Testimony of

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Mr. Chairman and members of the Committee, my name is Orin Kerr, and I am a professor of law at George Washington University Law School. I am honored to have been invited to testify today about habeas corpus jurisdiction over the claims of alien detainees held at Guantanamo Bay.

I will make two points. First, it appears likely that the Supreme Court would hold that the writ of habeas corpus must be available to the detainees as a matter of constitutional law. Second, if this is true, then the Constitution requires a judicial forum that provides the detainees with an effective opportunity to test the legality of their detention. It is uncertain but unlikely that the judicial review presently available to the detainees is adequate to satisfy this standard. Taking these two points together, there is a significant possibility that the absence of habeas corpus jurisdiction over the detainee claims at Guantanamo Bay violates the Suspension Clause of the Constitution.

1. The Writ of Habeas Corpus and Guantanamo Bay

My first point, that the Supreme Court would likely hold that the writ must be available to the detainees, is based on the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466 (2004). In Rasul, the Supreme Court held that the then-existing version of 28 U.S.C. § 2241 provided a statutory basis for extending habeas jurisdiction to the claims of alien detainees held at Guantanamo Bay. Importantly, the Court's holding in Rasul was statutory rather than constitutional. Specifically, the Court held that § 2241 provided federal jurisdiction over the detainees' claims because their custodians were "within the[] respective jurisdictions" of federal district courts. At the same time, the opinions filed in the case contain language suggesting that a majority of the Court considers Guantanamo Bay to be part of United States territory for purposes of the writ of habeas corpus. If so, the writ of habeas corpus must extend to the detainees at Guantanamo Bay absent a valid suspension of the writ.

Three passages in the Rasul opinions suggest this result. The first appears in the majority opinion by Justice Stevens - which was joined by Justices O'Connor, Souter, Ginsburg, and Breyer - in a section discussing whether a presumption exists against extraterritorial application of the habeas statutes. According to the Court's opinion, the answer was not relevant because Guantanamo Bay is within the United States' territorial jurisdiction:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III.
Rasul, 542 U.S. at 480-81.

The second passage suggesting a constitutional requirement of habeas corpus jurisdiction at Guantanamo Bay appears on the next page of the majority opinion, in a discussion of whether allowing jurisdiction over the detainees' claims was consistent with the history of the writ. Justice Stevens' opinion for the Court concluded that habeas jurisdiction over the detainee claims was indeed consistent with history:

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." King v. Cowle, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." Ex parte Mwenya, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.).

Rasul, 542 U.S. at 481-82. The Court bolstered this analysis with several long footnotes, including one directly taking on Justice Scalia's contrary view that extending the writ to alien detainees at Guantanamo Bay was historically unprecedented. See id. at 482, n.11-n.14.

The third relevant passage in the Rasul opinions is Justice Kennedy's separate concurring opinion. Justice Kennedy rejected the statutory interpretation of the Rasul majority and instead addressed the constitutional question. In his view, federal courts had jurisdiction over the detainees' claims in large part due to the specific status of Guantanamo Bay. Justice Kennedy explained:

Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

542 U.S. at 487 (Kennedy, J., concurring).

What do these three passages tell us? They indicate that a majority of the current Justices - specifically, Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer - views Guantanamo Bay as part of the United States for habeas purposes. They indicate that a majority of the current Justices likely would hold that the writ of habeas corpus must therefore extend to Guantanamo Bay as a matter of constitutional law. If so, the writ or its equivalent must be made available to the detainees.

It is true that a divided panel of the D.C. Circuit recently reached a contrary result. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), cert. denied, 127 S. Ct. 1478 (2007). However, the reasoning in that decision is in obvious tension with the Supreme Court's language in Rasul. In Boumediene, the D.C. Circuit concluded that Guantanamo Bay is part of Cuba, not the United States, and that application of the habeas statute to persons detained at the base would not be consistent with the historical reach of the writ of habeas corpus. Judge Randolph rejected the relevance of Rasul in a short footnote. See id. at 992 n.10. Although the Supreme Court denied certiorari in Boumediene for procedural reasons, it seems highly likely that the Court will agree to resolve this issue in a future case. Given that Judge Randolph's approach in Boumediene is in obvious tension with the language found in the majority and concurring opinions in Rasul, it seems likely that a majority of the Supreme Court will view the case differently than did the D.C. Circuit in Boumediene.

2. Providing an "Adequate and Effective" Forum

If the detainees at Guantanamo Bay have a constitutional right to the writ of habeas corpus, Congress must provide a judicial forum that will provide the detainees with an effective opportunity to litigate the legality of their detention. Congress cannot withdraw the writ unless it provides an "adequate and effective" alternative remedy, Swain v. Pressley, 430 U.S. 372 (1977), or else Congress suspends the writ "in Cases of Rebellion or Invasion." U.S. Const. Art I. Sec 9, Cl. 2. Because there is broad agreement that Congress has not suspended the writ under the Suspension Clause, the key question is whether Congress's alternative means of judicial review of executive detention are "adequate and effective."

