Department of Justice

STATEMENT OF

GREGORY G. KATSAS
PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

HABEAS CORPUS AND
DETENTIONS AT GUANTANAMO BAY, CUBA

PRESENTED

June 26, 2007

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Thank you, Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the writ of habeas corpus and the judicial review procedures that Congress has provided to the aliens captured abroad and detained as enemy combatants at Guantanamo Bay, Cuba.

Since the attacks of September 11, 2001, the United States has been engaged in an armed conflict unprecedented in our history. Like past enemies we have faced, Al Qaeda and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation and its citizens. But unlike our past enemies, Al Qaeda forces show no respect for the law of war—they do not wear uniforms; they do not carry arms openly; and, most importantly, they direct their attacks primarily against innocent civilians. They have murdered thousands in attacks against the World Trade Center, the Pentagon, the U.S.S. Cole, and American embassies in Kenya and Tanzania, to name just a few. They have also plotted further attacks against the Empire State Building, the Sears Tower, the Library Tower, Heathrow Airport, Big Ben, NATO headquarters, and the Panama Canal, to name just a few. Faced with such a determined and ruthless opponent, we cannot

expect the ongoing conflict to end through negotiations, much less through unilateral concessions.

To prevent further attacks on our homeland, United States forces have captured members of Al Qaeda, and of the Taliban militia that had harbored and aided Al Qaeda, on battlefields in several countries. As in past armed conflicts, the United States has found it necessary to detain some of these combatants while military operations continue. During the ongoing conflict, we have seized more than 10,000 Al Qaeda or Taliban fighters. About 750 of these combatants—including many of the most dangerous—have been transferred to a detention facility on the United States military base at Guantanamo Bay, Cuba. Of those 750, approximately half have been released or transferred to other countries. The United States continues to hold about 375 detainees at Guantanamo Bay, of whom approximately 75 have been determined eligible for transfer or release. Departure of those detainees is subject to ongoing discussions with other nations. Moreover, the detainee assessment process continues for those not yet determined eligible for transfer or release.

In 2004, after having already released some 200 of the Guantanamo detainees, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review again, in a formalized process akin to other law-of-war tribunals, whether the remaining detainees met the criteria to be designated as enemy combatants. These CSRTs afford detainees greater procedural protections than ever before provided, by the United States or any other country, for wartime status determinations. Indeed, the CSRTs were designed to afford even greater protections than those deemed by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to be appropriate for United States

citizens detained as enemy combatants on American soil and entitled to due process protections. For example, under the CSRT procedures, each detainee receives notice of the unclassified basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Each detainee also receives assistance from a military officer designated to serve as his personal representative. Another military officer must present to the tribunal any evidence that might suggest the detainee is not an enemy combatant. Each tribunal consists of three military officers sworn to render an impartial decision and in no way involved in the detainee's prior apprehension or interrogation. Each tribunal decision receives at least two levels of administrative review. As Mr. Taft previously has testified, these protections exceed those used to make status determinations under Article 5 of the Geneva Convention. Of the 558 CSRT hearings conducted through the end of 2006, 38 resulted in determinations that the detainee in question was not an enemy combatant.

To ensure that enemy combatants are not held any longer than necessary, the Department of Defense also established separate tribunals known as Administrative Review Boards ("ARBs"). Those tribunals reassess, on an annual basis for each detainee, whether the detainee remains a continuing threat to the United States and its allies. Before each ARB hearing, a designated military officer provides the Board with all reasonably available information bearing on that question. The detainee receives a written unclassified summary of this information, and may present testimony on his own behalf. Another military officer is assigned to assist the detainee. Unless inconsistent with national security, the detainee's home government receives notice of, and may

provide information at, the hearing. As a result of ARB proceedings conducted in 2005 and 2006, 188 detainees have been approved for release or transfer to another country.

