

**NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 --  
(Senate - November 17, 2011)**

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, on behalf of the Senate Armed Services Committee, I am pleased to bring S. 1867, the National Defense Authorization Act for fiscal year 2012, to the Senate floor. The Armed Services Committee approved the bill by a unanimous vote of 26 to 0. This is the 50th consecutive year that our committee has reported a defense authorization act. Every previous bill has been enacted into law.

I would like to thank all of the members and the staff of the Senate Armed Services Committee for the commitment they have shown to the best interests of our men and women in uniform as we have developed this legislation. Every year, we take on tough issues, and we work through them on a bipartisan basis consistent with the traditions of our committee. I particularly thank Senator *McCain*, our ranking minority member, for his strong support throughout the process. The unanimous committee vote in favor of this legislation would not have been possible without his cooperation and support.

We were delayed in getting this year's bill to the Senate floor by two issues that have arisen since the time the Armed Services Committee approved the first version of this bill, S. 1253, in late June.

...

[T]he administration and others expressed misgivings about the detainee provisions in the initial bill, although the provisions in our initial bill represented a bipartisan compromise that was approved by the committee on a 25-to-1 vote. Many of these concerns were based on misinterpretations of the language in that bill; nonetheless, we have worked hard to address these concerns.

...

Mr. LEVIN. Second, the new bill would modify the detainee provisions to address concerns and misconceptions about the provisions in our initial bill. In particular, the new bill first modifies section 1031 of the bill, as requested by the administration, to assure that the provision that provides a statutory basis for the detention of individuals captured in the course of hostilities conducted pursuant to the 2001 authorization for use of military force, the AUMF, to make sure that those provisions and that statutory basis are consistent with the existing authority that has been upheld in the courts and neither limits nor expands the scope of the activities authorized by the AUMF.

It also modifies sections 1033 and 1034 of the bill, as requested by the administration, to impose 1-year restrictions rather than permanent limitations on the transfer of Gitmo detainees to foreign countries and on the use of Department of Defense funds to build facilities in the United States to house detainees who are currently at Gitmo.

We were unable to agree to the administration's proposal to strike section 1032, the provision that requires military detention of certain al-Qaida terrorists subject to a national security waiver. We did, however, adopt a number of changes to the provision. In particular, we modified the provision so that it clarifies that the President gets to decide who makes the determinations in coverage, how they are made and when they are made, ensuring that executive branch officials will have flexibility to keep any covered detainee in civilian custody or to transfer any covered detainee for civilian trial at any time.

Second, we clarify that there is no interruption of ongoing surveillance and intelligence-gathering activities or of ongoing law enforcement interrogation sessions. There have been misstatements, misimpressions, and misinterpretations of the provisions of our bill relative to those issues. We clarify them to make sure it is clearly understood by this body and the American people that--repeating, it is the executive branch, it is determined by the President, the people he appoints who will make determinations of coverage, how they are made, when they are made, so that it ensures the flexibility that the executive branch wants to keep any covered detainee in civilian custody or to transfer any covered detainee for civilian trial at any time.

It has been suggested that ongoing surveillance and intelligence-gathering activities by law enforcement people would be interrupted, or that their interrogation might be interrupted. It is very explicitly clear in this bill that there is no such interruption, there is no such interrogation session interruption or surveillance interruption or intelligence-gathering activities interruption. The process to make sure that doesn't happen is in the President's hands.

The administration officials reviewed the draft language for this provision the day before our markup and recommended additional changes. We were able to accommodate those recommendations, except for the administration request that the provision apply only to detainees who are captured overseas. There is a good reason for that. But even here, the difference is relatively modest, because the provision already excludes all U.S. citizens. It also excludes all lawful residents of the United States, except to the extent permitted by the Constitution. The only covered persons left are those who are illegally in this country or who arrive as tourists or on some other short-term basis, and that is a small remaining category, but an important one,

because it includes the terrorists who clandestinely arrive in the United States with the objective of attacking military or other targets here.

Contrary to some statements I have seen in the press, the detainee provisions in our bill do not include new authority for the permanent detention of suspected terrorists. Rather, the bill uses language provided by the administration to codify existing authority that was adopted by both the Bush administration and the Obama administration and that has been upheld in the Federal courts.

Moreover, the bill requires for the first time that any detainee who will be held in long-term military custody anywhere in the world would have access to a process that includes a military judge and a military lawyer.

I want to repeat that. For the first time, this bill provides that, in determining a detainee's status, the detainee will have access to a lawyer and to a military judge. That is not the case now. Nor would the bill preclude the trial of terrorists in civilian courts, as some have erroneously asserted. As a matter of fact, it is the contrary. The bill expressly authorizes the transfer of any military detainee for trial in the civilian courts at any time. An amendment that eliminated that authority was defeated in the Armed Services Committee on a bipartisan 19-to-7 vote during the markup of the initial bill.

The bill would not require the interruption of ongoing surveillance operations or ongoing law enforcement interrogations of suspected terrorists, as some have incorrectly asserted. The opposite is the case, as I have said, because we have included language in the bill that specifically precludes those possibilities.

The bill also provides that the President, not Congress, will decide who makes determinations of whether a detained person is in the narrow class covered, and the President will decide how and when these determinations are made.

The bill would not require that al-Qaida terrorists who are captured on American soil be transferred to military custody, because it includes an easily effectuated national security waiver. With this waiver authority, executive

branch officials may keep any detainee in civilian custody or move any detainee to civilian custody if they choose to do so.

That provision provides the executive branch flexibility to choose the most appropriate course of action for al-Qaida terrorists whom we capture, including detention in civilian custody. That was the intent of the original language, and it has

been clarified in the bill before us. I recognize that the administration remains unsatisfied with this provision, but we have gone a long way to address their concerns.

...

The PRESIDING OFFICER. The senior Senator from Arizona is recognized.

Mr. *McCAIN*. Mr. President, I ask unanimous consent to engage in a brief colloquy with the chairman, Senator *Levin*.

The PRESIDING OFFICER (Mrs. *Hagan*). Without objection, it is so ordered.

Mr. *McCAIN*. First of all, I wish to thank the Chairman for the long years of work we have had together. This is the culmination of this year's work which is coming to the floor after great difficulty and a lot of obstacles. I want to thank the Senator again for the spirit of bipartisanship, which is a long tradition in the committee which was practiced by our predecessors. Obviously, we know on occasion that we have differences of views, and sometimes we--especially I--express those in perhaps a passionate manner. But the fact is, at the end of the day, we continue to come together and work together for the good of this Nation's security.

...

We have worked with the administration over the past several weeks to address their concerns with the detainee provisions in our bill. We understand the administration is still not satisfied with the committee work. We have made many clarifications, modifications at the request of the administration to the detainee provisions as they were reported from the committee in June. As a result, we were able to report out the bill again this week with an overwhelming bipartisan vote of 26 to 0.

We will be glad to continue our discussions with the administration. I am grateful the administration reached out to us and that because of that discussion in negotiations with Mr. Brennan and others from the White House we were able to make some changes. I regret they haven't been sufficient to overcome their objections, but we will continue to work with them. This is a very important issue.

Obviously, our collective goal is to make sure that members of terrorist organizations, specifically al-Qaida, do not return to the fight, and that we make sure we are able to treat al-Qaida members who are captured in keeping with international law, but at the same time in keeping with the priority interests of America's national security. So I understand there will be an amendment on that issue or amendments. We look forward to debating and discussing that aspect.

Whatever additional concerns that may remain with the detainee provisions should be dealt with, as they will be, through debate and amendment. But, importantly, all of the aspects of this bill are of such vital importance to supporting the men and women of our Armed Forces and their families. We have already started to work on amendments that we know our colleagues are preparing to offer on this bill, and I encourage all my colleagues to file their germane amendments as quickly as possible.

...

Mr. UDALL of Colorado. Mr. President, I come to the floor to comment on the NDAA, the bill in front of us today. I want to start my remarks by acknowledging the leadership of Chairman *Levin* and Ranking Member *McCain*. Under their tutelage and leadership the committee has worked tirelessly to craft a Defense Authorization Act that provides our Armed Forces with the equipment, the services, the training, and the overall support they need to keep us safe while they themselves are being protected. I thank the chairman and ranking member, my colleagues, and, most important, the wonderful staff that works for us for their diligence and dedication to this important work.

I also come to the floor to speak out against a proposed change that I think would alter what has been a very effective set of terrorist detention policies and procedures. I believe to make those changes would complicate our capacity to prosecute the war on terror and call into question the principles we as Americans hold dear.

I filed an amendment, No. 1107, that would take a look at what is proposed in the NDAA. We have a solemn obligation to pass the National Defense Authorization Act. But we also have a solemn obligation to make sure those who are fighting the war on terror have the best, most flexible, most powerful tools possible. I have to say again, and I will say it more than two times in my remarks, I am worried these changes we are about to push through would actually hurt our national security.

I am a proud member of the Senate Armed Services Committee. As I have implied, and I want to be explicit, I understand the importance of this bill. I understand what it does for our military, which is why, in sum, what I am going to propose with my amendment is that we pass the NDAA without these troubling provisions but with a mechanism by which we can consider what is proposed and perhaps at a later date include any applicable changes in the law.

We need to hear from the Department of Defense, our intelligence community, and the administration more broadly on what our men and women in the field actually need to effectively prosecute the war on terror, especially before we change detainee

policies that are already working. As I am saying, I have serious concerns about the detainee provisions that have been included in the bill.

In my opinion, and in the opinion of many others--and I will share those opinions and insights with my colleagues--these provisions disrupt the capacity of the executive branch to enforce the law, and they impose unwise and unwarranted restrictions on our ability to aggressively combat international terrorism. In so doing, they inject legal uncertainty and ambiguity that may only complicate the military's operations and detention practices.

I am not the only one who has serious concerns. The Secretary of Defense has urged us to oppose these new provisions. Both chairmen of the Intelligence and Judiciary Committees strongly oppose them. The President's team is recommending a veto. These are people whose opinions should be carefully considered before we put these new proposals into our legal framework.

In the Statement of Administration Policy the White House states:

We have spent 10 years since September 11, 2001, breaking down the walls between intelligence, military and law enforcement professionals; Congress should not now rebuild those walls and unnecessarily make the job of preventing terrorist attacks more difficult.

Those are striking words that should give us all pause as we face what seems to me a bit of a rush to submit these untested and legally controversial restrictions on our ability to prosecute terrorists.

I ask unanimous consent to have the entire Statement of Administration Policy printed in the *Record* at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. UDALL of Colorado. Mr. President, these are complex issues that have far-reaching consequences for intelligence, civilian law enforcement agencies, and our intelligence community as they work to keep Americans safe from harm. Despite this fact, the Department of Defense and the national security staff, as far as I know, had little opportunity to review or comment on the final language in the provisions. As a result, these provisions restrained the ``Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available."

That quote comes directly from a letter addressed to the Armed Services Committee from Secretary Panetta. I think we all know that before he held the job he has now, Secretary of Defense, Mr. Panetta, was the Director of the CIA. He very well knows the threats facing our country, and he knows we cannot afford to make mistakes when it comes to keeping our citizens safe.

I also ask unanimous consent that Secretary Panetta's letter be printed in the *Record* at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. UDALL of Colorado. Mr. President, the provisions I am speaking to are well intended. I have much admiration for my colleagues who propose them, but I think we need to take some more time to consider the ramifications. The United States, our country, can currently choose from several options when prosecuting terrorists. That flexibility has allowed us to try, convict, and imprison hundreds of terrorists, and it allows the government to select the venue that will provide the highest likelihood of obtaining a conviction. The current detention provisions in the bill we are debating would strip away that flexibility and potentially impair our capacity to successfully prosecute and convict terrorists. It is not clear to me why, after 10 years of successfully prosecuting terrorists and preventing another 9/11-like attack, why we would want to limit our options while our enemies are constantly adapting their tactics and expanding their efforts to do us harm.

In a recent op-ed in the Chicago Times, a bipartisan group of three former Federal judges, including William S. Sessions, who was also the appointed Director of the FBI under President Reagan, said it best when describing these provisions:

Legislation now making its way through Congress would seek to over-militarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects to the exclusion of the FBI and local and State law enforcement agencies. As former Federal judges, we find this prospect deeply disturbing. Not only would such an effort ignore 200 years of legal precedent, it would fly in the face of common sense.

And I ask unanimous consent that op-ed be printed in the *Record* at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 3.)

Mr. UDALL of Colorado. I also point out these provisions raise serious questions as to who we are as a society and what our Constitution seeks to protect. One section of these provisions, section 1031, could be interpreted as allowing the military to capture and indefinitely detain American citizens on U.S. soil. Section 1031 essentially repeals the Posse Comitatus Act of 1878 by authorizing the military to perform law enforcement functions on American soil. That alone should alarm my colleagues on both sides of the aisle. But there are other problems with these provisions that must be resolved.

These detainee provisions are unnecessary, counterproductive, and potentially harmful to our counterterrorism efforts. I know I have said this a couple of times already, but it feels as though they are being rushed through in a manner that does not serve us well. The Department of Defense has had little input. There have been no hearings. Earlier this week the changes were presented to us in the Armed Services Committee just hours before we were asked to vote on them. These are just too important a set of questions to let them pass without a thorough review and far greater understanding of their effect on our national security and our fight against terrorism.

It feels to this Senator that we are rushing hastily to address a solution in search of a problem. We ought to hear from the Department of Defense, the intelligence community, our colleagues, and other relevant committees before we act. Do we believe this Congress--again, let me underline that after 10 years of successfully prosecuting the war on terror--should substitute its views for that of our Defense, intelligence, and Homeland Security leadership without careful analysis?

I recently received a letter signed by 18 retired military leaders in opposition to these provisions. The letter states that: "Mandating military custody would undermine legitimate law enforcement and intelligence operations crucial to our security at home and abroad." I could not agree more.

I would ask unanimous consent that this letter be printed in the *Record* at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 4.)

Mr. UDALL of Colorado. We are already trying and convicting terrorists in both civilian courts and under military commissions. The provisions that are in this bill would require the DOD to shift significant resources away from their mission, to act

on all the fronts all over the world, and they would become a police force and jailer. This is not what they are good at. This is not what we want them to do. I think it has potentially dangerous consequences because we have limited resources and limited manpower. We would not lose anything by taking a little bit more time to discuss and debate these provisions, but we could do real harm to our national security by allowing this language, unscrutinized, to pass, and that is exactly what our highest ranking national security officers are warning us against doing.

This is a debate we need to have. It is a healthy debate, but we ought to be armed with all of the facts and expertise before we move forward. The least we can do is take our time, be diligent, and hear from those who will be affected by these new limitations on our ability to prosecute terrorists.

It concerns me that we would tell our national security leadership--a bipartisan national security leadership, by the way--that we would not listen to them and that Congress knows better than they do. It doesn't strike me that that is the best way to secure and protect the American people. That is why I have filed amendment No. 1107. I think it is a commonsense alternative that will protect our constitutional principles and beliefs while also allowing us to keep our Nation safe. The amendment has a clear aim, which is to ensure we follow a thorough process and hear all views before rushing forward with new laws that could be harmful to our national security.

What is in the amendment? It is straightforward. Specifically the amendment would require that our Defense, intelligence, and law enforcement agencies report to Congress with recommendations for any additional authorities or flexibility they need in order to detain and prosecute terrorists. In other words, let's not put the cart before the horse or fix something that is not broken. Let's first hear from the stakeholders as to what laws they believe need to be changed to give them better tools to do their job.

My amendment then asks for hearings to be held so we can fully understand the views of respected national security experts. Moreover, it would require input from each of the relevant committees to ensure that we have carefully considered the benefits and consequences of our actions. The chairmen of our Judiciary and Intelligence Committees have deep concerns about the detainee provisions in the pending legislation. And, of course, as we underwent this process, the existing laws that guide our actions today would remain in place. They have been successful.

I see some of my colleagues who I think share my views who have come to the floor. They also made the compelling case that it is a system that is working. Why would we change it without thinking it through? It is straightforward, it is common sense, and it allows us to make sure we will win the war on terror.

Mr. DURBIN. Will the Senator from Colorado yield for a question, through the Chair?

Mr. UDALL of Colorado. Yes.

Mr. DURBIN. I thank the Senator from Colorado for his strong statement and totally support his position. This change in the Defense authorization bill goes beyond a military decision. It goes to the fundamental questions of principles of our Constitution and our body of law. As a member of the Senate Judiciary Committee, I believe this matter should have been considered as well by the Senate Judiciary Committee, and I believe Senator *Feinstein* has expressed the feeling that it should have been considered as well by the Senate Intelligence Committee.

I wish to use one example to ask the Senator from Colorado a question. When we had the so-called Underwear Bomber, the passenger on a commercial aircraft who tried to detonate a bomb--and thank God was unsuccessful--he was subdued, arrested, and interrogated by the Federal Bureau of Investigation in Detroit. After that investigation was underway--and he surrendered some information--he stopped talking, at which point the FBI investigators read

him his Miranda rights.

Then later, working with his parents, he resumed talking to the investigators and literally--according to the FBI--gave a dramatic amount of information helpful to us in keeping America safe and stopping terrorism. He was then prosecuted in the criminal courts of America, article 3 courts, and ultimately, weeks ago, pled guilty.

Mr. *McCain*. Will the Senator state his question.

Mr. DURBIN. I am going to. I would say to the Senator from Arizona, I think it is important we take some time on this important issue.

Mr. *McCain*. I would say it is important that all voices be heard.

Mr. DURBIN. Senator *McCain*, of course, as the ranking member, will have ample opportunity to express his point of view.

What I am asking the Senator from Colorado is this: Taking into consideration the language that is now being presented in this Defense authorization bill, particularly section 1032, it is my understanding the Federal Bureau of Investigation could not have continued their interrogation of this suspected terrorist without first contacting our military and bringing them in to determine whether they had jurisdiction over this

matter. In other words, time would have been lost, opportunities would have been lost, information might have been lost by following the new section in the bill.

I am asking the Senator from Colorado if this is a decision which he believes we should make in the haste of a Defense authorization bill or ought to step back and work with the President of the United States, the FBI, the military, and our intelligence forces to make sure we do not lose an opportunity to catch an alleged terrorist, to interrogate them, and to keep this country safe.

Mr. UDALL of Colorado. I thank the Senator from Illinois for his question. My understanding is the Senator from Illinois is correct, that provision 1032 would change the way in which interrogations would unfold. There may be some in the Senate who would see it differently, but that is all the more reason to adopt my amendment, which would allow a thorough process of hearing from the very experts who interrogated the Underwear Bomber and other experts who have been on the front lines in fighting terrorism. We ought to go slow. We should not fix something that is working fine right now.

I thank the Senator for his question.

Mr. DURBIN. If the Senator from Arizona will forgive me, I would ask one more question through the Chair. The question goes back to the point the Senator made: Section 1031, as I understand it, would be a departure from current law and would say that those who are American citizens can be detained indefinitely if they are suspected of certain terrorist conduct. I ask the Senator from Colorado: Is that the point the Senator made in his statement?

Mr. UDALL of Colorado. The Senator from Illinois is correct. Mr. President, 1031 would do just that, and it would come directly at a piece of law, posse comitatus, which dates back to the Civil War, that is held dear by all of us in America because it distinguishes between the military used to protect us against foreign foes and how we manage our own civil affairs here at home.

Also, as the Senator alludes to, it causes questions to be raised about something that is very sacred in our system of law, which is the writ of habeas corpus. You have to prove why you hold someone. You cannot detain an American citizen indefinitely in any other circumstance.

I thank the Senator for his questions.

Mr. LEVIN. Would the Senator yield for a question?

Mr. UDALL of Colorado. I would be happy to yield for a question.

Mr. LEVIN. We explicitly wrote into this bill the following language: that the procedures providing for the determination that somebody is an Al-Qaida terrorist or related, affiliated one is not required to be implemented until after the conclusion of the interrogation session, which is ongoing at the time the determination is made.

Is the Senator familiar with that language which explicitly says that the President will adopt the procedures--whatever procedures the President determines--to make sure there is no interference with an ongoing interrogation by the civilians as it appears in section 2(c) on page 363? Is the Senator familiar with that?

Mr. UDALL of Colorado. I am familiar with the language in the general way it has been introduced. I would say to the chairman of the Armed Services Committee that we had a chance to review this language starting about 48 hours ago.

One of the reasons I think my amendment is important is it would give those voices, which are being heard more and more as of today, who have concerns with this provision--they are not sure how it applies--that that is all the more reason to slow this down, to keep the existing law in place, and go through a more thorough process to understand the ramifications of the waiver provision and the other provisions the chairman and ranking member----

Mr. LEVIN. Is it not true, however, that the language which is in this bill that I just read clearly provides there will not be any interference with an interrogation session, that those procedures are to be determined by the President, and that it explicitly says there will not be any interference with the interrogation and the procedures will guarantee there will not be? That is the point of this language.

I don't understand how the statement could be made that this language in this bill interferes with the interrogation by civilian authorities and the FBI when the very language here says they will not interfere with that interrogation. I wonder if the Senator could explain to me his agreement with the Senator from Illinois that something in this bill would result in an interference with an interrogation.

