems to be widely conceded that military commissions are, in fact, the place where war crimes should be prosecuted.

Some have suggested that there is a need for Congress to expressly authorize the use of military commissions. There have also been suggestions that Congress should dictate the precise

¹⁷ William Winthrop, Military Law and Precedents, 464, 832 (2d ed. 1920); Major William Birkhimer, Military Government and Martial Law, 533-35 (3d ed. 1914).

¹⁸ See, e.g., Act of March 3, 1863, § 30 (12 Stat. 731, 736).

¹⁹ As the Court stated, “the detention and trial of [war criminals] – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.” Ex Parte Quirin, 317 U.S. 1, 25 (1942).

procedures to be used in military commissions, and that these should be required to mirror the process used in regular courts-martial. I disagree with both of these suggestions.

First, there is no need for Congress to authorize military commissions. The authority to establish military commissions is expressly granted to the President under Article II of the Constitution as an inherent part of his power as “Commander-in-Chief.” It has long been recognized, both as a matter of legal theory and historical practice, that the power to punish enemy forces is integral to a commander’s authority – it is one and the same with the commander’s power to direct the killing or capturing of enemy forces. Military commissions are thus a military instrument – a means by which a commander attempts to *control* the conduct of enemy forces in the field by punishing, or threatening to punish, their forces for violations of certain civilized norms. As Abraham Lincoln’s attorney general correctly observed, “The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles.” Undoubtedly, this is why military commissions have been so consistently used throughout our history.

Second, Congress has, in fact, already authorized the use of military commissions. In 1916 Congress revised the Articles of War to expand court-martial jurisdiction (i.e., jurisdiction over members of the U.S. military) to include offenses against the laws of war. Article 15 of this codification stated that the creation of statutory jurisdiction for courts martial does not “deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions.” In proposing this new article, the Army Judge Advocate General explained that it was meant to “save” the pre-existing jurisdiction of common law military commissions. In both the Yamashita and Madsen cases, the Supreme

Court noted that Article 15 was intended to preserve non-statutory jurisdiction of military commissions established by the President or commanders in the field to try law-of-war violations.

In Quirin, the Supreme Court held that Article 15 constituted congressional authorization for the President to create military commissions. The Court noted that “Congress [in Article 15] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases,” and held that “Congress [in Article 15] has authorized trial of offenses against the law of war before such commissions.” In 1950, Congress affirmed the Court's construction when, against the backdrop of the Court's decisions, it recodified Article 15 as Article 21, expressly indicating in the legislative history that it was aware of, and accepted, the Court's construction. See S. REP. 486, Establishing a Uniform Code of Military Justice, 81st Cong., 1st Sess., at 13 (June 10, 1949) (“The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court. (Ex Parte Quirin, 317 U.S. 1 (1942))”); H.R.REP. 491, Uniform Code of Military Justice, 81st Cong., 1st Sess., at 17 (April 28, 1949) (same).

The great advantage of military commissions, obviously, as common law courts, is that their procedures are flexible and can be tailored to meet military exigencies at any given time. Neither the Constitution nor the laws of war dictate any particular set of rules for trials before military commissions. Because these are Executive courts, designed to aid the President in carrying out his Commander-in-Chief responsibilities, the President and his commanders can readily adapt their procedures to changing conditions. In selecting procedures, the President must balance the interests of fairness with the national security interests of the country and the practical exigencies of the particular military campaign. In recognition of this, Congress has, in

Article 36, given the President broad authority to prescribe “[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in . . . military commissions and other military tribunals.” 10 U.S.C. § 836. For this reason, I think it would be a mistake to set in statutory concrete any particular set of procedures or standards. Especially given the fluid threats we face today, it is essential to maintain the flexibility inherent in military commissions.