

**NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 -- (Senate -
November 30, 2011)**

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 11 a.m. will be equally divided and controlled between the Senator from Michigan, Mr. *Levin*, and the Senator from Arizona, Mr. *McCain*, or their designees.

Mr. *McCAIN*. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. *McCAIN*. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

...

Mr. UDALL of Colorado. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENTS NOS. 1125 AND 1126

Mr. UDALL of Colorado. Mr. President, I rise today in support of amendments Nos. 1125 and 1126, which have been offered by the Intelligence Committee chairwoman, Senator *Feinstein*.

While the Senate did not adopt my amendment that would have instructed the Senate to consider these detainee matters separately from the Defense authorization bill, I believe Senator *Feinstein*'s amendments make important changes and improvements to the bill--improvements that may yet avoid a problem with a Presidential veto.

I thank the Presiding Officer for his comments yesterday on the detainee provisions that are in this proposed legislation. I urge my colleagues to support these amendments. I want to be clear. I intend to support them.

I have serious concerns going forward about the unintended consequences of enacting the detainee provisions in subtitle D of the Defense Authorization Act. These amendments help to alleviate some of my concerns.

I wish to, in the context of the debate we are having, note that in addition to the Secretary of Defense, Leon Panetta; the Director of National Intelligence, General Clapper; and FBI Director Mueller--who all oppose the detainee provisions--CIA Director Petraeus's senior staff has

indicated they, too, oppose the detention provisions. The CIA believes it is important to preserve the current U.S. Government's prosecution flexibility that has allowed both the Bush and the Obama administrations to effectively combat those who seek to do us harm.

After the vote yesterday, I had a chance to talk with a number of Members on the other side of the aisle and, frankly, on the other side of the debate, because this had bipartisan support on both sides of the debate. But the folks I talked to told me they did not support my amendment, but they were still interested in making some more targeted changes to the detention provisions. I hope those colleagues will take a close look at what Senator *Feinstein* is offering here today.

Let me speak to specifically what she would help resolve with her amendments. There are two important shortcomings that still exist in the current bill. One of her amendments would preserve the flexibility of the military, law enforcement, and intelligence agencies to collaborate, without undue limitation, in any investigation, interrogation, and prosecution of suspected terrorists. The other amendment would make it clear that American citizens cannot be held indefinitely in military detention without a trial. Again, I know the Presiding Officer spoke powerfully to that very legitimate and important concern yesterday.

The current language in the bill--which is why I took to the floor yesterday and I know on other occasions to make this point--I believe will disrupt the investigation, interrogation, and prosecution of terror suspects by forcing the military to interrupt FBI, CIA, or other counterterrorism agency operations--against each of these organizations' recommendations, including the military's.

In sum, we are going to create an unworkable bureaucratic process that would take away the intelligence community's and the counterterrorism community's capabilities to make critical and, in some cases, split-second decisions about how best to save Americans' lives.

Further--I cannot emphasize this enough--although my friends on the other side of this debate argue otherwise, the detainee provisions do allow for the indefinite military detention of American citizens who are accused of planning or participating in terror attacks. Simply accused--that cuts directly against values we hold dear: innocent until proven guilty, presumption of innocence. That is why this is such an important debate.

Let me be clear. There are American citizens who have collaborated with our enemies. There are American citizens who have participated in attacks against our soldiers and civilians. Those Americans are traitors. They should be dealt with, and we already have a system for ensuring they are brought to justice and made to pay a very heavy price for their crimes. That system is working. However, even in the darkest hours, we must ensure that our Constitution prevails. We do ourselves a grave disservice by allowing for any citizen to be locked up indefinitely without trial--no matter how serious the charges may be against them. Doing so may be politically expedient, but we risk losing our principles of justice and liberty that have kept our Republic strong, and it does nothing to make us safer. Our national security leadership has even said if we implement these provisions, it could make us less safe.

If I might reflect a bit on what we have learned. At least in three different wars--three wars we all learn about in our history classes: the Civil War, World War I, and World War II--as we look

back at those three wars, we made the decision and we drew the conclusion as Americans that we overreached, that we constricted civil liberties. President Lincoln limited habeas corpus in the Civil War. I know the Presiding Officer is familiar with the Palmer Raids during World War I and the aftermath of World War I. Of course, we know all too well the history of the interment of Japanese Americans.

I am not suggesting these provisions, as they are now included in this bill, would result in historians drawing those similar kinds of conclusions 10 or 20 or 30 years from now. But why not be safe? Why not take the time to ensure that we keep faith with those core values that make America what it is? That is all I am asking. I think that is all Senator *Feinstein* is asking for us to do. That is what the 38 Senators who joined us yesterday to vote for my commonsense approach were saying as well.

In sum, Senator *Feinstein* has offered some small changes. It would help alleviate some of the justifiable concerns with these provisions. As I have said, I continue to worry that there will be unintended consequences to enacting the detainee provisions altogether. However, we can make some of these small improvements to avoid harming our counterterrorism activities and preventing the loss of rights and freedoms granted to all Americans by our Constitution.

In closing, I urge all of our colleagues to support Senator *Feinstein's* amendments.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. *McCAIN*. Mr. President, briefly, while my friend from Colorado is on the floor, he said: Take the time. We have been taking time, I tell the Senator from Colorado, since September 11, 2001, when the United States of America was attacked. We passed the Detainee Treatment Act. We passed other pieces of legislation--the PATRIOT Act, and others. Take the time?

I say, in all due respect, we have taken a lot of time--in fact, hundreds and hundreds of hours of debate, discussion--as to how to address this threat to the United States of America.

If the Senator from Colorado supports the *Feinstein* amendment, I agree with that. I cannot agree that we have not taken the time. I personally have taken--I cannot tell you--untold hours addressing this issue of how we treat detainees. We may have a fundamental disagreement, but I do reject the argument that we have not taken the time.

I yield the floor.

Mr. UDALL of Colorado. Would the Senator respond to a question?

Mr. *McCAIN*. Go ahead.

Mr. UDALL of Colorado. As the Senator from Arizona knows, I have the utmost respect for the time the Senator has spent in this very important area. I think what I have been trying to say is that in regard to this particular set of detainee provisions, I want to ensure that all of the questions the FBI Director, General Clapper, Secretary Panetta, and others have raised about how these provisions would actually be applied--I have no question that the intent is spot on--I just am aware that there have been some concerns raised about how these new provisions would

actually be applied. I think Senator *Feinstein's* amendments--and I do not know where the Senator from Arizona stands at this point--may provide some greater clarification. I know there have been some conversations on the floor as to how we will deal with these amendments. So I appreciate the Senator's comments.

Mr. *McCAIN*. I thank the Senator from Colorado for his clarification, and I think I understand more clearly his rationale for his support of the amendment.

I yield the floor.

Mr. UDALL of Colorado. I yield the floor as well and suggest the absence of a quorum.

...

Mr. SESSIONS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SESSIONS. I would ask that I be notified after 10 minutes.

The PRESIDING OFFICER. The Chair will do so.

AMENDMENT NO. 1274

Mr. SESSIONS. Mr. President, I have offered an amendment that clarifies--although that is not exactly the right word--the fact that an unlawful combatant or a combatant who is held by the U.S. military for being an enemy of the United States, a combatant against the United States, or an unlawful combatant, is not therefore entitled to be released if the U.S. military or the civilian courts choose to prosecute him and he is acquitted or after he serves his sentence but before hostilities have ended. These are entirely different matters.

There are two questions: Are you an enemy combatant of the United States? These are the kinds of prisoners of war in World War II, Germans, for example, who were kept in Aliceville, AL. They stayed in a prisoner-of-war camp until the war was over, and they went home. They didn't violate the rules of war; they weren't prosecuted for any crimes. They simply were not released so that they could go and rejoin the battle in an attempt to kill more American service men and women. But they were lawful. They wore uniforms, they complied with the rules of war, and they were not able to be prosecuted.

But when a person sneaks into the country with an intent to murder women and children and innocent noncombatants, does not wear a uniform, and violates other provisions of the rules of war, then they can be not only held as a combatant but they can be held and tried for commission of crimes against the United States. That is the classic standard of the law of war.

I believe it is clear that if a person is captured and tried for a crime and, let's say, acquitted--whether in a civilian court or a military commission--they are not entitled to be released. To that

end, I would quote a number of statements to that effect. But I believe the legal system would be a lot better off if we spoke clearly on that matter today so there is no doubt whatsoever.

President Obama, on May 21, 2009, said this:

But even when [the prosecution] process is complete, there may be a number of people who could not be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States.

In other words, they remain prisoners of war who are likely to join the enemy if they are released. He goes on to say:

These are people who, in effect, remain at war with the United States. As I said, I am not going to release individuals who endanger the American people.

I think that is consistent with all rules of war, and I think the President was right in that statement.

Attorney General Eric Holder, in November of 2009, before the Judiciary Committee, said:

I personally think that we should involve Congress in [ensuring that the Executive Branch has the authority to make that decision], that we should interact with this committee in crafting a law of war detention process or program.

In other words, he was calling on us to work with them in developing statutes. But, historically, I think the law is clear at any rate.

Jeh Johnson, General Counsel to the Department of Defense, who came from the New York Times as general counsel for the New York Times--not a career Department of Justice defense attorney--said this before the Senate Armed Services Committee:

The question of what happens if there's an acquittal is an interesting question I think that as a matter of legal authority, if you have the authority under the laws of war to detain someone, and the Hamdi decision said that in 2004, that is true irrespective of what happens on the prosecution side as a matter of legal authority, I think we have law-of-war authority, pursuant to the authority Congress granted us with AUMF, as the Supreme Court interpreted it, to hold that person provided they continue to be a security threat, and we have the authority in the first place.

So, again, he is saying if they are not convicted, they can still be held if they continue to be a threat.

Secretary of State Hillary Clinton on ``Meet the Press" November of last year:

MR. GREGORY: But my question is, are we committed with these terror suspects that if they are acquitted in civilian courts, they should be released?

SECRETARY CLINTON: Well, no.

Senator *Jack Reed*, our West Point graduate and a member of the Armed Services Committee-- I am proud to serve with my Democratic colleague--this is what he said the November before last:

There are no guarantees [of conviction], but under basic principles of international law, as long as these individuals pose a threat, they can be detained, and they will. I do not believe they will be released under the principle of preventive detention, which is recognized during hostilities.

I believe this is legislation that would do nothing more but, importantly, will affirm the classical understanding of our laws of war, and as a result, the people who are charged can be tried, and if they are not convicted of a crime, they can still be detained.

I would note that an individual American soldier or German soldier or Japanese soldier who is lawful and released has a duty to report back to their military unit and commence hostilities until the war is over.

Senator *Graham* is here, a current JAG officer in the U.S. Air Force who has studied these matters very closely and has been engaged in this debate so eloquently. I am delighted to have him here and to have his support on this amendment. Perhaps he has some comments?

Mr. GRAHAM. Perhaps the Senator will yield for a question?

Mr. SESSIONS. I will be pleased to.

Mr. GRAHAM. As I understand the purpose of this amendment, it is basically to have the Congress on record for the concept that once you are determined to be an enemy combatant, a part of the enemy force, there is no requirement to let you go at any certain time because in war it would be silly to let an enemy prisoner go back to the fight for no good reason.

As the Senator has indicated, in the law of war, you can be prosecuted for a war crime. You could be taken to a Federal court and prosecuted for an act of terrorism, but if you are acquitted, that is not an event that would require us to release you if the evidence still exists that you are a threat to the country and part of the enemy forces; is that correct?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. What I would like my colleagues to understand is that no German prisoner in World War II had the ability to go to a Federal judge and say: Let me go.

If you had brought up the concept in World War II that an American citizen who was collaborating with the Nazis could not be held as an enemy combatant, you would have been run out of town.

Does the Senator agree with me that in every war we have fought since the beginning of our Nation, unfortunately, there have been episodes where American citizens side with the enemy?

Mr. SESSIONS. That is certainly true.

Mr. GRAHAM. Does the Senator agree with me that our Supreme Court, as recently as about 3 to 4 years ago, affirmed the fact that we can hold our own as enemy combatants when the evidence suggests they have joined forces with the enemy? That is the law?

Mr. SESSIONS. That is the law as I understand it.

Mr. GRAHAM. Does my colleague agree with me that makes perfect sense, that an American who helps the Nazis has committed an act of war, not a common crime?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. Does he agree with me that our courts understand that when an American citizen collaborates with an enemy of our Nation, that is an act of war by that citizen against his own country and the law of war applies, not domestic criminal law?

Mr. SESSIONS. I certainly agree with the Senator that an American citizen can join in a war against the United States.

Mr. GRAHAM. And they can be treated as an enemy combatant in accordance with our laws?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. And the law of war allows the following: trial or detention or both. Is that correct?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. You can be held as an enemy combatant without trial?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. There is no requirement in international law to prosecute an enemy prisoner for a crime?

Mr. SESSIONS. Absolutely. It is up to the detaining authority whether they believe a person has committed a crime.

Mr. GRAHAM. Does the Senator agree with me that we do not want to start the practice in the United States that everybody we capture as an enemy prisoner is automatically a war criminal because that could come back to haunt our own people in future wars?

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. That we should reserve prosecution for a limited class of persons among enemy prisoners?

Mr. SESSIONS. That is correct.

The PRESIDING OFFICER (Mr. *Cardin*). The Senator has consumed 10 minutes.

Mr. GRAHAM. I ask unanimous consent to have 1 more minute.

The PRESIDING OFFICER. The Chair was informing the Senator that 10 minutes has elapsed.

Mr. SESSIONS. I asked to be informed at 10. I see Senator *Sanders* is here.

Mr. GRAHAM. Let's just logically walk through this. In every war in which America has been involved, American citizens unfortunately have chosen at times to side with the enemy. Our courts say the executive branch can hold them as enemy combatants, and the purpose is to gather intelligence. Does the Senator agree with that?

Mr. SESSIONS. That is a very important purpose of that.

Mr. GRAHAM. The Senator has been a U.S. attorney; is that correct?

Mr. SESSIONS. That is correct.

Mr. GRAHAM. Does criminal law focus on intelligence gathering?

Mr. SESSIONS. Absolutely not. It focuses on punishment for a crime already committed, normally.

Mr. GRAHAM. Does the Senator agree that holding an enemy prisoner--one of the benefits of capturing someone is gathering intelligence?

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. Does the Senator agree that our criminal system is not focused on that?

Mr. SESSIONS. Absolutely. In fact, we specifically tell people arrested that they have a right not to provide any intelligence, and it indicates it is clearly not the primary function.

Mr. GRAHAM. Does the Senator agree with me that if this Congress chose to change the law and say that an American citizen who has associated himself with al-Qaida cannot be interrogated for intelligence-gathering purposes, we would be less safe?