Mr. UDALL of Colorado. What I would say to my friend is that just having had an opportunity to review this language in the last 48 hours, I have no question about his intent, but I have heard from people with much greater expertise than I have that there are questions that are still unanswered. Maybe this provision is appropriate and will do what the chairman says it will do. But, again, that is why I think it would be well worth our time to take a further look at what is involved in these provisions.

Mr. LEVIN. I do appreciate the Senator's response. I have one other question, and that has to do with an American citizen who is captured in the United States and the application of the custody pending a Presidential waiver to such a person. I wonder whether the Senator is familiar with the fact that the language which precluded the application of section 1031 to American citizens was in the bill we originally approved in the Armed Services Committee, and the administration asked us to remove the language which says that U.S. citizens and lawful residents would not be subject to this section.

Is the Senator familiar with the fact that it was the administration which asked us to remove the very language which we had in the bill which passed the committee, and that we removed it at the request of the administration that this determination would not apply to U.S. citizens and lawful residents? Is the Senator familiar with the fact that it was the administration which asked us to remove the very language, the absence of which is now objected to by the Senator from Illinois?

Mr. UDALL of Colorado. I am familiar now because the Senator from Michigan has shared that fact with me. I am also familiar with the fact that the administration has other questions and concerns which has caused it to issue a set of provisions and issues they wish to further consider.

Mr. LEVIN. I thank my friend.

Mr. LEAHY. Would the Senator yield for a question?

Mr. UDALL of Colorado. I would be happy to yield to my friend from Vermont.

Mr. LEAHY. Is the Senator from Colorado aware that the administration has raised real concerns--both DOD and the White House--saying that requiring the President to devise the kind of procedures discussed in this bill creates all kinds of problems, and that this is one of the reasons why both the Senate Intelligence Committee and the Senate Judiciary Committee have asked to have the opportunity to hold hearings on a section that obviously involves the jurisdiction of both the Senate Intelligence and Senate Judiciary Committees?

Mr. UDALL of Colorado. I am. The Senator from Vermont is correct. That knowledge on my part is, in part, one of the reasons I filed the amendment we are discussing right now.

Mr. LEAHY. I thank the Senator.

Mr. UDALL of Colorado. I thank the Senator from Vermont.

I yield the floor.

Exhibit 1

**Executive Office of the President, Office of Management and Budget,**

Washington, DC, November 17, 2011.

Statement of Administration Policy

S. 1867--NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012--(SEN. LEVIN, D-MI)

The Administration supports Senate passage of S. 1867, the National Defense Authorization Act for Fiscal Year (FY) 2012. The Administration appreciates the Senate Armed Services Committee's continued support of our national defense, including its support for both the base budget and for overseas contingency operations and for most of the Administration's initiatives to control spiraling health costs of the Department of Defense (DoD).

The Administration appreciates the support of the Committee for authorities that assist the ability of the warfighter to operate in unconventional and irregular warfare, authorities that are important to field commanders, such as the Commanders' Emergency Response Program, Global Train and Equip Authority, and other programs that provide commanders with the resources and flexibility to counter unconventional threats or support contingency or stability operations. The Administration looks forward to reviewing a classified annex and working with the Congress to address any concerns on classified programs as the legislative process moves forward.

While there are many areas of agreement with the Committee, the Administration would have serious concerns with provisions that would: (1) constrain the ability of the Armed Forces to carry out their missions; (2) impede the Secretary of Defense's ability to make and implement decisions that eliminate unnecessary overhead or programs to ensure scarce resources are directed to the highest priorities for the warfighter; or (3) depart from the decisions reflected in the President's FY 2012 Budget Request. The Administration looks forward to working with the Congress to address these and other concerns, a number of which are outlined in more detail below.

Detainee Matters: The Administration objects to and has serious legal and policy concerns about many of the detainee provisions in the bill. In their current form, some

of these provisions disrupt the Executive branch's ability to enforce the law and impose unwise and unwarranted restrictions on the U.S. Government's ability to aggressively combat international terrorism; other provisions inject legal uncertainty and ambiguity that may only complicate the military's operations and detention practices.

Section 1,031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the ``AUMF"). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

The Administration strongly objects to the military custody provision of section 1032, which would appear to mandate military custody for a certain class of terrorism suspects. This unnecessary, untested, and legally controversial restriction of the President's authority to defend the Nation from terrorist threats would tie the hands of our intelligence and law enforcement professionals. Moreover, applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets. We have spent ten years since September 11, 2001, breaking down the walls between intelligence, military, and law enforcement professionals; Congress should not now rebuild those walls and unnecessarily make the job of preventing terrorist attacks more difficult. Specifically, the provision would limit the flexibility of our national security professionals to choose, based on the evidence and the facts and circumstances of each case, which tool for incapacitating dangerous terrorists best serves our national security interests. The waiver provision fails to address these concerns, particularly in time-sensitive operations in which law enforcement personnel have traditionally played the leading role. These problems are all the more acute because the section defines the category of individuals who would be subject to mandatory military custody by substituting new and untested legislative criteria for the criteria the Executive and Judicial branches are currently using for detention under the AUMF in both habeas litigation and military operations. Such

confusion threatens our ability to act swiftly and decisively to capture, detain, and interrogate terrorism suspects, and could disrupt the collection of vital intelligence about threats to the American people.

Rather than fix the fundamental defects of section 1032 or remove it entirely, as the Administration and the chairs of several congressional committees with jurisdiction over these matters have advocated, the revised text merely directs the President to develop procedures to ensure the myriad problems that would result from such a requirement do not come to fruition. Requiring the President to devise such procedures concedes the substantial risks created by mandating military custody, without providing an adequate solution. As a result, it is likely that implementing such procedures would inject significant confusion into counterterrorism operations.

The certification and waiver, required by section 1033 before a detainee may be transferred from Guantánamo Bay to a foreign country, continue to hinder the Executive branch's ability to exercise its military, national security, and foreign relations activities. While these provisions may be intended to be somewhat less restrictive than the analogous provisions in current law, they continue to pose unnecessary obstacles, effectively blocking transfers that would advance our national security interests, and would, in certain circumstances, violate constitutional separation of powers principles. The Executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. Section 1034's ban on the use of funds to construct or modify a detention facility in the United States is an unwise intrusion on the military's ability to transfer its detainees as operational needs dictate. Section 1035 conflicts with the consensus-based interagency approach to detainee reviews required under Executive Order No. 13567, which establishes procedures to ensure that periodic review decisions are informed by the most comprehensive information and the considered views of all relevant agencies. Section 1036, in addition to imposing onerous requirements, conflicts with procedures for detainee reviews in the field that have been developed based on many years of experience by military officers and the Department of Defense. In short, the matters addressed in these provisions are already well regulated by existing procedures and have traditionally been left to the discretion of the Executive branch.

Broadly speaking, the detention provisions in this bill micromanage the work of our experienced counterterrorism professionals, including our military commanders, intelligence professionals, seasoned counterterrorism prosecutors, or other operatives in the field. These professionals have successfully led a Government-wide effort to disrupt, dismantle, and defeat al-Qa'ida and its affiliates and adherents over two consecutive Administrations. The Administration believes strongly that it would be a

mistake for Congress to overrule or limit the tactical flexibility of our Nation's counterterrorism professionals.

Any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation would prompt the President's senior advisers to recommend a veto.

...

## Exhibit 2

### THE SECRETARY OF DEFENSE,

Washington, DC, November 15, 2011.

Hon. *Carl Levin*,  
*Chairman, Committee on Armed Services,*  
*U.S. Senate, Washington, DC.*

*Dear Mr. Chairman:* I write to express the Department of Defense's principal concerns with the latest version of detainee-related language you are considering including in the National Defense Authorization Act (NDAA) for Fiscal Year 2012. We understand the Senate Armed Services Committee is planning to consider this language later today.

We greatly appreciate your willingness to listen to the concerns expressed by our national security professionals on the version of the NDAA bill reported by the Senate Armed Services Committee in June. I am convinced we all want the same result-- flexibility for our national security professionals in the field to detain, interrogate, and prosecute suspected terrorists. The Department has substantial concerns, however, about the revised text, which my staff has just received within the last few hours.

Section 1032. We recognize your efforts to address some of our objections to section 1032. However, it continues to be the case that any advantages to the Department of Defense in particular and our national security in general in section 1032 of requiring that certain individuals be held by the military are, at best, unclear. This provision restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.

Moreover, the failure of the revised text to clarify that section 1032 applies to individuals captured abroad, as we have urged, may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.

Next, the revised language adds a new qualifier to ``associated force"--``that acts in coordination with or pursuant to the direction of al-Qaeda." In our view, this new language unnecessarily complicates our ability to interpret and implement this section.

Further, the new version of section 1032 makes it more apparent that there is an intent to extend the certification requirements of section 1033 to those covered by section 1032 that we may want to transfer to a third country. In other words, the certification requirement that currently applies only to Guantanamo detainees would permanently extend to a whole new category of future captures. This imposes a whole new restraint on the flexibility we need to continue to pursue our counterterrorism efforts.

Section 1033. We are troubled that section 1033 remains essentially unchanged from the prior draft, and that none of the Administration's concerns or suggestions for this provision have been adopted. We appreciate that revised section 1033 removes language that would have made these restrictions permanent, and instead extended them through Fiscal Year 2012 only. As a practical matter, however, limiting the duration of the restrictions to the next fiscal year only will have little impact if Congress simply continues to insert these restrictions into legislation on an annual basis without ever revisiting the substance of the legislation. As national security officials in this Department and elsewhere have explained, transfer restrictions such as those outlined in section 1033 are largely unworkable and pose unnecessary obstacles to transfers that would advance our national security interests.

Section 1035. Finally, section 1035 shifts to the Department of Defense responsibility for what has previously been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason--and certainly none has been expressed in our discussions to date--to upset a collaborative, interagency approach that has served our national security so well over the past few years.

I hope we can reach agreement on these important national security issues, and, as always, my staff is available to work with the Committee on these and other matters.

Sincerely,  
*John McCain.*

Exhibit 3

[From the Chicago Tribune, Oct. 7, 2011]

Beyond Guantanamo

(By Abner Mikva, William S. Sessions and John J. Gibbons)

A new shift in philosophy has begun to emerge among lawmakers in Washington. Legislation now making its way through Congress would seek to overmilitarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects, to the exclusion of the FBI and local and state law enforcement agencies. As former federal judges, we find this prospect deeply disturbing. Not only would such an effort ignore 200 years of legal precedent, it would fly in the face of common sense.

The bill in question, the 2012 National Defense Authorization Act, would codify methods such as indefinite detention without charge and mandatory military detention, and make them applicable to virtually anyone picked up in anti-terrorism efforts--including U.S. citizens--anywhere in the world, including on U.S. soil. Such an effort to restrict counterterrorism efforts by traditional law enforcement agencies would sadly demonstrate that many members of Congress have very little faith in America's criminal justice system.

It is a fact that our criminal justice system is uniquely qualified to handle complex terrorism cases. Indeed, civilian courts have successfully overseen more than 400 terrorism-related trials, whereas military commissions have handled only six. While the use of military commissions may occasionally be appropriate under the Constitution, the Guantanamo military commissions remain subject to serious constitutional challenges that could result in overturned guilty verdicts. The simple truth is that existing federal courts operate under rules and procedures that provide all the tools necessary to prosecute terrorism cases and they are not subject to the same legal challenges as military commissions.

We need access to proven instruments and methods in our fight against terrorism. Stripping local law enforcement and the FBI of the ability to arrest and gather intelligence from terrorism suspects and limiting our trial options is counterintuitive and could pose a genuine threat to our national security. Furthermore, an expanded mandatory military detention system would lead to yet more protracted litigation, infringe on law enforcement's ability to fight terrorism on a local and state level, and invite the military to act as law enforcement within the borders of our states.

In the face of these disturbing developments, we are encouraged by the fact that the administration has expressed its own concerns. The Obama White House has raised strong objections to congressional efforts to undermine the use of our traditional criminal justice system, efforts that would effectively eliminate the administration's ability to leverage "the strength and flexibility" of the system to "incapacitate dangerous terrorists and gather critical intelligence." In previous statements, President

Barack Obama said he intends to oppose any attempt to extend or expand such restrictions in the future. We submit to the president that the future is now.

We firmly believe the United States can preserve its national security without resorting to sweeping departures from our constitutional tradition. We call on Obama and Congress to support a policy for detention and trial of suspected terrorists that is consistent with our Constitution and maintains the use of our traditional criminal justice system to combat terrorism. Further restricting the tools at our disposal is not in the best interest of our national security.

Exhibit 4

*November 7, 2011.*

*Dear Senator:* We write today to thank you for signing on to the October 21, 2011 letter to Senator Reid regarding detainee provisions 1031-1033 in the National Defense Authorization Act. We are members of a nonpartisan group of forty retired generals and admirals concerned about the implications of U.S. policy regarding enemy prisoner treatment and detention. We have been following the public debate concerning the provisions closely and are troubled by the overreaching nature of the legislation that would allow for indefinite detention without trial, mandatory military custody of counterterrorism suspects and permanent transfer restrictions imposed on inmates already at GTMO, some of whom have been cleared for release.

We understand there has been significant disagreement about the provisions and exactly what their impact on national security would be; however, the fact that such disagreement exists underscores that further public debate is needed and the provisions should not go forward as a part of the NDAA.

Regardless of how one interprets the intent of the provisions, it does not cure the underlying defect: over-militarization of our counter terrorism response. Our military does not want nor seek to try all foreign terror suspects. Congress has wisely enacted dozens of criminal laws to incapacitate potential terrorists, and federal courts have convicted more than 400 of terrorism related crimes since 9/11. Using military commissions as a one-size-fits-all response threatens our security because commissions do not have the same broad array of criminal laws that our federal courts have.

Military custody may be an incident of battlefield operations, but mandating military custody would undermine legitimate law enforcement and intelligence operations crucial to our security at home and abroad. Providing an individualized

waiver would only serve to politicize each decision and possibly paralyze effective national security response.

We thank you again for signing on to the October 21, 2011 letter to Senator Reid and your attention to these important issues. As former members of our armed forces, please call on us as a resource as debate moves forward on detainee provisions as part of the NDAA

Sincerely,

General Joseph P. Hoar, USMC (Ret.); General Charles C. Krulak, USMC (Ret.); General William G. T. Tuttle Jr., USA (Ret.); Lieutenant General Robert G. Gard Jr., USA (Ret.); Vice Admiral Lee F. Gunn, USN (Ret.); Lieutenant General Charles Otstott, USA (Ret.); Rear Admiral Don Guter, USN (Ret.); Rear Admiral John D. Hutson, USN (Ret.); Major General William L. Nash, USA (Ret.); Major General Thomas J. Romig, USA (Ret.); Major General Walter L. Stewart, Jr., ANG (Ret.); Brigadier General James Cullen, USA (Ret.); Brigadier General Evelyn P. Foote, USA (Ret.); Brigadier General Leif H. Hendrickson, USMC (Ret.); Brigadier General David R. Irvine, USA (Ret.); Brigadier General John H. Johns, USA (Ret.); Brigadier General Murray G. Sagsveen, USA (Ret.); Brigadier General Stephen N. Xenakis, USA (Ret.).

...

Mr. *McCain*. I thank my friend from Michigan. I do that for the convenience of my colleagues because I know there will also be others coming to speak on this important issue.

I wish to point out that the Senator from South Carolina--a member of the National Guard, one of the major authors of the Detainee Treatment Act, and a person who has tried hundreds of cases in military courts--brings a degree of knowledge and expertise on this issue.

The Senator from New Hampshire served as attorney general of her State for a number of years. She understands the Miranda rights. She has been a student and leader on this issue of detainee treatment.

Also, of course, Senator *Chambliss*, in his role as the Republican leader on the Intelligence Committee, has a deep and longstanding involvement on detainee issues and the requirements for making our Nation safe.

I will be fairly brief except to say that by any judgment, the President's policy, the President's strategy, the President's movements concerning detainees have been a total

and abysmal failure. If the President of the United States would have had a coherent policy that made any sense whatsoever to anyone, we would not have had to act in the Senate Armed Services Committee.

Let me point out a couple of facts. The President of the United States campaigned saying that he would close Guantanamo Bay. Guantanamo Bay remains open. The President of the United States also said we would have detainees tried in civilian as well as military courts, and that was a position he has held.

So they had a great idea: Let's take Khalid Shaikh Mohammed to New York City. That was a great idea. Let's have \$300 million in security costs while they have a trial of one of the most notorious international criminals. Obviously, that one got the support it deserved.

Thanks to the release policy of Guantanamo, 27 percent of the detainees of Guantanamo who have been released are back in the fight, trying to kill Americans-- only this time they have a red badge of courage and a degree of legitimacy because they spent time in Guantanamo Bay.

Leaders of al-Qaida have been released from Guantanamo Bay under this administration. They were released under the Bush administration as well, to be fair, but we didn't know at that time how many of them would return to the fight. Some of the leaders in Yemen whom we are speaking about who are now doing everything they can to kill Americans were released from Guantanamo Bay. That can't be viewed as a successful policy. Thirty individuals in Guantanamo today are citizens of Yemen. We can't release them, obviously, back to Yemen.

So now what do we do in order not to have people go to Guantanamo Bay? We are now using U.S. naval ships to detain suspected terrorists. For 60 days, they kept a suspected al-Qaida member on board a ship. Now, when I support the construction of more Navy ships, I have a lot of missions in mind. Serving as a detainment facility for suspected terrorists is not one of them.

The Underwear Bomber was Mirandized 50 minutes into custody, and the Senator from Illinois forgot to mention that several weeks went by before the Underwear Bomber's family came and convinced him to cooperate. Suppose there had been an impending attack on the United States of America during the 50 minutes in captivity before he was Mirandized. Most Americans don't believe al-Qaida members should be Mirandized, as the Senator from New Hampshire, who has had a lot of experience with individuals who have exercised their Miranda rights, will point out.

So the administration policy has been a complete failure. What we are trying to do in this legislation--and we have tried and tried again to satisfy many of the concerns the administration has, including, I would point out, doing certain things such as making this legislation only for 1 year--not permanent but only for 1 year--and we have put into this legislation a national security waiver which is a mile wide. If the President of the United States decides that an individual should be given a trial in civilian court, he has a waiver that all he has to do is exercise. So I am not exactly sure why the administration feels so strongly about a 1-year restriction, with a national security waiver that is a mile wide. We made a couple of other changes at the request of the administration. So I can only assume that somehow this has some sort of political implications--and I don't say that lightly--as most of the actions concerning this whole detainee issue seem to be driven by.

So there were hearings held in the Senate Armed Services Committee. There was input from different sources. The Senator from Michigan has been fair and objective on this issue, and I am very appreciative of that. The vote in the Senate Armed Services Committee was, I believe, 26 to 0.

We feel very strongly that these provisions in this bill are necessary to keep Americans secure. We want to stop more than one out of every four of these detainees going back into the fight. We want to make sure the military court system applies here to people who are noncitizens and known members of al-Qaida. All of it seems to me to make perfect sense.

So obviously the administration ratcheted up the stakes today with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation's defense.

...

Mr. CHAMBLISS. Mr. President, I rise in opposition to the motion of the Senator from Colorado. As the vice chairman of the Senate Intelligence Committee, let me just say in response to the statement from the distinguished chairman of the Judiciary Committee that there has not been a lack of discussion of this issue, both within the Armed Services Committee and within the Intelligence Committee. While I am not permitted to talk about what has gone on within the Intelligence Committee, I assure my colleagues that this has been a major issue from a discussion standpoint for a number of months. In fact, it has been a point of discussion for almost 3 years now. I will get into some of that in my comments.

Secondly, just in quick response to the comment of the Senator from Illinois, the assistant majority leader, when he talked about how we would treat U.S. citizens

under this, I know how smart he is, and he is my friend, but he obviously hasn't read the bill. There is a specific exclusion for citizens of the United States being required to be detained by the military in this bill.

Over the past several years, there has been an ongoing debate concerning our Nation's ability to fully and lawfully interrogate suspected terrorists. One thing remains clear: After all of these years after 9/11, we still lack an unambiguous and effective detention policy. The consequences of that failure are very real. If we had captured bin Laden, what would we have done with him? If we had captured Anwar al-Awlaki, what would we have done with him? If today we capture Zawahiri, the leader of al-Qaida, what would we do with him? Many of us have posed these same questions to various administration officials, and the wide variety of responses only confirms that there is no policy. That is unacceptable, and that is why the detainee provisions in this bill are so absolutely critical.

I think it is fair to say that if we had captured bin Laden or Awlaki, we could have gained very actionable intelligence from either one of them, and that is our primary goal.

But how would we have done that? We have no detainee policy; there is no place we could have taken them for long-term interrogation. The closest thing to a policy we have heard from the administration is that Guantanamo is off the table. But that is not helpful when they provide no other alternatives.