In two recent statutes, Congress provided the detainees with even greater rights and protections. In the Detainee Treatment Act of 2005 ("DTA"), Congress prohibited the government from subjecting detainees to cruel, inhuman, or degrading treatment (§ 1003), established additional procedural protections for future CSRTs (§ 1005(a)), and provided for judicial review of final CSRT decisions regarding enemy-combatant status, and final military-commission decisions in war-crimes prosecutions, in the Court of Appeals for the District of Columbia Circuit (§ 1005(e)). At the same time, Congress foreclosed the Guantanamo detainees from pursuing alternative avenues of judicial review, including through habeas corpus. That aspect of the DTA sought to curtail the unprecedented avalanche of wartime litigation following the extension of the habeas statute to aliens at Guantanamo in *Rasul v. Bush*, 542 U.S. 466 (2004). In so doing, Congress merely restored the longstanding understanding that habeas is unavailable to aliens outside the sovereign territory of the United States.

Congress again addressed the detention, treatment, and prosecution of alien enemy combatants in the Military Commissions Act of 2006 ("MCA"). That statute responded to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which had held that (1) the judicial-review provisions of the DTA were inapplicable to cases that had already been filed on the date of its enactment; (2) aliens tried for war crimes before military commissions must generally receive the same protections afforded to United States servicemembers in courts martial; and (3) Common Article 3 of the Geneva Convention applies to the armed conflict between the United States and Al Qaeda. The MCA

addressed *Hamdan* by (1) providing for D.C. Circuit review of final CSRT and military-commission decisions, foreclosing habeas and other alternative means of review, and making these provisions expressly applicable to pending cases, *see* § 7; (2) authorizing the use of military commissions to try unlawful alien enemy combatants for war crimes under a codified set of procedures, *see* § 2; and (3) elaborating, for the sake of greater clarity, on the treatment standards that Common Article 3 requires, *see* § 6. The military-commission procedures imposed by Congress afford defendants greater protections than did the procedures used in the predecessor Military Commission Order No. 1, which in turn had afforded defendants greater protections than did the procedures used by the United States to conduct war-crimes prosecutions during World War II, and greater protections than do international war-crimes tribunals from Nuremberg to Yugoslavia.

Extending habeas corpus to aliens abroad is both unnecessary and profoundly unwise. Over 50 years ago, the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), held that aliens outside the sovereign territory of the United States have no constitutional right to habeas corpus under the Suspension Clause, particularly during times of armed conflict. In emphatic terms, the Court explained that such habeas trials

> [w]ould bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States.

Id. at 779. No less decisively, *Eisentrager* also rejected "extraterritorial application" of the Fifth Amendment to aliens. *See id.* at 784-85 ("No decision of this Court supports

such a view. None of the learned commentators of our Constitution has ever hinted at it. The practice of every modern government is opposed to it."). The Supreme Court has recently and repeatedly reaffirmed that constitutional holding of *Eisentrager*. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

Rasul does not undermine the constitutional holdings of *Eisentrager*. By its terms, *Rasul* addressed only the scope of the habeas corpus *statute*, and it explicitly distinguished between the statutory and constitutional holdings of *Eisentrager*. *See* 542 U.S. at 476-77. Moreover, *Rasul* acknowledged that the statutory holding of *Eisentrager* (that the habeas statute is inapplicable to aliens outside sovereign United States territory) remained good law until at least 1973. *See id.* at 479. Because the Suspension Clause mandates only traditional habeas standards, *see Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make'" (citation omitted)), it cannot possibly foreclose standards that prevailed in this country for almost two centuries. Moreover, *Rasul* acknowledged that the Guantanamo military base is outside sovereign United States territory. *See* 542 U.S. at 481-82. In that respect, *Rasul* is fully consistent with prior precedents holding that application of United States law to overseas military bases is extraterritorial (and thus presumptively disfavored)—even if (as one would hope) the United States exercises complete control over those bases. *See, e.g.*, *United States v. Spelar*, 328 U.S. 217, 221-22 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948).

For all of these reasons, in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), the D.C. Circuit recently upheld the constitutionality of

the habeas restrictions imposed by Congress in the DTA and the MCA. We strongly support *Boumediene* as a straightforward application of settled and sound constitutional precedent.

