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THE DUE PROCESS GUARANTEE ACT: BANNING INDEFINITE DETENTION OF AMERICANS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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WEDNESDAY, FEBRUARY 29, 2012

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:05 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Klobuchar, Franken, Grassley, Graham, and Lee.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. We have Senator Grassley, of course, here. Senator Feinstein, whose bill this is, is here. I see Senator Klobuchar here and Senator Franken, and, Senator Klobuchar, I understand you have another meeting, but you will be submitting questions for the record?

Senator KLOBUCHAR. That is right, Mr. Chairman. Thank you, and I am a cosponsor of Senator Feinstein's bill.

Chairman LEAHY. And without objection, your questions will be accepted for the record.

Last December, Congress enacted the National Defense Authorization Act—NDAA—for Fiscal Year 2012. The bill contained what to me are deeply troubling provisions related to indefinite detention. I viewed them as inconsistent with our Nation's fundamental commitment to protect liberty. I opposed and will continue to oppose indefinite detention. I fought against the Bush administration policies that led to the current situation, with indefinite detention being the de facto policy. I opposed President Obama's Executive order in March 2011 that contemplated indefinite detention. I opposed the provisions in the NDAA as well.

The American justice system is the envy of the world. A regime of indefinite detention degrades the credibility of our great Nation around the globe, particularly when we criticize other governments for engaging in such conduct. Indefinite detention contradicts the most basic principles of law that I have pledged to uphold since my years as a prosecutor and in our senatorial oath to defend the Constitution. That is why I am fundamentally opposed to indefinite detention without charge or trial.

During the Senate debate last year over the detention provisions in the NDAA, some Senators argued in favor of indefinite detention, including for individuals apprehended within the United States. I think this violates core constitutional principles of our country. That is why I repeatedly raised concerns and opposed the detention provisions in the NDAA. I was disappointed that the Senate rejected several efforts to amend or remove these measures as we debated the bill.

One of the amendments that did pass during the NDAA debate was offered by Senator Feinstein. Her amendment clarifies that nothing in the NDAA changed the status quo with regard to the authority of the Government to indefinitely detain U.S. citizens or others arrested within the United States. I thank her for her efforts, including her work on this hearing today, because this hearing follows the work of Senator Feinstein. In fact, after her opening statement, I intend to turn the gavel over to her.

There is significant disagreement over the Government's authority to indefinitely detain Americans and others arrested on American soil. I firmly believe that the Constitution makes such actions unconstitutional. In the 2004 Supreme Court opinion in *Hamdi* v. *Rumsfeld*, Justice O'Connor stated unequivocally: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The power of our Federal Government is, after all, bound by the Constitution.

Immediately following enactment of the NDAA last December, Senator Feinstein continued her efforts and introduced the Due Process Guarantee Act, which is the subject of our Judiciary Committee hearing this morning. I understand that Senator Feinstein had to moderate the bill in garnering bipartisan support. She is a superb legislator, and that is what one does to get that kind of support. And I greatly appreciate her continuing efforts to correct the excesses enacted in the NDAA and have joined to cosponsor her bill.

The Due Process Guarantee Act would make clear that neither an authorization to use military force nor a declaration of war confer unfettered authority to the executive branch. This is not unlike the resolution I introduced in 2006 to clarify that the Authorization for the Use of Military Force adopted after 9/11 did not authorize warrantless domestic surveillance. I hope that the Due Process Guarantee Act will serve to open a discussion about how to ensure that no individual arrested within the United States will be detained indefinitely. I believe our Constitution requires no less. The case of American citizens, of course, is the most striking, but to me the Constitution creates the framework that imposes important legal limits on the Government and provides that all people have fundamental liberties.

I am particularly pleased to welcome on behalf of the Committee Professor Lorraine Bannai, who was part of the legal team that helped overturn the unjust conviction of Fred Korematsu. Seventy years ago this month, President Roosevelt signed the Executive order that authorized the detention of thousands of Japanese Americans during World War II, including Fred Korematsu, as well as Professor Bannai's parents and grandparents. That was a tragic

chapter in our Nation's history for which those of us now in Congress have apologized and sought to provide some redress.

So I urge all Senators to join us in upholding the principles of our Constitution, protecting American values, and championing the rule of law. We need a bipartisan effort to guarantee that those arrested on American soil are not locked away indefinitely without charge or judicial review, and so that the United States remains the model for the rule of law to the world.

I yield first to Senator Grassley, as is our custom, and then to Senator Feinstein, who will take over as Chair of the Committee.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you very much for holding this hearing. This hearing continues lengthy debates that have occurred this past December and years before, but specifically in December with the National Defense Authorization Act for Fiscal Year 2012. Specifically, we will focus on the provisions related to the procedure for capturing, detaining, and adjudicating al Qaeda terrorists and other persons associated with al Qaeda.

These provisions have reopened an ongoing debate about the role and the powers of the President, Congress, and the courts in protecting national security. This debate has been ongoing since the founding of our Nation, but more recently since the terrorist attacks of 9/11. Whichever point of view one takes, this topic is bound to raise concerns for those on either side of the issue. So an open and transparent debate is warranted, and this hearing is part of that process.

We can agree that all branches of Government believe that American citizens should be afforded due process of law, and the express language of the NDAA, which includes the Feinstein amendment, means that U.S. citizens are expressly outside the scope of the NDAA mandatory military detention provisions. And only twice has the President chosen to put a citizen in military detention. Both times, at the end of the day, those individuals were transferred to civilian custody and charged with Federal crimes. However, for argument's sake, even if the President were to try to indefinitely detain an American citizen under military authority, that decision could be immediately challenged via a writ of habeas corpus in the Federal courts as outlined by Supreme Court precedent.

I would also note that late last night President Obama issued the procedures implementing mandatory military detention provisions of the NDAA. These procedures make clear that the NDAA expressly exempts U.S. citizens from mandatory military detention, but they also make it so procedurally difficult that effectively no individual of any nationality will likely ever be transferred to mandatory military custody under Section 2011. Between the bureaucratic requirements and the seven national security waivers, it is clear the provision will be seldom, if ever, used on anyone, let alone a United States citizen.

Much of the precedent on this matter dates back to the World War II case concerning a U.S. citizen who was among eight Nazi soldiers that landed on the beach of New Jersey with a goal of sab-

otaging American interests. These individuals, including the American citizen, were tried by President Roosevelt's administration in a military commission and sentenced to death. On appeal to the Supreme Court, the Court held that enemy belligerents, including the American citizens, were tried in a proper venue—a military commission—and upheld the sentence.

In 2004, the Supreme Court, by a vote of 6–3, found that an American citizens named *Hamdi*, captured on the battlefield in Afghanistan and detained in the U.S., had a right to petition for a writ of habeas corpus to challenge detention. But a plurality of the Court, in an opinion by Justice O'Connor, also held that the President had the authority to detain *Hamdi* because Congress had passed an Authorization for the Use of Military Force following the 9/11 attacks.

And the *Hamdi* plurality recognized that detention for the duration of the conflict was part of the "longstanding law of war principles." Justice O'Connor's opinion also made no distinction based upon an individual citizen's finding that, "There is no bar to this Nation holding one of its own citizens as an enemy combatant."

Two more recent lower court cases, *Padilla* and *al-Marri*, have added to the law regarding when a citizen or legal permanent resident can be detained, but neither case has reached the Supreme Court on the merits. But in *Hamdi* and *Padilla*, the Supreme Court said that an American citizen in military custody in the United States has a right to challenge his detention via a writ of habeas corpus. So this begs the question: Why is this legislation even necessary?

And there are two extremely serious practical questions for us to discuss. First, what would be the state of law on detention of American citizens and lawful permanent residents—even if captured abroad on a foreign battlefield—if this bill became law? And, second, would passage of this bill increase the chances that this country would be victimized by another terrorist attack?

Justice Jackson, who dissented in *Korematsu*, because the military sought "to make an otherwise innocent act a crime" for racial reasons, developed a famous analysis of Presidential power in the *Youngstown Steel* seizure case. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." After the Authorization for Use of Military Force and *Hamdi*, it is clear that President Bush and President Obama have been able to pursue terrorists under this first and highest level of Presidential power, namely, in concert with Congress.

Were Congress to require Congressional action beyond the use of military force legislation that the Supreme Court has already said authorizes detention of American citizens in America, the President would immediately be able to detain Americans only under the second category of Presidential power that Justice Jackson outlined.

Under this bill, we would be, as Justice Jackson put it, in a twilight zone of uncertainty as to the scope of Presidential power. That raises enormous practical questions, especially since the withdrawal of affirmative Congressional authorization would be retroactive. And in any future conflict, if Congress remains silent, we

would fight a war with the scope of Presidential power to detain citizens uncertain, with the result dependent "on the imperatives of events and contemporary imponderables, rather than on abstract theories of law."

A second practical question flows from the first. We have been very fortunate since September 11th not to have had any major terrorist attacks on American soil, although there were some close calls. The ability of the President to use the powers Congress has given him, with appropriate oversight, in addition to Congress' own powers, has been responsible for this excellent outcome since 9/11. Were we to take one of the President's clear powers and banish it to a twilight zone, it is not clear that the President will be able to continue to take the necessary actions that have prevented subsequent terrorist attacks. We should exercise exceptional caution before taking such a step.

Unfortunately, we do not have a representative of the administration present to discuss these issues today. I made a request to the Justice Department offering them an opportunity to testify at today's hearing, but they were unable to accommodate. This bill presents serious constitutional separation of powers issues, and it would be in our best interest to hear directly from the administration, especially in light of the fact that President Obama issued a signing statement on the provisions we are discussing. At the least, we need to hear the views of the Departments of Justice, Defense, and State regarding the impact of this.

I will put the rest of the statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you. And I would note for the record that the Justice Department did brief your staff, my staff, and any members who wanted last night on the new procedures.

Senator GRASSLEY. But wouldn't it be better if—well, that is true.

Chairman LEAHY. Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Let me thank you for holding the hearing and for cosponsorship of this bill.

I would also like to thank Senator Lee. I am delighted that he is here today, a major Republican cosponsor and a member of this Committee. And if you wish to make a brief statement while I am presiding before we go to the witnesses—well, if you change your mind, let me know.

I would also like to thank Senators Durbin, Klobuchar, Franken—who is here as well—Coons, and Blumenthal, who are members of this Committee and six of the 23 cosponsors of this bipartisan legislation. And I also want to thank the witnesses for being here today as well.

Let me take a moment to describe why this is such an important issue for me. I was very young during World War II, and one Sunday—my Dad was a doctor, and the only time I really saw very much of him was on Sunday. He said, "I want to show you some-

thing." And he took me down the peninsula south of San Francisco to a racetrack known as Tanforan. And it had been converted into an interment camp and processing center for Japanese Americans who on a certain day were told throughout the United States to report to be held in confinement—for no reason other than we were at war with Japan.

And so every Japanese American citizen essentially was interned, and Tanforan was a transition camp. I will never forget seeing the infield of the racetrack all filled with little tiny shacks, the barbed wire around the exterior. And I think I did not really realize the impact of that until many years later, and it remains, in my view, a dark stain on our history and our values and also something we should never repeat.

It took a long time, but in 1971, Congress passed and President Nixon signed into law something called the "Non-Detention Act of 1971," and subsequently Ronald Reagan made an official apology when he was President of the United States. The Non-Detention Act clearly states this, and I quote—it is very brief: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

Now, what happened was in the Armed Services Committee an amendment was put in the defense authorization bill which essentially used the resolution to authorize force to apply the laws of war also to the United States. And in the laws of war, a suspect on the battlefield can be held, detained, without charge until the end of hostilities. This had never been the case in the United States. So on the floor that day, there was considerable debate. The Judiciary staff, Senator Lee, Senator Paul, we spent a lot of time discussing this. The Intelligence staff came down, and there was a very, very good discussion on what was meant and what was not meant—I think we spent, Senator Lee, virtually the whole day on it. I remember being in the Republican cloakroom sitting with you and Senator Paul and trying to work this out.

Others on the floor, including myself and Senator Durbin, argued that this was prohibited by the Non-Detention Act and that the *Hamdi* decision by the Supreme Court was by its own terms limited to the circumstances of an American picked up on the battlefield in Afghanistan. The four-Justice plurality in *Hamdi* clearly stated, and I quote: "[The Government] has made clear, however, that, for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized."

So *Hamdi* in itself was very narrow and really related to the battlefield in Afghanistan only.

In the end, as the Chairman said, the Senate adopted a compromise that was worked out with Senators Graham, Durbin, Levin, McCain, Chambliss, and others, which passed by a 99–1 vote. I do not think any one of us thought that was really the solution. On that given day, it was the best we could do. And it provided that the defense authorization bill did not change current

law. In effect, what this did was leave it up to the courts to resolve at a later time.

There was widespread outrage at the notion that the defense authorization bill or the AUMF would authorize the military to indefinitely detain U.S. citizens without charge or trial. I believe that message clearly got out there and was reflected in the number of calls and letters that came in.

So the time is really now to end the legal ambiguity and state clearly once and for all that the AUMF or other authorities do not authorize such indefinite detention of Americans in America.

To accomplish this, a number of us joined to introduce the bill we are considering today, the Due Process Guarantee Act. This picks up right where the Non-Detention Act of 1971 leaves off. It amends that Act to provide clearly that no military authorization will allow for the indefinite detention of United States citizens or green card holders who are apprehended inside the United States. It does not change current law for terrorist detainees captured outside the United States.

The bill also codifies a clear-statement rule that requires any Congress in the future to expressly state when it wants to put United States citizens and green card holders into an indefinite detention; in other words, they have to explicitly authorize that. We lack the power to pass a statute that would prevent future Congresses from passing a statute to authorize such detention, although the Constitution may well prohibit it. However, we can at least provide that if a future Congress decides to take such action to override the protection of the Non-Detention Act, it must say so clearly and explicitly that Congress wants to authorize indefinite detention of United States persons.

As I understand it, under the Supreme Court precedent of *Yick Wo* v. *Hopkins* in 1886 and other cases, individuals residing in the United States, both legally and illegally, have the same due process protections as citizens under the Constitution. Therefore, some argue that this legislation should provide coterminous protection to all persons in the United States whether lawfully or unlawfully present. But, candidly, the question is whether we can pass such a bill to cover others besides United States citizens and green card holders. If there would be, I am all for it. We have explored this with our Republican cosponsors, and at the present time we do not believe there is support to go beyond this.

So whenever we draw the line or wherever we draw the line on who should be covered by the legislation, it is unclear to me why anyone apprehended on United States soil should be detained by the military. The criminal justice system has at least the follows four options at its disposal to detain suspected terrorists who may be in the United States legally: one, they can be charged with a crime and held; two, they can be held for violating immigration laws; three, they can be held as material witnesses as part of Federal grand jury proceedings; and, four, they can be held under the PATRIOT Act for 6 months at a time.

As we know, the Bush administration tried to expand the circumstances under which United States citizens could be held in indefinite detention. United States citizen Jose Padilla was detained without charge in a military prison for 3 years, even though he was

arrested inside the United States. Amid considerable controversy regarding the legality of his detention, *Padilla* was ultimately transferred out of military custody and tried and convicted in a civilian Federal court.

I very much agree with the Second Circuit Court of Appeals which ordered Padilla to be released in the case of *Padilla* v. *Rumsfeld* 2003 and held. And here is the quote: "We conclude that clear Congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. 4001(a), the Non-Detention Act, prohibits such detentions absent specific Congressional authorization."

The Second Circuit went on to say that the 2001 Authorization to Use Military Force passed after 9/11 "is not such an authorization and no exception to the Non-Detention Act otherwise exists." That is the Second Circuit.

The Fourth Circuit came to a different conclusion—and I think all of this is important or I would not bother with it—when it took up *Padilla's* case, but its analysis turned entirely on disputed claims that "*Padilla* associated with forces hostile to the U.S. Government in Afghanistan." And "like *Hamdi*"—and this is a quote—"*Padilla* took up arms against United States forces in that country in the same way and to the extent as did *Hamdi*."

The Due Process Guarantee Act would help resolve this apparent dispute between the circuits and adopt the Second Circuit's clear-statement rule. The bill states, "An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States unless an Act of Congress expressly authorizes such detention." That is the clear-statement rule that this bill will enact into law.

I want to be very clear about what this bill is and what it is not about. It is not about whether citizens such as *Hamdi* and *Padilla* or others who would do us harm should be captured, interrogated, incarcerated, and severely punished. They should be. But what about an innocent American like Fred Korematsu or other Japanese Americans during World War II? What about someone in the wrong place at the wrong time that gets picked up, held without charge or trial until the end of hostilities? And who knows when these hostilities end?

The Federal Government experimented with indefinite detention of United States citizens during World War II—a mistake that we now recognize as a betrayal of our core values. Experiences over the last decade prove the country is safer now than before the 9/11 attacks. Terrorists are behind bars. Dangerous plots have been thwarted. In the worldwide threat hearing, FBI Director Mueller testified that there have been 20 arrests just this past year of people who would do harm in the United States. The system is working.

Now is the time to clarify United States law to state unequivocally that the Government cannot indefinitely detain American citizens and green card holders captured inside this country without trial or charge.

I am sorry this is so long, Mr. Chairman, but I thought it was really important to point out what this is and what it is not.

Chairman LEAHY. I agree, and I thank you and Senator Lee and others who have supported this. And I will now give you the gavel.

Senator FEINSTEIN. [Presiding.] Thank you. Thank you very much.

And now, if I may, it is a great pleasure for me to introduce the two Members of Congress who are here today, and I am very grateful to them for being willing to come over to this body and give us their testimony.

I will begin with a friend and colleague from California, Congressman John Garamendi. He has represented California's 10th District since November of 2009. He previously served as Lieutenant Governor of California and in the California Legislature, also as insurance commissioner of the State, which was when I first met him. On December 16, 2011, he introduced the companion version of the Due Process Guarantee Act in the House of Representatives.

I will also introduce at this time, if I may, Representative Jeff Landry. He was elected in 2010 to represent Louisiana's 3rd District. Representative Landry is a veteran of Operation Desert Storm and has also served as a sheriff's deputy and police officer in Louisiana. On December 15, 2011, he introduced legislation in the House of Representatives to ensure that United States citizens could not be detained indefinitely, with all the rights of due process afforded to them.

I am grateful to you both, and, Congressman Garamendi, if you would begin.

STATEMENT OF HON. JOHN GARAMENDI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative GARAMENDI. Thank you very much, Senator Feinstein.

Senator FEINSTEIN. I would ask you, if you can—I know this is difficult. Clearly, I could not—to confine your remarks to as close to 5 minutes as you can. If you cannot, that is all right.

Representative GARAMENDI. I intend to do so, and we were instructed earlier to accomplish that. But I thank you very much, and Senator Grassley and other members of the Committee, for the pleasure as well as the honor of being here. I really appreciated your testimony and your statement, Senator Feinstein. It laid out the problem very, very clearly, and your leadership on this is much appreciated, certainly by me and I think by most Americans.

The Due Process Guarantee Act both on the Senate and the House side provides clarity in an area where Congress and the American people cannot afford to have ambiguity. Congress as the maker of this Nation's laws must always tread carefully when the fundamental rights enshrined in our Constitution are at issue, and we must leave no uncertainty when it comes to the rights of the American people. We must clarify the existing law to guarantee that due process rights for every American are protected. It is a foundational principle of our great Nation that we are all innocent until proven guilty and that we deserve a fair trial.

The fiscal year 2012 National Defense Authorization Act came too close to infringing on those rights. It is certainly not a perfect

piece of legislation, but it was a must-pass and provided the tools that our military needs to get the job done. There is much that was necessary in the NDAA: pay increases for our troops, TRICARE, as well as the necessary authorization for our troops.

Now, more than a decade has passed from that horrible event of September 11. Terrorists are behind bars and dangerous plots have been thwarted. The world knows that America will no longer tolerate safe havens for al Qaeda or any other terrorist group, and we do not need to sacrifice our civil liberties and subvert our Constitution for that security.

Unfortunately, the NDAA came too close to doing just that. Before and after the passage of the Defense Authorization Act, there was concern among Members of Congress and people from all walks of life, including the military, the law enforcement community, and others, that the language in the bill left open the possibility that U.S. citizens and legal permanent residents could be indefinitely detained without charge or trial. President Obama, the Secretary of Defense, Directors of the CIA and FBI, along with the Chairman, who leads the Senate Intelligence Committee—I think she is here at the moment—all oppose the indefinite detention. Those who receive the most up-to-date information on intelligence sit at the highest levels of Government, some of whom served both Democrats and Republicans, all believed that we do not need this policy to keep us safe.

President Obama was so concerned with the language in the NDAA that he wrote a Presidential signing statement about the detainee provisions, stating, "I want to clarify that my administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe doing so would break with our most important traditions and values as a Nation. My administration will interpret Section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of wars, and other applicable laws."

We just heard a furtherance of that earlier in the testimony before this Committee and the statement from the President.

While I take President Obama at his word, subsequent administrations will not be bound by this signing statement. The law itself must be absolutely clear, and that is why I chose to introduce the detention act in the House. This bill states unequivocally that the United States cannot indefinitely detain American citizens. It amends the Non-Detention Act of 1971, as does yours, Senator Feinstein, by providing Congressional authorization to use force that does not authorize indefinite detention without trial or charge of a U.S. citizen or permanent legal resident who are apprehended domestically.

In addition to the authorization to use force, the bill also states that a declaration of war or similar act by the Executive or Congress does not abridge this right.

The bill codifies the clear-statement rules and requires the Congress to expressly authorize detention authority when it comes to U.S. citizens or lawful residents. Hopefully that will never happen.

I will let it go at that, Senator. I do want to thank you and the members of this Committee, and particularly your leadership, Senator Feinstein, on this issue. When I heard of your leadership, I

said, "Let us do it in the House," and it turns out that we are doing it bipartisan. Sixty-two Members of the House, Democrat and Republican, have signed on to my bill, and you will hear Mr. Landry I think with the exact same number on his side. We need to solve this problem.

We thank you for your leadership.

Senator FEINSTEIN. Thank you very much, Congressman Garamendi.

Congressman Landry, I would like to welcome you to this side. It is great to have you here. Please proceed.

STATEMENT OF HON. JEFF LANDRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Representative LANDRY. Thank you, Senator. It is an honor. And for those of you all if you have a problem understanding my South Louisianan accent, Senator Lee said he would be sure to give you a transcript.

[Laughter.]

Representative LANDRY. I appreciate this opportunity to testify before you all today on an issue that I believe is of the utmost importance to the American people, and that is, their freedoms and liberties. And as I sit before you all today, I would like you not to think of me as a Member of the House of Representatives addressing the other body, but as an American citizen petitioning his Congress to protect the very foundation of our Constitution.

You see, when the Founders wrote our Constitution, they did not do it for the betterment of a political party or a social class or a particular group of people. They did it to enshrine the very certain inalienable rights that no country at the time nor even today confers upon its citizens.

They also understood that times would come and could arise when those freedoms would be threatened, and so to address these times, they bestowed upon Congress, and only Congress, under times of extreme strife, the right to deny Americans the very liberties the Constitution sought to protect. We must not take this responsibility lightly nor abrogate this power to another branch of Government. If Congress is suspending a writ of habeas corpus, it should say so directly. If we are not, then we should say so in clear and precise language.

The events of September 11, 2001, can be thought of as one of those times of extreme strife. Yet for good or bad, Congress' response took the form of past Congressional precedent in enacting laws of great ambiguity, leaving the Executive unfettered discretion.

As times have passed from that tragic date, we have had shining moments of success, but we recognize that serious threats still exist. We must, however, return to our citizens some of the very liberties we seek to protect.

Last December, we conducted one of the healthiest and meaningful debates heard in these halls in a long time. Without concern for party, we deliberated what price Americans should pay to protect our Nation. While this debate was meaningful, we did not finish the job. We left ambiguity which, in my humble opinion, could allow the President to indefinitely detain American citizens.

Our constituents and our consciences demand more, and I for one refuse to disappoint either. I have made it a top priority to correct this and ensure that the law clearly states that the NDAA shall not deny American citizens the right to an Article III court, and I have introduced House Resolution 3676 to that effect. This legislation, as Representative Garamendi just mentioned, currently enjoys the support of 62 bipartisan cosponsors. The fact that its sponsors hail from across the political spectrum, from Tea Party freshmen to conservatorship to members of the Democratic leadership and even progressives such as Representative Dennis Kucinich, should demonstrate what many have forgotten: that protecting Americans' rights is not one party's responsibility, it is our responsibility.

I do not hold the patent to the solution. Representative Garamendi has introduced legislation which is the counterpart to Senator Feinstein's Due Process Guarantee Act, yet he is fully supportive of my legislation as I am of his.

I have no pride of ownership on this issue. I came to Congress to solve problems. So my only desire is to see that this issue is put to rest once and for all.

If we do nothing more this year, let us show the American people that when their liberty is at stake, those whom they have entrusted to protect it will act to secure it.

Again, I thank the Committee for this opportunity and their interest in this issue.

Senator FEINSTEIN. Let me thank both of you very, very much. I know you are busy, you have other things to do, so if you wish, you can remain. If you would like to leave, that would be fine. But I am really thankful to both of you for doing what you are doing, and with 62 cosponsors on each, if there is a way of putting them together and moving this thing along, you know, I think we can all work together on this issue, because I think the important thing is what you said, Congressman Landry, that we maintain our core values.

So I very much appreciate it, and if you wish to be excused, you certainly may be.

Representative GARAMENDI. Senator, thank you very much. I do have to go. Please carry on your work to success. We will try to do the same on our side, and I think Mr. Landry and I will have one bill that we will be pushing forward on our side.

Senator FEINSTEIN. Great. Thank you very much.

Representative LANDRY. Thank you, Senator. It is an honor.

Senator FEINSTEIN. Now we will move on with the next panel. Mr. Bradbury, welcome. You have gained a few gray hairs since I last saw you. But you are very welcome. I want you to know that.

Lorraine Bannai is a professor of legal skills and director of the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law. Professor Bannai served on the legal team that successfully overturned the conviction of Fred Korematsu. Professor Bannai has spoken extensively on Japanese American internment and *Korematsu* v. *the United States*.

I will just introduce the three of you at this time.

Stephen Vladeck is a professor law and associate dean for scholarship at American University Washington College of Law. Professor Vladeck's teaching and research has focused extensively on

Federal jurisdiction, constitutional law, national security law, and international criminal law. He was also part of the legal team that successfully challenged the Bush administration's use of military tribunals at Guantanamo Bay, Cuba, in the Supreme Court case *Hamdan* v. *Rumsfeld*.

Steven Bradbury was the Acting Assistant Attorney General and Principal Deputy for the Office of Legal Counsel at the United States Department of Justice during the Bush administration. He served as the head of the Office of Legal Counsel from 2005 to 2009. He has appeared before this Committee, and I have had the pleasure as a member of the Intelligence Committee—I guess several times you have appeared there, and it is good to welcome you back, Mr. Bradbury, and we look forward to your testimony as well.

So we will proceed, and why don't we begin, Ms. Bannai, or, should I say, Professor Bannai, with you.

STATEMENT OF LORRAINE K. BANNAI, PROFESSOR OF LEGAL SKILLS, AND DIRECTOR, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, SEATTLE UNIVERSITY SCHOOL OF LAW, SEATTLE, WASHINGTON

Ms. BANNAI. Thank you very much. Senator Feinstein, Ranking Member Grassley, and members of the Committee, thank you so much for allowing me to testify today.