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. And that would be a change in the law as it exists today.

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. Does the Senator agree with me that his amendment that says you can be acquitted but still be held as an enemy prisoner is consistent with the law today?

Mr. SESSIONS. I certainly believe it is.

Mr. GRAHAM. I thank the Senator for offering this amendment.

To my colleagues, we are trying to fight a war, not a crime, within the value systems of being the United States, being the champion of the free world. I do not believe in torturing people, but I do believe--does the Senator agree with me that when it comes to interrogating people, sometimes the best tool is time?

Mr. SESSIONS. Absolutely. Someone may not be willing to talk today, but as time goes by they might be willing to completely change and be forthcoming.

Mr. GRAHAM. Does the Senator agree with me that we gathered good intelligence over time from people held at Guantanamo Bay?

Mr. SESSIONS. That is certainly true.

Mr. GRAHAM. Without water boarding them?

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. My point to my colleagues--and I enjoyed this discussion--is that if you take the ability to hold someone as an enemy combatant off the table, you cannot interrogate them for intelligence-gathering purposes, and if you put a time limit on how long you can hold them, you defeat the purpose of gathering intelligence. Does the Senator agree with that?

Mr. SESSIONS. Absolutely. That would undermine one of the functions of the U.S. military in dealing with enemies of the state.

Mr. GRAHAM. Does my colleague also agree that in this war, we provide a due process unlike any other war in the past?

Mr. SESSIONS. There is no doubt. No war has ever been lawyered to the degree this has.

Mr. GRAHAM. Does the Senator agree with me that every enemy combatant, citizen otherwise, held at Guantanamo Bay or captured in the United States has their day in Federal court through habeas proceedings?

Mr. SESSIONS. They do, and to a large degree that is different from any other war in our history.

Mr. GRAHAM. We never had, in the history of other wars, a Federal judge determining whether the military has the ability to determine whether someone is an enemy combatant, but we have that in this war. Does the Senator agree with that?

Mr. SESSIONS. Absolutely.

Mr. GRAHAM. Does the Senator agree that the government has to prove to an independent judge by a preponderance of the evidence that the person is a member of al-Qaida involved in hostilities?

Mr. SESSIONS. Yes.

Mr. GRAHAM. So everybody held after judicial review for the first time in the history of warfare.

Does the Senator agree with me that the annual review process that we have created by this law, this bill, the Defense Authorization Act, is something we have not done in other wars?

Mr. SESSIONS. We have not done that before, yes.

Mr. GRAHAM. Every detainee not only gets their day in Federal court, the government must prove they have a solid case to hold them as an enemy combatant, and everyone gets a yearly review as to whether they are a continuing threat?

Mr. SESSIONS. I believe so, yes, consistent with the language in the recent Supreme Court opinions--recent opinions--and perhaps it even goes further than what the Supreme Court requires.

Mr. GRAHAM. Is the Senator familiar with competency hearings in the civilian court?

Mr. SESSIONS. Yes.

Mr. GRAHAM. In our civilian law, we can hold people who are a danger to themselves or others without a trial but with judicial oversight; is that correct?

Mr. SESSIONS. That is done every day, yes, with judicial oversight.

Mr. GRAHAM. Would the Senator agree with me that it is very smart to evaluate whether we should allow someone to be let go and intelligence professionals should be able to make that decision as to whether the individual is a military threat, that that is a logical process?

Mr. SESSIONS. Absolutely it is. And just for the fact of my amendment, it does not require people to be held. It only gives the government the authority to do so if they deem it appropriate for the defense of America.

Mr. GRAHAM. Does my colleague agree with me that the recidivism rate of people we are releasing from Guantanamo Bay has gone up?

Mr. SESSIONS. Yes. It is extraordinarily disappointing, actually, and against projections of many of those advocating for early release.

Mr. GRAHAM. Some of these people have gone back to fighting and killed American soldiers?

Mr. SESSIONS. They certainly have.

Mr. GRAHAM. Does the Senator agree with me that the dangers our Nation faces do not justify changing existing law, denying this country the ability to gather intelligence even against an American citizen joined with al-Qaida, that that would be an unwise decision given the dangers we're facing?

Mr. SESSIONS. Yes.

Mr. GRAHAM. Does he agree with me that we need a legal system that understands the difference between fighting a war and fighting a crime?

Mr. SESSIONS. So well said. I agree.

Mr. GRAHAM. I thank the Senator.

Mr. SESSIONS. Mr. President, with regard to the question of citizenship, I would just say to my colleague that this in no way deals with that. Whatever the courts, whatever the bill and other laws say about citizenship will apply here. It does not change that status at all. I do believe the legislation is clearly consistent with the statements and testimony of President Obama; Attorney General Eric Holder; Jeh Johnson, counsel of the Secretary of Defense; Secretary of State Clinton, and others.

I urge acceptance of my amendment and yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

AMENDMENT NO. 1073 WITHDRAWN

Mr. LEVIN. Mr. President, I ask unanimous consent that the Cardin amendment, No. 1073, be withdrawn. That has the approval of the sponsor of the amendment.

...

The PRESIDING OFFICER. The Senator from Illinois.

AMENDMENT NO. 1126

Mr. KIRK. Mr. President, I rise in support of the Feinstein amendment with regard to section 1031 of this legislation. I am particularly worried because, unlike the authorized use of force original doctrine and legislation passed by the Congress, we limited the authority of the President and the U.S. military to those connected directly to the September 11 mass murder of Americans. I think, in times of emergency, I understand that. But the legislation would be the first congressional authorization to go far beyond that, to say that any "person who substantially supported al-Qaeda, the Taliban, or associated forces" including any person who has committed a belligerent act" would be allowed to be picked up by U.S. military authorities and held in U.S. military detention.

While I am in favor of robust and flexible U.S. military action overseas, including action against American citizens waging war against the United States, such as Anwar Al-Awlaki, I think we all should agree on a special zone of protection inside the jurisdiction of the United States on behalf of U.S. citizens.

I say this in support of the Feinstein amendment because I took the time--as we all should from time to time, serving in this body--to re-read the Constitution of the United States yesterday. The

Constitution says quite clearly: In the trial of all crimes--no exception--there shall be a jury, and the trial shall be held in the State where said crimes have been committed. Clearly, the Founding Fathers were talking about a civilian court, of which the U.S. person is brought before in its jurisdiction.

They talk about treason against the United States, including war in the United States. The Constitution says it ``shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.

The following sentence is instructive:

No person--

``No person," it says--

shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

I would say that pretty clearly, ``open court" is likely to be civilian court.

Further, the Constitution goes on, that when a person is charged with treason, a felony, or other crime, that person shall be ``removed to the State having Jurisdiction of the Crime"--once again contemplating civilian, State court and not the U.S. military.

As everyone knows, we have amended the Constitution many times. The fourth amendment of the Constitution is instructive here. It says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures--

Including, by the way, the seizure of the person

shall not be violated, and no Warrants shall issue, [except] upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Now, in section 1031(b)(2), I do not see the requirement for a civilian judge to issue a warrant. So it appears this legislation directly violates the fourth amendment of the Constitution with regard to those rights which are inalienable, according to the Declaration of Independence, and should be inviolate as your birth right as an American citizen.

Recall the fifth amendment, which says:

No person--

By the way, remember, ``no person"; there is not an exception here.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment--

Hear the words--

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War--

Meaning there is a separate jurisdiction for U.S. citizens who are in the uniformed service of the United States. But unless you are in the service of the United States, you are one of those "no persons" who shall be answerable for a "capital" or "infamous crime," except on "indictment of a Grand Jury."

The sixth amendment says:

In all criminal prosecutions--

Not some, not by exception; in all criminal prosecutions--

the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.....

I go on to these because I regard all of these rights as inherent to U.S. citizens, granted to them by their birth in the United States.

If we go on through the Constitution's amendments, we find in the fourteenth amendment that it says:

No State shall make or enforce any law--

Any law-- which shall abridge the privileges or immunities of citizens of the United States.....

I realize these powers have been defined by courts. But we would recall that even Abraham Lincoln ex post facto lost his ability to suspend the writ of habeas corpus pursuant to a Supreme Court decision; that in the case of Hamdi v. Rumsfeld, the Court did recognize that under the 2001 statute, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan. But I will recall--and, by the way, this included American citizens--I will recall that was in Afghanistan.

Clearly, we see in the case where an American citizen has gone to a foreign jurisdiction, joined a terrorist organization or foreign military, and is waging war on the United States, they can be held as a detainee of the U.S. military. Why didn't this legislation say that? Why did it not restrict its purview to those provisions? In Padilla v. Hanft, the Fourth Circuit did allow the capture of a U.S. citizen, Padilla--by the way, arrested at O'Hare Airport, a U.S. citizen and held in military detention. The Fourth Circuit said because he had foreign training and a foreign connection that it was legal to hold him.

But, remember, very soon thereafter the Bush administration surrendered this case. I think the Bush administration realized they were about to lose in the Supreme Court on the subject of whether the U.S. military could arrest and detain a U.S. citizen and to deprive them of their rights and subject them only to review under a petition of habeas corpus. I think they realized

they had to kick Padilla into the civilian court system, and therefore they did. It is only in that context that we should read the Padilla decision.

I think the bottom line is this: We funded a multi-hundred-billion-dollar Department of Defense, in the words of the movie, to put men on that wall, that we need on that wall, to defend us against foreign threats, and they must do hard and difficult things, including sometimes to U.S. citizens, such as Anwar al-Awlaki, who are waging war on the United States from a terrorist base in Yemen.

But the whole purpose of this exercise and this institution is to defend the rights of the United States and U.S. citizens inside their own country. One of the first things a person does when they join the U.S. military is not to swear allegiance to a President or to a foreign leader but actually swear allegiance to the Constitution of the United States and to its rights.

What is the whole purpose of the Constitution? It is to defend our rights against the government because we are one of those unique governments that "posits" a limited government and which rights are reserved according to the 10th amendment to the States or the individuals; that our rights supersede the government's. So we cannot say for an individual, for example, in Wisconsin, who has never been abroad, who may or may not have committed an act or may or may not have one association, that suddenly the U.S. military can roll in on that person, seize him or her, hold them in military detention, and only subject review of that case by one habeas corpus petition.

I would argue, then, that all of our rights as American citizens hang on the decision of the President of the United States; that if the President of the United States decides a person is substantially part of al-Qaida, the Taliban, or associated forces engaged in hostilities against the United States or they have committed a belligerent act or supported such hostilities in aid of such forces, all of their rights as an American citizen are now forfeited. Clearly, that is not the case.

The Founding Fathers understood the power of the state run amok under a distant king who did not regard the rights of the individual as worth much. We founded a republic and then wrote a constitution to defend those rights. While we face a very difficult and dangerous world overseas and have to do difficult and dangerous things, which I support, we should make sure there is a place for peace and justice and rights inside the United States.

So for us, in looking at this provision, the Feinstein amendment clearly limits the scope of this legislation in an appropriate way--that we do the difficult things overseas. But the whole purpose of the Department of Defense is to defend the United States and those rights inside our country, but that we as U.S. citizens, especially when we are inside this country, have inalienable rights which cannot be separated from us by any executive action; that we can only be held, incarcerated, that we can only have our liberties taken away from us on indictment of a grand jury, before a civilian court, and with a presumption beyond a reasonable doubt by unanimous vote of that jury.

That is the essence of who we are as Americans, and it is a historic decision that we would make if we allow this power to go forward. I think that is why Senator *Paul* and I were the only

two Republicans to vote against this. That is why so many e-mails and letters that I have received in the last few hours support this decision.

I understand that others have a different view. They describe the United States as a battlefield. I would say that is an overly harsh determination of how cheaply our rights can be held; that we have a multihundred-billion-dollar Defense Department; that we have a substantial and capable FBI; that we have enormous State and city and local police establishments, all with the capabilities to investigate and prosecute crimes, but under the Constitution of the United States; and that if we hold U.S. citizens as capable of losing their rights on an executive branch decision, that not beyond the shadow of a doubt but on a lower standard of care, that in the executive branch's view a person is connected to one of those things, then our rights are not worth very much.

I would say the whole purpose of the Constitution is to hold our rights higher than the government and subject only to review by a civilian court. That review, as described in the Constitution of the United States, is far more than a habeas corpus review. The text of the Constitution specifically refers to grand jury indictment.

For those who have questions, I would urge them, first, take a moment to reread the Constitution, that first document which, as a member of the U.S. military or as an elected Member of this body, we have to swear allegiance to, and then make up their minds. I think when they do, they will support the Feinstein amendment.

I yield the floor.

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

Mr. *McCAIN*. Mr. President, I must admit that I have heard some bizarre arguments in my time as a Member of this body in referencing the Constitution of the United States as a basis for the argument. Now, it is my understanding my friend from South Carolina--I ask unanimous consent to enter into a colloquy with the Senator from South Carolina.

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

Mr. *McCAIN*. It is my understanding that under the Constitution, it is the Supreme Court of the United States that gives the interpretation of the Constitution as to various laws and challenges to the Constitution. It is their responsibility. Is that a correct assumption?

Mr. *GRAHAM*. Yes, it is.

Mr. *McCAIN*. So our colleague from Illinois who continues to quote from the Constitution of the United States fails to quote from the specific addressing of this issue by the U.S. Supreme Court, specifically the Hamdan decision. Is that correct?

Mr. *GRAHAM*. That is correct.

Mr. *McCAIN*. Is it not true that according to that decision, the U.S. Supreme Court, whom we ask to interpret the Constitution of the United States--they have made many interpretations over

the years--says there is no bar to this Nation's holding one of its own citizens as an enemy combatant.

Now, one would think to the casual observer that is exactly what the U.S. Supreme Court meant. It is fairly plain language, not really complicated. I am not a lawyer, but how the Senator from Illinois, quoting from inalienable rights, can somehow totally disregard in every way what the U.S. Supreme Court says--they go on to say we hold that "citizens who associate themselves with the military arm of the enemy government"--and I believe, in the view of most, they would view that as a member of al-Qaida, which this legislation specifically addresses. We hold that "citizens who associate themselves with the military arm of the enemy government and with its aid, guidance and direction," which is exactly, basically, the language of our legislation, "aid, guidance and direction enter this country," enter this country, "bent on hostile acts are enemy belligerents within the meaning of the law of war."

How can anything be more clear to the Senator from Illinois? I mean, it is beyond belief. It is beyond belief.

They then go on and talk about the Civil War, the U.S. Supreme Court does. They talk about the Civil War. They talk about a code binding the Union Army during the Civil War that captured rebels would be treated as prisoners of war. So a citizen, no less than an alien, can "be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States."

Now, after 9/11, we declared that we were at war with al-Qaida. Is that correct?

Mr. GRAHAM. Yes.

