Opening Statement of Daniel J. Dell'Orto, Acting General Counsel, Department of Defense, to the House Armed Services Committee on July 31, 2008

Thank you, Mr. Chairman, Ranking Member Hunter, and Members of the Committee for the opportunity to testify on the "Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba."

The Department of Defense is working diligently to satisfy the considerable litigation requirements stemming from the Supreme Court's decision in *Boumediene v. Bush*. The ramifications of that decision for the Department of Defense and our nation are significant. The Department already has experienced some of these ramifications while others are looming in the near future and still others are as yet unknown. As significant as *Boumediene* is, it is only one in a recent line of decisions that establish an unprecedented level of judicial involvement in matters historically and, in the Department's view, appropriately, reserved to military professionals, including decisions on whom to detain as enemy combatants in an ongoing armed conflict.

There are currently more than 250 petitions for the writ of habeas corpus pending in federal district court that involve more than 300 current or former Guantanamo detainees. Now that the Supreme Court has ruled that these petitions may proceed, the Department is diverting personnel and assets from other ongoing missions to respond to them. Those diverted are not just legal personnel and administrative assets. We also have diverted, or are in the process of diverting, substantial numbers of intelligence assets to support this litigation.

The Department's immediate challenge is that what the law requires is currently unclear. As the Attorney General noted in a July 21, 2008 speech, the Supreme Court explicitly left many questions unanswered in *Boumediene*. The Court said that Guantanamo detainees have a constitutional right to pursue habeas proceedings in federal court. The Court did not say how these cases would proceed or what procedures and standards would apply. Given this lack of direction, and in the absence of legislation, the rules governing habeas proceedings for detainees at Guantanamo will be devised on an ad hoc basis in federal district courts.

Although we do not know what the federal district court will decree as the ultimate requirements for these proceedings, we anticipate a number of potential problems.

First, these habeas proceedings could require the diversion of significant operational, law enforcement and security resources in addition to administrative, legal, and intelligence resources. In addition to the significant resources the Department already is devoting to this litigation, if judges order the in-person appearance of detainees at hearings, numerous security assets would need to be devoted to the task. As alarming, if federal district court judges issue subpoenas requiring in-person testimony of those who gathered the relevant information pertaining to a habeas petitioner, combat troops, intelligence personnel, and other critical military and civilian personnel may need to be pulled from the theater of combat operations and sent to Washington, D.C., to answer questions from detainees' lawyers. As Justice Jackson presciently noted in *Johnson v. Eisentrager* in 1950,

> "It would be difficult to devise 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."

Indeed, the Supreme Court, in *Boumediene*, acknowledged that the conduct of habeas proceedings for Guantanamo detainees could raise national security issues.

Second, the rules for habeas proceedings could affect how our soldiers, sailors, airmen, and marines fight on battlefields around the world. It must be emphasized that petitioners in these cases have been detained under the law of war during an ongoing conflict. These are not the typical habeas proceedings in a civilian context, with which the federal judiciary is familiar. Judges could require arrest reports, chain-of-custody authentication reports, or other evidentiary processes. Rulings that evidence must be excluded or that a detainee must be freed because certain evidentiary processes, relevant to a civilian but not a wartime environment, were not followed, would, in effect, serve to regulate our troops on the battlefield, just as judges, in effect, regulate the local police in civilian life.

Third, habeas proceedings could be used as a vehicle for detainees charged with war crimes to attempt to halt or delay their military commission trials. The Supreme Court ruling in *Boumediene* was focused on challenges to the lawfulness of detention, not on military commission procedures as provided in the Military Commissions Act. Further, the Court looked favorably on the adversarial proceedings of prior military commissions. Although a federal district court judge recently rejected the effort of one detainee to block his military commission trial, another detainee already has filed a court

challenge to stop his military commission from moving forward, and others almost certainly will follow. As the Attorney General explained, Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants.

Finally, the Supreme Court, while providing access for detainees to the federal district courts for habeas proceedings, let stand the alternative route to the Court of Appeals for the District of Columbia Circuit Court under the Detainee Treatment Act. Detainees now have two separate, and redundant, legal channels through which they can challenge the legality of their detention, one under the Detainee Treatment Act and the other under the Constitution. This dual track challenge to detention only serves to strain the resources of the Department further, providing detainees greater opportunities to challenge their detention than those that areavailable to those U.S. citizens imprisoned in the United States.