As one of the attorneys who represented Fred Korematsu in successfully reopening his 1944 Supreme Court case and as a third-generation Japanese American whose family was incarcerated in the Mojave Desert of California during World War II, I appear before you to reflect on the important lessons I hope this country has learned from that dark chapter in our Nation's history. We know now what Japanese Americans always knew: that their imprisonment was unlawful; that it was not based on military necessity; and that it occurred because this country chose to sacrifice fundamental rights characteristic of a nation of laws even as it was fighting to preserve those rights on the battlefield.

The lessons of the Japanese American incarceration are many. First is the real, tangible meaning of due process. During World War II, pursuant to military orders authorized by the President, persons of Japanese ancestry—two-thirds of whom were American citizens—were removed from their west coast homes and imprisoned. There were no charges, there were no hearings. They were rounded up because our country feared attack, there were unfounded suspicions that some were spies, and they looked like the enemy.

In the face of that fear, the rule of law was suspended. We are now confronted with new fears against new peoples, and while we do need to ferret out criminal conduct, we need to do so in a way that preserves our system of laws.

Second, the Japanese American incarceration teaches us about the danger of unfettered discretion. Seventy years ago this month, President Roosevelt issued the military a blank check, delegating to it the authority to take whatever actions it wished against whomever it saw fit. Orders were issued subjecting Japanese Americans to curfew and then removal. In *Hirabayashi* v. *United States* and *Korematsu* v. *United States*, the Supreme Court upheld

those orders, deferring to the military judgment that they were necessary.

Forty years later, Fred Korematsu and Gordon Hirabayashi were exonerated on proof that the Government had withheld from the court material evidence bearing on the issue of military necessity. In essence, even as the military orders lacked factual basis, Japanese Americans languished in camps, many for over 3 years.

Finally, the World War II incarceration teaches us about human frailty during times of crisis. Many who played a role then later came to regret their decisions, among them Chief Justice Earl Warren, who, as Attorney General of California, vigorously sought the removal of Japanese Americans. He later reflected, "It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our State." We are thus warned to safeguard constitutional protections, particularly in times when fear and racism can infect responsible judgment.

The bill before you seeks to ensure that no citizen or permanent resident shall be detained without charge or trial. Our Constitution, as has been said, demands no less. I would urge, however, that the guarantee of due process applies to all persons. That guarantee, by its terms, states that "no person" shall be deprived of due process, without distinction among who it covers.

Further, the bill prohibits detention without due process unless authorized by Congress. Of course, Congress can provide important protections against abuses of executive or military power. However, there should be no suggestion that Congress could authorize detention that violates due process. The World War II incarceration was still wrong, despite Congressional approval of criminal penalties against those like Fred Korematsu who resisted internment.

The present bill is truly a step in the right direction. It clarifies that citizens and permanent residents are guaranteed due process. However, in squarely addressing one danger, one does not want to authorize others.

This Committee has an important opportunity to affirm to this country and to the world that we are a Nation governed by the rule of law, not military discretion, and a belief in basic human rights.

Thank you again for allowing me to speak.

[The prepared statement of Ms. Bannai appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much.

Stephen Vladeck.

STATEMENT OF STEPHEN I. VLADECK, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, WASHINGTON, D.C.

Mr. VLADECK. Senator Feinstein, Senator Grassley, and members of the Committee, thank you for inviting me to testify today. I would like to make three brief points:

First, as Senator Feinstein explained, the current law regarding whether Congress has authorized the military detention of individuals initially apprehended within the United States is decidedly unclear.

Second, there are compelling constitutional and prudential reasons why Congress should require a clear statement to authorize such detention.

And, third, such an approach would not unduly interfere with the President's power to incapacitate terrorism suspects within the United States.

As popular media reports suggest, there continues to be widespread public confusion as to whether the NDAA authorizes the Government to subject to military detention individuals initially apprehended inside the United States. The formal answer, as this Committee knows, is that it does not. Thanks to the Feinstein amendment, the NDAA merely preserves the status quo—a status quo that is defined entirely by the AUMF and the two cases arising under it involving domestic detention, the *Padilla* and *al-Marri* cases that Senators Grassley and Feinstein already mentioned.

I think it is safe to say, though, that neither of those cases, for the reasons Senator Feinstein suggested, clearly resolve the question. Indeed, if anything is actually clear about the status quo, it is its lack of certainty. I think the question becomes what do we do.

Now, this leads to my second point. There are sound constitutional reasons why Congress should have to speak clearly. The Supreme Court has repeatedly read the Due Process Clause of the Fifth Amendment to include both procedural and substantive limits on who may be detained without trial and for how long. And so for any individual protected by the Due Process Clause, regardless of their citizenship, domestic military detention will implicate constitutional concerns both at its inception and as its duration increases.

Given that conclusion, it only makes sound institutional sense to require Congress to provide a clear statement when it comes to the military detention of individuals arrested within the United States. Otherwise, Congress might trigger such grave constitutional questions wholly by accident, or at the very least without the deliberate and deliberative consideration that such questions warrant.

In light of that concern, Congress has in the past enacted such clear-statement rules. The Posse Comitatus Act of 1878 forbids the use of the army and the air force within the United States "as a posse comitatus or otherwise to execute the laws . . . except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." And to similar effect, we have heard about the Non-Detention Act of 1971, which I have long believed requires a similar clear statement as the Second Circuit held in the *Padilla* case, although the Fourth Circuit decided to the contrary.

To the extent that amending the Non-Detention Act to specify that clear or express authorization is the touchstone would restore this understanding, the Due Process Guarantee Act would provide a salutary clarification that the 2001 AUMF and other use-of-force authorizations do not satisfy this plain-statement requirement. As Deputy National Security Adviser John Brennan recently explained, "Our military does not patrol our streets or enforce our laws—nor should it." Congress, in my view, should amend the law to clarify that it shares this view.

My third and final point is that although some might believe that such an expanded clear-statement rule would unnecessarily circumscribe the Government's present authority to detain terrorism suspects arrested within the territorial United States, there are myriad existing authorities that would unquestionably satisfy such a clear-statement rule.

For example, all Federal criminal statutes necessarily satisfy the clear-statement rule since each expressly provides authority for imprisonment, and the Bail Reform Act of 1984 expressly authorizes pre-trial detention in appropriate cases. Given the Supreme Court's case law that presentment of a putative defendant before a neutral magistrate need only take place within 48 hours of an arrest undertaken without prior judicial process—and even then there might be exceptions based on exigent circumstances—the Government has a combination, as Senator Feinstein suggested, of short- and long-term detention authority for any individual arrested within the United States on suspicion of terrorism-related offenses. And in my written testimony, I elaborate on some of the other options available to the Government in these cases.

Now, to be sure, some of these authorities are controversial and may, in at least some of their applications, raise distinct constitutional questions. For present purposes, though, they serve as powerful testament to Congress' ability to expressly authorize domestic detention at least when it chooses to do so.

To be clear, the purpose of clear-statement rules is not to chill legislative initiative but, rather, to ensure that Congress proceeds deliberately in the face of the constitutional concerns I have described and to prevent the executive branch, whether this or any future President, from seizing on statutory ambiguity to claim powers on the homefront that Congress never specifically intended to confer.

Senator Feinstein, the very fact that this Committee is holding this hearing helps reinforce one of the most important points I could hope to make: that while reasonable people can certainly disagree about the desirable scope of U.S. detention authority, we should all have common cause when it comes to the need for Congress to carefully and specifically consider how that authority does and should apply domestically.

Thank you again for inviting me to participate, and I look forward to your questions.

[The prepared statement of Mr. Vladeck appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Vladeck.

Steven Bradbury, welcome again.

STATEMENT OF STEVEN G. BRADBURY, FORMER ACTING ASSISTANT ATTORNEY GENERAL, PRINCIPAL DEPUTY FOR THE OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRADBURY. Thank you, Senator Feinstein. Thank you, Senator Grassley and members of the Committee. It is an honor to appear again before this Committee.

The proposed legislation seeks to bar the President from detaining as an enemy combatant under the laws of war any American

citizen or lawful permanent resident of the United States who is apprehended in this country, even if the person is captured while acting as part of a foreign enemy force engaged in acts of war against the United States.

Today, without this legislation, any American citizens or lawful permanent resident who may be captured and held in the U.S. as an enemy combatant would have the right to challenge the legal basis for his detention in a habeas corpus proceeding, and he would also have the procedural rights guaranteed by the Due Process Clause.

The Supreme Court has reaffirmed these bedrock rights, and they serve to ensure that no authorization for the use of force or declaration of war could justify the detention of American citizens who have taken no active part in assisting an enemy in making war on the United States, such as was done with the thousands of innocent Japanese Americans who were forcibly held in internment camps during World War II.

In addition, if an American citizen is captured as an enemy combatant engaged in hostilities against the United States, the President—any President, I believe—would be strongly inclined to bring criminal charges against that person and to try him for his crimes in an Article III Federal court. Accordingly, the instances will be exceedingly rare when a citizen may be held without charge under the laws of war.

Nevertheless, in addressing the proposed legislation, we need to consider the possibility that there could well be extraordinary circumstances during an armed conflict when it may prove necessary to detain a U.S. citizen as an enemy combatant consistent with the laws of war. When considered in light of that possibility, the proposed legislation raises substantial problems, including both serious constitutional concerns and significant practical issues.

In *Hamdi*, five members of the Supreme Court concluded that the President's power to detain an enemy combatant is "so fundamental and accepted an incident to war" that it plainly falls within the "necessary and appropriate force" sanctioned by Congress in the AUMF. And the Court held that this well-recognized authority extends to U.S. citizens who act in league with the enemy and engage in hostilities against the United States. At the same time, a majority of the Court made it clear that Yaser Hamdi could challenge his status as an enemy combatant and the legality of his detention in a habeas corpus proceeding, and that he retained full procedural due process rights.

Although *Hamdi* did not directly address the President's authority under Article II, there is an important constitutional aspect to the Court's holding. The Court recognized that the power to detain enemy combatants is a "fundamental" incident of the use of military force. It is one essential element in the bundle of sovereign powers that a nation may exercise under the laws and customs of war. Under our Constitution, the authority to decide how the United States will exercise these law-of-war powers is assigned to the President as the commander of the Armed Forces. That is the consistent constitutional balance we have followed throughout our history.

S. 2003 would upset that balance by purporting to remove from the President's command one of the essential elements of the use of military force.

Congress clearly has an important share in the war powers of the United States, in addition to the power to declare war. But, historically, Congress has been careful to exercise its constitutional powers in ways that preserve the full and appropriate scope of the President's discretion to take actions necessary to protect the United States in furtherance of his duties as Commander-in-Chief.

S. 2003, however, would raise the prospect of a significant, and I believe unnecessary, conflict between the branches. This conflict is unnecessary because any American citizen or lawful permanent resident captured in the United States as an enemy combatant will have the right to habeas corpus and the rights guaranteed by the Due Process Clause. S. 2003 would not confer those rights—they already exist and are protected by the Constitution.

There is a further constitutional concern with this legislation. It seeks to apply as a general matter in any and all future conflicts, not just in the present armed conflict with al Qaeda. The legislation would thereby purport to bind future Congresses and to shift to the President the burden of obtaining an express statutory authorization for detention. Such a burden could seriously impede our ability to defend the Nation from attack in extraordinary circumstances when the threat facing the country is acute and there is a need to act with urgency.

Finally, S. 2003 would create significant practical difficulties.

First, it is a central strategy of al Qaeda to recruit U.S. persons to carry out attacks against the United States. The threat of homegrown terrorists acting in concert with foreign organizations is likely to increase. Unfortunately, S. 2003 would have the effect of reducing the flexibility of the United States to respond to that growing threat.

Second, if we capture on our soil a U.S. citizen or lawful permanent resident who is such an enemy recruit and has been actively involved in a plot against the United States, this proposed legislation could seriously impede our ability to gather critical intelligence from that combatant by requiring that criminal charges be brought as a condition of his continued detention.

Third, the information on which the United States bases the decision to detain the individual may constitute sensitive intelligence information or military secrets, and the requirement to bring criminal charges would impose a greater risk of disclosing such information to our enemies than may be the case in a habeas proceeding.

For all these reasons, if I were advising the executive branch today, I would recommend opposing this legislation.

Thank you, Senator Feinstein.

[The prepared statement of Mr. Bradbury appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Bradbury.

I want to go right to something that you said, and that is, on pages 9 and 10, the argument that the pursuit of criminal charges could interfere with the gathering of intelligence from a terrorist suspect.

I am in a position where I see that it has not, and that we have had the successful criminal prosecution of over 400 terrorists since 9/11, including Umar Farouk Abdulmutallab, the Christmas Day underwear bomber, including Najibullah Zazi and his compatriots who were traveling across the country to put bombs in the New York subway, as well as literally hundreds of others.

So doesn't this refuse your assertion, the fact that the record does not document this?

Mr. BRADBURY. Well, Senator Feinstein, I think we can all be thankful that circumstances have not arisen thus far that pose extraordinary circumstances where the law enforcement tools that are the primary vehicle for apprehending and handling terrorist suspects in the United States are not sufficient. But what I am posing is the distinct possibility of extraordinary circumstances where al Qaeda or other terrorist organizations affiliated with al Qaeda have recruited U.S. residents to infiltrate the country through secret cells to conduct mass attacks on the United States, and in circumstances, for example, of an unfolding plot or attempted attack where these individuals are apprehended.

The introduction of criminal process as a requirement, as a condition to detention, may require early administration of Miranda warnings, early access to courts, early access to defense counsel, and these usual attributes, which we obviously recognize and value of the criminal law enforcement process, can interfere with the necessary situation required for intelligence gathering and intelligence questioning.

Senator FEINSTEIN. I really dispute that. Since your day here, what has happened is the FBI now has 15,000 people in an intelligence unit in 57 offices across the United States, and that is how 20 potential attacks were prevented. Abdulmutallab was Mirandized. It did not stop him from pleading guilty. He has pled guilty, and he is serving a life sentence. So I do not think the theory matches the practice.

You say that to indefinitely detain United States citizens is an accepted incident of military force, but doesn't the Posse Comitatus Act, which has been with us for over a century, fly in the face of the assertion that domestic apprehension by the military of United States citizens is "fundamental and accepted"?

Mr. BRADBURY. The Posse Comitatus Act does prohibit the use of the military for domestic law enforcement purposes, and I would certainly expect that in almost any case the apprehension of the enemy combatant who is found on U.S. soil would most likely take place through law enforcement resources like the FBI, U.S. Marshals, or local law enforcement, et cetera, and due process would apply to the arrest or apprehension. But the question would be then: Would that individual be susceptible to transfer to military custody in the event it was determined that he was an enemy combatant actively engaged in war against the United States? And that is a right or power that any sovereign country has, and it is recognized under—as the Supreme Court said, well recognized under the laws and customs of war. And the concern I have is that this legislation would purport to strip away that sovereign power that any country has and prohibit the exercise of that option in an

extreme circumstance where it may be determined that it is necessary.

But I would acknowledge that it would be, as I tried to stress, very, very rarely used, and that it would be any President's intention, I firmly believe, wherever possible, to handle any U.S. citizen apprehended in the U.S. through the criminal process.

Senator FEINSTEIN. Let me just respond and turn quickly to our Ranking Member, Senator Grassley. I think the point is to maintain flexibility for the administration so that you have the choice actually, but the issue here is no charge or no trial until the end of hostilities, which can be 30 years from now. So that I think is an overwhelming issue that the Constitution speaks to loud and clear.

But, anyway, Senator Grassley.

Senator GRASSLEY. I am going to follow up where Senator Feinstein left off with you, Mr. Bradbury. This is about classified intelligence information. Recently a couple of high-profile leak prosecutions have fallen apart in court because the Justice Department was ordered to allow the defendant to introduce classified evidence. At least one case is now on interlocutory appeal. Isn't this evidence that the Classified Information Procedures Act may not be enough protection for classified information compared to a military commission?

Mr. BRADBURY. Yes. That was the determination I think we made and Congress made in enacting the Military Commissions Act, which does not apply to U.S. citizens but, nevertheless, recognizes that the Article III court ordinary criminal process does not provide sufficient protection in all cases—at least in some cases, I mean, for sensitive intelligence, because if the United States is going to prosecute someone for a crime that depends on the use of the classified information, they are going to have to divulge it. They are going to have to use it in court as evidence. And so what you will see is the criminal charges that may be brought in a particular case may be far narrower and more modest than the full range of information that the United States may have about that individual's activities.

Senator GRASSLEY. I want to go to the procedures that the White House released last night. They were required by Congress outlining steps and authority of the executive branch following—that has to follow before transferring an individual to military custody consistent with 1022. Repeated throughout the procedures and the accompanying fact sheet is the express statement that neither the mandatory military detention requirements under 1022 nor the procedures implementing 1022 apply to U.S. citizens. In fact, the procedures outlined such a convoluted process, as I see it, that it is actually tough to imagine a situation where even a non-U.S. citizen or member of al Qaeda captured abroad would be subject to the mandatory military detention.

So, Mr. Bradbury, if you are familiar with the new procedures that were released, isn't it true that under Section 1022 U.S. citizens are expressly exempt from mandatory military custody?

Mr. BRADBURY. Yes, that is true.

Senator GRASSLEY. And under the administration's procedures published last night, lawful permanent residents would also be exempt from mandatory military custody under that Act?

Mr. BRADBURY. Yes, my review indicated that the President was proposing, in effect, a blanket waiver from mandatory military detention for lawful permanent residents or resident aliens.

Senator GRASSLEY. But before someone can be held in military custody, the procedure required the Attorney General to get sign-off from the Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, Director of National Intelligence, and then even if he gets sign-off there, the FBI Director can essentially veto the transfer to military custody if it will disrupt an intelligence collection or national security investigation.

You worked in the executive branch, Mr. Bradbury. How difficult would the sign-off process be as outlined in the procedures?

Mr. BRADBURY. Well, it is quite extensive, and I think I would just point out, Senator Grassley, that it seems apparent that these procedures are intended to limit as far as possible the scope and application of the mandatory military detention provisions of the NDAA. And I think that is consistent with the policies of the administration, which have made it clear that they wish to address the terrorism problem domestically primarily as a law enforcement matter. And I think it is also consistent with what Senator Feinstein said, which is that the executive branch is going to want to maintain flexibility and is going to want to resist restrictive provisions one way or the other that Congress might attempt to apply by statute on the President's handling of enemy combatants. And I think that is reflected in the procedures, and I think it is reflected in the comments I am making, which really are a plea for flexibility between the branches.

Senator GRASSLEY. My next question is a long one, so let us go, and I will in the second——

Senator FEINSTEIN. All right. Senator Franken was—we use early bird, if that is all right, so——

Senator FRANKEN. Do you want to ask your long question? May I ask the Ranking Member if you would like to ask your long question?

Senator GRASSLEY. I will take advantage of that if nobody else objects.

[Laughter.]

Senator FRANKEN. I was just asking if you wanted to. I did not say I would let you.

[Laughter.]

Senator FRANKEN. No, no. Go ahead.

Senator GRASSLEY. Thank you.

Mr. Bradbury, we have been at war since 9/11. In fact, al Qaeda formally declared war on the United States in 1998 when they attacked two embassies and then attacked the USS Cole, and obviously we did not listen to al Qaeda. Only after 3,000 people were murdered did we, and even after bin Laden's death, al Qaeda and its affiliates still continue to plan attacks here.

As we get better at thwarting al Qaeda's efforts, they are now recruiting and radicalizing inside the United States, but consid-

ering how dangerous our enemy is—and we have done pretty well balancing civil liberties and the need to defend ourselves effectively—we have not imprisoned innocent U.S. citizens en masse or shut down newspapers. And anytime the actions of President Bush or President Obama have raised controversy, their actions have been robustly challenged in public discourse, the media, Congress, and the independent court system. So I am concerned when inappropriate comparisons to the war on terror are made.

So, Mr. Bradbury, do you think there is any comparison between the internment of innocent U.S. citizens and the detention of terrorists affiliated with or directed by al Qaeda to kill Americans?

Mr. BRADBURY. Actually, no, I do not. I do not think that is a fair comparison. I think that the vast majority if not all of the innocent Japanese Americans who were, regrettably, interned during World War II were not held under a proper interpretation of the law of war as enemy combatants. There was some amorphous claim of national security need. They would not be held by a Federal court in a habeas proceeding to satisfy enemy combatant definitions under the law of war. So they would not fall within the scope of what we are talking about here, which is the President's background authority—really, it is the Nation's, which I am trying to stress. It is a sovereign power that any nation has to detain under the laws of war enemy combatants who make war on that nation. And they would be subject to habeas review in a Federal court under the *Boumediene* decision and others of the Supreme Court, would hear evidence and would make a determination as to whether they are lawfully held properly as an enemy combatant, and they would have due process rights in that proceeding. The Court has made it clear. If those things were applied to Japanese Americans interned in World War II, a proper determination would have been to release them all because they could not have been held as enemy combatants under the law of war.

Senator GRASSLEY. Thank you, Senator Franken, for your consideration.

Senator FRANKEN. You are very welcome.

I would note that right after we did 9/11 imprison a lot of people who it turned out it was unwarranted and people who were put away and had no ability to contact a lawyer, no ability to tell their family where they were. So I would just—since the Ranking Member asked that question, I would remind us that every one of these circumstances is a little different. So I think the comparison here to what happened during World War II is a little bit more significant than Mr. Bradbury might suggest, and I see Ms. Bannai nodding her head.

I want to start by thanking Chairman Feinstein for her incredible leadership on this issue. Last December, when the Senate was debating the defense authorization bill, there were very few Senators who were as tenacious as Chairman Feinstein in pushing for better language to be included to prevent the indefinite military detention of American citizens. And I really want to applaud her efforts to get a better bill passed into law.

I filed two amendments that would have stripped two of the detention provisions from the defense authorization. Unfortunately, I was not able to get votes on my amendments, and despite our best

efforts, Congress ended up passing a bill that will radically alter how we investigate, arrest, and detain individuals suspected of terrorism, and this in my mind is a complete mistake. The idea that we could arrest and detain U.S. citizens and other persons living in the U.S. indefinitely without charge, without trial by jury, a jury of their peers, and without having to prove guilt beyond a reasonable doubt is, in my opinion, a denigration of the Bill of Rights. It is a denigration of what our Founders created when they established a civilian non-military justice system for trying and punishing people for crimes they commit on U.S. soil. And while I support Senator Feinstein's bill and agree our priority should be making sure that American citizens are not arrested by the military in the U.S., I think it is a mistake for the military to be authorized to detain anyone here in the United States, regardless of whether they are a citizen or not.

Ms. Bannai, when Congress enacted the Posse Comitatus Act just after the Civil War in 1878, or 13 years after the end of the war, we did so because we wanted to make it clear that the military could not and should not enforce our laws within the borders of the United States. Do you think the detention provisions that passed last year undermine that core principle and potentially put us one step closer to permitting martial law in this country?

Ms. BANNAI. Thank you very much, Senator, for that question. I have a couple of responses.

No, we have not imprisoned innocent citizens en masse, but I would like to suggest that we need not in order to raise due process concerns. Fortunately, we have not imprisoned a hundred thousand, but due process guarantees apply to individuals. There is a serious concern about allowing the detention of citizens and anyone in the United States without due process.

The issue regarding the internment during World War II is really who decides who is guilty of espionage and sabotage. During World War II the military decided, and I am very, very concerned about who will make that decision today.

There has also been expressed some concern about early access to Miranda warnings, courts, and counsel. I do not think that is something to fear. I think that is something that this Constitution guarantees.

It has also been said that anyone detained will have a right to habeas corpus. That guarantee did not do much for Japanese Americans during World War II. Japanese Americans were interned during the spring of 1942. It was not until December 1944 that Mitsuye Endo's habeas corpus petition was granted to release Japanese Americans from internment camps.

Yes, I am concerned that at present we are going to have the military involved in detaining citizens and giving the military unfettered discretion in deciding who should be detained and who should not be, and that is a tremendous concern to me. I think there are tremendous parallels between what happened during World War II and what we are facing today.

Senator FRANKEN. Thank you, Ms. Bannai. I will note that I am running out of time. I think in light of the courtesy that I extended to the Ranking Member that I be granted——

Senator GRASSLEY. My next 5 minutes in round two, you can take it right now. I have got to go.

[Laughter.]

Senator FRANKEN. That is very generous of you, considering you are leaving.

[Laughter.]

Senator FRANKEN. Well, I will just take a moment here because I do not like going over, and I just want to address this.

Mr. Bradbury, I just have to confess I am not a little disappointed to see that you were called to testify before us today. I think it is important to remind people watching this hearing that you are the author of several memos that authorized the use of enhanced interrogation techniques or what I and a lot of other people call "torture" during the Bush administration. One of your memos specifically authorized the use of waterboarding, cramped confinement, slapping, stress positions, nudity, and dietary manipulation, and a subsequent memo said you could combine some of those techniques together and it would not constitute torture.

In addition to this history, a lengthy investigation by the Office of Professional Responsibility concluded that you had drafted these memos with the goal of allowing the CIA torture program to continue, so it is very difficult for me, frankly, to rely on your legal opinion today. If the Office of Professional Responsibility questions your objectivity and reasonableness, then I think we on the panel all should as well.

Again, I realize I have gone well over my time, and I thank the Chair for allowing me to make this quick note for the record. And, Madam Chair, I would also like to add the Department of Justice's Office of Professional Responsibility's report on Mr. Bradbury to the record.

Senator FEINSTEIN. So ordered, and I thank you, Senator.

[The report appears as a submission for the record.]

Senator FRANKEN. Thank you.

Senator FEINSTEIN. I would also like to put in the record the testimony of Dr. Scott Allen, associate professor of medicine, University of California-Riverside. That will go into the record.

[The testimony appears as a submission for the record.]

Senator FEINSTEIN. Senator Lee.

Senator LEE. Thank you, Madam Chair, and thanks to the witnesses for being here today.

I, too, want to thank you, Senator Feinstein, for sponsoring this legislation, which I am very proud to cosponsor. I believe that the most important purpose of our Constitution is to place restrictions on the ability of the Government to interfere with our individual liberties. It is somewhat difficult to conceive of anything that interferes more with our liberty than a power exercised by the Government indefinitely to detain a U.S. citizen without trial. And that is exactly why I am very happy to cosponsor this legislation.

I would like to start my questions with Professor Vladeck, if I could. First of all, how do you respond to the argument made by Mr. Bradbury that restricting the detention of U.S. citizens apprehended on U.S. soil might interfere with the President's commander-in-chief powers in a way that might be constitutionally problematic?

Mr. VLADECK. Thank you, Senator. I think there are a couple of arguments, and so I think it depends on whether we are talking about short-term detention authority or long-term detention authority. I suspect my friend Mr. Bradbury would not dispute that the President has a wide array of authorities to incapacitate even a U.S. citizen temporary, in the short term, to prevent an imminent attack on suspicion of criminal activity, et cetera. So the real question, I think, is now would a requirement such as the one that the Due Process Guarantee Act would impose interfere with the President's short-term authority but, rather, his long-term authority. I think there the response is that same argument would suggest that the Non-Detention Act itself raises similar constitutional concerns even though President Nixon, who was hardly shy about voicing constitutional concerns vis-à-vis Executive power, did not object to the constitutionality of the Non-Detention Act on those grounds. And I think nothing would stop Congress, as Senator Feinstein suggested, from coming back and providing the very authorization it believes the President needs. My understanding of the bill is that the point is not to forbid such authorization but, rather, to require Congress specifically to authorize it.

So that is why I think in the short term it would not be a problem at all, and to the extent that it might be seen as a problem in the long term, it is one that prior Presidents who were rather ardent supporters of constitutional authority did not find—as Justice Jackson put it, the Commander-in-Chief Clause makes the President commander-in-chief of the military, not the country, and I think that is the principle at stake here.

Senator LEE. I assume you would argue further that any constitutionally problematic implications from that would be dwarfed in comparison to the intrusions, the effect of not having a provision like this in the law might result in a violation of the Fourth, Fifth, and Sixth amendments and the Suspension Clause and other constitutional protections.

