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before the

House Committee on the Judiciary

**“Protecting U.S. Citizens’ Constitutional Rights
During the War on Terror”**

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OPENING REMARKS



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Thank you, Chairman Goodlatte, Ranking Member Conyers, and members of the committee for this opportunity to give our views on the subject of military detention under the laws of war of terrorist suspects arrested within the United States.

This written statement represents the views of Robert Chesney, Professor of Law at the University of Texas School of Law and Non-Resident Senior Fellow at the Brookings Institution, and Benjamin Wittes, Senior Fellow at the Brookings Institution.

We would like to make four major points today, points which lead to a single recommendation:

First, a review of the relevant case law suggests that the Supreme Court as currently aligned would probably *not* approve the use of long-term military detention under color of the Authorization for the Use of Military force (AUMF) with respect to a United States citizen detainee who was arrested by law enforcement authorities within the United States. Whether it would approve detention for a non-citizen captured within the United States is also in doubt, though the matter is less clear in that setting.



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Second, current criminal justice authorities provide ample grounds for ensuring the incapacitation of such persons in most foreseeable instances. There is little if anything to be gained for the executive branch in gambling with the domestic military detention option, which would carry significant litigation risk and guarantee divisive political friction.

Third, although the Bush administration did use military detention for domestic captures in two instances—one involving a citizen, another a non-citizen—it typically relied on the criminal justice system instead. Indeed, in the case of the citizen detainee, it eventually backed away in the face of a looming judicial reversal. The Obama administration has stayed this course, taking similar action with respect to the domestic non-citizen detainee in military custody. Today it is highly unlikely that an administration of either party would attempt to use these authorities again.

Fourth, because these options nonetheless have not formally been foreclosed in law, there are periodic surges of interest in them by both political supporters and opponents. Supporters demand their use in cases like that of the Boston Marathon bombing. Opponents, meanwhile, have gone to court to seek injunctive relief against law of war detention authorities based on speculative fears of military

detentions that will not take place. All of this is disruptive, undesirable, and unnecessary.

Based on these observations, we therefore recommend that Congress codify in statute today's practical status quo. That is, Congress should state explicitly that detention authority under the AUMF and the NDAA does not extend to any persons captured within the territory of the United States. We provide a more expansive discussion of these points below, in two parts. The first part outlines the legal context against which these issues arise today. The second discusses the practical and policy consequences of leaving the current status quo uncoded in statute and explains our recommendation for legislation.

The Legal Context of Military Detention of Citizens and Persons Captured Within the United States

In some circumstances, the domestic use of law of war detention clearly is lawful and appropriate. The American Civil War provides the best example: Just about every one of the Confederate soldiers attacked and detained by Union forces in that conflict were American citizens. The problem of citizens' fighting for the enemy has not been limited to the Civil War, however. For varying reasons, American citizens have fought for the enemy in several other conflicts as well.

World War II provides a pair of striking examples that resulted in federal court decisions. One involved an American citizen--Gaetano Territo--who grew up in Italy and was conscripted into the Italian Army, only to be captured during the allied invasion of Sicily and then held for years as a POW. The other involved a group of saboteurs--two of with claims to American citizenship--who were dispatched by the German military to conduct a campaign of bombings in the United States, only to be captured after one of the men reached out to the FBI to reveal the plot. Both cases generated clear statements from the courts to the effect that an American who becomes a member of the enemy's armed forces during a war has no right to be treated differently than other enemy soldiers. *In re Territo* (a Ninth Circuit decision) applied that rule in affirming that it was perfectly lawful to hold Territo as a POW, and *Ex parte Quirin* (a Supreme Court decision) not only said the same but also approved prosecution by military commission for both the citizens and non-citizens among the captured German saboteurs.

Not all cases are so clear cut, however. Consider the famous case *Ex parte Milligan*, which involved events during the American Civil War. Milligan and others were taken into custody by military authorities in Indiana, and eventually prosecuted by

military commission for plotting to seize arms and use them to break prisoners out of a nearby POW camp maintained by the Union. The Supreme Court ultimately held that Milligan should not have been subjected to these measures because he was not said to be part of the Confederate armed forces and because the civilian courts were still open and functioning in Indiana at that time.

