Department of Justice

STATEMENT

OF

GREGORY G. KATSAS
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
IMPLICATIONS OF THE SUPREME COURT'S BOUMEDIENE DECISION FOR DETAINEES AT GUANTANAMO BAY, CUBA: ADMINISTRATION PERSPECTIVES

PRESENTED ON
JULY 31, 2008

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Thank you, Chairman Skelton, Ranking Member Hunter, and Members of the Committee. I appreciate the opportunity to appear again before the Committee and to discuss the implications of the Supreme Court's decision in *Boumediene v. Bush* for the more than 200 habeas corpus proceedings currently pending in the United States District Court for the District of Columbia.

When I last appeared before the Committee, the Supreme Court had denied certiorari in the *Boumediene* case, and Congress was considering whether and how to extend habeas corpus to the Guantanamo detainees. Since then, the Supreme Court reconsidered that decision, granted certiorari, and ultimately held that the approximately

265 aliens detained at Guantanamo Bay as enemy combatants have a constitutional right to challenge their detention in United States District Court through habeas corpus.

Last week, the Attorney General addressed the implications of the *Boumediene* decision in remarks made before the American Enterprise Institute. The Attorney General emphasized that *Boumediene* raises as many questions as it answers, and he urged Congress to act expeditiously to pass laws to address those questions, for the benefit of our Nation's security and the orderly litigation of the hundreds of Guantanamo habeas cases pending in the federal courts. In my opening remarks, I would like to take this opportunity to discuss the questions left open by *Boumediene* as well as to explain why we believe it imperative that Congress act.

As the Attorney General explained, the *Boumediene* decision is about the *process* of judicial review that must be afforded to those we detain in our ongoing armed conflict with al Qaeda, the Taliban, and associated groups, not about whether we can detain them at all. Under longstanding law-of-war principles, and under the Authorization for the Use of Military Force passed by Congress immediately after the terrorist attacks of September 11, 2001, the United States has every right to detain enemy combatants in order to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. In addition, this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer.

Although our right to detain enemy combatants in this armed conflict is clear, determining what, if any, rights those detainees should be granted to challenge their detention has been more complicated. This is not surprising, because the laws of war

governing detention of enemy combatants were designed with traditional armed conflicts in mind. However, as the President emphasized shortly after the September 11 attacks, the War on Terror is a different sort of war.

Over the past seven years, each of the three branches of our government has addressed the appropriate legal process for detaining combatants in the ongoing armed conflict. In the first few years after the September 11 attacks, the Executive Branch took the view, consistent with the traditional laws of war, that the United States could detain enemy combatants for the duration of hostilities, without judicial review of those detentions, as we had done in World War II and earlier armed conflicts. In its 2004 decisions in the *Hamdi* and *Rasul* cases, the Supreme Court agreed that enemy combatants in the present conflict could be subjected to military detention. At the same time, the Court recognized a role for the courts in reviewing the government's basis for detaining particular individuals as enemy combatants.

Following these developments, Congress and the Executive Branch sought to apply the Court's guidance in establishing a sound and sustainable framework to support military detention. In 2004, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review the determination whether each individual alien held at Guantanamo Bay is, in fact, an enemy combatant. Those tribunals were designed to afford detainees more procedural protections than the Geneva Conventions would afford for status determinations in traditional armed conflicts between signatory countries, and more procedural protections than the Supreme Court had said would be constitutionally sufficient to support the detention of an American citizen as an enemy combatant inside the United States.

Then, Congress enacted the Detainee Treatment Act of 2005, and later the Military Commissions Act of 2006. Those statutes established a new system of judicial review of the decisions to hold the Guantanamo detainees as enemy combatants. Under that system, the Guantanamo detainees could not file lawsuits for habeas corpus in the United States district courts. Instead, however, they were authorized to seek review of CSRT decisions classifying the detainees as enemy combatants in the United States Court of Appeals for the District of Columbia Circuit.

The Supreme Court considered the constitutionality of these procedures in *Boumediene v. Bush*, and held by a five-to-four vote both that the Guantanamo detainees have a constitutional right to challenge their detention through habeas corpus, and that the procedures for adjudication before the CSRTs, followed by judicial review through the Detainee Treatment Act, did not provide an adequate substitute for habeas corpus.

