Statement of Richard Klingler [1]

before

The House Committee on Armed Services

on

Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba: Non-Governmental Perspective.

July 30, 2008

Chairman Skelton, Ranking Member Hunter, and members of the Committee, I appreciate the opportunity to present my thoughts on the important issues raised by the U.S. Supreme Court's recent decision in *Boumediene v. Bush*. While I have written court briefs on detainee issues as a private sector attorney and have observed related cases as a government lawyer, I address you today in my personal capacity regarding the prospective implications of that decision.

Boumediene presents very significant issues that only legislation can address effectively. Federal courts have traditionally deferred very considerably to the Executive Branch and to the Congress on matters involving military operations or foreign affairs. Killing or capturing the enemy, and preventing its attacks on us, are core military functions, and detention of persons the military has found to be enemy combatants is a central and legitimate component of the war on terrorists – as the Supreme Court has elsewhere found. The military, as directed by the President in accord with applicable legislation, should be responsible for those determinations.

Boumediene abandons that tradition of deference. The extensive, overlapping judicial proceedings that must follow threaten an unprecedented degree of judicial policy formulation in matters affecting the military's operations and the defense of the nation. At the same time, *Boumediene* provided almost no guidance to lower courts regarding the processes to be used, the detainees' substantive rights, or the protections that must be afforded to the military's interests and the nation's security interests.

The resulting problem is straightforward. In their new, undefined role overseeing military functions, civilian judges are likely to draw too directly on processes and analysis developed to protect U.S. citizens in established criminal proceedings. They are unlikely to appreciate the consequences of their decisions on the formulation of national security policy or

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the conduct of military operations. The detainees are not U.S. citizens; they are not criminal defendants; and traditional proceedings rarely implicate national security concerns.

Some portray the issue as simply ensuring that the military holds people at Guantanamo who actually threaten Americans. The issue is far broader and more complex. The *Boumediene* decision is not limited by its terms to Guantanamo and has implications far beyond, including for Iraq and Afghanistan. The resulting judicial proceedings will allow judges to review the military's evidence, but also to decide when and how the military is empowered to detain enemy combatants and how the military must conduct its processes to support the judiciary's review. They create open-ended litigation that will allow detainees, their lawyers, and related advocacy groups to seek to challenge military policy and to constrain basic military counter-terror capabilities. Particular issues extend to how to resolve multiple, overlapping judicial processes, how to protect sensitive military and intelligence information, and how to ensure that military resources aren't diverted from core tasks. And, in the end, judges may make decisions for reasons having nothing to do with the evidence of threat or may themselves make mistakes -- leading to the release of persons who do in fact seek to kill American soldiers, civilians, and their allies.

These circumstances provide a compelling case for Congress to reassert the political branches' control over policy formulation in this area. Legislation would create certainty and reduce the risks that litigation poses to military operations and national security interests. The Executive Branch and the Chief Judge of the affected court have requested action. More broadly, Congress has the opportunity to reaffirm the principles underlying the military's actions against terrorists, including detentions, and to place on sounder footing the daily actions undertaken in the field by our military and intelligence officers.

The Judicial Tradition of Deference Regarding Military Policy and Operations

Boumediene marks a sharp departure from the long-standing judicial tradition of not enmeshing courts in the oversight of military and diplomatic matters. For those matters, the federal courts have traditionally deferred to the Executive and Congress – especially when both act in tandem.

Two cases from the most recent Supreme Court Term illustrate the principles underlying that tradition that extends to the early nineteenth century. In *Munaf v. Geren*, the Court considered barring U.S. military forces in Iraq from transferring U.S. citizens from their custody to Iraqi officials who sought to prosecute them for violating Iraqi law. The Court unanimously held that "prudential concerns" prevented it from interfering with the Executive Branch's operations even though the Court had habeas jurisdiction over the matter.