Mr. *McCain*. So we are at war. We have American citizens who are enemy combatants. Yet the Senator from Illinois, in the most bizarre fashion that I have heard, says, therefore, they are guaranteed the protections of--as he said--a trial.

I mean, I do not get it. Maybe the Senator from South Carolina can explain.

Mr. GRAHAM. I will be glad to yield to my friend from Illinois. Let me just try to set the stage the best I can. And I would love to have Senator *Levin* weigh in and anyone else.

The law, as it exists today, to my good friend from Illinois, has long held that when an American citizen collaborates with the enemy, that is an act of war, not a common crime. The constitutional review provided by the Supreme Court in cases involving American citizens collaborating with the enemy has said that we view that as an act of war and we apply the law of war. So our Supreme Court, in the Hamdi case just a few years ago, upheld the ruling in the *In re Quirin* case, which went back to World War II.

In that case, we had American citizens assisting Nazi saboteurs. The Supreme Court ruled that citizenship status does not prevent someone from being treated as part of the enemy force when they choose to join the enemy.

Why is this important? My good friend from Illinois is an intel officer. Intelligence gathering is part of war. An enemy combatant can be interrogated by our military intelligence community without Miranda rights. They can be held for an indefinite period of time to be questioned about past, present, and future attacks. The Supreme Court has legitimized that process because the individual in question was an American citizen captured in Afghanistan.

He pled to the Court: You cannot hold me as an enemy combatant because I am an American citizen.

The Court said: No, there is a long history in this country of having American citizens who collaborate with the enemy to be held as an enemy combatant.

Unfortunately, in every war we have engaged in, American citizens have provided aid and comfort to the enemy. In World War II we had American citizens assisting Nazi saboteurs.

Mr. *McCAIN*. Was not one of the most famous cases a woman whose name was Tokyo Rose, who propagandized--she was an American citizen. She propagandized on behalf of the Japanese when we were in the war. Afterwards she was given a military trial.

Mr. *GRAHAM*. Yes. The point is----

Mr. *McCAIN*. Not a civilian trial, not given her Miranda rights, but tried by military tribunal.

Mr. *GRAHAM*. Right. What we have done in the Military Commissions Act in 2009, civilians, American citizens cannot be tried in military commissions. It can only go to Federal court. But the point we are trying to make is it has been long held in this country that when an American citizen abroad or on the homeland decides to help the enemy, we have the right to hold them, not under a criminal theory but under the law of war because their effort to help the enemy, I say to my good friend from Illinois, is an act of war against their fellow citizens.

This is so important. If we deny our country the ability to hold and interrogate an American citizen who has joined forces with al-Qaida, we lose the ability to find out the intelligence they may have to keep us safe. If the choice is that an American citizen who chooses to collaborate with al-Qaida must be put in the criminal justice system, meaning they will have criminalized the war, the Congress will have restricted executive branch power.

To make it clear--please understand, I say to Senator *Feinstein*--the courts of the United States have acknowledged that the executive branch can hold an American citizen as an enemy combatant when they engage and assist the enemy. The courts of the United States recognize the power of the executive to do that as Commander in Chief.

The question for us is, Do we want to be the first Congress in the history of the Nation to say to the executive branch that they no longer have that power given to them by the courts, inherent with being Commander in Chief, to protect us against enemies foreign and domestic.

I argue to my colleagues, given the threats we face from homegrown terrorism, from al-Qaida groups and their affiliates, that now is not the time to change the law preventing our military

intelligence community from holding an American citizen who is helping the enemy on the homeland and prevent them from gathering intelligence.

I argue that the reason no other Congress has done this in past wars is because it didn't make a lot of sense. I argue that if a Senator came to the floor of the Senate during World War II and suggested that an American citizen who sided with the Nazis to sabotage American interests here could not be held as an enemy combatant, they would have been run out of town because most citizens would say anybody who helps the enemy--citizen or not--is a threat to our country.

Unlike other wars, we do have due process that exists today that never existed before. No Nazi soldier was able to go to a Federal court and say: Judge, let me go. The reason I have agreed, and the courts have applied habeas review to enemy combatant determination, is this is a war without end.

How does one become an enemy combatant? The executive branch makes the accusation. They have to follow the statutory criteria. This is a limited group of people in a limited classification. American citizen or not, if someone falls into this group, they can be held as an enemy combatant. But the executive branch has to prove to an independent judiciary that the case is sufficient, and under the law the judge has to agree with the military; we have an independent judiciary looking over the shoulder of the military in this war, unlike at any other time. So the government has to prove to a Federal judge, by a preponderance of the evidence, that this person is, in fact, an enemy combatant. If the judge disagrees, they are let go. If the judge agrees, we hold the enemy combatant, and they get an annual review process as to whether future detention is warranted. So we have robust due process.

But please understand what the Feinstein amendment is about. It is about the Congress of the United States, the Senate of the United States, for the first time in American history, restricting the ability of the executive branch to hold an American citizen who is collaborating with the enemy and question them under the law of war. If we do that to ourselves, we will regret it. I don't want to be in the first Congress, in the times in which we live, to change the law to deny our intelligence community and the Department of Defense the ability to deal with American citizens who have decided on their own to become part of al-Qaida. The day one decides they are going to side with al-Qaida, they have committed an act of war against the rest of us, and the courts acknowledge they can be held as an enemy combatant, not a common criminal.

The question for the Congress is, Do we want to undo that in the times in which we live? I plead with everybody in this body, get yourself educated about what the law is today. I ask Senator *Levin*, we have done nothing to change the law in this bill; is that correct?

Mr. LEVIN. Not only does 1031, the overall section, not change the law, it incorporates it, according to the administration's own statement of policy on what the current law is. The Senator is right. There is nothing in here which in any way affects habeas corpus, nor should we seek to do so. Habeas corpus remains exactly as it is. We could not change it if we wanted to, and we don't want to.

While the Senator asked me a question, I wish to answer a question with a question to him. Is it not true that for the first time, we provide that where there is going to be an unprivileged enemy

belligerent who could be held in long-term detention under the law of war--for the first time we provide a judge and a lawyer to that person; is that right?

Mr. GRAHAM. That is correct, and we have been working on that together for 5 years. To respond, if I may, because I think it is a very good discussion, does the Senator agree with me that under the law that exists today, in terms of the Supreme Court rulings, an American citizen can be held as an enemy combatant?

Mr. LEVIN. I read this yesterday, and I will read it again now. The Senator is right. I don't know how anybody reading this can reach any other conclusion but what the Supreme Court says, not because they are right or wrong but because of the Supreme Court: ``There is no bar to this Nation's holding one of its own citizens as an enemy combatant."

By the way, nor should there be, in my judgment.

Mr. GRAHAM. Does the Senator agree that in past wars American citizens, unfortunately, have collaborated with the enemy?

Mr. LEVIN. They have, and they have been treated as enemy combatants.

Mr. GRAHAM. Does he agree with me that in World War II some American citizens agreed to assist the Nazis and were held as enemy combatants?

Mr. LEVIN. I agree.

Mr. GRAHAM. Does the Senator agree it is good policy to hold and interrogate someone who is helping al-Qaida to find out what they know?

Mr. LEVIN. It is good policy. If they decline, under the procedures under our language, the person should be first interrogated for whatever length of time those procedures provide--by the FBI, local police or anybody else. They have the right to do that.

Mr. GRAHAM. Does the Senator agree that the criminal justice system is not set up to gather military intelligence?

Mr. LEVIN. Yes.

Mr. *McCAIN*. To interrupt, briefly, I wonder--in the interpretation of the Senator from Illinois of the Constitution of the United States--if it is an American citizen, say, somewhere over in Pakistan, who is plotting

and seeking to destroy American citizens, it is OK for us to send a predator and fire and kill that person, but according to the interpretation of the Senator from Illinois, if that person were apprehended in Charleston planning to blow up Shaw Air Force Base, then that person would be given his Miranda rights, how in the world does that fit?

Again, this is one of the more bizarre discussions I have had in the 20-some years I have been a Member of this body.

Mr. GRAHAM. Under the law as it exists today, an American citizen can be held as an enemy combatant. The question we are debating on the floor--Senator *Feinstein* is saying that in the future an American citizen who is deemed to have collaborated with al-Qaida or the Taliban or others could no longer be held as an enemy combatant for an indefinite period, which means we cannot gather military intelligence as to what they know about past, present, and future attacks.

I argue we would be the first Congress in history to bring about that result and that now would be the worst time in American history to do that. If we cannot hold a citizen who is suspected of assisting al-Qaida under the law of war, the only option is to put them in the criminal justice system. Then we cannot hold them indefinitely, and we cannot ask about present, past or future attacks because now we are investigating a crime, nor should we be allowed to do that under criminal law.

The point is that when a person assists the enemy, whether at home or abroad, they have committed an act of war against our citizens, and the Supreme Court has acknowledged that the executive branch has the power to hold them as an enemy combatant. The question is, Are we going to change that and say in the 21st century, in 2011, every American citizen who chooses to cooperate with al-Qaida can no longer be interrogated for intelligence-gathering purposes by our Department of Defense and our intelligence community; that they have to go into the criminal justice system right off the bat, where they are given a lawyer and are read their Miranda rights? If we do that, we are going to deny ourselves valuable intelligence. We would be saying to our citizens that we no longer treat helping al-Qaida as an act of war against the rest of us.

If one suggested during World War II that someone who collaborated with the Nazis should be viewed as a common criminal, most Americans would have said: No, they turned on their fellow citizens and they are now part of the enemy.

All I want to do is keep the law as it is because we need it now more than ever. I am sensitive to due process. There is more due process in this war. Every enemy combatant being held at Guantanamo Bay, captured in the United States, has to go before a Federal judge. The military has to prove their case to a Federal judge. There is an annual review process. That makes sense to me. What doesn't make sense to me is for this country and this Senate to overturn a power that makes eminent sense when we need it the most. It doesn't make sense to set aside a Supreme Court case that acknowledges that when an American citizen affiliates with al-Qaida, that is an act of war against the rest of us and to criminalize that conduct, denying us the ability to gather intelligence. If we go down that road, we have weakened ourselves as a people, without any higher purpose.

To those American citizens thinking about helping al-Qaida, please know what will come your way: death, detention, prosecution. If you are thinking about plotting with the enemy inside our country to do the rest of us harm, please understand what is coming your way: the full force of the law.

The law I am talking about is the law of armed conflict. You subject yourself to being held as an enemy of the people of the United States, interrogated about what you know and why you did what you did or planned to do, and you subject yourself to imprisonment and death. The reason you subject yourself to that regime is because your decision to turn on the rest of us and help a

group of people who would destroy our way of life is not something we idly accept. It is not a common, everyday crime. It is a decision by you to commit an act of aggression against the rest of us.

I hope and pray this Senate will not, for the first time in American history, deny our ability to interrogate and find intelligence from those citizens who choose to associate with the enemy on our soil, because if we do that, it will be a deviation from the law that has existed at a time when we need that law the most.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. KIRK. Mr. President, I will yield to Senator *Feinstein* in a minute. I appreciate the debate with my friends and mentors. The three of us who were just debating were all military officers, but we have different views. We are dangerously close to being similar to the House of Representatives, where they have face-to-face debate. I appreciate that.

The law that should not be changed is the Constitution of the United States, and we realize the regulations of the United States have force, that the statutes of the United States have greater force, and the Supreme Court decisions have even greater force. But no document is above the actual words of the Constitution. I will say those words are our birthright as American citizens.

The sixth amendment says you shall be secure in your person and that shall not be violated and no warrant shall issue except upon probable cause--meaning that a court has made that decision. Your first amendment rights say that no person--and there is no exception in the Constitution--shall be held to answer for capital or otherwise infamous crimes, unless presentment or indictment of a grand jury.

By the way, I am talking specifically about a U.S. person inside the jurisdiction of the United States. Our sixth amendment right says that in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial. Our fourteenth amendment right says no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. These are, without question, for U.S. citizens. There is a balancing act between the threats we perceive. We know the threats from foreign enemies and terrorists. That is well known to us, especially the new generation of Americans who witnessed the mass murders of September 11.

The Founding Fathers were also wrestling with another threat--the threat of the state, the government itself, against its own individuals and the abuse of power. We would forget the lesson of history, unless we understood that is a threat as well. We are told there will be no intelligence benefit if a U.S. citizen who is arrested can't be interrogated by Homeland Defense or FBI people.

And yet, I would say, as a member of the intelligence community, the FBI and the Department of Homeland Security are part of the intelligence community and feed information into the intelligence community and can be used.

One of the key ideas behind our American government is it is not what we do, it is how we do it. One of the things missing in section 1031 is who is the decider. The decider in this case is the suspicion of being part of the al-Qaida, the Taliban, or committing that belligerent act, but we

have no court making the decision. As an American, you no longer have a right to the civilian court system, and those rights are inherent to you and are your birthright as an American citizen.

We should make sure that what we do here and now is that we understand your rights; that as an American citizen you can only be incarcerated on indictment by a grand jury, which is by a preponderance of evidence; and then conviction is beyond the shadow of a doubt. Under this language, if you are accused of being part of al-Qaida or the Taliban, or of committing an act, you can be held subject to only one habeas review on a preponderance of evidence.

Most Americans think you can only be convicted of a crime in the United States beyond the shadow of a doubt by a jury of your peers. But if this is passed, that is no longer true. We want to make sure the decider always is a civilian article III court. We are talking about a very specific definition here inside the jurisdiction of the United States among American citizens.

I agree we can kill Anwar al-Awlaki, who is making war on the United States from a foreign jurisdiction. But when we are inside the United States, the whole point of the U.S. military and our establishment is to defend our rights, and those rights cannot be taken away from us by any executive action. They can only be taken away from us by action of a civilian court, by a jury of our peers and by their decision beyond a shadow of a doubt.

With that, I yield for the Senator from California, whose amendment I so strongly support.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I want one quick moment to respond and then I will propound a unanimous consent request.

We couldn't change the Constitution here if we wanted to, and nobody does want to. And that includes the right of habeas corpus. All the constitutional rights which the Senator from Illinois talked about are constitutional rights. They are there. They are guaranteed. They couldn't be changed by the Congress if we wanted to, and I hope nobody wants to change those rights.

But what the Senator ignores, and what has been ignored generally here, is that there is another path, and the Supreme Court has approved this path so that if any American citizen joins a foreign army in attacking us, that person may be treated as an enemy combatant. That is not me speaking. That is the Supreme Court in Hamdi.

There is no bar to this Nation's holding one of its own citizens as an enemy combatant.

If you join an army and attack us, you can be treated as an enemy combatant. The Supreme Court has said so more than once.

