Testimony of

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The Military Commissions Act of 2006 ("MCA") builds upon and works with the judicial review procedures set forth in the Detainee Treatment Act of 2005 ("DTA"). Together, they provide a set of judicial review procedures that are streamlined, yet fair and provide detainees with sufficient due process opportunities. As such, I believe that these provisions comport with the Constitution and will withstand judicial review.

Let me begin by briefly laying out the pre-MCA, DTA-driven judicial review system for detained unlawful enemy combatants. The DTA makes the D.C. Circuit the exclusive venue for handling any legal challenges by detainees and limits the D.C. Circuit's jurisdiction to two sets of circumstances - review of the validity of the final decision of a Combatant Status Review Tribunal ("CSRT") that an alien has been properly detained as an enemy combatant and review of the validity of the final decision by a Military Commission.

In both instances, the scope of review is precisely defined and limited to essentially two questions - whether CSRT or the Military Commission operated in a way that was consistent with the standards and procedures adopted by these respective bodies and whether, to the extent that the Constitution and laws of the United States are applicable, the use of such standards and procedures by either the CSRT or a Military Commission "to reach the final decision is consistent with the Constitution and laws of the United States".

By the way, while there has been some debate about the meaning of this language - specifically, whether any factual issues arising out of the CSRT or Military Commissions proceedings can be reviewed by the D.C. Circuit (and, ultimately, by the Supreme Court) - in my view, there is at least a possibility that one key factual issue may be amenable to review. Because under the teaching of Ex Parte Milligan, it is unconstitutional to bring civilians before Military Commissions, while the Article III courts are open and functioning, an enemy civilian who has been subjected to the Military Commissions procedures is, arguably, in a situation where the applications of such procedures to him is inconsistent with the Constitution of the United States. This, by the way, is what the Court did in Quirin by rejecting the petitioners' contention that they were civilians, not subject to military jurisdiction. To be sure, the Milligan case dealt with an American citizen, being tried by a military commission on American soil. It is not entirely clear whether, even in the aftermath of the Rasul decision, it is the case that an enemy alien, held at Guantanamo or elsewhere outside of the United States, is deemed to be subject to the substantive constitutional protections implicated by Milligan, as distinct from being merely eligible for an access to a federal court in the context of a habeas proceeding.

I want to emphasize that I do not take limitations on judicial review available to detained unlawful enemy combatants lightly. Indeed, I believe any restrictions on judicial review that entirely eliminate the access to Article III courts amount to a total suspension of habeas corpus, and are unnecessary and constitutionally problematic. I feel so strongly about this matter that I spoke out publicly against an early version of the DTA, which seemed to eliminate all judicial

review opportunities. This, of course, is not what ended up being done, and I believe that the judicial review options featured in the DTA are consonant with the constitutional requirements, as construed by the Supreme Court in such leading cases as Milligan, Quirin and Yamashita.
Now, moving on to the MCA, while the CSRT procedures remain unchanged, the Military Commission-related procedures are greatly refined. The MCA establishes a new body - the Court of Military Commission Review - as the final entity within the military establishment for reviewing and confirming the decisions of Military Commissions and specifies that the D.C. Circuit's jurisdiction to determine the final validity of the Military Commission's judgment does not arise until all of the intra-military system appeals have been exhausted or waived. This is quite reasonable and is designed to enable the D.C. Circuit to step in after the military system has finished its work. It appears that the existing language would ensure that an accused, being tried by Military Commission, who decides that he wants to waive the review by the Court of Military Commission Review, would be unable then to get into the D.C. Circuit as well. I am not sure whether this is deliberate or an oversight. But assuming that this is a deliberate choice, it does not strike me as being particularly volatile of due process - the right analogy from the civilian justice system might be a defendant, who having been tried by a District Court, decides to waive an appeal to the Circuit Court and, as a result, cannot get to the Supreme Court as well.
The MCA also has language - in Section 6 - that reaffirms the proposition that, outside of the DTA-provided judicial review system, "[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States", provided that he has been determined to be an enemy combatant - presumably, through a CSRT-based process. The bill also removes any jurisdiction to hear cases for damages or injunctive relief, arising out of any aspect of detention, transfer, trial or conditions of confinement of an enemy combatant, against the U.S. or any of its agents. This provision effectively vitiates any prospect of civil liability in this area by either the U.S. or its agents, and, when combined with the revised War Crimes Act provisions, ensures full legal immunity for CIA interrogators or anybody else involved in the interrogation process, provided they comply with these revised War Crimes Act provisions.
In an understandable response to the Hamdan Court's decision that the DTA jurisdiction limiting provisions were not sufficiently clear on the issue of retroactive application, the MCA comes up with a pretty air tight language - "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act" - on the retroactivity issue. I cannot imagine how any U.S. court would find this language to be insufficient to ensure retroactive application.
The MCA, also partially in response to the Hamdan decision and partially to the way in which this decision was interpreted by the media and academe, contains pretty air tight language, indicating that "[n]o person may invoke the Geneva Conventions, or any protocols thereto, in any habeas" action brought against the U.S. or any of its agents. As intended, this language renders the Geneva Conventions judicially unenforceable. However, since, in my view, this has always been the case, and the Hamdan court has brought in Common Article 3 only in the very narrow and limited context - military commission proceedings - and has done so in the context of Congress' alleged legislative incorporation of that Article through the UCMJ, I am not at all troubled by the MCA's reaffirmation of this principle.
My bottom line view is that the MCA has come up with a fair and balanced approach to judicial review, eliminating repetitive challenges, banning forum shopping, and yet, preserved the necessary essentials of a judicial review for detained unlawful combatants, going both to the

issue of their status and their prosecution. As such, the MCA is consonant with both the Constitution and our international law obligations.