It did so based on the core principles underlying the tradition of deference. "[T]hose issues arise in the context of ongoing military operations," and the "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[2] Issuing the order would also raise "concerns about unwarranted judicial intrusion into

[2] *Munaf v. Geren*, No. 06-1666, *slip op.* 11 (June 12, 2008) (internal quotations omitted throughout).

the Executive's ability to conduct military operations abroad."[3] Instead, the Constitution "requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[4] As for claims that judicial intervention was required to prevent the Iraqi government from torturing the U.S. citizens, "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."[5]

Similarly, the Court in *Medellin v. Texas* drew on this tradition in addressing whether, as a result of treaties entered by the United States, a decision of the International Court of Justice had the force of domestic law and thus pre-empted inconsistent provisions of state law – either directly or through a Presidential memorandum. The Court held that it did not. It reasoned that these and other non-self-executing treaties are not part of domestic law – not for enforcement in U.S. courts, not for pre-emption, and not for Article II's requirement that the President "take care that the laws be faithfully executed." Such treaties include the U.N. Charter and many of the humanitarian law treaties that underpin litigation against counter-terrorism and related U.S. policies.

Excluding such treaties from domestic law rested squarely on the tradition of deference. Relying on cases dating to 1829, the Court defined its role by reference to Congress' and the President's determinations. Courts could address treaty terms where Congress and the President clearly indicated that domestic law encompassed a treaty, but "[t]he point of a non-self-executing treaty is that it addresses itself to the political, *not* the judicial department … ."[6] Such "international obligations" between sovereign states were "the proper subject of political and diplomatic negotiations,"[7] and judicial action risked impairing "the ability of the political branches to determine whether and how to comply with [them]."[8]

Boumediene **and the Litigation of Military Policy and Operations**

In *Boumediene*, a bare majority of the Court sharply abandoned this tradition. It struck down, as contrary to the Constitution's Suspension Clause, a provision of the Military Commissions Act ("MCA") that limited federal judicial review of the military's determinations that certain foreign nationals should be detained in Guantanamo because they threatened U.S. forces and citizens in an ongoing military conflict. The majority held that habeas courts' review of the military's determinations, in addition to the narrower review that Congress provided via a federal Court of Appeals, was needed to "safeguard liberty" through the "separation of powers."

This unprecedented overturning of military policy was not, however, compelled by any clear basis in law – and was instead an exercise in judicial policymaking. The majority's opinion candidly acknowledged its scant legal underpinnings. Canvassing the history of the habeas writ until 1789, the majority found no case where an English or colonial court "granted habeas relief

[3] *Id.* 22.
[4] *Id.* 22-23.
[5] *Id.* 23.
[6] *Medellin v. Texas*, No. 06-984, *slip op.* 20 (March 25, 2008).
[7] *Id.* 24.
[8] *Id.* 15.

to an enemy alien detained abroad,"[9] or in circumstances that supported extending jurisdiction to Guantanamo.[10] Nor did it find that any later cases lent direct support, beyond suggesting that a flexible test may determine the writ's scope.

The Court did, however, find a case that had already addressed just this issue of non-citizens held by the military beyond the nation's territory – and found no habeas jurisdiction. In *Johnson v. Eisentrager*, the Court denied habeas relief to alien detainees held in post-War, occupied Germany because the detainees "at no relevant time were within the territory over which the United States is sovereign" and had been and remained "beyond the territorial jurisdiction of any court of the United States."[11] The *Boumediene* majority provided no persuasive basis for distinguishing this case.

Instead, the majority justified its decision with policy determinations. It candidly asserted the benefits of the judiciary's intervention on behalf of foreigners who the military believed threatened Americans. In focusing on the detainees' status, the majority second-guessed the military's determination of the threat posed to U.S. soldiers, civilians, and allies.[12] And, the majority simply found not "credible" the Government's claims that "the military mission at Guantanamo would be compromised."[13] A habeas court's erroneous release of a detainee who may go on to kill U.S. soldiers, civilians, and allies – as detainees erroneously released by the military have – might credibly be thought contrary to the central "military mission" at issue.

The Scope and Implications of the *Boumediene* Decision

So what issues does the *Boumediene* decision present? Seven separate areas of difficulty are immediately apparent, all contributing the potential for increased judicial policymaking over military policy and operations and for harm to national security interests.