My unanimous consent request is the following: that the Senator from California be recognized first for whatever comments she wishes to make, then the senior Senator from Illinois be recognized to speak on whatever subject he wishes--on the amendment of the Senator from California or whatever--and then Senator *Merkley's* amendment be in order to be called up by Senator *Merkley*.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from California.

Mrs. FEINSTEIN. I thank the distinguished manager of the bill, and I say to the distinguished senior Senator from Illinois, who is here, I will try to be relatively brief. But I would also say that seldom do we get an opportunity on the floor of the Senate to debate what is fundamental to this American democracy. In a sense, I am pleased this issue has now been aired publicly because I think we can address it directly.

Senator *Durbin*, I also want to thank your colleague, the junior Senator from Illinois, Senator *Kirk*, for his cosponsorship of this amendment.

The fact of the matter is, the original draft of this defense bill had this language in it:

The authority to detain a person under this section does not extend to the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place in the United States except to the extent permitted by the Constitution of the United States.

That was removed from the bill. Essentially, what we are trying to do is put back in that you cannot indefinitely detain a citizen--just a citizen--of the United States without trial. Due process is a basic right of this democracy. It is given to us because we are citizens of the United States. And due process requires that we not authorize indefinite detention of our citizens.

Where I profoundly disagree with the very distinguished chairman and ranking member of the Armed Services Committee is by saying that *Ex parte Quirin* established the law for U.S. citizens in this area that still holds. It does not. I went to the *Hamdi* opinion, and I wish to read some of the plurality opinion as written by Justice O'Connor. This first quote is from page 23 of her opinion.

As critical as the government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Continuing on page 24:

We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

It then goes on, referring to the *Hamdi* case, on page 26:

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker.

Then to quote from Justice Scalia's opinion, which is important commentary on the 1942 case *Ex parte Quirin*, he says:

The government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of Federal courts. It places primary reliance on *Ex parte Quirin*, a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Hans Haupt, was a U.S. citizen.

Justice Scalia concludes:

This case was not this Court's finest hour.

Mr. President, the difference today is that we as a Congress are being asked, for the first time certainly since I have been in this body--and I believe since the senior Senator from Illinois has been in this body--to affirmatively authorize that an American citizen can be picked up and held indefinitely without being charged or tried. That is a very big deal, because in 1971 we passed a law that said you cannot do this. This was after the internment of Japanese-American citizens in World War II. It took that long, until 1971, when Richard Nixon signed the Non-Detention Act, and that law has never been violated.

The *Quirin* case was not about whether a U.S. citizen captured during wartime could be held indefinitely, but rather whether such an individual could be held in detention pending trial by military commission. The recent case of an American put into military custody, of course, was Jose

Padilla, and there was a good deal of controversy over the years about his case. He was ultimately transferred out of military custody, tried and convicted in a civilian court.

What we are talking about here--and I am very pleased Senator *Kirk* and Senator *Lee* have joined us as cosponsors in this--is the right of our government, as specifically authorized in a law by Congress, to say that a citizen of the United States can be arrested and essentially held without trial forever.

The hypothetical example that has been offered by the Senator from Arizona, the ranking member of the committee, is: Would we want someone who is an American--who is planning to kill our people, bomb our buildings--not to be held indefinitely under the laws of war? I believe it is a different situation when it comes to American citizens. What if it is an innocent American we are talking about? What if it is someone who was in the wrong place at the wrong time? The beauty of our Constitution and our law is it gives every citizen the right of review--review by a court, and this is what the *Hamdi* decision is all about. The defense bill on the floor, as written, would take us a step backward. The bill, as written, would say an American citizen can be picked up, can be held for the length of hostilities--is that 5 years, 10 years, 15 years, 20 years, 25 years, 30 years--without a trial. I say that is wrong. I say that is not the way this democracy was set up. And I also say that is totally unnecessary because our federal courts work well to prosecute

terrorists. We can go back to the Shoe Bomber, as a case in point. We can go back to Abdulmutallab as a case in point. We can go back to the record of the Federal courts prosecuting over 400 terrorists since 9/11.

I want to thank Senator *Durbin* for his interest in this issue and his cosponsorship of this amendment. It is very much appreciated. I don't know whether we can win this, but I think it is very important that we try and I know we are getting more and more support as people learn more about what this bill does. I think it is very important that we build a record in this body, because I have no doubt this is going to be litigated. I hope we are successful with this amendment. I hope we can protect the rights of Americans.

Mr. President, as we have occasion to look at people in Guantanamo, we know there are people there who were in the wrong place at the wrong time. If they are going to be held forever, that is a mistake, and we don't want the same thing to happen to American citizens in this country.

This is another example of how we are over-militarizing things that aren't broken. As I have said previously here on the floor, I don't see a need for the military to go around arresting Americans. The national security division of the FBI now has some 10,000 people. They have 56 field local offices with special agents who are well equipped to arrest terrorists and also interrogate them. Certainly the Justice Department is equipped to prosecute terrorists in Federal criminal court. The conviction rate and the long sentences achieved shows their success.

I am hopeful we will be able to pass this amendment and change the bill to reflect that Americans are protected from permanent detention without trial. That is all we are trying to do.

I thank the Senator from Illinois, I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, let me say at the outset what an extraordinary job my colleague from California has done. There was a time in American history, before law schools, when people read the law and practiced the law. The Senator from California has not only read the law, she has written many laws, and her competence in advocating this important constitutional question has been proven over and over. So I thank her for having the determination and courage to stand up for her convictions against some who would be critical of anyone who broaches the subject.

This is a controversial subject. We are talking about the security of Americans. We are talking about terrorism. We all remember a few years ago when our lives were interrupted--a time we will never forget--when terrorists attacked the United States and killed 3,000 innocent American people on 9/11. We came together in this Congress, Democrats and Republicans, and said we need to keep this country safe; that we never want that to happen again. So we passed new laws, suggested by President George W. Bush, and enacted by Democrats and Republicans in Congress.

We created new agencies, such as the TSA security agency at airports and we empowered our intelligence branches--which Senator *Feinstein* has a particular responsibility for as chairman of

the Senate Intelligence Committee--by giving them more people, more technology, and more authority, and we said to them, keep us safe.

We said to our military: We want you to be the best in the world and continue to be, and we will provide the resources for that to happen. Then we turned, as Senator *Feinstein* has noted, to the Federal Bureau of Investigation and said: We are going to dramatically increase your numbers and give you the technology you need to keep us safe.

Here we are some 10 years later, and what can we say? We can say thanks to the leadership of President George W. Bush and Barack Obama, 9/11 was not repeated--and we never want it repeated.

We can also say, with very few exceptions, in the 10 years since 9/11 that we have done all these things consistent with America's values and principles. Other countries--and we see them even today--faced with uncertainty and insecurity throw out all of the rules of human conduct even to the point of killing their own people in the streets to maintain order. Thank God that never has occurred in the United States, and I pray it never will. Those of us who are elected to represent our States in the Senate take an oath, an oath that we are going to uphold and defend the Constitution with its values and principles. We understand that taking that oath may mean that we are accepting due process, and due process says a fair day in court for someone accused of a crime. Other countries dispense with that. They don't need a trial. They find someone suspected of a crime, whatever it might be, that person is given summary execution, and that is the end of the story. No questions asked.

We don't do it that way in America. We establish standards of conduct and justice, and particularly as it relates to the people who live in America, our citizens and legal residents who are in the United States. That is what this debate is about.

This is an important bill, S. 1867. It comes up every year in a variety of different forms, and we are lucky to have Senator *Carl Levin* and Senator *John McCain* who put more hours into it than we can imagine to write the bill to authorize the Department of Defense to do its job. It is the best military in the world, and their hard work makes certain that it stays in that position.

But this provision they have added in this bill is a serious mistake--serious. It is serious enough for me to support Senator *Feinstein* in her efforts to change and remove the language. Why?

First, we know the law enforcement officials in the United States of America, the Attorney General's Office, the FBI have done a good job in keeping America safe. They have arrested over 300 suspected terrorists in the United States--over 300 of them--and they have tried them in the criminal courts of America, on trial, in public, for the world to see that these people will be held to the standards of trial as an American citizen. Of those 300, they have successfully prosecuted over 300 alleged terrorists, then incarcerated them in the prisons of America, including Marion, IL, in my home State, where they are safely and humanely incarcerated.

The message to the world is: We are going to keep America safe, but we are going to do it by playing by the rules that make us America. Due process is one of those rules, and it has worked. It has worked under two administrations.

Now comes this bill and a suggestion that we need to change the rules. The suggestion is, in this measure, that we will do something that has not been done in America before. Section 1031 of this bill, for the first time in the history of America, will authorize the indefinite detention of American citizens in the United States. This is unprecedented. In my view, as chair of the Constitution Subcommittee of Senate Judiciary, it raises serious constitutional concerns.

Senator *Levin* and Senator *McCain* disagree. In an op-ed piece for the Washington Post, they recently wrote:

No provision in the legislation expands the authority under which detainees can be held in military custody.

But look at the plain language of section 1031. There is no exclusion for U.S. citizens. So the question is, If we believe an American citizen is guilty or will be guilty of acts of terrorism, can we detain them indefinitely? Can we ignore their constitutional rights and hold them indefinitely, without warning them of their right to remain silent, without advising them of their right to counsel, without giving them the basic protections of our Constitution? I don't believe that should be the standard.

I listened to Senator *McCain*. He makes a pretty compelling argument: Wait a minute. You are telling me that if you have someone in front of you who you think is a terrorist who could repeat 9/11, you are going to read their Miranda rights to them?

Well, as an American citizen, yes, I would. I would say to Senator *McCain* the same argument would apply if that person in front of me was not a suspected terrorist but a suspected serial killer, a suspected sexual predator; we read them their Miranda rights. We believe our system of justice can work with those rights being read.

Do you remember the case about 2 years ago of the person who was on the airplane, the Underwear Bomber, Abdulmutallab? He was coming to the United States to blow up that airplane and kill all the people onboard, and thank God he failed. He tried to ignite a bomb and his clothing caught on fire, and the other passengers jumped on him, subdued him, and he was arrested. This man, not an American citizen, was taken off the plane and interrogated by the Federal Bureau of Investigation. After he stopped talking voluntarily, they read him his Miranda rights. We all know them from the crime shows that we watch on TV: the right to remain silent, everything you say can be used against you, the right to retain counsel. He was read all those things, and he shut. But that wasn't the end of the story.

By the next day, they were back interrogating him and they had contacted his parents, brought his parents to this country. He met with his parents and turned and said: I will cooperate. I will tell you everything I know. He started talking, and he didn't stop.

At the end of the day, he was charged with terrible, serious crimes, brought to trial in Detroit, and pled guilty under our criminal system. Now, he wasn't an American citizen, but even playing by the rules for American citizens we successfully prosecuted this would-be bomber and terrorist.

What is the message behind that? The message behind that is we will stand by our principles and values and still keep America safe. We will trust the Federal Bureau of

Investigation and the Department of Justice to successfully prosecute suspected and alleged terrorists. We will not surrender our principles even as we fight terrorism every single day.

Now, this bill changes, unfortunately, a fundamental aspect of that. It says if an American citizen is detained and suspected to be involved in terrorism with al-Qaida or other groups, they can be held indefinitely without being given their constitutional rights.

I appreciate that Senator *Levin* and Senator *McCain* have said they are willing to consider excluding U.S. persons, but section 1031 doesn't. I hope they do.

I want to address a couple statements that have been made by my Republican colleagues. I like them and respect them.

I would say to Senator *Graham*, my colleague and friend from South Carolina, I listened to Senator *Levin* tell us privately and publicly over and over again: What we have here doesn't change the law. Then I listened to your arguments on the floor saying: Well, the law needs to be changed. That is why we are doing this. So I am struggling to figure out if Senator *Levin* and Senator *Graham* have reconciled.

Mr. GRAHAM. May I respond?

Mr. DURBIN. I want the Senator to respond, but I want to ask point blank, is there an exclusion currently in the law for U.S. citizens under section 1031 and whether or not under 1031 American citizens can be detained indefinitely?

Mr. GRAHAM. No. And there should not be. Could I finish my thought?

Mr. DURBIN. Of course.

Mr. GRAHAM. Now, we are good friends, and we are going to stay that way. But you keep saying something, Senator *Durbin*, that is not true. The law of the land is that an American citizen can be held as an enemy combatant. It is the Hamdi decision, and I quote:

There is no bar to this Nation's holding one of its own citizens as an enemy combatant.

Hamdi was an American citizen captured in Afghanistan fighting for the Taliban. Justice O'Connor specifically recognized that Hamdi's detention could last for the rest of his life because law of war detention can last for the duration of the relevant conflict.

The Padilla case involves an American citizen captured in the United States, held for 5 years as an enemy combatant, and the Fourth Circuit reviewed his case and said that we could hold an American citizen as an enemy combatant.

To my good friend from Illinois, throughout the history of this country American citizens in every conflict have, unfortunately, decided to side with the enemy at times. In re Quirin is a

1942-1943 case that involved American citizens assisting German saboteurs. They were held under the law of war because the act of collaborating with the enemy was considered an act of war, not a common crime.

So the law of the land by the courts is that an American citizen can be held as an enemy combatant. That has been the law for decades.

What Senator *Feinstein* would do is change that. The Congress would be saying we cannot hold an American citizen as an American combatant.

I do appreciate the time. Now, let me tell you why I think that is important.

The Senator is a very good lawyer. Under the domestic criminal law, we cannot hold someone indefinitely and question them about enemy activity: What do you know about the enemy? What is coming? What were you doing? Where did you train? Under domestic criminal law, we can't question somebody in a way that would put them in jeopardy.

Under military intelligence gathering we can question an enemy prisoner without them having a lawyer to be able to find out how to defend America. If we can't hold this person as an enemy combatant, the only way we can hold them is under domestic criminal law. When the interview starts and the guy says: I want my lawyer; I don't want to talk to you anymore--under the criminal justice model there is a very limited time we can hold them or question them without reading them their rights or giving them a lawyer.

Under intelligence gathering our Department of Defense, the FBI, and the CIA can tell the individual: You are not entitled to a lawyer. You have to sit here and talk with us because we want to know what you know about present, past, and future attacks.

If we can't hold an American citizen who has decided to collaborate with al-Qaida as an enemy combatant, we lose that ability to gather intelligence. That is the change that Senator *Feinstein* is proposing; that the law be changed by the Congress to say enemy combatant status can never be applied to an American citizen if they collaborate with al-Qaida. That would be a huge loss of intelligence gathering, it would be a substantial change in the law, and it would be the first time any Congress has ever suggested that an American citizen can collaborate with the enemy and not be considered a threat to the United States from the military point of view. I don't want to go down that road because I think that is a very bad choice in the times in which we live.