We have heard some administration officials say holding detainees on ships for brief periods of time solves this detention problem. Now, Senator *McCain* just addressed that issue, and we have a great U.S. Navy. It is not the intention of the U.S. Navy to function in a way of sailing ships around the world and having terrorists brought to ships for detention. A state-of-the-art facility like Guantanamo Bay is off the table, but holding someone on a ship, never intended to be a floating prison and prohibited from long-term detention by the Geneva Conventions is somehow a humane replacement for Guantanamo? That simply does not make sense.

The intent behind the detainee provisions in this bill is very simple: We must be able to hold detainees for as long as it takes to get significant foreign intelligence information without them lawyering up, as the Christmas Day bomber did so famously after only 50 minutes of interrogation.

Again, to my friend from Illinois, who talked about the fact that once this young man's parents got involved, that after his Miranda rights had been given to him, he gave us an awful lot of intelligence--and that is true in his case--I doubt very seriously that Zawahiri's parents, who probably are not even alive, are going to step up and tell

their son: You ought to go in and talk to these folks and give them all the details about the way you helped plan the September 11 attacks on the United States of America. We just know with high-value targets that is not going to happen on a wholesale basis, and we simply need to be in a position to gain actionable intelligence from every one of those individuals.

While I fully support the detainee provisions in this bill, I believe there are other improvements that can and should be made. For example, I am cosponsoring Senator *Ayotte's* amendment which will allow our intelligence interrogators to use lawful interrogation methods beyond those set forth in the Army Field Manual.

We need to be clear on exactly what this means. This amendment does not authorize or condone torture, and every technique used in every interrogation must comply with our laws and treaty obligations. I believe there needs to be flexibility in how we interrogate terrorists. But even more so I believe it is foolish to publicize--as the Army Field Manual does--the specific techniques that can be used in interrogating a suspected terrorist.

Over the years, we have heard repeatedly from the intelligence community that the element of surprise is sometimes our greatest asset in gathering timely intelligence from detainees. Senator *Ayotte's* amendment gives the intelligence community the ability to use techniques that have not been broadcast over the Internet. In my opinion, that makes a lot of sense. I hope my colleagues will agree because the folks we are dealing with in the terrorist world today--these guys who are the meanest, nastiest killers in the world; who wake up every morning trying to figure out ways to kill and harm Americans--are not stupid. They carry laptops. They know how to use the Internet. We gain valuable information oftentimes through the airwaves. We know how smart they are, and we know they have the capability of going on the Internet today and reviewing the Army Field Manual. They know exactly the way they are going to be interrogated and the type of techniques that are going to be used to gain intelligence from them.

The Armed Services Committee has worked very hard on a bipartisan basis to come up with legislation that will improve congressional oversight of detainee matters, as well as provide greater assurance that detainees who pose a threat to our national security are not released so they can return to the fight.

As the vice chairman of the Intelligence Committee, I have a specific interest in making sure our intelligence community has the ability to gather timely and actionable intelligence from detainees. I believe this bill will help our intelligence interrogators do exactly that, and I urge my colleagues to support these provisions

fully as was done on a unanimous basis within the Armed Services Committee when this issue was discussed, debated, and talked about thoroughly during the markup.

Ms. AYOTTE. Madam President, I rise in opposition to the amendment offered by the Senator from Colorado to strike the detainee provisions from the defense authorization markup--provisions that were agreed upon on an overwhelming bipartisan basis in the Armed Services Committee.

I would like to start first by revisiting the history of this and where we are because the reason the Armed Services Committee, in the first place, thought it was very important we discuss this issue in committee and address it is that having participated in hearings over the course of months and months in the Armed Services Committee, there has been witness after witness from our Defense Department who has come in and our military leaders with whom we have been talking about the detention policy and asking them very important questions about where we are and how we are going to ensure that our military and intelligence community has the tools they need to protect America, and also asking them about this issue of detainees and how we are treating them.

Because one of the important facts my esteemed colleague from Georgia, as well as the ranking member, Senator *McCain*, mentioned, is that we have a recidivism rate of 27 percent from Guantanamo--those who have reengaged our soldiers again and are back in theater. I was very concerned about this in the Armed Services Committee. That caused, over a series of months, us to ask about the administration's detainee policy.

I just want to share some of the comments that were made over that period of time in February. Secretary Michael Vickers said the administration is in the final stages of revising or establishing its detention policy.

Now, that was 8 months ago, and we are now 10 years into this war. In April I questioned GEN Carter Ham, the Commander of Africa Command, about what we would do if we captured a member of al-Qaida in Africa. Do you know what he told me. He said, ``We would need some lawyerly help on answering that one."''

So this is an area that cried out for clarification on a bipartisan basis because it is so important to ensure that while we remain at war with terrorists that we have the right policies in place to protect Americans. That is why the Armed Services Committee worked very hard.

I thank the chairman of the committee, Chairman *Levin*, for his diligent work, along with other members of the committee for coming forward with this provision--that the

Senator from Colorado is seeking to strike--as well as the ranking member, Senator *McCain*.

What ended up happening is, we brought forward a compromise that passed overwhelmingly out of committee originally in June. In fact, it passed out 25 to 1, and then the administration raised some concerns about it. In reaction to those concerns, I know the chairman of the Armed Services Committee, as well as the ranking member and some others of us, including myself, sat down with members of the administration to hear out their concerns and to try to accommodate their concerns while still making sure we had a policy that would give proper guidance, would protect Americans, and would fundamentally deal with this issue of making sure, in the first instance, that we reaffirmed our authority that we are at war with al-Qaida post 9/11; second, reaffirming that when we are at war the presumption is military custody because the priority has to be gathering intelligence to protect our country; and then, third, those who are released from Guantanamo, making sure there is a standard in place so they cannot reengage back into the battle to harm our troops, our partners, and our allies.

In that process, that is how this provision was derived that Senator *Udall* from Colorado seeks to strike with his amendment. If we were to eliminate these provisions, we would be putting our country in a position where these important issues are not being addressed, and they need to be addressed just based on what we have heard from our military leadership over many months in the Armed Services Committee.

So I would also echo what Senator *Chambliss*, who is the vice chairman of the Intelligence Committee, said. This is an issue that has been thoroughly discussed in this body and cries out for passage in the Defense Authorization Act. I want to point out a couple of very important parts to this. Now, I am someone who, on the recent appropriations bill, the CJS appropriations bill, brought an amendment that would have provided for military commissions trials for members of al-Qaida and associated forces who have committed an attack against us or our coalition partners because I am deeply concerned that this administration has been treating these types of cases as common criminal cases.

When I brought that amendment forward, it did not pass this body. I feel very strongly that the policy should be that we treat these cases for what they are, military cases, because we remain at war and our priorities should be to gather intelligence. But I point out the fact that after my amendment lost, I sat down with the chairman of the Armed Services Committee, the ranking member, and the administration to hear out their concerns.

So while this amendment--I would have gone further in my amendment--addresses many of the objections that were raised--in fact, I think all of the objections which were raised to the amendment I brought to the floor from the other side; that is, we have given the administration flexibility to make the decision on whether they believe it is appropriate, based on national security concerns, which has to be the primary concern and consideration of how to treat those who have committed an attack on our country who are members of al-Qaida or associated forces, and also who are not members of this country, so who are foreign citizens and are seeking to attack our country or have attacked our country in a way that the administration can decide it is best to handle them in a civilian court or a military system.

So all of the objections that were raised to my amendment--I stand by my amendment--but they are addressed in this compromise. And to hear the objection to it, that there is not flexibility, it is very clear that is just not true when you look at the language in this amendment because we adjusted the amendment to address the administration's concerns to say no interrogation will be interrupted based upon this amendment; that interrogations have to be the priority, and we are giving the administration maximum flexibility under this amendment.

So I do not understand why there are such objections continuing when this is as a result of a very good, strong good-faith effort to address any operational concerns that were raised based on the amendment I brought and even based on the prior language which, in my view, I think was very sufficient.

I want to point out something that is very important. In the course of the discussions we had with the administration on section 1031, which we have heard cited as a section that could be used to detain Americans indefinitely, this section was changed based on feedback from the administration. In fact, the administration asked us to actually strike a provision in it that would have said American citizens--it did not apply to American citizens, and, in fact, had to comply with the Constitution of the United States.

So I am a little bit apoplectic to understand why the administration is raising an objection about something they actually asked to be removed on a section they told us they were satisfied with and based on revisions that we made that they wanted. We said we would be happy to make these accommodations because we wanted to make sure we got this right.

So on that section, I do not understand why we are in a position where the Senator from Colorado is trying to remove it--the administration is objecting to it--when we took the language they gave us and incorporated it directly into the National Defense Authorization Act.

One point I think is being lost: So why is it that this amendment creates an initial presumption for military custody? This is the most important point. The priority has to be in protecting American citizens by gaining available intelligence to protect our country. The esteemed Senator from Illinois cited the case of the so-called Christmas Day or Underwear Bomber as an example of how cases have worked well.

Well, I think it is important to appreciate the facts of that case. This is a situation where the underwear bomber is caught with the explosives strapped to him, where there are hundreds of witnesses on the plane, and they were able to make their case in the absence of any interrogation or confession. What ended up happening is he was questioned at the scene for about 50 minutes? Then he was read his Miranda rights, one of those being: You have the right to remain silent.

Let's think about that for a second. We would want to tell terrorists: You have you have the right to remain silent. Common sense will tell you telling a terrorist they have the right to remain silent is counter to what we need to do to protect Americans. We do not want them to remain silent, we want them to tell us everything they know. But continuing on with that case, the only reason he reengaged in providing information for our country is because his parents intervened. Weeks later, his parents convinced him he should cooperate with us; that he should provide information and tell us what he knew.

If our interrogation policy for people who commit attacks on our country is going to be, well, we hope a parent comes and intervenes to help us get information that will protect Americans, I think we are in trouble if that is our intelligence-gathering procedure.

So I wanted to point out, since that case is cited as an example by the Senator from Colorado and the Senator from Illinois as to why this section should be struck, if anything, I think that case points out why we need guidance in this area and why it is very important the priority be on gathering intelligence.

That is what this amendment does. It gives the administration sufficient flexibility, based on concerns they raised, operational concerns. If the FBI is conducting an interrogation, they do not have to stop it because of anything in this provision. That is very clear.

If the administration wants to treat someone in a civilian court, even though I do not think they should versus a military commission who is a member of al-Qaida who has attacked our country, that waiver is in here. That flexibility is in here.

This was a reasonable compromise where people like me who would have gone a lot further did not get what we wanted. But what we did do is get a very strong bipartisan compromise that came out of this committee overwhelmingly. When we had a vote at the beginning of the week, and the Senator from Colorado raised the very same amendment to strike this provision, it was rejected overwhelmingly on a bipartisan basis.

So I hope this Chamber will also overwhelmingly reject striking this very important provision from the National Defense Authorization Act.

Again, we cannot be in a position where we spend the next year in the Armed Services Committee again hearing from our military leaders: The administration is still in the final stages of revising or establishing its detention policy. I certainly do not want to hear again from one of our generals, when I ask him about our detention policy and what we are going to do with terrorists: I would need some lawyerly help in answering that one.

This amendment gives us the guidance we need. I would ask my colleagues to reject striking it from the authorization.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, I view the detention provisions of this bill as real pernicious, as an attack on the Executive power of the President, and contrary to the best interests of this Nation. So I rise to express my strong opposition to three specific detention provisions in the Defense authorization bill.

There was some discussion on the Senate floor that the Intelligence Committee had reviewed these. This is not true. I would like to read a letter that I sent to the majority leader that was signed by every Democratic member of the Intelligence Committee on October 21.

We write as members of the Senate Judiciary Committee--

Because there were some Judiciary Committee members on this.

and the Senate Select Committee on Intelligence, to express our grave concern with subtitle D, titled Defense Matters of title 10 of S. 1253, the National Defense Authorization Act for Fiscal Year 2012. We support the majority of provisions in the

bill which further national security and are of great importance. But we cannot support these controversial detention positions.

Then we go on to say--and I will not read the whole letter. I will put the whole letter in the *Record*.

The executive branch must have the flexibility to consider various options for handling terrorism cases, including the ability to prosecute terrorists for violations of U.S. law in Federal criminal court.

Yet, taken together, sections 1031 and 1032 of subtitle (d) are unprecedented and require more rigorous scrutiny by Congress. Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force, especially because it would authorize the indefinite detention of American citizens without charge or trial .....

I will stop reading here, but again, I want to emphasize this point. We are talking about the indefinite detention of American citizens without charge or trial. We have not done this at least since World War II when we incarcerated Japanese Americans. This is a very serious thing we are doing. People should understand its impact.

I want to outline the provisions in the Armed Services bill that would further militarize our counterterrorism efforts and ignore the testimony and recommendations of virtually all national security and counterterrorism officials and experts. We have heard from the Secretary of Defense, the Attorney General, the general counsel of the Defense Department, and John Brennan, the Assistant to the President for Homeland Security and Counterterrorism. Every one of them opposes these provisions. They have to carry them out. They are the professionals responsible for so doing. Yet, we are going to countermand them?

The first problematic provision, section 1032, requires mandatory military custody with no consideration of the details of individual cases. The bill mandates military detention of any non-U.S. citizen who is a member of al-Qaida, or an associated force, whatever that may be, and who planned or carried out an attack, or attempted attack, on this country or abroad. Here is the problem: The Armed Services Committee ignores the administration's request to have this provision apply only to detainees captured overseas. Therefore, any noncitizen al-Qaida operative captured in the United States would be automatically turned over to military custody.

Military custody for captured terrorists may make sense in some cases, but certainly not all. Requiring it in every case could harm our Nation's ability to investigate and respond to terrorist threats and create major operational hurdles. For example, the FBI

has 56 local field offices around the country. It is staffed with agents who can arrest, interrogate, and detain. The military does not. As has been the policy of Republican and Democratic Presidents before and after 9/11, the decision about where to hold a prospective terrorist should be based on the facts of each case, and should be made by national security professionals in the executive branch.

In a letter, Secretary Panetta said this week that this provision ``restrains the executive branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available."

He added that the bill as written ``..... may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States."

This is the man who ran the CIA and is now running the Department of Defense, and we are going to ignore him? Are we saying it doesn't make any difference what he says? I am not part of that school of thought. I think what he says does make a difference.

I ask unanimous consent to have Secretary Panetta's November 15 letter printed in the *Record*.

There being no objection, the material was ordered to be printed in the **RECORD**, as follows:

...

Mrs. FEINSTEIN. Let me explain why this proposal is bad policy.

Consider the case of Najibullah Zazi. He was arrested in September of 2009 as part of an al-Qaida conspiracy to carry out suicide bombings of the New York City subway system. The FBI arrested Zazi after they had followed him on a 24/7 basis. He began providing useful intelligence to the FBI once captured.

If the mandatory military custody in the Armed Services bill were law, all of the surveillance activities, all of what the FBI did would be in jeopardy. Instead of interrogating him about his coconspirators, or where he had hidden other bombs, the FBI would have squandered valuable time determining whether Zazi was a member or part of al-Qaida or an ``associated force." Requiring law enforcement and national security professionals to determine whether an individual meets a specific legal definition adds a delay--most people would have to admit this. Also a waiver process takes time as it proceeds through the President and Secretary of Defense, both of

whom believe it unduly complicates the ability to immediately interrogate an individual or prevent another attack.

Suppose a terrorist such as Zazi were forced into mandatory military custody. Then the government could also have been forced to split up codefendants, even in cases where they otherwise could be prosecuted as part of the same conspiracy in the same legal system.

Zazi was a permanent legal resident. His coconspirators were both U.S. citizens. They would be prosecuted on terrorist charges in Federal criminal court, but Zazi himself would be transferred to military custody. Two different detention and prosecution systems would play out and could well complicate a unified prosecution.

Incidentally, in the Zazi case, prosecutors have obtained convictions against six individuals, including guilty pleas from Zazi, who faces life in Federal prison without parole.

What could be better than that? If it is not broke, don't fix it. What is happening now isn't broke. That is the point.

Guess what. I try to do my homework, I read the intelligence, and I try to know what is happening. It is working. The government has its act together. Now arbitrarily this is going to change because there is a predilection of some people in this body that the military must do it all--if they cannot do it all, a part of it. But what this does is essentially militarize certain criminal terrorist acts in the United States. I have a real problem with that. I don't understand why Congress would want to jeopardize successful terrorism prosecutions.

The former speaker was talking about Farouq Abdulmutallab, better known as the Underwear Bomber, from Christmas Day in 2009. Abdulmutallab was brought into custody in Detroit after failing to detonate a bomb on Northwest Flight 253. He was interrogated almost immediately by FBI special agents. And he talked.

Some critics contend that Abdulmutallab stopped talking later that day because he was Mirandized. That happens to be correct, at least temporarily. But what these critics don't mention is that he likely would have been even less forthcoming to military interrogators.

It was FBI agents who traveled to Abdulmutallab's home in Nigeria and persuaded family members to come to Detroit to assist them in getting him to talk. The situation would have been very different under Section 1032. Under the pending legislation, it would have been military personnel who were attempting to enlist prominent

Nigerians to assist in their interrogation, and Abdulmutallab would have been classified as an enemy combatant and held in a military facility and, therefore, his family would not be inclined to cooperate. This is we have been told on the Intelligence Committee.

For the record, Umar Farouq Abdulmutallab pleaded guilty to all charges last month in a Federal criminal court in Michigan and will likely spend his life behind bars. What can be better than that? Where can the military commission come close to that effort? In fact, they can't. They had 6 cases, minor sentences, or released, plus 300 to 400 convictions in Federal Court.

To conclude on this mandatory military custody provision, the Defense Department has made clear it does not want the responsibility to take these terrorists into mandatory military custody. But do we know better? I don't think so.

The Department of Justice has said that approximately one-third of terrorists charged in Federal Court in 2010 would be subject to mandatory military detention, absent a waiver from the Secretary of Defense.

The administration contends that the mandatory military custody is unwise because our allies will not extradite terrorist suspects to the United States for interrogation and prosecution--or even provide evidence about suspected terrorists--if they will be sent to a military brig or Guantanamo.

Finally, the military isn't trained or equipped for this mission--they have plenty to do as it is--but the Department of Justice is.

As John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, said in March:

Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. As they should be.

I agree.

The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country. Nor should it.

I could add that our military doesn't spend its resources and expertise surveilling terrorists in the U.S. like Najibullah Zazi, as the FBI did, to know his every move, to know where he bought the chemicals, to know the amount of chemicals, to know what

backpacks they had, and to follow him to New York. It makes no sense to me to have to transfer that jurisdiction.

The second problematic provision imposes burdensome restrictions to transfer detainees out of Guantanamo, section 1033. This provision essentially establishes a de facto ban on transfers of detainees out of Gitmo, even for the purpose of prosecution in U.S. courts or another country.

The provision requires the Secretary of Defense to make a series of certifications that are unreasonable--and, candidly, unknowable--before any detainee is transferred out of Gitmo.

Again, here is an example: The administration proposed eliminating the requirement that the Secretary of Defense certify that the foreign country where the detainee will be sent is not "facing a threat that is likely to substantially affect its ability to exercise control over the individual."

How can the Secretary of Defense certify that--facing a threat that is likely to not just affect, but substantially affect, its ability to exercise control over the individual? What does it mean for a nation to "exercise control" over a former Gitmo detainee? Does he have to be in custody? Can he have an ankle bracelet? Is he remanded to his home? Is he in some county facility somewhere? What does it mean?

The Secretary of Defense must also certify, in writing, that there is virtually no chance that the person being transferred out of American custody would turn against the United States once resettled.

I agree with the sentiment, but as it is written, this is another impossible condition to satisfy.

The administration tried to work with the Armed Services Committee to make this section more workable, but the input by professionals in the defense, law enforcement, and intelligence communities, quite frankly, was rejected.

The committee didn't address the concerns of the administration except to limit these restrictions to 1 year.

In his November 15 letter, Secretary Panetta wrote he was troubled this section remains essentially unchanged and that none of the administration's concerns or suggestions for the provision were adopted. This in itself is a concern. The views of the professionals who do this day in and day out should be considered. Congress is not

on the streets, we are not shadowing terrorists, we are not putting together intelligence. So I find this just terribly imperious.

The third problematic detention provision reverses the interagency process of detention reviews for those detained at Guantanamo.

Let me begin by saying I support detention of terrorists under the law of war. There must be a way to hold people who would, if free, take up arms against us. But detention without charge, perhaps forever, is a power that must be subject to serious review to ensure it is applied correctly and that we are only holding people--in some cases for decades--with cause and careful consideration and review.

Incidentally, this would apply to U.S. citizens. Do we want to go home and tell the people of America we are going to hold them, if such a situation comes up, without any thorough and considered review? It is just not the American way.

In March, the President issued an executive order that laid out the process for reviewing each detainee's case to make sure indefinite detention continues to be an appropriate and preferred course. Section 1035 essentially reverses the interagency process created by the President's order.

Let me just say a few things about this process. The Secretary of Defense is in charge of the decision. He is allowed to reject the findings of an interagency review board that includes a senior official from the State Department, the Department of Defense, the Justice Department, DHS, the Office of the Director of National Intelligence, and the Office of the Chairman of the Joint Chiefs of Staff. They, together, review a case of a person who could be held forever without trial, without charge. They can deliberate on the kind of threat this individual continues.

