Testimony of

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Thank you, Chairwoman Feinstein, Ranking Member Kyl, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the legal rights of the enemy combatants detained at Guantanamo Bay, Cuba, both under the Constitution and the laws that Congress has passed.

The Subcommittee conducts this hearing less than one week after the Supreme Court heard oral argument in Boumediene v. Bush, No. 06-1195, a case that may well shed considerable light on the questions now before the Subcommittee. In the Boumediene case, the D.C. Circuit held that Congress had acted within its constitutional authority in passing the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. Those statutes confirmed that the alien enemy combatants captured abroad and detained now in Guantanamo Bay could not challenge their detention through the writ of habeas corpus. The statutes did not leave the detainees without a day in court, but instead provided that the Guantanamo detainees, after receiving fair hearings before military status tribunals, could seek review of those decisions before the D.C. Circuit.

The Supreme Court now is considering whether the Guantanamo detainees may claim any constitutional entitlement to the writ of habeas corpus and, if they do, whether the judicial review procedures established by Congress would satisfy such an entitlement. This morning, I would like to explain the legal rights that the detainees enjoy under our law and why the existing system under the Detainee Treatment Act is not only a fair and constitutionally adequate alternative to habeas corpus, but one that is manifestly superior to habeas in protecting our Nation's ability to prosecute the war against al Qaeda, the Taliban, and their associated forces in Afghanistan and elsewhere.

The United States is currently engaged in an armed conflict unprecedented in our history. The attacks of September 11th demonstrated that, like past enemies we have faced, al Qaeda and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation and its citizens. Al Qaeda, the Taliban, and their associated forces, however, show no respect for the law of war--they do not wear uniforms; they do not carry arms openly; and they direct their attacks primarily against innocent civilians. They have murdered thousands in attacks against the World Trade Center, the Pentagon, the U.S.S. Cole, and American embassies in Kenya and Tanzania, to name just a few. They have also plotted further attacks against the Empire State Building, the Sears Tower, the Library Tower, Heathrow Airport, Big Ben, NATO headquarters, and the Panama Canal among others.

To prevent further attacks on our homeland, United States forces and our coalition partners have captured enemy combatants, including members of al Qaeda, the Taliban, and their associated forces, who have harbored and aided al Qaeda. As in past armed conflicts, the United States has found it necessary to detain some of these combatants while military operations continue. During the ongoing conflict, we have seized more than 10,000 enemy combatants. About 775 of these combatants--including many of the most dangerous--have been transferred to a detention facility on the United States military base at Guantanamo Bay, Cuba. Of those 775, well over half have been released or transferred from Guantanamo Bay to other countries. The United States continues to hold approximately 305

detainees at Guantanamo Bay. Although many of these detainees remain a threat to our country, approximately 80 have been determined eligible for release or transfer.

The United States Provides Alien Enemy Combatants Detained At Guantanamo Bay, Cuba With An Unprecedented Set of Rights.

One of the bedrock principles of the law of war is reciprocity. The Geneva Conventions oblige a party to an armed conflict to provide an enemy force with greater protections based upon the enemy force's respect for the provisions of the Conventions. Paradoxically perhaps, the refusal of members of al Qaeda and the Taliban to show any respect for the law of war--their refusal to wear uniforms or to distinguish themselves from the civilian population--in fact has resulted in the United States providing them with an unprecedented degree of legal process, including civilian judicial review, to assure ourselves that the individuals detained at Guantanamo Bay in fact pose a continuing threat to the United States.

In 2004, after having already released some 200 Guantanamo detainees through its own review processes, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review, in a formalized process akin to other law-of-war tribunals, whether the remaining detainees met the criteria to be designated as enemy combatants. These CSRTs afford detainees greater procedural protections than ever before provided, by the United States or any other country, for wartime status determinations. Indeed, the CSRTs afford even greater protections than those deemed by the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), to be appropriate for United States citizens detained as enemy combatants on American soil. The CSRTs also afford greater protections than those used to make status determinations under Article 5 of the Third Geneva Convention.

