THE DUE PROCESS GUARANTEE ACT: BANNING INDEFINITE DETENTION OF AMERICANS
Hearing Before the Senate Committee on the Judiciary
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Chairman Leahy, Senator Grassley, and distinguished members of the Committee:

Thank you for inviting me to testify before the Committee today. I'd like to make three brief points: ***First***, 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. ***Third***, such an approach would not unduly interfere with the President's power to incapacitate terrorism suspects within the United States.

I. THE NDAA AND THE UNCLEAR STATUS QUO

As popular media reports suggest, there continues to be widespread public confusion as to whether the National Defense Authorization Act for Fiscal Year 2012 ("NDAA")[1] authorizes the government to subject to military detention individuals initially apprehended inside the territorial United States, including U.S. citizens.[2] The formal answer, of course, is that it does not.[3] Thanks to an amendment introduced by Senator Feinstein, the NDAA merely preserves the status quo with regard to such authority, a status quo defined entirely by the September 2001 Authorization for Use of Military Force ("AUMF"),[4] and the only two cases raising whether it authorizes domestic detention.[5] Neither of these cases, however, clearly resolves the question.

1. Pub. L. No. 112-81, 125 Stat. 1298 (2011).

2. *See, e.g.*, Charles C. Krulak & Joseph P. Hoar, *Guantánamo Forever?*, N.Y. TIMES, Dec. 13, 2011, at A35 ("One provision would authorize the military to indefinitely detain without charge people suspected of involvement with terrorism, including United States citizens apprehended on American soil.").

3. *See* NDAA § 1021(e), 125 Stat. at 1562 ("Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."). Marty Lederman and I have suggested that the NDAA *does* resolve an outstanding debate about whether detention authority under the AUMF is informed by the laws of war, *see* Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War* (pts. 1–2), LAWFARE, Dec. 31, 2011, http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i/, but that point is tangential to today's hearing.

4. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

The first of these two cases involved Jose Padilla, a U.S. citizen initially arrested on a material witness warrant at Chicago's O'Hare Airport in May 2002. Padilla was transferred to military custody one month later and detained as an "enemy combatant" until early 2006,[6] when he was indicted on criminal charges and tried (and ultimately convicted) in an Article III court.[7] Although the Supreme Court never ruled on the legality of Padilla's detention as an "enemy combatant,"[8] both the Second and Fourth Circuits did, reaching diametrically opposite conclusions. The Second Circuit initially ruled in December 2003 that Padilla's military detention was not authorized because of the Non-Detention Act,[9] which provides that "[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress."[10] Although the government argued that the AUMF provided such authority, the Court of Appeals disagreed—concluding that, at least for citizens arrested within the territorial United States, § 4001 requires a "clear statement," which the AUMF did not provide.[11]

The Fourth Circuit subsequently disagreed with the Second Circuit,[12] albeit by offering a somewhat different version of the facts of Padilla's case—predicated on the finding that Padilla had associated himself with enemy forces in Afghanistan, and, "with [their] aid, guidance, and direction entered this country bent on committing hostile acts on

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committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

5. Although Yaser Esam Hamdi was eventually detained as an "enemy combatant" inside the United States, his initial capture and detention occurred in "in a zone of active combat operations" in Afghanistan. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510, 516 (2004) (plurality opinion).

6. *See* Padilla v. Hanft, 547 U.S. 1062, 1062–63 (2006) (Kennedy, J., concurring).

7. *See* United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011) (summarizing facts—and rejecting appeal—of Jose Padilla's conviction in civilian criminal court).

8. When the case first reached the Court in 2004, the Justices held that Padilla had brought his habeas petition against the wrong defendant, and that, as such, the federal courts in New York did not have personal jurisdiction over the proper respondent. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004). Padilla promptly refilled in an appropriate venue—the District of South Carolina. *See* Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005).

9. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

10. 18 U.S.C. § 4001(a) (2006).