There are people who are in Guantanamo--or I should say who were in Guantanamo--who were simply in the wrong place at the wrong time. That is possible for an American as well. Everything we are all about is to see that the system is a just system. This is not just and particularly not for a U.S. citizen. I don't care who they are, they have certain rights under the Constitution as a U.S. citizen.

Why should we place the Department of Defense above the unified judgment of five other departments on what is, at its heart, a question about the legality of continued detention, the assessment of the threat a detainee poses, and the options available to handle that individual?

Secretary Panetta is not requesting new authority in this section. Again, reading from the Secretary's November 15 letter, he says:

Section 1035 shifts to the Department of Defense responsibility for what has been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason--and certainly none has been expressed in our discussions to date--to upset a collaborative, interagency approach that has served our national security so well over the past few years.

Let me conclude by saying I support the vast majority of provisions in this authorization. The bill improves our national security and it is essential to meet our commitment to the men and women of our Armed Forces. I understand all that, and I have voted for virtually every Defense authorization bill. But I intend to continue to oppose these three detention policy provisions.

I have not made up my mind, candidly, how I will vote on this bill. I guess maybe I see things a little differently than many in this body, because one of the things I have learned in my time here is the importance of the U.S. Constitution--and I have had 18 years on the Judiciary Committee--and what it means to have due process of law, and that means for everybody. That is for the poorest person on the street, the wealthiest person or whoever it is. Criminals are entitled to due process of law.

How can we do this? It may not stand the test of constitutionality. But be that as it may, despite having raised these concerns months ago and offered suggestions to address them, this bill does very little to resolve my three principal concerns and those of the administration about mandatory military custody and the possibility this bill will create operational confusion and problems in the field.

I look forward to the debate. Candidly, I hope sides haven't hardened. The three amendments I will offer will--one will strike the language, one will insert the word ``abroad," in section 1032, and one will carry with it the administration's proposal. I hope there will be the opportunity to offer these amendments.

I can't think of anything more serious that we are doing, and I must tell you a lot of effort has gone into putting the FBI in a position by creating a huge intelligence operation within the Federal Bureau of Investigation to be able to deal with terrorist threats in this country. We also have a Department of Homeland Security to do that as well. To now say the military is going to take over in certain situations is going to end up unworkable, if, in fact, this becomes the law and I hope it will not.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, I wonder if the Senator from California might offer those amendments right now and call them up so we can get a vote on them. We are trying to vote on amendments, and I am wondering if she could call up one of those amendments, we could debate it, and then vote on it.

Mrs. FEINSTEIN. I only found out this bill was coming up this morning, so the administration is reviewing the largest amendment at the present time.

The other two amendments, we may already have filed those.

We have filed those, but I would prefer to wait until we have the larger amendment, which is being reviewed by the administration, and then I will be making a decision as to which I want to go with.

Mr. LEVIN. Which amendment is the larger one?

Mrs. FEINSTEIN. This is the amendment currently being reviewed by the administration.

Mr. LEVIN. Is that one of the three?

Mrs. FEINSTEIN. Yes.

Mr. LEVIN. Which was the larger of the three; can the Senator describe it for us?

Mrs. FEINSTEIN. There are several amendments.

Mr. LEVIN. Which is the one currently being reviewed, if the Senator is able to share that with us.

Mrs. FEINSTEIN. This essentially would strike the detention provisions and replace them with proposals from the executive branch. It reflects what the White House offered to Senators *Levin* and *McCain* as compromise language on the detention provisions to address the opposition raised by the administration.

Mr. LEVIN. I thank the Senator.

Mrs. FEINSTEIN. I have more to say, but I am not sure.

Mr. LEVIN. That helps. I thank the Senator.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Madam President, one, I would like to begin by thanking Senators *Levin* and *McCain*. I don't know how long Senator *Levin* and I have been working on this together--it seems like forever--trying to get a detainee policy in a post-9/11 world that the courts will accept and that lives within our values. I have just been thinking throughout the years about the journey we have taken--beginning with the Bush administration--where the idea of indefinite detention of unlawful enemy combatants originated by executive order.

I do believe, since 9/11, we have been in a state of undeclared war with organizations such as al-Qaida. The Congress created legislation early on--right after the attacks of 9/11--allowing the President to use military force against al-Qaida. Part of being able to engage someone militarily is to detain those we capture. But that has been years ago. This is the first time Congress has spoken since the early days of the war.

We tried during the Bush administration to work with the Bush people to create a law of war detention system by statute. We had a problem there. They felt the executive order was the way to go. I have always believed when the Congress and the White House work together, the courts appreciate it as being a more collaborative process. So we went from sort of one extreme--to where we had military commissions that were almost legislating a conviction--to a better product, and the end product was the 2009 bill we worked on with Senator *Levin* that got almost 80 votes. So we have come a long way.

About the detention issue. Here is what I have been trying to accomplish for years. I wish to make sure we understand the difference between fighting a war and fighting a crime. When it comes to al-Qaida operatives, whether they are captured in the United States or overseas, the first thing we should be doing as a nation is trying to find out what that person knows about the attack in question or future attacks. When we capture an enemy prisoner, the first thing our military does is turn the person over to the military intelligence community for questioning.

I am of the belief that we have the ability to question people under the law of war without congressional authorization. But when the Congress acts, it is better for us all. So in this bill, working with Senators *Levin* and *McCain*, we have, as a body, said the President--this President and all future Presidents--will have the ability to detain a member of al-Qaida and other allied organizations, regardless of where they are captured in the world, and hold them as an enemy combatant.

Under the law of war, when we capture an enemy prisoner, there is no magic date we have to let them go. The problem with this war, unlike other wars, is there will not be a definable end. We had 400,000 German prisoners in military prisons inside the

United States during World War II. We weren't going to let those folks go if they had been in jail 1 year. Not one of them got to go see a Federal judge saying: Let me out of here.

Under the law of war of our military, the executive branch of government has the authority to protect the Nation, and courts have not interfered with that 200-year right.

What is different about this war? There are no capitals to conquer, there is no air force to shoot down or navy to sink. So we have people who don't wear uniforms who are roaming the globe, and they don't have a home country, they have a home idea, and we are fighting an ideology. Sometimes they make it to our soil and sometimes they don't.

So here is what we are trying to do. We are trying to create a hybrid system, for lack of a better word. If you captured an al-Qaida member overseas in Afghanistan, Iraq, or Yemen, it is clear that they have no constitutional right to petition a judge in the United States: Let me go.

When we put people in Guantanamo Bay, the Bush administration argued that prison wasn't subject to legal review by our courts. And in the Hamdi case involving a U.S. citizen captured in Afghanistan, the Supreme Court held that we could hold an American citizen as an enemy combatant. They suggested to the Bush administration a procedure to ratify that decision. They pointed to an Army regulation, 190--I can't remember the number--and we tried to come up with a procedure that would allow us some due process as a nation for an enemy combatant, including an American citizen.

In the Boumediene case, the Court said: Wait a minute. We are going to allow a habeas petition by those held as enemy combatants--American citizens or non-American citizens--if they are at Guantanamo Bay because we have control over that facility. That is part of the United States in terms of our legal infrastructure.

So the law of the land is that if you are captured overseas, even if you are an American citizen, you can be held as an enemy combatant and questioned by our military with no right to proceed to a criminal venue. It is not a choice to try them or let them go. You can hold an unlawful enemy combatant for an indefinite period of time just like you could hold any other enemy prisoner in any other war. But what we have done differently in this war is we have said: Our courts will review the military's decision to declare you as an enemy combatant in a habeas procedure--not a criminal trial but a habeas procedure--as to whether there is sufficient evidence to label you as an unlawful enemy combatant.

So, to my colleagues on the other side, the law of the land by the Supreme Court is that an American citizen can be held as an enemy combatant. Like every other enemy combatant, they have habeas rights, but they don't have the right to say: Try me in a civilian court or military commission court, because when we capture someone, the goal is to gather intelligence.

The Christmas Day Bomber, the Times Square case--the reason many of us want military custody from the outset is that under domestic criminal law, other than a very narrow public safety exception, we don't have the right under criminal law to hold someone for an indefinite period of time without providing them a lawyer and telling them what their legal rights are or charging them in a court of law. And let me say, as a military lawyer, I would never want that to be the case. I don't want to change our domestic criminal system to allow us to grab someone and hold them indefinitely, pending criminal charges, without the right to a lawyer, the right to remain silent being presented to the defendant, and presentment to court, because that is what criminal law is all about. Under military law, whether it is here at home or abroad, you can hold someone suspected of being an enemy agent, enemy prisoner, and you can interrogate them humanely and lawfully--and we have good laws now governing interrogation procedures--without having to present them to a court. That is the difference between intelligence gathering and fighting a crime.

The Padilla case was an American citizen captured inside the United States. He was held for about 4 years in Charleston Naval Brig, and the Fourth Circuit Court of Appeals ruled that, yes, an American citizen captured within the United States can be held as an unlawful enemy combatant, but they have the right to counsel when it comes to presenting their habeas case. They don't have the ability to tell the interrogator and the military: I don't want to talk to you now. I want my lawyer.

When you are talking to a military interrogator or the FBI or the CIA trying to gather intelligence, you don't have a right to remain silent, you don't have a right to a lawyer because we are trying to defend ourselves against an enemy bent on our destruction. The day we decide to treat you as a common criminal, even a terrorist suspect, all those civilian rights attach.

So this bill is trying to create a process that if you are captured in the United States, this legislation says that you will be presumptively put in military custody because that is the only way we can hold you and interrogate you because under domestic criminal law, that is not available, nor should it be.

There is a waiver provision here. If the administration believes that military custody is not the right way to go, they can waive that. But the day you turn someone over to civilian authorities for the purpose of prosecution, you have a very limited window to

gather intelligence because all the criminal rules apply. And what we are trying to do is to make sure we can defend ourselves and not overly criminalize the war. That is why this is so important.

As to the White House concerns--they wanted to have that flexibility without any statutory involvement--I believe this will serve the Nation well long after President Obama leaves office. I don't know who the next President will be, but I do believe this: We will be under threat and siege by an enemy bent on our destruction.

So if you believe, as I do, that we are at war but it is a different kind of war, please give your Nation--our Nation--the ability to defend us. And the best way to be safe in the war on terror is to gather good intelligence and hit them and stop them before they hit you because they could care less about dying. So intelligence gathering is the way to keep us safe.

Most enemy prisoners captured in traditional wars never go to court. The last thing I am worried about is how you prosecute these guys. The first thing I worry about is, what do they know, and what is coming our way?

So the provisions of 1032 apply to captures within the United States. And we are saying that when an al-Qaida operative suspected of being involved in a terrorist act--a very limited class of cases, by the way--is captured on our soil, we would like them to be in military custody from the get-go. But we have provisions that say: You don't have to make that decision or interrupt an interrogation. There is a window of time in which you can deal with the case without having to make the waiver. We are not impeding interrogations, and we are not saying you have to stay in military custody forever because we give this administration and future administrations the flexibility to waive that provision if it makes sense.

To the Christmas Day Bomber--he was read his Miranda rights within an hour, his family was involved, and it turned out that he pled guilty. I am not a professional interrogator, but I do know this: You don't read an enemy prisoner their rights when you capture them on the battlefield in a war. The question is, Is the United States part of the battlefield? That is really what this is about. Are we going to allow the enemy to get here, and all of a sudden all the rules change because they made it to our homeland? I would argue that the closer they are to us, the more we want to know. So it would be an absurd outcome that if somehow the enemy could find a way to get to our homeland, all the rules change because if you capture one of these guys in Yemen, nobody is suggesting you have to give them a lawyer.

Well, when you get to the United States, what we are suggesting is that we have a legal system that understands the difference between fighting a war and fighting a

crime, and if you are suspected of being an al-Qaida member, citizen or not, we are going to find out what you know through lawful interrogation techniques. That has to be done under the military system because civilian domestic criminal law doesn't allow that to be done.

That is what we created here--a bifurcated system with waivers. If we don't have this in place, we are going to lose intelligence and our Nation is going to be at risk. People are going to get killed if we lose good intelligence.

So, to me, the idea of reading someone their Miranda rights doesn't make a lot of sense, but you have the flexibility to do that, if you choose, out in the field. You just have to get a waiver. So when you capture somebody on the homeland, I don't want our people to think that you have to give them a lawyer and read them their rights and that you can't question them about what they know about attacks against our homeland. That is dumb. That doesn't make us a better people, that makes us less safe. Let's put them in military custody, with the right to waive that. Let's give our interrogators plenty of time to find out what is going on. Then we will make a decision about where to prosecute.

I believe Federal courts have a role in the war on terror. There have been plenty of cases involving terrorism that went to Federal court where you had a good outcome. There have been cases going to Federal court where you had less than a stellar outcome. The key is, if you are holding an enemy combatant for 4 or 5 years under the law of war, I don't think it makes sense to put them in civilian court. You should put them in military commissions. And we are talking about people we have been holding for a period of time because we looked at them as a military threat, not as a common criminal.

So the provisions in 1032 are good law that will stand the test of time. It will allow us on our homeland to do what we can do overseas. Wouldn't it be odd not to be able to protect yourself because the enemy got to the United States less than you could if you captured them overseas?

Now let's talk a little bit about American citizens. There are a few people--and I give them credit for having passionate, honest-held beliefs that the President of the United States doesn't have the authority to designate an American citizen who has now joined al-Qaida--to issue an order to kill him--this al-Awlaki guy who was in Yemen. The bottom line is, the President, through a legal process we created years ago, made a determination that an American citizen has joined the enemy forces, and he issued an order through a legal process that says: If you find this guy, you can capture or kill him.

Now, wouldn't it be odd if you had a law that says you can kill somebody, but when you capture them, you can't hold them for a very long time, you can't indefinitely detain them? Well, death is pretty indefinite. So if you can kill a guy, why in the world can't you hold them and interrogate them to find out what they know about this attack or future attacks?

So let's be consistent. It makes sense to me that if an American citizen wants to join al-Qaida, they are no longer our friend, they are our enemy. And if the evidence is solid and it has gone through a legal process and this President or any other President determined that an American citizen is now operating abroad trying to harm us, joining al-Qaida, I believe they have the absolute legal and moral authority to identify that person as a threat to the United States; kill or capture. And if you don't agree with me, fine. I think about 80 percent of my fellow citizens do. It would be absurd not to be able to have that ability.

Citizenship is something to be respected. It is something to be cherished. It is not a "get out of jail free" card when you turn on your fellow citizens.

So at the end of the day, we have a system in place now that I am very proud of.

To Senator *Levin*, we have negotiated and we have compromised because the administration had some legitimate concerns. They had some legitimate concerns about Congress overly mandating how you detain, interrogate, and try prisoners. What we have come up with is the balance I have been seeking for 5 years. If you capture someone in the United States, you start with the presumption that you are going to gather intelligence in a lawful manner and prosecution is a secondary concern. We give the executive branch the ability to waive that requirement, and we have conditions on that requirement that will not interrupt an interrogation.

But we need to let this President know, and every other President, that if you capture someone in the homeland, on our soil--American citizen or not--who is a member of al-Qaida, you do not have to give them a lawyer or read them the rights automatically. You can treat them as a military threat under military custody, just like if you captured them overseas.

So this provision that Senators *Levin*, *McCain* *Ayotte*, and all of us have worked on makes perfect sense to me. It is a balance between protecting our homeland, living within our values, and giving the executive branch the flexibility they need to protect us, but just using good old-fashioned common sense. Under domestic criminal law, you cannot hold someone indefinitely without giving them a lawyer or reading them their rights, nor should you. But under military law, if you have evidence that the

person is a military threat, you don't have to give them a lawyer. That makes no sense whether you capture them here or overseas.

Everyone held as an unlawful enemy combatant has the right to access our Federal courts. Under this bill, it is not just one time you get to go to court. We create an annual review process so that if you are held as an enemy combatant in military prison or civilian prison, you will get an annual review.

We don't want you to go into a black legal hole. We don't want an enemy combatant determination to be a de facto life sentence.

I am proud of this work product. We go further than what the courts require. The courts require a habeas review of any person held as an enemy combatant. But at the end of the day, we say you have an annual review.

That requirement is for people captured in the United States, held at Gitmo. It doesn't apply to people held in Afghanistan. Thank God it doesn't. But in circumstances where someone is captured in the United States, held at Guantanamo Bay, every person will have their day in court to challenge the status of enemy combatant, and if they are going to be held indefinitely, they are going to get an annual review process as to whether it makes sense to hold them for 1 year.

Again, I wish to emphasize in war we do not have to let people go who are a danger. Most of these cases are intel cases. We are not fighting a crime, we are fighting a war. If the intelligence is good enough to convince a Federal judge that this person is a military threat, why in God's name would you want to let him go because of the passage of time? Our message to al-Qaida recruits is don't join al-Qaida because you could get killed or wind up dying in jail. Isn't that the message we want to send? Why in the world would we require our Nation to release somebody when the evidence presented to a Federal judge is convincing enough for him to sign off on what the military determined at an arbitrary point in time? That doesn't make us better people. It would make us less safe.

This bill is a very sound, balanced work product, and I will stand by it, I will fight for it, and I respect those who may disagree. But why did we take out the language Senator *Levin* wanted me to put in about an American citizen could not be held indefinitely if caught in the homeland? The administration asked us to do that. Why did they ask us to do that? It makes perfect sense. If American citizens have joined the enemy and we captured them at home, we want to make sure we know what they are up to, and we do not want to be required, under our law, to turn them over to a criminal court, where you have to provide them a lawyer at an arbitrary point in time. So the administration was probably right to take this out.

Simply stated, if you are an American citizen and you want to join al-Qaida: Bad decision; you could get killed or you could spend the rest of your life in military prison as a military threat or you could wind up in an article 3 court and maybe get the death penalty. I want people to know there is a downside to joining the enemy. I want to give our country the tools we need as a nation to fight an enemy and do it within our values. I don't want to waterboard people, but I don't want the only interrogation tool to be the Army Field Manual, online where anybody can read it. I wish to make sure everybody has a chance to say: I am not an enemy combatant. But I don't want to criminalize the war by capturing somebody on our soil and saying: You have a right to remain silent, when we would never read that right and present that to them if we captured them overseas.

We want to make sure we can gather intelligence, whether we capture them at home or abroad, whether they are an American citizen or not, if there is evidence they have joined al-Qaida.

To my colleagues, if you join al-Qaida, no matter where you join, no matter where you take up arms against the United States, we have every right in the world to treat you as a military threat. People who have joined al-Qaida are not members of a mob. They are not trying to enrich themselves. They are trying to put the world into darkness. Our laws need to distinguish the difference between a guy who robbed a liquor store and somebody who wants to blow up an airplane over Detroit or blow up innocent people in Times Square. If you do not understand that difference and if you do not have a legal system that can recognize that difference, then we have failed the American people.

This is a good work product. It has strong bipartisan support. We worked with the administration. But we are in a long war where a lot is at stake. I have tried to be as reasonable as I know how to be, and this work product is the best effort of a lot of well-meaning people, Republicans and Democrats. I will defend it. If you want to keep arguing about it, some people suggested we will talk a long time about this--yes, we will talk a long time about this. We will have a good discussion among ourselves as to whether an al-Qaida operative caught in the United States gets more rights than if we caught him overseas. We will have an argument among ourselves as to whether our military should be able to gather intelligence to protect us, regardless of where the person is captured, and the question for the nation is: Is America part of the battlefield? You better believe it is part of the battlefield. This is where they want to come. This is where they want to hurt us the most. If they make it here, they should not get more rights than they would get if they attacked us overseas.

They should not be tortured because it is about us, not about them. The reason I don't want to torture anybody is because I like being an American. I think it makes us

stronger than our enemies. There are ways to get good intelligence from the enemy without having to mimic their behavior. I do believe the military's work product should be judged and reviewed in Federal court in a reasoned way. That is part of this legislation. I do not want anybody to be sitting in jail forever without some review process so that one day maybe they could get out.

But here is what I will not tolerate. I will not criminalize what is a war. I will not put this Nation in the box of having captured a terrorist, when the evidence is solid that we know they are part of the enemy trying to kill us and say we have to give them a lawyer or let them go because of the passage of time. That makes no sense.

Senator *Levin*, Senator *McCain*, this is a product we should be proud of. We should fight for it, and we are going to fight. If you want to make it a long fight, it will be a long fight. We are not giving up.

Mr. *McCAIN*. Will the Senator yield for a question?

The PRESIDING OFFICER (Mr. *Begich*). The Senator from Arizona.

Mr. GRAHAM. Yes.

Mr. *McCAIN*. I am a little puzzled. Maybe the Senator from South Carolina has a response to this. Perhaps Chairman *Levin* does. We did give a national security waiver, which is very generous, in that the President just has to certify that it is in the national interest.

Mr. GRAHAM. Right.

Mr. *McCAIN*. Why does he think that would not be acceptable if there were a case where an individual would be held by civilian authorities rather than military authorities?

Mr. GRAHAM. The only answer I can give to Senator *McCain* is that there is a legitimate concern about encroaching on executive power. I have that concern. The executive branch is the lead agency in this war. They are the lead agency when it comes to prosecuting crime. But what I am trying to do, along with his help and that of Senator *Levin*, is to create statutory authority for this President and future Presidents that will serve the Nation well.

