HEARING BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

"THE DUE PROCESS GUARANTEE ACT:
BANNING INDEFINITE DETENTION OF AMERICANS"

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Testimony of Steven G. Bradbury

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

Chairman Leahy, Senator Grassley, and Members of the Committee, thank you for the kind invitation to testify today regarding S. 2003, the Due Process Guarantee Act. It is a distinct honor to appear before this Committee.

Please note that I am speaking today only for myself, in my personal capacity, and not on behalf of my law firm, any current or former client, or any other organization or entity.

Introduction

I served in the Department of Justice from 2004 until 2009, and I led the Department's Office of Legal Counsel from early 2005 until the end of the Bush administration. OLC is the office of the executive branch that most often addresses constitutional and statutory questions involving the interplay

between the Article II duties and authorities of the President and the Article I powers of Congress. During my tenure in OLC, for example, I had the privilege of working with Members of Congress and appearing before this Committee in connection with enactment of the Military Commissions Act of 2006. It is in light of my experience in OLC that I offer these thoughts on the proposed legislation, S. 2003.

This bill would amend the Non-Detention Act, 18 U.S.C. § 4001, by adding a new subsection providing as follows:

> 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.

The evident purpose of the legislation is to prevent the President from detaining as an enemy combatant under the laws of war, without criminal charge, 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, such as a U.S.-based terrorist recruit of al Qaeda acting to carry out an armed attack within our borders.

It should be stressed that today, without this legislation, any American citizen 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 rights in recent years, including in *Hamdi v. Rumsfeld*, and the recognition and enforcement of these bedrock rights 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, I believe it is important to recognize that if an American citizen is captured in the U.S. as an enemy combatant engaged in hostilities against the United States, the President—any President—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 rare when such a person would be held for an extended period without charge as an enemy combatant under the laws of war, and that has, indeed, been our experience historically, including in the years since 9/11.

Nevertheless, in addressing 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 it 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.

Background: *Hamdi v. Rumsfeld*

In *Hamdi v. Rumsfeld*, five members of the Supreme Court concluded that the Authorization for the Use of Military Force, or "AUMF," enacted in the immediate wake of the attacks of 9/11, authorized the President to detain a U.S. citizen in military custody as an enemy combatant in accordance with the laws of war. *See* 542 U.S. 507, 518-19 (2004) (plurality opinion of Justice O'Connor for four members of the Court); *id.* at 587 (dissenting opinion of Justice Thomas) (agreeing with plurality that AUMF authorized detention).

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, that due process guaranteed him 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 decisionmaker, and that he had a right to counsel in pursuing such a

challenge. *See id.* at 524-39 (plurality opinion); *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 internment of Japanese Americans in World War II. *See id.* at 535 (plurality opinion) (citing Justice Murphy's dissent in *Korematsu v. United States*).

In construing the language of the AUMF that authorizes the President to use "all necessary and appropriate force" against nations, organizations, and persons associated with the attacks of 9/11, the Court in *Hamdi* recognized that the President's power to detain an enemy combatant in a time of armed conflict 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. *Id.* at 518 (plurality opinion). And the Court held that the President's well-recognized authority to detain enemy combatants in accordance with the laws of war extends to the detention of U.S. citizens who act in league with the enemy and engage in hostilities against the United States. *See id.* at 519.

For these reasons, the Court concluded that the AUMF constituted an act of Congress that could authorize Hamdi's detention as an enemy combatant, notwithstanding the language of subsection (a) of the Non-

Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* at 517.

Although the Court in *Hamdi* did not directly address the scope of the President's constitutional authority as Commander in Chief under Article II, I believe 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. In other words, 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 (the use of military force in accordance with the laws of war) is assigned to the President, as the commander of the Armed Forces.

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.

Constitutional Concerns Raised by S. 2003

S. 2003 would threaten to upset that balance by purporting 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.

I recognize that 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. 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. That is consistent with the design of our Constitution. The Founders intended the branches to work together in responding to threats from foreign powers and to avoid debilitating constitutional conflicts, particularly during wartime. That is one of the important teachings of the Supreme Court's analysis in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988).

S. 2003, however, would raise the prospect of a significant and unnecessary conflict between the branches by purporting to remove completely from the President's discretion one fundamental attribute of military force that the President might determine is essential to exercise in a moment of national crisis.

I say that this conflict is "unnecessary" because, as recognized by the Supreme Court in *Hamdi*, any American citizen captured in the United States as an enemy combatant will always have the right to habeas corpus (guaranteed by the Constitution unless Congress were expressly to suspend the Writ) 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 aspect to the constitutional concerns raised by S. 2003. It would purport 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 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.

Practical Issues

As I indicated earlier, I also believe that S. 2003 would create significant practical difficulties. Let me highlight three potential types of issues.

First, in this War on Terror in which we find ourselves, we know that it is a central strategy of al Qaeda and the terrorist organizations affiliated with al Qaeda to recruit U.S. persons, including here on our soil, 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 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.

Third, 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 the sort of habeas review proceedings that have developed with respect to the Guantanamo detainees conducted by the district court under the supervision of the D.C. Circuit.

Conclusion

For these reasons, if I were in the Office of Legal Counsel today, I would recommend that the executive branch oppose enactment of S. 2003.

That concludes my written statement, Mr. Chairman, and I would be happy to take questions from the Committee.

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