

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.