1. Beyond Guantanamo. Perhaps most important, the majority's reasoning is not limited to Guantanamo. It could conceivably apply to Iraq, Afghanistan and elsewhere. The *Boumediene* majority made up a new, open-ended test with "at least" three factors to determine whether habeas jurisdiction applies.[14] These include (i) the petitioners' "citizenship and status," (ii) where the apprehension and detention took place; and (iii) "practical obstacles" that applying habeas jurisdiction may present.[15]

The majority decision found that these conditions for habeas jurisdiction were met at Guantanamo but did not clearly limit the decision to Guantanamo. Nor is the decision necessarily limited to long-term detention. I believe the decision is best read as limited to Guantanamo, but the factors are so flexible that a non-deferential judge could readily find a way to extend the court's jurisdiction far afield. Detainees and their lawyers have already asserted

[9] *Boumediene v. Bush*, No. 06-1195, *slip op.* 21-22 (June 12, 2008).
[10] *Id.* 16.
[11] 339 U.S. 763, 778 (1950).
[12] *Boumediene*, slip op. 37-38.
[13] *Id.* 39.
[14] *Id.* 36.
[15] *Id.* 36-37.

that U.S. courts should use their habeas powers to review the detention of foreigners held in Afghanistan.

2. Multiple federal court proceedings. The decision provides detainees with up to three paths to federal court while providing little guidance regarding the relation between those different proceedings. Under the Detainee Treatment Act, federal courts were already assessing the military's determinations made through the combatant status review tribunals. Even under the *Boumediene* majority's reasoning, this process very closely resembles the review habeas courts must now provide. The government has asked the relevant federal court to suspend the DTA process pending the resolution of habeas petitions, and some of the detainees' lawyers seek to have that federal court intervention continue. For them, two bites at the apple is better than one.

Separately, habeas review may well be available in addition to federal court review of any military commission sentences imposed on detainees, despite the MCA's provisions to the contrary. That is, just as criminal defendants convicted in the state court system or the federal court system often attempt to use habeas review to overturn their sentences, detainees' lawyers may well seek to use habeas proceedings to challenge military commission sentences – even though the MCA provides a separate and exclusive process for direct federal court review of those convictions and sentences. More significantly, detainees' lawyers have already sought to use habeas proceedings to halt the military commission trials. For the moment, they have been unsuccessful.

3. Multiple judges. Apart from the different paths to federal court, detainees' lawyers can seek habeas review from different federal judges. There is no specialized court and no necessary consolidation of cases before a single judge. Because very considerable uncertainty surrounds the substance and procedure for the new habeas petition reviews, different judges are likely to apply different standards to similar cases. Detainees' lawyers have an obvious incentive to shop for sympathetic judges. Because most habeas petitions are currently or are likely to be filed with judges in the District Court for the District of Columbia, this difficulty is one that the courts are already struggling with, and they may have some success in reducing the scale of the problem by addressing certain issues common to multiple petitions. But even this measure, if successful, would not provide uniformity across particular proceedings.

4. Procedural uncertainty. The *Boumediene* majority barely addressed the procedural burdens that the government must satisfy in habeas proceedings. As Chief Justice Roberts pointed out, the majority could not even bring itself to opine on the central issue before it of what process was due to the detainees. Depending on the scope of deference that individual trial court judges apply, these procedural standards may be appropriately deferential to the military and intelligence interests at stake, or they may be quite high. Implicitly, the majority appeared to require certain procedural protections that the federal courts' reviews of CSRT determinations do not necessarily provide. At the same time, the Court has repeatedly indicated that Congress has substantial latitude to alter the standard habeas proceedings to accommodate the government's distinct interests in holding enemy combatants. Even so, detainees' lawyers have since claimed that they are entitled to nearly trial-like procedures, including extensive rights to discovery,

witnesses, and to test the government's evidence, and substantial burdens of proof and production imposed on the government.

5. Substantive Uncertainty. *Boumediene* provided no guidance to lower courts regarding detainees' substantive rights, and how the habeas process must be crafted to accommodate whatever those rights might be. In *Hamdi v. Rumsfeld*,[16] the detained American citizen possessed the full range of Constitutional rights, yet even so the Court contemplated a very truncated habeas proceeding. That is not so for foreign citizens with no significant connection to the United States prior to their detention. Such foreigners are not entitled to many of the Constitution's protections. *Boumediene*'s finding that Guantanamo satisfied the multi-factor habeas jurisdiction test for purposes of the Suspension Clause did not amount to a conclusion that those detainees were held on U.S. "territory" or otherwise are entitled to the Constitutional protections of U.S. citizens. The majority confirmed that "our opinion does not address the content of the law that governs petitioners' detention."[17] Even so, the habeas proceedings (like the military commission trials) provide detainees' lawyers with the ability to assert a range of constitutional claims. Detainees' lawyers have asserted claims based on the Ex Post Facto Clause, equal protection principles, the Fifth Amendment, the Bill of Attainder Clause, and international law. While there are strong bases to reject these claims, certain classes of judges may well wish to make new law in this area.