The habeas restrictions in the DTA and the MCA are not only constitutional, but also necessary for our Nation's security. As Justice Jackson explained in *Eisentrager* (339 U.S. at 779), it would be "difficult to devise a more effective fettering" of military operations than by extending habeas rights to aliens captured and held abroad as enemy combatants during ongoing hostilities. Justice Jackson's pointed warning was amply confirmed during the brief habeas experience between 2004, when *Rasul* was decided, and 2006, when Congress most recently and most definitively restored the statutory holding of *Eisentrager*. During that time, more than 200 habeas actions were filed on behalf of more than 300 of the Guantanamo detainees. The Department of Defense was forced to reconfigure its operations at a foreign military base, in time of war, to accommodate hundreds of visits by private habeas counsel. To facilitate their claims, detainees urged the courts to dictate conditions on the base ranging from the speed of Internet access to the extent of mail deliveries. Through a series of interlocutory habeas actions, military-commission trials were enjoined before they had even begun. Perhaps most disturbing, habeas litigation impeded interrogations critical to preventing further terrorist attacks. One of the detainees' coordinating counsel boasted about this in public: "The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation * * * with attorneys. What are they going

to do now that we're getting court orders to get more lawyers down there?" *See* 151 Cong. Rec. S14256, S14260 (Dec. 21, 2005). Finally, whatever burdens were imposed by briefly extending habeas to the few hundred detainees recently held at Guantanamo Bay, these would pale in comparison to the havoc in larger conflicts were the habeas statute generally extended to aliens held abroad as wartime enemy combatants. In World War II, for example, the United States held over two million such enemy combatants. For military operations of that scale, imposing the litigation standards that prevailed at Guantanamo Bay between 2004 and 2006 would be unthinkable.

Such an imposition is also unnecessary. As explained above, both Congress and the Executive recently have extended to detainees protections unprecedented in the history of armed conflict, from the administrative CSRT procedures, which afford far greater protections than do Article 5 tribunals, to the statutory military-commission procedures, which afford far greater protections than did their World War II predecessors or than do counterpart procedures used by international tribunals. Moreover, in both the CSRT and military-commission contexts, Congress has provided for judicial review and allowed detainees not only to challenge the jurisdiction of the relevant tribunals, but also to raise any constitutional or statutory claim of their choosing. *See* DTA § 1005(e)(2)(C)(ii) (challenge to CSRT); *id.* § 1005(e)(3)(D)(ii) (challenge to military commission). Even for detainees held in this country, that alone would make the existing scheme a constitutionally adequate substitute for habeas. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001) (habeas courts traditionally reviewed "pure questions of law," but "generally did not review factual determinations made by the Executive"); *Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear,

decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on the facts."); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) (traditional habeas is "appellate in its nature"). But Congress went even further, and allowed detainees to challenge both the sufficiency of evidence underlying their CSRT determination or military-commission conviction and the tribunal's compliance with its own procedures. *See* DTA § 1005(e)(2)(C)(i) (CSRT); *id.* § 1005(e)(3)(D)(i) (military commission). Even where habeas is available (*e.g.*, for detainees tried in the United States or its insular territories), prior habeas law would have barred those claims. *See, e.g.*, *Yamashita*, 327 U.S. at 23 ("the commission's rulings on evidence and the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities"); *Ex Parte Quirin*, 317 U.S. 1, 24 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.")

In sum, except for two years under a recent, aberrational, and now twice-superseded decision, habeas corpus has never been available to aliens captured and held outside the United States as enemy combatants during ongoing armed conflict. The Constitution does not require such an extension of habeas, which would severely undermine our ongoing armed conflict against a determined and resourceful terrorist enemy. Nonetheless, despite the magnitude of the Al Qaeda threat, the political branches have provided detainees with unprecedented wartime protections and with judicial review that exceeds that available even under traditional habeas standards. The existing system goes well beyond what we have provided in past armed conflicts, and well beyond what other nations have provided in like circumstances. It represents a careful balance

between the interests of detainees and the exigencies of wartime, and a careful compromise painstakingly worked out between the political branches. The existing system is both constitutional and prudent, and should not be upset.

Thank you, Mr. Chairman. I look forward to answering any questions.