AMERICAN UNIVERSITY

W A S H I N G T O N , D C

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

WASHINGTON COLLEGE OF LAW
4801 MASSACHUSETTS AVENUE, NW WASHINGTON, DC 20016
Phone: 202/274-4241 | Fax: 202/274-0830
E-Mail: svladeck@wcl.american.edu

> 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.