The line between *Milligan*, on one hand, and *Territo* and *Quirin*, on the other, is clear enough: persons who are part of the armed forces of the enemy during an armed conflict are not relieved from military detention (or from prosecution by military commission in the event of a war crime allegation) simply by virtue of being U.S. citizens. Where the person is *not* part of the enemy's armed forces, however, military detention or trial is not an option if ordinary civilian courts remain open. This thumbnail sketch provides key context for understanding post-9/11 debates regarding the constitutionality of military detention for U.S. citizens.

But there is a second important element to consider as well: in the context of any given conflict fought under color of a congressional authorization to use force, the courts have to consider whether Congress intended for the executive branch to wield detention authority over citizens in the first place. This was not a question that generated attention prior to the mid-20th century, but it is a pressing question today, thanks to the Non-Detention Act of 1971 (18 USC § 4001(a)), which provides that citizens may not be detained other than pursuant to statute. That law requires the executive branch, and ultimately the courts, to ask whether an authorization to use force that may not mention detention explicitly nonetheless authorizes it implicitly--and thus counts as sufficient statutory authority to satisfy the Non-Detention Act.

Against this backdrop, consider the events of the post-9/11 period as they relate to the detention of citizens and of other persons captured within the United States. The question of citizen detention arose briefly at the very outset of the conflict in Afghanistan, thanks to the capture of "American Taliban" John Walker Lindh. Lindh was in military custody initially, and unavoidably so in the circumstances. After a time, however, the Bush administration chose to transfer him into the civilian criminal justice system in the United States, the first of many successful prosecutions in the Bush years involving persons linked to the Taliban and al Qaeda. That move prevented exploration of whether Lindh could simply have been held for the duration of hostilities like other enemy fighters.

As it turned out, however, Lindh was not the only citizen fighting with the Taliban. Yaser Esam Hamdi had been born in Louisiana, and thus had a plausible claim to citizenship as well. This came out after his capture in Afghanistan and after his transfer to Guantanamo. At that point, he was promptly shifted to a military facility within the United States, but unlike Lindh, Hamdi remained in

military custody. His situation was quite similar to that of Gaetano Territo (the Italian-American POW discussed above) except that crucially, Hamdi did not concede that he had been part of the enemy's armed forces. Ultimately, his habeas corpus petition reached the Supreme Court, which in 2004 issued a split decision: As a citizen, Hamdi was entitled to more process than he had thus far received, but on the other hand, he would indeed be subject to military detention if the government could prove he had been a Taliban fighter, as it alleged.

The Court in *Hamdi* went out of its way to confine its holding to the particular facts presented in that case, plainly conscious that other fact patterns might arise in circumstances that did not so clearly track *Territo* or *Quirin*. The justices had one such example before them at that very moment: the case of Jose Padilla.

Jose Padilla was an American citizen who went abroad to join the jihad movement prior to 9/11. He became famous in May 2002 when he was arrested in Chicago coming off an international flight. The government announced that he was an al Qaeda agent planning an attack in the United States, possibly involving a "dirty" (i.e., radiological) bomb. He was not arrested on criminal charges, however, but rather was held on a "material witness" arrest warrant (a centuries-old statutory authority to use the power of arrest when necessary to ensure that a witness is available to testify before a grand jury or at trial). As we explain in more detail in the next section, the problem the government faced was that its knowledge about Padilla's plans was based at least in part on the coercive--and highly classified--interrogation of a separate suspected al Qaeda member. With criminal prosecution not plausible for the time being, and the clock ticking on the viability of material-witness detention, the Bush administration eventually opted to shift Padilla into military custody. Habeas litigation, not surprisingly, followed thereafter.