6. Release and Error. A habeas petition seeks release from custody. A federal judge may well find that the military has not proved its case to the judge's satisfaction. When a detainee is ordered released in those circumstances, what conclusion can we draw? It would be foolhardy to conclude that the released detainee is harmless, that the military was wrong on the merits, or that the released detainee would not seek to kill American soldiers, civilians, and allies.

Even when release is ordered, the military may still be right. The military can legitimately consider evidence that may not be admissible in court. It may have evaluated the evidence differently, and with greater expertise. It may have required a lower standard of proof. It may have applied a different test of what constitutes a threat to the nation. The judge may find for the detainee on a range of novel legal grounds that have nothing to do with the danger the detainee poses to Americans. Or, the judge may simply err. For judges that use a baseline developed in U.S. criminal proceedings or for judges who do not accept that we are engaged in a war against terrorists, their disagreement with the military may have little bearing on whether the military had erred in its assessment of the detainee. Release may free the innocent, but also may re-arm the malicious. The military itself has itself erroneously released detainees who have gone on to fight against our soldiers and our allies. Habeas proceedings only increases the risk of erroneous release. While some have objected to the language Justice Scalia used in dissent in *Boumediene* to express this idea, his underlying point was clearly correct and remained unrebutted by the majority.

7. Classified Information. Detainee habeas proceedings are likely to implicate very sensitive military and intelligence information if they are not carefully constrained. In the traditional criminal law context, the Classified Information Procedures Act ("CIPA") provides a

[16] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[17] *Boumediene*, slip op. 69.

very unwieldy mechanism for protecting classified information when the government prosecutes defendants with full Constitutional rights. Here, where the detainees themselves are bringing suit and do not possess the Fifth and Sixth Amendment rights that limit CIPA's protections for classified information, classified information can receive considerably more protection. In detainee proceedings to date, this issue has generally been handled through ad hoc protective orders, but the government has asserted that the amount of classified information at issue and the breadth of potential disclosure have been extraordinary. Indeed, as parallel proceedings under FoIA show, obtaining sensitive military and intelligence information is often an objective of advocacy groups that participate in detainee cases. At a minimum, the potential to secure and use sensitive information provides detainees' counsel with considerable leverage.

Litigation Context. Having judges shape policy is unfortunate in the normal course, and having them shape military policy amid legal uncertainty is especially dangerous. *Boumediene* has created just the legal vacuum that may be ideal for lawyers with novel theories but far from ideal for creating the legal certainty and operational flexibility required for our military.

All litigators, including the detainees' excellent lawyers, excel at exploiting procedural and substantive uncertainties and at exploiting the related absence of restraint on judges who may be sympathetic to them or hostile to the government. The uncertainties surrounding detention threaten to create litigation difficulties similar to those surrounding death penalty cases, particularly in the 1980s and 1990s. There, a dedicated group of expert litigators and law firms, often ideologically opposed to any imposition of the death penalty, conducted decades of litigation designed to limit and delay the imposition of the death penalty. While this representation reflects a very valuable legal tradition and often noble service, it came at significant cost to the administration of justice. As a result, Congress legislated to increase certainty and reduce the scope for litigation.

The costs of advocacy litigation addressing military affairs may be considerably higher. Many of the participants in detainee litigation expressly seek to advance a conception of international law and military policy that, if accepted and incorporated into our legal system, would considerably constrain the U.S. military's actions against terrorists and in other contexts. Using U.S. court filings to advance multilateral, "soft power" sources of constraint on U.S. military power is entirely lawful and within the conventions of judicial processes. Open-ended legal proceedings may not, however, be the best way for the United States to formulate military policy now that the courts have dealt themselves into that business. Constraining habeas and other proceedings through clearer rules that advance the government's legitimate interests and reject the broader arguments advanced by various advocates will reduce the scope for judicial policymaking over military affairs.

