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**Senate Committee on Armed Services**

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I would like to thank the Senate Committee on Armed Services for inviting me to share my views on the Military Commissions Act of 2006 (“MCA”), the Detainee Treatment Act (“DTA”), and the procedures used by the Department of Defense (“DOD”) to determine detainees’ status under the international Law of Armed Conflict (“LOAC”) and try some of them for war crimes.

Fundamentally, I believe that the MCA and DTA comport with the United States Constitution and more than meet the applicable LOAC standards. In this regard, the MCA and DTA procedures are streamlined, yet fair. They provide detainees with judicial process that is more than sufficient to enable them to mount a meaningful challenge at the appropriate time to their detention. Meanwhile, the actual procedures currently used by the DOD to determine the status of detainees – Combatants Status Review Tribunals (“CSRTs”) – and to try them for war crimes – Military Commissions – are constitutionally sufficient and give to the detainees far more due process than they have had under any other “competent tribunals” convened, for example, under Article 5 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 (“Geneva III”) or any Military Commission in history.

The fact that DOD also holds on an annual basis Administrative Review Boards (“ARBs”), which focus primarily on the question of whether detainees held in U.S. custody pose continued danger and whether viable alternatives exist to their continued detention further underscores the extent to which the U.S. has opted to provide captured enemy combatants with additional rights, that go above and beyond those required under LOAC or the Constitution. To underscore this point, since the notion of enabling captured enemy combatants to be released “on parole” fell out of practice by the late 19<sup>th</sup> Century, the current U.S. practice of releasing captured enemy combatants before the end of hostilities is historically unprecedented. Likewise, the historic practice has been to punish harshly captured individuals, determined to be unlawful enemy combatants, largely irrespective of the extent to which they personally were involved in any specific combat activities, primarily because unlawful combatancy was viewed a supremely dangerous

phenomenon, to be suppressed and delegitimized. By contrast, the current U.S. practice has been not to prosecute at all, at least so far, the vast majority of individuals determined to be unlawful enemy combatants. The fact that this procedural and substantive generosity has not been widely hailed and appears not to even been noticed by most of the critics is unfortunate.

The MCA and DTA make the United States Court of Appeals for the District of Columbia Circuit the exclusive venue for handling any legal challenges by detainees and limits the Court to exercising jurisdiction until after a CSRT or Military Commission has exercised a final decision. Substantively, judicial review is limited essentially to two questions: whether the CSRT or Military Commission operated consistent with the rules and standards adopted by it, and whether the CSRT or Military Commission reached a decision that is “consistent with the Constitution and laws of the United States.”

In my view, this scope of judicial review is not only sufficient for non-citizens held abroad, but is constitutionally sufficient for United States citizens themselves. In this regard, the fact that the review does not commence at the district court level, and does not follow in all particulars the existing federal statutory habeas procedures codified at 28 U.S. § 2241, is constitutionally unexceptional. This proposition is well-established by the existing Supreme Court precedence. For example, in *Swain v. Pressley*, 430 U.S. 372, 381 (1977), the Supreme Court stated that “the substitution [for a traditional habeas procedure] of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.” More recently, the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), that this habeas-type review could be had in a United States court of appeals. Hence, the DTA and MCA set up a perfectly permissible form of statutorily-conferred habeas review by the D.C. Circuit.

Also, contrary to the critics’ assertions that DTA- and MCA-prescribed procedures are deficient because they do not allow for the judicial review of factual issues, I believe that the scope of habeas corpus review provided by the DTA and MCA is not limited to reviewing merely the legality of CSRT or Military Commission procedures. Under *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), it is unconstitutional to bring civilians before Military Commissions or to hold them as enemy combatants if civilian Article III courts are open and functioning. Accordingly, a detainee should be able to claim that he is not, in fact, an enemy combatant, and the relevant factual record of the CSRT or the Military Commission would be judicially reviewable. In this regard, the DTA and MCA

language clearly allows such a review and the D.C. Circuit will have access to the entire factual record, generated by a CSRT or Military Commission, including the classified portions thereof.

Indeed, this is the same type of review given to Nazi saboteurs (of whom at least one was a U.S. citizen) in *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Supreme Court rejected their contention that they were civilians, not subject to military jurisdiction. It is also supported by the Supreme Court's recent opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which emphasizes that the government needs to provide "credible evidence" that the detainee is, in fact, an enemy combatant, and the burden then shifts to the detainee to offer more persuasive evidence that he is not an enemy combatant. To be sure, habeas review of this factual determination should not be *de novo*, but instead should be based on the Supreme Court's "credible evidence" standard. This concept comports both with the U.S. Constitution and LOAC.