Under the CSRT procedures, each detainee receives notice of the unclassified basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Each detainee also receives assistance from a military officer designated to serve as his personal representative. Another military officer must present to the tribunal evidence that might suggest the detainee is not an enemy combatant. Each tribunal consists of three military officers sworn to render an impartial decision and in no way involved in the detainee's prior apprehension or interrogation. Each tribunal decision receives at least two levels of administrative review. Of the 558 CSRT hearings conducted through the end of 2006, 38 resulted in determinations that the detainee in question no longer met the definition of an enemy combatant.

To ensure that enemy combatants are not held any longer than necessary, the Department of Defense also established separate tribunals known as Administrative Review Boards ("ARBs"). Those tribunals reassess, on an annual basis for each detainee, the need for continued detention. The review includes an assessment of the degree to which a detainee remains a continuing threat to the United States and its allies and whether there are other factors bearing on the need for continued detention. Before each ARB hearing, a designated military officer provides the Board with all reasonably available and relevant information. The detainee receives a written unclassified summary of this information, and may present testimony on his own behalf. Another military officer is assigned to assist the detainee. The detainee's home government receives notice of, and may provide information at, the hearing. As a result of ARB proceedings conducted in 2005 and 2006, 188 detainees have been approved for release or transfer to another country. ARB proceedings have also been conducted throughout 2007.

Congress has provided the detainees with even greater rights and protections through two recently passed statutes. In the Detainee Treatment Act of 2005 ("DTA"), Congress provided for judicial review of final CSRT decisions regarding enemy-combatant status and imposed certain additional procedural requirements on the CSRT process. At the same time, Congress removed the statutory jurisdiction over habeas corpus that the Supreme Court had recognized in Rasul v. Bush, 542 U.S. 466 (2004). Congress judged that such a measure was necessary to curtail the unprecedented flood of detainee litigation that had followed the Rasul decision. The DTA reflects Congress's judgment that the CSRT process, with judicial review before the D.C. Circuit, constitutes the appropriate means through which the detainees can challenge their detention. Indeed, the DTA provides a more than adequate substitute for habeas, even if, contrary to existing precedent, the Guantanamo detainees might lay claim to a constitutional right to habeas corpus.

Congress again addressed the detention and prosecution of alien enemy combatants in the Military Commissions Act of 2006 ("MCA"). The MCA implemented the holding of Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), which had concluded that military commission proceedings were not authorized under then-existing law and that Common Article 3 of the Geneva Conventions applies to the armed conflict between the United States and al Qaeda. The MCA addressed Hamdan by establishing a military commission system for alien unlawful enemy combatants, see § 2, and clarifying the treatment standards required by Common Article 3, see § 6. The military-commission procedures imposed by Congress provided defendants with far greater protections than the procedures the United States used to conduct war-crimes prosecutions during World War II, and greater protections than many international war-crimes tribunals.

Alien Enemy Combatants Captured and Detained Outside the United States Have Never Enjoyed The Right To Petition For A Writ of Habeas Corpus.

The MCA also confirmed and reiterated Congress's judgment under the DTA that the writ of habeas corpus is not an appropriate vehicle for alien enemy combatants to challenge their detention by the military. As many have recognized, the writ of habeas corpus, which traces its origins to Magna Carta, represents a fundamental protection under Anglo-American law. It is important to understand, however, that the writ of habeas corpus is fundamentally a doctrine tailored for peacetime circumstances. The Constitution specifically grants Congress the authority to suspend the writ, even as it applies to American citizens, during times of rebellion or invasion. See U.S. Const. art. I, § 9. The Founders of the Constitution likely would have been surprised to think that such an action would have been required with respect to the rights of alien enemy combatants. In the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to alien enemy soldiers captured and detained during wartime.

The Supreme Court is currently considering the scope of the writ in the Boumediene case. Although the Court may provide additional guidance in the coming months, the Court last addressed this topic 50 years ago, holding in Johnson v. Eisentrager, 339 U.S. 763 (1950), that aliens outside the sovereign territory of the United States have no constitutional right to habeas corpus under the Suspension Clause, particularly during times of armed conflict. In emphatic terms, the Court explained that such habeas trials

[w]ould bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States.

