TESTIMONY OF

DAVID B. RIVKIN, JR.

PARTNER, BAKER & HOSTETLER LLP,

CO-CHAIRMEN OF THE CENTER FOR LAW AND COUNTERTERRORISM AT THE

FOUNDATION FOR DEFENSE OF DEMOCRACIES

HEARING ON

"THE LEGAL, MORAL, AND NATIONAL SECURITY CONSEQUENCES OF 'PROLONGED DETENTION'"

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY,

SUBCOMMITTEE ON THE CONSTITUTION

JUNE 9, 2009

Chairman Feingold, and members of the Senate Judiciary Committee, Subcommittee on the Constitution, I am pleased to appear before you and to testify at a hearing on "The Legal, Moral, and National Security Consequences of 'Prolonged Detention'." I would say that we act "morally" when we do our absolute utmost, within the bounds of law, to defend the United States, and the American people, from terrorism. Thus, as the long war on terrorism continues through its eighth year, it is vital that we remember that the detainees now in U.S. custody at Guantanamo Bay and many other locations in Iraq and Afghanistan are not ordinary criminal suspects, such as the individuals responsible for the original World Trade Center bombing in 1993 or the Oklahoma City bombing in 1995, who must be charged and brought to trial, or released, in accordance with rigorous constitutional and statutory requirements guaranteeing a speedy trial. Instead, the detainees whom we discuss today are individuals captured in the context of an international armed conflict, and fall into the category of "unlawful belligerents" or "unlawful combatants." Their legal rights and liabilities must be determined with reference to that status, in accordance with the Laws of War. [1]

The category of unlawful combatants is firmly rooted in both international law and the Law of War.[2] As early as 1582, the Judge Advocate General of the Spanish Army in the Netherlands wrote with respect to those with no lawful right to engage in warfare:

> The laws of war, therefore, and of captivity and of postliminy [the restoration of rights or status after release], which only apply in the case of enemies, can not apply in the case of brigands . . . . Since then those alone who are "just" enemies [*i.e.,* those enjoying the

[1] *See generally* Lee A. Casey, David B. Rivkin, Jr., Darin R. Bartram, *Detention and Treatment of Combatants in the War on Terrorism* (The Federalist Society for Law & Public Policy Studies 2002) [hereinafter *Detention and Treatment of Combatants*].

[2] The category of unlawful combatant has, of course, been called by other names over the years, including "unlawful belligerent," "unprivileged belligerent," and "franc-tireur."

> sanction of a state under the laws of war] can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war are not qualified to bargain about matters that only inure to the benefit of "just" enemies. [3]

Similarly, the 18th Century international law publicist Emmerich de Vattel recognized the category of unlawful combatant, and described it thus:

> When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers. [4]

In the mid-19th Century, the Instructions for the Government of Armies of the United States in the Field, provided that "[m]en, or squads of men, who commit hostilities

[3] Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 60 (John Pawley Bate, Trans. 1912).
[4] Emmerich de Vattel, *The Law of Nations* 481 (Luke White ed. Dublin 1792).

. . . without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates." [5]

Thus, the classification of unlawful combatant was well established by the beginning of the 20th Century, when the minimum requirements necessary for recognition as a lawful belligerent (membership in a group with a recognized command structure, uniform or other distinguishing insignia, that carried arms openly and that conducted its operation in accordance with the laws of war), were incorporated into Article I of the 1907 Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land. [6] The 1914 Manual of Military Law published by the British War Office explained both the distinction, and its purpose, as follows:

> The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned. Both these classes have distinct privileges duties, and disabilities. *It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the*

[5] *See* Instructions for the Government of Armies of the United States in the Field General Orders, No. 100, April 24, 1863, *reprinted in* 7 John Moore, *A Digest of International Law* §174 (1906).
[6] Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Convention" or "Hague Regulations"]. The conditions that must be satisfied before lawful belligerency is established are as follows:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:--
>
> (1) To be commanded by a person responsible for his subordinates;
> (2) To have a fixed distinctive emblem recognizable at a distance;
> (3) To carry arms openly; and
> (4) To conduct their operations in accordance with the laws and customs of war.

other, and shall not be permitted to enjoy the privileges of both. In particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen. . . .