In his dissent in *Hamdi*, Justice Scalia argues that the Constitution does not permit indefinite detention of citizens without charge absent one of two things: either suspension of the writ of habeas corpus or charges. You know, you have got two options there. Do you agree with his analysis in *Hamdi*?

Mr. VLADECK. I have to confess I am actually slightly more partial to Justice Souter's analysis in *Hamdi*. I think even Justice Scalia does not necessarily agree with Justice Scalia's analysis in *Hamdi*. He, for example, has supported State laws that provide for the civil commitment of sex offenders, which would be inconsistent with that principle.

I think there are very serious due process constraints on when citizens can be held and non-citizens who have due process rights can be held without criminal charges, but I do not think it is a categorical bar along the lines that Justice Scalia suggested.

Senator LEE. I think he justifies that—there is a portion of his dissent, I think, that addresses that. He would probably categorize that in the same category where he talks about quarantine laws and indefinite detention on the basis of insanity.

Mr. VLADECK. Right, and I think—I mean, obviously, I think the distance between Justice Scalia and me on this point is not very

much. But, you know, I am mindful of the case of *Gaetano Territo*, a U.S. citizen who was found in the Italian army during World War II, and it seems to me that if international law authorizes the detention of enemy soldiers as prisoners of war, as during World War II clearly it did, then, you know, I am not sure that Justice Scalia would think that we had no power to detain even someone like Territo in that context. But I think the authority is incredibly limited, and as Justice Souter suggested in *Hamdi*, it really should require Congress to expressly provoke the question.

Senator LEE. Thank you.

Mr. Bradbury, in your testimony you state that the instances will be rare in which an American citizen apprehended on U.S. soil might be held for an extended period of time without charge. If that is the case, then might it not make sense simply to subject those people to the criminal process, to charge them on charges of treason, or whatever the case may be? Given the fact that this might arise in relatively few instances, shouldn't you just balance that by saying let us just put them through the process?

Mr. BRADBURY. Well, the concern would be that one instance, which is very difficult to predict, where the criminal process may not be sufficient. And it is hard to predict what the particular circumstances might be, but there may be an acute necessity perceived both by Members of Congress and the President that there is an unfolding threat and an individual is involved and that individual needs to be detained for some period where intelligence questioning can occur, where we can continue to keep secret the sort of sensitive information that we would necessarily need to disclose if we had to bring charges, criminal charges against that person.

And so those are the circumstances that I am talking about, and I am certain that they will be rare. There has really been one individual since 9/11 who was a U.S. citizen apprehended in the United States who was held under laws of war as an enemy combatant. So I am confident any President would do whatever he could to avoid the circumstance, and that is why I think the proposal for the legislation—and I understand the sentiments behind it, but I think it creates a potential for conflict that because of the rarity of the circumstances we are talking about I think is really unnecessary to confront that and to create that potential for conflict.

Senator LEE. Thank you very much, Madam Chair, and I see my time has expired. Thank you very much.

Senator FEINSTEIN. And thank you very much.

Senator Graham, welcome.

Senator GRAHAM. Thank you, Madam Chairman. I appreciate it very much, and to all of you for coming. This is, I think, a really good topic for the country to be discussing, and I would like to start off kind of explaining my thinking.

I believe that after 9/11 we have been in an undeclared state of war with al Qaeda and that the attacks of 9/11 should be viewed from the law of armed conflict perspective, not the domestic criminal law perspective.

Who are the two professors? I am sorry. OK. Do you agree with the proposition that we are at war with al Qaeda?

Mr. VLADECK. I think yes. I think Congress has so found. I think the Supreme Court has so held, yes.

Senator GRAHAM. OK. Ma'am?

Ms. BANNAI. Yes.

Senator GRAHAM. OK. Well, that is a good place to start because here is my goal: As Senator Lee was saying, the idea of an American citizen collaborating with al Qaeda I hope is, Steven, very rare. I think we have had two cases. What drives my thinking, Senator Feinstein, is that my primary goal is to get as much good intelligence as we can when we capture someone. And I would like to give the administration really high marks for taking the fight to al Qaeda along the Pakistan border. These drone attacks, the bin Laden raid were really, I think, a tough call for the President to send people deep inside of Pakistan. I thought he had every legal right to do so, and, quite frankly, that was a good outcome. But we just cannot kill all these guys and be safe. When we capture somebody, it is a golden opportunity to find out about what the enemy is up to in future attacks.

Mr. Bradbury, does the law enforcement model in the United States really allow you to gather military intelligence effectively?

Mr. BRADBURY. Well, I do not believe it does, Senator Graham, based on my interactions with intelligence community folks and folks in the military and the work that we did so closely——

Senator GRAHAM. Well, let us say that we captured an American citizen in Afghanistan like the *Hamdi* case. Does anybody on the panel believe that we should read them their Miranda rights in Afghanistan? Two noes?

Mr. VLADECK. I would say, you know, if he was captured by the military, obviously the military is not about to read him his Miranda rights. I think if he is arrested by the FBI, even outside the United States, that changes the calculus.

Senator GRAHAM. OK. That is a very good point, and the calculus I am trying to say is that the goal is to gather intelligence. It is not the agency that makes the capture. The national security goal is to find out what that person, even if it is an American citizen, knows about enemy operations.

The fact pattern that I think we could face 1 day is someone here in the Nation, an American citizen, gets radicalized, like the Major, gets online and believes that jihad is their calling, goes to Pakistan, trains at a madrassah, and they come back to Dulles. There are two fact patterns here.

So we know from the intelligence picture that they are in a madrassah that is very linked to al Qaeda, radical thought. How do you say your last name, sir, Stephen?

Mr. VLADECK. Vladeck.

Senator GRAHAM. If we captured them at Dulles airport, would you have to read them their rights?

Mr. VLADECK. Well, Senator, as you know, I think it is important to remind the Committee that, you know, Miranda is an exclusionary rule, and so what that means is that if evidence is obtained in violation of a defendant's Miranda rights, it can be suppressed at trial. But with regard to can you interrogate him, Miranda does not actually stop them from doing anything.

Senator GRAHAM. But Miranda says you have a right to a lawyer and not just to remain silent. So I guess what I am saying is that the military model of interrogating a prisoner overseas in every other war never gave an enemy combatant a lawyer in the interrogation process. Now, you get a lawyer when you go to a habeas proceeding, so Judge Mukasey made that distinction in *Padilla*. They did not say that Padilla had a right to an attorney during the interrogation. They said he had a right to an attorney during his habeas hearing. And one of the Congressmen said that we have suspended habeas corpus. Nothing could be further from the truth. Everyone captured in the United States held as an enemy combatant has a habeas right to appear before a judge. Do you agree with that?

Mr. VLADECK. I agree with that, although that was not always the position of the Bush administration.

Senator GRAHAM. No, let me tell you—will you verify that I have been at odds with you guys, too?

Mr. BRADBURY. Yes, absolutely.

Senator GRAHAM. I am trying to find that middle ground.

Mr. BRADBURY. And there has been an evolution, I think. A healthy evolution.

Senator GRAHAM. An evolution by the courts, and, quite frankly, I think the Bush administration relied way too much on Executive power, and that this administration is reluctant to use power that has been there. I think the *In re Quirin* case is a classic example. You had American citizens involved in helping Nazi saboteurs. They were tried by a military commission. Of course, nobody in World War II ever suggested that an American citizen helping the Nazis, somehow that became a criminal act. My view is that an American citizen helping al Qaeda is basically engaging in a war against us, the rest of us, and we already used the military justice model. But we do not allow military commissions for American citizens, and I am OK with that.

Here is the rub: This is a war without end. So what I have tried to do is initially allow, Senator Feinstein, that initial capture, that guy coming back from the madrassah, that we could hold them without torturing them for the intelligence-gathering purposes—that is a lawful activity because we are at war—and they cannot be tried in military commissions. So the idea that they will go to an Article III case, that is the disposition.

But if you use the law enforcement model, the public safety exception does not get you to where you want to go, and I just do not want to lose intelligence. I do not want to put people in no-man's-land. I want every case to go before a Federal judge, and the judge has to agree with the Government that there is ample evidence to say you are an enemy combatant, defined under the very narrow statute. And that is all I am trying to do. I do not want to torture anybody. And prosecution is a secondary concern to me. Like the Christmas Day bomber case, there is plenty of evidence that he tried to blow up the airplane. When we read him his Miranda rights, there were a couple of weeks that went past. The FBI went to his parents, and they basically talked him into cooperating.

What I would like to do is just hold him for a period of time, collect intelligence from agencies around the world, and make a rea-

soned decision about when to prosecute and how to prosecute. And I think we have done that with our legislation. In all due respect, I think reading Miranda rights when you capture someone on the homeland is not the best way to gather intelligence. I do not want to torture anybody. I want to make sure they have an independent judiciary. And we will keep working on this to see if we can get it right. But you made a really good point. The homeland to me is part of the battlefield. When you wrap your head around the idea that the homeland is part of the war on terror battlefield—and just like in other wars, when an American citizen went over to the enemy, they were treated as somebody engaged in a war activity, not a common criminal activity.

So, Senator Feinstein, I look forward to working with you to see if we can find a way to make sure we are all on the same sheet of music, and I know that you as the Intelligence Committee Chairman want to preserve intelligence gathering because that is the best way to defeat this enemy, and at the same time, you want to make sure that there is due process.

And just finally on the issue of American citizens, this will be a rare event, but when that day comes—and homegrown terrorism is a real problem—I want to make sure we have a legal system that recognizes the distinction between fighting a crime and fighting a war. And that has always been my goal. And thank you for this hearing, and to be continued.

Senator FEINSTEIN. Let me thank you, Senator Graham. You know, I wish you could see what I see in spending most of my time on Intelligence. We have never been more proficient than we are today. The FBI has never been as effective at interrogation as they are today. We just reviewed the budget and intel, and the numbers—well, the numbers that have been released are 10,000 to 15,000 people in the FBI who do intelligence today all across the United States. So the opportunity to surveil, the opportunity to collect evidence certainly was there. And Najibullah Zazi is a classic case, from Colorado to New York. And the case was made. Abdulmutallab, you pointed out, it was dead bang. He was Mirandized, but he pled guilty. And so, you know, I think the key is flexibility, and flexibility for the Executive as to whether this be trial by Federal court or by military court.

You know, having said this, I think there is really a basic need because being in the wrong place at the wrong time and looking the part—I mean, Japanese Americans, that is how they got interned. And so in any event, there is a difference of opinion. As you know, I love working with you. I would be very happy to sit down and see if we cannot work this out. But there is a very profound, I think, kernel of American jurisprudence and constitutional rights involved in all of this.

I did want to make one comment to you, Mr. Bradbury, and that is on the Classified Information Procedures Act which protects classified information, which gives an Article III judge the ability to keep it separate. And I just wanted to point that out.

I want to thank everybody, Ms. Bannai, Mr. Vladeck, Mr. Bradbury, thank you. It is good to have you here.

Senator GRAHAM. Madam Chairman, can I just respond?

Senator FEINSTEIN. Sure.

Senator GRAHAM. Let me just tell you where I agree and disagree. I am an all-of-the-above approach guy. Article III courts are a fine venue for terrorism cases. The intelligence community are unsung heroes. But we have been lucky. The bomb did not go off in Detroit because it just did not go off. The Times Square bomb did not go off because the guy just did not know how to set it off. Those are two situations where the system did fail—not because people did not try, but it is just you have got to be right all the time to have to be right once.

And here is the difference between, I guess, our positions: Once we capture these guys, I do not want to read them their Miranda rights. I want them to be uncertain as to what is going to happen to them. They are not going to be tortured. But I want to hold them long enough to gather intelligence in an effective way: Where did you train? Where did you go?

Now, maybe reading Miranda rights is the best way to get that intelligence. I am not saying you cannot read Miranda rights. Let us leave that up to the professionals. I am just trying to create a legal system that understands the distinction between prosecuting somebody for a crime and gathering intelligence.

If the executive branch wants to read Miranda rights, that is fine with me. But I believe most Americans have a hard time dealing with these cases from a law enforcement perspective. In no other war did we do this. When we captured the American citizens helping the German saboteurs, they were deemed an enemy combatant of this country. I do not want to lose that thought process. We are really talking about a handful of people as American citizens. But the idea of the war's coming to our homeland is real, and when you capture somebody—if the President says we can kill an American citizen in Yemen through the executive branch decision you are an enemy combatant, I support that. Why in the world couldn't we hold them for intelligence gathering?

It makes no sense to give the Executive branch the power to assassinate somebody who is actively helping the enemy abroad, and if they are lucky enough to make it to the homeland, all of a sudden it is a common crime. I am trying to avoid that dilemma. And I want flexibility, but I want a legal regime that understands the difference between fighting a war and fighting a crime. And I think there is a way for all of us to get there.

Thank you very much. God bless. And to those intelligence people working hard, I believe in you. And to the Article III prosecutors, I think you are doing a great job. And to the military commission prosecutors, I think you are doing a great job. And to the Obama administration, thanks for using both systems.

Senator FEINSTEIN. OK. In response to you, there is a public safety exception to Miranda which can be used, which gives the opportunity to collect intelligence. There are also four other methods which I outlined in my opening statement.

But I have to be somewhere else, and you are always terrific.

Senator GRAHAM. To be continued.

Senator FEINSTEIN. And I always enjoy discussing it with you.

The hearing is adjourned. Thank you, everybody.

[Whereupon, at 11:50 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

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March 26, 2012

Hon. Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy:

Thank you for allowing me to testify before the Committee at its February 29, 2012, hearing on "The Due Process Guarantee Act: Banning Indefinite Detention of Americans." Below, please find my answers to the Questions for the Record submitted by Senators Klobuchar and Coons.

I hope you will let me know if there is anything else I can do to assist the Committee with its work.

Sincerely,

Lorraine K. Bannai
Professor of Legal Skills and
Director, Fred T. Korematsu Center
for Law and Equality

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Due Process Guarantee Act: Banning Indefinite Detention of Americans
Senate Judiciary Committee

February 29, 2012

QUESTIONS FOR THE RECORD FOR LORRAINE K. BANNAI

From Senator Amy Klobuchar

In your testimony, you discuss the importance of Congressional oversight of the Executive branch, citing the internment of Japanese Americans during World War Two as an example in which appropriate actions by Congress were absent. In the context of military detentions and related policies, do you have recommendations as to the nature and parameters of Congressional oversight that should be implemented?

Answer:

After President Franklin Delano Roosevelt issued Executive Order 9066, authorizing the War Department to issue orders controlling the Japanese population on the West Coast, Congress passed Public Law 503, which made violation of any military order issued pursuant to Executive Order 9066 a federal crime.[1] In enacting this statute, however, Congress failed in two important respects:

First, it failed to scrutinize the justification for the Executive Order. As has been established by both the Congressional Commission on Wartime Internment of Civilians[2] and the *coram nobis* cases of Fred Korematsu and Gordon Hirabayashi[3], there was no military necessity for the wartime incarceration of Japanese Americans. While some would doubt whether Congress during World War II would have been inclined to question Executive Order 9066 and the military orders issued pursuant to it, one should hope that Congress would serve as a check on exercises of Executive and military power that are excessive. There was no opposition or debate in Congress regarding Public Law 503. At the very least, Congress should inquire into whether there is a sufficient basis to justify Executive action.

Second, in authorizing the military to take adverse action against civilians during World War II, both Congress and the Executive failed to specify the type of conduct that would be criminalized. Congress did not identify acts subject to punishment; it left that determination up to the discretion of military authorities.[4] In fact, the conduct criminalized was to be

[1] Pub. L. No. 77-503, 56 Stat. 173 (1942).

[2] U.S. Comm'n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: *Personal Justice Denied*, at 18 (The Civil Liberties Public Education Fund & University of Washington Press, 1997) (1982).

[3] *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

[4] Public Law 503 simply stated that "whoever shall enter, remain in, leave, or commit any act in any military area . . . contrary to the restrictions applicable to any such area . . . shall . . . be guilty . . . "

specified in not-yet-issued military orders. On March 14, 1942, during Congressional discussion of Public Law 503, Senator Robert Taft of Ohio criticized the bill for its vagueness:

> I think this is probably the "sloppiest" criminal law I have ever read or seen anywhere. . . I do not want to object, because the purpose of it is understood. . . . I have no doubt [this] act . . . would be enforced in war time. I have no doubt that in peacetime no man could ever be convicted under it, because the court would find that it is so indefinite and so uncertain that it could not be enforced under the Constitution.[5]

Thus, Congress should ensure that there be no detention of any individual without a clear, constitutionally sufficient statement as to the proscribed conduct that would justify such detention.

From Senator Christopher A. Coons

1. Thank you for your testimony and important historical perspective on this critical issue. Given your experience in the *Korematsu* case, I am interested in your thoughts on Attorney General Holder's recent statement, which defended the view that the administration has the legal authority to conduct targeted killings of Americans abroad, under certain circumstances:

   > "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

   The Fifth Amendment guarantees all United States citizens against loss of life or liberty without "due process *of law*" (emphasis added). Do you agree that the Fifth Amendment permits the targeted killing of Americans abroad without any judicial process?

   Answer:

   No. Though I am not an authority on Constitutional Law, the United States Supreme Court has made clear that Americans detained abroad are possessed of fundamental due process rights. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

   Given that an American citizen detained abroad is entitled to due process in challenging the validity of his or her detention, it only stands to reason that the same process, or greater process, should be ensured prior to the taking of his or her life.

[5] Congressional Record, March 19, 1942, p. 2726.

I would say that due process is the same as judicial process. The issue of whether an American abroad can be killed would seem to turn on a few key questions: first, whether the American poses a direct threat and what a direct threat is, and, second, who makes that determination. In his remarks, Attorney General Holder spoke to the authority of the United States to use lethal force to "target" U.S. citizens "at least" in circumstances in which (1) the citizen is a senior operational leader of Al-Qaeda or associated forces; (2) he or she is actively engaged in planning to kill Americans and poses an imminent threat of violent attack on the United States; (3) capture is not feasible; and (4) the operation is conducted in a manner consistent with the law of war. The question is not solely whether these are good criteria; the question is who decides whether the criteria is satisfied. I find it a frightening proposition that military authorities or the Executive would themselves, without judicial intervention, determine, for example, who is a "leader" of a force associated with an enemy; whether the citizen was involved in "active planning" or posed an "imminent threat"; and whether capture is "feasible" or not.

During World War II, the President issued a blank check to the military to decide who should be subject to removal and detention to protect the national security, and, pursuant to that authority, the military removed over 110,000 persons of Japanese ancestry from the West Coast and incarcerated them. We now know that the Executive and military judgments were wrong. The courts are the guardians of our constitutional rights, and they, not the Executive or military, decide when an immediate, real, and lethal threat can only be averted by a curtailment of those rights.[6]

2. What do you see as the problem, if any, with relying upon regulation, military discretion, or civilian executive discretion in determining the proper scope of fundamental rights as United States citizens?

Answer:

The courts decide the scope of the rights guaranteed United States citizens under the Constitution. Neither the military, the Executive, nor Congress can define or determine the scope of those rights, although the Executive and Congress can take action to ensure that those rights are protected (as the current bill introduced by Senator Feinstein seeks to do).

To allow the military or the Executive to define the scope of constitutional rights invites them to trammel on those rights. Their actions must always be subject to judicial review to ensure that constitutional guarantees are adequately protected.

[6] It should be noted that Mitsuye Endo did file a petition for writ of habeas corpus to challenge her incarceration during World War II; thus, she had access to the courts to seek review of her detention. However, her petition was not granted until 2-1/2 years after the initial orders removing Japanese Americans from the West Coast. *Ex Parte Endo*, 323 U.S. 283 (1944). Thus, it cannot be said that the writ provided her or other Japanese Americans an effective, speedy means of seeking judicial review of their unjust detention.

Questions for Steven Bradbury

Former Acting Assistant Attorney General
and Former Principal Deputy Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice

1) Some people have compared U.S. actions in the war on terror to restrictions of civil liberties in previous conflicts. In particular, some critics claim that the use of military detention against enemy belligerents, as the Supreme Court found was provided for in the Authorization for Use of Military Force (AUMF), is equivalent to the internment of U.S. citizens of Japanese descent during the Second World War. I reject this comparison. Those citizens were innocent of any wrongdoing and were interned as a result of fear and racism. Today, we face threats from al-Qaeda and their affiliates that include the recruitment of U.S. citizens and legal permanent residents to carry out attacks on our soil. These individuals are enemy belligerents, not innocent civilians.

   Questions:

   - Can you please describe the differences between the internment of U.S. citizens of Japanese descent during the Second World War and the authority to detain persons covered by the AUMF?

     Tens of thousands of Japanese Americans were detained during World War II based solely on their country of origin and a generalized belief that some of them might work for the enemy. The terrorists currently held in military custody by the United States, for example at the Guantanamo Bay Naval Base, are being detained because they were captured abroad by the U.S. military and intelligence services and determined to be enemy combatants.

     The forced internment of innocent Japanese Americans during World War II was wrong, and it would never be upheld today under modern Supreme Court due process jurisprudence. Nor could it be justified under the laws and customs of war. The United States government held tens of thousands of Japanese Americans in internment camps during World War II under a generalized claim that they posed a threat to national security simply because of their Japanese heritage, not as prisoners of war or otherwise as enemy combatants under the laws of war. Unlike the enemy combatants covered by the Authorization for Use of Military Force of 2001 (the "AUMF") and the recently enacted National Defense Authorization Act for Fiscal Year 2012 (the "NDAA"), the many thousands of innocent Japanese Americans forcibly interned during World War II had not engaged in acts of war against the United States or otherwise actively aided the enemy in supporting hostilities against our Nation; in other words, they were not eligible for detention under the traditional laws of war.

Therefore, I do not believe it is fair or accurate to suggest a comparison between the AUMF or NDAA and the internment of innocent Japanese Americans during World War II. The AUMF and NDAA simply confirm that the United States may detain enemy combatants who have actively supported or engaged in fighting against the United States on behalf of our enemies in the current, ongoing armed conflict with al Qaeda, the Taliban, and associated terrorist forces. This authority to detain is supported by and fully consistent with the traditional and recognized laws of war, as the Supreme Court has held, and it is the same authority that any sovereign nation has when it finds itself in an armed conflict with enemy forces. In further contrast to the mass internment of many thousands of Japanese Americans during World War II, I have no doubt that it would be exceedingly rare for any U.S. citizen to be held as an enemy combatant in military custody for any extended period of time, and, indeed, that has been our experience since 9/11. Furthermore, even in those very rare cases where military detention might be necessary, any U.S. citizen or lawful resident who joins forces with the enemy to make war on the United States and who may be captured or held in the U.S. will always have the right to challenge the legality of his detention under habeas corpus, and in any such proceeding the individual would enjoy the protections of the Due Process Clause of the Fifth Amendment, as the Supreme Court confirmed in *Hamdi v. Rumsfeld.*

- Would a U.S. citizen be subject to detention under the AUMF, the NDAA, and Supreme Court case law related to the war on terror solely on the basis of his or her race, ethnicity, or national origin?

  No. Such an individual would be potentially eligible for military detention only because of his status as an enemy combatant under the traditional laws and customs of war. As the Supreme Court recognized in *Hamdi v. Rumsfeld*, sovereign nations that find themselves in an armed conflict have the traditional power to detain enemy combatants until the end of hostilities under the laws of war regardless of the citizenship of the enemy combatant. But, as the Supreme Court also made clear in *Hamdi*, any U.S. citizen who is detained in military custody in the U.S. would always have the right to challenge the legal basis for his detention in a habeas corpus proceeding, and he would have the rights to basic due process in that proceeding. Race, ethnicity, and national origin are not grounds for detention as an enemy combatant under the laws and customs of war, and any attempt by the United States to detain a U.S. citizen in military custody solely because of his race, ethnicity, or national origin would be incompatible with due process.

- Have U.S. citizens been detained en masse on unfounded accusations of terrorism since the attacks of September 11, 2001?

  No. Only two Americans have been detained for extended periods in military custody as enemy combatants under the AUMF—Yaser Hamdi, who was captured fighting for the Taliban on the battlefields of Afghanistan, and Jose Padilla, who was arrested at O'Hare International Airport on suspicion of entering the United States to carry out terrorist acts on behalf of al Qaeda. Hamdi eventually relinquished his U.S. citizenship and was

transferred to Saudi Arabia. Padilla was eventually transferred to law enforcement custody and was tried and convicted in an Article III federal court, and he is now serving a criminal sentence in federal prison. One other American, John Walker Lindh, was captured while fighting for the Taliban and was initially detained as an enemy combatant, but he was quickly transferred to Justice Department custody; he was charged with crimes in federal court, pleaded guilty, and is also serving a sentence in federal prison.

In the future, under the AUMF and NDAA, I would expect it to be extremely rare for any U.S. citizen to be detained as an enemy combatant in military custody for any prolonged period of time. I believe that any President would be strongly inclined in any such case to charge the U.S. citizen with federal crimes (potentially including treason) at the earliest opportunity and to refer him to the custody of the Department of Justice for criminal trial proceedings in an Article III federal court.

- What about aliens held on material witness warrants or illegal immigration charges? Can you please explain why those were justified and how they differ from both the internment of U.S. citizens of Japanese descent during the Second World War and the detention authority at issue with S.2003?

Both of these forms of custody are specifically authorized by statute, each is subject to judicially enforced limitations, and each requires particularized and individualized factual determinations that justify the limited detention.

The material witness statute, 18 U.S.C. § 3144, permits federal law enforcement authorities to obtain a judicial warrant to detain temporarily an individual who has information material to a pending criminal justice proceeding, including a grand jury proceeding, where the Government can show to the satisfaction of a judge that there is a significant risk the individual would flee and evade a subpoena if not taken into temporary custody. The custodial authority provided by the material witness statute is limited in duration, must be incident to and for the purpose of advancing a particular criminal proceeding, and is not designed to provide a means for obtaining critical intelligence information from the witness. The use of the material witness statute to hold persons suspected of involvement in terrorist-related activity for temporary periods has been reviewed and, with certain exceptions, upheld by the courts in several decisions since 9/11.

Under the immigration laws, the Attorney General is authorized upon warrant to apprehend and detain an alien pending removal proceedings where the alien has committed certain offenses or is suspected of activity posing a danger to national security. *See* 8 U.S.C. § 1226. In general, if an alien is ordered removed following removal proceedings, the Attorney General is directed to detain the alien in custody for up to 90 days pending removal, and if removal cannot be completed within 90 days, the alien is subject to supervised release pursuant to regulations issued by the Attorney General. *See id.* § 1231.

If, however, the Attorney General certifies that there are reasonable grounds to believe the alien is engaged in or is likely to engage in terrorist activity, espionage or sabotage, or plotting to overthrow the government of the United States, the Attorney General is required to detain the alien and to initiate removal proceedings or criminal charges against the alien within seven days of taking the alien into custody. *See id.* § 1226a(a). If no criminal charges are filed and removal does not appear likely in the foreseeable future, the Attorney General is authorized to detain an alien subject to such certification for periods of up to six months, but only if the Attorney General determines that release of the alien will threaten the national security of the United States or the safety of the community or any person. *Id.* § 1226a(a)(6). In order to continue to hold the alien in custody, the Attorney General is required to review and reconsider that determination each six months, and the Attorney General's determinations are subject to judicial review and challenge in habeas corpus proceedings in federal court with appeal to the D.C. Circuit. *See id.* §§ 1226a(a)(7), 1226a(b). (These latter provisions were enacted by Congress following the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in which the Court held (1) that an alien found to be removable from the United States could challenge his continued detention in a habeas corpus proceeding, and (2) that, in light of significant due process concerns and in the absence of specific statutory authorization from Congress, the immigration laws would be construed to permit detention of the alien beyond the ordinary 90-day removal period only for a reasonable period of time, which the Court presumptively deemed to be six months.)