The Need for Legislation

Some, including some in Congress, have responded to *Boumediene* by stating that the judiciary can work out the military policy issues created by the Court's rejection of Congress' statutory scheme. The many, significant difficulties outlined above should suffice to establish that legislation is required. The Administration's own request, made personally through the

Attorney General, provides further basis to legislate. If more were needed, there are additional considerations:

The judiciary itself has requested assistance from Congress. The judges of the United States District Court for the District of Columbia are the trial judges who must grapple most directly with the habeas petitions filed by detainees held at Guantanamo and in Iraq and Afghanistan. Already, that court has held initial hearings and set a briefing schedule to begin to address some of the issues common to at least the Guantanamo petitions. At the same time, the Chief Judge of that court, the Hon. Royce Lamberth, recently stated: "Guidance from Congress on these difficult subjects is, of course, always welcome" and "such guidance sooner, rather than later, would certainly be most helpful."[18]

In addition, the interests at stake are too significant to await the resolution of lengthy and often conflicting judicial proceedings. Proceedings may directly involve (i) disclosure of sensitive military and intelligence information; (ii) investigators, witnesses, and lawyers diverted from important military tasks to supporting the new civilian proceedings; (iii) costly and risky security measures involved in the transport of detainees or witnesses; (iv) the creation of burdensome evidentiary requirements; and (v) the usual burdens and costs of extensive, intensive litigation. As the Attorney General half-joked, the alternative to legislation may be devoting military resources to a "CSI Kandahar."

More significantly, many, many years of litigation creates uncertainty for our counter-terror policy. These proceedings inherently involve the formulation and implementation of military policy affecting ongoing operations and resources. In these circumstances, legal certainty and operational flexibility are at a premium for our military forces. Ongoing litigation is the antithesis of both.

Finally, the Constitution vests responsibility for these military policy matters in the Congress and the Executive Branch, not the judiciary. Apart from *Boumediene*, as discussed above, even the Court generally recognizes that principle. Legislation is the only way to constrain and direct the judiciary's role and to repair the harms caused by *Boumediene*. And especially for those who argue that Congress should serve a more robust role in the development of policy in the war on terror: now is your chance.

Legislative Considerations

Several principles or approaches might usefully guide the crafting and review of specific legislative proposals. These considerations seek to constrain and direct the judiciary's policymaking role in military affairs, accommodate legitimate government objectives, and reduce the uncertainty that litigation creates for military operations and policy.

First, legislation should reject any equivalence between the procedural and substantive rights afforded to U.S. persons and those afforded to foreign citizens with no substantial ties to the United States. While detainees' lawyers argue that the entire military commission system is

[18] "*Press Release: Chief Judge Lamberth Responds to Attorney General Mukasey's Remarks Regarding Guantanamo Habeas Proceedings*," United States District Court for the District of Columbia (July 21, 2008).

flawed and violates equal protection principles because it is limited to non-U.S. persons, this argument has it backward. The Constitution itself affords U.S. citizens and persons with ties to the U.S. greater rights and provides the government with legitimate and even compelling reasons to distinguish between U.S. citizens and foreign nationals with no ties to this country – much less foreign nationals who our military has concluded would harm Americans and their allies. We are at war with foreign forces, fully supporting Congress' distinctions based on ties to the U.S. Nothing in *Boumediene* is to the contrary.

Second, legislation should distinguish sharply between the habeas rights afforded to criminal defendants and those afforded to persons held by the military as enemy combatants. *Hamdi* and *Boumediene* itself indicate that the criminal processes should not be applied directly into this context, and that special care must be taken to accommodate legitimate military interests. Even so, in the absence of legislation many judges will reach for familiar tools and approach the issue from an entrenched perspective.

Third, Congress has the power to craft legislation according to the balance of interests that serves the United States, independent of claims of what customary international law or open-ended treaty provisions supposedly require. Detainees' lawyers have claimed, for example, that Geneva Conventions Common Article 3 invalidates the military commission trials. This is wrong on the merits, and in any event the Supreme Court has clearly established that federal statutes supersede earlier-entered treaty obligations.[19] More broadly, the Court has recently confirmed that Congress and the President, through legislation, determine which treaty or other international obligations have the force of domestic law, and they have done so clearly with respect to Common Article 3 and the military commissions process.[20] Congress may, of course, elect to take account of international obligations while retaining very substantial discretion to define the contours of them.