Peaceful inhabitants . . . may not be killed or wounded, nor as a rule taken prisoners . . . . *If, however, they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.* [7]

The classification of unlawful combatant remains fully applicable today, and was not eliminated by the various agreements entered after World War II, in particular the Geneva Conventions of 1949, as some have claimed. [8] In 1977, during the negotiations that resulted in Protocol I and Protocol II to the Geneva Conventions of 1949, a number of developing countries *attempted* to achieve a rule that would have been more protective of unlawful combatants, entitling them to protection "equivalent" to those of

[7] War Office, *Manual of Military Law* 238 (1914). Although it was fully recognized that "irregular" combatants could achieve the status of lawful belligerents, this was *only* if they complied with the basic requirements of the Hague Regulations. Anyone not complying with those requirements, constituted an unlawful belligerent who was not entitled to prisoner of war status, and would could be punished for his unlawful belligerency. A point confirmed in the current U.S. Field Manual on The Law of Land Warfare: "[p]ersons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." *See* Department of the Army*, Field Manual on The Law of Land Warfare* 34 (July 1956).

Significantly, this included the regular forces of a state if they also failed to meet the minimum requirements: "[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces. *See Manual of Military Law,* at 240.

[8] *See Detention and Treatment of Combatants, supra* note 1, at 2-7.

POWs.[9] The United States, however, rejected this effort to undermine the traditional laws of war, and repudiated Protocol I for this very reason. In his note transmitting Protocol II (dealing with armed conflicts within a single country) to the Senate for its advice and consent, President Reagan explained the American rejection of Protocol I as follows:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . .

[9] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), Art. 44(2) [hereinafter Protocol I]. Thus, under the language of Protocol I, the status of unlawful combatant would not have been eliminated (and such individuals could still have been punished as having violated the laws and customs of war), but groups operating in violation of the Hague Regulations would have been given more protection than hitherto required. Accordingly, the United States took a very strong position rejecting even these changes, which it feared would undermine the traditional Hague Regulations in any case.

> It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law. [10]

Thus, overall, the status of unlawful combatant is firmly grounded in international law, and the rules applicable to such individuals may be applied by the United States to members of al Qaeda and the Taliban fully in accordance with recognized and accepted international norms. [11]

Unlawful combatants, although they are not entitled to the status and privileges of legitimate prisoners of war ("POWs") under the Geneva Conventions, [12] can nevertheless, like POWs, be detained until the conclusion of hostilities. In this regard, although unlawful combatants *may* be punished for their unlawful belligerency, there is no rule of international law *requiring* that they be punished, and their detention at least until the close of hostilities would be fully supported by the same rationale that underpins the rule permitting POWs to be held -- to prevent their return to the fight. [13]

---

[10] Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987), 1977 U.S.T. LEXIS 465.

[11] For an analysis of the failure of either al Qaeda or the Taliban to qualify as "lawful" belligerents, *see Detention and Treatment of Combatants, supra* note 1, at 9-13.

[12] *See Detention and Treatment of Combatants, supra* note 1, at 7-9.

[13] Under the Geneva Conventions, the recognized purpose and justification of confinement during the conflict is the "legitimate concern -- to prevent military personnel from taking up arms once more against the captor State." International Committee of the Red Cross, *Commentary on the*

This, of course, may well involve a very significant length of time. Even hostilities between states may last for protracted periods. For example, taking just the wars in which the United States was involved (at least for some portion of the conflict) over the past century, the First World War lasted four years (1914-1918), the Second World War lasted six years (1939-1945), the Korean War lasted three years (1950-1953), and the Vietnam War lasted sixteen years (1959-1975), with significant U.S. involvement lasting from 1963-1973. Some U.S. POWs were held by North Vietnam for nearly a decade. Only the 1991 Gulf War was concluded in less than one year. In the case of an undeclared war, particularly one where at least some of the parties are not state actors, the precise point at which the conflict ends must be determined based on all of the facts and circumstances at the time. As Secretary of State William Seward explained in 1868:

> It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

Therefore, the United States can lawfully hold captured al Qaeda and Taliban members during the conflict, even though this may involve a considerable period of

---

Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War 546-47 (1960) [hereinafter *ICRC Commentary on Geneva Convention III*].

detention. This is a legal and – in view of the grave threat posed by these individuals to our freedom and security – an immensely reasonable one.