Congress has been too quiet and too silent. During the Bush years, we did not assert ourselves enough. We let things go. We were reluctant to get involved. Now we are involved in a constructive way.

What we have said as a Congress, if this bill passes, is that the executive branch has flexibility, but the Congress of the United States--which has powers when it comes to war--believes that an al-Qaida operative, those associated with al-Qaida, should be initially held in military custody because we are trying to gather intelligence. As I tried to explain, if you turn them over to civilian authorities for law enforcement purposes, then the whole process of intelligence gathering stops. You have to read Miranda rights. There is a very limited public safety exception. We allow a waiver if that is in the best interests of our national security. We have requirements in the bill not to impede interrogation. That is why we are doing this, because we want a process that will allow us to deal with people caught in the United States in a consistent way from administration to administration and understand the distinction between gathering intelligence to defend yourself in a war and prosecuting a crime.

Mr. *McCain*. Everyone we capture may not be as stupid as the couple who waived their Miranda rights. One of them is going to be pretty smart and certainly not waive their Miranda rights. Wouldn't that make sense over time?

Mr. *Graham*. The Senator is absolutely right. The flexibility of whether to Mirandize somebody exists. I don't know what is the best way. I do believe the best start is to take the Christmas Day Bomber off the plane and interrogate him in terms of what he knows about future attacks, how he planned this attack, and worry about prosecution in a secondary fashion. The only way you can do that is through a military custody intelligence-gathering process.

At the end of the day, I do believe it makes a lot of sense for the Congress to weigh in. We have not done it before. We have balanced this out. The administration's concerns have been met as much as I know how to meet them, and I am very proud of the work product.

Mr. *Levin*. Will the Senator yield for a question?

Mr. *Graham*. Yes.

The *Presiding Officer*. The Senator from Michigan.

Mr. *Levin*. The Christmas Day Bomber, I believe he was taken off that plane in Detroit, he was interrogated by the FBI; is that correct?

Mr. *Graham*. Yes, I believe so.

Mr. *Levin*. There was nothing wrong with that. That was the choice of the executive branch. It worked here.

Mr. GRAHAM. Nothing wrong with that.

Mr. LEVIN. We make it flexible. This is something which I heard today from the supporters of this amendment. They want flexibility.

Mr. GRAHAM. Right.

Mr. LEVIN. That is exactly what we provide in this amendment. That is the question Senator *McCain* just asked: If this administration or any administration decides that they want to provide the civilians with opportunity to interrogate, for whatever length of time they want, they are going to set the procedures under this language in our bill; is that not correct? The President will determine the procedures. If he wants those procedures to be civilian control until some point, that is going to be up to the President. We may disagree with that or not.

Mr. GRAHAM. Exactly.

Mr. LEVIN. There are Members of our body who very strongly disagree with that.

Mr. GRAHAM. Right.

Mr. LEVIN. But that is not who is going to decide. We are not going to make the decision that the person is going to be given or not given civilian interrogation. That decision is going to be made by a President who sets the procedures for interrogation and will decide whether to provide a waiver; is that correct?

Mr. GRAHAM. That is contract. If I might continue the conversation for a minute, if you don't mind. Would the Senator agree with me that if we all of a sudden required our soldiers to read Miranda warnings to an al-Qaida operative caught in Afghanistan, people would think we were crazy?

Mr. LEVIN. I would think it would be a very bad policy.

Mr. GRAHAM. OK. What if we have the very same person who made it out of Afghanistan and makes it to America. I think most people would want us to gather intelligence to find out what is coming next. Would the Senator agree with me, if you put someone in civilian control for the purpose of prosecution, intelligence gathering becomes very difficult?

Mr. LEVIN. Not necessarily. I think there are occasions where the civilian interrogation may be actually more workable.

Mr. GRAHAM. OK. Fair enough. But does the Senator agree with me that you cannot indefinitely hold someone under domestic criminal law without presenting them to court or reading them Miranda rights?

Mr. LEVIN. That is correct--indefinitely. But how long that lasts is a procedure the President is going to determine.

Mr. GRAHAM. Right. But here is the point we are going to make. Some of us believe that presentment to a court and a Miranda warning may not be the best way to go, in terms of gathering intelligence. Under military custody for intelligence gathering there is no right to remain silent; does the Senator agree with that?

Mr. LEVIN. Under military custody, yes.

Mr. GRAHAM. So we are starting the game with military custody but for the reasons the Senator just said--and they may be good reasons, to say that is not the right way to go--they can go down another path. That is all we are trying to do. Because there is a sort of a gap when it comes to someone caught in the United States. We are trying to provide clarity, what to do with an al-Qaida member caught in the United States, to create flexibility but start the process with intelligence gathering because, in the United States, if you hold someone, under the law enforcement model, caught in the United States, you have to read them their rights. You have to present them to court.

If they are in military custody, you don't have to do that. But what system fits the situation best should be left to the executive branch. We are just creating an avenue for military custody that can be waived.

Mr. LEVIN. That is correct, providing flexibility which we should provide in order for the executive branch to have what they want, which is the flexibility. There, I think, many of our colleagues believe there is too much flexibility. But whether that is right or----

Mr. GRAHAM. Oh, yes, they are over here. There are plenty of them.

Mr. LEVIN. But whether they are right or wrong, the facts are in this bill there is flexibility. It is carefully laid out. The President will lay out the procedures and notify the Congress of those procedures. But the point is, we do provide the very flexibility that the President of the United States has sought. We give them that flexibility, and it seems to me for the characterization of this bill to be that there is no flexibility, that somebody must go into military detention, is inaccurate. We ought to debate policy, but we should not debate what the words of a bill are.

One other thing. Is it not correct that when it is said, as the Senator from California did, that this provision has unprecedented and new authority for indefinite detention of American citizens without trial, that as a matter of fact we had in section 1031, in the bill filed months ago, language which would have exempted American citizens? It was the administration that wrote 1031 the way it is now and has approved of that language; is that not correct?

Mr. GRAHAM. That is absolutely correct. Let's talk about indefinite detention and what it means. When someone is captured as a member of al-Qaida--the Bush administration has had people at Guantanamo Bay for years. They are being held under the law of war. Does the Senator agree with that?

Mr. LEVIN. I am sorry?

Mr. GRAHAM. The Bush administration has had prisoners held at Guantanamo Bay for years now who have not been prosecuted. They are held under the law of war.

Mr. LEVIN. That is correct.

Mr. GRAHAM. The Obama administration has continued to hold at least 48 under that same theory.

Mr. LEVIN. And believes they have that authority.

Mr. GRAHAM. I believe they are right. All the Congress is saying to the President--this one and future Presidents--is we agree with you, that if the person is a member of al-Qaida or an affiliated group, you can hold them as an enemy combatant without the requirement to let them go at an arbitrary point in time, but under the law, if they are at Guantanamo Bay or captured in the United States, they have a habeas right to appeal that determination to a judge.

Under our bill, does the Senator agree with me, we have done more than that? We have created an annual review process so the person being indefinitely held will have some due process every year?

Mr. LEVIN. The Senator is correct. The Senator has led the way to have this kind of additional protection for those prisoners. There is greater protection in this bill because of that review process than there is without this bill.

Mr. GRAHAM. Right. And we should do that.

Mr. LEVIN. If I could, one other question, because the Senator is an expert on this subject. Is it also not true for the first time in terms of determining whether a person is, in fact, somebody who needs to be detained under the law of war--for the first time when that determination is made, that person is entitled to a lawyer and entitled to a military judge?

Mr. GRAHAM. Let me tell the Senator how he is dead right. I offered an amendment to the first bill we put on the table here on the floor about this, and I had a requirement of a military lawyer being given to the respondent at a combat status review tribunal. Every person being held as an enemy combatant by our military gets a combat status review tribunal. We are saying that tribunal has to be chaired by a military judge, and we are saying they can access a lawyer. That, to me, is a welcomed change.

The Obama administration and the Bush administration decided to put the military judge requirement in place. But this now is a statutory requirement, so the next President is going to be bound to do that. We are trying to create a process to allow a status tribunal hearing to be done in a more due-process friendly fashion. We require a judge and we provide access to counsel. To me that is a giant step forward.

Mr. LEVIN. And it is the law for the first time; is that not correct?

Mr. GRAHAM. For the first time it is now not the whim of the administration. It will be the law of the land.

Mr. *McCAIN*. If this bill is enacted.

Mr. GRAHAM. If this bill is enacted.

Mr. *McCAIN*. To kind of summarize this issue for our colleagues, we believe an al-Qaida operative is an enemy combatant and, therefore, the assumption should be that that enemy combatant should be under military custody whether it be in the United States or any place else?

Mr. GRAHAM. That is correct.

Mr. *McCAIN*. I would argue especially in the United States since that poses the greatest threat. However, with our assumption that that person should be held under military custody, we still give a very wide waiver in case there are extenuating circumstances.

In other words, we are saying that we assume an al-Qaida operative, or a suspected al-Qaida operative, is an enemy combatant wherever they are on Earth and, therefore, they should be under military custody unless there is some reason that the President determines otherwise.

The counterargument we are hearing, in summary, is that because that al-Qaida operative is apprehended in the United States, therefore, they should fall under civil authority, thereby negating the assumption that he is an enemy combatant; he is a common criminal. This is a very important principle in this discussion we are having.

How do you treat a suspected al-Qaida terrorist who wants to, in the case of the Underwear Bomber, blow up a plane with 100 some-odd passengers on it? Shouldn't that person be treated as an enemy combatant and, therefore, subject to all of the rules of military people who are under the supervision of the military? Isn't that what we are debating here? The ACLU and the left, with all due respect, feel that person should be--first of all, that al-Qaida operatives should be treated under our criminal system

rather than treated as an enemy combatant who wants to do great harm to the United States of America. Is that an accurate description of what we are talking about here?

Mr. GRAHAM. Yes, with one caveat. There is a line of thinking that we should be using Federal courts exclusively, that military commissions are not appropriate in any circumstance, and that we should be using the law enforcement model once we deal with an al-Qaida operative, particularly here in the United States.

What we are saying in this legislation is that the battlefield includes our own homeland. So that argument being made by the ACLU, I think, will bear that because most Americans feel we are not dealing with somebody who robbed a liquor store. These people present a military threat, and we should be able to gather intelligence in a lawful way.

The administration's concern was, are we overstepping Executive power. I have, quite frankly, said I am concerned about that. Peter was concerned about that; Dave was concerned about that; I have been concerned about that because I don't believe you can have 535 attorneys general or commanders in chief.

What we did to accommodate that concern is what the Senator from Arizona said, we started out with a military custody requirement that can be waived and the procedures to be waived are in the hands of the executive branch. As Senator *Levin* has indicated, this, to me, is very flexible and is so flexible that I feel very good about it.

If it were a mandate to put everybody in military custody and try them in military commissions, even though I think that is the best thing to do, I would object, because the flexibility to make those decisions needs to be had in the executive branch. There may be a time when an article 3 court is better than a military commission court for an al-Qaida operative. I don't want the Congress to say article 3 courts could never be used. I don't want the Congress to say military commissions are bad. We now have a good military commission system. We have a process where the homeland is part of the battlefield. The individual being captured on our homeland can be held to gather intelligence under military law. And if somebody is smarter than us and believes that is not the right model, they can change the model.

That is the best we can do, and that is the best I am going to do because I am very worried that in the future we are going to lock ourselves down into policies that would have an absurd outcome that if you made it to America, we cannot gather intelligence, which would be crazy. There is no good reason for that.

Mr. LEVIN. Would the Senator yield?

Mr. GRAHAM. Yes.

Mr. LEVIN. In addition to providing in this bill that the determination as to whether somebody is al-Qaida is to be made through procedures which the President will adopt, No. 1, which is flexibility.

Mr. GRAHAM. Right.

Mr. LEVIN. No. 2, that determination shall not interfere with any interrogation which is undertaken by civilian or any other authorities; is that not correct? And, finally, on top of that, there is a waiver that is provided. We have all of that protection. So the statements that are made on this floor and in some of the press that somehow or other we are pushing everybody who is determined to be al-Qaida into the military detention system is not accurate because we have those three protections, the procedures for that decision as to whether someone is al-Qaida, our procedures, which the President is going to adopt; secondly, we only apply this to al-Qaida, not to everybody who might be captured; and, third, we have a waiver for triple protection to protect what the Senator rightly is sensitive to, and that is there be flexibility in the executive branch.

All of us may say we want it done one way or another. We may presume it be done one way or another, we may wish that it be done one way, civilian or military. Some of us may have different opinions. That is not the point. That is not the issue. The issue is what does this bill provide. This bill provides a reasonable amount of

flexibility and does not tell the President you must turn somebody who is suspected of being al-Qaida over to the civilians at any point or to the military at any point.

Mr. GRAHAM. If I may add another layer of process here. Some people on our side say that is way too much. You should throw these people in military--  
Senator *Lieberman*, my dear friend, if you left it up to him, everybody caught as an al-Qaida operative would be thrown in military custody and would be held as long as we need to hold them and would be tried by military commissions.

At the end of the day that is sort of where I come out, but I am not going to create a 535-commander-in-chief body here because there are times when that may not work. What we have done is what the Senator said. If you capture someone at home, it is as the Senator described. The reason, to my colleagues on this side, I wanted to build in

the things the Senator described is because I am very worried about crossing over out of our lane into the executive lane. I think we have created a great process.

But here is what happens to that al-Qaida operative. Not only does the executive branch have the flexibility to go one way versus the other, starting with the idea of military custody, but all the things the Senator said are true.

What do they have beyond that? If someone is being held as an enemy combatant, there are regulations requiring that they be presented to a combat status review tribunal, now with a military judge, access to counsel--I think it is within 60--I cannot remember the time period. That is done. Then they have the right to take that decision and appeal it to a habeas Federal district court judge.

No one in America is going to be held as an enemy combatant who doesn't get their day in Federal court. But their day in Federal court is a habeas proceeding, not a criminal trial. If the judge agrees with the United States that you are, in fact, an enemy combatant, then you can be held indefinitely, but we require an annual review. If the judge lets you go, they have to let you go. This is the best we can do. This is a hybrid system. In no other war do you have access to a Federal court.

As I said before, this is war without end, and if we don't watch it, an enemy combatant determination can be a de facto life sentence because there will never be an end to these hostilities probably in my lifetime. I recognize that. And in working with the Senator from Michigan and Peter and others, we have come up with a process now that allows the Federal court to review the military decision. We will have an annual review process if the judge agrees with the military. That, to me, is due process that makes sense in a war without an end; something you would not do in World War II, but something we need to do here.

So to the critics, please read the damn bill. I apologize for saying it that way, but you are talking about things that don't exist. There is plenty of flexibility and waiver requirements in this bill. No one is being held indefinitely without due process. Not only is this due process you wouldn't get in any other war, this is due process beyond what exists today only if we can pass this bill.

I don't mind being considered by some of my colleagues as maybe too friendly to due process. The reason I am so passionate about this is what we do sets a precedent for the world and the future. If one of our guys is captured, I can look the other people in the eye--al-Qaida could care less, but other people might--and say we are a rule of law nation. I believe in the rule of law, but there is a difference between the rule of law of fighting a crime and fighting a war.

I am proud of the military legal system. I do believe the military justice system has a role to play in this war. In military commissions, the judges are the same judges who administer justice to our own troops, the same prosecutors, the same defense attorneys, the same jurors. I am proud of the military legal system. I am proud of the Federal court system. I want to use both.

Senator *Levin*, we have been working on this for years.

This is the best work product I have seen. I hope my colleagues will understand we have thought long and hard about this, and if we don't get a process in place that has some definition, some certainty, some guidance, we are letting our Nation down.

This is a good bill, and I hope people will vote for it.

Mr. LEVIN. If this bill contained the provisions as described by our friend from California, I would vote against our bill.

Mr. GRAHAM. So would I, at my own detriment.

I don't want to mandate the executive branch to do everything as *Lindsey Graham* would like. I want to start with a theory that makes sense and provides flexibility to change it if that makes sense. I don't want anybody to be in jail because somebody in the military said they are an enemy combatant. I want a Federal judge involved in a sensible way. I want due process to make sure we can tell the world: You are not sitting in a jail because somebody said you were guilty of something. You had a chance to challenge that. But to the critics: I will not stand for the idea that we can't defend ourselves under the law of war, because I believe we are at war. In war, we have the right to hold enemy prisoners. We don't have to let them go to kill again. In war, you can hold people and gather intelligence in a human way.

That is what we are able to do under this bill--fight a war within our values.

I yield.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. *McCAIN*. Mr. President, I see the Senator from Illinois on the Senate floor, whom I know is very heavily involved in this issue. I think we have been debating this amendment now for about 3 hours, at least, and we have had a number of speakers from both sides.

I hope that perhaps we can go ahead and vote on this amendment. I was informed and the chairman was informed by Senator *Reid* that there is a limited amount of time that can be spent on this bill. I realize how important it is to him, but we have no further speakers right now. I know the Senator from Illinois wishes to speak on it. But would it be agreeable that after we have exhausted the number of speakers that we could go ahead and vote on the amendment?

Mr. *DURBIN*. No. It is not pending.

Mr. *McCAIN*. It is too bad. Let me just say to the Senator from Illinois, this is an important issue, and I understand how important it is to him. But this legislation has a lot to do with defending this country. For the Senator to hold up the entire bill because he doesn't think it has been discussed enough is a disservice to the men and women in the military whose concerns and needs this bill addresses, as well as the needs of the Nation's security.

So we took up this amendment in the belief that we were going to go ahead and debate it and vote on it. So the Senator from Illinois, if we are forced to not be able to complete work on this legislation, I think bears a pretty heavy burden because we have a lot of other provisions in this bill that are also vitally important to the security of this Nation.

We have had spirited debate. I have been involved in this legislation of the national defense authorization bill for a quarter of a century. We have moved forward and we have had debate and we have had votes. I hope we can do that now so we can move forward to other issues.

The Senator from Kentucky is on the Senate floor with an amendment he would like to have debated and voted on, and we have about 100 more. So I say to the Senator from Illinois that after we have had sufficient debate, I hope we can go ahead and vote on the amendment.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I don't know--I now have the floor, so I will proceed.

First, let me thank the Senator from Arizona. We have served together in the House and in the Senate. I respect him very much. I certainly have the highest respect, as well, for the Senator from Michigan. But I will tell my colleagues this: If the argument is, if we don't vote on this amendment tonight the security of the United States is in peril, that is a little hard to make because we are not going to finish this bill tonight, No. 1. No. 2, it is pretty clear the administration opposes this particular amendment, at least I have been told they do. No. 3, if we are talking about something as fundamental as changing some laws in this country relative to the U.S. Constitution, I have to agree with Senator *Leahy*, the chairman of the Judiciary Committee, and Senator *Feinstein*, the chairman of the Intelligence Committee, that this great body should take the time, debate the issue, and vote on it in a timely fashion.

I am not here to filibuster this matter, but I am here to discuss it.

To those who have come to the floor and said it is imperative to move now to change the way we deal with terrorist detainees in the United States, I would like to make a record for them.

For the record, over the last 10 years we have dealt with alleged terrorists in the United States. During that 10-year period of time 300 alleged terrorists have been successfully prosecuted in the criminal courts of America and incarcerated safely in American prisons--300. During that same 10-year period of time, six--count them, six--have been subjected to prosecution through military tribunals. So the score is 300 to 6 for those who want to change the system, with 300 saying we have a pretty darn good Federal Bureau of Investigation, we have excellent lawyers at the Department of Justice, and the American court system has responded well to keep us safe. So the notion that this has to be changed tonight to keep America safe, I don't know there is any evidence to support that.

I listened to some of the arguments on the Senate floor, and I wish to call to the attention of my colleagues that this is not an insignificant change in the law. If section 1031 is enacted into law, for the first time we will be saying in the law that we can detain indefinitely an alleged terrorist who is an American citizen within the United States of America.

Mr. GRAHAM. Would the Senator yield?

Mr. DURBIN. I will yield after I complete my point. I believe most of us feel if someone is charged with terrorism--an American citizen--that normally they would be subjected to constitutional protections and rights as American citizens. For those who believe in military tribunals--and I know the Senator from South Carolina does because he has been engaged in them personally and feels they are an honorable and effective way of prosecuting individuals--he knows, as I do, we have gone through in the last 10 years a series of Supreme Court cases that have questioned whether we are handling military tribunals in the right fashion.

The law is not settled when it comes to military tribunals, but the law is clearly settled when it comes to article 3 criminal courts, to the point that 300 alleged terrorists have been successfully prosecuted and convicted.

So I think this is worthy of debate. It is a valid issue. The security of America will always be a valid issue on the floor of the Senate. But let's do it in a thoughtful way. This matter was not referred to the Senate Judiciary Committee. It was not referred to the Senate Intelligence Committee. It was decided by the Armed Services Committee. As good as they are, as great as the people are who serve on that committee, there are others who should have a voice in the process.

I yield to the Senator from South Carolina if he has a question he would like to direct through the Chair.