So to my good friend, the law is clear we can hold an American citizen as an enemy combatant. The Congress is contemplating changing that, and I think it would be a very bad decision in the times in which we live to deny our ability to hold an American citizen and question them about what they know and why they decided to join al-Qaida.

Mr. *McCAIN*. Mr. President, I ask for the regular order. What is the regular order?

The PRESIDING OFFICER. The Senator from Illinois has the floor.

Mr. *GRAHAM*. Simply stated, if a person decides to collaborate with al-Qaida in a very limited way, can we hold them? They have to be a member of al-Qaida or affiliated with it or be

involved in a hostile act. But if they do those things, historically, American citizens who chose to side with the Nazis--in this case, al-Qaida--have been viewed by the rest of us not as a common criminal but as a military threat.

Now is not the time to change that. We need that ability to question that person: Why did you join al-Qaida? Where did you train? What do you know about what is coming next? And the only way we can get that information is to hold them as an enemy combatant and take all the time we need to protect this Nation and interrogate.

Mr. DURBIN. I would like to reclaim the floor.

Mr. GRAHAM. Yes, sir. I appreciate the exchange.

Mr. DURBIN. And would the Senator end that with a question mark?

Mr. GRAHAM. And, was I right?

Mr. DURBIN. I thank my colleague from South Carolina.

What the Senator concluded with, though, I think is critical to this conversation. He said the only way to get to the bottom of whether there is an al-Qaida connection that could threaten the United States is military detention. Well, the Abdulmutallab case argues just the opposite. It was the Federal Bureau of Investigation that he sat before and told all of the information that the Senator has just discussed.

Mr. GRAHAM. May I respond and say the Senator is right.

I am an all-of-the-above guy. I believe that military and civilian courts should be used.

When an American citizen is involved, does the Senator agree with me that military commissions are off the table?

Mr. DURBIN. So the Senator is arguing that every President should have all the options, criminal courts as well as military commissions and tribunals?

Mr. GRAHAM. Absolutely.

Mr. DURBIN. Well, what is the difference, then, with what the Senator is standing for and what is the current situation? From my point of view, our Presidents--President Bush and President Obama--since 9/11, have used both, with more success on the criminal courts side--dramatically more success on the criminal courts side.

The obvious question that Senator *Feinstein* poses is, if the system isn't broken, if the system is keeping us safe, if we have successfully prosecuted over 300 alleged terrorists in our criminal courts and 6 in military commissions, why do we want to change it?

Mr. GRAHAM. Here is the point I am trying to make.

Mr. DURBIN. Retaining the floor.

Mr. GRAHAM. Thank you. And this is a very good exchange.

My view is that when we capture somebody at home and the belief is that they are now part of al-Qaida, that if we want to read them their Miranda rights and put them in Federal court, we have the ability to do that. This legislation doesn't prevent that from happening.

Does it, I ask Senator *Levin*?

Mr. LEVIN. It does not.

Mr. GRAHAM. But what Senator *Feinstein* is proposing is that no longer do we have the option of holding the American citizen as an enemy combatant to gather intelligence, and we don't have the ability to hold them for a period of time to interrogate them under the law of war.

What I would suggest to the Senator is that the information we receive from Guantanamo Bay detainees has been invaluable to this Nation's defense. To those who believe it was because of waterboarding, I couldn't disagree more. The chief reason we have been able to gather good intelligence at Guantanamo Bay is because of time.

The detainee is being humanely treated, but there is no requirement under military law to let the enemy prisoner go at a certain period of time.

If you take away the ability to hold an American citizen who has associated himself with al-Qaida to be held as an enemy combatant, you can no longer use the technique of interrogating him over time to find out what he knows about the enemy.

You are worried about prosecuting them. I am worried about finding out what they know about future attacks. They are not consistent. You can prosecute somebody. That is part of the law. What the Senator is taking away from us is the ability to gather intelligence. Our criminal justice system is not set up to gather intelligence.

Mr. DURBIN. I want to reclaim the floor. I know Senator *McCain* is anxious for me to conclude and there is something he is anxious to do quickly, but I will try to do this in appropriate time for the gravity of the issue before us.

But to suggest the only way we can get information about a terrorist attack on the United States by al-Qaida and other sources is to turn to the military commissions and tribunals and not use the FBI and not use the Department of Justice defies logic and experience. Abdulmutallab, the Underwear Bomber, a member of al-Qaida, failed in his attempt to bring down that plane, interrogated successfully by the FBI, basically told them everything he knew over a period of time. It worked. To argue that you cannot do this defies the experience with Abdulmutallab.

I want to say a word about the Hamdi case. I listened as Senator *Feinstein* read the Supreme Court decision. I do not think the Supreme Court decision stands for what was said by the Senator from South Carolina. I think what he said was inaccurate. I do not believe Justice O'Connor went to the extent of saying you can hold an American citizen indefinitely.

Let me also say when it comes to the Hamdi case, Hamdi was captured in Afghanistan. He was captured on the battlefield in Afghanistan, not the United States. And Justice O'Connor, in that opinion, was very careful to say the Hamdi decision was limited to "individuals who fought against the United States in Afghanistan as part of the Taliban." She was not talking about American citizens and their rights. She was talking about this specific situation.

Now let's go to the case of Jose Padilla. Jose Padilla, some will argue, is a precedent for the indefinite detention of American citizens. But look at what happened in the case of Padilla, a U.S. citizen placed in military custody in the United States. The Fourth Circuit Court of Appeals, one of the most conservative courts in our Nation, upheld Padilla's military detention.

Then, before the Supreme Court had the chance to review the Fourth Circuit's decision, the Bush administration transferred Padilla out of military custody and prosecuted him in an article III criminal court.

I do not think that Hamdi or Padilla makes the case that has been made on this floor.

I want to say I think Senator *Feinstein* is proper in raising this amendment. I think the fact is that Hamdi is a U.S. citizen, but it does not stand for the indefinite detention of U.S. citizens as this new law would allow.

It troubles me that as good, as professional, as careful as our government has been to keep America safe, we now have in a Defense authorization bill an attempt to change some of the most fundamental, constitutional principles in America. This bill went through a great committee, our Armed Services Committee, but not through the Judiciary Committee which has specific subject matter jurisdiction over our Constitution. It did not go through the Intelligence Committee. And for the record, the provisions in this bill--which some have said are not that significant, that much of a change--are opposed by this administration, opposed by the Secretary of Defense, Leon Panetta, who received a 100-to-nothing vote of confidence from the U.S. Senate when he was appointed, opposed by our Director of National Intelligence, who says these provisions will not make America safer but make it more difficult to protect America, and opposed by the Federal Bureau of Investigation.

I entered a letter from Director Muller in the *Record* yesterday, as well as the Department of Justice.

You have to ask yourself, if all of these agencies of government, which work day in, day out, 24-7 to keep us safe, tell us not to pass these provisions because it does not make America safer, it jeopardizes our security, why are we doing it?

Senator *Feinstein* has the right approach: Let us try to preserve some of the basic constitutional values here. I think we can. I hope my colleagues will take care before they vote against Feinstein. Despite the respect, which I share, that they have for our Armed Services Committee and its leadership--this is a matter of constitutional importance and gravity. It is important for us to take care and not to change our basic values in the course of debating a Defense authorization bill. Let's keep America safe but let's also respect the basic principle that American citizens are entitled to constitutional rights. The indefinite detention of an American citizen accused--not

convicted, accused of terrorist activity--the indefinite detention runs counter to the basic principles of the Constitution we have sworn to uphold.

I yield the floor.

The PRESIDING OFFICER (Mrs. *Hagan*). The Senator from Michigan.

Mr. LEVIN. I wonder if the Senator will yield for a question. Would the Senator agree that the majority opinion in Hamdi said the following:

There is no bar to this Nation's holding one of its own citizens as an enemy combatant.

Mr. DURBIN. I would respond by saying Justice O'Connor in that decision said:

[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

We therefore hold that a citizen-detainee, seeking to challenge his classification as enemy combatant, must receive notification of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.

Mr. LEVIN. Would the Senator agree that specifically referred to there is that a citizen being held as an enemy combatant is--excuse me. Would the Senator agree that what he read refers to the exact statement of the Justice that a citizen who is held as an enemy combatant is entitled to certain rights? Would the Senator agree that that, by its own terms, says that a citizen can be held as an enemy combatant?

Mr. DURBIN. In the particular case of Hamdi, captured in Afghanistan as part of the Taliban.

Mr. LEVIN. She did not say that. She said ``a citizen." I know what the facts of the case are. She did not limit it to the facts of the case.

Mr. DURBIN. I am sorry but she did. The quote:

..... individuals who fought against the United States in Afghanistan as part of the Taliban.

Mr. LEVIN. She did not limit it to that. She described the facts of that case.

Mr. DURBIN. She limits it to that case. If I could make one response and then I will give the floor to the Senator. This is clearly an important constitutional question and one where there is real disagreement among the Members on the floor. I think it is one that frankly we should not be taking up in a Defense authorization bill but ought to be considered in a much broader context because it engages us at many levels in terms of constitutional protections.

Mr. LEVIN. I agree with the Senator that Justice O'Connor said what the Senator said she said. Would the Senator agree with me that Justice O'Connor said:

There is no bar to this Nation's holding one of its own citizens as an enemy combatant.

Would the Senator agree that she said that?

Mr. DURBIN. As it related to Hamdi captured in Afghanistan.

Mr. LEVIN. Would the Senator agree she said that, however?

Mr. DURBIN. As it related to Hamdi, of course.

Mr. LEVIN. I am giving the Senator an exact quote. I know the facts of the case.

Mr. DURBIN. I can read the whole paragraph rather than the sentence.

Mr. LEVIN. You already have. Given the facts of the case. I understand the facts of the case, that it was somebody captured in Afghanistan. My question is, of the Senator: Would he agree that Justice O'Connor said--she is talking about this case, of course----

Mr. DURBIN. Yes.

Mr. LEVIN. "There is no bar to this Nation holding one of its own citizens"?

Mr. DURBIN. Captured on the field of battle in Afghanistan.

Mr. LEVIN. Would the Senator agree that the Justice said the following, that a citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," and would pose the same threat of returning to the front during the ongoing conflict? Would the Senator agree that she said that?

Mr. DURBIN. Of course.

Mr. LEVIN. Would the Senator agree that she quoted from the Quirin case, in which an American citizen was captured on Long Island?

Mr. DURBIN. She did make reference to the Quirin case.

Mr. LEVIN. Did she cite that with approval?

Mr. DURBIN. I would say there was some reservation in citing it. I say to the Senator, our difficulty and disagreement is the fact we are dealing with a specific individual captured on the field of battle in Afghanistan with the Taliban.

Mr. LEVIN. I understand.

Mr. DURBIN. We are not talking about American citizens being arrested and detained within the United States and being held indefinitely without constitutional rights.

Mr. LEVIN. My question, though--my question is: Did Justice O'Connor say that, in *Quirin*, that one of the detainees alleged that he was a naturalized United States citizen, we held that--these are her exact words:

Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the law of war.

Did she say that?

Mr. DURBIN. I can tell the Senator there were references in there to the case, but the Supreme Court has never ruled on the specific matter of law which the Senator continues to read. Until it rules, we will make the decision in this Department of Defense authorization bill, and it is not an affirmation of current law because there has been no ruling.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. *McCain*. Isn't it true that Justice O'Connor was specifically referring to a case of a person who was captured on Long Island? Last I checked, Long Island was part--albeit sometimes regrettably--part of the United States of America.

Mr. LEVIN. She is quoting with approval from the *Quirin* case in which one of the detainees was----

Mr. *McCain*. Captured in the United States of America.

Those are the facts of the case.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. *McCain*. Madam President, I am afraid we have to move to the amendment of Senator *Merkley*, who has been very patient.

Mr. LEVIN. According to a unanimous consent agreement which was entered into----

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. I understand Senator *Merkley* was going to be recognized next to offer his amendment. That was according to the unanimous consent agreement. I understand the Senator from New Hampshire, I don't know for how long, needed to make a unanimous consent request. Am I correct? No? I am incorrect.

According to the existing unanimous consent agreement, which was entered into----

Mr. *McCain*. Can I ask the indulgence----

The PRESIDING OFFICER. The Senator from Arizona.

Mr. *McCAIN*. Could I ask the indulgence of my friend from Oregon, that the Senator from South Carolina be allowed 2 minutes, and the Senator from New Hampshire be allowed 5 minutes? Would that be all right with the Senator from Oregon?

Mr. *MERKLEY*. Yes.

Mr. *McCAIN*. I thank him for his courtesy too. I say to the Senator from Illinois, this is an important debate and discussion. I appreciate his presentation. I think a lot of people are getting a lot of good information, on what is a very complex and very central issue. I thank the Senator from Illinois.

I yield.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. *GRAHAM*. Please understand what you are about to do if you pass the Feinstein amendment. You will be saying as a Congress, for the first time in American history, an American citizen who allies himself with an enemy force can no longer be held as an enemy combatant. The *In Re Quirin* decision was about American citizens aiding Nazi saboteurs, and the Supreme Court held then that they could be held as enemy combatants. So as much respect as I have for Senator *Durbin*, it has been the law of the United States for decades that an American citizen on our soil who collaborates with the enemy has committed an act of war and will be held under the law of war, not domestic criminal law. That is the law back then. That is the law now.

Hamdi said that an American citizen--a noncitizen has a habeas right under law of war detention because this is a war without end. The holding of that case was not that you cannot hold an American citizen, it is that you have a habeas right to go to a Federal judge and the Federal judge will determine whether the military has made a proper case. It has nothing to do with an enemy combatant being held as an American citizen. What this amendment would do is it would bar the United States in the future from holding an American citizen who decides to associate with al-Qaida.

In World War II it was perfectly proper to hold an American citizen as an enemy combatant who helped the Nazis. But we believe, somehow, in 2011, that is no longer fair.

That would be wrong. My God, what are we doing in 2011? Do you not think al-Qaida is trying to recruit people here at home? Is the homeland the battlefield? You better believe it is the battlefield.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. *GRAHAM*. Madam President, I ask unanimous consent for 1 more minute.

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

Mr. GRAHAM. That is the point. Why would you say that if you are in Afghanistan, we can blow you up, put you in jail forever, but if you make it here, all of a sudden we cannot even talk to you about being part of al-Qaida. What a perverse outcome, to say if you make it to America, you are home free; you cannot be interrogated by our military or our CIA; you get a lawyer. And that is the end of the discussion. That is what you would be doing. That is crazy. No Congress has ever decided to do that in other wars. If we do that here, we are changing the law in a way that makes us less safe. That is not going to be on my resume.

It is not unfair to make an American citizen account for the fact that they decided to help al-Qaida to kill us all and hold them as long as it takes to find intelligence about what may be coming next. And when they say "I want my lawyer," you tell them "Shut up. You don't get a lawyer."