Accordingly, the custodial detention authorities provided by the material witness statute and the immigration laws are quite different from the World War II internment of Japanese Americans because they are (1) subject to judicially reviewed and enforced statutory limitations, (2) require particularized and individualized factual determinations, and (3) do not allow for indefinite detention. These specific statutory authorities are also different from the military detention authority available under the AUMF and NDAA because they are not based on the traditional laws of war and are not limited to enemy combatants who have supported or engaged in armed hostilities against the United States.

2) It is highly unlikely that a President would actually place a U.S. citizen in military custody. President Bush did it twice, with Jose Padilla and Ali al-Marri, and each case was very controversial. These cases generated substantial litigation in lower courts, and there were serious risks with how the Supreme Court would handle them. For those reasons, at the end of the day, President Bush transferred Padilla and al-Marri to federal civilian custody and charged them with federal crimes. Nevertheless, there may be an emergency situation, for example, in which a U.S. citizen could be interrogated for intelligence more effectively in military custody than in civilian custody, where he may demand a lawyer or insist on his right to silence. Even in such a case, the U.S. citizen would have the right to petition a federal court for a writ of habeas corpus and have his detention reviewed by a neutral decision-maker. Furthermore, in his signing statement to the National Defense Authorization Act (NDAA), President Obama specifically said that he would <u>not</u> place a U.S. citizen in military custody. Thus, there are already constraints—legal, political, and practical—on using military detention authority against a U.S. citizen. If it were nevertheless

necessary, there would have to be a very serious reason for it. This bill would inhibit the President from acting in those cases. These facts raise the question of whether S.2003 is really necessary—especially when it may have unintended consequences or may unduly restrict the President's authority to respond to emergency situations.

Questions:

- Can you please describe the case law that guarantees the right to petition for a writ of habeas corpus by a U.S. citizen in military detention?

  The principal case is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, five members of the Supreme Court concluded that Yaser Hamdi, a U.S. citizen who was captured on the battlefields of Afghanistan fighting for the Taliban and who was held in military custody in a brig in the United States, could challenge his status as an enemy combatant and the legality of his detention in a habeas corpus proceeding, and the Court ruled that due process guaranteed Hamdi the right to receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision maker and that Hamdi had a right to counsel in pursuing such a challenge. *See id.* at 524-39 (plurality opinion of Justice O'Connor for four members of the Court); *id.* at 553 (opinion of Justice Souter concurring in relevant part). The Court emphasized that these due process rights are a bulwark that help to prevent the kind of abuse of executive power in wartime that characterized the mass internment of Japanese Americans in World War II. *See id.* at 535 (plurality opinion) (citing Justice Murphy's dissent in *Korematsu v. United States*).

  Also relevant to this question is the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the Court held (1) that alien enemy combatants detained in military custody at the Guantanamo Naval Base had a constitutional right to habeas corpus review, and (2) that the alternative review procedures enacted by Congress in the Detainee Treatment Act of 2005 did not provide an adequate substitute for traditional habeas corpus review. Although *Boumediene* addressed the situation of alien enemy combatants, not U.S. citizens, there can be little doubt that the rights of U.S. citizens to petition for habeas corpus are equal, and likely greater, than the rights of the aliens whose claims were at issue in *Boumediene*. The Court's holding that the Constitution limits Congress's ability to preclude habeas corpus review would plainly apply to protect the rights of U.S. citizens similarly held in military custody.

- What rights would be protected by a federal court in reviewing a petition for a writ of habeas corpus?

  The rights protected in a habeas corpus proceeding would include the right of habeas corpus itself, which is guaranteed by Article I, Section 9 of the Constitution, and the rights guaranteed to all U.S. citizens and lawful resident aliens by the Due Process Clause of the Fifth Amendment. The basic contours of these rights are summarized by

the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 524-39 (2004) (O'Connor, J., plurality opinion), and *Boumediene v. Bush*, 553 U.S. 723 (2008), discussed above.

- Would a federal court have the ability to order the President to release a U.S. citizen or LPR from military detention?

  Yes. Habeas corpus would give the detainee the right to challenge the legality of his detention in federal court, and if the court determined that there was no legal basis for his detention (for example, that he did not meet the definition of an enemy combatant who is subject to military custody under the AUMF and NDAA), the court would have authority to order his release.

- Some have argued that the benefits of military custody for intelligence gathering are superseded by the "public safety exception" to *Miranda*. Can you please explain why the public safety exception would not be enough to guarantee intelligence gathering capability in some cases?

  Depending on the particular circumstances, the so-called public safety exception to *Miranda* may not be sufficient in scope or duration to permit effective intelligence gathering from a captured terrorist combatant. The exception provides a narrow exception to *Miranda* warnings where law enforcement has an objective basis to question a suspect in order to address and neutralize an imminent and immediate threat to police safety or the safety of the public. *See New York v. Quarles*, 467 U.S. 649 (1984). The exception was recognized to permit focused, on-the-scene questioning by police in order to locate a nearby loaded gun. In such narrow circumstances, the answers to such questions and the information gleaned from those answers may be admissible in a criminal trial against the suspect. Beyond these narrow circumstances, the application of the public safety exception to *Miranda* remains unclear. In particular, its potential application in the context of the War on Terror to more prolonged intelligence questioning would be uncertain and would inevitably be subject to the discretion of courts on a case-by-case basis. Although the exception could potentially be expanded and formalized by statute for purposes of its application in the War on Terror, in the absence of such a statutory expansion, the contours of the exception are likely to remain nebulous and limited to the most immediate and exigent types of threats.

3) The Supreme Court, in the *Hamdi* case, held that the President had the authority under the Authorization for Use of Military Force (AUMF) to detain a U.S. citizen who was captured on the battlefield in Afghanistan, since the AUMF provided him the power to take all necessary measures to fight al-Qaeda, the Taliban, and associated forces, and detention of enemy combatants is a fundamental war power. The Court did not address the question of the President' inherent authority as Commander-in-Chief to detain enemy combatants.

Questions:

- Please describe the Constitutional concerns with this bill.

While I am confident that it would be an extremely rare occasion for any U.S. citizen to be held for an extended period in military custody, in addressing the constitutional issues raised by the proposed legislation, we need to consider the possibility that there could well be extraordinary circumstances during an armed conflict when the President may determine that it is necessary to detain a U.S. citizen as an enemy combatant consistent with the laws of war. In my view, when considered in light of that possibility, the proposed legislation raises substantial problems, including both serious constitutional concerns and significant practical issues.

In *Hamdi*, a majority of the Supreme Court recognized that the power to detain enemy combatants is a "fundamental" incident of the use of military force. Thus, it is one essential element in the bundle of sovereign powers that a nation may exercise under the laws and customs of war. Under our Constitution, the authority to decide how the United States will exercise this bundle of sovereign powers (in other words, how we will use the fundamental incidents of military force in accordance with the laws of war) is assigned to the President, as the commander of the Armed Forces. *See* U.S. Const. Art. II, § 2. S. 2003, however, would purport to deny the President the authority to use one fundamental and accepted incident of military force when prosecuting an authorized armed conflict. In effect, this legislation would attempt to remove from the President's command one of the essential elements in the bundle of sovereign powers that comprise the use of military force, as reflected in the laws and customs of war.

Under our Constitution, Congress has an important share in the war powers of the United States. In addition to the power to declare war, Congress has the power to appropriate the funds necessary to support the military, to make rules for the regulation of the Armed Forces, to define and punish offenses against the law of nations, and to make rules concerning captures on land and water. *See* U.S. Const. Art. I, § 8. In particular, the power to make rules concerning "captures" could be construed to support a restriction on the disposition or treatment of U.S. citizens who are captured as enemy combatants in wartime. Nevertheless, historically, Congress has been careful to exercise its constitutional powers in ways that preserve the full and appropriate scope of the President's discretion to take actions necessary to protect the United States in furtherance of his duties as Commander in Chief.

S. 2003 also raises constitutional concerns by purporting to deny the President the ability to detain U.S. citizens as enemy combatants as a general matter, in any and all future conflicts, not just in the present armed conflict with al Qaeda and associated forces. The legislation would thereby purport to bind future Congresses and to shift to the President the burden in all future conflicts of obtaining from Congress an express statutory authorization for such detention. Such a burden could seriously impede the President's ability to defend the Nation from attack, including in extraordinary

circumstances when the threat facing the country is acute and there is a need to act with urgency.

The constitutional tensions created by S. 2003 may lead to at least three types of practical difficulties that could impede the effective conduct of the War on Terror. First, it is a central strategy of al Qaeda and the terrorist organizations affiliated with al Qaeda to recruit U.S. persons, including within our country, to carry out attacks against the United States. The threat of homegrown terrorists acting in concert with foreign organizations is likely to increase. Unfortunately, S. 2003 would have the effect of reducing the flexibility of the United States to respond to that growing threat by eliminating the possibility of holding such combatants consistent with the traditional laws of war. Second, if we capture on our soil a U.S. citizen or lawful permanent resident who is such an enemy recruit and has been actively involved in carrying out, or is otherwise aware of, an unfolding plot by a foreign power against the United States, this proposed legislation could seriously impede our ability to gather critical intelligence from that combatant through military questioning. By requiring that criminal charges be brought against the detainee as a condition of his continued detention, S. 2003 would threaten to disrupt the practical opportunity to conduct such intelligence gathering. Finally, the information on which the United States bases the decision to detain the individual as an enemy combatant may constitute sensitive classified intelligence information or military secrets that we must protect from disclosure. The requirement to bring criminal charges contemplated by S. 2003 would impose a greater risk of disclosing such information to our enemies than would ordinarily be the case in habeas review proceedings.

- Can Congress, as contemplated by this bill, on the one hand provide the President with the authority (or even the obligation) to wage war but restrict his ability to do so with what he Supreme Court has labeled powers "fundamental" to waging war?

  Congress has the power to declare war, and it may support and authorize the use of military force by statute without a declaration of war, as it did in the AUMF. But once Congress has acted to trigger or sanction the exercise of the sovereign powers of the United States to use all necessary and appropriate military force to defeat an enemy, the authority to decide whether, when, and how to use the fundamental incidents of military force in pursuit of that national goal is granted to the President. That is the consistent constitutional balance we have followed throughout our history. S. 2003 would threaten to raise very serious constitutional tension by creating a real risk that the President's exercise of his wartime authorities as Commander in Chief in particular circumstances could come into conflict with Congress's statutory commands. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

- Is there a precedent for Congress restricting the fundamental war-fighting powers of the President?

  I am not aware of a direct precedent for the restriction proposed in S. 2003.

- If Congress can restrict the President's detention authority, can it restrict other war-fighting capabilities, such as using special forces or particular weapons?

  I am doubtful that Congress could do so or that it would attempt to do so, but the enactment of S. 2003 would be a step in that direction and would raise serious constitutional concerns that Congress may be embarking on a path that could lead to such legislative efforts to interfere with or micromanage the President's choice and conduct of war-fighting tactics.

4) President Obama, despite campaigning in part against President Bush's conduct of the war on global terror, has continued many of President Bush's policies, such as the use of military commissions and detention at the U.S. Navy base at Guantanamo Bay, Cuba. Furthermore, despite then-candidate Obama's criticism of President Bush for issuing "signing statements," giving notice to interpret statutes so as not to infringe on Presidential authority under the Constitution, and then-candidate Obama's promise not to issue them, almost from the beginning of his Administration, President Obama has, in fact, issued signing statements many times. Indeed, he issued a lengthy signing statement on the National Defense Authorization Act (NDAA) of 2012, declaring that he would ignore those provisions that he disagreed with.

   Questions:

   - In your testimony, you said that if you were still at the Office of Legal Counsel (OLC), you would recommend that the President oppose S.2003. Do you believe, based on your experience, that any OLC official, regardless of the political party, would recommend that a President oppose S.2003 or a similar bill, out of concern for Presidential authority? If so, please explain why.

     Yes, I believe so. OLC's approach to the separation of powers between the branches, particularly when it involves protecting and preserving the President's constitutional authorities as Commander in Chief, has been and continues to be broadly consistent across administrations, regardless of political party.

   - Do you believe, based on President Obama's past issuance of signing statement on matters involving Presidential authority, that he would issue a signing statement on S.2003?

     I think it is quite likely.

5) S. 2003 is intended to clarify the legal authority for detention of U.S. citizens, but it may make it more complex. The Presidents' detention authority in the war or terrorism has been litigated extensively for ten years. The standards for habeas corpus review have been litigated, and continue to be litigated in the D.C. Circuit, in numerous cases involving detainees at Guantanamo Bay. The court rulings are not always clear, especially in many cases that have only plurality decisions and where the full impact of the controlling opinion is not obvious. Even when Congress has attempted to provide statutory guidance, such as in the Military Commissions Act, courts (including the Supreme Court) have not interpreted Congress's actions the way they were

intended. Inserting a new statute would needlessly complicate this landscape, providing litigants with more opportunities to challenge government measures to fight terrorism and providing courts with more opportunities to interfere in military decision-making.

Questions:

- Since it would amend the Non-Detention Act to explicitly cover wartime operations, could S.2003 interfere with current authority to detain enemy combatants, including U.S. citizens, abroad?

  It should not directly interfere with military detention authority abroad, but it could well create arguments that might be raised by detainees in court proceedings.

- If S. 2003 had been law, would the military have been able to detain the U.S. citizen who was among the Nazi saboteurs in the *Quirin* case?

  If the proposed law had existed in 1942, it would have prohibited by its terms the detention of the U.S. Nazi saboteur in military custody.

- If S.2003 had been law, would the military have had the authority to detain Major Nidal Hasan after he killed 13 people and wounded 29 at Fort Hood, Texas?

  As a member of the U.S. Armed Forces, Major Hasan could still have been detained in military custody under the Uniform Code of Military Justice, which provides universal jurisdiction for the Department of Defense over members of the U.S. military. If S. 2003 had been law, however, by its terms it would have barred Major Hasan from being detained in military custody as an enemy combatant under the AUMF, even if the evidence clearly showed that his actions were taken in active league with and in support of armed hostilities against the United States by a foreign enemy power, such as al Qaeda in the Arabian Peninsula.

- The bill states that it applies retroactively to the Authorization to Use Military Force (AUMF) against al-Qaeda, the Taliban, and associated forces. What impact would it have on cases that have already been decided, or are in the pipeline?

  I would not expect it to have a retroactive effect on cases already concluded. I do not know whether there are cases currently in the pipeline where S. 2003 would have an effect; that question is better answered by the Departments of Justice and Defense.

- If enacted, would this bill be subject to litigation? And would this help or complicate the question of the President's detention authority?

  I expect it would definitely generate legal challenges that would need to be litigated, and I do believe it would significantly complicate the President's ability to detain dangerous enemy combatants covered by S. 2003 in military custody should he determine it

necessary to do so—for example, to protect the United States from an unfolding terrorist plot being carried out by a homegrown cell of al-Qaeda-affiliated terrorists.

- Near the end of the hearing, Senator Feinstein stated that flexibility is paramount in determining whether civilian or military detention is utilized. I agree with this statement. However, in your opinion, would S.2003 provide the operational flexibility to the Executive Branch Senator Feinstein discussed, or would it put in place a rigid structure that would limit the options for the President to detain those who take up arms against the United States?

  I believe S. 2003 would significantly undercut the President's flexibility and would therefore work directly against the goal articulated by Senator Feinstein.

6) On Monday, March 5th, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process." Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

Questions:

- Attorney General Holder's argument about authority to kill Americans abroad is predicated on the notion that the Executive Branch is the preeminent constitutional entity when dealing with matters of national security. Do you believe that the legislative restrictions on detention outlined in S.2003 are consistent with this notion?

  No, I do not believe they are.

- How would Congress's enactment of S.2003 square with the Attorney General's argument? Wouldn't it call into question the President's unilateral authority for targeted killings?

  S. 2003 only purports to apply to persons apprehended in the United States, and I have no reason to believe that the Attorney General would approve the targeting of U.S. persons in the United States for lethal military force. Nevertheless, it might create arguments that could be raised in a court challenge, depending on the circumstances.

- If S.2003 were enacted, would it provide a precedent for Congress also to pass legislation restricting the President's ability to target American citizens abroad without judicial process?

  It would certainly provide a precedent for restricting the President's military authority by statute, and I would be concerned that Congress might try to build on that precedent in the future, including by extending it to protect U.S. persons found abroad.

7) During your testimony, you mentioned some of the inherent difficulties in trying terrorism cases in Federal District Courts and mentioned the Classified Information Procedures Act (CIPA) as a tool to protect classified information. While CIPA has not been updated since September 11, 2001, it has been used with more and more frequency.

Questions:

- Is the Classified Information Procedures Act (CIPA) sufficient to adequately protect classified information in a public, civilian trial?

  I have no reason to question the adequacy of CIPA in most criminal trials in Article III courts. I would point out, however, that CIPA's classified evidence procedures differ in significant respects from the classified evidence procedures applicable to trials of alien enemy combatants for war crimes conducted under the Military Commissions Act, as amended. In particular, the classified evidence provisions applicable to the military commissions process include specific added protections for the sources, methods, and activities by which classified evidence is acquired. Those protections provide, for example:

  > **"When trial counsel seeks to introduce evidence before a military commission under this chapter and the Executive branch has classified the sources, methods, or activities by which the United States acquired the evidence, the military judge shall permit trial counsel to introduce the evidence, including a substituted evidentiary foundation pursuant to the procedures described in subsection (d), while protecting from disclosure information identifying those sources, methods, or activities, if—(A) the evidence is otherwise admissible; and (B) the military judge finds that—(i) the evidence is reliable; and (ii) the redaction is consistent with affording the accused a fair trial."**

  10 U.S.C. § 949p-6(c)(2). Such a provision is likely to be of particular importance where the proof of the alien enemy combatant's guilt depends on information gathered by the military and intelligence agencies through the use of exceptionally sensitive intelligence sources and methods. CIPA does not include a comparable provision.

  In addition, consistent with international standards for war crimes tribunals, the military commissions process permits a wider use of hearsay evidence (subject to judge-approved reliability and fairness requirements) than is available in Article III criminal trials. The combination of hearsay rules and the additional protections for classified

sources and methods under the Military Commissions Act allows greater flexibility in the presentation of evidence during the trial process for military commissions.

- Does CIPA need to be updated or reformed? If so, what types of reforms would be necessary to fix the Act and provide greater protection for classified information?

If S. 2003 became law, the Executive Branch would be required to charge the enemy combatants covered by this provision with criminal offenses, including in situations where the combatant is being held on the basis of sensitive and classified national security information. In certain circumstances, this requirement may create a need to modify the provisions of CIPA to be more protective of sensitive intelligence sources and methods so as to prevent disclosure to al Qaeda and other terrorist organizations. I would, however, defer to the Department of Justice on whether any amendments to CIPA may be needed, either in the absence of S. 2003 or if it were to become law.

* * *

Please note that in addition to the above answers, I am also attaching for the record copies of two letters concerning a subject raised by a Member of the Committee during the February 29, 2012 hearing on S. 2003.

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STEPHEN I. VLADECK
Professor of Law and
Associate Dean for Scholarship

March 22, 2012

Hon. Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy:

Thank you, once more, for the opportunity to testify before the Committee at its February 29 hearing on "The Due Process Guarantee Act: Banning Indefinite Detention of Americans." Further to your letter of March 8, please find below my answers to the Questions for the Record submitted by Senators Klobuchar and Coons.

Please do not hesitate to let me know if there is any further information or assistance that I can provide to the Committee.

Sincerely yours,

Stephen I. Vladeck

Questions from Senator Klobuchar:

Q: *Do the guidelines released recently with respect to the National Defense Authorization Act provide clear guidance, in your view, to law enforcement on how potential enemy combatants are to be handled while in the custody of law enforcement?*

A: It is my opinion that Presidential Policy Directive 14 ("PPD-14"), issued on February 28, 2012, *does* provide clear guidance to law enforcement officers at the local, state, and federal level on the steps to follow in any instance in which an individual is taken into custody who may be subject to "mandatory military detention" under section 1022 of the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"). First, with regard to local and state law enforcement officers, PPD-14 expressly provides [in ¶ I(E)] that

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> The requirement in section 1022(a) of the NDAA does not apply to individuals arrested by, or otherwise taken into the custody of, State or local law enforcement agencies, and the procedures and requirements set out in this Directive shall not apply while individuals are held in the custody of State or local law enforcement agencies.

Thus, PPD-14 is clear that local and state law enforcement officers are expected to take *no* additional steps when it comes to the detention of individuals whom they have reason to believe might be subject to mandatory military detention under the terms of the NDAA. As for federal law enforcement officers, ¶ III of PPD-14 sets out detailed procedures to be followed in any case in which the relevant officials have "probable cause" to believe that an individual in custody is a "covered person" under section 1022, and therefore potentially subject to mandatory military detention. Those procedures include mandatory notice to the Attorney General; screening for probable cause; and a requirement that the Attorney General—and not the originating law enforcement officer—make the ultimate determination whether or not section 1022 applies to a particular detainee. Although the Attorney General is empowered to issue further implementing regulations with regard to that determination, PPD-14 is clear on its face about the role of the originating / arresting law enforcement officers.

Q: *Do the guidelines provide clear guidance, in your view, to law enforcement on the procedures through which enemy combatants will be transferred to military detention?*

A: It is my opinion that PPD-14 provides guidance to law enforcement on the disposition of those individuals who are subject to "mandatory military detention" under section 1022, *i.e.*, non-citizens who are a "covered person" under section 1022 *and* not subject to a national security waiver. As the NDAA itself makes clear, this disposition does not necessarily *have* to include transfer to military detention. After all, section 1022(a)(1) only requires military detention in such cases "pending disposition under the laws of war," and section 1021(c)(3) identifies "Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction" as one of those dispositions.

To that end, ¶ IV of PPD-14 articulates basic procedures to follow in order to "implement" determinations that a specific detainee is a covered person not subject to a national security waiver. As it describes,

> The FBI or any other Federal law enforcement agency that has taken a Covered Person into custody shall, in consultation with the Attorney General and the Secretary of Defense, ensure that any transfer to U.S. military custody occasioned by a Covered Person

> determination does not result in the interruption of any ongoing interrogation, the compromise of any national security investigation, or the interruption of any ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States.

Moreover, ¶ IV goes on to bar transfer to military custody "unless and until" the FBI director (or his designee) determines that the above is true. Although PPD-14 does not specify procedures to follow *subsequent* to that determination, it is clear as to what must take place up to that point.

Q: *Beyond the recent guidelines, is there any other guidance, or any established sets of protocols, with respect to the investigation, detention, or transfer of terrorism suspects by law enforcement?*

A: Because section 1022 of the NDAA creates a novel and unprecedented detention requirement, I am unaware of any systematic (and public) protocols governing the investigation, detention, and transfer of terrorism suspects by law enforcement along the lines contemplated by section 1022 of the NDAA. That said, there is no immediately obvious reason why procedures, guidelines, and protocols that otherwise govern ordinary investigation and detention of criminal suspects would not also apply in these cases. As for transfer of suspects, there are well-established rules governing the transfer of criminal suspects from the custody of one jurisdiction to another, including as between civilian and military federal law enforcement officials. I see no reason why law enforcement officers would need to deviate from these established practices in cases arising under the NDAA.

Questions from Senator Coons:

Q: *Thank you for your testimony and for sharing your expertise with the committee. Some of my colleagues have asserted that due process rights for United States citizens are sufficiently protected by the ability to petition a court via the writ of habeas corpus, as provided under* Hamdi v. Rumsfeld, *542 U.S. 507 (2004). The writ, however, provides substantially less due process rights than would otherwise be afforded to detained citizens awaiting a formal charge. What substantive and procedural due process protections are lacking in a habeas proceeding as compared to a formal charge of terrorism, murder, or sedition?*

A: Justice Kennedy made this exact point quite eloquently in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). As he explained, "Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order."

Id. at 783. Thus, in the Guantánamo habeas proceedings, the D.C. Circuit has held that the government need only establish by a preponderance of the evidence (*i.e.*, 50.1%), that the individual in question is "part of or substantially supported al-Qaeda, the Taliban, or associated forces." *See, e.g.*, *al-Bihani* v. *Obama*, 590 F.3d 866 (D.C. Cir. 2010). That standard is unquestionably far easier to satisfy than the requirement in a criminal case that the government prove *beyond* a reasonable doubt that the defendant committed a specific crime.

More than that, though, the critical difference between habeas corpus proceedings and criminal prosecutions is that the Supreme Court has consistently held the former to be "civil," and therefore proceedings in which the protections of the Sixth and Eighth Amendments (among others) do not apply. To similar effect, the privilege against self-incrimination protected by the Fifth Amendment only prevents the government from compelling individuals to be a witness against themselves in a *criminal* case. No comparable constitutional rule bars the admissibility of such evidence in civil proceedings. And although the Due Process Clause of the Fifth Amendment applies to both civil and criminal proceedings, some of the rules the Court has read into that provision (including, for example, the requirement that prosecutors disclose potentially exculpatory evidence articulated in *Brady* v. *Maryland*) have no bearing in civil suits challenging executive detention.

I do not mean to offer an exhaustive list of the rights that are available to criminal defendants that are unavailable in a habeas proceeding. Suffice it to say, though, that the government's burden is dramatically higher in the former, and the constitutional protections for the detainee far less robust in the latter.

Q: *As some of my colleagues noted in the hearing, the concept of the "battlefield" may extend to all parts of the world, including United States soil. In light of this, what is your understanding of the breadth of the court's ruling in Hamdi v. Rumsfeld regarding the scope of the federal government's ability to detain indefinitely a United States citizen found "on the battlefield"?*

A: In my view, *Hamdi* is a remarkably narrow ruling, and the specific and careful language employed by Justice O'Connor in her opinion for the plurality is instructive. First, Justice O'Connor held only that "Congress has clearly and unmistakably authorized detention in the *narrow circumstances considered here*." 542 U.S. at 519 (emphasis added). As she elaborated, "There can be no doubt that individuals who fought against the United States *in Afghanistan as part of the Taliban*, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF." *Id.* at 518

(emphasis added). Tellingly, Justice O'Connor tied detention authority not just to the *location* of capture (Afghanistan), but to the nature of the U.S. military deployment therein:

> If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [our understanding of the government's detention authority] may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Id. at 521 (citations omitted). It seems only fair to read this passage as suggesting that, once U.S. troops are no longer "involved in active combat in Afghanistan," the question whether the AUMF authorizes detention will have to be reached anew. Regardless, I do not believe there is any way to read *Hamdi* as supporting the idea that the AUMF authorizes detention of individuals seized anywhere in the world. To the contrary, *Hamdi* appears to support, at most, the detention of individuals picked up in Afghanistan while U.S. forces are engaged in combat operations there. And while the analysis employed by the *Hamdi* plurality might *also* apply to the detention of individuals captured on *other* "hot" battlefields, it is not immediately obvious that the result in such a case would necessarily follow. *Hamdi* by no means cuts *against* that outcome; I just don't think it clearly supports the government's detention authority in any cases other than those specifically described by Justice O'Connor.

Q: *In a speech at the Northwestern University Law School on March 5, 2012, Attorney General Holder stated:*

> *Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.*

In your view, what are the relevant "law of war principles" that protect U.S. citizens abroad from extrajudicial killing, and what process exists to guarantee that they are followed?

A: To the first part, I would respectfully refer you to the Report of the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Philip Alston, a copy of which is available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf. Professor Alston's report carefully and comprehensively summarizes the relevant international law principles governing "targeted killing" cases, and there is little I could hope to add to his analysis.