Fourth, legislation should reduce the opportunities for detainees to secure multiple or overlapping remedies from federal courts. *Boumediene* found that the DTA's process of military and federal court review of detainees' status was not an adequate substitute for habeas proceedings, but did not invalidate that review process. The result: two parallel proceedings, both converging principally at the D.C. Circuit and then the Supreme Court, address largely overlapping issues. This permits detainees to have two mechanisms to present their cases, and requires the government to defend its policies and disclose information in two settings, but the DTA process remains on the books. While the courts may hold the DTA proceedings in abeyance, they may not, and legislation could usefully eliminate or rationalize this duplicative review.

Separately, the habeas proceedings intersect awkwardly with the military commission trial proceedings – both through the detainees' claims that the trials should not proceed until habeas claims are heard and the potential availability of some undetermined scope of habeas review after the trials conclude. Legislation could reaffirm and clarify that the trials can proceed, subject perhaps to only the most limited habeas review thereafter.

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[19] S*ee Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006).
[20] *See Medellin v. Texas*, No. 06-984, slip op. (March 25, 2008).

Fifth, legislation should reduce the burdens on the military in habeas proceedings and the scope for judicial second-guessing of military policy. At a minimum, legislation should ensure that detainees receive no greater protections than the Supreme Court had previously indicated were appropriate for U.S. citizen detainees: thus, there should be a presumption in favor of the evidence set forth in the government's return and no bar on the use of hearsay evidence.[21] A habeas proceeding is not a trial in the ordinary course and should not remotely resemble one in this context. Adopting procedural rules to fit the circumstances must also address concerns regarding protection of classified information, not holding the military to evidentiary requirements applicable to criminal proceedings, security and personnel risks related to production of witnesses, and other risks to the military's wartime operations.

Hamdi v. Rumsfeld, confirms that it is appropriate to limit habeas proceedings "to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict" and to simply ensure that detainees "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions."[22] The government interprets this framework as establishing a limited obligation to produce exculpatory evidence, a presumption in favor of the government's evidence, very limited discovery, limited hearings, and extensive use of hearsay testimony. *Hamdi* concerned a U.S. citizen held as an enemy combatant. The Court upheld the military's power to detain *Hamdi* and, in a plurality decision that is binding as a result of Justice Thomas's separate opinion, indicated that a habeas court's review should reflect appropriate deference to the military's determination. The Guantanamo detainees are not U.S. citizens and have no ties to the United States, and should at a minimum be afforded no greater procedural protections than U.S. citizens.

Sixth, legislation should seek to confirm that habeas proceedings should not apply equally to detainees held beyond Guantanamo. The Court has made clear that legislation will not itself settle the bounds of habeas jurisdiction. Even so, legislation could usefully confirm a sense of Congress that foreign detainees held overseas, beyond Guantanamo, are not subject to habeas jurisdiction, or at a minimum should be subject to the same "prudential" considerations that led the Court in *Munaf v. Geren* to decline to exercise that jurisdiction at the request of a U.S. citizen held in Iraq. Legislation could also provide, in the event that the courts disregarded those conclusions, even more stringent presumptions in favor of the government's return and greater restrictions on the discovery and evidence that might be available to such detainees held far afield.

Finally, Congress should reaffirm that the nation is engaged in a war against terrorists and that the military is authorized to detain members of particular terrorist groups that seek to harm American soldiers, citizens, and allies. The nub of many of the judicial disputes is simply that some members of the judiciary and the bar do not believe that we are truly at war against a terrorist threat or that war powers are appropriately deployed to detain those who would undertake acts of terror against this nation. Or, they believe that we once were at war and time has degraded the threats we face to those that can and should be managed through the criminal process. They will seek not only to have courts review the factual basis for holding particular detainees but also set rigorous limits on the military's detention powers. If members of Congress

[21] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (plurality opinion).
[22] *Id.* at 533.

truly agree with these views, they should repeal the 2001 Authorization for Use of Military Force, decline to fund important aspects of the military's ongoing counter-terror efforts, and spare our military the risks it today undertakes.

If Congress does not seek to restrict the military's counter-terrorism efforts, however, reaffirming and clarifying the bounds of the AUMF would update that authorization in light of our increased knowledge of the foes we face. It would remind the courts of the commitment of two co-ordinate branches to using all appropriate means to confront pressing threats to our national security. Doing so may even serve to shift the courts from their current course of military policymaking and return them to a centuries old tradition of deferring to the "political branches" in matters of military and foreign affairs.