The PRESIDING OFFICER. The Senator's time has expired.

Mr. GRAHAM. "You are an enemy combatant, and we are going to talk to you about why you joined al-Qaida."

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. Madam President, I also rise in opposition to the amendment offered by Senator *Feinstein*, and I certainly appreciate the comments of my colleague from South Carolina. It would lead to an absurd result that if we were in a situation where an American citizen became a member of al-Qaida and from within our country attacked Americans and we could not gather the maximum amount of information from them to make sure we could prevent future attacks against our country--that is what is at issue here.

I would like to point out a couple of issues that have not been addressed with respect to Senator *Feinstein's* amendment.

If you look at the language of that amendment, she says that the authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of hostilities. I think this provision is going to create some real problems for the executive branch. If I were they, I would be in here raising these issues because it does not distinguish--the language--between an American citizen who is captured overseas versus an American citizen captured in the United States of America.

Let's use the example of Anwar al-Awlaki. Mr. al-Awlaki, a member of al-Qaida, was actually killed by us overseas. So it would lead to the absurd result that we could not detain him to gather intelligence, but we believe that we are authorized--by the way, I agreed with the administration taking that step to take out Mr. al-Awlaki, who was a great danger to our country overseas. So the language as written would lead to that absurd result that would tie the administration's hands, that they can actually kill these individuals, but they can't detain them under military custody and interrogate them to make sure we can find out what they do know and what other attacks are being planned against the United States of America.

Also with respect to the language in this amendment, the language itself is a defense lawyer's dream. You can't hold a U.S. citizen until the end of hostilities. Well, how long can you hold them? I mean, it is not clear. There is no language in that. This is going to be litigated to heaven, and this is an area where our intelligence professionals need clarity. This is going to create more issues for the executive branch in an area that needs clarity and where there needs to be some identified rules and they have to be focused on gathering intelligence to protect Americans.

Senator *Durbin* has cited the Abdulmutallab case on numerous occasions as a way--as a great case as an example of how we can gather intelligence from enemy combatants to protect America. Let's review the facts of that case again. Fifty minutes into the interrogation, he was told: You have the right to remain silent. He exercised that right because he was given Miranda warnings, and it was only 5 weeks later that we were actually able to get through the Miranda warnings after we went to his parents. Is that the type of system we want? What happened in that 5 weeks? What did we lose in terms of information that could have protected America?

If we can't hold an American citizen who has chosen to be a member of al-Qaida and has participated in a belligerent act against our country to ask them what other attacks they are planning and whom they are working with, how are we going to get information to make sure that--God forbid--we can prevent another 9/11 on our soil, because that is why they want to come to the United States of America. Also, how do we deal with this issue of homegrown radicals?

Unfortunately, this amendment, in my view, is going to be a situation where we are opening the welcome mat. If you get to America and you can recruit one of our citizens to be a member of al-Qaida, then you don't have to worry about them being held in military custody. You don't have to worry about us using our maximum tools to gather intelligence to protect Americans.

I think this amendment is very misguided. I again would point out that the administration should be concerned about the language in this amendment. It does not distinguish between an American citizen who is captured on our soil who is trying to attack us and one overseas. But either way, if an American citizen has joined al-Qaida and is trying to kill us from within our own country, they have become part of our enemy and are at war with us.

The PRESIDING OFFICER. The Senator's time has expired.

Ms. AYOTTE. Thank you, Madam President.

I urge my colleagues to oppose the Feinstein amendment.

...

Mr. LEE. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. LEE. Madam President, I ask unanimous consent that the current amendment be set aside so I might speak briefly regarding amendment No. 1126.

Mr. LEVIN. Madam President, reserving the right to object, I wonder if the Senator would just seek the right to--the Senator has a right to speak on another amendment without setting aside this amendment. So I ask that the Senator not set aside the pending amendment but just simply speak on whatever amendment he wishes to speak.

Mr. LEE. Wonderful. The second request is withdrawn.

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

AMENDMENT NO. 1126

Mr. LEE. Madam President, I rise today to speak in support of amendment No. 1126 to the current pending legislation. The purpose of this amendment is to make clear that the United States shall not detain for an indefinite period U.S. citizens in military custody.

I understand this has been the subject of a lot of debate. I also understand this would be a break not only with the current pending legislation but also with current practice, based on Supreme Court precedent and lower court precedent that some have interpreted to deem this a constitutionally permissible practice.

It has often been suggested by several of my colleagues that it is the province of the Supreme Court to interpret the Constitution, and that statement is absolutely correct as far as it goes. But it is not the beginning of the analysis and the end of the analysis.

We, as Senators, independently have an obligation, consistent with and required by our oath to the Constitution--which I took just a few months ago just a few feet from where I stand now--to uphold the Constitution of the United States. That means doing more than simply the full extent of whatever the courts will tolerate.

In this instance, what we are talking about is the right of the U.S. military to detain indefinitely, without trial, a U.S. citizen, simply on the basis that person has been deemed an enemy combatant.

Now, there is a real slippery slope problem here, and it is the very kind of slippery slope problem for which we have protections such as the fifth amendment and the sixth amendment. You see, under the fifth amendment, a person cannot be held for an infamous crime unless they have been subjected to a process whereby a grand jury indictment has been issued. A person cannot be held and tried for a crime without having counsel made available to them and without the opportunity for a speedy trial in front of a jury of the peers of the accused.

We can scarcely afford as Americans to surrender these fundamental civil liberties for which wars have been fought, for which the founding era, the founding generation fought so nobly against our mother country to establish and thereafter to protect. We have to support these liberties. I think at a bare minimum, that means we will not allow U.S. military personnel to arrest and indefinitely detain U.S. citizens, regardless of what label we happen to apply to them. These people, as U.S. citizens, are entitled to a grand jury indictment to the extent they are being held for an infamous crime. They are also entitled to a jury trial in front of their peers and to counsel.

We cannot, for the sake of convenience, surrender these important liberties. I am not willing to do that. That is why I support this amendment, amendment No. 1126, to the pending legislation. I encourage each of my colleagues to do so.

I want to point out that yesterday I voted against what became known as the Udall amendment. I did so in part because I do not believe that fixed the problem I am talking about. The Udall amendment did not even purport to address current practice or the policies as they have been established in recent years: that this kind of detention is in some circumstances acceptable. It called for a study and it eliminated certain provisions in the proposed legislation, but it did not fix the underlying problem.

This Feinstein amendment, amendment No. 1126, does fix that. That is why I support it. I encourage each of my colleagues to do the same.

When we take an oath to the U.S. Constitution--to uphold it, to support it, to protect it, to defend it--we are doing more than simply agreeing to do whatever the courts will tolerate. We are taking an oath to the principles embodied in this 224-year-old document that has fostered the greatest civilization the world has ever known.

Thank you, Madam President.

I suggest the absence of a quorum.

...

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. Mr. President, I ask unanimous consent that Senator *Lieberman* and I be allowed to engage in a colloquy.

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

AMENDMENT NO. 1068

Ms. AYOTTE. Mr. President, obtaining intelligence from high-value terrorist detainees is an urgent national security priority that is essential to protecting Americans. Unfortunately, under current law, terrorists need look no further than the Internet to find out everything they need to know about our interrogation practices and how they can circumvent them. Under President Obama's 2009 Executive Order 13491, all U.S. Government interrogators are limited to the interrogation techniques that are available online and described in the Army Field Manual. As a result, all members of the intelligence community, including the non-Department of Defense intelligence professionals who support the high-value detainees interrogation group, must conform to the procedures in the Army Field Manual, which was written by the U.S. Army for the U.S. Army; that is, there is little flexibility permitted under these rules, and they are easy for those who want to harm us to circumvent them and to know exactly what techniques we will use to gather information to protect our country if they are detained as an enemy combatant.

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

Ms. AYOTTE. Yes, I will.

Mr. LIEBERMAN. Let me thank my friend, Senator *Ayotte*, for playing such a leading role in our debates on this critical issue of how our country handles detainees and gathers intelligence in our war on terrorism. I share her concerns about the potential damage to our intelligence collection efforts inflicted by adherence to the existing restrictions on interrogations. That is why I am pleased to be, with others, a cosponsor of the amendment introduced, amendment No. 1068.

I will say that I am also disturbed about the amount of misinformation that seems to be circulating about this amendment and similar efforts in the past that I have supported.

I ask the Senator from New Hampshire, does amendment No. 1068 authorize torture?

Ms. AYOTTE. I thank my friend, the Senator from Connecticut, first, for his leadership in this body on national security. We both had the privilege of serving our States as attorneys general.

The answer is no. This is an amendment, I point out, that not only is Senator *Lieberman* sponsoring--and I appreciate his experience and leadership on this most important national security issue--but Senator *Chambliss*, vice chairman of the Intelligence Committee, as well as Senator *Graham* and Senator *Cornyn*, who are both members of the Armed Services Committee, as well as the Judiciary Committee. It is very important to be clear about what this amendment would and would not do.

This proposal takes every possible measure to put into place intelligence-gathering practices that honor our American values and laws. Our amendment in no way condones or authorizes torture. There have been many groups trying to misrepresent what is in this amendment. Any new interrogation techniques that are developed would be required to comply with the U.N. Convention Against Torture, the Military Commissions Act, the Detainee Treatment Act, as well as section 2441 of Title 18 U.S. Code that relates to war crimes.

Mr. LIEBERMAN. I thank my friend for that clarification. It is very important. It is very critical--particularly for those who misunderstood this amendment--to understand the host of protections that the amendment puts in, both compelling compliance with the international convention against torture, as well as explicit prohibition in American law against interrogation that amounts to torture.

I want to ask my friend another question. Right now, all Federal Government interrogators, whether in the military or in the civilian intelligence community, are limited to using the Army Field Manual. So why does the Senator think it is so critical to give interrogators the ability--limited ability--to go beyond the Army Field Manual?

Ms. AYOTTE. I appreciate the question from my friend and colleague. The decision by President Obama to limit interrogators to the Army Field Manual was based, in part, on the horrible abuses that happened at Abu Ghraib prison in Iraq. Undoubtedly, the abuses at Abu Ghraib failed to reflect American values, tarnished America's reputation, and certainly damaged our interests. However, responding to these abuses by reflexively applying an Army Field Manual--which, to be clear, terrorists can go online and get and know exactly which techniques they will be subject to if captured--to all Federal Government interrogators doesn't reflect the

severity of the threat to our country and the importance of providing our nonmilitary intelligence collectors all of the lawful tools they need to gather intelligence to prevent nuclear attacks and protect our country.

Mr. LIEBERMAN. I thank the Senator for that answer. I completely agree with her. It is important to step back and perhaps state the obvious. Why do we capture enemy combatants? Why do we take prisoners of war? Two reasons, really. The obvious one is to get them off the battlefield against us so they can no longer attempt to kill Americans in uniform and, in the case of the war we are in with Islamist terrorists, to kill civilians. That is first--get them off the battlefield.

The second purpose--and this has been the traditional purpose of taking prisoners of war as long as there has been warfare in human history, and all the more so now--is to gather intelligence from them that will assist us in defeating the enemy and protecting our goals and protecting the lives of our men and women in uniform. That traditional purpose for taking prisoners of war is all the more critical in the unconventional war we are in against a brutal enemy that doesn't strike from battleships or tactical air fighters or military tanks or even in uniform; they strike us from the shadows, and they strike civilians as well.

It is very important to approach this amendment understanding that we are trying to increase, in a reasonable way, the capacity of those who work for us to protect our security and freedom to interrogate detainees that we have captured in the war against terrorism. One of the purposes is to gather intelligence, which will help us protect the lives of Americans and of our allies.

The preface to the Army Field Manual says it applies to the active Army, the Army National Guard, and the U.S. Army Reserve, unless otherwise stated. So as to the field manual, recognizing that these words create limited applicability of the manual outside the Army, the Army Training and Doctrine Command authors had the wisdom to warn that this manual was "Army doctrine," and it would have to be adapted, altered to apply to other "military departments" or other military service. If the interrogation techniques in this manual are not ideally suited for military services other than the U.S. Army, why should civilian interrogation professionals in the intelligence community, and particularly those who are in support of a high-value detainee interrogation, those who get the most powerful and influential and dangerous prisoners of war, be forced to comply with a document written for a defined military unit, which is the U.S. Army? I ask my friend from New Hampshire that question.

Ms. AYOTTE. I appreciate the question from the Senator from Connecticut. Absolutely, as the Senator pointed out, the Army Field Manual was not created for this purpose. As he mentioned, the high-value detainee interrogation group is a group consisting of the CIA, FBI, and Defense Intelligence Agency, designed to interrogate the worst terrorists, who are likely to have valuable information about future attacks and information we need to protect our country. To address this problem, we drafted the amendment through this authorization that would allow members of the intelligence community, who are assigned to or in support of the high-value interrogation group, to utilize interrogation techniques that are consistent with our laws and values. Our amendment would ask the Secretary of Defense, working with the Director of National Intelligence and the Attorney General, to develop a classified annex to the Army Field Manual that terrorists could not see. Unfortunately, now they can go on the Internet and look at the techniques. It classifies

that the Army Field Manual would provide interrogation techniques that would be used by that important select group of intelligence-gathering professionals, to allow them to have for their use the techniques they need to gather information and protect our country.

Mr. LIEBERMAN. Again, I thank my friend from New Hampshire, but I want to go back to something I said earlier. We have described the purpose of this amendment--what I call the due process we have put into it, the mandate that it comply with existing international norms and treaties, and, obviously, to comply with our law. I want to say to my colleague that it is certainly not my intention--and I ask my colleague is it her intention--that any of the measures we are authorizing--the interrogation tactics for the worst of the terrorist detainees--should or could equal what is conventionally known as torture? In other words, we are not attempting to legalize torture with this amendment.

Ms. AYOTTE. I thank the Senator for the question. The answer is, no; we are not. We believe torture violates our laws and runs counter to American values. That is what I believe. That is why we specifically require the techniques developed by the Secretary of Defense, the Director of National Intelligence, and the Attorney General have to comply with the U.N. Convention Against Torture and all applicable laws, including the Detainee Treatment Act. Thus, the ACLU's claim the amendment threatens to revive the use of torture is patently false, unfortunately.

Currently, the Army Field Manual interrogation techniques our intelligence community interrogators must follow are publicly listed online. That is unacceptable. It is like the New England Patriots giving their opponents their playbook days or weeks before the game begins. In my experience as attorney general of New Hampshire and as a murder prosecutor, no detective or cop in even a common criminal case would tell the criminals what techniques they are going to use to gather information.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, could I ask my friend from New Hampshire to allow me to propose a unanimous consent request?

Ms. AYOTTE. I would grant the leader that request.

The PRESIDING OFFICER. The majority leader.