As for the process that exists to guarantee that these principles (along with whatever requirements domestic law imposes in such cases) are followed, I do not believe adequate public information exists with which I can address this issue. As I wrote in a more detailed evaluation of the Attorney General's speech posted at the "Lawfare" blog (http://www.lawfareblog.com/2012/03/more-on-the-holder-speech/),

> the Attorney General *did* at least pay lip-service to the *Mathews* test [for assessing how much process is due], and to the seven criteria that appear to be the government's prerequisites to the use of such force. But the real questions have never been about those seven criteria (most of which had been a matter of rough consensus for some time); it's been about the decisionmaking process. Who decides? How? What goes into the question of whether the threat is "imminent," or, as importantly, that there is no feasible option for capture or other forms of incapacitation without undue risk? How much room is there for contrary views? How hard do we try to investigate other potential outcomes with the assistance of our foreign partners? What happens if/when we make a mistake?

My own view is that, contrary to the Attorney General, it is impossible to be sure that a purely internal, non-adversarial process will be sufficient to ensure compliance with both international and domestic law rules. As Justice Jackson put it, "due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 225 (1953). Without a better public understanding of what the internal process is, I'm afraid that it is impossible to evaluate its sufficiency as a matter of domestic *or* international law.

Using science and medicine to stop human rights violations

SUBMISSIONS FOR THE RECORD

Testimony of Dr. Scott Allen, MD
Associate Professor of Medicine, University of California, Riverside,
Medical Advisor, Physicians for Human Rights

The Senate Judiciary Committee Hearing
"Due Process Guarantee Act: Banning Indefinite Detention of Americans"
Wednesday, February 29, 2012

I am a Clinical Associate Professor of Medicine at the University of California, Riverside and a medical advisor to Physicians for Human Rights. PHR is an independent, non-profit organization that uses medical and scientific expertise to investigate human rights violations and advocate for justice, accountability, and the health and dignity of all people. We are supported by the expertise and passion of health professionals and concerned citizens alike.

I am very grateful for the opportunity to submit my written testimony to the Senate Judiciary Committee in a hearing regarding the "Due Process Guarantee Act of 2011" and I would like to thank Chairman Senator Leahy and Senator Feinstein as well as the other Members of this Committee for holding this important and timely hearing.

I have worked in the field of correctional health for over fourteen years including full-time work in a state prison facility as both a primary care doctor and a medical director. In addition, I have also worked with refugee and immigrant populations in indefinite detention situations. Finally, I worked on and oversaw the report, *Punishment Before Justice: Indefinite Detention*, which was issued by Physicians for Human Rights in June 2011. This report, as well as my recent letter to the editor of the New York Times regarding the medical effects of indefinite detention, are attached as exhibits to my testimony.[1]

Indefinite detention refers to a situation in which the government places individuals in custody without informing them when—if ever—the detainee will be released. Indefinite

[1] The full report is also available at https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf.

detention is vastly different from imprisonment because the detainee does not know whether he will be charged with crimes, if he will receive a trial or hearing, when he will see his family again (if ever), or if he will ever be released. Yet, a person indefinitely detained is not serving a jail sentence. Naturally, these many attributes of indefinite detention create a heightened degree of uncertainty, unpredictability and uncontrollability over the elemental aspects of one's life, causing severe harms in healthy individuals, independent of other aspects or conditions of detention.

The harmful psychological and physical effects of indefinite detention have been documented (varying by individual) to include:

- Severe and chronic anxiety, acute fear, and dread;
- Pathological levels of stress that damage the core psychological functions of the immune, cardiovascular, and central nervous system;
- Hypertension;
- Depression and suicide;
- Post-traumatic stress disorder;
- Dissociation, schizophrenia, and psychosis; and
- Enduring personality changes.

Some individuals even manifest physical symptoms of the psychological trauma they are suffering such as breathing difficulties, physical pain and skin disorders. In cases where the individual who is subject to indefinite detention has also previously experienced trauma, such as war, torture, or abuse, the physical and psychological effects of indefinite detention are exacerbated.

Moreover, indefinite detention affects individuals *beyond the detainee himself*. When a loved one is indefinitely detained, families are separated. Consequently, parents, spouses and children can and have suffered similar feelings of uncertainty, unpredictability and uncontrollability leading to the physical and psychological effects described above.

As a health care professional, having seen first-hand the physical and psychological effects of indefinite detention, I can attest to the devastating harms an individual suffers. These are medical, documented harms that in some cases may rise to the level of severe abuse of individuals, or torture in extreme cases. As a health care professional, I would conclude that the medical effects of indefinite detention are both physical and psychological and they result in lasting severe harms to individuals. Therefore, as a physician with first-hand knowledge of the real harms caused by indefinite detention, I must recommend that indefinite detention not be utilized as a long-term solution for detaining individuals.

To that end, I would recommend that the United States government reject solutions to national security problems that permit or rely on indefinite detention and, until the time that indefinite detention is abolished as a matter of policy, the United States government should provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees. Further, if indefinite detention of individuals is allowed to continue, I would recommend permitting non-governmental, independent medical and psychological experts to evaluate the mental and physical health of detainees.

Again, I thank you for this opportunity to provide my testimony on this issue of extreme importance to the American people and Congress and am available to answer any questions or further discuss these issues.

Scott A. Allen, MD
Riverside, California
February 28, 2012

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Steven G. Bradbury
1775 I Street, N.W., 11th Floor
Washington, DC 20006

March 1, 2012

Hon. Patrick J. Leahy, Chairman
Hon. Chuck Grassley, Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Hearing on the Due Process Guarantee Act, February 29, 2012

Dear Chairman Leahy and Ranking Member Grassley:

I wish to thank the Committee again for the opportunity to appear at yesterday's hearing concerning S. 2003, the Due Process Guarantee Act.

During the hearing, Senator Franken referred to a report of the Justice Department's Office of Professional Responsibility. Unfortunately, I was not given an opportunity to respond to Senator Franken. I am therefore writing to offer the following points for the record:

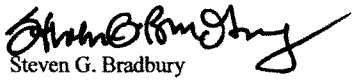
First, the OPR report cited by Senator Franken was rejected and repudiated by the Office of the Deputy Attorney General in a January 5, 2010 opinion by Associate Deputy Attorney General David Margolis, the senior career official in the Department of Justice. A copy of that opinion is available at http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

Second, OPR never found that any legal advice I gave during my time in the Office of Legal Counsel failed to satisfy standards of professional responsibility.

And, third, every opinion I rendered for OLC represented my best judgment of what the law required. While we addressed some difficult questions during my time in OLC, I never allowed policy or programmatic purposes to override my legal judgment, and any suggestion to the contrary is flatly wrong.

I respectfully request that this letter be made a part of the hearing record.

Very truly yours,



Steven G. Bradbury

cc: Senator Feinstein
Senator Franken

Steven G. Bradbury
1775 I Street, N.W., 11th Floor
Washington, DC 20006

March 16, 2012

Hon. Al Franken, Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Hearing on the Due Process Guarantee Act, February 29, 2012

Dear Senator Franken:

I was disappointed to receive your letter of March 7, 2012. I suspect we will continue to disagree on these matters, and I don't see much to be gained from an extensive back and forth, but I do wish to offer for the record the following points in response to your letter.

First, I don't believe the Office of Professional Responsibility ("OPR") report of July 29, 2009 concerning OLC's interrogation opinions has any continuing official force or validity after its findings and recommendations concerning John Yoo and Jay Bybee were overruled by Associate Deputy Attorney General David Margolis.

OPR's function is to investigate allegations of professional misconduct by Department of Justice attorneys and to make findings as to whether Department attorneys have failed to satisfy standards of professional responsibility and, if so, to recommend disciplinary action, bar referrals, or other actions. *See* 28 CFR § 0.39a. In cases where OPR finds that a Department attorney has engaged in professional misconduct, OPR submits the finding to the Office of the Deputy Attorney General for review and approval by ADAG Margolis. *See* Margolis Mem. at 2 n.1 & 6. In cases where OPR does not make a finding that a Department attorney has failed to satisfy standards of professional responsibility, the matter is usually closed and no report is issued. *See* Summary of OPR Procedures, http://www.justice.gov/opr/about-opr.html. Unlike the Inspector General, OPR does not have independent authority to issue public reports, *see* Margolis Mem. at 4 & n.2, and it does not have a license to produce commentary about a particular attorney's work separate and apart from a finding that the attorney has failed to satisfy standards of professional responsibility. *See* 28 CFR § 0.39a.

In the case of the July 2009 report, the only findings and recommendations made by OPR concerning alleged attorney misconduct related to John Yoo and Jay Bybee, and those findings and recommendations were reviewed and rejected by David Margolis. In light of that official action by ADAG Margolis, I believe it is fair to say that the remaining editorial comments contained in the OPR report, including comments concerning the opinions that I signed, have no independent force or effect.

Second, in any event, while the OPR report contained certain criticisms of my opinions, the only formal finding reached by OPR concerning my work was that it satisfied the requirements of professional responsibility applicable to Department lawyers. Again, OPR never found that any legal advice I gave failed to satisfy standards of professional responsibility.

Third, the primary concern raised in the OPR report about my opinions was fully answered and, I believe, should be considered resolved. The report indicated that suggestions had been raised that I was pressured to issue opinions so as to permit the CIA program to continue. As the report noted, however, I specifically assured OPR that I "neither felt nor received any pressure . . . as to the outcome of [these] opinions"; while "there was time pressure to complete the memoranda, . . . which was not at all unusual at OLC," there was no "pressure to reach a certain result." OPR Report at 145. Moreover, in a letter to OPR of January 19, 2009, commenting on the initial draft of the report, Attorney General Mukasey and Deputy Attorney General Filip also addressed this question of pressure and stated that "a fair reading of [the limited evidence cited for this concern] suggests only that there was pressure to come to an answer as soon as possible, not pressure to come to any particular answer or conclusion. This is consistent with Bradbury's recollection. In light of this, we were pleased to hear that OPR did not intend to suggest that Bradbury was pressured to come to a particular result." Mukasey/Filip Letter to OPR at 11 (citing statement of OPR attorney).

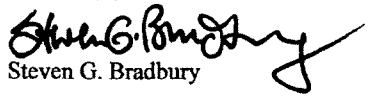
Fourth, some of the criticisms raised in the report, and highlighted in your letter, simply reflect the fact that there were differences of view among officials within the Bush administration; those differences only prove there was vigorous debate about these issues, not that my legal analysis was faulty or distorted. Moreover, while I firmly believe the remaining criticisms identified by OPR were unfair and unwarranted, I am significantly handicapped in my ability to address those criticisms because a full and fair response would require access to materials that have not been made public. These materials include, among other things, my February 2007 letter for OLC responding to the State Department Legal Adviser and the comments that OLC submitted to OPR in January 2009 concerning OPR's draft report.

Fifth, while the letter's reliance on highly charged labels like "abuse," "cruel," "inhuman," "contemptible," and "reprehensible" may reflect sincerely held personal opinion, the conclusory use of these labels cannot substitute for sound legal analysis.

Finally, I fully agree that it is a privilege to appear before the Judiciary Committee, just as it was a high honor for me to serve the public interest for nearly five years in the Department of Justice. I was conscious of that honor every day I served, and that is how I approached my duties as a legal adviser to the Executive Branch. To that end, every opinion I rendered for OLC was prepared in good faith and represented my own best judgment of what the law required. As I emphasized in the opinions themselves, several of the issues I addressed involved difficult questions of law about which reasonable people can disagree, and I have acknowledged those differing legal perspectives. But in approaching and addressing these difficult issues, my legal judgment was never clouded by pressure from any quarter—not the White House, not the CIA, not the Attorney General, not the Vice President's Office, not any other agency, office, or officer—and the legal conclusions I reached for OLC were not compromised by any policy goals or preferences.

I respectfully request that the Committee include this letter in the hearing record.

Very truly yours,



Steven G. Bradbury

cc: Chairman Leahy
Ranking Member Grassley
Senator Feinstein

Senator Dianne Feinstein
Opening statement at Senate Judiciary Hearing on the Due Process Guarantee Act
February 29, 2012

>>**Senator Feinstein**: Thank you very much, Mr. Chairman. Let me thank you for holding the hearing and for co-sponsorship of this bill. I would also like to thank Senator Lee; I am delighted that he is here today and a major Republican cosponsor, member of this committee and, if you wish to make a brief statement while I am presiding, before we go to the witnesses – [Senator Lee responds off-mic]. Well, if you change your mind, let me know.

I'd also like to thank Senators Durbin, Klobuchar, Franken, who is here as well, Coons and Blumenthal who are members of this committee and six of the twenty three cosponsors of this bipartisan legislation. And I also want to thank the witnesses for being here today, as well.

Let me take a moment to describe why this is such an important issue for me. I was very young during World War II and one Sunday—my dad was a doctor and the only time I ever saw very much of him was on Sunday— he said I want to show you something. And he took me down the peninsula, south of San Francisco, to a race track known as Tanforan. And it had been converted into an internment camp and processing center for Japanese Americans, who, on a certain day, were told throughout the United States to report, to be held in confinement for no reason other than we were at war with Japan. And so every Japanese American citizen essentially was interned. And, Tanforan was a transition camp. I'll always remember seeing the infield of the racetrack all filled with little tiny shacks, the barbed wire around the exterior. And, I think I didn't really realize the impact of that until many years later. And it remains, in my view, a dark stain on our history and our values and also something we should never repeat.

It took a long time, but in 1971, Congress passed and President Nixon signed into law something called the Non-Detention Act of 1971. And subsequently, Ronald Reagan made an official apology when he was President of the United States. The Non-Detention Act clearly states this, and I quote, it's very brief, "No citizen shall be imprisoned, or otherwise detained by the United States, except pursuant to an Act of Congress," end quote.

Now, what happened was, in the Armed Services Committee, an amendment was put in the Defense Authorization Bill, which essentially used the resolution to authorize force to apply the laws of war also to the United States. And in the laws of war, a suspect on the battlefield can be held, detained, without charge until the end of hostilities. This had never been the case in the United States. So, on the floor that day, there was considerable debate. The Judiciary staff, Senator Lee, Senator Paul, we spent a lot of time discussing this. The Intelligence staff came down. And there was a very, very good discussion on what was meant and what was not meant. I think we spent, Senator Lee, virtually the whole day on it. I remember being in the Republican Cloakroom sitting with you and Senator Paul and trying to work this out.

Others on the floor, including myself and Senator Durbin argued that this was prohibited by the Non-Detention Act and that the *Hamdi* decision by the Supreme Court was, by its own terms, limited to the circumstances of an American picked up on the battlefield in Afghanistan. The four justice plurality in *Hamdi* clearly stated, and I quote, "If the government has made clear, however, that for purposes of this case, the enemy combatant that it is seeking to detain is an individual, who it alleges was part of, or supporting forces hostile to the United States or coalition partners in Afghanistan, and who engaged in an armed conflict against the United States there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized". So, *Hamdi*, in itself, was very narrow and really related to the battlefield in Afghanistan only.

In the end, as the Chairman said, the Senate adopted a compromise that was worked out with Senators Graham, Durbin, Levin, McCain, Chambliss, and others, which passed by a 99-1 vote. I don't think any one of us thought that was really the solution. On that given day, it was the best we could do. And it provided that the Defense Authorization Bill did not change current law. In effect, what this did was leave it up to the courts to resolve at a later time.

There was widespread outrage at the notion that the Defense Authorization Bill or the AUMF would authorize the military to indefinitely detain U.S. citizens without charge or trial. I believe that message clearly got out there and was reflected in the number of calls and letters that came in. So, the time is really now to end the legal ambiguity and state clearly once and for all that the AUMF, or other authorities, do not authorize such indefinite detention of Americans in America.

To accomplish this, a number of us joined to introduce the bill we are considering today, the Due Process Guarantee Act. This picks up right where the Non-Detention Act of '71 leaves off. It amends that act to provide clearly that no military authorization will allow for the indefinite detention of United States citizens or Green Card holders who are apprehended inside the United States. It does not change current law for terrorist detainees captured outside the United States. The bill also codifies a clear statement rule that requires any Congress in the future to expressly state when it wants to put United States citizens and Green Card holders into an indefinite detention. In other words, they have to explicitly authorize that. We lack the power to pass a statute that would prevent future Congresses from passing a statute to authorize such detention, although the Constitution may well prohibit it. However, we can at least provide that if a future Congress decides to take such action to override the protection of the Non-Detention Act, it must say so clearly and explicitly that Congress wants to authorize indefinite detention of United States persons.

As I understand it, under the Supreme Court precedent of *Yick Wo v. Hopkins* in 19—excuse me—1886, and other cases, individuals residing in the United States both legally and illegally have the same Due Process protections as citizens under the Constitution. Therefore, some argue that this legislation should provide coterminous protection to all persons in the United States, whether lawfully, or unlawfully present.

But, candidly, the question is whether we can pass such a bill to cover others beside United States citizens and Green Card holders. If there would be, I am all for it. We have explored this with our Republican cosponsors and at the present time, we do not believe that there is support to go beyond this. Whenever we draw the line or wherever we draw the line on who should be covered by the legislation, it is unclear to me why anyone apprehended on United States soil should be detained by the military. The criminal justice system has at least the following four options at its disposal to detain suspected terrorists who may be in the United States illegally. One, they can be charged with a crime and held. Two, they can be held for violating immigration laws. Three, they can be held as material witnesses as part of federal grand jury proceedings. And four, they can be held under the PATRIOT ACT for six months.

As we know, the Bush Administration tried to expand the circumstances under which United States citizens could be held in indefinite detention. United States citizen Jose Padilla was detained without charge in a military prison for three years, even though he was arrested inside the United States. Amid considerable controversy regarding the legality of his detention, Padilla was ultimately transferred out of military custody and tried and convicted in a civilian federal court. I very much agree with the Second Circuit Court of Appeals, which ordered Padilla to be released in the case of *Padilla v. Rumsfeld,* 2003 and held. And here is the quote "we conclude that clear, Congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001a, the Non-Detention Act, prohibits such detentions absent specific Congressional authorization" end quote.

The Second Circuit went on to say that the 2001 authorization to use military force passed after 9/11, quote, "is not such an authorization and no exception to the Non-Detention Act otherwise exists," end of quote. That is the Second Circuit. The Fourth Circuit came to a different conclusion— and I think all of this is important or I wouldn't bother with it—came to a different conclusion when it took up Padilla's case. But its analysis turned entirely on disputed claims that quote, "Padilla associated with forces hostile to the United States government in Afghanistan," end quote. And, quote, "like Hamdi," end quote, and this is a quote "Padilla took up arms against United States forces in that country in the same way and to the extent as did Hamdi," end of quote.

The Due Process Guarantee Act would help resolve this apparent dispute between the circuits and adopt the Second Circuit's clear statement rule. The bill —our bill—states, quote "An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen, or lawful permanent resident of the United States apprehended in the United States, unless an act of Congress expressly authorizes such detention" end quote. That's the clear statement rule that this bill will enact into law.

I want to be very clear about what this bill is and what it is not about. It is not about whether citizens such as Hamdi and Padilla, or others who would do us harm should be captured, interrogated, incarcerated and severely punished. They should be. But what about an innocent American, like Fred Korematsu, or other Japanese Americans during World War II? What about someone in the wrong place at the wrong time that gets picked up, held without charge or trial until the end of hostilities, and who knows when these hostilities end.

The federal government experimented with indefinite detention of United States citizens during World War II, a mistake that we now recognize as a betrayal of our core values. Experiences over the last decade prove the country is safer now than before the 9/11 attacks. Terrorists are behind bars, dangerous plots have been thwarted. In the Worldwide Threat Hearing, FBI Director Muller testified that there have been twenty arrests just this past year of people who would do harm in the United States. The system is working. Now is the time to clarify United States law to state unequivocally that the government cannot indefinitely detain American citizens and Green Card holders captured inside this country without trial or charge.

I am sorry this is so long, Mr. Chairman, but I thought it was really important to point out what this is and what it is not.

AL FRANKEN
MINNESOTA

SUITE
SH-309
202-224-5641

United States Senate

WASHINGTON, DC 20510-2309

March 7, 2012

Steven G. Bradbury
1775 I Street, NW, 11th Floor
Washington, DC 20006

Dear Mr. Bradbury:

I received your March 1st letter to Chairman Leahy and Ranking Member Grassley concerning the Senate Judiciary Committee's hearing on the Due Process Guarantee Act (S. 2003). Your letter contains a number of erroneous statements, and I wanted to take this opportunity to clarify the Committee's hearing record.

Your letter states that the Department of Justice's (DOJ) Office of Professional Responsibility (OPR) final report, dated July 29, 2009, was "rejected and repudiated by the Office of the Deputy Attorney General in a January 5, 2010 opinion by Associate Deputy Attorney General David Margolis." This is simply not true.

In fact, Mr. Margolis's memorandum for the Attorney General was exclusively focused on the very narrow topic of whether former Office of Legal Counsel (OLC) attorneys John Yoo and Jay Bybee should be referred by DOJ to state bar disciplinary authorities in the jurisdictions where Mr. Yoo and Mr. Bybee are bar members. Mr. Margolis was very explicit that his review did not include OPR's analysis of the memoranda you authored during your time at OLC. He stated: "OPR reviewed and analyzed several memoranda authored by former OLC attorney Steve Bradbury. Because that review did not result in a finding of misconduct or poor judgment, I have not reviewed that analysis. Rather, my review was strictly limited to the findings of misconduct against Yoo and Bybee."[1] Mr. Margolis also noted that there were a number of other topics, such as decisions by DOJ to decline prosecutions regarding interrogation of certain detainees, which he did not review when drafting the memorandum.

Furthermore, Mr. Margolis's opinion was very careful to distinguish OPR's analysis from his own conclusion that Mr. Yoo and Mr. Bybee should not be referred to the state bar disciplinary authorities. His memorandum neither rejects nor repudiates the OPR report in its entirety, as you claim. Although Mr. Margolis does not adopt OPR's findings of professional misconduct for Mr. Yoo or Mr. Bybee, he was very clear that his reason for not referring Mr. Yoo or Mr. Bybee to the state bar disciplinary authorities was because "OPR's analysis in this case depends on an analytical standard that reflects the Department's high expectation of its OLC

[1] Memorandum from David Margolis, Associate Deputy Attorney General, U.S. Dep't of Justice, to Eric Holder, Attorney General, U.S. Dep't of Justice, *Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Related to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 2 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

attorneys rather than the somewhat lower standards imposed by applicable Rules of Professional Conduct."[2] Mr. Margolis goes on to explain that Mr. Yoo's and Mr. Bybee's memoranda "contained some significant flaws... [but] all flaws do not constitute professional misconduct."[3] He states: "my decision not to adopt OPR's misconduct finding should not be misread as an endorsement of the subjects' efforts."[4] He concludes "that Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments,"[5] and he notes that the bar associations in the District of Columbia or Pennsylvania can choose to take up this matter, but the Department will not make a direct referral.[6] This very careful parsing of the legal analysis in the OPR report hardly amounts to a rejection or a repudiation of the report. For you to state otherwise is wildly inaccurate. Moreover, Mr. Margolis's memorandum is not relevant for purposes of assessing your credibility to testify as a witness before the Senate Judiciary Committee because Mr. Margolis is explicit that his analysis does not include OPR's assessment of your work while at OLC.

While I recognize that OPR did not find that your memorandum failed to satisfy the standards of professional responsibility, OPR made a number of damning statements about your legal work that are, in my opinion, highly relevant to whether the Judiciary Committee should rely on your testimony. Notably, the OPR report stated: "[o]ur review raised questions about the objectivity and reasonableness of some of the Bradbury Memos' analyses."[7] It went on to say that: "[s]ome of the memoranda's reasoning was counterintuitive,"[8] and perhaps most telling, it found that some of your conclusions "appear to be inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3 [of the Geneva Conventions]."[9] It also noted that some of your analysis was "incomplete"[10] and relied on "uncritical acceptance" of the CIA's representations.[11] The report goes on to state that "[w]e found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue."[12]

The report also notes that others within the government, including Deputy Attorney General Jim Comey, and OLC lawyer Patrick Philbin, objected to the issuance of your 2005 memorandum on the combination of certain enhanced interrogation techniques. Mr. Comey specifically noted that your analysis was "flawed" and he indicated he had "grave reservations"

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[2] *Id.* at 68.
[3] *Id.* at 67.
[4] *Id.* at 68.
[5] *Id.*
[6] *Id.* at 67.
[7] Office of Prof'l Responsibility, U.S. Dep't of Justice, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 241 (July 29, 2009) [hereinafter OPR Final Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.
[8] *Id.* at 249.
[9] *Id.* at 250.
[10] *Id.* at 250.
[11] *Id.* at 243.
[12] *Id.* at 241.

and that "[Mr. Philbin] felt just as strongly that this [memorandum] was wrong."[13] And John Bellinger, then the Legal Adviser to Secretary of State Condoleezza Rice, wrote to you to state he was "'concerned that the [2007 Bradbury] opinion's careful parsing of statutory and treaty terms' would be considered a 'work of advocacy to achieve a desired outcome.'"[14]

Finally, I would like to note for the record that the enhanced interrogation techniques you authorized in a total of four memoranda between 2005 and 2007[15] are, in my opinion, absolutely reprehensible. In your memorandum dated May 10, 2005 on enhanced interrogation techniques, you found a total of thirteen techniques may be used against a detainee without violating the federal statutory prohibition on torture. These techniques include: dietary manipulation, nudity, attention grab, walling, facial hold, facial slap or insult slap, abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation of more than 48 hours, and waterboarding.[16] In another May 10, 2005 memorandum on the combined use of certain techniques, you concluded that the combined use of waterboarding, sleep deprivation by shackling, and dietary manipulation could be used against a detainee without amounting to torture.[17] You also authorized an escalating series of phases of cruel and inhuman behavior against prisoners and approved a prototypical interrogation that begins with a detainee stripped of his clothes, shackled, hooded, with a walling collar over his head and around his neck.[18] You then proceeded to explain how over a number of subsequent sessions, the detainee could be subjected to escalating levels of abuse, including water dousing, numerous slaps or grabs by the interrogator in a single session, and sleep deprivation of up to 180 hours.[19] Putting aside the discredited legal merits of your advice, I want to note for the record that this advice is, in my opinion, contemptible.

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[13] E-mail from Jim Comey, Deputy Attorney General, Department of Justice to Chuck Rosenberg, Chief of Staff, Deputy Attorney General Jim Comey (Apr. 27, 2005, 5:49 PM), *available at* http://documents.nytimes.com/justice-department-communication-on-interrogation-opinions#p=1.

[14] OPR Final Report at 241.

[15] *See* Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Application of 18 U.S.C. §§2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) [hereinafter *Techniques* Memo], *available at* http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000798.pdf; Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) [hereinafter *Combined Techniques* Memo], *available at* http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000844.pdf; Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005), *available at* http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000864.pdf; Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* (July 20, 2007), *available at* http://www.aclu.org/torturefoia/released/082409/olc/2007 OLC opinion on Interrogation Techniques.pdf.

[16] *See Techniques* Memo at 9-18.

[17] *See Combined Techniques* Memo at 19.

[18] *See id.* at 6-7.

[19] *See id.* at 7-8.

The Senate Judiciary Committee is one of the original standing committees in the United States Senate, and it is one of the most influential committees in Congress. It is an honor and a privilege to be called to testify before the Senate Judiciary Committee. I referenced the results of OPR's report during the hearing on the Due Process Guarantee Act because OPR was very critical of your legal analysis, objectivity, and reasonableness. Although OPR did not conclude that the problems they identified rose to the level of professional misconduct, when the federal government spends more than four years investigating a lawyer and concludes that it has "serious concerns about some of [your] analysis,"[20] that should be sufficient to raise questions about whether Congress should rely on you as an expert witness. I wish the Committee had considered this prior to calling you to testify at this hearing, and I hope the Judiciary Committee and other congressional committees will consider these points when assessing your expertise and your credibility to testify on this or any other subject at any future hearing before Congress. The fact that you grossly mischaracterized David Margolis's memorandum in your letter to Committee staff just further underscores how woefully unsuited you are to appear as a witness before the Judiciary Committee.