Id. at 779. No less decisively, Eisentrager also rejected "extraterritorial application" of the Fifth Amendment to aliens. See id. at 784-85 ("No decision of this Court supports such a view. None of the learned commentators of our Constitution has ever hinted at it. The practice of every modern government is opposed to it.").

The Supreme Court's decision in the Rasul case several years ago was fully consistent with the underlying constitutional holdings of Eisentrager. Rasul held that the Guantanamo detainees could avail themselves of the writ of habeas corpus, but the Court emphasized that its holding was based upon its interpretation of the modern habeas corpus statute, and not the underlying question of what the Constitution requires. See 542 U.S. at 476-77. Following Rasul, Congress twice clarified that the habeas corpus statute did not extend to the Guantanamo detainees, and the D.C. Circuit held those restrictions to be constitutional in the decision now under review by the Supreme Court.

The Detainee Treatment Act Procedures Would Constitute An Adequate And Effective Alternative To Any Habeas Corpus Right.

It is important to remember that the CSRT process was established to provide the alien enemy combatants detained at Guantanamo with the due process standards that the Supreme Court held in Hamdi to be adequate for an American citizen detained as an enemy combatant. Justice O'Connor's controlling opinion in Hamdi stated that the due process requirements for enemy combatants could potentially be satisfied "by an appropriately authorized and properly constituted military tribunal," such as the Article 5 tribunals constituted under Army Regulation 190-8. Hamdi,

542 U.S. at 538. The CSRT procedures build upon Army Regulation 190-8 and, indeed, provide additional process by giving the detainee the assistance of a personal representative and authorizing the military officers conducting the CSRT to consider all reasonably available evidence bearing upon whether the detainee is, or is not, an enemy combatant.

The DTA further provides for the review of the CSRT determination by the D.C. Circuit, a right to civilian judicial review not called for by the Geneva Conventions and indeed, never before provided to alien enemy combatants. The D.C. Circuit can consider all available constitutional and statutory arguments with respect to the detainee's detention; the court can ensure that the military followed its own procedures in conducting the proceeding; and the court can review the evidence and confirm that the military tribunal properly applied the requirement that a decision to hold the detainee as an enemy combatant be supported by a preponderance of the evidence.

Judicial review under the DTA, together with CSRT procedures built under the principles laid out in Hamdi, provide an unprecedented degree of process to alien enemy combatants. Indeed, the scope of judicial review goes beyond the very limited right to habeas corpus that the Supreme Court recognized in reviewing the criminal judgments (including death sentences) of military tribunals convened during World War II. The Court made clear that the role of the federal courts in those cases was limited to considering the jurisdiction of the tribunal itself; the federal courts neither weighed the sufficiency of the evidence nor reviewed the military's compliance with its own procedures. See In re Yamashita, 327 U.S. 1, 23 (1946) ("[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts"); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners."). In view of these precedents, and the Hamdi decision, the DTA procedures clearly constitute a fully "adequate and effective" alternative to habeas corpus that would satisfy any constitutional right to habeas corpus that would be enjoyed by an alien enemy combatant. Swain v. Pressley, 430 U.S. 372, 381 (1977); see also INS v. St. Cyr, 533 U.S. 289, 305-06 (2001); Felker v. Turpin, 518 U.S. 651, 664 (1977) ("[J]udgments about the proper scope of the writ are normally for Congress to make.") (quotation marks omitted).

The Detainee Treatment Act Procedures Are More Sensitive to Military Operations Than The Traditional Peacetime Writ of Habeas Corpus.