Padilla's case closely resembled the *Quirin* scenario, in that he was said to be an agent of the enemy who had entered the United States surreptitiously in an attempt to carry out bombings. It also had elements of *Milligan*, however, in that that Padilla was not alleged to be a soldier in any sort of recognized armed force, but rather was part of a clandestine terrorist network. That terrorist network *was* the enemy in the current conflict, of course, which is why many viewed the situation as a direct repeat of *Quirin*. This made sense to the first district judge to consider the matter, at any rate. Relying on *Quirin* and distinguishing *Milligan*, future Attorney General Michael Mukasey held in *Padilla ex rel. Newman v. Bush* that Padilla was detainable in theory, expressly rejecting the argument that his citizenship immunized him--though also insisting that Padilla be allowed to challenge the factual basis for the government's claims. The Second Circuit Court of Appeals reversed, however, concluding that for a non-battlefield capture like Padilla, the Non-Detention Act would not be satisfied without a clear statement

from Congress of its intention for the AUMF to provide detention authority over citizens.

The stage was set for the Supreme Court to settle the matter, but things quickly got complicated. Four of the Justices took the position that Padilla was not subject to detention. Five, however, withheld judgment on the merits in favor of focusing on a procedural error: The petition, they said, should have been litigated in the federal court in South Carolina and in the Fourth Circuit Court of Appeals, not in New York and in the Second Circuit.

Notwithstanding the Supreme Court's vacating of the Second Circuit's ruling, it was clear from the contemporaneous *Hamdi* decision that one of the five justices in *Padilla* majority almost certainly would side with Padilla on the merits. Justice Scalia dissented in *Hamdi*, arguing that detention should not be available for U.S. citizens even in the clearer circumstances *Hamdi* presented. It thus appeared only a matter of time and procedure before a majority of the Court would hold that detention under the AUMF was not available for U.S. citizens captured inside the United States.

We never found out what would happen, however. Padilla prevailed again on remand to a district judge in South Carolina, and then lost before the Fourth Circuit based on a new argument: that Padilla was exactly like Hamdi in that he had borne arms on the Afghan battlefield in late 2001, but simply had been luckier in remaining free until 2002. At any rate, the next stop was the Supreme Court, again, and no small prospect of defeat for the government. Most observers believe this prospect explains why the Bush administration at that stage transferred Padilla back to civilian custody--where he faced criminal trial at long last. Padilla was prosecuted in federal court in Florida on charges relating to his pre-9/11 conduct (going abroad in hopes of joining the jihad movement, in effect), was convicted, and is now serving a prison sentence.

The end of the Padilla litigation did not end the opportunity for courts to struggle with the question of detention authority in the United States. There was one other domestic military detainee in the Bush years, a Qatari man named Ali Saleh Kahlah al-Marri. As in Padilla's case, the government first used civilian authorities to detain al-Marri after concluding that he might be an al Qaeda agent. As in Padilla's case, it eventually moved him into military custody. And as in Padilla's case, the resulting habeas litigation was a mess, with a variety of judges embracing a broad array of different theories. First, the district judge concluded that there was no obstacle to detaining al-Marri, as he was not a citizen and thus the AUMF need not be more explicit in providing for detention in his case. The Fourth Circuit disagreed, however, with the initial panel opinion concluding that as a lawful resident, al-Marri had Fifth Amendment rights, that those rights precluded

detention beyond what the law of war might allow in this case, and that the law of war did not permit detention in this circumstance. This in turn led to an *en banc* review by the full court, which splintered wildly across an array of opinions. A slim majority sided with the government, but without a single unifying theory to explain that result. Once more, the Supreme Court might have resolved the matter, and it did grant *certiorari* in an apparent bid to do so. But following the Padilla path once again, the government--now the Obama administration--transferred al-Marri to the civilian criminal justice system, mooted the issue and leaving the question of detention authority for domestic captures under the AUMF in doubt.

There has been no new case of domestic military detention--whether involving citizens or non-citizens--since those cases from the early years of post-9/11 counterterrorism, nor any clarification of the legal questions that the aforementioned cases raised.

Indeed, the issues involved appeared entirely dormant until Congress took up the question of domestic detention in the course of crafting the National Defense Authorization Act for Fiscal Year 2012. An initial draft of that bill contained a clause that provided for detention authority to extend to citizens and to others within the United States. The language used to accomplish that result was decidedly indirect, but once its meaning became clear, it drew extensive criticism. There was sharp debate in Congress--and more generally--with respect to whether such authority should, in fact, be confirmed, and proposals emerged to reframe the bill to accomplish the opposite result--i.e., clarifying that there is *not* detention authority in such cases. This proved equally difficult to move forward, so in the end, Congress opted for the easiest course of action: the NDAA FY'12 explicitly states that nothing in the bill should be taken as weighing in one way or the other on the question of domestic and citizen detention.