Sincerely,

Al Franken
United States Senator

cc: The Honorable Patrick J. Leahy, Chairman of the Senate Judiciary Committee
The Honorable Chuck Grassley, Ranking Member of the Senate Judiciary Committee
The Honorable Dianne Feinstein, Chairman of the Senate Select Committee on Intelligence

[20] OPR Final Report at 258.

DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists

July 29, 2009

NOTE: THIS REPORT CONTAINS SENSITIVE, CLASSIFIED AND CONFIDENTIAL INFORMATION. DO NOT DISTRIBUTE THE REPORT OR ITS CONTENTS WITHOUT THE PRIOR APPROVAL OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY.

H. The Bradbury Memos

When Levin left the Department in early February 2005, Bradbury became OLC's Acting AAG.[105] Bradbury continued to work on a replacement for the Classified Bybee Memo, as well as a second classified memorandum that considered the legality of the combined use of EITs.[106]

Bradbury's point of contact at the CIA for these memoranda was CTC attorney [redacted] Correspondence from [redacted] to Bradbury indicates that the CIA provided its comments on the Combined Techniques Memo to OLC on March 1, 2005.

[redacted]

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105 Bradbury was Acting AAG from February 5 to February 14, 2005. He then reverted to Principal Deputy AAG, but no acting AAG was appointed. He again became Acting AAG in June 2005,when his nomination to the position of AAG was submitted to the Senate, until April 27, 2007, when his time as AAG expired without Senate action on his nomination. He again reverted to the position of Principal Deputy AAG, but, again, no acting AAG was appointed.

106 Levin started working on the combined techniques memorandum before he left the Department, but was unable to complete it before his departure.

[redacted]

Bradbury circulated drafts of his memoranda widely within the Department. Both the Office of the Attorney General (OAG) and the Office of the Deputy Attorney General (ODAG) reviewed drafts, as did lawyers from the Department's National Security Division and the Criminal Division. John Bellinger at the State Department and Dan Levin, then at the NSC, were also included in the process. As discussed below, DAG Comey voiced no objections to the 2005 Bradbury Memo, but requested changes in the Combined Techniques Memo, which were not made. Former AAG Levin told us that he passed along comments on the Article 16 Memo to Bradbury, but that he does not remember seeing a final draft of the document.[107]

1. The 2005 Bradbury Memo (May 10, 2005)

The 2005 Bradbury Memo was one of two May 10, 2005 memoranda written to replace the Classified Bybee Memo.[108] The 2005 Bradbury Memo considered whether the use of thirteen specific EITs by the CIA would be "consistent with the federal statutory prohibition on torture" and concluded that, "although extended sleep deprivation and use of the waterboard present more substantial questions . . . none of these [EITs], considered individually, would violate" the torture statute.

The 2005 Bradbury Memo concluded that the use of the following EITs, as proposed by the CIA, would be lawful: (1) dietary manipulation; (2) nudity; (3) attention grasp; (4) walling; (5) facial hold; (6) facial slap or insult slap; (7) abdominal slap; (8) cramped confinement; (9) wall standing; (10) stress positions; (11) water dousing; (12) sleep deprivation (more than 48 hours); and (13) the

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107 Bradbury told us, however, that he remembers personally delivering a copy of the signed Article 16 Memo to Levin in his office at the NSC.

108 The 2005 Bradbury Memo noted that it superseded the Classified Bybee Memo, but added that it "confirms the conclusion of [the Classified Bybee Memo] that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate [the torture statute]." 2005 Bradbury Memo at 6, n.9.

waterboard. Each technique was described in the memorandum, along with the restrictions and safeguards the CIA had represented would be implemented with their use.

The memorandum noted at the outset that the CIA had represented that EITs would only be used on "High Value Detainees." Those individuals were defined by the CIA as (1) senior members of al Qaeda or an associated group; (2) who have knowledge of imminent terrorist threats against the United States or who have had direct involvement in planning such terrorist actions; and (3) who would constitute a clear and continuing threat to the United States or its allies if released. 2005 Bradbury Memo at 6.

Following a general discussion of the torture statute, the 2005 Bradbury Memo considered whether each individual technique would cause "severe physical or mental pain or suffering." As a preliminary matter, the memorandum noted that the EITs were developed from SERE training, and recited some of the same statistics regarding the effect of EITs on trainees that had appeared in the Classified Bybee Memo to support the conclusion that SERE EITs did not result in prolonged mental harm. 2005 Bradbury Memo at 29, n.33; Classified Bybee Memo at 5. Although the 2005 Bradbury Memo prefaced its discussion with the qualifying statement, "fully recognizing the limitations of reliance on this experience,"

In evaluating the legality of the first eleven techniques, the memorandum concluded that those EITs clearly did not rise to the level of "severe mental pain or suffering." The memorandum then turned to the two remaining techniques -- sleep deprivation and waterboarding.

The discussion of sleep deprivation noted that the Classified Bybee Memo had failed to "consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee" or the possibility of severe physical suffering unaccompanied by severe physical pain. The 2005 Bradbury Memo pointed to information provided by CIA OMS that "shackling of detainees is not designed to and does not result in significant physical pain," reviewed the OMS monitoring procedures, and concluded that "shackling cannot be expected to result in severe physical pain" and that "its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so." 2005 Bradbury Memo at 37. The memorandum also cited OMS data and three books on the physiology of sleep and concluded that sleep deprivation did not result in any physical pain. *Id.* at 36.

On the question of whether sleep deprivation caused severe physical suffering, the 2005 Bradbury Memo noted that, "[a]lthough it is a more substantial question," it "would not be expected to cause 'severe physical suffering.'" *Id.* at 37. The memorandum acknowledged that, for some individuals, the technique could result in "prolonged fatigue, . . . impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision," and concluded that this could constitute "substantial physical distress." *Id.* at 37-38. However, because CIA OMS "will intervene to alter or stop" the technique if it "concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress," the 2005 Bradbury Memo found that sleep deprivation "would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of" the torture statute. *Id.* at 39-39. Relying on similar assurances from CIA OMS, and on one medical text, the 2005 Bradbury Memo also concluded that sleep deprivation would not cause "severe mental pain or suffering" within the meaning of the torture statute. *Id.* at 39-40.

With respect to the waterboard, the 2005 Bradbury Memo noted that the "panic associated with the feeling of drowning could undoubtedly be significant" and that "[t]here may be few more frightening experiences than feeling that one is unable to breathe." *Id.* at 42. However, the memorandum noted that, according to OMS, the technique was not physically painful, and that it had been

administered to thousands of trainees in the SERE program.[109] *Id.* Furthermore, "the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain . . . ." *Id.* Accordingly, "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'severe physical pain.'" *Id.* at 42-43.

The 2005 Bradbury Memo also concluded that the waterboard did not cause "severe physical suffering" because any unpleasant sensations caused by the technique would cease once it was discontinued. Because each application would be limited to forty seconds, the memorandum reasoned, any resulting physical distress "would not be expected to have the duration required to amount to severe physical suffering." *Id.*[110]

The 2005 Bradbury Memo commented that the "most substantial question" raised by the waterboard related to the statutory definition of "severe mental pain or suffering." Noting that an act must produce "prolonged mental harm" to violate the statute, the memorandum again cited the experience of the SERE program and the CIA's experience in waterboarding three detainees to conclude that "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'prolonged mental harm.'" *Id.* at 44.

The 2005 Bradbury Memo referred, in a footnote, to the CIA OIG Report's findings regarding the CIA's previous use of the waterboard, where the OIG had highlighted the lack of training, improper administration, misrepresentation of

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[109] The 2005 Bradbury Memo acknowledged that most SERE trainees experienced the technique only once, or twice at most, whereas the CIA program involved multiple applications, and that "SERE trainees know it is part of a training program," that it will last "only a short time," and that "they will not be significantly harmed by the training." 2005 Bradbury Memo at 6.

[110] The 2005 Bradbury Memo stated in its initial paragraph that it had incorporated the Levin Memo's general analysis of the torture statute by reference. The Levin Memo, citing dictionary definitions of suffering as a "state" or "condition," concluded that "severe physical suffering" was "physical distress that is 'severe' considering its intensity and duration or persistence [and not] merely mild or transitory." Levin Memo at 12.

expertise, and divergence from the SERE model in the CIA interrogation program. The 2005 Bradbury Memo stated that

> we have carefully considered the [CIA OIG Report] and have discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique.

Id. at 41, n.51.

Thus, "assuming adherence to the strict limitations" and "careful medical monitoring," the 2005 Bradbury Memo concluded that "the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate" the torture statute. *Id.* at 45.

2. The Combined Techniques Memo (May 10, 2005)

The Combined Techniques Memo began by briefly recapping the 2005 Bradbury Memo's conclusions, and stated that it would analyze whether the combined effects of the authorized EITs could render a prisoner unusually susceptible to physical or mental pain or suffering, and whether the combined, cumulative effect of the EITs could result in an increased level of pain or suffering. The memorandum outlined the phases, conditions, and progression of a "prototypical" CIA interrogation, based upon the "Background Paper on CIA's Combined Use of Interrogation Techniques" that the CIA had sent to Levin on December 30, 2004 (CIA Background Paper). The Combined Techniques Memo noted that the waterboard would be used only in certain limited circumstances, and that it may be used in combination with only two EITs: dietary manipulation and sleep deprivation.[111]

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[111] The Combined Techniques Memo noted that the waterboard must be used in combination with dietary manipulation, "because a fluid diet reduces the risks of the technique." Combined Techniques Memo at 16. According to the CIA OMS Guidelines, a liquid diet is imposed [redacted]

E. Analysis of the Bradbury Memos

Our review raised questions about the objectivity and reasonableness of some of the Bradbury Memos' analyses, although we did not conclude that those failings rose to the level of professional misconduct. The Bradbury Memos relied substantially upon the legal analysis of the Levin Memo (which corrected the most obvious errors of the Bybee and Yoo Memos) and applied that analysis to the facts and information provided to the Department by the CIA.[199] The Bradbury Memos were more carefully and thoroughly written than the Bybee and Yoo Memos, and unlike those memoranda, did not advance unsupported legal arguments that suggested that acts of torture were permitted or could be justified in certain circumstances. We nevertheless had some concern about the Bradbury Memos' analyses.

Others within the government expressed similar concerns. As discussed above, DAG Comey and Philbin objected to the issuance of the Combined Techniques Memo. In addition, Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, wrote to Bradbury and stated that he was "concerned that the [2007 Bradbury] opinion's careful parsing of statutory and treaty terms" would be considered "a work of advocacy to achieve a desired outcome." February 9, 2007 Bellinger letter at 11.

We found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue. First, we found some evidence that there was pressure on the Department to produce legal opinions which would allow the CIA interrogation program to go forward, and that Bradbury was aware of that pressure. Although Bradbury strongly denied that he was expected to arrive at a desired outcome, in Comey's April 27, 2005 email to Rosenberg, Comey stated that "[t]he AG explained that he was under great pressure from the Vice President to complete both memos, and that the President had even raised it last week." He wrote, "Patrick [Philbin] had previously reported that Steve [Bradbury] was getting constant similar pressure from Harriet Miers

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[199] The May 2005 Bradbury Memos were in some respects replaced or updated by the 2007 Bradbury Memo, which adopted much of their analysis. Prior to President Obama's executive order of January 22, 2009, providing that no one was to rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009, the 2005 Bradbury Memos had not been withdrawn by the Department.

and David Addington to produce the opinions." In addition, Bellinger told us that there was tremendous pressure placed on the Department to conclude that the program was legal and could be continued, even after the DTA and MCA were enacted.

The Bradbury Memos contained some of the flaws we noted in the Bybee and Yoo Memos. Although the Bradbury Memos, unlike the Classified Bybee Memo, acknowledged the substantial differences between SERE training and the use of EITs by the CIA, some sections of the Bradbury Memos nevertheless cited data obtained from the SERE program to support the conclusion that the EITs were lawful as implemented by the CIA. The SERE program was also cited as evidence that the CIA interrogation program and its use of EITs was "consistent with executive tradition and practice." In light of the significant differences, as pointed out by the CIA itself, between a training program and real world application of techniques, we found this argument to be strained.

We also noted that the Bradbury Memos frequently relied upon representations and assurances from the CIA concerning the procedures, monitoring, and safeguards that would accompany the use of EITs. For example, OLC's approval of the sleep deprivation technique was based on assurances from the CIA that medical officers would "intervene to alter or stop" the technique if they concluded in their "medical judgment that the detainee is or may be experiencing extreme physical distress." OLC's approval of waterboarding assumed "adherence to the strict limitations" and "careful medical monitoring," implicitly acknowledging that application of the techniques could constitute torture under certain circumstances.

Similar representations had accompanied the CIA's original request to use EITs in the interrogations of Abu Zubaydah, KSM and others, and as the CIA OIG Report determined, many abuses nevertheless took place. Under these circumstances, we question whether it was reasonable for Department officials to accept such representations at face value, given the CIA's previous history with EITs, the inevitable pressures faced by interrogation teams to achieve results, the CIA's demonstrated interest in shielding its interrogators from legal jeopardy, and the difficulty of detecting, through "monitoring," the largely subjective experiences of severe mental or physical pain or suffering.

The Bradbury Memos also reflect uncritical acceptance of the CIA's representations regarding the method of implementation of certain EITs. For example, in concluding that prolonged sleep deprivation, which involves shackling and diapering detainees, did not constitute cruel, inhuman, or degrading treatment, Bradbury noted that the CIA asserted that the use of diapers was necessary because releasing detainees from shackles to relieve themselves "would present a security problem and would interfere with the effectiveness of the technique" and that "diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee." Article 16 Memo at 13; 2007 Bradbury Memo at 9-10. However, the CIA's 2002 list of proposed EITs described diapering as a separate EIT, in which the detainee "is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him."[200]

In addition, we question whether it was reasonable for OLC to rely on CIA representations as to the effectiveness of the EITs. The CIA Effectiveness Memo was essential to the conclusion, in both the Article 16 Memo, drafted in 2005, and the 2007 Bradbury Memo, that the use of EITs did not "shock the conscience" and thus did not violate the Due Process Clause because the CIA interrogations were not "arbitrary in the constitutional sense," that is, had a governmental purpose that the EITs achieved. However, as Bradbury acknowledged, he relied entirely on the CIA's representations as to the effectiveness of EITs, and did not attempt to verify or question the information he was given. As Bradbury put it, "[I]t's not my role, really, to do a factual investigation of that."[201]

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[200] We had similar concerns about two documents that were not the subject of this investigation – a letter and a memorandum from Bradbury to the CIA, both dated August 31, 2006, evaluating the legality of the conditions of confinement at the CIA's secret facilities. Some of the conditions were approved because, among other reasons, they were represented as essential to the facilities' security. However, these conditions were similar or identical to conditions that were previously described by the CIA or the military, in documents we found in OLC's files, as "conditioning techniques." Those conditions of confinement included isolation, blindfolding, and subjection to constant noise and light.

[201] Bellinger told OPR that he pushed for years to obtain information about whether the CIA interrogation program was effective. He said he urged AG Gonzales and White House Counsel Fred Fielding to have a new CIA team review the program, but that the effectiveness reviews consistently relied on the originators of the program. He said he was unable to get information from the CIA to show that, but for the enhanced techniques, it would have been unable to obtain the information it believed necessary to stop potential terrorist attacks.

U.S. Senator Chuck Grassley • Iowa

Ranking Member • Senate Judiciary Committee

http://grassley.senate.gov

Prepared Statement of Senator Chuck Grassley of Iowa
Ranking Member, U.S. Senate Committee on the Judiciary
"The Due Process Guarantee Act: Banning Indefinite Detention of Americans"
Wednesday February 29, 2012

Mr. Chairman, thank you for holding today's hearing. This hearing continues a lengthy debate that occurred this past December as Congress passed the National Defense Authorization Act for Fiscal 2012. Specifically, we'll focus on the provisions related to the procedures for capturing, detaining, and adjudicating al-Qaeda terrorists and other persons associated with al-Qaeda.

These provisions have reopened an ongoing debate about the role, and powers of the President, Congress, and the Courts in protecting national security. This debate has been ongoing since the founding of the nation, but more recently since the terrorist attacks of 9/11. Whichever point of view one takes, this topic is bound to raise concerns from those on the other side of the issue. So, an open and transparent debate is warranted.

We can agree that all branches of the government believe that American citizens should be afforded due process of law. And the express language of the National Defense Authorization Act, which includes the Feinstein Amendment, means that U.S. citizens are expressly outside the scope of the National Defense Authorization Act's mandatory military detention provisions. And only twice has the President chosen to put a citizen in military detention; both times, at the end of the day, those individuals were transferred to civilian custody and charged with federal crimes. However, for arguments sake, even if the President were to try to indefinitely detain an American citizen under military authority, that decision could be immediately challenged via writ of habeas corpus in the federal courts as outlined by Supreme Court precedent.

I would also note that late last night, President Obama issued the procedures implementing the mandatory military detention provision of the National Defense Authorization Act. These procedures make clear that the National Defense Authorization Act expressly exempts U.S. citizens from mandatory military detention, but they also make it so procedurally difficult that effectively, no individual of any nationality will likely ever be transferred to mandatory military custody under section 1022. Between the bureaucratic requirements and the seven national security waivers, it is clear the provision will be seldom, if ever used on anyone, let alone a U.S. citizen.

Much of the precedent on this matter dates back to a World War II case concerning a U.S. citizen who was among eight Nazi soldiers that landed on a beach in New Jersey with the goal of sabotaging American interests. These individuals, including the American citizen, were tried by President Roosevelt's administration in a military commission and sentenced to death.

On appeal to the Supreme Court, the court held that enemy belligerents, including the American citizen, were tried in the proper venue, a military commission, and upheld the sentence.

In 2004, the Supreme Court—by a vote of 6-3—found that an American citizen named Hamdi captured on the battlefield in Afghanistan and detained in the U.S. had a right to petition for a writ of habeas corpus to challenge his detention. But, a plurality of the court, in opinion by Justice O'Connor, also held that the President had the authority to detain Hamdi because Congress had passed an Authorization for Use of Military Force following the 9/11 attacks.

And, the *Hamdi* plurality recognized that detention for the duration of the conflict was part of the "longstanding law-of-war principles." Justice O'Connor's opinion also made no distinction based on an individual's citizenship finding that "There is no bar to this Nation's holding one of its own citizens as an enemy combatant."

Two more recent lower court cases, *Padilla* and *al-Marri* have added to the law regarding when a citizen or legal permanent resident can be detained, but neither case has reached the Supreme Court on the merits. But in *Hamdi* and *Padilla*, the Supreme Court said that an American citizen in military custody in the United States has a right to challenge his detention via writ of habeas corpus. This begs the question, why is this legislation even necessary?

And, there are two extremely serious practical questions for us to discuss. First, what would be the state of the law on detention of American citizens and lawful permanent residents—even if captured abroad on a foreign battlefield—if this bill became law? And, second, would passage of this bill increase the chances that this country would be victimized by another terrorist attack?

Justice Jackson, who dissented in Korematsu, because the military sought "to make an otherwise innocent act a crime" for racial reasons, developed a famous analysis of presidential power in the Youngstown steel seizure case. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." After the Authorization for Use of Military Force and *Hamdi*, it is clear that President Bush and President Obama have been able to pursue terrorists under this first and highest level of presidential power, namely in concert with Congress.

Were Congress to require congressional action beyond the Authorization for Use of Military Force that the Supreme Court has already said authorizes detention of American citizens in America, the President would immediately be able to detain Americans only under the second category of presidential power that Justice Jackson outlined.

Under this bill, we would be, as Justice Jackson put it, in a twilight zone of uncertainty as to the scope of presidential power. That raises enormous practical questions, especially since the withdrawal of affirmative congressional authorization would be retroactive. And in any future conflict, if Congress remains silent, we would fight a war with the scope of presidential power to detain citizens uncertain, with the result dependent "on the imperatives of events and contemporary imponderables, rather than on abstract theories of law."

A second practical question flows from the first. We have been very fortunate since September 11 not to have had any major terrorist attacks on American soil, although there were some close calls. The ability of the President to use the powers Congress has given him, with appropriate oversight, in addition to Congress' own powers, has been responsible for this excellent outcome. Were we to take one of the President's clear powers and banish it to the twilight zone, it is not clear that the President will be able to continue to take the necessary actions that have prevented subsequent terrorist attacks. We should exercise exceptional caution before taking such a step.

Unfortunately, we do not have a representative of the Administration present today to discuss these important issues. I made a request to the Justice Department offering them an opportunity to testify at today's hearing, but they were unable to accommodate. This bill presents serious constitutional separation of powers issues and it would be in our best interest to hear directly from the Administration—especially in light of the fact that President Obama issued a signing statement on the provisions we're discussing. At the least, we need to hear the views of the Departments of Justice, Defense, and State regarding the impact this may have prior to voting on this proposal.

Additionally, it is of interest to me that we are debating detention of American citizens, yet—according to media reports this past fall—the Administration has issued a secret memorandum authorizing the targeted killing of American citizens abroad. Both the Chairman and I have sent letters to the Attorney General seeking a copy of that memorandum. To date, the Justice Department has not responded. At the least, we should know what the Administration's legal argument is that justifies the targeted killing of an American, and what limits apply to that authorization.

I also want to note that, unfortunately, the majority did not even inform us until Monday afternoon that the hearing would include a panel of Congressmen. This issue is too important not to hear the opposing view, so I look forward to the testimony from all of the witnesses. Thank you.

DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists

July 29, 2009

NOTE: THIS REPORT CONTAINS SENSITIVE, CLASSIFIED AND CONFIDENTIAL INFORMATION. DO NOT DISTRIBUTE THE REPORT OR ITS CONTENTS WITHOUT THE PRIOR APPROVAL OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY.

We concluded that Philbin did not commit professional misconduct in this matter. Philbin raised his concerns about the memoranda with both Yoo and Bybee, he did not have ultimate control over the content of the memoranda, and he did not sign them. After Yoo and Bybee resigned from the Department, Philbin directed [redacted] to notify the Department of Defense that it could not rely on the Yoo Memo to approve any additional enhanced interrogation techniques. He later alerted Goldsmith to the flawed reasoning in the memoranda, and participated in the decision to formally withdraw the Bybee and Yoo Memos. Accordingly, we concluded that Philbin did not commit professional misconduct in this matter.

[redacted]

[redacted] was a relatively inexperienced attorney when the Bybee and Yoo Memos were being drafted, and [redacted] worked under the direction and supervision of Yoo. Although [redacted] appears to have made errors of research and analysis in drafting portions of the Bybee and Yoo Memos, [redacted] work was subject to Yoo's and Bybee's review and approval. We therefore concluded that [redacted] should not be held professionally responsible for the incomplete and one-sided legal advice that was provided in the memoranda.

5. Steven Bradbury

Bradbury signed four OLC memoranda related to the CIA interrogation program: the 2005 Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo. As discussed above, we had serious concerns about some of his analysis, but we did not conclude that those problems rose to the level of professional misconduct. The Bradbury Memos incorporated the legal analysis of the Levin Memo, which Bradbury helped draft, and which substantially corrected the defects in the Bybee and Yoo Memos – specifically eschewing reliance on the Commander-in-Chief, necessity, and self-defense sections, correcting the inaccurate specific intent section, and removing the earlier memoranda's reliance on the health benefits statute. None of the analysis in the Bradbury Memos is comparable to the inadequately supported, unprecedented theories advanced in the Bybee and Yoo Memos to support the proposition that torture can be permitted or justified under certain circumstances.

In applying the facts to the law, Bradbury explicitly qualified his conclusions and explained the assumptions and limitations that underlay his analysis. Moreover, Bradbury distributed drafts of the memoranda widely, within and without the Department, for comments. The memoranda were written in a careful, thorough, lawyerly manner, which we concluded fell within the professional standards that apply to Department attorneys.

As previously discussed, in light of the interrogation abuses described in the CIA OIG Report and the ICRC report, as well as the fact that the SERE program was fundamentally different from the CIA interrogation program, however, we believe Bradbury should have cast a more critical eye on the conclusory findings of the Effectiveness Memo, which were essential to his analysis, in both the Article 16 Memo and the 2007 Bradbury Memo, that the use of EITs was consistent with constitutional standards and international norms. However, we found that these issues did not rise to the level of professional misconduct.

6. Other Department Officials

We did not find that the other Department officials who reviewed the Bybee Memo committed professional misconduct. We found Michael Chertoff, as AAG of the Criminal Division, and Adam Ciongoli, as Counselor to the AG, should have recognized many of the Bybee Memo's shortcomings and should have taken a more active role in evaluating the CIA program. John Ashcroft, as Attorney General, was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program. Ashcroft, Chertoff, Ciongoli, and others should have looked beyond the surface complexity of the OLC memoranda and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound. However, we cannot conclude that, as a matter of professional responsibility, it was unreasonable for senior Department officials to rely on advice from OLC.

G. Institutional Concerns

In addition to assessing individual responsibility in this matter, we noted, in the course of our investigation, several managerial concerns. First, we found that the review of the OLC memoranda within the Department and the national security arena was deficient. The memoranda were not circulated to experts on

Statement of Karen Korematsu
Co-Founder, Fred T. Korematsu Institute for Civil Rights and Education
Daughter of Fred T. Korematsu

TO SUPPLEMENT
Before the United States Senate
Committee on the Judiciary
Hearing: "The Due Process Guarantee Act: Banning Indefinite Detention of Americans"

February 29, 2012
Washington, D.C.

My name is Karen Korematsu. I am the co-founder of The Fred T. Korematsu Institute for Civil Rights and Education, a program of the Asian Law Caucus, in San Francisco, California and the daughter of Fred T. Korematsu. I am honored to have the opportunity to submit this statement in regards to the very important bill, The Due Process Guarantee Act, and the hearing "The Due Process Guarantee Act: Banning Indefinite Detention of Americans," held on Wednesday, February 29, 2012.

I would like to offer my sincere thanks to Senator Feinstein, Chairman Leahy, Ranking Member Grassley and members of the Committee for holding the February 29 hearing to address the problematic detention regime created by enactment of §§ 1021 and 1022 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012.

Watching the hearing I was struck by the powerful statements of several Senators in support of due process for all persons present in the United States. I was heartened that the predicate for many of the statements was lessons learned from the unjust incarceration of 120,000 Japanese Americans pursuant to Executive Order 9066 issued by President Franklin D. Roosevelt seventy years ago on February 19, 1942. Senator Feinstein's childhood memory of going with her father to witness the incarceration of Japanese Americans at the Tanforan Racetrack south of San Francisco and how seeing the barbed wire and tiny shacks that were horse stalls impacted her. It led to her position that the incarceration was a "dark stain on our history and our values and is something we should not repeat." This brought tears to my eyes and my father would have been proud of the Senators for reminding all of the grave mistakes of history.

I am extremely grateful that Senator Feinstein and others are working to undo the application of the NDAA to U.S. citizens and legal permanent residents, but I believe my father would have strongly advocated for this protection to extend to all persons.

