TESTIMONY OF STEPHEN H. OLESKEY
OF WILMER CUTLER PICKERING HALE AND DORR LLP,
COUNSEL FOR SIX GUANTANAMO DETAINEES

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

JULY 26, 2007

Introduction

Thank you Chairman Skelton, Ranking Member Hunter, and Members of the House Armed Services Committee for inviting me to speak to you today on this important issue. All habeas counsel are grateful for the time, energy and thought which this Committee is devoting to consideration of habeas restoration for our clients, many of whom have now been detained at Guantanamo Bay for more than five and a half years.

My name is Stephen H. Oleskey and I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr. I have been a member of the Massachusetts Bar since 1968 and am also admitted in New York and New Hampshire. I previously also served as Massachusetts Deputy Attorney General and Chief of that office's Public Protection Bureau. My practice generally focuses on complex civil litigation.

By way of background to today's testimony, my experience in the critical matter before this Committee arises from my role as lead counsel and pro bono advocate for six Guantanamo detainees in the period since July 2004, following the decisions of the United States Supreme Court in the *Rasul* and *Hamdi* cases.

Briefly, our representation has been as follows. Our clients, Algerians by birth, were working and living with their wives and children in Bosnia and Herzegovina—an American ally—when, at the demand of the United States, they were arrested by Bosnian police in October 2001. Based on statements by representatives of the United States that our clients were suspected of planning terrorist acts in Bosnia, these men's homes and offices were thoroughly searched and examined. After a ninety day investigation, and based on the recommendation of the Bosnian prosecutor, the Bosnian Supreme Court ordered in January 2002 that all six men be released for lack of evidence. At the insistence of the United States, however, as our clients were about to leave the Central Jail in Sarajevo, the Bosnian executive instead turned them over to the U.S. military forces resident in Bosnia as part of the international peace-keeping mission. The men were immediately flown to the just-opened Camp Delta facility at Guantanamo Bay Naval Station, where they have been held since January 20, 2002.

Along with colleagues from WilmerHale, I have gone to Guantanamo Bay on nine occasions to meet and counsel our clients since my first visit in December 2004. (Before visits by pro bono counsel to Guantanamo began in the wake of the Supreme Court's June 2004 decision in *Rasul v. Bush*, no detainee had met with or spoken to an attorney, although many—including our clients—had been imprisoned in Guantanamo for almost three years.) I represented the men in habeas corpus proceedings in the United States District Court for the District of Columbia, where our suit, *Boumediene v. Bush,* was dismissed in January 2005. I also represented them in the resulting appeal to the United States Court of Appeals for the District of Columbia, where between the spring of 2005 and the fall of 2006 we briefed our clients' appeal on four separate occasions and had two separate oral arguments. In February 2007, after almost two years of deliberation, the Court of Appeals denied our clients' appeal by a vote of 2-1. We then filed a petition for a writ of certiorari to the Supreme Court, which was initially denied (with three dissents) in April 2007, and then granted on our petition for rehearing on June 29, 2007. That appeal is now being briefed with the consolidated Al Odah appeal. Both cases are to be heard in the Supreme Court's upcoming October 2007 Term.

Separately, we also filed petitions for each of our clients pursuant to the Detainee Treatment Act of 2005 ("DTA"). Those appeals are now pending at a preliminary stage in the District of Columbia Court of Appeals.

Our clients, like approximately 365 other detainees at Guantanamo, have never been charged with or indicted for any alleged criminal activity by the United States, and have never been allowed to stand trial for any asserted wrongdoing. Each of them was put before a Combat Status Review Tribunal in the fall of 2004 and determined through that process to be an "Enemy Combatant." Subsequently, each has had his status considered by two Annual Review Boards at Guantanamo; none of them have been recommended for release. None of them have been referred for criminal proceedings before a Military Commission pursuant to the provisions of the Military Commissions Act of 2006 ("MCA") or otherwise.