These are but a few of the concerns we have about Guantanamo detainee habeas proceedings and their consequences for the Department. We recognize that there are opposing considerations and that writing the rules governing these habeas proceedings will require a difficult balancing of many interests. The Department acknowledges and respects the judgment and expertise of the federal courts; however, Congress is best suited to conduct this balancing and to write the rules for habeas proceedings for detainees at Guantanamo Bay.

The federal district courts do not have the institutional competency that Congress has to address these questions effectively and efficiently, appropriately taking into

account national security concerns and the potential impact on ongoing military operations. Further, judges might impose conflicting rules, putting the Department in an untenable position, at least until those differences can be resolved in higher courts after considerable delay and uncertainty while the War on Terror continues. Although the DC District Court is attempting to coordinate the cases to some degree, many substantive issues likely will be determined by multiple judges in individual cases. Finally, unlike Congress, federal judges cannot consider and refine the entire statutory framework of Guantanamo detainee legal process. By providing rules for habeas proceedings, Congress can ensure that habeas proceedings do not delay trials by military commission and justice for the victims of the September 11, 2001 attacks. Congress can ensure that the government does not waste resources litigating and relitigating the very same issues in the more than 250 pending habeas petitions and in the more than 190 cases in the United States Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act. Legislation, not litigation, is the best vehicle for writing these rules.

The Department of Defense fully supports the six specific principles that the Attorney General suggested should guide the legislation of rules for habeas proceedings for detainees at Guantanamo Bay, Cuba.

First, Congress should make clear that federal courts may not order the Government to bring, admit, or release those detained at Guantanamo Bay into the United States.

Second, Congress should ensure national security secrets are protected and that terrorists do not use these proceedings as a means to discover what we know about them and how we acquired that information.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes.

Fourth, Congress should explicitly reaffirm that the United States remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations and that 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 adapted to the realities of national security. To eliminate duplicative efforts and inconsistent rulings, one district court should have exclusive jurisdiction over these habeas cases, and common legal issues should be decided by one judge in a coordinated fashion. Military servicemembers should not be required by subpoenas to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should suffice. Military servicemembers should not be required to create such documents as the arrest reports and chain-of-custody logs that civilian law enforcement entities use.

Sixth, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. Congress should eliminate statutory judicial review under the Detainee Treatment Act. Congress 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 U.S. custody.

Along these lines, the Department of Defense requests that legislation expressly confirm that the habeas jurisdiction of the federal courts does not extend beyond the holding of *Boumediene*. We believe this proposition is reflected in the current law following Boumediene, which extended constitutional habeas jurisdiction based on the unique circumstances prevailing at Guantanamo Bay. It goes without saying, however, that all of the difficulties that we face with respect to the Guantanamo habeas petitions would pale in comparison to the difficulties we would encounter were federal court jurisdiction extended to those detained near a zone of active hostilities, such as in Iraq and Afghanistan. The burden of litigating the petitions of some 270 some detainees at Guantanamo is considerable, but the prospect of litigating the petitions of multiple hundreds of alien detainees in Afghanistan and tens of thousands of alien detainees in Iraq would simply be crippling. The Constitution of the United States hardly contemplates such a result.

Although the topic of today's hearing is the "Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba," I have begun by discussing the implications of *Boumediene* for the Department of Defense. In my current position as Acting General Counsel of the Department of Defense, as in my previous career as a judge advocate and Army officer for more than 27 years, my foremost duty has always been to our troops—to ensure that they can lawfully do what is necessary to fight and win our nation's wars and to defend our nation from attacks, whether those attacks come from adversary nation states or from non-state actors, such as al Qaeda. We must remain mindful that the enemy we face today and have faced since the early 1990s

uses 21st century technology to perpetrate the types of brutal, indiscriminate attacks on civilians. As the Congress considers legislation in response to *Boumediene*, and weighs the many important interests at stake, I trust that you will carefully consider this as well. Thank you.