Testimony of

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I would like to thank the Senate Committee on the Judiciary for inviting me to share my views at the hearing on "Restoring Habeas Corpus: Protecting American Values and the Great Writ." Fundamentally, I believe that the current Military Commissions Act of 2006 ("MCA") and the Detainee Treatment Act ("DTA") comport with the United States Constitution, exceed the applicable international law of armed conflict ("LOAC") standards, and are well in line with America's constitutional tradition and values. Accordingly, any "restoration" would be providing unlawful enemy combatants and alleged unlawful enemy combatants with far more process than they have been entitled to in U.S. history.

The MCA and DTA procedures are streamlined, yet fair. They provide detainees with judicial process that is more than sufficient to enable them to mount a meaningful challenge at the appropriate time to their detention. These procedures are constitutionally sufficient and give to the detainees far more due process than they have had under any other "competent tribunals" convened under the Geneva Conventions in the past, or in any past Military Commission.

Under the current system, the United States Court of Appeals for the District of Columbia Circuit is the exclusive venue for handling any legal challenges by detainees. The DTA and MCA also limit the Court to exercising jurisdiction until after a CSRT or Military Commission has exercised a final decision, and limit judicial review essentially to two questions: whether the CSRT or Military Commission operated consistent with the rules and standards adopted by it, and whether the CSRT or Military Commission reached a decision that is "consistent with the Constitution and laws of the United States."

In my view, this scope of judicial review is not only sufficient for noncitizens held abroad, but is constitutionally sufficient for United States citizens themselves. In this regard, the fact that the review does not commence at the district court level, and does not follow in all particulars the existing federal statutory habeas procedures codified at 28 U.S. § 2241, is constitutionally unexceptional. Indeed, it certainly does not constitute a suspension of habeas corpus. This proposition is well-established by the existing Supreme Court precedents. For example, in Swain v. Pressley, 430 U.S. 372, 381 (1977), the Supreme Court stated that "the substitution [for a traditional habeas procedure] of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." More recently, the Supreme Court held in INS v. St. Cyr, 533 U.S. 289, 314 (2001), that this habeas-type review could be had in a United States court of appeals. Hence, the DTA and

MCA set up a perfectly permissible form of statutorily conferred habeas review by the D.C. Circuit.

Also, contrary to the critics' assertions that the current habeas system is deficient because it does not allow for the judicial review of factual issues, I believe that the D.C. Circuit and Supreme Court are not limited to reviewing merely the legality of CSRT or Military Commission procedures. Under Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), it is unconstitutional to bring civilians before Military Commissions or to hold them as enemy combatants if civilian Article III courts are open and functioning. Accordingly, a detainee should be able to claim that he is not, in fact, an enemy combatant, and the relevant factual record of the CSRT or the Military Commission would be judicially reviewable. In this regard, the DTA and MCA language clearly allows such a review and the D.C. Circuit will have access to the entire factual record, generated by a CSRT or Military Commission, including the classified portions thereof.

Indeed, this is the same type of review given to Nazi saboteurs (of whom at least one was a U.S. citizen) in Ex Parte Quirin, 317 U.S. 1 (1942), where the Supreme Court rejected their contention that they were civilians, not subject to military jurisdiction. It is also supported by the Supreme Court's recent opinion in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), which emphasizes that the government needs to provide "credible evidence" that the detainee is, in fact, an enemy combatant, and the burden then shifts to the detainee to offer more persuasive evidence that he is not an enemy combatant. To be sure, habeas review of this factual determination should not be de novo, but instead should be based on the Supreme Court's "credible evidence" standard. This concept comports both with the U.S. Constitution and LOAC.

Recently, the D.C. Circuit upheld the constitutionality of the MCA against attack by detainees, who were asserting preexisting habeas claims in Boumediene v. Bush, No. 05-5062 (D.C. Cir. 2007), cert. den'd, 547 U.S. ___ (2007), against challenges that the scheme violates the Constitution's "Suspension Clause," which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. In the case of the Boumediene petitioners, it is my understanding that these detainees have all had their status reviewed and confirmed by CSRTs, and now have separate habeas corpus actions in the D.C. Circuit challenging their detention.