I. The Central Role of the Great Writ of Habeas Corpus Since 1789

The Great Writ of Habeas Corpus traces its roots to 1215 and the Magna Charta. Long before the establishment of the American Colonies, the Writ had evolved through court decisions in

England as the critical procedural bulwark protecting those detained by the King and facing indefinite detention without trial or charge. Of course, in cases involving a potential death sentence, being able to compel the King's officers to demonstrate the grounds for imprisonment before a neutral judge was literally a matter of life or death.

The protection of the writ of Habeas Corpus was available in the original American Colonies from their earliest days to the time of the Revolution.[1] Hamilton called habeas a "bulwark" of individual liberty, and referred to secret imprisonment as that "dangerous engine of arbitrary government," where a prisoner's "sufferings are unknown or forgotten."[2] At its historical core, the writ serves as a check against arbitrary and indefinite executive detention without trial and it is in this context that its protections have traditionally been considered strongest.[3]

As has often been observed, in the immediate aftermath of the American Revolution, when the Founders gathered in Philadelphia at the Constitutional Convention of 1789, habeas corpus was considered so central a right to secure liberty in the new republic that it was enshrined directly in the body of the Constitution, in Article I, Section 9, Clause 2, as a limitation on the power of Congress:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Immediately thereafter, the First Congress codified this constitutional protection in the Judiciary Act of 1789.[4] This made the writ immediately available to any individual held by the United States who challenged the lawfulness of his detention.

In keeping with the importance of this Constitutional command, the writ has been legally suspended during only four periods in the almost 220 years of our Republic. The first suspension occurred during the Civil War, when the District of Columbia was dramatically imperiled by Confederate forces. Later, the writ was suspended during Reconstruction, when turmoil in areas of the South challenged the functioning of the federal courts; then again in the

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[1] William F. Duker, *A Constitutional History of Habeas Corpus.*, 98, 115 (1980).
[2] *The Federalist*, No. 84 (Alexander Hamilton) (George W. Carey & James McClellan, eds. 2001) (quoting Blackstone)
[3] *See, e.g., INS v. St. Cyr*, 533 U.S.289, 301 (2001); *Swain v. Pressley*, 430 U.S.372, 385-86 (1977) (Burger, C.J., concurring).
[4] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified in 28 U.S.C. § 2241).

early 1900s in the then American colony of the Philippines; and finally once more in Hawaii in 1941 in the aftermath of the bombing of Pearl Harbor.[5] In each instance, faithful to the command of the Suspension Clause, suspension has been explicitly limited to the duration of the emergency requiring it, and each time with an express determination the public safety required this drastic action—consistent with Supreme Court rulings requiring that, even during these undisputable instances of "Rebellion or Invasion," congressional suspension must be limited in scope and duration.[6]

In assessing the constitutionally protected scope of the Great Writ, the Supreme Court has stated that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'"[7] Congress must tailor any suspension of the writ geographically to those jurisdictions undergoing rebellion or facing imminent invasion.[8] To avoid substantial constitutional questions as to whether a suspension is constitutionally legitimate, the Supreme Court also requires that Congress "articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction.[9] And if Congress seeks to avoid invoking the Suspension Clause by replacing habeas jurisdiction with a substitute remedy, the Supreme Court will carefully scrutinize the substitute remedy to determine whether it is "inadequate [or] ineffective to test the legality of a person's detention," in which case the elimination of habeas will be deemed unconstitutional.[10]

Habeas allows—indeed requires—meaningful judicial review of the legal and factual basis for detentions by an Article III federal judge. In contrast, in Guantanamo, the "enemy combatant" determinations are made by military panels in a command structure setting. This review is particularly important for the Guantanamo detainees because of the Administration's failure to distinguish between innocent civilians and combatants;[11] the Administration's decision to seize

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[5] *Hamdi v. Rumsfeld*, 542 U.S. 507, 563 (Scalia, J., dissenting); William F. Duker, *A Constitutional History of Habeas Corpus.*, 98, 115 (1980); 149, 178 n.190.

[6] See, *e.g.*, *Ex parte Milligan*, 71 U.S. 2, 126 (1866), where the Court reached this conclusion even though Congress had authorized a broader suspension of the writ.

[7] *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518. U.S. 651, 663-664 (1996)) (emphasis added).

