Testimony of

The Honorable William P. Barr

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Mr. Chairman, and Members of the Committee, 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 an Assistant Attorney General, 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.
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. The essence of war is the destruction of the enemy's forces - either by killing them or capturing them. When the American military captures and holds hostile forces, it does not do so as a punishment or as a prelude to eventual punishment. Our purpose is 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 requirements 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.

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. 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 commissions.

Let me turn to address some of the challenges being made to the way we are proceeding with these al-Qaeda and Taliban detainees.

I. The Determination That Foreign Persons Are Enemy Combatants

The Guantanamo detainees' status as enemy combatants 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 on the battlefield have a Due Process right under the Fifth Amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. In over 225 years of American military history, there is simply no precedent for this claim.

The easy and short answer to this claim is that it has been, as a practical matter, mooted by the military's voluntary use of the CSRT process, which gives each detainee the opportunity to contest his status as an enemy combatant. As discussed below, those procedures are clearly not required by the Constitution. Rather they were adopted by the military as a prudential matter. Nonetheless, those procedures would plainly satisfy any conceivable due process standard that could be found to apply. In its recent Hamdi decision, the Supreme Court set forth the due process standards that would apply to the detention of an American citizen as an enemy combatant. The CSRT process was modeled after the Hamdi provisions and thus provides at least the same level of protection to foreign detainees as the Supreme Court said would be sufficient to detain an American citizen as an enemy combatant. 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.

Moreover, most of the guarantees 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, could satisfy the core procedural guarantees owed to an American citizen. 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. 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.

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 the zone of battle have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth 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. 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." 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, 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.

These efforts flow from a fundamental error - confusion between two very distinct constitutional realms. In the domestic realm of law enforcement, the government's role is disciplinary - sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility 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. Rather it 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.

It seems to me that the kinds of military decisions at issue here - namely, what and who poses a threat to our military operations - are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that the office holds the final authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.

I am not speaking here of "deference" to Presidential decisions. In some contexts, courts are fond of saying that they "owe deference" to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference - the point here is that the ultimate substantive decision rests with the President and that courts have no authority to substitute their judgments for that of the President.

The Constitution's grant of "Commander-in-Chief" power must, at its core, mean the plenary authority to direct military force against persons the Commander judges as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the conflict. At the heart of these kinds of 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 from the domestic prosecutive arena as a basis for judicial supervision of our military operations in time of war would not only be wholly unprecedented, but it 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 fundamentally 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.
The Supreme Court's decision in Rasul v. Bush does not undercut these long-standing principles. In Rasul, the Supreme Court addressed a far narrower question - whether the habeas statute applies extraterritorially - and expressly refrained from addressing these settled constitutional questions. The Court, in concluding that the habeas statute reached aliens held at Guantanamo Bay, relied on the peculiar language of the statute and the "'extraordinary territorial ambit' of the writ at common law." Of course, the idiosyncrasies of the habeas statute do not have any impact on judicial interpretation of the reach of the Fifth Amendment or other substantive constitutional provisions.
Moreover, the Court's recognition in Rasul that the United States exercises control, but "not ultimate sovereignty" over the leased Guantanamo Bay territory confirms the inapplicability of the Fifth Amendment to aliens held there.
Nevertheless, even if Guantanamo Bay is somehow deemed sovereign United States territory, the Fifth Amendment is still inapplicable. The Supreme Court, in addition to the requisite detention on sovereign United States territory, demands that the aliens only "receive constitutional protections" when they have also "developed substantial connections with this country." Thus, under the Court's formulation, "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" sufficient to trigger constitutional protections. The "voluntary connection" necessary to trigger the Fifth Amendment's due process guarantee is sorely lacking with respect to enemy combatants. Whatever else may be said, there can be no dispute that these individuals did not arrive at Guantanamo Bay by free choice. Captured enemy combatants that have been transported to Guantanamo Bay for detention thus are not entitled to Fifth Amendment due process rights.
It should also be noted that the Supreme Court's decision in Rasul was a statutory ruling, not a constitutional one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.
An important consequence follows: Congress remains free to restrict or even to eliminate entirely the ability of enemy aliens at Guantanamo Bay to file habeas petitions. Congress could consider enacting legislation that does so - either

by creating special procedural rules for enemy alien detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from haling military officials into court altogether.

II. 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 some 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.

The Geneva Conventions award protected POW status only to members of "High Contracting parties." Al-Qaeda, a non-governmental terrorist organization, is not a High Contracting party. 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 their arms openly, and conduct their operations in accordance with the laws of war.

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. The President's 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. This most fundamental exercise of Executive authority is binding on the courts. Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts. 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."

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

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 it terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualifies for POW status. I am not aware that any detainee has raised any "doubt" as to their status. On the contrary, the principle 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.

III. The Propriety of Military Tribunals

Finally, I want to say a word about those detainees whom the United States is charging with violations of the laws of war. Throughout our history, we have used military commissions to try members of foreign forces for violations of the laws of war. Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals. As one commentator noted, military commissions "will not be rendered illegal by the omission of details required upon trials by courts-martial." The courts therefore have specifically upheld the use of such commissions, and the President has established military commissions to try members of the Taliban and al-Qaeda for violations of the laws of war.

In one sense we seem to 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 out civilian court system. It is undoubtedly this mindset that is still animating much of the sniping. 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. The debate now seems to have re-centered on exactly what kind of military trial is appropriate. Consequently, those that lost this debate are now attempting to transmogrify military commissions into carbon copies of Article III courts. This effort is without legal merit. First, the Supreme Court recognized in Hamdi that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Second, as I will explain, the argument opponents of military commissions advance is derived from a fundamental misapprehension of the underlying statute at issue.

One prominent war criminal whom the United States wishes to try is Hamdan, the former bodyguard and driver of Osama bin Laden. Some individuals - including the district court in that case - have argued that a military commission does not afford enough process and that war criminals must receive the full benefits of a formal military court martial. These arguments ignore the long-standing use of military commissions to try war criminals and grossly misread the Uniform Code of Military Justice.

Those who argue that war criminals should receive a full court martial also incorrectly rely on Article 36 of the Uniform Code of Military Justice ("UCMJ"). That section states that the rules that a President establishes for a military commission "may not be contrary to or inconsistent with" the UCMJ. Contrary to recent arguments, the UCMJ does not establish the baseline for all military commissions. Rather, only a certain few UCMJ provisions apply to military commissions. Thus, requiring military commission to comply with all the provisions of the UCMJ would render those specific references superfluous and render the entire point of a commission unnecessary.

This conflicts with the aforementioned historical precedent and the UCMJ itself, which recognizes the distinction between commissions and courts martial. This limitation also would severely change the courts' traditional understanding that military commissions arise out of common law war powers and not out of any particular statute. Thus, using the UCMJ to limit the President's use of military commissions would contravene the Executive's historic powers to create and manage commissions and would turn the UCMJ's own recognition of a distinction between commissions and courts martial on its head.