Mr. REID. The reason I ask is that Senator *Levin* and I have a classified briefing that starts at 5:30.

May I ask the Senator how much longer she wishes to speak? It doesn't matter, but just so I have an idea.

Ms. AYOTTE. I would say probably 5 minutes.

Mr. REID. Mr. President, I ask unanimous consent that following the statement of Senator *Ayotte* of approximately 10 minutes--she has been here long enough that she has learned

to keep Senators' time, and 5 minutes really isn't 5 minutes--does the Senator from Connecticut wish to speak?

Mr. LIEBERMAN. Mr. President, I would say to the leader, I am in this with the Senator from New Hampshire, so we will complete our colloquy within 10 minutes.

Mr. REID. So following their colloquy of 10 minutes, I ask unanimous consent the Senate proceed to a period of morning business for 1 hour; that following that we go back to the Defense authorization bill.

There will be no more votes this evening, though, Mr. President.

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

Mr. REID. I appreciate the time of the Senator from New Hampshire.

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. I thank our leader for giving us the opportunity to continue this colloquy.

I just wanted to point out--we were talking about the fact the Army Field Manual is online--that in my experience as New Hampshire's attorney general and prior to that as a murder prosecutor--and I know my colleague served as his State's attorney general as well--no detective or cop on the beat, in a common criminal case--and, of course, we are dealing with a situation where we are at war with terrorists--would ever give a criminal their playbook as to what techniques they would use to question them to get information to see if a crime has been committed and to see that justice is served. Yet here we are in a situation where we have online the techniques from the Army Field Manual while we are at war with terrorists who want to kill us.

What we are saying with this amendment is that we need to allow the intelligence professionals to develop techniques, but in a classified annex, consistent with our laws, that would allow them to gather intelligence and not tell our enemies what techniques will be used to gather information from them.

Not surprisingly, al-Qaida terrorists have taken advantage of our willingness to tell them publicly on the Internet what will and will not happen during an interrogation should they be captured. Al-Qaida terrorists have familiarized themselves with the interrogation techniques they would confront if captured, and they are training on how to respond. That makes it more difficult for us to gather information.

The willingness of the United States to give the equivalent of interrogation Cliff'sNotes to terrorists places our interrogators at a disadvantage and makes it more difficult to gather the information we need to save American lives. So developing a classified annex of lawful techniques for intelligence professionals who are interrogating the worst terrorists would make it harder for terrorists to train to avoid and resist interrogation.

The key to our amendment is giving this limited group of intelligence community interrogators the techniques they need to gather information but to do so without resorting to torture and while retaining an operational advantage that makes it more likely an interrogation will be successful.

Mr. LIEBERMAN. Again, Mr. President, I thank the Senator from New Hampshire. Just in listening to her, it seems so unacceptable that we are basically telegraphing to our enemy exactly the range of tactics that we will use against them as part of the interrogation.

We have set some quite appropriate constraints in this amendment consistent with our values and our laws and international law so that we are not going to get anywhere near torture. But when a member of al-Qaida or a similarly associated terrorist group is captured, I want that person to be terrified about what is going to happen to them while in American custody. I want them not to know what is going to happen. I want the terror they inflict on others to be felt by them as a result of the uncertainty of not knowing they can look on the Internet and find out exactly what our interrogators are going to be limited to.

Again, we will not tolerate torture. We will not tolerate what happened at Abu Ghraib. I think the limited interrogation in the Army Field Manual was an understandable but excessive reaction to the extreme and unacceptable behavior by Americans at Abu Ghraib. I hope this amendment will facilitate a return to the kind of sensible middle ground on which we will not be shackling our interrogators as they try to get intelligence, within the law, to protect our freedom and the safety of those who are fighting for us.

So I want to ask my friend from New Hampshire whether she thinks we have now a kind of one-size-fits-all approach to interrogation that is posted online. In other words, our laws should make it easier, within the law, not harder, to gather intelligence to keep Americans safe. Yet it seems the current policy runs counter to that basic principle. Does my friend from New Hampshire agree?

Ms. AYOTTE. I do. I do agree. As a matter of common sense, this amendment should go forward. The reality of telling our enemies online what to expect just defies common sense. That is what we are addressing with this amendment.

Mr. GRAHAM. If I may, I find the discussion fascinating. May I enter into the colloquy?

The PRESIDING OFFICER. Subject to the previous order, the Senator is welcome to join the colloquy.

Mr. GRAHAM. I thank the Chair.

As I understand it, the reason the Senator is having to do this is because President Obama, by Executive order, prevented the CIA and other agencies from using any enhanced interrogation techniques that have been classified in the past; is that correct?

Ms. AYOTTE. That is right. Unfortunately, we are just telegraphing to our enemies what techniques we are going to use.

Mr. GRAHAM. If I may, let me ask another question. All of us agree we don't want to torture anybody. Waterboarding is not the way to get good intelligence. Not only is it not the right thing to do, it is just not the wise thing to do. But we believe we have gone too far the other way; that when the President said no interrogation technique is available to our intelligence community other than the Army Field Manual, does my colleague agree that, for the first time in American history, we are advertising to our enemies what we can do to them if we capture them, and no more can be done?

Ms. AYOTTE. I would say the Senator is absolutely right. I appreciate that the Senator from South Carolina has cosponsored this amendment, as has Senator *Lieberman*, and I appreciate Senator *Lieberman's* leadership. I would like to say while we are in this colloquy that Senator *Lieberman* has also been a mentor to me in the Senate, and I appreciate that as well as his leadership on these issues.

Really, it comes down to this: We should not be telegraphing, we should not be advertising to our enemies what techniques our professional interrogators will use. This amendment is limited to the group of professionals who will focus on these issues and who will be gathering intelligence from terrorists.

We have to protect our country. Why would we do this? It just doesn't make sense.

Mr. GRAHAM. My good friend from Connecticut is aware there is a proposal pending on the floor of the Senate that would say, for the first time in American history, if a U.S. citizen decides to collaborate with an enemy, they cannot be held as an enemy combatant. I think the Senator is very familiar with the history of the law in this area. Unfortunately, during the entire history of our country, during other conflicts, American citizens have, on occasion, collaborated with the enemy, one of the most famous cases being the *In re Quirin* case, where an American citizen in New York and other places was helping Nazi saboteurs try to sabotage America.

In that case, the Supreme Court ruled an American citizen could be detained as an enemy combatant because the decision to collaborate with the enemy was a decision to go to war with their country, not a common crime, and that the law to be applied was the law of war. I am certain the Senator is familiar with the Hamdi case, where an American citizen seized in Afghanistan was allowed to be held as an enemy combatant. The Hamdi decision reaffirmed *In re Quirin*, and the Padilla case involved an American citizen captured in the United States accused of collaborating with al-Qaida.

All of those cases reaffirm the law of the land is, if someone chooses to help al-Qaida, they have committed an act of war against their fellow citizens, and they can be held as an enemy combatant for an indeterminate period of time so that we can gather intelligence about what they may have done or about what they know about the enemy.

Does the Senator from Connecticut agree that now would be a very bad time for the Congress to say, for the first time in American history, if an American citizen decides to help al-Qaida attack us, to kill us, our military can't hold them as an enemy combatant and find out what they were up to?

Mr. LIEBERMAN. Mr. President, I thank my friend from South Carolina for participating in our colloquy, and, of course, I totally agree with him, first of all, on the principle. As he has said very well, and he knows the law very well or better than anyone around here, the Supreme Court has made clear an American citizen, who by his or her acts has declared themselves to be an enemy of the United States, can be treated as an enemy combatant. If we change that now, it is not only wrong on principle, but it is absolutely the wrong time to do this.

Let me speak now for a moment--and I am privileged to be the chair of the Senate Homeland Security Committee.

The PRESIDING OFFICER. The 10 minutes allocated for the colloquy has expired.

Mr. LIEBERMAN. Mr. President, I ask unanimous consent for an additional 4 minutes.

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

Very briefly, the great concern we have now in terms of the security of the homeland is from so-called homegrown terrorists, radicalized Americans who effectively have joined al-Qaida or other terrorist enemies to attack the United States.

It is a sad and painful reality that, since 9/11, the only Americans killed on American soil by Islamist extremists and terrorists have been killed by other Americans who have been radicalized, who have become enemy combatants. I am speaking particularly of MAJ Nidal Hasan who killed 13 people at Fort Hood, and then an American named Bledsoe, who walked into an Army recruiting station in Little Rock, AR, and killed an Army recruiter just because he was wearing a uniform of the U.S. Army.

So these people have taken sides. They have joined the enemy. So to have this body at this time, as the threat of homegrown terrorism rises, say: No, they can't be treated as enemy combatants, not only does it not make sense and is totally unresponsive to the facts I have just described, the fact is, it is also dangerous.

So I couldn't agree with the Senator more. I wish to thank Senator *Ayotte*, as we come to the end of this colloquy, for her initiative, frankly, for swiftly establishing herself in the Senate as one of our important leaders on national security matters. I am a little biased about this, but I know her experience as a former State attorney general has helped as well as what I have noted is her active and informed participation on the Armed Services Committee.

I must say that as I am about to enter my last year privileged to be a U.S. Senator, it gives me great comfort to know Senator *Ayotte* is going to be here to carry on these fights for American national security and for freedom.

Ms. AYOTTE. I thank Senator *Lieberman* very much. Again, I appreciate the Senator's leadership and all he has done for our country, to protect our country. I dare say no one has been more focused on protecting our country, and we deeply appreciate his leadership.

AMENDMENT NO. 1067 WITHDRAWN

Ms. AYOTTE. Before I yield the floor, I need to briefly discuss the withdrawal of an amendment I have, which is amendment No. 1067, regarding notification of Congress with respect to the initial custody and further disposition of members of al-Qaida and affiliated entities.

I have received assurances from the Armed Services Committee majority and minority staff that these comments and steps which are outlined in that amendment will be addressed when the Defense bill goes to conference.

Therefore, Mr. President, I ask unanimous consent that my amendment No. 1067 be withdrawn. But I also understand that the Armed Services Committee will take up my amendment when the Defense bill goes to conference as part of the conference on this bill.

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

Mr. RUBIO. Mr. President, some people are wrongly suggesting that the National Defense Authorization Act for fiscal year 2012, this legislation will allow the military to capture and indefinitely detain any American citizen, and that the U.S. Armed Forces would be able to perform law enforcement functions on American soil because of the authority conferred under sections 1031 and 1032 of the act.

Several people have asked about my votes on the National Defense Authorization Act for fiscal year 2012. In particular, some people are wrongly suggesting that this legislation will allow the military to capture and indefinitely detain any American citizen, and that the U.S. Armed Forces would be able to perform law enforcement functions on American soil because of the authority conferred under sections 1031 and 1032 of the act. While I do have other serious concerns with this legislation, those particular assertions could not be further from the truth. I want to take this time to explain what the law actually does, what my position is on these issues, and why I joined with Senators *Demint*, *Coburn* and *Lee* to vote for those specific sections but against cloture on the final bill.

Section 1031 of this act merely affirms the authority that the President already has to detain certain people pursuant to the current authorization for use of military force. In fact, this same section of the bill specifically states that nothing stated in section 1031 is intended to expand the President's power. In addition, this section sets specific limits on who can be detained under this act to only those people who planned or helped carry out the 9/11 attacks on the United States or people who are a member of, or substantially support, al-Qaida, the Taliban, or their respective affiliates. There is no language that could possibly be construed as repealing the Posse Comitatus Act and allowing the U.S. military to supplant your local police department in carrying out typical law enforcement activities.

In particular, some folks are concerned about the language in section 1031 that says that this includes "any person committing a belligerent act or directly supported such hostilities of such enemy forces." This language clearly and unequivocally refers back to al-Qaida, the Taliban, or its affiliates. Thus, not only would any person in question need to be involved with al-Qaida, the Taliban, or its surrogates, but that person must also engage in a deliberate and substantial act that directly supports their efforts against us in the war on terror in order to be detained under this

provision. There is nothing in this bill that could be construed in any way that would allow any branch of the military to detain a law-abiding American citizen if they go to the local gun store or grocery store. What this section of the bill does is help provide for our national security by giving clarity to the military in regard to its authority to detain people who have committed substantially harmful acts against the United States. This is extremely important given that there are al-Qaida cells currently operating within our borders. I would not leave the risk of a terrorist attack that could claim the life of a member of my family up to chance, and I will not leave that risk for your family either.

Section 1032 of this bill concerns a smaller group of people who Congress believes are required to be detained by the U.S. military because people who fit within this criteria are a more serious threat to our national security. Any person detained under section 1032 must be a member of, or part of, al-Qaida or its associates and they must have participated in the planning or execution of an attack against the U.S. or our coalition partners. Simply put, the application of this detention requirement is limited to al-Qaida members that have tried to attack the U.S. or its allies. However, this detention requirement is clearly limited by a clause that states that the requirement to detain does not extend to U.S. citizens or lawful permanent residents.

Together, these two sections do the following: They affirm the authority of the executive branch to act within our national interest, and they provide the Federal Government with the tools that are needed to maintain our national security. This bill does not overturn the Posse Comitatus Act; the military will not be patrolling the streets. This bill does not take away our rights as citizens or lawful permanent residents; the authority under this act does not take away one's habeas rights. These sections do not take away an individual's rights to equal protection under the 14th amendment to the U.S. Constitution, nor do they take away one's due process rights afforded under the 5th or 14th. If this bill did such a thing, I would strongly oppose it.

I want to thank everyone for reaching out to the office to voice their concerns on this bill. I want to assure them that I always have, and always will, listen to their concerns and address them in a timely fashion. I know this bill is not perfect. In fact, I proposed two amendments to prevent the President from transferring foreign terrorists to the U.S. to be prosecuted in the Federal court system, and I joined with Senators *DeMint*, *Coburn*, and *Lee* to vote against cloture. However, in regard to the assertions that this bill allows the U.S. military to supplant our local police departments or that it allows the Federal Government to detain otherwise law-abiding citizens for simply carrying on in their daily lives, those assertions are entirely unfounded. As always, if anyone has any other questions, please feel free to contact me.

Mr. GRAHAM. I would like to do a colloquy with my good friend from Connecticut.

Senator *Lieberman* said something that I think we need to sort of absorb. As the chairman of the Homeland Security Committee, does the Senator believe the likelihood of American citizens being recruited, enlisted, and radicalized on behalf of al-Qaida is going up? Is that what the Senator is trying to tell us?

Mr. LIEBERMAN. Mr. President, I say to my friend from South Carolina, I not only believe it, but it is shown by the facts.

I wish I had the numbers exactly in front of me. But if we chart attempts at terrorist attacks on the United States--and here I am limiting it to people who are affiliated with the global Islamist extremist movement--there were a few after 9/11, but in the last 2 or 3 years, the numbers have gone up dramatically.