[8] Milligan, a resident of Indiana, a state not in rebellion, was therefore found by the Supreme Court to have his right to habeas protected despite the statute enacted by Congress which Milligan challenged by seeking habeas relief. *Id.*

[9] *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

[10] *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (internal quotation marks omitted); see also *St. Cyr*, 533 U.S. at 305.

[11] A confidential CIA report developed in the summer of 2002 stated that most of the Guantanamo detainees "didn't belong there." Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, The New Yorker (July 3, 2006).

people in locations far from any battlefield and even (like our clients) in allied nations; and the fact that, as highlighted by the recent court declaration of reserve Army intelligence officer Lieutenant Colonel Stephen Abraham, the CSRTs are "largely a tool for commanders to rubber-stamp decisions they had already made."[12]

In sharp contrast to the limited appellate review provided by the Detainee Treatment Act, habeas corpus mandates factual review of the claimed basis of a Guantanamo prisoner's indefinite detention. By ensuring that the detainee is given meaningful notice of the allegations claimed to support his "enemy combatant" status and a meaningful opportunity (through counsel in a real adversarial proceeding) to contest those allegations, habeas can ensure that only those who should be correctly categorized as enemy combatants will continue to be held. In the case of my clients, for example, we would expect a federal judge in a habeas trial not only to hear evidence regarding the thorough investigation and resulting order for their release by a competent Bosnian court, but also to consider what justifications are now proffered by the government for our clients' continuing imprisonment for the last five and one-half years. For as the Supreme Court stated in *Hamdi*: "[c]ertainly, we agree that the indefinite detention for the purpose of interrogation is not authorized."[13]

Habeas provides access to counsel, a vital resource in a proceeding where liberty is a stake, particularly where potential life time imprisonment is the outcome sought by the Government. Counsel access has long been a critical and unquestioned adjunct of habeas representation, but it is expressly prohibited in the Combat Status Review Tribunals created by the Defense Department in 2004. Its indispensability is all the more unquestioned here, where detainees like our clients are denied any access to the classified evidence compiled against them; had no ability to examine any adverse witnesses or sources relied on by their CSRTs; and were denied access to any favorable witnesses except fellow Guantanamo prisoners or to any documents bearing on their status as an enemy combatant. Notably, after the Military Commissions Act was passed, the Government made various attempts to limit counsel access visits, to limit attorney access to

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A former Guantanamo commander, Brigadier General Jay Hood, was even more candid: "Sometimes, we just didn't get the right folks." But, he said, prisoners remain held at Guantanamo because: "Nobody wants to be the one to sign the release papers. There's no muscle in the system." Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, Wall. St. J., A1 (Jan. 26, 2005).

[12] William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. Times, A1 (July 23, 2007). *See also* Declaration of Lt. Col. Stephen Abraham, Case No. 07-1134 (D.C. Cir. June 15, 2007).

[13] *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality).

classified evidence that would have been reviewable under the old habeas regime, and to violate attorney-client privilege by monitoring and reviewing legal communications.

Habeas allows review of Government decisions to transfers of prisoners necessary to prevent further protracted illegal detention in another country and often torture there. Following the *Rasul* decision in 2004, many federal court judges presiding over habeas petitions entered orders requiring the Government to give 30 days notice before transferring a detainee from Guantanamo to another country for follow-on imprisonment. [14] Since enactment of the Detainee Treatment Act, courts have held that they now lack the authority to enter such orders, no matter how severe the projected risk to a detainee from such rendition to a third country. Without the restoration of habeas, this very real risk remains wholly unconstrained and subject only to executive considerations.

Finally, habeas, but not the DTA process, can provide release as a remedy in those cases where a federal judge determines that the grounds on which a prisoner has been imprisoned have been found—independently of the military CSRT process—to "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[15] Consistent with the centuries-old practice of habeas here and in England, the federal habeas statute gives federal judges the broad power to do "as law and justice require," including the power to order a prisoner's release where the judge determines that the imprisonment is illegal.[16]

II. *Rasul*, *Hamdi*, and *Hamdan*: the Supreme Court Speaks Three Times in Two Years on Guantanamo but the Detainees Continue to Be Denied Access to Habeas

Against this backdrop of the Great Writ as a fundamental bulwark against arbitrary indefinite imprisonment, and the internationally controversial creation of Guantanamo Bay prison by the Administration in an undisputed attempt to create a legal black hole,[17] Congress adopted the DTA and the MCA.