11. *See Padilla*, 352 F.3d at 699. As Judges Parker and Pooler explained, "While it may be possible to infer a power of detention from the [AUMF] in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the [AUMF] that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not 'arrayed against our troops' in the field of battle." *Id.* at 722.

12. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

American soil."[13] Thus, the Court of Appeals reasoned, Padilla's case more closely resembled that of Yaser Hamdi (whose detention the Supreme Court held to be authorized by the AUMF),[14] and so the clear statement required by the Second Circuit in cases of purely domestic detention was unnecessary.[15] Because Padilla's transfer to criminal custody arguably mooted his habeas petition, the Supreme Court ultimately declined to review the Fourth Circuit's decision.[16]

The second case of post-9/11 military detention within the territorial United States involved Ali Saleh Kahlah al-Marri, a Qatari national who was residing in the United States when he was arrested on a material witness warrant in December 2001.[17] Although al-Marri was detained pending various criminal charges until June 2003, he was subsequently transferred to military custody and detained as an enemy combatant through March 2009,[18] at which point, like Padilla, he was transferred back to civilian custody to stand trial before an Article III court.[19] As in Padilla's case, al-Marri's transfer thereby mooted his challenge to the lawfulness of his military detention, and led the Supreme Court to vacate a decision by the en banc Fourth Circuit,[20] which had held, 5-4, that the AUMF authorized al-Marri's detention.[21]

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13. *Id.* at 392.

14. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517–24 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting) ("I agree with the plurality that we need not decide [whether the President has inherent power to detain U.S. citizens as 'enemy combatants'] because Congress has authorized the President to do so.").

15. *See Padilla*, 423 F.3d at 395–96.

16. *See* Padilla v. Hanft, 547 U.S. 1062 (2006) (mem.).

17. *See* al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004).

18. *See* al-Marri v. Spagone, 555 U.S. 1220 (2009) (mem.).

19. *See* John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 29, 2009, at A22.

20. *al-Marri*, 555 U.S. at 1220 (vacating the Fourth Circuit's decision and remanding with instructions to dismiss the appeal as moot).

21. *See* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc). There was no controlling rationale for the five-judge majority as to why the AUMF authorized al-Marri's detention. Instead, the opinion that arguably governed was the narrow concurrence by Judge Traxler, in which he concluded that

> I am of the opinion that the AUMF also grants the President the authority to detain enemy combatants who associate themselves "with al Qaeda, an entity with which the United States is at war," and "travel[] to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets," even though the government cannot establish that the combatant also "took up arms on behalf of that enemy and against our country in a *foreign* combat zone of that war."

Id. at 259 (Traxler, J., concurring in the judgment) (alteration in original; emphasis added).

Much more can—and has been—said about this case law. For present purposes, though, it suffices to note that there is exceedingly little precedent bearing on the government's power to subject individuals arrested inside the United States to military detention. The only opinion still in force—that of the Fourth Circuit in *Padilla*—turned on exceedingly narrow facts, and has been questioned even by the jurist who *wrote* it.[22] Thus, although the Feinstein Amendment to the NDAA preserved the status quo with regard to domestic military detention under the AUMF, the only thing that is clear about that pre-NDAA case law is its *lack* of certainty.[23]

II. THE VIRTUES OF (AND PRECEDENTS FOR) A CLEAR STATEMENT RULE

This leads me to my second point—that there are sound constitutional and prudential reasons why Congress should have to speak clearly whenever it seeks to authorize the military detention, without trial, of individuals arrested or otherwise captured within the territorial United States.

It should go without saying that extended domestic military detention raises grave constitutional questions. At least where citizens are concerned, Justice Scalia has suggested that the Suspension Clause categorically bars domestic detention absent a valid suspension of habeas corpus.[24] More generally, the Supreme Court has repeatedly read

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22. *See* Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005). In criticizing the government's attempt to moot Padilla's case on the eve of Supreme Court review, Judge Luttig suggested that:

> its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant.