In 1942, my father, then 23-years-old, refused to report to the government's incarceration camps for Japanese Americans. He was arrested and convicted of defying the government's unjust orders, but decided to take his case all the way to the United States Supreme Court. He was denied his freedom by the nation's highest court, which validated the wholesale imprisonment of Japanese American citizens on the basis of "military necessity." In 1983 a team of *pro bono* attorneys re-opened my father's case using a *petition for writ of error coram nobis* and convinced a federal court to overturn his conviction. In the last decades of his life, my father crisscrossed this country to educate about the lessons of the Japanese American incarceration and to warn against the dangers of racial profiling. He spoke out to protect the civil rights of Arab, Middle Eastern, Muslim and South Asian Americans after the tragic events of September 11 and remained an activist until his passing in 2005. My father's life-long struggle for justice serves as a reminder of the need to protect civil liberties for all people.

The year prior to my father's passing, on January 14, 2004, he submitted an amicus brief[1] in support of Petitioners in *Rasul v. Bush.*[2] Petitioners in *Rasul* were

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[1] *Brief of Amicus Curiae Fred Korematsu in Support of Petitioners*, filed January 14, 2004, ("Amicus Brief") available at http://korematsuinstitute.org/wp-

Guantanamo Bay detainees, none of whom had citizenship or legal permanent resident status in the United States. The Bush Administration argued that these detainees did not have the constitutional right to petition the courts in regards to their detention. My father's brief aggressively argued that these detainees, despite their lack of citizenship or other immigration status, had a right to constitutional protections.

In advocating that constitutional protections should apply to the Guantanamo Bay detainees my father argued that a vision of the world where the government could detain without review "is inconsistent with our constitutional commitment to a government of laws."[3] He went on to ask that "[l]et us not now set the foundation for later apologies and belated attempts to restore narrowed rights."[4]

My father admonished the U.S. Supreme Court to "make clear that even in wartime, the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel."[5]

Furthermore, my father reminded the U.S. Supreme Court that "[o]ur failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again."[6] He explained that while certain aspects of the post-September 11 world may be unprecedented, the "challenges to constitutional liberties these cases present are similar to those the nation has encountered throughout its history."[7] The brief cited five different historical examples in addition to Japanese American Internment, and explained that in each instance the hysteria of the day led to cruel and unnecessary violations of human rights, and that in each case our nation regretted the excesses. My father asked that we not make that mistake again.[8] Today, I ask you for the same.

At core, my father's reasons for supporting the rights of detainees without immigration status in the United States were grounded in his deep sense that all persons should have their human rights respected. Not only does the due process clause apply to

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content/uploads/2010/09/Amicus-Brief-2003-Rasul-Odah.pdf

[2] 542 U.S. 466 (June 28, 2004).

[3] Amicus Brief, *supra*, at 28.

[4] Amicus Brief, *supra*, at 28.

[5] Amicus Brief, *supra*, at 28.

[6] Amicus Brief, *supra*, at 28.

[7] Amicus Brief, *supra*, at 2.

[8] Amicus Brief, *supra*, at 5-6.

all persons present in the United States regardless of immigration status,[9] but international law also provides that "all individuals, including non-citizens, must be protected from arbitrary detention."[10] In this ongoing time of hysteria and fear unchecked power should not be granted to the executive or legislative branches. As my father's experience shows, strict adherence to the Constitution and the principles of human rights is particularly necessary during times of conflict. Even good people can let fear overcome them and racism and religious bigotry continue to exacerbate the risk that innocent people will be arbitrarily and unfairly incarcerated. In the case of my father, the military leadership in charge, General DeWitt, was found to be acting out of racism when he lied about the risk and the solicitor general was found to have with-held the truth from the Supreme Court. I ask that the Committee expand the scope of the Bill to provide for the protection of all persons present in the U.S.

I would also like to respond briefly to two comments that were made during the hearing.

First, Senator Grassley asserted that it is inappropriate to compare internment of Japanese Americans with post September 11 detentions. The Senator acknowledged that internment of Japanese Americans was wrong, but that the many post-September 11 detentions are appropriate. I respectfully disagree with Senator Grassley's position.

The story of Lakdhar Boumediene alone should be sufficient to serve to refute Senator Grassley's statement. Boumediene was an international humanitarian executive working for the Red Crescent Society of the United Arab Emirates in Bosnia.[11] Boumediene's life was turned upside-down when he was picked up on October 9, 2001 by intelligence officers, allegedly because the U.S. believed he was involved in a plot to attack Bosnia. The Bosnian court investigated, found that there was no evidence to support the allegation, and ordered Boumediene's release. But Boumediene's nightmare was just beginning. He was picked up and sent to Guantanamo Bay, where he languished from 2002 until he was finally released in 2009. Boumediene was tortured at Guantanamo Bay, he went on a hunger strike for two years, and he missed seven years of his young family's life. Like my father, Boumediene took his case to the US Supreme Court.[12] Thankfully, this time, justice was served. The Court ruled that detainees like

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[9] *Mathew v. Diaz*, 426 U.S. 67 (1976) (due process clause applies regardless of immigration status); *see Plyler v. Doe*, 457 U.S. 202 (1982) (striking down statute denying funding for education of immigrant students without immigration status).

[10] David Weissbrodt, *Final report on the rights of non-citizens*, U.N. Doc. E/CN.4/Sub.2/2003/23 (2003), *available at* http://www1.umn.edu/humanrts/demo/noncitizenrts-2003.html#_ftnref81.

[11] Lakhdar Boumediene, NY Times, *My Guantanamo Nightmare*, January 7, 2012, *available at* http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html?partner=rss&emc=rss&pagewanted=print.

[12] *Boumediene v. Bush*, 553 U.S. 723 (2008).

Boumediene had the right to a day in court to challenge their detention. Just five months after the Court's ruling, the district court ordered that Boumediene be set free. In a recent op-ed, Boumediene wrote: "I'm told that my Supreme Court case is now read in law schools. Perhaps one day that will give me satisfaction, but so long as Guantánamo stays open and innocent men remain there, my thoughts will be with those left behind in that place of suffering and injustice."[13]

Boumediene is not alone. Since September 11th, over 700 men and children have been subjected to indefinite detention at Guantanamo Bay, Cuba.[14] Currently, 171 men continue to be detained there. Guantanamo Bay is just one of the several detention systems that have been utilized, and must be subject to application of our laws. If some of these men are rightly detained, let a court of law determine that fact. The issue is whether or not in a democracy we require an independent trier of fact to make that determination and provide the detained an opportunity to rebut the charge.

The second point I would like to address is Senator Graham's statement that the government should have the flexibility to choose military detention for purposes of intelligence gathering. In particular he asserts that those captured in the U.S. should not be read their *Miranda*[15] rights. As Senator Feinstein and Professor Stephen Vladeck explained in response: (1) *Miranda* is an exclusionary rule, (2) a public safety exception would apply to any emergency situation,[16] and (3) the FBI has a developed intelligence gathering system.

We are a nation of laws. Those laws protect us, and we must stand by those laws. If we don't, there will be nothing left to protect us. In contemplating whether to support various positions and laws relating to issues bearing on detention and discrimination, I make these decisions as I think my father would have done. Remember, all it takes is one man who can make a difference in the fight for civil rights and due process for all. You can make that difference too. Let my father give you the courage to "stand up for what is right!"

For the above reasons, I ask that the Committee expand the scope of the bill to provide for the protection of all persons present in the United States. Only then can we truly live in an America that is consistent with our Constitution and that respects human dignity.

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[13] Boumediene, *supra.*

[14] Center for Constitutional Rights, *Guantanamo: Ten Years Too Many*, January 6, 2012, *available at* http://my.firedoglake.com/centerforconstitutionalrights/2012/01/06/guantanamo-ten-years-to.

[15] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[16] *New York v. Quarles*, 467 U.S. 649 (1984).

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
"The Due Process Guarantee Act: Banning Indefinite Detention of Americans"
February 29, 2012

Last December, Congress enacted the National Defense Authorization Act (NDAA) for Fiscal Year 2012. The bill contained what to me are deeply troubling provisions related to indefinite detention. I viewed them as inconsistent with our Nation's fundamental commitment to protect liberty. I opposed and will continue to oppose indefinite detention. I fought against the Bush administration policies that led to the current situation, with indefinite detention being the de facto policy. I opposed President Obama's executive order in March 2011 that contemplated indefinite detention. I opposed the provisions in the NDAA, as well.

The American justice system is the envy of the world. A regime of indefinite detention degrades the credibility of this great Nation around the globe, particularly when we criticize other governments for engaging in such conduct. Indefinite detention contradicts the most basic principles of law that I have pledged to uphold since my years as a prosecutor and in our senatorial oath to defend the Constitution. That is why I am fundamentally opposed to indefinite detention without charge or trial.

During the Senate debate last year over the detention provisions in the NDAA, some Senators argued in favor of indefinite detention, including for individuals apprehended within the United States. I believe this violates core constitutional principles. That is why I repeatedly raised concerns and opposed the detention provisions in the NDAA. I was disappointed that the Senate rejected several efforts to amend or remove these measures as we debated the bill.

One of the amendments that did pass during the NDAA debate was offered by Senator Feinstein. Her amendment clarifies that nothing in the NDAA changed the status quo with regard to the authority of the Government to indefinitely detain U.S. citizens or others arrested within the United States. I thank her for all her efforts, including her work on this hearing today.

There is significant disagreement over the Government's authority to indefinitely detain Americans and those arrested on American soil. I firmly believe that the Constitution makes such actions unconstitutional. In the 2004 Supreme Court opinion in *Hamdi v. Rumsfeld*, Justice O'Connor stated unequivocally: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The power of our Federal Government is bound by the Constitution.

Immediately following enactment of the NDAA last December, Senator Feinstein continued her efforts and introduced the Due Process Guarantee Act, which is the subject of our Judiciary Committee hearing this morning. I understand that Senator Feinstein had to moderate the bill in garnering bipartisan support. I greatly appreciate her continuing efforts to correct the excesses enacted in the NDAA and have joined to cosponsor her bill.

The Due Process Guarantee Act would make clear that neither an authorization to use military force nor a declaration of war confer unfettered authority to the executive branch to hold

Americans in indefinite detention. This is not unlike the resolution I introduced in 2006 to clarify that the Authorization for the Use of Military Force adopted after 9/11 did not authorize warrantless domestic surveillance. I hope that the Due Process Guarantee Act will serve to open a discussion about how to ensure that ***no*** individual arrested within the United States will be detained indefinitely. I believe that Constitution requires no less. The case of American citizens is the most striking, but to me the Constitution creates the framework that imposes important legal limits on the Government and provides that ***all*** people have fundamental liberty protections.

I am particularly pleased to welcome on behalf of the Committee Professor Lorraine Bannai, who was part of the legal team that helped overturn the unjust conviction of Fred Korematsu. Seventy years ago this month, President Roosevelt signed the executive order that authorized the detention of thousands of Japanese Americans during World War II, including Fred Korematsu, as well as Professor Bannai's parents and grandparents. That was a tragic chapter in our Nation's history for which those of us now in Congress have apologized and sought to provide some redress.

I urge all Senators to join us in upholding the principles of our Constitution, protecting American values, and championing the rule of law. We need a bipartisan effort to guarantee that those arrested on American soil are not locked away indefinitely without charge or judicial review. And so that the United States remains the model for the rule of law to the world.

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Office of the Attorney General
Washington, D. C. 20530

January 19, 2009

Mr. H. Marshall Jarrett
Counsel
Office of Professional Responsibility
United States Department of Justice

Re: OPR Report Regarding the Office of Legal Counsel's Memoranda on Issues Relating to the CIA's Use of Enhanced Interrogation Techniques on Suspected Terrorists

Dear Mr. Jarrett:

On December 31, 2008, we, and certain members of our staff, met with you, James Meade, and Tamara Kessler to discuss the Office of Professional Responsibility's (OPR) draft report regarding the Office of Legal Counsel's (OLC) Memoranda on Issues Relating to the CIA's Use of Enhanced Interrogation Techniques on Suspected Terrorists ("Draft Report"). That meeting occurred following your provision midday on December 23, 2008, of the 191-page, highly-classified Draft Report to the Office of the Attorney General (OAG). On December 23, you indicated that if OAG had any classification concerns regarding the Draft Report, those concerns should be provided by January 2, 2009. You further provided that, with respect to previously agreed-upon opportunities for OAG and ODAG review and comment on the report prior to its actual release, you contemplated publicly releasing a unclassified version of the report on January 12, 2009. On December 31, you explained that, until a day or two earlier, you were unaware that OPR attorneys had promised subjects of the report, through their counsel, the chance to review and comment on the report before it was publicly released. You further explained that as of December 31 neither the subjects of the report nor their counsel had yet seen it.

In the wake of the December 31 meeting, you have informed us that given OPR's need to review and consider the preliminary concerns we expressed at the December 31 meeting, the further issues raised in a January 7, 2009 OLC letter to you (which we believe deserves close review), and any comments provided after subjects of the report and their attorneys review the Draft Report, the report will not be finalized before the end of the current Administration. You have similarly concluded that your office will not be able to determine its final position before the end of the current Administration on whether professional misconduct referrals, which are presently contemplated in the Draft Report, are ultimately appropriate. Because the report will not be concluded during our tenure, we have memorialized our concerns in this letter.

We understand that under longstanding Department practice, the Department makes no decision regarding a bar referral or publication of such a report in any form or forum until the Department's own internal review process is completed. Under Department practice, this process includes a chance for the subjects to review the report and to contest OPR findings against them. We also understand that for at least the last decade and spanning Administrations of both political parties, Associate Deputy Attorney General David Margolis has been the final decisionmaker within the Department with respect to findings against former Department employees. In that regard, to the extent OPR ultimately determines that, in its view, misconduct referrals are appropriate for former OLC attorneys Jay Bybee or John Yoo, we ask that this letter be shared with the appropriate members of the Office of the Attorney General and the Office of the Deputy Attorney General, and further that it be available in any DOJ appeal process to all parties involved in that process, including the subjects of any appeal and their attorneys. Finally, to the extent the Department would ultimately make any bar referrals, at the conclusion of internal review by Department leadership offices, we ask that this letter be included in any version of the final Report forwarded to bar authorities or released to Congress or the public.

I. PROCESS CONCERNS

We appreciate OPR's effort to provide us with an opportunity to review and comment on the Draft Report before the end of this Administration. Nevertheless, the time proposed for our review was unrealistically and, with all respect, unacceptably, short. This is particularly true given the length of the OPR investigation, which has been ongoing for nearly four and a half years, the fact that OAG has been asking about progress on the Draft Report since at least the early summer of 2008, and the length and classification level of the Draft Report itself. More specifically, the Draft Report is nearly 200 single-spaced pages long and is classified at the sensitive compartmented information level, greatly complicating the ability of anyone—including the Attorney General himself—to review it. Notwithstanding these complications, the Draft Report was not provided to OAG or ODAG until December 23, 2008, and you asked for comments prior to January 12, 2009, the date you originally proposed to release the report to Congress and the public. Even if this period did not include the Christmas and New Year's holidays, it would have been insufficient for us to conduct a thorough review, given our other responsibilities within the Department and the additional responsibilities attendant to trying to ensure a smooth transition to a new Administration. Our concerns with this rushed process were exacerbated by the number of errors and other issues—discussed more fully below—that we identified in the abbreviated review we were able to undertake.

Furthermore, because OPR waited until the closing days of this Administration to share its Draft Report for comment, you have informed us that it will not be able to revise the report, as OPR determines is appropriate, in potential response to the issues that we have identified before the Administration ends. You similarly will be unable even to receive, much less evaluate, comments from Messrs. Bybee and Yoo and their counsel, as well as others you criticize within that time period. You indicate that you will not even be able to determine during this Administration whether some of the most serious aspects of the Draft Report—namely, its proposed and unprecedented bar referrals of former OLC attorneys Bybee and Yoo for professional misconduct under D.C. Bar Rules 1.1 and 2.1—will be included in the final report.

This has regrettably undermined, if not eliminated, our ability to review OPR's considered findings.

To justify this truncated timeline, you noted in our December 31 meeting that you had attempted to establish a timeline for review and comment similar to that which OPR and the Office of Inspector General (OIG) established for review of the report concerning the firings of United States Attorneys. That explanation falls short in at least one very material respect. OPR and OIG kept our offices apprised of the progress and substance of the United States Attorneys investigation for many months leading up to our first review of that report. That same consultation did not occur in this matter.

In addition, we were troubled to learn that, despite the fact that OPR investigators had agreed to allow the two main subjects of the Draft Report—John Yoo and Jay Bybee—to review and comment on the draft, no plans had been made as of December 31 (or some twelve days before a suggested public release) for such a review to take place. Indeed, it appears, with all respect, that such a review might not have occurred at all had staff in our offices not raised the issue with you in late December 2008. We are pleased that OPR intends to keep the commitment it made during the investigation to provide Messrs. Yoo and Bybee and their counsel with a copy of the Draft Report for review and comment. We further agree that the review process going forward inside DOJ should include an opportunity for both to exercise their full and standard appellate rights, if applicable, within DOJ before any professional bar referrals would be made or before any report were made public—the latter of which, you have stated and we agree, is itself tantamount to a bar referral.

II. SUBSTANTIVE COMMENTS AND CONCERNS

As discussed at our December 31 meeting, we have numerous questions about and concerns with some of the findings, and conclusions in the Draft Report. We recognize that it is OPR's responsibility to reach an independent conclusion and make recommendations. As you know, we both have been strong defenders of OPR and its mission. Nonetheless, we are concerned that the current proposed findings of professional misconduct, recommendation for reconsideration of prosecutorial declinations, and request that the Department review certain memoranda signed by Steven Bradbury, are based on factual errors, legal analysis by commentators and scholars with unstated potential biases, unsupported speculation about the motives of Messrs. Bybee and Yoo, and a misunderstanding of certain significant Department of Justice and Executive Branch interagency practices. We summarize below our leading concerns with the Draft Report's unclassified analysis and recommendations.

A. Findings of Professional Misconduct

The key finding of the Draft Report is that, in drafting certain OLC memoranda related to potential interrogations of suspected terrorists, former OLC attorneys John Yoo and Jay Bybee "failed to meet their responsibilities under D.C. Rule of Professional Conduct 1.1 to provide competent representation to their client, the United States, and failed to fulfill their duty to

both previously done—but we see little basis for OPR's conclusion that it reached these conclusions in bad faith.

In summary, we believe there are substantial, material problems with the Draft Report's analysis of the Rule 1.1 issue.

Rule 2.1 Finding—Failure to Provide Candid Legal Advice

The Draft Report also finds that attorneys Yoo and Bybee provided advice that "did not represent independent legal judgment or candid legal advice." [*Id.* at 172-77, 179-80.] OPR's investigation does not seem to us to support this conclusion, and we find its proposal even more unconvincing than any proposed conclusion under Rule 1.1.

After reviewing relevant documents from this time period and interviewing all the attorneys involved in requesting and providing this advice, OPR found no direct evidence that the opinions in question reflected anything other than Mr. Bybee's or Mr. Yoo's best legal judgment at the time—a fact that OPR confirmed in our recent meeting, *see supra* note 3, but that the Draft Report does not once mention. Nor has OPR identified any previous or subsequent commentary by either Mr. Bybee or Mr. Yoo that indicates that their actual legal views differed from those set forth in the opinions in question. Both Mr. Bybee and Mr. Yoo stated that their opinions reflected "a fair and objective view of the statute's meaning and that they never intended to arrive at a foreordained result." [Draft Report at 172.][10]

While any one of us—within OPR, OAG, or ODAG—might disagree with certain conclusions, or even many conclusions, offered by OLC during the relevant time period, the Draft Report provides little basis to speculate that the attorneys involved did not offer their independent, candid legal advice in good faith under the difficult circumstances presented. Absent any evidence to disbelieve the testimony of Mr. Bybee and Mr. Yoo, we respectfully submit that the speculation currently contained in the Draft Report is insufficient to support a finding that these attorneys were not acting in good faith or rendering their best independent assessment of the law in providing the advice contained in these opinions.[11]

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[10] Given classification concerns it is difficult to discuss what OPR appears to view as the most relevant evidence that Bybee and Yoo failed to provide their independent and candid legal advice.

[11] We also note that the factors OPR considered to determine whether Mr. Bybee and Mr. Yoo violated Rule 2.1 were factors OPR created in this case. As the draft report itself states, these factors are supported by little, if any, legal precedent or scholarly commentary. [Draft Report at 126.] If, as OPR asserts, there is little, if any relevant precedent concerning Rule 2.1, then such an approach is almost unavoidable. However, we note that the Draft Report offers as evidence of professional incompetence the Bybee Memo's failure to cite precedent to support its definition of the phrase "prolonged mental harm" under seemingly analogous circumstances. [Draft Report at 139.] When explicating that at least somewhat vague phrase, the Bybee Memo noted that the phrase appeared nowhere else in the federal code, and it then cited and discussed various dictionaries and secondary sources. [Bybee Memo at 7.] The Draft Report does not identify or suggest any secondary sources that the Bybee Memo should have also considered, nor does the Draft Report suggest that the phrase elsewhere appears elsewhere in any section of the federal code. [Draft Report at 139.]

B. RECONSIDERATION OF CERTAIN DECLINATIONS

The Draft Report recommends that "the Department reexamine certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG." [*Id.* at 9.] As the Draft Report itself recognizes, the question whether to prosecute matters addressed in the CIA OIG report has been addressed independently by two sets of prosecutors, first in the Counterterrorism Section (then located in the Criminal Division) and later in the U.S. Attorney's Office for the Eastern District of Virginia. In both cases, the declinations were based on a variety of prosecutorial considerations, many of which seemingly would be unaffected by any information in the Draft Report and most of which seemingly would have been known to prosecutors at the time of their decisions.[12] Indeed, prosecutors in the Eastern District of Virginia made their decision to decline prosecution in 2005, well after the 2002 Bybee Memo had been withdrawn by the Department. In addition, if and when OPR's report is finalized (whether with or without any professional misconduct referrals), the prosecutors could be given access to it, and could re-evaluate their decisions as they saw fit. In light of these facts, we believe it is unnecessary for OPR to recommend reconsideration.

C. RECOMMENDATION THAT THE DEPARTMENT REVIEW THE BRADBURY MEMOS

The Draft Report also recommends that the Department review certain Bradbury Memos. The Draft Report, however, does not acknowledge a key fact—that the Attorney General himself already reviewed the Bradbury Memos. This was undertaken, in what we believe was an unprecedented effort, in response to congressional requests for the Attorney General to do so. That fact alone, which is not even mentioned in the Draft Report, makes the recommendation seem inapposite.

Further, OPR supports its recommendation for an additional review on several grounds that appear to be misguided and inadequately supported. For example, the Draft Report says that the Bradbury Memos should be reviewed because there was "evidence that there was pressure on the Department to complete legal opinions which would allow the CIA interrogation program to go forward." [*Id.* at 182.] But the Draft Report, with all respect, misinterprets the only evidence it cites. As the Draft Report acknowledges, Bradbury has repeatedly stated, under oath and in his interviews with OPR, that he was never pressured to reach any particular result in his evaluation of CIA's interrogation program. In the end, it appears that OPR relies almost entirely on an email from then-DAG Jim Comey. But a fair reading of that email again suggests only that there was pressure to come to *an answer as soon as possible*, not pressure to come to *any particular answer or conclusion*. This is consistent with Bradbury's recollection. In light of this, we were pleased to hear that OPR did not intend to suggest that Bradbury was pressured to come to a particular result. [Statement of J. Meade, Dec. 31 meeting.][13]

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[12] Some of these considerations are discussed in classified portions of the Draft Report.

[13] It is extraordinarily commonplace for a client to urge or even pressure his or her attorney for a faster answer to a legal question than the attorney (or we, or a third-party reviewer, years later) may have preferred. Such clients furthermore typically are individuals and institutions with far less grave responsibilities than senior Executive Branch officials attempting to effectively defend our Nation and its citizens from terrorism and violence, consistent with legal advice from those positioned to undertake the analysis. In the same way, judges often impose tighter time constraints on attorneys, during trials and briefing, than the attorneys (or third-parties) might regard as optimal or

Another reason offered to support the review recommendation is the alleged failure of OLC or the Department to consider and address the moral and policy considerations triggered by the issues. [Draft Report at 189-90.] Although the Draft Report does not recommend OLC specifically do this, it does suggest that someone at the Department should address those issues. This criticism, however, appears to be based on a misapprehension of facts—both generally with respect to Department practices concerning the provision of policy (and moral) advice within the Executive Branch, and also more specifically with respect to events during the time period of the OLC opinions at issue.

Within the Executive Branch, there are extensive efforts to solicit relevant policy advice from all affected Departments or agencies. In this process, often referred to colloquially as "The Interagency," policy issues are reviewed and vetted, typically in an ascending process, with initial reviews and discussions occurring through subject matter experts and relatively senior officials. As the review progresses, it is carried forward and refined by officials such as the Deputies in the respective Departments. Ultimately, as appropriate, the policy reviews and analyses are further refined by "Principals," such as the Attorney General, the Secretary of Defense, the Secretary of State, and so forth. The exact number of levels of review can vary—based on whether there is broad consensus, the gravity or scope of the issue, etc.—but the salient point is that this review is undertaken and senior level Department officials can and do routinely provide policy advice within it. They also have the opportunity to provide moral advice, as appropriate, to interagency colleagues and the Vice President and President. With respect to policymaking concerning the question of interrogation practices at the time in question, it also has been widely reported that this was a subject discussed, at cabinet-level meetings, with, among others, the then-Attorney General present and participating.[14]

To be sure, some or all of us now participating in the review of the OPR Draft Report might disagree with the policy guidance that was then provided; we might even speculate about whether we would have disagreed with some or all of the policy assessments and advice provided if we actually had participated in events as they unfolded in real time in the months and years immediately following September 11, 2001. However, at the very minimum, the Department then and now participates, and surely will continue to participate, in a robust Executive Branch policy process that allows for senior level officials to offer, as appropriate, policy and moral advice.

Let us please offer three final points in this regard. First, in contemplating when and how the Department best offers its policy (or moral) advice to others in the Executive Branch, please note that the scope of policy questions under review is extraordinarily vast and complex. It reaches to issues, to take just a few examples, involving difficult environmental, diplomatic, economic, health care, and military matters. Our sister Departments and agencies within the

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even reasonable. The fact that Executive Branch officials would pressure OLC for *an answer*, so that they could proceed consistent with it, whatever that required, is enormously different than the allegation or speculation that an OLC attorney provided particular legal advice, or reached a particular conclusion, he or she did not believe in good faith was correct.

[14] *See, e.g.*, Staff of S. Comm. on Armed Servs., 110th Cong., REPORT ON INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xv (Comm. Print 2008); Condoleeza Rice, QFR from S. Comm. on Armed Servs. at 1-2, 6 (Sept. 12, 2008); John B. Bellinger, III, QFR from S. Comm. on Armed Servs. at 1-3, 7 (Sept. 12, 2008).

Executive Branch often are specifically tasked with being the world's leading experts on such matters, and those Departments and agencies draw upon literally hundreds of thousands of experienced and well-trained subject matter experts. Most of these experts are career civil servants who serve, and serve well, through administrations of whatever political affiliation. The Department of Justice and its senior leaders offer substantial policy and other advice in this Executive Branch process, but simple humility dictates the recognition that, on many issues presented, we are not the best-positioned voices in the policy dialogue.