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[14] See Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 (2006) (summarizing decisions).
[15] *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (citing 28 U.S.C. § 2241(c)(3)).
[16] 28 U.S.C. § 2243.
[17] See Patrick F. Philbin and John C. Yoo, Memorandum for William J. Haynes, II, General Counsel, Department of Defense (Dec. 28, 2001), *available at* http://www.library.law.pace.edu/research/011228_philbinmemo.pdf.

These statutes cannot be understood without a brief review of Congress' earlier enactment of the Authorization for Use of Military Force resolution ("AUMF") in September 2001, in the immediate aftermath of the terrible events of September 11.[18]

The AUMF authorized the President to

> use all necessary and appropriate force against the those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[19]

Congress in the AUMF thus empowered the President to act against two limited classes of nations, organizations, and persons: those involved in the planning and execution of the September 11 attacks, and those who harbored such persons or organizations. Three years later in the *Hamdi* decision, discussed below, the Supreme Court plurality confirmed, accordingly and narrowly, only that the AUMF "authorizes the President to use 'all necessary and appropriate force ' against 'nations, organizations, or persons' *associated with the September 11, 2001, terrorist attacks.*[20]

In *Rasul v. Bush*,[21] a decision that arose out of a habeas action filed by Guantanamo detainees in 2002, the Supreme Court held that foreign nationals imprisoned by the United States at Guantanamo, a "territory over which the United States exercises exclusive jurisdiction and control," could challenge their confinement through the ancient writ of habeas corpus.[22] This conclusion was "consistent with the historical reach of the writ of habeas corpus," which extended not only to "sovereign territory" but also to "all other dominions under the sovereign's control."[23] In a justifiably famous footnote, the Court also noted that the petitioners had "unquestionably describe[d] 'custody in violation of the Constitution or laws or treaties of the

[18] Pub. L. 107-40, 115 Stat. 224 (2001)
[19] *Id.* §2.
[20] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (citations omitted and emphasis added).
[21] *Rasul v. Bush*, 542 U.S. 466 (2004).
[22] *Rasul*, 542 U.S. at 476.
[23] *Rasul*, 542 U.S. at 481-482.

United States,"[24] and it remanded the cases for "*the District Court to consider in the first instance the merits of petitioners' claims.*"[25]

Nine days after *Rasul* and the companion case of *Hamdi v. Rumsfeld*[26] were decided in late June 2004, the Defense Department acted to undercut the effect of the two rulings. In an order issued by then Deputy Defense Security Paul Wolfowitz, a summary military proceeding called a Combat Status Review Tribunal ("CSRT") was established in an open attempt to avoid habeas review by federal courts. The CSRT "review" took place before three commissioned officers. The prisoner was allowed no counsel and had no right to view any classified evidence offered to the CSRT to support his designation as an "enemy combatant." While the CSRT procedures allowed detainees to offer documents and witness, this opportunity was limited to evidence that the CSRT concluded was "reasonably available"—a standard that, in practice, excluded much readily accessible evidence, including available witnesses and documents that were actually in the government's physical possession.

In the case of two of our clients, the publicly filed Bosnian court order that they be released for lack of evidence—an order specifically referenced in our federal habeas petition filed only three months earlier—was found not to be "reasonably available." In another instance, a client's superior in his Red Crescent office in Sarajevo was found by his CSRT to be not "reasonably available" as a witness to testify that the client was duly employed as a social worker by that organization in October 2001 when he was arrested. I readily located this individual by calling the Red Crescent office at the number listed in the Sarajevo phone book and asking to speak with him. Our client Mustafa Ait Idir told his CSRT that documents showing he previously resided in Croatia would be useful, but the Tribunal President responded only that "I do not know what the procedure is, but you should really take the opportunity to get that information. Mr. Ait Idir responded, sensibly enough, "How, when I am at GTMO?" This information was never provided.