In its basic terms, a petition for habeas corpus is a lawsuit brought by someone in custody seeking release on the ground that his detention is unlawful. The most common example of such petitions involves defendants who have been convicted in state court and who argue that the conviction and subsequent detention violate the Constitution or laws of the United States. For at least a century, habeas corpus has usually applied to imprisonment in regular criminal cases and detention by immigration authorities. Congress and the courts have developed an extensive body of law in both statutes and cases to guide habeas proceedings in those settings.

Before the Supreme Court's decision in *Boumediene*, however, no alien enemy combatant detained outside the United States had ever before received a right to habeas corpus constitutionally protected under the Suspension Clause. The majority opinion

itself acknowledged as much, in stating that the Supreme Court had never before "held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Boumediene*, 128 SCt. at 2262. Nonetheless, the Court concluded that the unique nature of this conflict, and the unique features of the naval base at Guantanamo Bay, Cuba (in particular, the degree of control exercised by the United States over the base), were enough to extend the writ to cover the aliens who are detained there as enemy combatants.

Now that the Supreme Court has spoken, the task is to move forward consistent with the principles set forth in the Court's decision. That responsibility rests with the Legislative and Executive Branches as much as it does with the judiciary. This reality follows from *Boumediene* itself: Although the Supreme Court settled the question of *whether* the Guantanamo detainees have a constitutional right to habeas corpus, the Court did not decide questions relating to *how* those habeas corpus proceedings must be conducted. To the contrary, the Court stressed that "[t]he extent of the showing required of the Government in these cases is a matter to be determined," *Boumediene*, 128 SCt. at 2271, and that "our opinion does not address the content of the law that governs petitioners' detention." *Id.* at 2277. Moreover, the Court expressly invited the political branches to decide "how best to preserve constitutional values while protecting the Nation from terrorism," and it stressed that, in assessing those difficult tradeoffs, "proper deference must be accorded to the political branches." *Id.* Those aspects of the *Boumediene* decision are consistent with the settled and more general principle, as the Supreme Court stated in its 1996 decision in *Felker v. Turpin*, 518 U.S. 651 (1996), that

"judgments about the proper scope of the writ are normally for Congress to make." *Id.* at 664.

In *Boumediene*, the Court specifically recognized that habeas proceedings for the detainees at Guantanamo Bay could raise serious national security issues, and that these issues could require that adjustments to the rules that apply in ordinary habeas proceedings brought by defendants in domestic criminal custody. The Court noted, and with good reason, that certain accommodations might be made "to reduce the burden habeas corpus proceedings will place on the military" and to "protect sources and methods of intelligence gathering." *Boumediene*, 128 SCt. at 2276. In that respect, *Boumediene* was consistent with Justice O'Connor's controlling 2004 decision in *Hamdi*, which likewise had acknowledged, in determining the Due Process rights of citizens held as enemy combatants, that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). In the case of aliens held as enemy combatants at Guantanamo, the *Boumediene* Court did not decide the issue of what adjustments should be made for these unprecedented habeas proceedings; instead, it left those questions open. It is those questions—the questions that *Boumediene* left unanswered—that Attorney General Mukasey addressed in his speech last week.

First, will a federal court be able to order the release of aliens detained as enemy combatants at Guantanamo Bay into the United States? The Supreme Court stated that a federal trial court must be able to order at least the conditional release of a detainee who successfully challenges his detention. But what does it mean to order the release of a foreign national captured abroad and detained at a secure United States military base in

Cuba? For example, what happens if a detainee's home country will not take him back, or if we cannot transfer the detainee to that country because it will not provide the required humanitarian guarantees that the detainee will not be subject to abuse when he gets home? This question is already upon us in pending litigation. In the *Parhat* litigation, a detainee argued to the D.C. Circuit that the CSRT record did not adequately support his detention as an enemy combatant. After reviewing the CSRT record, the D.C. Circuit concluded that the CSRT had failed to make appropriate findings regarding the reliability of the documents it relied upon and that the Court could not determine whether the documents were, on their face, sufficiently reliable to support the CSRT's enemy combatant determination. The Court therefore ordered the Department of Defense either to conduct a prompt new CSRT for Parhat or else to release him. Then, Mr. Parhat sought an order from the habeas court ordering his *immediate* release into the United States, even *before* the further CSRT or habeas proceedings had run their course. Mr. Parhat, I should add, seeks to settle himself in the greater Washington, D.C. area.