I would also like to address briefly the procedures used by CSRTs and Military Commissions. While many have criticized the procedures used by these bodies, the practical realities of the situation support the current DTA and MCA procedures. The fact is that, throughout history, it has been difficult to distinguish between irregular combatants and civilians. That is part of the reason why Taliban and al Qaeda members do not make themselves known. And, true to form, nearly all detainees claim to be shepherds, students, pilgrims, or relief workers, collude amongst themselves to support their stories, and name persons thousands of miles away who can "verify" that they are not enemy combatants.

Accordingly, the only appropriate point of reference for assessing the sufficiency of procedures used by the CSRTs and Military Commissions is their historical and international counterparts - Tribunals organized under Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 to identify enemy combatants, and the Military Commissions used by the United States in, and in the aftermath of, World War II. Here, it is

undisputed that the CSRTs and Military Commissions offer far more process to the Guantanamo detainees than either Article 5 Tribunals or World War II-style Military Commissions.

To be sure, if you compare the CSRTs and Military Commissions to civilian courts, they undoubtedly feature more austere procedures. However, the CSRTs and Military Commissions are meant to address a military reality that is quite different and distinct from the realities of the criminal justice system, and it does disservice both to our legal traditions and to the "rule of law" to pretend otherwise. The simple fact is that up to today, our legal institutions have recognized the propriety of using specialized military bodies in time of war, where civilian courts lack competence. This should continue.

The fact that DOD also holds on an annual basis Administrative Review Boards ("ARBs"), which focus primarily on the question of whether detainees held in U.S. custody pose continued danger and whether viable alternatives exist to their continued detention further underscores the extent to which the United States has opted to provide captured enemy combatants with additional rights, that go above and beyond those required under LOAC or the Constitution. The current U.S. practice of releasing captured enemy combatants before the end of hostilities is historically unprecedented, since the notion of enabling captured enemy combatants to be released "on parole" fell out of practice by the late 19th Century.

Similarly, persons determined to be unlawful enemy combatants have historically been punished harshly irrespective of the extent to which they personally were involved in any specific combat activities, primarily because unlawful combatancy was viewed a supremely dangerous phenomenon, to be suppressed and delegitimized. By contrast, the current U.S. practice has been not to prosecute, at least so far, the vast majority of individuals determined to be unlawful enemy combatants. The fact that this procedural and substantive generosity has not been widely hailed and appears not to even been noticed by most of the critics is unfortunate.

Finally, I would like to comment briefly on one aspect of the various schemes being considered to effect the so-called restoration of habeas corpus for captured unlawful enemy combatants. As I understand it, S. 576, the "Restoring the Constitution Act of 2007" is the leading vehicle for bringing about this result. In my view, the Act's repeal of the MCA and DTA-related revisions to 28 U.S.C. § 2241, the federal habeas corpus statute, is particularly ill-advised at this time. This is because all, or nearly all, Guantanamo-based detainees currently have habeas corpus petitions challenging their status determination pending in the D.C. Circuit. These petitions were stayed pending the resolution of the pre existing habeas petitions, which were dismissed in Boumediene. As a result, the D.C. Circuit will begin reviewing CSRT decisions shortly, and the detainees will have received judicial review of their determinations in the relatively near future, with Supreme Court review also almost certainly forthcoming.

The Restoring the Constitution Act or any other similar legislative vehicles would almost certainly short-circuit this process, very likely leading to vexatious litigation about what is being reviewed in what habeas corpus petition, the effects of preclusion doctrines on subsequent habeas petitions, and the like. I would respectfully urge the Senate not to proceed down this path, but instead wait for final judicial resolution of pending habeas corpus petitions before acting further.