Id. at 588.

23. I have focused in my testimony on post-September 11 case law. But I don't believe *pre*-September 11 case law alters this analysis. Although *Ex parte Quirin* is routinely invoked as support for the government's power to subject individuals arrested within the United States to military detention, that case is inapposite for two reasons: (1) the saboteurs were not detained without charge, but were tried by military commission; and (2) relatedly, the very statutes the Court held to authorize their trial by military commission *a fortiori* authorized their detention incident to that trial. *See Ex parte* Quirin, 317 U.S. 1 (1942). As for the one case in which a U.S. citizen *was* detained without trial during World War II, there, the citizen in question was captured in Italy while fighting for the Italian Army—not inside the territorial United States. *See In re* Territo, 156 F.2d 142 (9th Cir. 1946).

24. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 563–72 (2004) (Scalia, J., dissenting).

the Due Process Clause to include both procedural and substantive limits on who may be detained without trial and for how long.[25] And so for any individual protected by the Due Process Clause, regardless of citizenship, domestic military detention will implicate constitutional concerns both at its inception and as its duration increases.[26]

Given that conclusion, it only makes sound institutional sense for Congress to legislate a clear-statement requirement when it comes to the military detention of individuals arrested within the territorial 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. Most famously, the Posse Comitatus Act of 1878 forbids the use of the Army and 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."[27] Whether or not one sees military detention as falling within the ambit of the Posse Comitatus Act,[28] the same justifications for requiring express authorization in that context should apply with equal or greater force to detention.

And when it comes to the detention of U.S. citizens, Congress has also adopted such a rule in the Non-Detention Act. That statute was enacted by Congress in 1971 largely in response to the Japanese-American internment camps during World War II,[29] in which a substantial percentage of the more-than 100,000 detainees were held *without* specific

25. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001) (recognizing a presumptive six-month time-limit on how long non-citizens can be detained pending deportation before the government's inability to successfully remove them from the country should require their release); Kansas v. Hendricks, 521 U.S. 346 (1997) (holding that Due Process Clause requires specific and individualized dangerousness showings before violent sex offenders can be subject to civil commitment); Foucha v. Louisiana, 504 U.S. 71 (1992) (same for civil commitment of individuals found not guilty at trial by reason of insanity); United States v. Salerno, 481 U.S. 739 (1987) (same for pre-trial confinement of criminal defendants).

26. *See* Demore v. Kim, 538 U.S. 510, 548 (2003) (noting "our repeated decisions that the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual").

27. 18 U.S.C. § 1385 (2006) (emphasis added).

28. *See, e.g.*, Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 588 n.9 (S.D.N.Y. 2002) (holding that Posse Comitatus Act does not apply to military detention).

29. *See* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436 (noting that "groups of Japanese-American citizens regard the [Emergency Detention Act of 1950] as permitting a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II"); *see also id.* at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1439 ("Repeal alone might leave citizens subject to arbitrary executive detention, with no clear demarcation of the limits of executive authority. . . . [R]epeal alone would leave us where we were prior to 1950.").

statutory authorization.[30] It has long been my view that, in light of this history, the Second Circuit was unquestionably correct in *Padilla* that the Non-Detention Act meant to require *clear* congressional authorization for the detention of U.S. citizens.[31] But the Fourth Circuit held to the contrary in Padilla's case.

To the extent that amending § 4001(a) 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. Indeed, as Deputy National Security Advisor John Brennan recently explained, "it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it."[32] Congress should amend the law to clarify that it shares this view.

III. NUMEROUS EXISTING AUTHORITIES WOULD SATISFY A CLEAR STATEMENT RULE

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.