Although courts have not explained in detail what makes an alternative collateral remedy adequate and effective, existing precedents suggest that an adequate and effective collateral remedy is a remedy that provides the substantial equivalent of a traditional habeas writ. Put another way, alternatives to habeas corpus are "adequate and effective" only when they largely recreate the opportunities conferred by the traditional form of habeas relief. See, e.g., Sanders v. United States, 373 U.S. 1, 14 (1963) (stating in dictum that the creation of any "substantial procedural hurdles" which made a remedy "less swift and imperative" than the traditional writ of habeas corpus would engender "the gravest constitutional doubts" under the Suspension Clause); United States v. Hayman, 342 U.S. 205 (1952) (suggesting that a judicial hearing without the presence of the detainee was not adequate and effective remedy); Pressley, 430 U.S. at 384 (concluding that vesting collateral relief in judges that lack life tenure does not render an otherwise-identical remedy "inadequate and ineffective"); Alexandre v. U.S. Attorney General, 452 F.3d 1204, 1205-06 (11th Cir.2006) (holding that 2005 provisions of REAL ID Act concerning alien deportation that provides alternative mechanisms for challenging deportation

"does not violate the Suspension Clause of the Constitution because it provides. . . the same review as that formerly afforded in habeas corpus").

Does the form of judicial review presently provided to the detainees satisfy this standard? The answer is uncertain today for two reasons. First, it remains very unclear what the detainees' substantive or procedural rights may be, if any, rendering it difficult to know whether the provisions of current law are adequate to vindicate them. It is possible that the detainees have no rights, but it is possible that they do. Compare Khalid v. Bush, 355 F. Supp.2d 311 (D.D.C. 2005) with In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005). If the detainees have some rights, the extent of those rights may hinge on where individual detainees were captured, how long they have been held, and the status of ongoing military operations at the time judicial review is sought. See Boumediene v. Bush, 127 S. Ct. 1478, 1479 (2007) (Breyer, J., joined by Souter, J., and Ginsburg, J., dissenting from the denial of certiorari).

Second, the scope of judicial review currently afforded the detainees remains uncertain. The key provision is Section 1005 of the Detainee Treatment Act (DTA) or 2005, Pub.L. 109-148. The DTA lodges exclusive jurisdiction in the D.C. Circuit, but it does not explain what procedures the D.C. Circuit must use to review determinations of the Combatant Status Review Tribunals (CSRTs). The D.C. Circuit has only just begun to hear cases on what kind of procedures it will follow to review CRST decisions. Just last week, the D.C. Circuit held oral argument in Bismullah v. Gates (06-1197) and Parhat v. Gates (06-1397). Those combined cases may help determine the scope of the D.C. Circuit's review, and in particular the scope of the record the D.C. Circuit will use. Without knowing what procedures the D.C. Circuit will follow, and without knowing what rights the individual detainees have, any effort to determine whether the procedures are adequate to adjudicate those rights must be speculative.

Despite these uncertainties, there are very significant reasons to doubt that the DTA provides a constitutionally adequate form of judicial review. The reason is that "adequate and effective" collateral remedies mean adequate and effective judicial remedies. For purposes of the Suspension Clause, the constitutional question is whether the scope of judicial review of the executive detention is adequate and effective, not whether the process received by the detainees is adequate and effective. By its terms, however, the DTA permits only a very limited role for Article III courts. According to the DTA, the D.C. Circuit can only inquire as to two questions when reviewing the CSRT's decisions:

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

DTA, § 1005(e)(2)(c).

Judicial review provided by § 1005(e)(2)(c)(i) is very narrow. The CSRT procedures do not resemble those of a trial. The detainee is not represented by an advocate, and the detainee's

access to evidence is sharply limited. As a result, judicial review limited to whether the status determination complied with the rules for CSRTs is not the same as judicial review of whether the detainee is in fact an enemy combatant.

Judicial review provided by § 1005(e)(2)(c)(ii) is potentially much broader, but may also be insufficient. Even assuming that § 1005(e)(2)(c)(ii) permits the D.C. Circuit to review fully the legal and constitutional adequacy of the CSRT proceedings, by its terms this language does not appear to permit the D.C. Circuit to consider what standards and procedures in federal court are needed to vindicate the detainees' rights. If adjudicating the detainee's legal claims requires hearings in federal court beyond the narrow bounds of that provided in § 1005(e)(2)(c), it seems that the DTA does not allow them. This is all the more problematic given that the DTA lodges judicial review in an appellate court, the D.C. Circuit, instead of a trial court. A trial court has standard procedures for collecting evidence and developing a record. An appellate court does not.

As a result, the alternative remedy provided by the DTA seems poorly designed to permit an adequate and effective hearing on any legal rights that the detainees may have.
Restoring statutory habeas right at Guantanamo Bay would resolve these legal uncertainties. If Congress does not restore habeas rights at Guantanamo Bay, there is a significant possibility that its removal of habeas jurisdiction over the detainee claims at Guantanamo Bay will be held to violate the Suspension Clause of the Constitution.
Thank you again for the opportunity to testify today. I look forward to your questions.