Mr. GRAHAM. I thank the Senator from Illinois. I wish to respond. No. 1, it is good to debate. It is good to have discussions about important matters. The Senator from Illinois is right. There is nothing more important than defending the homeland.

Now, let me just state the law as I understand it. The Hamdi case was an American citizen captured in--

...

Mr. GRAHAM. If I may respond to my friend from Illinois, Hamdi was an American citizen captured in Afghanistan. He had joined al-Qaida--the Taliban, I guess in that case. We captured him when we went into Afghanistan. We brought him back and we held him as an enemy combatant for intelligence-gathering purposes. His case went to the Supreme Court. The Supreme Court said we could hold an American citizen as an unlawful enemy combatant, we just have to create procedures, a due process requirement. Eventually, the court said every unlawful enemy combatant has a habeas right.

The law of the land is clear that an American citizen helping the enemy overseas can be held indefinitely. But they have the right to petition a judge as to whether the initial determination was correct. If the habeas judge believes there is not enough evidence to hold this enemy combatant, then they have to release them. But if the judge agrees with the government that there is enough evidence to hold them as an enemy combatant, they can be held indefinitely. This President is holding 48 people at Guantanamo Bay who have never seen a criminal courtroom because of the theory of law of war.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I say to the Senator from South Carolina, I yielded for a question.

The PRESIDING OFFICER. That is correct.

Mr. DURBIN. Can the Senator bring it to a question?

Mr. GRAHAM. The question is--I forget what I said.

Mr. DURBIN. Let me just say to my colleague, whom I respect and count as a friend, the critical difference between the Senator from Michigan and the Senator from South Carolina is this: The Hamdi case involved an American citizen, part of the Taliban, arrested in Afghanistan, OK? The Senator from South Carolina made that point when he said the word ``overseas." Unfortunately, section 1031 does not create that distinction. An American citizen arrested in the United States, charged with terrorism, without any connection to overseas conduct--having been arrested overseas, I should say--is still going to be subject to indefinite detention.

The only thing I would add is this: I think this is a good exchange, and I think we need more. The notion that we have to hurry up and get this done in the next 5 minutes is not, I don't think, an appropriate way to deal with this. I know Senator *Paul* and Senator *Merkley* are waiting, and I am prepared to yield the floor at this point.

If this matter comes up again this evening, I hope we can engage in further discussion.

Mr. LEVIN. I just have a question, if the Senator would yield, of the Senator from Illinois.

Mr. DURBIN. Sure.

Mr. LEVIN. Is the Senator aware of the fact that section 1031 in the bill we adopted months ago in the committee had exactly the language that the Senator from Illinois thinks should be in this section 31, which would make an exception for U.S. citizens in lawful residence? That was in our bill. I am wondering if the Senator is aware that the administration asked us to strike that language from section 1031 so that the bill in front of us now does not have the very exception the Senator from Illinois would like to see in there.

Mr. DURBIN. I have the greatest respect for the Senator and the administration, but I think I am also entitled to my own conclusion.

Mr. LEVIN. No, I understand. But I am just asking the Senator, is the Senator aware it was the administration that asked us to strike that language, the exception for U.S. citizens?

Mr. DURBIN. Not being a member of the committee, I did not follow it as closely as the Senator did. I respect him very much and take his word.

Mr. LEVIN. I thank the Senator.

Mr. DURBIN. I yield the floor.

...

Mr. GRAHAM. Mr. President, the exchange with Senator *Durbin* was very good. The law of the land is pretty clear--unequivocal, in my view--that an American citizen captured overseas can be held as an enemy combatant, and every enemy combatant held at Guantanamo Bay or captured in the United States has habeas rights. The Padilla case involves an individual who was captured in the United States, suspected of being an al-Qaida operative, and was held for 4 years. He appealed his case to the Fourth Circuit, and the Fourth Circuit said: You have a right to a lawyer to prepare your habeas case, but you do not have a right to a lawyer to interrupt the interrogation. You can be held as an enemy combatant, and they can gather intelligence for an indefinite period.

That is the law of the land, and that is why the administration came over and said the provision that Carl and I were talking about really would change the law. They are preserving the ability, if they want to--they do not have to do this--basically, to hold an American.

Here is the thought process for the body and the Nation: If you capture somebody--not just involved in terrorism; that is not just what we are talking about--al-Qaida

operatives involved in an attack on the United States, if they are an American citizen--who cares?--if they are doing that, we want to know what they know, interrogate them and hold them for prosecution, or just hold them so they will not go back to the fight. That is the law.

All we are doing is creating a procedure for that system to be followed. We are not doing anything different than already exists. This notion, somehow, that the homeland is not part of the battlefield is absurd. Why in the world would we give somebody rights who came to America to attack us different than we would if we caught them overseas, when the point is, they are involved with the enemy--American citizen or not. We are just creating a procedure that will allow that situation to be handled. So that is why the administration objected to our language, and I think they are right.

...

Mr. GRAHAM. Mr. President, I ask unanimous consent to enter into a colloquy with my colleague from New Hampshire.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAHAM. We are talking about this amendment. Let's debate this amendment. Let's vote on this amendment. But the heart of the issue is whether the United States is part of the battlefield in the war on terror. The statement of authority I authored in 1031, with cooperation from the administration, clearly says someone captured in the United States is considered part of the enemy force regardless of the fact they made it on our home soil. The law of war applies inside the United States not just overseas. The authorization to use military force right after the war began allowed us to go into Afghanistan and use detention and capture and military force to deal with the enemy in Afghanistan and other places overseas.

To my colleague from New Hampshire, does she believe al-Qaida considers American soil part of the battlefield?

Ms. AYOTTE. In response to the Senator from South Carolina, I would say, unfortunately, our country is the goal for al-Qaida, and we saw that with September 11 and the horrible attacks on our country that day that killed Americans.

They want to come here and harm us and hit us where it hurts us the most. So, unfortunately, America is part of the battlefield. To put ourselves in a position where we would not allow our military intelligence, law enforcement, to have the tools they

need to gather the most intelligence to protect Americans on our soil would lead to an absurd result.

Mr. GRAHAM. Does the Senator agree that with Senator *Levin* and a very bipartisan work product we have now created a legal system that says the following: If a U.S. citizen, a non-U.S. citizen is involved in an al-Qaida attack on our Nation, and is captured within the United States, we are allowing our military the ability to hold them as part of the enemy force, to question and interrogate them for intelligence gathering, and that right we have overseas to hold somebody now exists in the United States because the threat is the same?

Ms. AYOTTE. I would say to my colleague from South Carolina, when he spoke on the floor he captured the most important part of this; that is, without the amendment we have been debating, we do not even give our military, law enforcement, intelligence officials the ability to decide which system is best in each incident. Rightly so, when you are in our country, when you are an American citizen, you are given your Miranda rights. You are told: You have the right to remain silent. You have the right to have a lawyer. We need to make sure we do not create a distinction where if you are captured abroad, you are treated one way--and we are giving our officials maximum flexibility to gather as much information as possible to protect our country--but if you make it here, the rules are different, and we do not give the officials who are set to protect us every day, both from a military and law enforcement end, the flexibility they need to gather maximum intelligence.

It would just be an absurd result to treat it differently. It would almost encourage: Come to America--unfortunately--to attack us because you will actually be given greater rights if the attack occurs here.

Mr. GRAHAM. Would the Senator agree that what we have been able to do on the committee is basically say, in law for the first time, that the homeland is part of the battlefield; that military custody is available to hold a suspected al-Qaida operative caught in the United States--American citizen or not--but we are going to allow the administration--this administration and all future administrations--to change that model if they believe it is best?

To me, we have created a right by our intelligence community, law enforcement community, to do at home what they can do overseas. If we do not do that, that would just not only be absurd, I think it would make us all less safe for no higher purpose. So to my colleagues who believe we are changing something, all we are trying to do is make sure that when the enemy makes it to America, we can hold them and gather intelligence to protect ourselves, no more and no less.

We start with the presumption of military custody. But if the experts in the field, this administration or future administrations, believe that model is not best, they can seek a waiver. That, to me, is what we should have been doing for years. Because the battlefield, to those who are listening, is an idea, not a country. We are battling an idea; that is, a terrible idea.

Their idea is, if you are a moderate Muslim seeking to worship God a different way, you are not worthy of living. If you are a Jew or a Gentile, you name it, if you do not bow to their view of religion, then you are going to live in hell. So that is what we are fighting. At the end of the day, this legislation creates a process to deal with the threats in our own backyard and, unfortunately, does the Senator from New Hampshire agree, that there is going to be further radicalization, that homegrown terror is where this war is going to?

Ms. AYOTTE. I would agree with the Senator from South Carolina that unfortunately there are threats we face within our own country from homegrown radicalism. But also let's not forget, this amendment, in terms of the military custody, applies to members of al-Qaida or associated forces who have planned an attack against our country or our coalition partners and are not U.S. citizens. So in this provision we are talking about foreigners coming to our country who are members of al-Qaida and who want to harm Americans, if we think about what happened on September 11.

I would also add, I think it is very important what is in this important provision of the Defense Authorization Act, in response to the Senator from California, who raised the case of Zazi as an example where she thought that case would be impacted by this amendment, that is simply, with all respect to the Senator from California, not the case.

Because if one looks at the language in our amendment, we have given flexibility to the executive branch to conduct the interrogations, to have surveillance. So in the Zazi case, there was surveillance undertaken. We put express language in here allowing the executive branch to allow law enforcement to conduct surveillance, to conduct interrogation.

I would point out that provision in terms of the amount of flexibility we have actually given the executive branch. But most importantly, we have dealt with the issue the Senator talked about, which is, in the absence of this provision, when terrorists come to our country and attack us, we are in a position where, under our law enforcement system, they have to give Miranda rights. They have the right to presentment. We are simply saying they have the option to make sure they can put intelligence gathering as the top priority.

So this, as the Senator has identified and talked about, is a very reasonable compromise. As the Senator knows, my colleague from South Carolina, I would have actually liked to have seen this go further. But it is very important that we bring this forward.

Mr. GRAHAM. I would add that Senator *Lieberman* would have gone further than the Senator. There is nobody whom I respect more than Senator *Lieberman*, but we are trying to find a balanced way.

So in summary, 1032, the military custody provision, which has waivers and a lot of flexibility, does not apply to American citizens, and 1031, the statement of authority to detain, does apply to American citizens. It designates the world as the battlefield, including the homeland.

Are you familiar with the Padilla case? That is a Federal court case involving an American citizen captured in the United States who was held for several years as an enemy combatant. His case went to the Fourth Circuit. The Fourth Circuit Court of Appeals said: An American citizen can be held by our military as an enemy combatant, even if they are caught in the United States, because once they join the enemy forces, then they present a military threat and their citizenship is not a sort of a get-out-of-jail-free card; that the law of the land is that an American citizen can be held as an enemy combatant. That went to the Fourth Circuit. That, as I speak, is the law of the land.

Ms. AYOTTE. That is right. That is the law of the land. That is what is reflected in this provision in the Defense Authorization Act. It is reflective of case law issued by our U.S. Supreme Court, which in not only that

case but in subsequent cases basically said, in those instances, you do have to provide habeas-type relief.

Mr. GRAHAM. In the Padilla case, that went to the Fourth Circuit. The Hamdan case went to the Supreme Court. That was capture overseas. But the Fourth Circuit ruling stands that an American citizen captured in the United States can be held as an enemy combatant.

But 1032, requiring military custody, is only for noncitizens captured in the United States. So the bottom line is, I think we have constructed a very sound, solid system that deals with homeland captures and homeland threats. We have created due process that understands this is a war without end, that no one is going to be held in jail indefinitely without going to a Federal court to make their case that they are unfairly held, that if the Federal court rules with the government, there is an annual review

process that would allow the opportunity to get out in the future based on an evaluation of the case.

From a due process point of view, I am very proud of the work product. I think it makes sense. I think it is a balance between our right to be safe and our rights to provide individuals with due process. But the big breakthrough is that we are now, for the first time as a Congress, creating a system that not only will allow this President flexibility and guidance, but future Presidents, and it will help us in further court challenges.

Quite frankly, the Congress is saying, through this bill, if someone is caught in the United States, citizen or not, joining al-Qaida, trying to do harm to our Nation, we are going to create a system where you can be held, you can be prosecuted, you can be interrogated within our values, and we are not going to create an absurd result that if you make it here, none of that applies. That is all we are trying to do. Does the Senator agree with that?

Ms. AYOTTE. I would agree with that. The Senator has already pointed out how important it is to have these provisions in place to give the officials who do this work every day whom we have so much respect for the ability to gather intelligence.

We need this provision to protect our country from attacks on our homeland. It is so important. I would ask one question of the Senator from South Carolina. He is familiar with the military commissions.

Mr. GRAHAM. If I may, I think we need to move to the appropriations conference report. We will do it very quickly.

Ms. AYOTTE. I will ask the Senator quickly. The Senator from Illinois said we have only had six civilian trials with terrorists.

Mr. GRAHAM. Military commissions.

Ms. AYOTTE. Six military commission trials and hundreds of civilian trials of terrorists. I would ask the Senator, did the administration suspend military commission trials for a period of time?

Mr. GRAHAM. The reason we have not had more is because the Obama administration withdrew charges. Thank goodness they have reinstated charges. There are military commission hearings going on as we speak. I am in the camp of "all the above."

Sometimes article 3 courts are the best venue, sometimes military commissions. The Ghailani case was someone we held as an enemy combatant for years, took to Federal court and 200-and-something charges and got convicted on 1. Our Federal courts are not set up to deal with people who have been held as enemy combatants under the law of war, then tried in civilian systems.

The Christmas Day Bomber, it made perfect sense to me to put him in an article 3 court. We found out he was a low-level guy, not one of the higher-ups. But if we catch someone here at home or overseas who is involved deeply in terrorism in terms of what they know, then we would hold them for a period of time to question them.

Then, if you wanted to decide to prosecute, military commissions make the most sense. So the only reason we have not had more military commission trials is because they have been stopped. I am not saying Federal courts are not an appropriate venue sometimes. I am saying that when you hold someone under the law of war for years to gather intelligence, which you have a right to do, we need to keep them in the same system, and you see what happens when you mix systems.

I am very proud of the bill, great debate to have, long overdue. If we can get this enacted into law, I will say this: Americans can look anyone in the world in the eye and say: We have robust due process. We can also tell the people in this country whom we are sworn to protect that we have a system that recognizes the difference between an al-Qaida operative trying to kill us and destroy our way of life and a common criminal. We need to do both.

I yield the floor.

...

**NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012--  
Continued -- (Senate - November 17, 2011)**

[Page: S7684]

---

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that the pending amendments be set aside in order to call up amendments Nos. 1125 and 1126.

I further ask that Senators *Leahy*, *Durbin*, and *Udall* of Colorado be added as cosponsors to both amendments.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. *Feinstein*] proposes en bloc amendments numbered 1125 and 1126.

The amendments are as follows:

(Purpose: To clarify the applicability of requirements for military custody with respect to detainees)

On page 361, line 9, insert ``abroad" after ``is captured".

The PRESIDING OFFICER. The Senator from Colorado.

AMENDMENT NO. 1107

Mr. UDALL of Colorado. Mr. President, I ask unanimous consent that the pending amendment be set aside and amendment No. 1107 be called up.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The bill clerk read as follows:

The Senator from Colorado [Mr. *Udall*] proposes an amendment numbered 1107.

Mr. UDALL of Colorado. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To revise the provisions relating to detainee matters)

Strike subtitle D of title X and insert the following:

Subtitle D--Detainee Matters

**SEC. 1031. REVIEW OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.**

(a) *In General.*--Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall, in consultation with appropriate officials in the Executive Office of the President, the Director of National Intelligence, the Secretary of State, the Secretary of Homeland Security, and the Attorney General, submit to the appropriate committees of Congress a report setting forth the following:

(1) A statement of the position of the Executive Branch on the appropriate role for the Armed Forces of the United States in the detention and prosecution of covered persons (as defined in subsection (b)).

(2) A statement and assessment of the legal authority asserted by the Executive Branch for such detention and prosecution.

(3) A statement of any existing deficiencies or anticipated deficiencies in the legal authority for such detention and prosecution.

(b) *Covered Persons.*--A covered person under this section is any person, other than a member of the Armed Forces of the United States, whose detention or prosecution by the Armed Forces of the United States is consistent with the laws of war and based on authority provided by any of the following:

(1) The Authorization for Use of Military Force (Public Law 107-40).

(2) The Authorization for Use of Military Force Against Iraq Resolution 2002 (Public Law 107-243).

(3) Any other statutory or constitutional authority for use of military force.

(c) *Congressional Action.*--Each of the appropriate committees of Congress may, not later than 45 days after receipt of the report required by subsection (a), hold a hearing on the report, and shall, within 45 days of such hearings, report to Congress legislation, if such committee determines legislation is appropriate and advisable, modifying or expanding the authority of the Executive Branch to carry out detention and prosecution of covered persons.

(d) *Appropriate Committees of Congress Defined.*--In this section, the term ``appropriate committees of Congress'' means--

(1) the Committee on Armed Services, the Committee on the Judiciary, and the Select Committee on Intelligence of the Senate; and

(2) the Committee on Armed Services, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence of the House of Representatives.

...

AMENDMENT NO. 1105

(Purpose: To make permanent the requirement for certifications relating to the transfer of detainees at United States Naval Station, Guantanamo Bay, Cuba, to foreign countries and other foreign entities)

On page 365, line 12, strike `` for fiscal year 2012".

...

AMENDMENT NO. 1158

(Purpose: To clarify the permanence of the prohibition on transfers of recidivist detainees at United States Naval Station, Guantanamo Bay, Cuba, to foreign countries and entities)

On page 367, strike line 11 and all that follows through `` Guantanamo" on line 18 and insert the following:

*(c) Permanent Prohibition in Cases of Prior Confirmed Recidivism.--*

(1) **PERMANENT PROHIBITION.**--Except as provided in paragraph (2) and subject to subsection (d), the Secretary of Defense may not use any amounts authorized to be appropriated or otherwise made available to the Department of Defense for any fiscal year to transfer an individual detained at Guantanamo

...

AMENDMENT NO. 1093

(Purpose: To require the detention at United States Naval Station, Guantanamo Bay, Cuba, of high-value enemy combatants who will be detained long-term)

At the end of subtitle D of title X, add the following:

**SEC. 1038. REQUIREMENT FOR DETENTION AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA, OF HIGH-VALUE DETAINEES WHO WILL BE DETAINED LONG-TERM.**

(a) *Findings.*--Congress makes the following findings:

(1) The United States is still in a global war on terror and engaged in armed conflict with terrorist organizations, and will continue to capture terrorists who will need to be detained in a secure facility.

(2) Since 2002, enemy combatants have been captured by the United States and its allies and detained in facilities at the Guantanamo Bay Detention Facility (GTMO) at United States Naval Station, Guantanamo Bay, Cuba.

(3) The United States has detained almost 800 al-Qaeda and Taliban combatants at the Guantanamo Bay Detention Facility.

(4) More than 600 detainees have been tried, transferred, or released from the Guantanamo Bay Detention Facility to other countries.

(5) The last enemy combatant brought to the Guantanamo Bay Detention Facility for detention was brought in June 2008.

(6) The military detention facilities at the Guantanamo Bay Detention Facility meet the highest international standards, and play a fundamental part in protecting the lives of Americans from terrorism.

(7) The Guantanamo Bay Detention Facility is a state-of-the-art facility that provides humane treatment for all detainees, is fully compliant with the Geneva Convention, and provides treatment and oversight that exceed any maximum-security prison in the world, as attested to by human rights organizations, the International Committee of the Red Cross, Attorney General Holder, and an independent commission led Admiral Walsh.

(8) The Guantanamo Bay Detention Facility is a secure location away from population centers, provides maximum security required to prevent escape, provides multiple levels of confinement opportunities based on the compliance of detainees, and provides medical care not available a majority of the population of the world.

(9) The Expeditionary Legal Complex (ELC) at the Guantanamo Bay Detention Facility is the only one of its kind in the world. It provides a secure location to secure and try detainees charged by the United States Government, full access to sensitive and classified information, full access to defense lawyers and prosecution, and full media access by the press.

(10) The Guantanamo Bay Detention Facility is the single greatest repository of human intelligence in the war on terror.

(11) The intelligence derived from the Guantanamo Bay Detention Facility has prevented terrorist attacks and saved lives in the past and continues to do so today.

(12) The intelligence obtained from questioning detainees at the Guantanamo Bay Detention Facility includes information on the following:

(A) The organizational structure of al-Qaeda, the Taliban, and other terrorist groups.

(B) The extent of the presence of terrorists in Europe, the United States, and the Middle East, and elsewhere around the globe.

(C) The pursuit of weapons of mass destruction by al-Qaeda.

(D) The methods of recruitment by al-Qaeda and the locations of its recruitment centers.

(E) The skills of terrorists, including general and specialized operative training.

(F) The means by which legitimate financial activities are used to hide terrorist operations.