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30. At least from a statutory authority perspective, there were three distinct sets of issues in the internment cases: For those (like Fred Korematsu) who were convicted of violating an Act of Congress, their detention could arguably be described as being authorized by Congress (even if likely unconstitutional on other grounds). *See* Korematsu v. United States, 323 U.S. 214 (1944). As Chief Justice Rehnquist has suggested, those internees who were Japanese nationals could possibly have been (but were not) detained under the Alien Enemy Act, 50 U.S.C. §§ 21–24, just like tens of thousands of German and Italian nationals were also detained during the war. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 208–210 (1998). Finally, the most controversial category included those internees, like Mitsuye Endo, who were U.S. citizens who voluntarily relocated to the camps. *See Ex parte* Endo, 323 U.S. 283 (1944). Although each category poses its own constitutional problems, the Non-Detention Act itself would have only categorically prohibited detention of those individuals similarly situated to Endo.

31. *See, e.g.*, Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003). *See generally* Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 395, 406 (1974) (providing a more comprehensive summary of the legislative debates culminating in the enactment of the Non-Detention Act).

32. Remarks of John O. Brennan Before the Program on Law and Security, Harvard Law School (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

For example, all federal criminal statutes would necessarily satisfy a clear statement rule, since each expressly provides authority for imprisonment,[33] and the Bail Reform Act of 1984 expressly authorizes pre-trial detention in appropriate cases.[34] Given the Supreme Court's jurisprudence holding 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,[35] the government thereby has a combination of short- and long-term detention authority for any individual arrested within the United States on suspicion of terrorism-related offenses.

In addition, there is also the possibility that the government might validly obtain a federal material witness warrant to detain individuals who may have information material to ongoing terrorism investigations even when there is not enough evidence to support an indictment against those suspects.[36]

For non-citizens within the United States, the government has express authority to detain for immigration violations pending deportation,[37] along with the specific power conferred by section 412 of the USA PATRIOT Act[38] to detain non-citizen terrorism suspects for seven days before charging them with a criminal or immigration offense or releasing them.[39]

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33. *See, e.g.*, 18 U.S.C. § 2339B(a)(1) (2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both . . . .").

34. *See* 18 U.S.C. § 3142(e).

35. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 55–58 (1991). Even *County of Riverside* recognized that 48 hours may not be constitutionally required in cases in which the government can "demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

36. *See* 18 U.S.C. § 3144; Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011); *cf.* United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (holding that § 3144 can be used to secure witnesses before *grand* juries, and that the detention of a material witness for 29 days was not inappropriate on the facts of the case).

37. *See* 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States"); *see also* Diop v. ICE, 656 F.3d 221, 230 (3d Cir. 2011) (summarizing the role of § 1226(a)). Indeed, in some cases, federal law *requires* detention of certain non-citizens pending removal. *See* 8 U.S.C. § 1226(c).

38. *See* 8 U.S.C. § 1226a(a)(3) (authorizing detention of non-citizens if the Attorney General certifies that he has reason to believe that the detainee (1) committed certain offenses related to espionage, terrorism, or supporting the overthrow of the government by violent or other unlawful means; or (2) "is engaged in *any other activity* that endangers the national security of the United States" (emphasis added)).

39. Section 412 authorizes detention for up to seven days before the Attorney General must either (1) place the non-citizen in removal proceedings; or (2) bring criminal charges. *See id.* § 1226a(a)(5). But the statute appears to contemplate *continued* detention within the removal proceedings for up to six months, so long as "the 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).

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's ability to expressly authorize domestic detention when it chooses to do so.

Finally, lest this point go unmentioned, even in cases in which extant law does not provide express authorization for domestic military detention, and subject to relevant constitutional considerations, Congress can *provide* clear authorization to supplement these existing authorities. 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 noted above, and to prevent the Executive Branch from seizing on statutory ambiguity to claim powers on the homefront that Congress never specifically intended to confer.

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Mr. Chairman, 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 applies domestically. Thank you again for inviting me to participate in this hearing. I look forward to your questions.