I hasten to say these represent a very small percentage of the Muslim-American community. But of course it doesn't take too many people to cause great havoc. We have been effective at law enforcement and, frankly, we have been lucky that all but two of these attempts have been stopped. But I think we would find law enforcement officials, Homeland Security officials saying the toughest and most dangerous threat right now to the homeland security of the American people comes from homegrown terrorists who have been self-radicalized or radicalized by somebody else.

Mr. GRAHAM. I think that is important for us to understand. Does the Senator agree with me that when we look at the war on terror, the United States is part of the battlefield?

Mr. LIEBERMAN. Well, there is no question our enemies have declared it part of the battlefield. The very official commencement of the war against Islamist terrorism, 9/11, was an attack on America's homeland, on civilians.

Mr. GRAHAM. So let's just go with that thought for a moment.

Let's say our intelligence community, our law enforcement community, and our military/Department of Defense are all monitoring al-Qaida threats at home and abroad; does the Senator agree with that?

Mr. LIEBERMAN. Absolutely true. Al-Qaida and like Islamist terrorist groups.

Mr. GRAHAM. Under the Posse Comitatus Act, the military cannot be used for domestic law enforcement functions. Does the Senator agree with me that tracking al-Qaida operatives--citizen or not--within the United States is not a law enforcement function; it is a military function?

Mr. LIEBERMAN. It is a combination, truthfully.

Mr. GRAHAM. But our military has the ability to defend us against al-Qaida attacks at home, such as they do abroad.

Mr. LIEBERMAN. Right.

Mr. GRAHAM. So if the Department of Defense somehow intercepted information about an al-Qaida cell, let's say in Connecticut or South Carolina, could they be involved in suppressing that cell?

Mr. LIEBERMAN. I would say what has happened here since 9/11, and what we needed to have happen, is that the old stovepipes have dissolved and we have military, civilian, CIA, FBI, each with a focus, working together.

For instance, the Army doctor who killed 13 people at Fort Hood, our committee did an investigation in that case. He was actually communicating with the radical cleric Awlaki in Yemen over the Internet. That was picked up by international intelligence operatives. Part of the story is it wasn't transferred effectively to the Army so they could grab him before he committed the mass murder at Fort Hood.

But I have to say for the record, the primary responsibility for counterterrorism now in the United States is with the FBI that has developed an extraordinary capability since 9/11. But it works very closely with the CIA, gathering international intelligence, NSA, homeland security, and the military.

Mr. GRAHAM. As a team effort.

Mr. LIEBERMAN. Right.

Mr. GRAHAM. Let's imagine a scenario next week where we find an al-Qaida cell exists that is planning a series of attacks against the United States, and within that cell we have some American citizens and we have people who have come here who are noncitizens.

Would the Senator agree with me, since Congress has designated cooperating or collaborating with al-Qaida to be an act of war, that entire cell could be held as enemy combatants and questioned by our intelligence community as to what they know about the attack and questioned on future attacks?

Mr. LIEBERMAN. That certainly should be the case, and we have had this circumstance in reality. They are all part of the same enemy. In the case the Senator posits, they have all been part of the same plot to attack the American people.

Mr. GRAHAM. So would the Senator agree with me that the current law is very clear that anytime an American citizen joins the enemy force, they can be held as an enemy combatant; that is the law?

Mr. LIEBERMAN. That is the law. As the Senator has said and Chairman *Levin* has said several times in the debate, there may be some in the Chamber who don't like it, but that is what the U.S. Supreme Court has said very clearly.

Mr. GRAHAM. If we capture an American citizen as part of this cell and we can't hold them as an enemy combatant for intelligence-gathering purposes, does domestic criminal law allow us to hold someone for an indefinite period of time to gather military intelligence?

Mr. LIEBERMAN. No.

Mr. GRAHAM. Does domestic criminal law focus on the wrongdoing of the actor, based on a specific event, when we are trying to resolve a dispute between the wrongdoer and the victim?

Mr. LIEBERMAN. Yes, it does. The Senator is making a very important point. It goes back to the colloquy the Senator from New Hampshire and I had, which is, when we capture an enemy combatant, we do so for two reasons: One is to get that enemy off the battlefield, the second is to

gather intelligence. Sometimes the second purpose is more important than the first because it can lead us to other plots against the American people.

Mr. GRAHAM. Does the Senator agree with me the reason the Supreme Court has recognized that an American citizen could be held as an enemy combatant if they collaborate with an enemy is that the Court views that as an act of war; and under the powers of the Commander in Chief, he can suppress all the enemies, foreign and domestic, that are at war with us?

Mr. LIEBERMAN. I do. There has been a lot of talk about the Constitution. The Constitution makes very clear that the primary responsibility we have in the Federal Government is to provide for the common defense, to protect the security of the American people.

Mr. GRAHAM. So our courts have recognized that during a time of hostilities, the executive branch has the authority to detain an American citizen who is helping the enemies of the Nation. The question is, Does the Congress want to change that for the first time ever?

I would like to add something that my good friend from Rhode Island got me thinking about. I have always tried to explain indefinite detention, what are we trying to do here? Clearly, in war, there is no requirement to let the enemy prisoner go back to the fight after the passage of time. We don't want to let any enemy prisoner go back to the fight because that makes no good sense. The problem with this war is, there is no definable end. That is the reason we have a habeas review, because we will never know when hostilities are over. So an enemy combatant determination could be a de facto life sentence, and that is why our Supreme Court said we want a judicial check on the executive branch.

So every enemy combatant will have their day in Federal court, and the government has to prove, by a preponderance of the evidence to an independent judge, that the decision to hold this person is warranted under the law. That was what the Hamdi case was about. I think that makes sense because it will not be the traditional war; it will be a war without a definable end.

The idea of continuing to hold them, if the judge says to the government: You are right, there is compelling evidence this person was involved with al-Qaida, tried to get involved with a hostile act; you are right, they are part of the enemy, you can hold them forever. But we have come up with an annual review process to make sure they will have a chance every year to have their case looked at.

Senator *Whitehouse* got me thinking. In our own law, under the civil justice system--such as Hinckley, the man who shot President Reagan, he was acquitted in court, by reason of insanity, of shooting President Reagan. He has been in a psychiatric hospital ever since, and he can be held away from the community because he is a danger to himself or others.

I think what Senator *Whitehouse* is saying is, the idea that we can hold someone--the Court has agreed with the government--as part of the enemy force as a continuing threat is not an unknown concept. We just have to have a review.

The PRESIDING OFFICER. The Senator asked to be notified at 10 minutes.

Mr. GRAHAM. I thank the President.

I would suggest to our colleagues, let's think this thing through. Let's realize that if the enemy is coming to our homeland, the enemy is recruiting American citizens; and if we find an American citizen who has, in fact, joined forces with al-Qaida, our No. 1 goal should be to gather intelligence to prevent future attacks and to find out what that person knows about what the enemy is up to. Our secondary concern should be prosecution. When we interrogate somebody as the enemy combatant, the best thing we have on our side is time.

I don't want to waterboard anyone, but I want to keep them in a controlled environment where time is on our side, and I will argue that the best information we have from Guantanamo Bay detainees did not come from waterboarding, it came from the fact that we could hold them for an indeterminate period of time, and through time, they began to cooperate and tell us valuable information.

Does the Senator agree that is the concept we need to hold onto in this war?

Mr. LIEBERMAN. I thank my friend. I absolutely agree. I talked to professionals in this business of interrogation, and they say some of the most effective interrogation takes time. I have had people describe to me detainees who were totally uncooperative, and they were asked over and over for days and weeks and months, and then finally broke and began to give information that was critically important for the protection of our country. So I do agree.

I want to stress two things the Senator from South Carolina has said because it is very relevant to the attempt to give special status to Americans deemed to be enemy combatants in the contravention of existing U.S. Supreme Court rulings that say if you are an American and you are found to have joined the enemy, then you can be treated as an enemy combatant, which common sense tells you is what you are.

Here is what I want to say, and this is important to what we are here for. There are two kinds of due process that are put into the bill, the underlying language and the compromise that has been adopted on the treatment of detainees. One, for the first time there is a judicial process to determine the status of the detainee, whether evidence shows that the detainee should, in fact, be treated as an enemy combatant. The second is that while the enemy combatant is subject to indefinite incarceration, that indefinite incarceration is subject to annual review now. So we can determine, according to a stated series of standards, whether that person----

Mr. GRAHAM. Wouldn't the Senator agree that under domestic criminal law, that indefinite ability to question about enemy activity doesn't exist?

Mr. LIEBERMAN. That is absolutely right. The Senator stated earlier--and it is an important point--this is the danger we get into as we start to treat people who are terrorists as common criminals, or even uncommon criminals, which is that the criminal law aims at imposing a penalty, doing justice, incarcerating somebody as a result. The law of war is aimed at making sure that enemy combatants, prisoners of war, are taken off the battlefield----

Mr. GRAHAM. And to my colleagues----

Mr. LIEBERMAN. Until the war is over.

Mr. GRAHAM. I acknowledged in the Christmas Day Bomber case, in the Times Square attempted bombing, that they were put in Federal court. I am okay with that. I do believe in the "all of the above" approach. Our Federal courts can handle cases involving transnational terrorists and al-Qaida members and so can military commissions. The idea of reading somebody their Miranda rights may be the best interrogation technique. I know that we were able to get some good information after reading Miranda rights.

I guess the point I am trying to make is I acknowledge that the people doing the interrogation are better suited to make that decision than I am. I just don't want the Congress by legislation to say for the first time in the history of the country in this war--unlike any other war you no longer have it available to you, the U.S. Government, the ability to hold somebody as an enemy combatant if you believe that is the best way to gather intelligence. I am not saying the other system cannot be used. Let's leave it up to the professionals.

But the Senate is suggesting through the legislation being proposed that the idea of holding an American citizen who is suspected of collaborating with al-Qaida that they can no longer be held as an enemy combatant is not only changing the law, it is taking off the table a tool that I think we need now more than ever. I don't want us to lose sight of the fact of what we are doing here and what it would mean to our country and our ability to defend us. No one in World War II would have tolerated the idea that someone who collaborated with a Nazi trying to kill us on our own soil would have any other disposition than to be considered an enemy of the American people.

My question for this body is: Do you think al-Qaida is an organization that doesn't present that same kind of threat? Is it the Senate's desire to say during these times that an American citizen can collaborate with al-Qaida to kill us on our own soil and that is no longer considered an act of war? I would argue that that would be one of the most irresponsible decisions ever made in a time of war by an elected body. It not only would change the law as we know it, it would create an opportunity and a hole in our defenses at a time when, as the Senator has indicated, the threat is growing.

I say to Senator *Lieberman*, thank you for being a steady, stern, consistent voice along the line that since 9/11 our Nation has been in an undeclared state of war. The enemy still roams the globe. They have as their hope and dream hitting us again here at home. And, for God's sake, let's not weaken our defenses in a way that no other Congress has ever chosen to weaken the executive branch in the past. I thank the Senator for his service.

Mr. LIEBERMAN. I thank my friend from South Carolina for his expertise in this area and also his sense of principle. We have colleagues on the floor who want to speak. I want to say a final word. I know the Senator from South Carolina is particularly worried about pending amendments that would alter the way in which the underlying bill now treats enemy combatants who are citizens of the United States.

The underlying provision in the bill on detainee treatment fills a gap in our law that has been harmful and difficult for our military to deal with because there is no law about how to treat detainees. Senator *Graham* worked very closely with Senator *Levin* and Senator *McCain* to draft this compromise, and it is a good compromise. As he knows, if I had my preference, there would

be no waiver in this because I believe anybody who is an enemy combatant is an enemy combatant and as a matter of principle ought to be held in military custody and tried by a military tribunal according to all the protocols of the Geneva Conventions, according to the Military Code of Justice.

Incidentally, if these tribunals are good enough for American men and women in the military who face charges, they ought to be good enough for enemy combatants who face charges.

But here is my point: The Levin-McCain-Graham provision in this bill on detainees is a compromise. It is a reasonable, effective, bipartisan compromise. It is the kind of compromise that doesn't happen here enough, and so I support it because even though I might have wished it would have gone further, so to speak, it is a lot better than the status quo. And I say that at this moment because I urge our colleagues who now want to come in with other amendments, to essentially undo this bipartisan compromise can do great damage. I am saying myself, yes, I wish it had not given the President the power to waive that he has under the bill and take somebody who is an enemy combatant to a normal article III Federal court, but this provision is a real step forward from the status quo, and I think if we can say that, then we ought to support it. So I hope our colleagues will think twice before trying to undo the compromise, and that if they do go forward with it, that our colleagues on the floor will defeat those amendments.

Mr. GRAHAM. Mr. President, I will wrap this up. I know we have colleagues who want to speak. Let me reiterate what Senator *Lieberman* said. There is a stream of thought that every member of al-Qaida, American citizen or not, is an enemy of the people of the United States in a military sense, not a criminal sense, and they should be in a military tribunal. That is the way we have handled most cases in the past.

Here is what I believe: I believe that the choice of venue should lie with the executive branch, and I think there is a very robust role for article III courts. So I don't want to say from a congressional point of view that every member of al-Qaida has to be tried by a military commission all the time, because, quite frankly, sometimes article III courts could be the better venue. When it comes to telling the executive branch that you have to put a noncitizen in military custody inside the United States, I think that is the right way to do it, but I don't know enough, so if there is a reason to waive that provision, the experts can waive it.

I have been very cautious about micromanaging the executive branch because they are the ones fighting the war. We have a role to play, we have a voice to be heard, and here is what I am urging some my colleagues. This compromise is not what some of our friends wanted, such as Senator *Lieberman* and, quite frankly, it is not what the ACLU wants, because they don't buy into the idea that al-Qaida operatives are anything other than common criminals. So you have two poles here. I believe an al-Qaida operative is not a common criminal, and if an American citizen joins al-Qaida they should be treated as an enemy combatant as one possibility. But if you want to go down the other road, you can go down that road. I just don't want us to take off the table, for the first time in the history of America, that an American citizen trying to help the enemy kill us here at home somehow can no longer be talked to by our military to gather intelligence. That is a crazy outcome.

I think we have a good bill that gives maximum flexibility to the executive branch but preserves the tools we are going to need now and into the future. And to my colleagues, please ask yourself: If in World War II we could hold an American citizen who tried to help the Nazis blow up America as an enemy combatant, why wouldn't you want to help hold an American citizen who is helping al-Qaida--which did more damage to the homeland than the Nazis--as an enemy combatant? Why would you want to take off the table the ability to hold that person, humanely interrogate them to find out why they joined, who they talked to and what they know? Because what they know and who they talked to may save thousands of lives. For us to say you cannot do that for the first time in the history of the country would be a colossal mistake.

I yield the floor.