

Statement of
The Honorable Patrick Leahy

United States Senator
United States Senate
February 29, 2012

Last December, Congress enacted the National Defense Authorization Act (NDAA) for Fiscal Year 2012. The bill contained what to me are deeply troubling provisions related to indefinite detention. I viewed them as inconsistent with our Nation's fundamental commitment to protect liberty. I opposed and will continue to oppose indefinite detention. I fought against the Bush administration policies that led to the current situation, with indefinite detention being the de facto policy. I opposed President Obama's executive order in March 2011 that contemplated indefinite detention. I opposed the provisions in the NDAA, as well.

The American justice system is the envy of the world. A regime of indefinite detention degrades the credibility of this great Nation around the globe, particularly when we criticize other governments for engaging in such conduct. Indefinite detention contradicts the most basic principles of law that I have pledged to uphold since my years as a prosecutor and in our senatorial oath to defend the Constitution. That is why I am fundamentally opposed to indefinite detention without charge or trial.

During the Senate debate last year over the detention provisions in the NDAA, some Senators argued in favor of indefinite detention, including for individuals apprehended within the United States. I believe this violates core constitutional principles. That is why I repeatedly raised concerns and opposed the detention provisions in the NDAA. I was disappointed that the Senate rejected several efforts to amend or remove these measures as we debated the bill.

One of the amendments that did pass during the NDAA debate was offered by Senator Feinstein. Her amendment clarifies that nothing in the NDAA changed the status quo with regard to the authority of the Government to indefinitely detain U.S. citizens or others arrested within the United States. I thank her for all her efforts, including her work on this hearing today.

There is significant disagreement over the Government's authority to indefinitely detain Americans and those arrested on American soil. I firmly believe that the Constitution makes such actions unconstitutional. In the 2004 Supreme Court opinion in *Hamdi v. Rumsfeld*, Justice O'Connor stated unequivocally: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The power of our Federal Government is bound by the Constitution.

Immediately following enactment of the NDAA last December, Senator Feinstein continued her efforts and introduced the Due Process Guarantee Act, which is the subject of our Judiciary Committee hearing this morning. I understand that Senator Feinstein had to moderate the bill in garnering bipartisan support. I greatly appreciate her continuing efforts to correct the excesses enacted in the NDAA and have joined to cosponsor her bill.

The Due Process Guarantee Act would make clear that neither an authorization to use military force nor a declaration of war confer unfettered authority to the executive branch to hold Americans in indefinite detention. This is not unlike the resolution I introduced in 2006 to clarify that the Authorization for the Use of Military Force adopted after 9/11 did not authorize

warrantless domestic surveillance. I hope that the Due Process Guarantee Act will serve to open a discussion about how to ensure that no individual arrested within the United States will be detained indefinitely. I believe that Constitution requires no less. The case of American citizens is the most striking, but to me the Constitution creates the framework that imposes important legal limits on the Government and provides that all people have fundamental liberty protections. I am particularly pleased to welcome on behalf of the Committee Professor Lorraine Bannai, who was part of the legal team that helped overturn the unjust conviction of Fred Korematsu. Seventy years ago this month, President Roosevelt signed the executive order that authorized the detention of thousands of Japanese Americans during World War II, including Fred Korematsu, as well as Professor Bannai's parents and grandparents. That was a tragic chapter in our Nation's history for which those of us now in Congress have apologized and sought to provide some redress.

I urge all Senators to join us in upholding the principles of our Constitution, protecting American values, and championing the rule of law. We need a bipartisan effort to guarantee that those arrested on American soil are not locked away indefinitely without charge or judicial review. And so that the United States remains the model for the rule of law to the world.

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