The net (and intended) effect was to leave in place the veil of uncertainty that had been generated by the combination of the *Hamdi*, *Padilla*, and *al-Marri* decisions of the prior decade. Future presidents were left free to roll the dice by asserting such authority, or not, as they might see fit to try.

What Should Congress Do?

In our view, Congress should put this issue to rest at last by clarifying that neither the AUMF nor the NDAA FY'12 should be read to confer detention authority over persons captured in the United States (regardless of citizenship). The benefits of keeping the option open in theory are slim, while the offsetting costs are substantial.

We say the benefits are slim chiefly because the executive branch has so little interest in using detention authority domestically. The Bush administration had little appetite for military detention in such cases all along, preferring in almost all instances involving al Qaeda suspects in the United States to stick with the civilian criminal justice system. The experiment of military detention with Padilla and al-Marri did little to encourage a different course, given the legal uncertainty the cases exposed. That uncertainty has, in turn, created an enormous disincentive for any administration—of whatever political stripe—to attempt this sort of detention again. A *de facto* policy thus developed in favor of using the criminal justice apparatus whenever humanly possible for terrorist suspects apprehended in the United States. And whenever humanly possible turned out to mean always; while military detention may remain *potentially* available as a theoretical matter, it is not *functionally* available for the simple reasons that (i) executive branch lawyers are not adequately confident that the Supreme Court would affirm its legality and (ii) in any event, they have a viable and far-more-reliable alternative in the criminal justice apparatus.

In September 2010, the Obama administration made this unstated policy official, announcing that it would use the criminal justice system exclusively both for domestic captures and for citizens captured anywhere in the world. In a speech at the Harvard Law School, then-White House official John Brennan stated:

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.

...

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system.

To put the matter simply, military detention for citizens or for terrorist suspects captured domestically, was tried a handful of times early in the Bush administration; the strategy was abandoned; it has been many years since there was any appetite in the executive branch—under the control of either party—for trying it again; and it has for some time been the stated policy of the executive branch *not* to attempt it under any circumstances. We do not expect any administration of either party to break blithely with the consensus that has developed absent some dramatically changed circumstance. The litigation risk is simply too great, and the criminal justice system's performance has been too strong to warrant assuming this risk.

But ironically, even as this strong executive norm against military detention of domestic captures and citizens has developed, a fierce commitment to this type of detention has also developed in some quarters. The fact that the norm against detention is not currently written into law has helped fuel this commitment, enabling the persistent perception that there is greater policy latitude than functionally exists. The result is that every time a major terrorist suspect has been taken into custody domestically in recent years—the arrest of Djokhar Tsarnaev is only the most recent example—the country explodes in the exact same unproductive and divisive political debate. To caricature it only slightly, one side argues that the suspect should have been held in military custody, instead of being processed through the criminal justice system; it decries the reading of the suspect his *Miranda* rights; and it criticizes the administration, more generally, for a supposed return to a pre-9/11 law enforcement paradigm. The other side, meanwhile, defends the civilian justice system, while also demanding the closure of Guantánamo and attacking the performance of military commissions for good measure.

This kabuki dance of a debate is not merely a matter of rhetoric. Separate and apart from the U.S. citizen detention language we described above, in the course of producing the 2012 NDAA Congress also explored the option of *mandating* military detention for suspects (citizen or not) taken into custody within the United States. The administration resisted these efforts, and the resulting language in conference committee ultimately stopped far short of requiring military detention. The administration further softened the effects of that language, moreover, through its subsequent interpretation of the new language. All of which brings us back to our point: there is a big gulf between the real, functional state of play (in which the criminal justice system provides the exclusive means of processing terrorist suspects captured within the United States) and the perception in some quarters that military detention remains a viable option, perhaps even a norm, for domestic and citizen terrorist captures.