As Lieutenant Colonel Abraham makes plain today from his separate perspective as an intelligence officer intimately involved with the CSRT process in Guantanamo, the Tribunals

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[24] *Rasul*, 542 U.S. at 483 n.15.
[25] *Rasul*, 542 U.S. at 485 ((quoting 28 U.S.C. § 2241(c)(3), the federal habeas statute)(emphasis added)
[26] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reviewing habeas petition brought by a U.S. citizen initially detained in Guantanamo and then transferred to naval brigs in the United States as an "enemy combatant")

were biased against the detainees, and based their conclusions on grossly incomplete information. While our clients were ordered arrested in Bosnia by the U.S. for an alleged plot to bomb the U.S. Embassy, no evidence was found in the investigation that followed in Bosnia that linked them to such a plot. There was no evidence located that any possessed maps, sketches, bombs, or bomb-making components, weapons or any other tangible evidence demonstrating involvement in such a plot. Indeed, Mr. Ait Idir's CSRT determined that that there was no such plot. When the CSRT pressed the "Recorder" for more information on the plot and Ait Idir's claimed link to it, the reply was that there was only a "suspected" plot. Nonetheless, despite his CSRT's conclusion that the alleged plot (which was the urgent reason advanced by the United States government to demand that the Bosnians arrest him) did not exist, his panel affirmed his "enemy combatant" status.

Colonel Abraham observes in his testimony that he saw no attempts to obtain and provide to the CSRTs evidence that might exonerate a detainee, even though the CSRT Implementation Procedures promulgated by then Secretary of the Navy Gordon England on July 29, 2004 expressly provide: "*In the event the Government information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.*"[27] As an illustration of the total failure of the CSRT system to follow this elemental principle codified in its own Implementation Procedures, the CSRT for our client Saber Lahmar is particularly telling. Mr. Lahmar was charged at his CSRT with being a leader of a Bosnian cell of the GIA terrorist group(the "Algerian Armed Islamic Front"). Our other clients were implicated in this supposed "cell" on the basis of their connections—whether professional or social—to Mr. Lahmar, the alleged leader and hub of the cell. With Mr. Lahmar as the crucial centerpiece of the government's cell theory, Commander James Crisfield (Legal Adviser, CSRT) in October 2004 forwarded to his superior Colonel David Taylor (OARDEC Forward Commander) an email entitled "POSSIBLE EXCULPATORY INFORMATION ON ... [SABER LAHMAR]." But the OARDEC Command provided this exculpatory evidence about Mr. Lahmar to only two members of his CSRT—and then only *after* that Tribunal had made its decision. And the exculpatory information was never provided to any of our five other clients' CSRT panels, despite the fact that their alleged "association" with Mr.

[27] Gordon England, Memorandum regarding Implementation of Combatant Status Review Tribunals for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), Enc. 1, ¶ H(4).

Lahmar (the supposed cell leader) was an important element of their respective enemy combatant determinations.

In deciding enemy combatant status, the CSRT was permitted to "consider any information it deem[ed] relevant to a resolution of the issue before it," including hearsay and evidence procured by torture or coercion. The Wolfowitz order also applied a "rebuttable presumption in favor of the government's evidence." And it employed a sweeping and greatly expanded definition of an "enemy combatant," including "an individual who was part of *or supporting* Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or it coalition partners [and] ...*includes* any person who as committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[28]

In January 2005, two federal judges in Washington reached diametrically opposite conclusions on the question of whether federal courts could consider the merits of Guantanamo petitioners' claims.[29] One, Judge Leon, dismissed our case, holding that detainees have no rights that are enforceable in federal court.[30] The other, Judge Green, who was coordinating the balance of the cases filed at that time, held that federal courts did have jurisdiction, that "all detainees possess Fifth Amendment due process rights," and that their cases should go forward to trial on the merits.[31] Both cases were appealed and it is these appeals which are now before the Supreme Court for briefing and hearing this fall, almost three years after the district court made these preliminary rulings on their habeas claims.