(13) Key intelligence used to find Osama bin Laden was obtained at least in part through the use of enhanced interrogation of detainees at the Guantanamo Bay Detention Facility, with Leon Panetta, Director of the Central Intelligence Agency, acknowledging that "[c]learly some of it came from detainees and the interrogation of detainees...." and confirming that "they used these enhanced interrogation techniques against some of those detainees".

(b) *Requirement.*--Each high-value enemy combatant who is captured or otherwise taken into long-term custody or detention by the United States shall, while under such detention of the United States, be detained at the Guantanamo Bay Detention Facility (GTMO) at United States Naval Station, Guantanamo Bay, Cuba.

(c) *High-value Enemy Combatant Defined.*--In this section, the term "high-value enemy combatant" means an enemy combatant who--

(1) is a senior member of al-Qaeda, the Taliban, or any associated terrorist group;

(2) has knowledge of an imminent terrorist threat against the United States or its territories, the Armed Forces of the United States, the people or organizations of the United States, or an ally of the United States;

(3) has, or has had, direct involvement in planning or preparing a terrorist action against the United States or an ally of the United States or in assisting the leadership of al-Qaeda, the Taliban, or any associated terrorist group in planning or preparing such a terrorist action; or

(4) if released from detention, would constitute a clear and continuing threat to the United States or any ally of the United States.

**NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012--  
Resumed -- (Senate - November 18, 2011)**

...

Pending:

...

Feinstein amendment No. 1125, to clarify the applicability of requirements for military custody with respect to detainees.

Feinstein amendment No. 1126, to limit the authority of Armed Forces to detain citizens of the United States under section 1031.

Udall (CO) amendment No. 1107, to revise the provisions relating to detainee matters.

...

Collins amendment No. 1105, to make permanent the requirement for certifications relating to the transfer of detainees at United States Naval Station, Guantanamo Bay, Cuba, to foreign countries and other foreign entities.

Collins amendment No. 1158, to clarify the permanence of the prohibition on transfers of recidivist detainees at United States Naval Station, Guantanamo Bay, Cuba, to foreign countries and entities.

Inhofe amendment No. 1093, to require the detention at United States Naval Station, Guantanamo Bay, Cuba, of high-value enemy combatants who will be detained long-term.

...

Mr. *McCAIN*. Mr. President, I thank Senator *Levin* and his staff for their hard work on this very important piece of legislation. I am glad to see the chairman announced that the staff will be in working next week. For a change, the taxpayers will get a return on their investment. I am very glad to know that. But in all seriousness, they did a lot of work late last night and will be working hard all this week.

I think that maybe our colleagues should plan on some late nights when we get back because we do need to get this done. There is a lot of important business before the Senate.

I would also like to point out that we spent the better part of yesterday on the detainee issue, and I appreciate that the detainee issue is one that is of transcendent importance. It certainly goes beyond just national security. It is a very controversial issue with the American people and Members on both sides of the aisle. On one side of the aisle, they would like to see much more restrictive policies, and on the other side of the aisle there is a very serious concern--and a legitimate concern, although I don't share it--about erosion of the constitutional rights and liberties of American citizens.

Hopefully, we can get a vote on that amendment so we can move forward to other very important amendments that Members obviously, by the large number of amendments, are very interested in in this process. I also hope we are able to get a unanimous consent agreement to limit, to cut off the number of pending amendments so that we can make progress on those that have been filed and those that are pending.

I thank the chairman again and our respective staffs and our colleagues. I thought it was a very beneficial debate we had yesterday that a lot of Members participated in, and I think it served not only to educate our colleagues and the American people who observed it, but I also think it was a healthy discussion that was held on both sides of the aisle and on both sides of this issue, and it very well informed Senators on this issue.

Again, I understand, for example, that the Senator from Illinois, Mr. *Durbin*, came to the floor and said we need a very in-depth discussion on this issue. I think we had that. I also think this is a very important issue and one that deserved the attention of the Senate, but now I think it is time to move on.

I also congratulate all Members who took part in sort of a colloquy and discussion we had amongst Members on both sides of this issue yesterday. I have found that those colloquies add a great deal to the debate as we get the input and ideas and sometimes spirited discussion on these issues.

So I thank the chairman, and we look forward to getting this important piece of legislation done.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Michigan.

Mr. LEVIN. Mr. President, first of all, I thank my friend and colleague from Arizona, the ranking member, for his comments and for all of his work on the committee. All of our colleagues on the committee have put in a lot of time.

I want to emphasize something he said about the opportunity here for debate--that we have a number of pending amendments, including the amendments on detainees. We are here to hear debate on those or any other amendments today and on Monday. We were here yesterday and had a long debate. As the Senator from Arizona said, we had a lengthy debate, and we were prepared to vote. The supporters were not. That is fair enough. If they want additional time to debate it, we should welcome that. But there is time, there is time today and there is time on Monday when we get back to debate that amendment and those amendments not only on the detainees but on many other issues that are important that are in this bill.

I agree with my friend from Arizona that we should ask the majority leader to make Monday night available for votes after the scheduled vote at 5:30. We need to have votes on amendments. I would hope that amendments that can't be agreed to will be voted on on Monday night after the vote on the judge, which is scheduled for 5:30.

I also agree with the Senator from Arizona about trying to get a limit on the number of amendments. We will try again today to see if we can get a

[Page: S7787]

unanimous consent agreement. I haven't had a chance to talk this morning with the Senator from Arizona, but we will try--and he just has given me an indication that this is fine with him--to see if we can't set a time later on today, maybe at noon or 1:00, for the filing of amendments and to limit amendments to those that are filed by that time.

We are going to try to get that done with a safety valve, which I suggested last night and I think is acceptable to the Republican manager, my friend from Arizona, which is that, in addition to whatever amendments are filed by whatever time we put in the unanimous consent proposal, there be an additional two amendments on each side that would be available to the managers that would need to be relevant--just relevant amendments--to an amendment that is filed or relevant to the bill. I think you would need a safety valve, and people would understand that. Those two amendments would be allocable--two amendments each by the Republican manager and myself, if that is agreeable. It would take unanimous consent, but I think everyone realizes we have to have a universe here that we can work with during the next week.

...

The ACTING PRESIDENT pro tempore. The Senator from Michigan.

Mr. LEVIN. Mr. President, I will be done in one moment so that our friend from New Mexico can schedule his presentation.

I just wanted to add one additional thing to what the Senator from Arizona said, in addition to agreeing with him. We will be here today and we will be here a week from Monday so that there will be plenty of opportunity to debate these pending amendments or other amendments, and people need to know we are going to be seeking votes on these pending amendments if we can't clear them or work them out.

There will be an opportunity for debate before the vote.

One other comment; that is, I will have a detailed statement addressing the detainee issue a little later on this morning. It will address some of the statements that are incorrect and misleading which were in the administration's statement on this subject. Also, some of the statements of our colleagues need to be addressed and, I believe, corrected. Because this is a complex issue it is important to know what is in the bill and what is not in the bill. If it is properly characterized and if it is properly stated, it is still complex, but to misstate it or overstate it or to mischaracterize what is in our bill just confuses an issue which needs to be debated on its merits and not confused. It is complicated enough without obfuscation and confusion about what is in the bill on detention or other matters and what is not in the bill.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Arizona.

AMENDMENTS NOS. 1200, 1066, 1067 AS MODIFIED, 1068, 1119, 1090, 1089, 1056, AND 1116 EN BLOC

Mr. *McCain*. Mr. President, I appreciate the indulgence of my friend, Senator *Udall*. If it is OK with the chairman, I ask unanimous consent that the following amendments be considered pending on behalf of their sponsors? Would that be agreeable?

For Senator *Cornyn*, amendment No. 1200, related to Taiwan F-16s; for Senator *Ayotte*, amendment No. 1066, related to financial audits; for Senator *Ayotte*, amendment No. 1067, as revised, related to the notification of Congress for the initial custody of members of al-Qaida; for Senator *Ayotte*, amendment No. 1068, related to the authorization of lawful interrogation methods; for Senator *Brown* of Massachusetts, amendment No. 1119, related to child custody rights; for Senator *Brown* of Massachusetts, amendment No. 1090, related to housing allowance rates; for Senator *Brown* of Massachusetts, amendment No. 1089, related to disclosures by schools participating in tuition assistance; for Senator *Wicker*, amendment No. 1056, related to military

chaplains; and for Senator *Wicker*, amendment No. 1116, related to truck licenses for transitioning servicemembers.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

The ACTING PRESIDENT pro tempore. The clerk will report by number the amendments called up by the Senator from Arizona.

The bill clerk read as follows:

The Senator from Arizona [Mr. *McCain*], proposes amendments numbered 1200, 1066, 1067 as modified, 1068, 1119, 1090, 1089, 1056, and 1116 en bloc.

The amendments are as follows:

...

AMENDMENT NO. 1068

(Purpose: To authorize lawful interrogation methods in addition to those authorized by the Army Field Manual for the collection of foreign intelligence information through interrogations)

At the end of subtitle D of title X, add the following:

**SEC. 1038. AUTHORITY FOR LAWFUL INTERROGATION METHODS IN ADDITION TO THE INTERROGATION METHODS AUTHORIZED BY THE ARMY FIELD MANUAL.**

(a) *Authority.*--Notwithstanding section 1402 of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), the personnel of the United States Government specified in subsection (c) are hereby authorized to engage in interrogation for the purpose of collecting foreign intelligence information using methods set forth in the classified annex required by subsection (b) provided that such interrogation methods comply with all applicable laws, including the laws specified in subsection (d).

(b) *Classified Annex.*--Not later than 90 days after the date of the enactment of this Act, and on such basis thereafter as may be necessary for the effective collection of foreign intelligence information, the Secretary of Defense shall, in consultation with the Director of National Intelligence and the Attorney General, ensure the adoption of a classified annex to Army Field Manual 2-22.3 that sets forth interrogation techniques and approaches, in addition to those specified in

Army Field Manual 2-22.3, that may be used for the effective collection of foreign intelligence information.

(c) *Covered Personnel.*--The personnel of the United States Government specified in this subsection are the officers and employees of the elements of the intelligence community that are assigned to or support the entity responsible for the interrogation of high value detainees (currently known as the ``High Value Detainee Interrogation Group"), or a successor entity.

(d) *Specified Laws.*--The law specified in this subsection is as follows:

(1) The United Nations Convention Against Torture, signed at New York, February 4, 1985.

(2) Chapter 47A of title 10, United States Code, relating to military commissions (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).

(3) The Detainee Treatment Act of 2005 (title XIV of Public Law 109-163).

(4) Section 2441 of title 18, United States Code.

(e) *Supersedure of Executive Order.*--The provisions of Executive Order No. 13491, dated January 22, 2009, shall have no further force or effect, to the extent such provisions are inconsistent with the provisions of this section.

(f) *Definitions.*--In this section:

(1) **ELEMENT OF THE INTELLIGENCE COMMUNITY.**--The term ``element of the intelligence community" means an element of the intelligence community listed or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(2) **FOREIGN INTELLIGENCE INFORMATION.**--The term ``foreign intelligence information" has the meaning given that term in section 101(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(e)).

...

The ACTING PRESIDENT pro tempore. The Senator from Michigan.

Mr. LEVIN. I thank the Senator from New Mexico for his remarks. I agree with him; it was a lively debate. I also agree with him it is to be desired that kind of debate occurs more often in the Senate. The Senator from New Mexico has been very active in the effort to have these kinds of debates by rules changes,

which would make these kinds of debates a lot more likely, and by other mechanisms.

To make an inquiry, did the Senator from New Mexico restore the regular order to the Levin-McCain amendment? I missed that.

Mr. UDALL of New Mexico. I did. Let me say to Chairman *Levin*, not only lively, robust, but very informative. I learned a lot in the process of listening to him and to Senator *McCain* and Senator *Durbin* and the other Senators who came down about the issue. I think that is the way the Senate works best: to have the amendments and various provisions of the Defense authorization bill be a part of a lively and informative debate.

I thank the Senator for that, and I yield the floor.

Mr. *McCain*. Mr. President, I assume, then, having watched the debate and been informed, that the Senator from New Mexico now takes the position that Senator *Levin* and I do on this issue, and his next mission is to convince his colleague from Colorado of the correctness of our position?

Mr. UDALL of New Mexico. At this point I am still listening and trying to ascertain as much as I can about the actual provisions of the Defense authorization bill. But the Senator is correct. There could be trouble in Udall Valley. There might be a split. We do not see that yet, but there is a possibility of it.

Mr. *McCain*. One thing I have learned about the Senator from New Mexico is that he does give all issues a fair and objective hearing. He listens and he pays attention and he is informed in his decisions. I thank him for taking part in this one.

Mr. UDALL of New Mexico. I also know that when the two of my colleagues-- when the chairman and Senator *McCain*, the ranking member--come together on a provision and are able to persuade their committee to go with it, that says something to the Senate itself, to have that before the Senate. I want to study it very carefully. I know Senator *Graham* was down here, who has been very active on this issue and has a tremendous amount of experience. I look forward to the continuing debate, and I yield the floor.

Mr. LEVIN. Mr. President, I thank the Senator from New Mexico again for the comments, but also tell him how very much impressed I have been right from the first day I heard him with his open mindedness on subjects. It is very important that we keep open minds, and he has shown just how to do that. We appreciate that on an issue this complex, particularly on the Defense bill.

...

Mr. LEVIN. Mr. President, in a short while I hope we will have, and expect that we will have, some amendments that have been cleared on both sides that we are going to be able to offer and hopefully adopt.

What I thought I would do now is make a fairly lengthy statement about statements which have been made relative to the detainee provisions in S. 1867. First, I want to comment on the statements that were made in the Statement of Administration Policy--this is a so-called SAP. So when I refer to SAP during these comments, and I use that term, it is the acronym which means Statement of Administration Policy.

I am going to first quote exactly from the SAP, and then I am going to

[Page: S7797]

comment and show why these statements I am referring to are inaccurate. From the SAP:

Section 1031 attempts to expressly codify the detention authority that exists under the authorization for Use of Military Force.

The authorization for use of military force is referred to as the AUMF. The quote continues:

The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qaida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals.

Well, Mr. President, given how important the administration says these authorities are, it should be helpful to have them codified so they can stand on the strongest possible footing.

The next quote:

Because the authorities codified in this section [1031] already exist, the administration does not believe codification is necessary and poses some risk.

The quote continues:

After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country.

The quote continues:

While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

Well, Mr. President, section 1031 was written by administration officials for the purpose of codifying existing authority. The description of persons covered is identical to the position taken by the administration and upheld in the courts. The provision specifically provides that nothing in the provision either limits or expands the authority of the President or the scope of the AUMF.

It is also worth noting that the SAP does not support the argument made by some Senators that section 1031 creates a new or unprecedented authority. On the contrary, the Statement of Administration Policy, the SAP, acknowledges the provision codifies existing law.

Now, this is hardly surprising since the committee accepted all of the administration's proposed changes to section 1031.

I am continuing to quote from the Statement of Administration Policy:

The administration strongly objects to the military custody provision of section 1032, which would appear to mandate military custody for a certain class of terrorism suspects. This unnecessary, untested and legally controversial restriction of the President's authority to defend the Nation from terrorist threats would tie the hands of our intelligence and law enforcement professionals.

Well, Mr. President, it is interesting that the SAP states the amendment would ``appear to'' mandate military custody. In fact, it does not mandate military custody and does not tie the administration's hands because it includes a national security waiver which allows suspects to be held in civilian custody.

Next quote:

Moreover, applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets.

Well, the administration itself asked that we delete limitations in section 1031 on the applicability of detention authority inside the United States that would have excluded U.S. citizens and lawful residents based on conduct taking place inside the United States to the extent authorized by the Constitution. The exact words were ``except to the extent authorized by the Constitution.''

If it is appropriate to authorize military detention inside the United States under section 1031, it is not at all clear what "serious and unsettled legal questions" in this narrow category of cases could be raised by requiring such detention subject to a national security waiver. Further, nothing in section 1032 would require or even permit our military to "patrol our streets."

Section 1032 applies, by its very term, only to a person "who has been captured in the course of hostilities" authorized by the AUMF. The provision has no applicability to a person who has not already been so captured and does not speak to the question of when or where such a capture might be authorized.

The provision does not give the military authority to make arrests or conduct any law enforcement functions inside the United States.

Next quote:

We have spent ten years since September 11, 2001, breaking down the walls between intelligence, military, and law enforcement professionals; Congress should not now rebuild those walls and unnecessarily make the job of preventing terrorist attacks more difficult.

In answer to that, it is not clear what walls the administration thinks the provision builds. Nothing in this provision limits the participation of law enforcement or intelligence professionals in the interrogation of detainees in military custody or vice versa or the sharing of information.

Next quote:

Specifically, the provision would limit the flexibility of our national security professionals to choose, based on the evidence and the facts and the circumstances of each case, which tool for incapacitating dangerous terrorists best serves our national security interests.

The provision does not limit the flexibility of the executive branch to choose the appropriate tool for taking on terrorists. On the contrary, the provision expressly directs the President to establish procedures for making determinations of coverage, authorizes the executive branch waiver of military detention requirements where they do apply, and expressly authorizes the transfer of any detainee to civilian custody for trial.

The next quote from the SAP:

The waiver provision fails to address these concerns, particularly in time-sensitive operations in which law enforcement personnel have traditionally played the leading role.

It is not clear why the administration thinks the use of a waiver would be problematic in time-sensitive operations. The need for a waiver is not triggered until the executive branch determines an individual is covered. The President has control over who makes these determinations, how they are made, and when they are made, so the executive branch should not be faced by a determination of coverage for which it is not ready. And even if, for some reason, executive branch officials were not ready to deal with their own determination, the provision specifically provides that a determination of coverage may not be used to interrupt ongoing surveillance, intelligence gathering, or interrogation sessions.

The next quote from the SAP:

These problems are all the more acute because the section defines the category of individuals who would be subject to mandatory military custody by substituting new and untested legislative criteria for the criteria that the Executive and Judicial Branches are currently using for detention under AUMF in both habeas litigation and military operations. Such confusion threatens our ability to act swiftly and decisively to capture, detain, and interrogate terrorism suspects, and could disrupt the collection of vital intelligence about threats to the American people.

The SAP is wrong. Detention under section 1032 is expressly limited to persons for whom detention is authorized under criteria currently used by the executive branch and the courts. The new and untested legislative criteria about which the SAP expresses concern is language narrowing the application of the provision to a small category of those for whom detention is already authorized.

Also, because the provision addresses only the question of whether an individual should be transferred to military custody after capture, it is not clear how it could possibly threaten the ability of executive branch officials to act swiftly and decisively to capture anybody.

Because the provision expressly states it may not be applied to interfere with an ongoing surveillance, intelligence gathering, and interrogations, it is not clear how it could possibly threaten the ability of executive branch officials to interrogate terrorism suspects or disrupt the collection of vital intelligence about threats to the American people.

The next quote from the SAP:

Rather than fix the fundamental defects of section 1032 or remove it entirely, as the administration and the chairs of several congressional committees with jurisdiction over

these matters have advocated, the revised text merely directs the President to develop procedures to ensure the myriad problems that would result from such a requirement do not come to fruition.

The administration reviewed the language directing the President to develop procedures and they made several suggestions for improvements to that language. The committee adopted all of the administration's suggestions. The remaining change suggested by the administration, which the committee did not adopt, was a proposal to limit the application of the provision to persons captured abroad. This difference does not constitute a myriad of problems which are complex or hard to understand.

This is the last comment they make on that section:

Requiring the President to devise such procedures concedes the substantial risks created by mandating military custody, without providing an adequate solution. As a result, it is likely that implementing such procedures would inject significant confusion into counterterrorism operations.

The language referred to was included to address concerns expressed by the administration. That does not in any way constitute an acknowledgment that the concerns were valid. Whether these concerns were valid or not, they have now been resolved by specific language in the revised provision.

Continuing:

The certification and waiver, required by section 1033 before a detainee may be transferred from Guantanamo Bay to a foreign country, continue to hinder the Executive Branch's ability to exercise its military, national security, and foreign relations activities. While these provisions may be intended to be somewhat less restrictive than the analogous provisions in current law, they continue to pose unnecessary obstacles, effectively blocking transfers that would advance our national security interests, and would, in certain circumstances, violate constitutional separation of powers principles. The Executive Branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.

The provision is not only "intended to be somewhat less restrictive" than provisions that are included in previous authorization and appropriations acts signed by the President, it is less restrictive. Unlike last year's bill, this provision includes a waiver, which allows the administration to proceed with a transfer even if the certification requirements cannot be met.

Congress has expressed strong concerns about recidivism among Gitmo detainees who have been released in the past. It cannot be in our national

security interests to "act swiftly" if we fail to provide adequate safeguards against terrorists rejoining the fight against us.

In discussions on this issue, administration officials have made a single priority request--that the provision be made a 1-year limitation instead of a permanent limitation. And the committee agreed to that change.

Section 1034's ban--

And I am now continuing the quote from SAP--

on the use of funds to construct or modify a detention facility in the United States is an unwise intrusion on the military's ability to transfer its detainees as operational needs dictate.

This provision is the same as the provisions included in last year's authorization and appropriations acts which were signed by the President. In discussions on this issue, administration officials made a single priority request--that the provision be made a 1-year limitation instead of a permanent limitation. The committee agreed to that change.