Second, as part of this overall process, OLC has long had a unique role, both within the Department's efforts and within the interagency review as a whole. OLC often contributes to the policy process by being tasked to give simply legal advice, shorn of any policy preferences or shading. This task is well understood within the interagency process, and it is designed to ensure that at least one legal analysis, from very well-credentialed and hard-working attorneys, is provided that will not mask discretionary policy preferences as legal requirements or prohibitions. There are innumerable attorneys who work for our sister Departments and agencies, and often the claim is made that they, whether unintentionally or purposefully, are attempting to achieve policy outcomes by casting them as legal requirements. OLC therefore is tasked with providing legal advice *simpliciter*, across an enormously broad waterfront of complex legal questions, and not shading that advice with policy or other considerations. Again, such policy or moral advice is provided, as appropriate, by senior leaders from other offices and positions within the Department, and also, of course, from senior leaders from State, Defense, Treasury, EPA, HHS, and so forth, as well as, of course, by senior advisors to the President and Vice President.[15]

Third, with respect to the analysis set forth in the Draft Report, the comments to D.C. Bar Rule 2.1 appear at odds with OPR's suggestion that it would be "appropriate and necessary" for *OLC* to incorporate "moral, social and political factors" into its analysis of the relevant legal authorities concerning interrogation. [Draft Report at 189; *see also id.* at 191.] Specifically, Comment 3 to Rule 2.1 states, where "[a] client expressly or impliedly ask[s] the lawyer for purely technical advice," and is "experienced in legal matters," "the lawyer may accept [the request] at face value" and provide technical legal advice. Only where a client is "inexperienced in legal matters" may the lawyer's "responsibility as advisor" include providing guidance that goes beyond "strictly legal considerations." As discussed above, OLC's typical function in the Executive Branch is to provide its technical legal opinion to clients throughout the Executive Branch. Those clients (in this case, the General Counsel of the CIA and the White House Counsel) are sophisticated policymakers, who are fully capable of understanding the parameters of such advice and evaluating non-legal factors on their own. Those clients also are involved, along with the Attorney General and other cabinet members, as part of a robust and on-going Executive Branch review of relevant policy and moral issues.

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[15] If OLC were to more broadly provide policy and moral advice, it would necessarily need to gather substantial amounts of additional, relevant information across a broad array of subjects. Otherwise, the moral or policy advice would be ill-informed and even irresponsible. Such a process would diminish OLC's ability to perform its historic mission of providing pure legal advice. Attendant delays also would hinder OLC in its mission of providing that type of legal advice to the Executive Branch within timeframes that assist a President and his or her Administration to expeditiously evaluate and address challenges in a dynamic, evolving, and sometimes dangerous world, where inaction itself can have profound human consequences.

Finally, the next Administration will be free to review these opinions—as it is with all OLC memos or opinions—if it wishes. It is therefore unnecessary for OPR specifically to recommend such a review.

III. CONCLUSION

It is impossible to predict with precision the full impact of a recommendation of disciplinary action against lawyers who worked under the unprecedented circumstances referred to above, including the catastrophic loss of life suffered by the country in the September 11 attacks, the express threat of further such attacks and murders, and the possibility that such additional deaths could be avoided, as well as the absence of any reason to believe that these OLC lawyers were acting in anything but good faith. Nonetheless, it is also impossible to believe that government lawyers called on in the future to provide only their best legal judgment on sensitive and grave national security issues in the time available to them will not treat such a recommendation as a cautionary tale—to take into account not only what they honestly conclude, but also the personal and professional consequences they might face if others, with the leisure and benefit of years of hindsight, later disagreed with their conclusions. Faced with such a prospect, we expect such lawyers to trim their actual conclusions accordingly. Nor, if the recommendation of professional discipline stands, could the Department reasonably be expected to readily attract, as it does now, the kinds of lawyers who could make such difficult decisions under pressure without the lingering fear that if those decisions appear incorrect when reconsidered, not only their conclusions but also their competence and honesty might be called into question. OLC lawyers might be willing to subject themselves to the inevitable public second-guessing of their work that occurs years later in a time of relative calm. But we fear that many might be unwilling to risk their future professional livelihoods. Jack Goldsmith has written already of the dangers that what he calls cycles of aggression and timidity in intelligence gathering present to national security lawyers and the welfare of the Nation as a whole. *See* THE TERROR PRESIDENCY at 163-64. We believe that the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country.

Sincerely,

Michael B. Mukasey
Attorney General

Mark Filip
Deputy Attorney General

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

January 5, 2010

[redacted]

MEMORANDUM FOR THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL

FROM: David Margolis
Associate Deputy Attorney General

SUBJECT: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists

DISCUSSION:

On July 29, 2009, the Office of Professional Responsibility (OPR) issued a final report entitled *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*. OPR concluded that former Office of Legal Counsel (OLC) attorneys John Yoo and Jay Bybee engaged in professional misconduct by failing to provide "thorough, candid, and objective" analysis in memoranda regarding the interrogation of detained terrorist suspects. Consistent with OPR's usual procedures, OPR indicated its intent to refer its finding of misconduct to the state bar disciplinary authorities in the jurisdictions where Bybee and Yoo are members.

[redacted]

[redacted]

In keeping with usual Department practice,[1] I invited Bybee and Yoo to submit responses to OPR's final report. They submitted those responses on October 9, 2009, and the matter is now ripe for decision. My task is a narrow one. The OPR report addresses a number of topics without reaching misconduct findings against any Department attorney. I did not review OPR's analysis of those topics. For example, during the course of its investigation, OPR reviewed prosecutive declinations regarding interrogations of certain detainees, but I have not examined its analysis of those issues. In addition, OPR reviewed and analyzed several memoranda authored by former OLC attorney Steve Bradbury. Because that review did not result in a finding of misconduct or poor judgment, I have not reviewed that analysis. Rather, my review was strictly limited to the findings of misconduct against Yoo and Bybee.

For the reasons stated below, I do not adopt OPR's findings of misconduct. This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, OPR's own analytical framework defines "professional misconduct" such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard. For this reason and based on the additional analysis set forth below, I cannot adopt OPR's findings of misconduct, and I will not authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed.

I. Historical and procedural background

The terrorist attacks of September 11, 2001, engaged the United States in an unprecedented conflict involving a non-sovereign enemy. As a result of the unprecedented nature of the conflict, it has been the job of OLC to determine the legal contours of our nation's efforts to combat the terrorist threat. For example, on September 25, 2001, OLC issued a Memorandum Opinion for the Deputy Counsel to the President, *President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 2001 WL 34726560 (2001), and on October 23, 2001, OLC issued a Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, 2001 WL 36190674 (2001). The latter opinion notes, "The situation in which these issues arise is unprecedented in recent American history." *Id.* at *2. These were but the first of many opinions OLC issued regarding the response to September 11, 2001. These opinions fulfilled the role of OLC to identify the legal parameters within which policy-makers could make choices

[1]Beginning in the 1990s, I have been the Department of Justice official who has resolved challenges to negative OPR findings against former Department attorneys, most often in the context of proposed bar referrals.

[redacted]

and Bybee's contention that *Neagle* suggests the availability of a defense to charges arising out of expressly prohibited interrogation techniques seems wrong, particularly since the CAT treaty permits no justification for torture.

2. The Classified Bybee memo

a. Failure to discuss history surrounding use of water in interrogations

OPR first criticized the classified Bybee memorandum's discussion of waterboarding for failure to cite the United States' history surrounding the use of water in interrogations. OPR claimed the classified Bybee memo should have discussed *In re Estate of Marcos Litigation*, 910 F.Supp. 1460 (D.Haw. 1995) and *United States v. Lee*, 744 F.3d 1124 (5th Cir. 1984). In the former, the court considered damage claims from Filipino victims of the oppressive Marcos regime. The court listed fourteen interrogation methods it described as forms of torture. *Marcos*, 910 F.Supp. at 1463. The court's description of one of those techniques is similar to the waterboard. Subsequent to a jury trial during which the jury found in favor of 22 named plaintiffs, the court appointed a special master to depose a sampling of class members in the Philippines in an effort to develop a basis for the jury to determine damages for the class. *See Hilao v. Marcos*, 107 F.3d 767, 772 (9th Cir. 1996). The Special Master deposed 137 class members, approximately three of whom had been subjected to a waterboard-like procedure. In two of the cases, the waterboard-like procedure was part of a course of conduct that included other clearly torturous acts. In the third, the plaintiff, at 8:00 pm,

> was taken to a forest, stripped, forced to lie on a table, had his hands and feet held down, and had soapy water poured into his nose and mouth which made him feel like he was drowning. This treatment lasted until 4:00 am, during which time [plaintiff] lost consciousness "many times," felt chest pains, and cried. He testified that he never screamed because there was water in his mouth. After he would pass out, the soldiers would revive [plaintiff] which he said felt like "somebody was pushing the water out of his stomach." [Plaintiff] testified, "I experienced a lot of sufferings during that time. I wish that it would be better for them to kill me than to bear what they were actually doing to me at that time."

In re Estate of Marcos, 1994 WL 874222, 35 (D.Haw. January 3, 1995). The special master validated this claim and recommended a damage award of $30,000. *Id.* While the Ninth Circuit Court of Appeals considered two separate appeals in the case, only one of the opinions discussed a specific interrogation, and it was not the interrogation described above. *See Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). On appeal, the court quoted and approved the district court's jury instruction regarding torture that tracked the TVPA language. *Id.* at 792-93. The

[redacted]

[redacted]

Special Master apparently applied that same standard. A discussion of the *Marcos* case may have been helpful in some limited sense, but the only fact pattern that even resembled the procedure for which the CIA sought approval was found to constitute torture by a special master in an unpublished decision. Furthermore, it is even less clear that a discussion of this case was necessary in a memorandum written specifically to the CIA and for very limited distribution. Finally, Yoo and Bybee cited the Court of Appeals opinion in the appendix of the unclassified Bybee memo. Unclassified Bybee memo at 49. For these reasons, I am not persuaded that failure to cite this case evidences professional misconduct.

In *Lee*, the United States brought civil rights charges against law enforcement officers who subjected individuals in their custody to water torture. However, the opinion does not describe the technique nor conduct any analysis that would be useful as a predictor for how courts might construe Section 2340A in the future. In the Levin memo, written to replace the unclassified Bybee memo, Levin observed that Congress may have adopted a definition of torture that differed from the colloquial use of the term and noted that only the CAT definition was relevant to his analysis. Levin memo at 2. For these reasons, failure to cite *Lee* does not evidence professional misconduct.

OPR also described additional historical examples of "water torture," but the examples are distinguishable from the proposed technique and were not analyzed under language similar to the torture statute or the CAT. While citation to these examples may have provided useful historical context, it seems that such context would largely relate to the policy decision rather than to the legal question. For this reason, the Rules of Professional Conduct did not require reference to those historical incidents. *See* OPR final report at 21 n.23.

b. Failure to discuss distinctions between SERE training and interrogation

OPR next criticized the classified Bybee memo for failing to point out [redacted]

A close reading of the unclassified Bybee memo demonstrates that the psychological impact of the proposed techniques mattered only to the approval of the waterboard. The torture statute proscribes acts "specifically intended to inflict severe physical or mental pain or suffering

[redacted]

[redacted]

consequences to the trainees indicates that it is highly improbable that such consequences would result here." *Id.* at 17-18. The memo would more correctly have observed that Zubaydah's psychological assessment, combined with the SERE experience and the CIA's intention to have medical experts monitor the interrogation, made it highly improbable that Zubaydah would suffer mental health consequences. As drafted, however, the memo could be interpreted as concluding that the SERE experience alone virtually eliminated the need for an individualized assessment. [redacted] Because of the context, however, that erroneous (at worst) or poorly drafted (at best) observation was not critical to the approval of the techniques on Zubaydah.

c. Other criticisms

OPR faulted the classified Bybee memo for failing to discuss whether procedures used to effect sleep deprivation would cause severe physical or mental pain or suffering apart from the sleep deprivation itself. OPR pointed out that the Bradbury techniques memo[17] noted that the classified Bybee memo had not considered the mechanisms for effecting sleep deprivation. The Bradbury techniques memo concluded, however, that those mechanisms would not cause severe pain or suffering and approved sleep deprivation as an interrogation technique that would not violate the torture statute. Bradbury had the advantage of considering the reported experiences from prior interrogations involving sleep deprivation that would not have been available to Yoo and Bybee. *See* Bradbury techniques memo at 37 n.45. Furthermore, by way of example only, the European Court of Human Rights found that sleep deprivation was not torture but likewise did not explore the means used to keep a detainee awake. *See Ireland v. United Kingdom, supra.* The memo would have been more complete had OLC asked the CIA how it intended to keep a detainee awake and addressed those mechanisms.

Next, OPR claimed that the classified Bybee memo should have noted that a Supreme court case from 1944 quoted an American Bar Association (ABA) report describing sleep deprivation as "the most effective torture and certain to produce any confession desired." OPR final report at 236 *quoting Ashcraft v. Tennessee*, 322 U.S. 143, 151 n.6 (1944). As observed by Levin, colloquial uses of the term "torture" have little relevance to determining whether a particular technique violates the torture statute. Levin memo at 2. Furthermore, the actual question before the Court was weather Ashcraft's confession was compelled not whether the interrogation was torturous. The Court cited the referenced ABA report only as one account of

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[17]Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: Application of 18 U.S.C. §§ 2340-2540A to Certain Techniques That May Be Used. in the Interrogation of a High Value al Qaeda Detainee, May 10, 2005.

[redacted]

the disputed events surrounding Ashcraft's interrogation. Although the Court found Ashcraft's confession was compelled, the Court itself did not describe the interrogation as torturous. *Id.* at 154. For these reasons, I am unpersuaded that the Rules of Professional Conduct required Yoo and Bybee to cite *Ashcraft* in the classified Bybee memo.

Finally, OPR faulted Yoo and Bybee for failing to consider how a detainee would be forced to maintain stress positions. Although the Bradbury techniques memo addressed the mechanisms used to keep someone awake, it did not address the mechanisms used to cause someone to maintain stress positions. OPR faulted Yoo and Bybee for failing to consider whether the "subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions." OPR final report at 237. First, it is implausible that the CIA would seek authority to use a stress position but fail to advise the CIA that the detainee would be beaten in order to maintain the position. Second, the torture statute itself prohibits certain types of threats that would cause prolonged mental harm including threats of imminent death, threats to inflict torturous pain, and threats of death or torturous pain to third parties. The memo listed those prohibited threats in its discussion of the techniques in question. Classified Bybee memo at 1. Finally, although the memo does not address the possibility that shackling could constitute torture, its broad prohibition on the infliction of severe pain communicated to the CIA that it could not inflict severe pain in an effort to maintain an approved stress position. For these reasons, the DCRPC did not unambiguously require Yoo and Bybee to address the mechanisms for maintaining approved stress positions.

3. Conclusion

In sum, I concluded that in the unclassified Bybee memo, Yoo and Bybee's discussion of severe pain, *PCATI v. Israel*, Commander-in-Chief authority, and self-defense (particularly the discussion of *In re Neagle*) were flawed. On the other hand, although the analyses of specific intent, the CAT ratification history, United States judicial interpretations, *Ireland v. United Kingdom*, and the necessity defense were debatable, those analyses generally were most susceptible to criticism because they slanted toward a narrow interpretation of the torture statute at every turn. I concluded above that the DC Rules, considered in total and not in isolation, obligated Yoo and Bybee not to knowingly or recklessly provide incorrect legal advice or to provide advice in bad faith. Further, Rule 1.1 unambiguously obligated them to provide competent advice. The District of Columbia courts have held proof of violation of Rule 1.1 requires a serious deficiency defined as "an error that prejudices or could have prejudiced a client . . . caused by lack of competence." *In re Evans*, 902 A.2d 69-70 (D.C. 2006).

With respect to Bybee, particularly in light of his supervisory role in the issuance of these memos, I conclude the preponderance of the evidence does not support a finding that he knowingly or recklessly provided incorrect advice or that he exercised bad faith. Also, there is

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February 21, 2012

War Without End

To the Editor:

"This War Is Not Over Yet," by Mary L. Dudziak (Op-Ed, Feb. 16), makes a vivid and important observation: despite the end of the Iraq and Afghanistan conflicts, this administration has laid the foundation for a never-ending global battle.

Among other wartime privileges the United States claims, it asserts the right to detain people indefinitely until the end of "hostilities." The cost of indefinite detention to human life cannot be overstated.

A person indefinitely detained can experience pathological levels of stress that damage the immune and cardiovascular systems, as well as hypertension, depression, suicide, post-traumatic stress disorder and lasting personality changes. Some people even manifest physical symptoms of the psychological trauma like breathing difficulties and physical pain.

The United States has an obligation to treat all detainees with a certain standard of care, but when there is no end to the global war against Al Qaeda, indefinite detention is a life sentence without trial, and it can result in lasting physical and mental harm.

SCOTT A. ALLEN
KRISTINE A. HUSKEY
Washington, Feb. 17, 2012

The writers are, respectively, a medical adviser to Physicians for Human Rights and director of its Anti-Torture Program.

Punishment Before Justice: Indefinite Detention in the US

Executive Summary

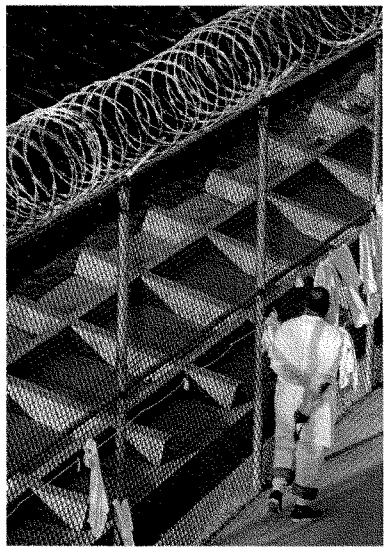
This report demonstrates that the harms endured by individuals held indefinitely are unconstitutionally punitive, thus violating detainees' rights to due process. Moreover, the serious harm that already traumatized populations face constitutes cruel, inhuman or degrading treatment, in violation of domestic and international law.

Indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee when—if ever—the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody. The term encompasses other custody arrangements, including "preventive detention," "executive custody," "security detention," "military detention," "prolonged detention," "administrative detention," "conditional detention," or, under the March 7 Executive Order, "continued law of war detention." [1]

The US currently has approximately 170 individuals indefinitely detained at Guantánamo Bay. While only 15 of these individuals have been designated "high value detainees,"[2] many of these detainees have already spent roughly 7-9 years[3] in the harshest, most restrictive, and isolating conditions available[4] and were subjected to torture.[5] The US government also indefinitely detains thousands of refugee and non-refugee immigrants, detentions whose purported justifications include national security, immigration, and foreign policy concerns.[6] Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many non-refugee seekers have languished in detention for years vainly waiting for the day that they will finally be deported.[7]

Independent evaluations of current detainees' medical records and forensic medical and psychological evaluations of former detainees, confirmed by first-hand accounts of military personnel and lawyers, have demonstrated that national security detainees were tortured by the US government.[8] Similar evaluations of asylum seekers have established that many were tortured at the hands of state and non-state actors within their home countries.[9] In addition, NGOs have collectively and powerfully made the case that mandatory, indefinite detention violates domestic and international laws concerning the civil and political right to be free from arbitrary arrest and detention.[10]

The Obama Administration's analysis of current procedures has resulted in it promulgating rules that contemplate more frequent reviews (before military tribunals) of the government's justification for detaining those held on national security grounds. The administration also has made statements of intent to reform the civil detention scheme applicable to immigrants and asylum seekers.[11] However, a system that permits the govern-



A detainee walks in the outdoor recreation area at Camp 6, Naval Station Guantánamo Bay, Cuba, March 1, 2011. (U.S. Navy photo by Mass Communication Specialist 2nd Class Jordan J. Miller/Released)

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ment to hold people year after year, review after review, on the grounds that the individual poses a threat to the nation without the government ever being required to prosecute or release the detainee, does not transform an indefinite detention into a detention of a fixed term.

Methodology

Little clinical research has focused specifically on the health effects of the indefinite duration of detention.[12] This report draws on research concerning

i. the experiences of analogous populations such as political prisoners and prisoners of war,[13] the wrongfully convicted,[14] and inmates held in administrative segregation for non-disciplinary reasons;[15]
ii. the physical and psychological effects of uncertainty, uncontrollability, and unpredictability as evidenced by those subjected to conditions of sensory deprivation[16] and confronted with medical uncertainty;[17] and
iii. the physical and psychological effects of being isolated from one's social, linguistic, cultural and familial networks.[18]

The medical literature provides convincing evidence that the indeterminacy of an indefinite detention creates a degree of uncertainty, unpredictability and uncontrollability that causes severe harms in healthy individuals independent of other aspects or conditions of detention. The harmful psychological and physical effects of indefinite detention include:

- Severe and chronic anxiety and dread
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune, cardiovascular, and central nervous systems
- Depression and suicide
- Post-traumatic stress disorder
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.

Furthermore, the harms associated with indefinite detention threaten to severely exacerbate existing severe physical and psychological symptoms and perpetuate mental suffering, thereby foreclosing any opportunity for healing.

Conclusions and Recommendations

In light of these unavoidable and serious health effects, policies mandating or permitting indefinite detention must be abolished. Physicians for Human Rights urges the US government to take affirmative steps to end indefinite detention in those contexts and proposes the following recommendations toward that goal.

Regarding National Security Detainees at Guantánamo and Other Sites

The United States government should:

- Reject solutions to national security problems that permit or rely on indefinite detention and take affirmative efforts to end its current practice.
- Support trials in Article III courts for individuals detained at Guantánamo and coordinate the various branches of government to ensure that civilian trials for detainees are a policy priority.
- Grant a request from the Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment to investigate the detention facility at Guantánamo.
- Encourage greater international cooperation for both prosecutions and repatriation of detainees at Guantánamo.
- Until the time that indefinite detention is abolished as a matter of policy, the United States government should Provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees.
- Permit non-governmental, independent medical and psychological experts to evaluate the mental and physical health of detainees.

Regarding Individuals In Immigration Detention:

- Strictly limit mandatory detention in the immigration setting to ensure that individuals who do not pose a security threat nor flight risk have the opportunity to pursue release from detention.
- Strictly limit the use of detention for asylum applicants.
- Make greater use of alternatives to detention, including community-based monitoring programs that have been proven effective, without significantly expanding the total number of immigrants under some form of DHS supervision.
- Allow the American Bar Association and the United Nations High Commissioner for Refugees broad access to immigration detention facilities.
- Promulgate regulations that require the Department of Homeland Security to routinely update an individual in immigration detention about the stages of the detention process including, whenever possible, time estimates regarding court proceedings. Congress should amend the Immigration and Naturalization Act to reflect the need for regular status updates for individuals in immigration detention.

...a system that permits the government to hold people year after year, review after review, on the grounds that the individual poses a threat to the nation without the government ever being required to prosecute or release the detainee, does not transform an indefinite detention into a detention of a fixed term.

NOTES

1. March 7, 2011 Executive Order, *supra* n. 1. *See also* A. Caldwell, *Executive Order for Detainee Review Being Drafted*, WASHINGTON POST, Dec. 22, 2010.
2. The Guantánamo Docket: High Value, NY TIMES available at *http://projects.nytimes.com/guantanamo/detainees/high-value*.
3. The first detainees were transferred to Guantánamo on January 11, 2002. The Guantánamo Docket: A History of the Detainee Population, NY TIMES, *available at http://projects.nytimes.com/guantanamo*.
4. G. Brenner, *The Expected Psychiatric Impact of Detention in Guantanamo Bay, Cuba, and Related Considerations*, 11 JOURNAL OF TRAUMA & DISSOCIATION 469, 471 (2010). (noting that Guantánamo detainees are held for "22 hr per day, in small rooms with minimal exercise or stimulation. Nearly 80% are isolated, often for years. In maximum security areas, there is minimal activity, companionship or physical exercise").
5. PHR, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT 2008, *available at http://brokenlives.info/?page_id=69*; PHR, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES, 2005, *available at: http://physiciansforhumanrights.org/library/report-2005-may.html*; PHR/HRF, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY, 2007, *available at http://physiciansforhumanrights.org/library/report-2007-08-02.html*.
6. Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security, responsible for administering U.S. immigration policy, detains more than 400,000 individuals every year. Heartland Alliance National Immigrant Justice Center *et al.*, YEAR ONE REPORT CARD: HUMAN RIGHTS AND THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS, October 16, 2010, available at *http://immigrantjustice.org/icereportcard*. *See also* N. Bernstein, *Immigration Detention System Lapses Detailed*, NY TIMES, December 3, 2009. From 2001 to 2010, the average daily detention population rose from approximately 20,000 non-citizens to over 30,000. C. Haddal and A. Siskin, Immigration-Related Detention: Current Legislative Issues, CONGRESSIONAL RESEARCH SERVICE, January 27, 2010 at 12. In 2003, at least 5,000 of those held in immigration detention were asylum seekers. A. Keller *et al.*, *Mental health of detained asylum seekers*, 362 LANCET 1721, 1721 (2003).
7. PHR, Bellevue/NYU Program for Survivors of Torture, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS, 2003, at 38; M. Dow, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS, U. of California Press: 2004 at 223 ("AMERICAN GULAG").
8. *See, e.g.*, PHR, AIDING TORTURE, *supra* n. 6; PHR, BROKEN LAWS, BROKEN LIVES, *supra* n. 7; PHR, BREAK THEM DOWN, *supra* n. 7; PHR/HRF, Leave No Marks, *supra* n. 7. *See also* Iacopino, *supra* n.6.
9. *See, e.g.*, PHR, FROM PERSECUTION TO PRISON, *supra* n. 9.
10. *See, e.g.*, Human Rights Watch, "US: Prolonged Indefinite Detention Violates International Law Current Detention Practices at Guantanamo Unjustified and Arbitrary," January 24, 2011, *available at http://www.hrw.org/en/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law*.
11. March 7, 2011 Executive Order, *supra* n. 1; A/HRC/WT.6/9/USA/1 at ¶ 93 (National report submitted by the United States to the Human Rights Council Working Group on the Universal Periodic Review, 1-12 November 2010). ("DHS issued revised parole guidelines, effective January 2010, for arriving aliens in expedited removal found to have a credible fear of persecution or torture. The new guidelines firmly establish that it is not in the public interest to detain those arriving aliens found to have a credible fear who establish their identities, and that they pose neither a flight risk nor a danger to the community").
12. G. Coffey *et al.*, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, 70 SOCIAL SCIENCE & MEDICINE 2070, 2071 (2010). ("Very little is known about how detainees attempt to adapt to the institutional environment of detention centres and deal with the indeterminate nature of their confinement, or how the measures they take affect their well-being and integration into society on release").
13. *See, e.g.*, B. Griffeth and R. Bally, *Language and Cultural Barriers in the Assessment of Enemy Prisoners of War and Other Foreign Nationals*, 57 PSYCHIATRIC SERVICES 258, 258 (2006); B. Saab *et al.*, *Predictors of psychological distress in Lebanese hostages of war*, 57 SOC SCI & MED 1249-57 (2003).
14. *See*, A. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME AND JUSTICE 1 (2005).
15. *See, e.g.*, Bruce Arrigo, THE ETHICS OF TOTAL CONFINEMENT (Oxford U. Press: pending) at 94. ("Perhaps one of the greatest concerns regarding administrative segregation is that an inmate may be placed there indefintely ... placement in this type of solitary confinement relies solely on the discretion of correctional administrators and staff ... (because this isn't considered "disciplinary segregation," there is no process associated with it).
16. *See, e.g.*, C. Haney, *Issues in Solitary, Supermax Confinement*, 49 CRIME & DELINQUENCY 124 (2003); PHR/HRF, LEAVE NO MARKS, *supra* n. 7.
17. L. Johnson et al., *The Illness Uncertainty Concept: A Review*, 13 CURRENT PAIN AND HEADACHE REPORTS 133 (2009); J. Reich *et al.*, *Uncertainty of Illness Relationships with Mental Health and Coping Processes in Fibromyalgia Patients*, 29 JOURNAL OF BEHAVIORAL MEDICINE 307 (2006).
18. Griffeth *supra* n. 27 at 258.

Woman in immigration detention. Getty Images.

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