In the fall of 2005, at the urging of the Administration, the Congress passed the Detainee Treatment Act, which the Administration contended was intended to eliminate jurisdiction over petitions filed by or on behalf Guantanamo detainees.[32] To replace habeas, the DTA also created an alternative process where detainees could seek review of final CSRT decisions in the District of Columbia Court of Appeals. That procedure, however, is inherently flawed, as it effectively

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[28] Notably, when the Administration asked the Supreme Court to approve its detention of "enemy combatants" in the *Hamdi* appeal, it carefully limited the term to an "individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (plurality) (internal quotation marks omitted). Hamdi had in fact been seized in Afghanistan.

[29] These two cases were, respectively, our clients' *Boumediene v. Bush* petition and the parallel case of *Al Odah v. United States.*

[30] *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

[31] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

[32] Pub, L. 109-148, 119 Stat. 2680, 2739 (2005).

insulates the lopsided and hastily drawn-up CSRT process I have described. Moreover, the DTA's judicial review mechanism promises-indeed invites- endless rounds of administrative litigation as detainee cases potentially bounce back and forth between the Court of Appeals and new CSRT panels, while international condemnation of Guantanamo continues to sully the image of this great nation, and the years of detention for most men stretch on indefinitely.

Six months later, in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA's purported repeal of habeas jurisdiction for Guantanamo detainees did not apply to pending habeas petitions.[33] The Court also struck down as not authorized by Congress the few military commissions established by a 2001 Presidential order to try detainees actually charged with crimes.[34] It also held that all Guantanamo detainees are protected, at a minimum, by Common Article 3 of the Geneva Conventions which requires basic protections for military commission trials and prohibits torture, cruel treatment, and other abuse.[35]

With strong encouragement from the Administration, Congress responded in the Fall of 2006 by enacting the Military Commissions Act of 2006.[36] This statute not only provided Congressional authorization for the military commissions struck down in *Hamdan* as lacking such authorization but also in Section 7(a) purported to strip federal court jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus filed by or on behalf of an alien. . . who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," and (2) "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien described in the first category.[37] The Military Commissions Act was not limited to Guantanamo detainees but was extended to encompass any foreign nationals detained by the United States as "enemy combatants." In the June 2007 *Al-Marri* decision, the federal Fourth

[33] 126 S. Ct. 2749, 2764-2765 (2006)
[34] *Hamdan* at 2797-2798.
[35] *Hamdan* at 2795.
[36] Pub. L. 109-366, 120 Stat. 2600 (2006)
[37] *Id.* at § 241(e)(2).

Circuit court of appeals rejected the Administration's argument that the MCA applies to lawful resident aliens held in the United States, but the Administration is appealing that decision. [38]

Four months earlier, however, in the *Boumediene* and *Al Odah* appeals, the District of Columbia Court of Appeals issued a divided 2-1 decision rejecting the detainees' efforts—by that time more than five years old—to obtain habeas hearings. The majority concluded that the Military Commissions Act of 2006, enacted during the pendency of these appeals, operated to strip federal jurisdiction over habeas appeals. The majority also concluded that the MCA's jurisdiction-stripping provision did not violate the Suspension Clause because, in its view, habeas corpus would not have been available as of 1789 to persons "without presence or property in the United States.[39] The panel reached this conclusion notwithstanding the majority's statement in *Rasul* that the ability of Guantanamo prisoners to invoke habeas corpus was consistent with the "historical reach of the writ."[40] Finally, although the majority recognized that although Guantanamo detainees are not "enemy aliens" like the convicted German soldiers in *Johnson v. Eisentrager*,[41] it nonetheless treated *Eisentrager* as controlling. The majority stated that the distinctions between the century old U.S. Naval Station at Guantanamo where the U.S. exercises full authority and the allied prison in Germany post World War II where the Eisentrager petitioners were held, are "immaterial to the application of the Suspension Clause."[42] Judge Rogers dissented, agreeing that while the Military Commissions Act did act to repeal federal habeas jurisdiction for Guantanamo detainees, such a repeal was unconstitutional in light of the *Rasul* decision and the Congress failure in the MCA to replace habeas with a "commensurate procedure."[43]