Although the DTA procedures provide a constitutionally adequate alternative to habeas corpus, they do so through procedures more sensitive and properly adapted to the "weighty and sensitive governmental interests" at stake when it comes to the ability of the United States safely to detain those aliens who fight against us. See Hamdi, 542 U.S. at 531. The Department of Defense has built on existing law of war precedents in spelling out the CSRT rules in considerable detail, and Congress has provided additional guidance under the DTA. As the recent litigation in the Bismullah case suggests, questions remain over the scope of these rules. Those questions, however, pale by comparison to the uncertainties that would prevail were habeas corpus rights recognized at Guantanamo Bay. The CSRTs have been readily convened at Guantanamo Bay and conducted in the presence of the detainees. Would we be required to bring the detainees into the United States for habeas hearings? What rules of evidence and discovery would apply? How would classified evidence be protected? Could a detainee compel a U.S. soldier to return from Afghanistan or Iraq to testify? There is a reason why, when the Supreme Court in Hamdi considered the procedures that apply on habeas to a citizen enemy combatant, it endorsed the Article 5 tribunals embodied in Army Regulation 190-8, rather than the traditional procedures governing peacetime habeas corpus.

As Justice Jackson explained in Eisentrager, it would be "difficult to devise a more effective fettering" of military operations than by extending habeas rights to aliens captured and held abroad as enemy combatants during ongoing hostilities. See 339 U.S. at 779. Justice Jackson's prescient warning was amply confirmed during the brief habeas experience between 2004, when Rasul was decided, and 2006, when Congress most recently and most definitively restored the statutory holding of Eisentrager. During that brief time, more than 200 habeas actions were filed on behalf of more than 300 Guantanamo detainees. The Department of Defense was forced to reconfigure its operations at a foreign military base, in time of war, to accommodate hundreds of visits by private habeas counsel. To facilitate their claims, detainees urged the courts to dictate conditions on the base ranging from the speed of Internet access to the extent of mail deliveries. Through a series of interlocutory habeas actions, military-commission trials were enjoined before they had even begun. Perhaps most disturbing, habeas litigation impeded interrogations critical to preventing further terrorist attacks. One of the detainees' coordinating counsel boasted about this in public: "The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms

to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation * * * with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?" See 151 Cong. Rec. S14256, S14260 (Dec. 21, 2005). Finally, whatever burdens were imposed by briefly extending habeas to the few hundred detainees recently held at Guantanamo Bay would pale in comparison to the havoc in larger conflicts were the habeas statute generally extended to aliens held abroad as wartime enemy combatants. In World War II, for example, the United States held over two million such enemy combatants. For military operations of that scale, imposing the litigation standards that prevailed at Guantanamo Bay between 2004 and 2006 would be unthinkable.

Perhaps the most serious question that would arise with respect to granting habeas rights to enemy combatants held at Guantanamo would be whether such detainees would have the right to review classified information justifying their continued detention, and whether they could potentially force the United States to decide between either exposing highly sensitive intelligence sources to members of al Qaeda, the Taliban, or their associated forces, or instead releasing such detainees. We simply cannot maintain a system in which the Government can detain these fighters only at the cost of disclosing classified information about our intelligence sources and methods. This is particularly true in light of the fact that contrary to myth, Guantanamo Bay has not been a base for permanent detention. More than half of the detainee population already has been transferred, and we have learned that more than 30 detainees whom we have released in fact have returned to the battle to fight American soldiers.

Extending habeas corpus to the detainees at Guantanamo would not only be unwise from the standpoint of our national security, but it would be completely unnecessary in view of the extensive and unprecedented procedures currently provided to the detainees. As explained above, both Congress and the Executive recently have extended to detainees protections unprecedented in the history of armed conflict. The DTA affords the detainees with a CSRT hearing that goes beyond the procedures required by the Geneva Conventions, and implemented by Army Regulation 190-8, and the DTA further permits the detainees to obtain judicial review of that decision before the D.C. Circuit.

In sum, although the DTA procedures provide a more than constitutionally adequate substitute for habeas corpus--even if the writ were to apply--they do so in a manner that is sensitive to the needs of our ongoing conflict against al Qaeda, the Taliban, and their associated forces, including the need to protect classified information and the need to ensure that detainees are not able to undermine our war effort from within the courtroom. The existing system goes well beyond what we have provided in past armed conflicts, and well beyond what other nations have provided in like circumstances. It represents a careful balance between the interests of detainees and the exigencies of wartime, and a careful and constitutional compromise painstakingly worked out between the political branches.

Thank you, Chairwoman Feinstein and Ranking Member Kyl. I look forward to answering any questions.