The next quote from the SAP:

Section 1035 conflicts with the consensus-based interagency approach to detainee reviews required under Executive Order No. 13567, which establishes procedures to ensure that periodic review decisions are informed by the most comprehensive information and considered views of all relevant agencies.

Section 1035 does not conflict with the Executive order of the interagency review process established in the Executive order; rather, it requires the issuance of procedures to implement the review process required by the Executive order.

The Executive order states that a Gitmo detainee will not be released if the interagency process results in a unanimous recommendation against release. The Executive order states that a Gitmo detainee will be released if the interagency process results in a unanimous recommendation for release. But it is silent as to what happens if the process does not result in a unanimous recommendation.

The provision in the bill addresses that issue by providing that no Gitmo detainee will be released without the consent of the Secretary of Defense. This does not contradict the Executive order; it is a truism, since nobody can be released without agreement of all of the agencies.

In discussions with the committee, administration officials did not even raise this provision as a priority issue.

Finally, on the Statement of Administration Policy, the SAP:

Section 1036, in addition to imposing onerous requirements, conflicts with procedures for detainee reviews in the field that have been developed based on many years of experience by military officers and the Department of Defense.

The only new requirement imposed by section 1036 is the requirement for a military judge and legal representation for any detainee who will be held in long-term custody. In discussions with the committee, the administration did not object to this new requirement. On the contrary, the only change requested by the administration in this provision was to strike the words "long-term." The committee did not agree to this proposed change because it would have been onerous to impose this requirement in the case of all detainees, including those who are captured and released or held on a short-term basis.

Mr. President, I now would like to move to my comments on some of the statements of the senior Senator from California.

The first comment of Senator *Feinstein* that I wish to address is the one where she said: "Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force."

On this one, the committee accepted all of the administration's language changes which were written to ensure that the provision is consistent with the AUMF. The provision specifically states it does not "limit or expand the authority of the President on the scope of the AUMF." The SAP on the provision states that "the authorities codified in this section already exist" under the AUMF.

The next quote from the Senator from California is the following. Section 1031:

..... would authorize the indefinite detention of American citizens without charge or trial. Do we want to go home and tell the people of America that we're going to hold them if such a situation comes up without any review, without any habeas?

The committee accepted all of the administration's proposed changes to section 1031, and as the administration has acknowledged, the provision does nothing more than codify existing law. Indeed, as revised pursuant to administration recommendations, the provision expressly "affirms" an authority that already exists. The Supreme Court held in the Hamdi case that

existing law authorizes the detention of American citizens under the law of war in the limited circumstances spelled out here, so this is nothing new.

The initial bill reported by the committee included language expressly precluding ``the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States."

The administration asked that this language be removed from the bill. Mr. President, 1031 does not refer to habeas and in no way limits habeas, nor could it. No American can be held in military detention without habeas review and no non-American can be held in military detention inside the United States without habeas. For non-Americans outside the United States, the bill requires the administration to establish review procedures, including, for the first time, a military judge and access to a military lawyer for the status determination.

The next quote of the Senator from California is the following. Under Section 1032:

..... any noncitizen al-Qaida operative captured in the United States would be automatically turned over to military custody. Military custody for captured terrorists may make sense in some cases, but certainly not all.

Mr. President, Section 1032 does not mandate military custody. It does not tie the administration's hands because--and this is critically important--it includes a national security waiver which explicitly allows any suspect to be held in civilian custody. Nothing is automatic. The administration would have the discretion to waive military detention and hold a detainee in civilian custody if it decided to do so.

The next quote in the case of Najibullah Zazi:

If the mandatory military custody in the armed service bill was law--

The committee bill was law--

all of the surveillance activities, all of what the FBI did would have to be transferred immediately to the military. .... Then the government would have been forced to split up co-defendants, even in cases where they otherwise could be prosecuted as part of the same conspiracy.

Zazi was a permanent legal resident. His co-conspirators were both U.S. citizens. They would be prosecuted on terrorist charges in Federal criminal court, but Zazi himself would be transferred to military custody. Two different detention and prosecution systems would play out and could well complicate a unified prosecution.

It is not accurate to say everything the FBI did in the Zazi case would have had to be ``transferred immediately to the military." First, it is not at all clear Zazi was covered by the provision because we don't know that he was al-Qaida, and in any event there is an exclusion because he is a lawful resident alien of the United States.

Second, until a coverage determination was made, no transfer would be required and the President would decide how and when that determination would be made.

Finally, even if Zazi were somehow determined to be covered, the requirement could have been waived and Zazi could have been kept in civilian custody in the discretion of the executive branch.

Also, as to this statement that the executive branch would be forced to split up codefendants in the Zazi case, even if he was covered by the provision or in any other case, that is because the provision includes a waiver

that would have allowed him to be held in civilian custody from the outset if the executive branch officials decided to do so and also because the provision expressly authorizes the transfer of any military detainee to civilian custody for trial in the Federal courts even without a waiver. So executive branch officials are always able to consolidate cases should they decide to do so in the Federal courts.

The next statement which the Senator made was the following:

The Department of Justice has said that approximately one-third of terrorists charged in Federal court in 2010 would be subject to mandatory military detention, absent a waiver from the Secretary of Defense.

Taking the Justice Department at its word, there have been approximately 300 terrorist cases in Federal court over the last 10 years or about 30 a year. One-third of that number would be just 10 cases a year in which the executive branch officials would have to make determinations of coverage and, if necessary, exercise their waiver authority.

Even that number appears to be exaggerated. Cases of attempted al-Qaida attacks on American soil have been highly publicized and receive extensive scrutiny, understandably, in Congress. We are not aware of more than half a dozen cases, total, over the last decade. The reason the debate on this issue always seems to come back to the same handful of cases appears to be there only are a handful of cases that are covered by this provision potentially.

In her next quote:

The administration contends that the mandatory military custody is unwise because our allies will not extradite terror suspects to the United States for interrogation and prosecution or even provide evidence about suspected terrorists if they will be sent to a military brig or Guantanamo.

This provision expressly states that the waiver authority may be used to address these concerns and to assure an ally that a suspect will not be held in military custody if transferred to the United States and if that assurance is necessary to obtain that transfer. Administration officials suggested a wording change to preclude misinterpretation of this provision and the committee adopted the very wording proposed by the administration.

The next quote of the Senator from California is that Section 1033:

..... essentially establishes a de facto ban on transfers of detainees out of Guantanamo, even for the purpose of prosecution in United States courts or in other countries.

There is no limitation at all in the bill on the transfer of Gitmo detainees to the United States for trial or for any other purpose. With regard to the transfer to other countries, Section 1033 is less restrictive than current law, which was signed by the President.

The next quote I would address is the following. Section 1033:

..... requires the Secretary of Defense to make a series of certifications that are unreasonable and candidly unknowable before any detainee is transferred out of Guantanamo. Again, an example, the administration proposed eliminating the requirement that the Secretary of Defense certified that the foreign country from whence the detainee will be sent to is not quote `facing a threat that is likely to substantially affect its ability to exercise its control over the individual.'

The same language was included in last year's authorization and appropriations bills that were signed by the President. We added a waiver provision this year to make it easier to transfer detainees. In discussion with the committee, the administration made a single priority request on this issue; that the provision be made a 1-year limitation instead of a permanent limitation, and the committee agreed to that change.

Finally, the last quote of the Senator from California from yesterday that I am going to address is the following:

In March, the President issued an executive order that laid out the process for reviewing each detainee's case to make sure that indefinite detention continues to be an appropriate and preferred course. Section 1035 essentially reverses the interagency process created by the President's order.

This was the same allegation made by the statement of administration policy. It is erroneous, and I addressed the answer to that allegation in my remarks a little earlier today, relative to the statement of administration policy, the SAP, so I am not going to comment further. But I would direct everyone back to those comments on the statement of administration policy similar to that statement of the Senator from California, which I addressed at that time.

I appreciate the patience of our Presiding Officer. This was a long statement, but I think it is essential we understand there are issues that need to be debated and should be debated, but there is nothing but confusion created on an issue that is already complex when misstatements are made about what is in a bill of the committee and what is not in the bill of a committee.

The words in the committee bill are words that are clear. They need to be debated, but they should not be exaggerated or misinterpreted. This is an important debate. We had a good debate yesterday, and I expect we will complete this debate on Monday so we can vote on these detention provisions and amendments relative thereto of Senator *Udall* hopefully on Monday night.

I yield the floor.

...

Ms. AYOTTE. Mr. President, I would like to thank the chairman of the Armed Services Committee for such a thorough analysis of the detainee provisions represented in section 1031 through 1034 of the Defense authorization bill. This is a very important part of the Defense authorization bill, and I certainly appreciate the thoughtful analysis that the chairman did.

I would say that his thoughtful and detailed analysis addressed all the red herrings that have been raised about these particular provisions. Because if you read carefully the language in the provisions that were addressed by the Armed Services Committee, they do provide the flexibility that the administration says they have sought in making the best decisions on how to treat detainees, particularly those who become members of al-Qaida and come to our country to commit an attack against our country. We have to make sure we have the right provisions in place to protect Americans and the flexibility so the executive branch officials are able to decide what is the best track to handle a particular case or member of al-Qaida who comes to our country to, unfortunately, attack us.

I also wish to remind this body that these provisions of the Defense Authorization Act were passed out of the Senate Armed Services Committee on an overwhelming bipartisan basis. In fact, the entire Defense Authorization Act

was voted out twice unanimously by the Armed Services Committee, including on Monday of this week, when we again voted out the entire provisions of this act unanimously.

So the particular provisions the chairman just discussed were the result of extensive discussions not only within the committee but also based upon testimony we heard over months from military officials regarding concerns they had about the lack of clarity in our detention policy, and that is where we came to the provisions in 1031 through 1034.

I wish to also remind this body there were many of us who would have gone much further in terms of how we would handle members of al-Qaida who come to our country to commit attacks against our citizens or those who would commit attacks against our citizens or soldiers overseas and our coalition partners. I brought forth an amendment on the CJS appropriations minibus that would have prohibited funding altogether for civilian trials of this same category for terrorists in the United States. So I would have liked to have gone much further. But I respect the amendment the committee voted out, which, in this instance, addressed the administration's concerns of allowing the administration a national security waiver to decide how to handle these cases whether they wanted to take a military track or a civilian track based on the national security interests of our country, which is, of course, what has to be foremost in these cases.

I wish to again remind everyone of the problem we have, which is that the priority, when we are dealing with a member of al-Qaida who is seeking to attack our country, has to be intelligence gathering. We have to make sure we give our executive branch agencies the tools they need to be able to gather information to know about future attacks and to protect our country.

What happens now in our civilian system is, if someone is arrested here, if they are in the civilian system, they are given rights that are part of our constitutional system, which is Miranda rights, for example. If they are in custody and there is interrogation, they have to be told they have the right to remain silent, that they have a right to a lawyer, and that they have a right to speedy presentment. These types of rights are incredibly important to our civilian system.

When we have a terrorist who is a member of al-Qaida, who is a foreigner, and who comes to this country to attack our country, the first thing they hear should not be "you have the right to remain silent." We have to allow our executive branch officials the ability to make intelligence gathering the first priority. This amendment allows that and gives the executive branch the ability to decide in which system they want to treat them and to be able to prioritize intelligence gathering so we can protect Americans and make sure if someone who is a member of al-Qaida comes to our country to attack us, we can gather

information without immediately having to tell them ``you have the right to remain silent."

That is what is so important with this amendment. It was a bipartisan compromise. As I said, there are Members of the Senate, including myself, who would have liked to have gone much further. But we addressed so many of the concerns of the administration they came up with to make sure they had, with these provisions, the ability to not have to interrupt an interrogation, to conduct the interrogation as they saw fit, to make sure they could conduct ongoing surveillance, and to decide whether a military or civilian track was best based on our national security interests.

I will say just one thing with respect to the transfer provisions and the concerns that have been raised about the provisions set forth for transferring detainees from Guantanamo. This is an area that cried out for some clarification, and it is important that the standard the committee came up with is in statute. Actually, as the chairman mentioned, the reason the committee addressed this is because our defense officials raised some concerns about what the waiver provisions should be from Guantanamo. This has been an area of interest of mine because of where we are right now with the Guantanamo detainees.

Unfortunately, the reality is that 27 percent of those who have been released from Guantanamo have gotten back into the fight and are back trying to kill us, our troops, and our coalition partners. This is an area where it was very important to have clear standards: where transfer would only be appropriate in the instances where we could ensure there wouldn't be recidivism so that we could protect our troops and our partners from having to see the very same individuals we had already had in custody at Guantanamo. So the provisions set forth here are very important to have that statutory standard for when transfers can be made and how they should be handled.

In fact, I would add, when we think about some of the detainees who have gotten back into theater whom we had in our custody at Guantanamo, they are conducting suicide bombings, recruiting radicals, and training them to kill Americans and our allies. Some of the former Gitmo detainees--and I think unfortunately it is a little bit of a badge of honor now to get back into theater and to be engaged in fighting again. Said al-Shihri and Abdul Zakir represent two examples of former Guantanamo detainees who returned to the fight and assumed leadership positions in terrorist organizations that are dedicated to killing Americans and our allies. Said al-Shihri has worked his way up to be No. 2 in al-Qaida in the Arabian Peninsula. We had him in our custody and, unfortunately, he was released. Abdul Zakir now serves as a top Taliban military commander and a senior leader in the Taliban Quetta Shura again fighting us and our allies.

Again, I am concerned that in the world of terrorists it has become a badge of honor to be released from Guantanamo and then to get back into the fight against us. So I just wanted to put in perspective what we heard from our senior defense officials over a period of months in the Armed Services Committee as to why it is important to have a standard that allows the Department of Defense, under

limited circumstances and based on protecting our country, to transfer the detainees, but only when we have addressed the issue of recidivism and they are assured that these individuals aren't going to get back in theater and try to kill American soldiers or our allies. That is why this provision is in here, and I am very pleased it is in here to make sure we address this important issue to keep Americans protected and our allies protected.

I will repeat again that this was a bipartisan compromise. This morning the chairman very thoroughly went through each of the issues raised in the Statement of Administration Policy. Also, in my view, he thoroughly knocked down many of the red herrings that were raised about this provision on the Senate floor yesterday by Senators who are seeking to strike this provision from the Defense Authorization Act.

It is important that this body pass this Defense authorization. It is important for not only these provisions, but also so many of the provisions of this Defense authorization that give our troops the tools they need, as we tell them we are here to support them, to make sure we move forward with the Defense authorization, including these important provisions that address how we handle detainees.

Again, I wish to thank the chairman of the Armed Services Committee for his leadership on this issue. I know he has worked very hard in meeting with the administration, meeting with those of us on the other side of the aisle who actually wanted to go much further in coming up with a very strong, important piece of legislation that will protect Americans and move us forward and provide some clarity in an area where we need clarity to make sure our executive branch officials have the tools they need to gather intelligence to protect Americans from the terrorist attacks because, unfortunately, those who are members of al-Qaida still seek to kill us for what we believe, not for anything we have done, and we can't forget that.

So I thank the chairman.

...

AMENDMENT NO. 1274

(Purpose: To clarify the disposition under the law of war of persons detained by the Armed Forces of the United States pursuant to the Authorization for Use of Military Force)

On page 360, between lines 17 and 18, insert the following:

(5) Notwithstanding disposition under paragraph (2) or (3), further detention under the law of war until the end of hostilities authorized by the Authorization for Use of Military Force.

Mr. SESSIONS. ...

I want to thank Senator *Ayotte*--a former prosecutor, attorney general of New Hampshire--for jumping in right away into the very critical issue of detainees and how they should be treated in the United States. In the short time she has been here, she is making a big difference on that.

I was involved in it on the Judiciary Committee. I have been involved in it on the Armed Services Committee. I am basically exhausted with it. I remain flabbergasted. I think you are right, Senator *Ayotte*. This is progress I believe you have made in these negotiations, but I think we have gone too far in many of these ideas already. It does not make common sense.

Let me say a couple of things about it. When a person is at war against the United States and they are captured in combat activities against the United States, they are able to be detained. They do not have to be tried. They do not have to be given Miranda rights. They have to comply with the Geneva Conventions about food and the right to communicate, and, within limits, they can be interrogated. All of those things are part of the Geneva Conventions. And they are to be detained until the war is over. That is so fundamentally logical. Why in the world would a person who is fighting an enemy and could have killed the enemy at one moment and captures them the next moment then be required, while the war is still ongoing, to release them so they can shoot you again and attack you again?

This is perfectly logical. It is part of the history of war, and it has long been established that when you capture enemy combatants, you can detain them until the conflict is over. But we have had this obsessive desire and attack by some that the people who have been captured need to be released, and they insisted that they be released. So they started with the least dangerous members, and they have released, I guess now, a majority of the people who have been detained. And among the least dangerous members who have been released, as Senator *Ayotte* says, we now have 27 percent who have been identified as in the war, attacking us now, and one of them is one of the top leaders in al-Qaida. This was never necessary.

Guantanamo is a perfectly logical place to hold these individuals, and how it became such a political issue--and President Obama campaigned on it, and Attorney General Eric Holder was out there complaining about it. Then he gets in as the Attorney General of the United States, and they commence to make some serious errors, in my opinion.

One of the biggest errors was to create a presumption that somebody who has been apprehended attacking the United States should be treated in civilian courts. I know Senator *Ayotte* just said this earlier, but people need to know. If you are going to try someone in civilian court, you have to give them the Miranda immediately because when they come before the judge, if they made an admission without Miranda, it cannot be used against them. And you have to tell them immediately that they are entitled to a lawyer. When you capture people in a war, you don't give them lawyers. That has never been a part of the rules of war. And they are guaranteed presentment, the right to speedy trial in Federal court within 70 days. They are entitled to a preliminary hearing. So all of the other bad guys and terrorists now have an opportunity to know that you have captured their co-conspirator, perhaps, and are aware of the circumstances and may scatter in a way that you would not want to occur.

So these are realistic things. So if there is a presumption--first of all, I would say all of the cases should be tried in military commissions, if they are tried, and not in civilian court. But certainly the presumption should be that they would be in military commissions because if the presumption, as Attorney General Holder has declared, is that it is civilian, then you have to do the warning.

I remember in one of my hearings, Senator *Lindsey Graham*, a JAG officer in the Air Force--still trains as a reservist--grilled I believe it was Attorney General Holder and asked him: Well, what would happen if bin Laden were captured? Would you give him Miranda rights? And he could not answer the question. He would not answer the question because under his presumption, if Osama bin Laden were apprehended, he should be given Miranda rights.

So that is the nub of the problem we have been wrestling with, and we have had a lot of political rhetoric, in my opinion, attacked President Bush time and time again. They did not conduct everything perfectly, but many of the attacks on President Bush, his Department of Justice, and his military were unfair.

Do you know that not a single person in Guantanamo was ever waterboarded, that the U.S. military never participated in that? These were intel interrogations done under limited circumstances to a very few people. Whether they should have been done or not, we can all argue and disagree, but the idea that the U.S. military, the Defense Department, was systematically torturing and abusing prisoners is absolutely untrue. No military under such difficult circumstances has performed so well.

...

Mr. CHAMBLISS. ...

In conclusion, I am extremely proud of the hard work the Armed Services Committee Members and staff have done to put together this Defense authorization bill. I would particularly like to compliment our leadership, Chairman *Levin* and Ranking Member *McCain*, on the job they have done and their willingness to work with Members of the Committee on our specific issues-issues such as the one Senator *Ayotte* and I discussed on the floor yesterday, along with Senator *Graham*, Senator *McCain*, and Senator *Levin*, regarding detainee policy, of which we have none at the present time and to which folks such as Senator *Ayotte* have given a great deal of thought and have come up with some very logical ways in which we can address this issue of detainees so that we can get actionable intelligence from those detainees and, at the same time, ensure they are treated in ways that are respectful to our system of jurisprudence on the military side as well as on the civilian side.

...

Ms. AYOTTE. Mr. President, I thank the Senator from Georgia for his leadership on the Armed Services Committee and also for the important work he has been doing as the vice chair of the Intelligence Committee to make sure our country is protected. He is particularly knowledgeable on these issues of how we treat detainees, and we did have a detailed colloquy on the floor. His insight has been so important in making sure we have the right policies in place to protect America.

...

AMENDMENT NO. 1080

(Purpose: To clarify the applicability of requirements for military custody with respect to detainees)

On page 361, line 9, insert after ``a person who is described in paragraph (2) who is captured'' the following: ``abroad or on a United States military facility''.

...

AMENDMENT NO. 1290

(Purpose: To strike the national security waiver authority in section 1032, relating to requirements for military custody)

On page 362, strike lines 8 through 15.

AMENDMENT NO. 1291

(Purpose: To strike the national security waiver authority in section 1033, relating to requirements for certifications relating to the transfer of detainees at United States Naval Station, Guantanamo Bay, Cuba, to foreign countries and entities)

On page 365, line 9, strike `` and subsection (d)".

On page 367, line 14, strike `` and subsection (d)".

On page 368, strike line 13 and all that follows through page 370, line 13.