Judge Rogers rested her conclusion on two factors. First, far from adhering to the Supreme Court's requirement of "careful consideration and plenary processing of . . . claims including full opportunity for presentation of the relevant facts,"[44] many aspects of the CSRT proceedings—

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[38] *See Al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007). Mr. Al-Marri, a Qatari national, arrived in the United States with his wife and five children on a student visa to study at Bradley University in Peoria, Illinois. He was first arrested on fraud charges but those charges were dropped shortly before trial when he was declared by the President to be an "enemy combatant."
[39] *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007)
[40] 543 U.S. at 481-482
[41] 339 U.S. 763 (1950)
[42] 543 U.S. at 992.
[43] 543 U.S. at 1004 (Rogers, J., dissenting).
[44] *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

evidentiary presumptions against the detainee, lack of access to the government's extensive classified evidence provided to the CSRT but not the detainee, the many obstacles to presenting rebuttal evidence, and the detainees' inability to have the assistance of counsel at the CSRT—are "inimical to the nature of habeas review."[45] Second, she found that the judicial review of the CSRT process provided by Congress in the DTA, "is not designed to cure these inadequacies."[46] The DTA prevents the detainee from offering evidence rebutting the government's case; it "implicitly endorses" detention on the basis of evidence obtained through torture; and if the court were to find a particular detention unjustified, neither the DTA nor the MCA authorizes the court of appeals to order the prisoner's release.[47] Indeed, in some cases where *CSRTs themselves* found detention to be unjustified, the government simply reconvened CSRTs seriatim until it obtained the desired results.[48] Colonel Abraham's testimony here today confirms this inexcusable practice.

III. The Need to Restore Habeas is Confirmed By the *Bismullah* Decision on July 20, 2007

On July 20, a three judge panel of the District of Columbia Court of Appeals issued a key decision in *Bismullah v. Gates* governing proceedings governing the CSRT review provisions of the Detainee Treatment Act.[49] This panel addressed for the first time "various procedural motions the parties have filed to govern our review of the merits of the detainees' petitions."[50] The decision did accept in several respects a broader view of detainee procedural rights than the Government advocated, notably in adopting a wider view of the "record on review" to be scrutinized by the court of appeals in each case. The court held that the record for review includes "all the information that a Tribunal is authorized to obtain and consider," which in turn is defined as "such reasonably available information in the possession of the U.S.Government bearing on the issue of whether the detainee meets the criteria to be designated as an "enemy combatant."[51] The court also adopted a presumption that DTA counsel for detainees have the

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[45] 543 U.S. at 1006 (Rogers, J., dissenting)
[46] 543 U.S. at 1006 (Rogers, J., dissenting).
[47] 543 U.S. at 1004 (Rogers, J., dissenting).
[48] Mark Denbeaux & Joshua Denbeaux, *No Hearing Hearings—CSRT: The Modern Habeas Corpus?* 37-39 (2006) (available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf)
[49] __F.3d __, 2007 WL 2067938 (D.C. Cir. 2007).
[50] *Bismullah*, 2007 WL 2067938, *1.
[51] *Bismullah*, 2007 WL 2067938, *1.

"need to know" any classified information relating to their clients' case, subject to rebuttal by the government within narrow categories of highly sensitive information.52

But with a host of other issues, the court either resolved them adversely to DTA petitioners or left them unresolved for yet more procedural motions, litigation and delays. These issues include the DTA's rejection of the very heart of effective advocacy, attorney-client privileged communications, by allowing a screened DOJ team to review the substance and content of legal mail—something not allowed under the district court habeas protective order.[53] In light of the fact that no detainee counsel may communicate with their Guantanamo clients other than through infrequent personal visits (which must be scheduled well in advance with DOD) or more regularly through mail, this restriction is extremely serious.