That gulf has real costs. Most obviously, it generates significant political friction every time a major terrorist arrest happens in the United States. It increases the apparent political polarization of an area that should be above politics—and in which the counterterrorism reality is far less polarized than the inter-branch relations over the issue would suggest. And it reinforces the perception that domestic military detention remains a viable option, needlessly alarming those who fear it and needlessly misleading those who wish to see it. The resulting confusion fuels sharp debate over something that is no longer meaningfully an option in functional terms. That debate even spills over at times into litigation, most notably—and disruptively—in the context of the *Hedges* case in New York (in which journalists and activists persuaded a district judge to enjoin enforcement of

detention authority, despite the utter implausibility of the claim that they might be subjected to it).

To be clear, closing off the possibility of the executive branch's trying such detention again in the future is not without potential costs. Consider the Padilla case once more. Contrary to the mythology that has developed about it over the years, the decision to move Padilla into military custody did not result from some ideological commitment on the part of the Bush administration to domestic military detention or to expanding executive power. It was, rather, a least-bad alternative in a circumstance in which options within the criminal justice system appeared to have run out. Recall that the government initially held Padilla in the criminal justice system. As then-Deputy Attorney General James Comey explained in 2004:

Padilla was arrested by the FBI in Chicago on a material witness warrant authorized by a federal judge in New York. And he was transferred to Manhattan where I was then the United States attorney.

He was appointed a lawyer at public expense. And we set about trying to see if he would tell the grand jury what he knew about al Qaeda.

With time running out in that process, on June 9th of 2002, just about two years ago, the president of the United States ordered that Padilla be turned over to the custody of the Department of Defense as an enemy combatant, where he remains.

...

Had we tried to make a case against Jose Padilla through our criminal justice system, something that I, as the United States attorney in New York, could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right.

He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week, and hope—pray, really—that we didn't lose him.

It is certainly possible that we will one day again confront a case in which strong evidence exists that an individual member of an AUMF-covered group poses a huge threat within the United States, but in which the evidence supporting this view is either too sensitive to disclose or inadmissible for any of several reasons. In such a situation, legislation prohibiting the military detention of suspects captured in the United States in theory could precipitate an outcome like the one that Comey feared in 2002. From that perspective, the option of at least attempting to

sustain military detention, despite the legal uncertainty we described above, would be attractive.

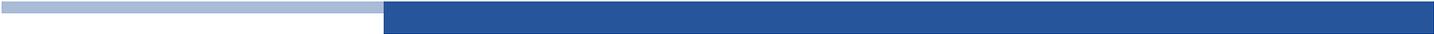
For a variety of reasons, however, we believe that situation is far less likely to develop today than it was in 2002. Law enforcement practice has improved substantially in this space. The FBI and Justice Department have developed significant expertise in handling suspects like Padilla. And as we mentioned before, one of the reasons the information developed against Padilla was unusable by Comey was that it had been obtained by the CIA using highly-coercive means; those means are no longer in use. None of this eliminates the possibility of a case like Padilla's developing in the future, of course, but it does suggest that such scenarios are unlikely to arise. Indeed, such a situation has not arisen since the earliest years of the war on terror.

Aside from a Padilla-like scenario, a ban on military detention in domestic capture scenarios thus would foreclose no course of action that is realistically available to the executive branch at this stage given its own preferences. It would, rather, merely codify the existing understanding reflected in executive branch policy and practice—policy and practice reinforced over the years by well-informed expectations about the likely views of the justices on the underlying legal issues.

Adopting such a change, it is worth emphasizing, would run with the grain of America's traditional wariness when it comes to a domestic security role for the U.S. military. There have unfortunately been times in our nation's history when it has been necessary and proper for the military to play such a role. It is far from clear that this is the case today, however, given the demonstrated capacity of the criminal justice system in the counterterrorism context.

In the final analysis, we conclude that the manifest legal uncertainty and political friction overhanging the domestic military detention option entail costs that, in our view, outweigh the hypothetical benefits of continuing to leave that option open as a statutory matter. We therefore favor legislation that would clarify that military detention in counterterrorism under the AUMF is not available with respect to any persons--whether United States citizens or aliens--arrested within the United States.

We look forward to addressing your questions.



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