

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 not 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's 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 the 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.