Second, how will the courts handle classified information in these unprecedented court proceedings? Much of the information supporting the detention of enemy combatants held at Guantanamo Bay is drawn from highly classified and sensitive intelligence. And we know from bitter experience that terrorists adjust their tactics in response to what they learn about our intelligence-gathering methods. For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies.

Third, what are the procedural rules that will govern these court proceedings? Must each detainee receive a full-dress trial, with live testimony by the detainee here in

Washington? Will a detainee be able to subpoena a soldier to return from combat duty in Afghanistan or Iraq to testify? Should one detainee be allowed to call other detainees as witnesses? Or compel the United States to reveal its intelligence sources in order to establish the admissibility of critical evidence?

One could say that these questions should be left to the courts, to be resolved through litigation. Unless the political branches act, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending. The federal court in the District of Columbia is already working diligently on some of these issues. But with so many cases, there is a serious risk of inconsistent rulings and considerable uncertainty. Without guidance from Congress, different judges—even on the same court—will disagree about how the difficult questions left open by *Boumediene* should be answered. Such disagreement will, in turn, lead to a long period of protracted litigation—with the possibility of different procedures being used in different cases—until, perhaps, the Supreme Court intervenes yet again.

But uncertainty is not the only, or even the main, reason these issues should not be left to the courts alone to resolve. Congress and the Executive Branch are affirmatively charged by our Constitution with protecting national security, are expert in such matters, and are in the best position to weigh the difficult policy choices that are posed by these issues. Judges play an important role in deciding whether a chosen policy is consistent with our laws and the Constitution, but it is our elected leaders who have the responsibility for making policy choices in the first instance. Moreover, it is well within the historic role and competence of Congress and the Executive Branch to attempt to

resolve difficult questions about the procedures that should apply in habeas corpus proceedings.

For these reasons, the Attorney General recently urged Congress and the Executive Branch to work together to resolve the difficult questions left open by the Supreme Court. The Attorney General identified six principles that he believes should guide any such legislation. I would like to recommend them to you today.

First, Congress should make clear that a federal court may not order the Government to bring those detained at Guantanamo into the United States. There are approximately 265 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; indeed, many already have demonstrated their ability and their desire to kill Americans. Although the Constitution may require generally that a habeas court have the authority to order release, no court should be able to order that an alien captured and detained abroad during wartime be admitted and released *into the United States*. Even bringing a detainee into the United States for the limited purpose of participating in his habeas proceeding would require extraordinary efforts to maintain the security of the site. To the extent detainees need to participate personally, technology should enable them to do so by video link from Guantanamo Bay, which is both remote and safe.

Second, in the context of wartime status determinations, habeas proceedings must be conducted in a way that protects classified information and intelligence sources and methods. We need to protect our national security secrets, and we believe we can accomplish that goal in a manner that is fair to both the Government and detainees alike.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of the detainees charged with war crimes (about 20 at present). Two weeks ago we received a favorable court decision rejecting the effort of one detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. The victims of the September 11th terrorist attacks should not have to wait any longer to see those who stand accused face trial.

Fourth, any legislation should acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans—soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures for habeas proceedings. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings "practical."

Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers should not be required to leave the battlefield to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be sufficient. Federal courts have never treated habeas corpus as demanding full-dress trials, even in ordinary criminal cases, and it would be particularly unwise to do so here.

Sixth, because of the significant resource constraints on the Government's ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. One unintended consequence of the Supreme Court's decision in *Boumediene* is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act, and it should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of United States custody.

These are the central principles that the Department believes should govern any legislation in this area. There is a pressing need for such legislation, as these cases are proceeding now. Chief Judge Lamberth of the United States District Court for the District of Columbia expressed support for legislation, but he urged Congress to act quickly, because the habeas cases are moving forward this fall. He said: "Guidance from Congress on these difficult subjects is, of course, always welcome. Because we are on a

fast track, however, such guidance sooner, rather than later, would certainly be most helpful." The judgment of the political branches can help the courts to adjudicate these cases fairly, uniformly, accurately, and efficiently, while ensuring that we have firm institutions in place that will allow our Nation to continue to prosecute this war with success.

* * *

Again, Mr. Chairman, thank you for the opportunity to appear today to discuss these important issues. I believe it is important that Congress and the Executive Branch cooperate to ensure that these cases proceed in the federal courts in a responsible and efficient manner that is consistent with the interests of national security, while preserving the procedural rights of detainees. We look forward to working with Congress to meet those objectives.