Moreover, the court held that DTA counsel, unlike habeas counsel, may represent detainees only in their challenge to the CSRT itself, and may only correspond with detainees regarding events that occurred between the run-up to the detainees' capture and the conclusion of their eventual CSRT hearing.[54] In many cases, such as ours, where our clients had lived in Bosnia with their families for some time, had traveled outside the country on occasion for visits elsewhere, had employment in Algeria and elsewhere bearing on their classification as "enemy combatants," this limitation is a very serious handicap to an effective attack on the CSRT result.

The opinion also leaves unresolved several other key elements of the DTA's apparent inadequacy, including the lack of any explicit power for the court to order release; an uncertain definition of when information is "reasonably available" for production to detainees; the uncertain right of detainees to introduce evidence contradicting the case presented by the government; and the apparently foreclosed right of detainees to seek discovery about the results in other CSRTs—even when those CSRTs were reviewing factually parallel cases involving other alleged members of a single purported conspiracy.

The delays inevitable in seeking responses to each of these open questions, and others, with possible intervening appeals to the Supreme Court, contrast very unfavorably with the federal district courts' long-established standards governing evidentiary practice and procedure in

[52] *Bismullah*, 2007 WL 2067938, *8.
[53] *Bismullah*, 2007 WL 2067938, *11.
[54] *Bismullah*, 2007 WL 2067938, *10-11.

habeas trials. Moreover, it cannot seriously be disputed by anyone that the government has calculatedly taken maximum advantage of any claimed ambiguity to resist any steps likely to result in meaningful hearings for any detainees, beginning with its pre-DTA position that the *Rasul* decision did not mean that Guantanamo detainees have any rights that can be vindicated in a habeas proceeding—a contention that is now only likely to be resolved by the Supreme Court itself almost four years after Rasul. Assuming a favorable outcome to petitioners in the Supreme Court, the preliminary stages of habeas proceedings might begin in mid 2008—six years into many men's imprisonment.

IV. Conclusion

At issue before this Committee and Congress is nothing less than the question of this great nation's commitment to the rule of law. Hundreds of men, including our six clients, are facing potential lifelong imprisonment without any assurance that they will ever be tried on any criminal charges (where ironically they would actually have the assistance of counsel and be able to call witnesses and to offer documents) or given any fair opportunity to challenge the claimed basis of their apprehension and detention by our government.

This Congress faces a unique challenge to our fundamental assurance in the fundamental core of habeas corpus as a time-tested mechanism to allow a prisoner held without charge by the executive to challenge the basis for that imprisonment. As Justice O'Connor wrote for the *Hamdi* plurality in 2004, in light of the Government's position on the duration of the "war on terror, it was "not farfetched" that "Hamdi's detention could last for the rest of his life."[55] Justice's O'Connor's statement looks even more prescient in July 2007 than in it did in June 2004.

As a country we face an entirely new challenge to our view of who we are and how we wish to view ourselves and be viewed by the rest of the world. We have never before now claimed the power to deny such a basic right to prisoners permanently. And we have never claimed the power to suspend habeas lawfully absent a finding that public safety required this drastic resort as a temporary measure- as the Suspension Clause plainly requires.

[55] *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004) (plurality).

From the position of this now battle-tested trial lawyer, I respectfully suggest that deferring to the Supreme Court for full resolution of this critical issue is neither responsible policy nor effective law making. Moreover, it unnecessarily places the Supreme Court squarely on a collision course with this Branch. It is Congress's adoption of the MCA less than a year ago that underpinned the court of appeals decision in February in the *Boumediene* and *Al Odah* decisions that these 375 men have no habeas rights. Congress can right that result and let the habeas mechanism proceed, as it has for centuries, by adopting H.R. 2826. No amount of tinkering by the court of appeals can ever put right a system as broken as the hastily cobbled-together and thoroughly disgraced CSRT system. The sooner that reality is acknowledged, the sooner will this country begin to recover from the international criticism leveled at us publicly and privately for our decision to hold hundreds of men in Guantanamo indefinitely without recourse to a fundamentally fair process to test that imprisonment, a circumstance that legitimately appalls us when it happens to our citizens elsewhere in the world.

I welcome the Committee's questions.

Thank you.