Testimony in Support of SB 999
The Liberty Preservation Act

My name is Marc Scaringi. I am an attorney in Harrisburg, Pennsylvania. The need for the Liberty Preservation Act, SB 999, has arisen because of new federal law that gives the federal government the opportunity to use the Law of War, with its indefinite detentions and denial of many Constitutional rights, right here in Pennsylvania. This new law has been condemned by many – Republicans and Democrats, Conservatives and Liberals alike – as a dangerous infringement on the Constitutional right to due process of law afforded to all Americans. While SB 999 does not prevent the federal government from enforcing this law in Pennsylvania, it does ensure that our state, county and local officials do not assist it in doing so.

The need for SB 999 results from two amendments to the National Defense Authorization Act of 2012 known as the NDAA. United States Senators Lindsay Graham (R-SC) and John McCain (R-AZ), teamed up with the Obama Administration, to push through two amendments to this bill, which two amendments became known as sections 1021 and 1022.

During floor debate, Senator Graham explained these two amendments, "basically say in law for the first time that the homeland is part of the battlefield" and people can be imprisoned without charge or trial **"American citizen or not."** In order to illustrate the effect of these new sections, Senator Graham acted out a hypothetical encounter with a "detainee," being detained under the NDAA. Senator Graham, acting the role of the US government official, shouted at the hypothetical "detainee," "*And when they say, 'I want my lawyer,' you tell them, 'Shut up.' You don't get a lawyer..."* Senators McCain and Graham were conducting this floor debate to make "legislative history" to set the ground for future courts to write into these amendments what these Senators say they mean.

What do these sections say and do? Sections 1021 and 1022 expanded the authority provided by the Authorization of Use of Military Force Act of 2001 (the AUMF) for the U.S. military to seize, not just actual "enemy combatants" as the 2001 law authorized, but also persons suspected of "supporting" al-Qaeda, the Taliban or "associated forces" and to detain such persons indefinitely without charge or trial. The drafters of these sections used this broad language in order to empower the President to cast as wide a net as possible in deciding whom to detain during this War on Terror. The President can take the position that these sections empower him to use the Law of War, including indefinite detention, against U.S. citizens on U.S. soil. Such an action by the President, however, would contravene many of our most important and oldest rights enshrined in the U.S. Constitution.

In response to this expansion of executive authority, a group of United States Senators, led by Rand Paul (R-KY), Mike Lee (R-UT) and Diane Feinstein (D-CA) wrote an amendment to the NDAA of 2013. This amendment simply declared the US government is prohibited from

indefinitely detaining US citizens on US soil. However, the House/Senate Conference Committee, which was chaired by Sen. John McCain, rejected the amendment and replaced it with language that appears to provide Constitutional protections, but in fact does not. That is because the final language codified the bare-boned, minimalist protection afforded to US citizens under current US Supreme Court jurisprudence as most recently pronounced in a 2004 decision known as *Hamdi v. Rumsfeld*.

In *Hamdi*, a plurality of the Supreme Court afforded Mr. Hamdi, a U.S. citizen being indefinitely detained on U.S. soil by the U.S. military under the AUMF, with only the writ of habeas corpus. The Court, in fact, denied Mr. Hamdi other important Constitutional rights he was otherwise entitled to as a U.S. citizen. Justice Scalia dissented arguing Mr. Hamdi should not have been indefinitely detained and should have been afforded his Constitutional rights and tried in criminal civilian court for the crime of treason.

Earlier this year Justice Scalia reminded us that our nation has conducted mass indefinite detentions during wartime before, namely the internment of US citizens of Japanese ethnicity during World War II. Justice Scalia denounced the notorious US Supreme Court decision, in *Korematsu v. United States*, that upheld the indefinite detention of Japanese-Americans. Justice Scalia stated, "Well of course Korematsu was wrong. And I think we have repudiated it in a later case. But you are kidding yourself if you think the same thing will not happen again."

Furthermore, the Obama and Bush Administrations have taken an expansive interpretation of executive branch authority in this area. President Obama, in litigation involving this Section of the NDAA, has not disclaimed the claimed power to detain a US citizen on US soil.

The solution to the problem is for the U.S. Congress to repeal sections 1021 and 1022 and affirm that the Rule of Law and the full panoply of Constitutional rights must be afforded to U.S. citizens even during the War on Terror. In the meantime, the people of Pennsylvania can take action here at home. Through passage of the Liberty Preservation Act, we can send a clear message that the Commonwealth of Pennsylvania refuses to comply with or assist the U.S. Government in implementing the NDAA.

Pennsylvania has a proud history of refusing to comply with unconstitutional or immoral federal laws. In the 19th Century, the Pennsylvania General Assembly opposed the federal Fugitive Slave Acts and passed Personal Liberty Acts designed to protect runaway slaves from federal law. One such Pennsylvania law resulted in a seminal United States Supreme Court case, *Prigg v. Pennsylvania*, which is still good law today.

In an 8-1 decision written by the Chief Justice Joseph Story, the US Supreme Court declared the Pennsylvania Personal Liberty Law of 1826 and its predecessor unconstitutional

under the Supremacy Clause. But, importantly, the Court also ruled the federal government was required to enforce its own acts and could not compel Pennsylvania to do so. Justice Story's opinion left the door open for Pennsylvania and any other state to enact laws prohibiting state officials from assisting in the seizing, detaining and returning of runaway slaves.

In response to the *Prigg* decision, the Pennsylvania General Assembly passed the Personal Liberty Law of 1847. This law fined any state official who assisted in the enforcement of the federal Fugitive Slave Acts, fined any jailer who held a fugitive slave in his jail and made it a misdemeanor offense for anyone who used force upon a fugitive slave. It also removed jurisdiction of fugitive slave cases from state courts and prohibited state judges from issuing warrants to seize and detain fugitive slaved. So there is judicial and legislative precedence for Pennsylvania to enact a law of non-compliance.

The Pennsylvania General Assembly can also look around the country to other states for guidance. Several states have taken similar action. Anti-NDAA bills have been introduced in over a dozen other states and have been enacted into law in Virginia, Michigan, Alaska and California. The California Liberty Preservation Act, which passed unanimously in its State Senate and received only a single "no" vote in the State Assembly, was recently signed into law by Governor Jerry Brown. If one of the most liberal states in the nation can enact a law refusing to comply with these infamous and patently unconstitutional sections of the NDAA, then we can certainly do so here in Pennsylvania.

I urge you to vote in favor of SB 999, the Liberty Preservation Act.

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