Recently, the D.C. Circuit upheld the constitutionality of the MCA against attack by detainees, who were asserting preexisting habeas claims in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. 2007), cert. den'd, 547 U.S. \_\_\_\_ (2007). These petitioners argued that the MCA/DTA statutory judicial review scheme violates the Constitution's "Suspension Clause," which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. In the case of the *Boumediene* petitioners, it is my understanding that these detainees have all had their status reviewed and confirmed by CSRTs, and now have separate habeas corpus actions in the D.C. Circuit challenging their detention.

Significantly, the Supreme Court refused to review the D.C. Circuit's decision. Writing separately in support of the Supreme Court's denial of certiorari, Justices Stevens and Kennedy suggested that the MCA and DTA should be interpreted as extending statutory habeas corpus jurisdiction to persons if "the Government has unreasonably delayed proceedings under the [DTA]." This is a pretty aggressive statutory interpretation and is not the one easily supportable by the plain meaning of the MCA. In this regard, section 7 of the MCA clearly withdrew federal court jurisdiction over habeas corpus claims of detainees awaiting a status determination, and emphasized that all challenges to such determinations must be made in the D.C. Circuit, according to the DTA's terms.

In any case, the fact that at least six Supreme Court Justices, including two Justices – Stevens and Kennedy – who were in the majority in the recent *Hamdan*

*v. Rumsfeld*, 126 S. Ct. 2749 (2006) decision, which struck down the pre-MCA version of Military Commissions, let stand the D.C. Circuit's *Boumediene v. Bush* decision, and refused to consider a facial challenge to the constitutionality of the MCA is highly significant. It certainly casts substantial doubt on the critics' contention that MCA is palpably unconstitutional.

I would also like to address briefly the procedures used by CSRTs and Military Commissions. While many have criticized the procedures used by these bodies, the practical realities of the situation support the current DTA and MCA procedures. The fact is that, throughout history, it has been difficult to distinguish between irregular combatants and civilians. That is part of the reason why Taliban and al Qaeda members do not make themselves known. And, true to form, nearly all detainees claim to be shepherds, students, pilgrims, or relief workers, collude amongst themselves to support their stories, and name persons thousands of miles away who can "verify" that they are not enemy combatants.

Accordingly, the only appropriate point of reference for assessing the procedures used by the CSRTs and Military Commissions is their historical and international counterparts – Tribunals organized under Article 5 of the Geneva III to identify enemy combatants, and the Military Commissions used by the United States in, and in the aftermath of, World War II. Here, it is undisputed that the CSRTs and Military Commissions offer far more process to the Guantanamo detainees than either Geneva III's Article 5 Tribunals or World War II-style Military Commissions.

To be sure, if you compare the CSRTs and Military Commissions to civilian courts, they undoubtedly feature more austere procedures. However, the CSRTs and Military Commissions are meant to address a different military reality, and it does disservice both to our legal traditions and to the "rule of law" to pretend otherwise. The simple fact is that up to today, our legal institutions have recognized the propriety of using specialized military bodies in time of war, where civilian courts lack competence. I expect this to continue.

Finally, I would like to comment briefly on one aspect of S. 576, the "Restoring the Constitution Act of 2007." While I believe that the Act is neither desirable as a matter of policy – I would certainly take exception to its provisions requiring broad disclosure of intelligence sources, methods and activities – nor necessary as a matter of law, the Act's repeal of the MCA and DTA-related revisions to 28 U.S.C. § 2241, the federal habeas corpus statute, is particularly ill-advised at this time. This is because all, or nearly all, Guantanamo-based detainees

currently have habeas corpus petitions challenging their status determination pending in the D.C. Circuit. These petitions were stayed pending the resolution of the pre-existing habeas petitions, which were dismissed in *Boumediene*. As a result, the D.C. Circuit will begin reviewing CSRT decisions shortly, and the detainees will have received judicial review of their determinations in the relatively near future, with Supreme Court review also almost certainly forthcoming.

The Restoring the Constitution Act would almost certainly short-circuit this process, very likely leading to vexatious litigation about what is being reviewed in what habeas corpus petition, the effects of preclusion doctrines on subsequent habeas petitions, and the like. I would respectfully urge the Senate not to enact this bill, but instead wait for final judicial resolution of pending habeas corpus petitions before acting further.