Statement of Daniel J. Dell'Orto
Principal Deputy General Counsel
Office of General Counsel
U.S. Department of Defense

Thank you, Mr. Chairman, Ranking Member Hunter, and Members of the Committee for the opportunity to testify before you today regarding individuals detained by the Department of Defense as unlawful enemy combatants.

The United States is in a state of armed conflict with Al Qaida, the Taliban and its associated forces. During this conflict, persons have been captured by the United States and its allies, and some of those persons have been detained as enemy combatants. The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principal purpose of this detention is to prevent the persons from returning to the battlefield, as some have done when released.

Detention of enemy combatants in wartime is not criminal punishment and therefore does not require that the individual be charged or tried in a court of law. It is a matter of security and military necessity that has long been recognized as legitimate under international law.

In *Hamdi v. Rumsfeld*, the Supreme Court confirmed this principle of international law and held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the "necessary and appropriate" force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks.

The U.S. relies on commanders in the field to make the initial determination of whether persons detained by U.S. forces qualify as enemy combatants. Since the war in Afghanistan began, the United States has captured, screened and released approximately 10,000 individuals. Initial screening has resulted in only a small percentage of those captured being transferred to Guantanamo. The United States only wishes to hold those who are enemy combatants who pose a continuing threat to the United States and its allies.

In addition to the screening procedures used initially to screen detainees at the point of capture, the Department of Defense created two administrative review processes at Guantanamo in the wake of the *Hamdi* and *Rasul* cases: Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs). The CSRT and ARB processes provide detainees with a measure of process significantly beyond that which is required by international law.

The CSRT is a formal review process, created by the Department of Defense and incorporated into the Detainee Treatment Act of 2005 (DTA), that provides the detainee with the opportunity to have his status considered by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections, building upon procedures found in Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. The CSRT guarantees the detainee rights notable beyond those provided by an Article 5 tribunal. In addition to the opportunity to be heard in person and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process. This personal representative has the opportunity to review the government information relevant to the detainee. Furthermore, a CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority, empowered to return the record to the tribunal for further proceedings. In addition, if new evidence comes to light relating to a detainee's enemy combatant status, a CSRT can be reconvened to reevaluate that status.

In addition to the CSRT, an ARB conducts an annual review to determine the need to continue the detention of those enemy combatants not charged by military commission. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention – intelligence value, as an example. Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released, or be transferred. The ARB process also is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

In *Rasul v. Bush,* the Supreme Court ruled that the federal habeas corpus statute applied to Guantanamo and therefore federal courts have jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. The Court accordingly held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants could invoke the habeas jurisdiction of a district court. Of course, there is not and has never been a constitutional habeas right that attaches in this setting.

In the Detainee Treatment Act of 2005, Congress established additional procedural protections for future CSRTs and provided for judicial review of final CSRT decisions regarding enemy-combatant status in the U.S. Court of Appeals for the District of Columbia Circuit. At the same time, Congress foreclosed the Guantanamo detainees from pursuing alternative avenues of judicial review, including through statutory habeas corpus. The Military Commissions Act of 2006 (MCA) made the provisions providing

for judicial review of final CSRT decision and foreclosing statutory habeas expressly applicable to pending cases.

The DTA and the MCA permit the D.C. Circuit to review CSRT determinations of detainees at Guantanamo. Traditional *habeas* review in alien-specific contexts involved, in general, review of questions of law, but other than the question of whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive. However, under the DTA, to the extent an alien-petitioner has concerns about the legal adequacy of the CSRT standards and procedures used to make an "enemy combatant" determination, he may squarely raise those claims and have them adjudicated in the Court of Appeals. Further, the Court of Appeals' review involves an assessment by that Court of whether the CSRT, in reaching its decision, complied with the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence. Providing review of an enemy combatant determination in a nation's own domestic courts is an unprecedented process in the history of war.

As some of you know, the Department has filed motions to dismiss all habeas cases brought by detainees at Guantanamo Bay. Under the MCA, and as affirmed by the D.C. Circuit in *Boumediene*, the appropriate venue for detainee challenges to the lawfulness of their detention is in the D.C. Circuit. As you also may be aware, the Supreme Court recently granted certiorari to review the *Boumediene* decision. We look forward to presenting our argument to the Court in the Fall and are confident in our legal position, as upheld by the D.C. Circuit.

Extending statutory habeas to aliens held at Guantanamo Bay is both unnecessary and unwise. Together, Congress and the President developed the Detainee Treatment Act and the Military Commissions Act. Those statutes, which were passed with bipartisan majorities, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, the Congress, and numerous military and civilian personnel, applied to the nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and experience, and doing so would do a disservice to the American public.