DEFENSE AUTHORIZATION -- (Senate - December 01, 2011)

Mr. GRAHAM. While we decide how we are going to move on the Defense bill, I appreciate Senator Kyl coming to the floor. Senator Kyl and I, along with Senators Levin and McCain, have been working on detainee policy for years now. There is an issue that is before the Senate soon. It involves what to do with an American citizen who is suspected of collaborating with al-Qaida or an affiliated group.

Does the Senator agree with me that in other wars American citizens, unfortunately, have aided the enemies of their time?

Mr. KYL. Mr. President, yes. I would say to my colleague, unfortunately, it is the case that there probably hasn't been a major conflict in which at least some American citizen has decided to leave his country and side with the enemy.

Mr. GRAHAM. Is the Senator familiar with the efforts by German saboteurs who landed--I believe, in the Long Island area, but I don't know exactly where they landed--during World War II, and they were aided by American citizens to execute a sabotage plot against the United States?

Mr. KYL. Mr. President, yes. In fact, there is a famous U.S. Supreme Court case, Ex parte Quirin, decided in 1942, that dealt with the issue of an American citizen helping the Nazi saboteurs that came to our shores.

Mr. GRAHAM. Does the Senator agree with me that our Supreme Court ruled then that when an American citizen decides to collaborate and assist an enemy force, that is viewed as an act of war and the law of war applies to the conduct of the American citizen?

Mr. KYL. Mr. President, I would say to my colleague, yes. My colleague knows this case, I am confident. I think one quotation from the case makes the point clearly--in Ex parte Quirin the court made clear: ``Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency.''

In other words, if a person leaves their country and takes the position contrary, they side with the enemy, they become a belligerent against the United States, the fact that they are still a citizen does not protect them from being captured, from being held, and in this case even being tried by a military tribunal.

Mr. GRAHAM. So the law, at least since 1942, by the Supreme Court has been that if someone decides as an American citizen to join forces with enemies of the United States, they have committed an act of war against their fellow citizens. It is not a criminal event we are investigating or dealing with; it is an act of war, and the American citizens who helped the Nazis were held as enemy combatants and tried as enemy combatants?

Mr. KYL. Mr. President, yes. I would just qualify that statement this way. A person can be subject to military custody being a belligerent against the United States, even while being a U.S. citizen, be tried by military commission because of the act of war against the United States that they committed. One could also theoretically have been tried in a criminal court. But one can't reach the opposite conclusion, which is that they can only be tried in civilian court.

Mr. GRAHAM. In the Military Commission Act of 2009, we prohibited American citizens from being tried by military commissions. I am OK with that. But what we have not done--and I would be very upset if we chose to do that--is take off the table the ability to interrogate an

American citizen who has chosen to help al-Qaida regarding what they know about the enemy and what intelligence they may provide us to prevent a future attack.

Since homegrown terrorism is a growing threat, under the current law, if an American citizen became radical, went to Pakistan and trained with al-Qaida or an affiliated group, flew back to Dulles Airport, got off the plane, got a rifle, went down to the Mall right behind us and started shooting people, does the Senator agree with me that under the law as it exists today, that person could be held as an enemy combatant, that person could be interrogated by our military and intelligence community and we could hold them as long as necessary to find out what they know about any future attacks or any past attacks and we don't have to read them their Miranda rights?

Mr. KYL. Mr. President, yes. The answer to the question, short, is, yes. It is confirmed by the fact that in the Hamdi case, the U.S. Supreme Court precisely held that detention would be lawful. Of course, with the detention being lawful, the interrogation to which my colleague refers could also be taken.

Mr. McCAIN. Would the Senator yield for a question on that subject point?

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. McCAIN. The individual who was an American citizen--Mr. Hamdi, the subject of the U.S. Supreme Court case--was an American citizen captured in Afghanistan; is that correct?

Mr. GRAHAM. Yes.

Mr. McCAIN. Yet in the Supreme Court decision reference is made to an individual who was captured during World War II in the United States of America; isn't that correct? It was referenced in the Supreme Court decision.

Mr. GRAHAM. Yes. The In re Quirin case dealt with an American citizen helping the Nazis in America. The Hamdi case dealt with an American citizen helping the Taliban in Afghanistan.

Mr. McCAIN. The reason why I raise the question is because the Senator from Illinois, and others, have cited the fact that Hamdi was an American citizen but captured in Afghanistan, not in the United States of America.

Yet isn't it a fact that the decision in Hamdi also made reference to a person who was apprehended in the United States of America?

This is what is bizarre about this discussion, it seems

to me.

Mr. GRAHAM. The Hamdi case cited In re Quirin for the proposition that an American citizen who provides aid, comfort or collaboration with the enemy can be held as an enemy combatant. The In re Quirin case dealt with an American citizen helping the Nazis in New York. The Padilla case involves an American citizen, collaborating with al-Qaida, captured in the United States.

Mr. McCAIN. So I guess my question is, it is relevant where the citizen of the United States was captured. Because the decision made reference to people captured both in the United States and outside the United States.

Mr. GRAHAM. Exactly. I would add, and get Senator Kyl's comment. Wouldn't it be an absurd result if you can kill an American citizen abroad--Awlaki--whatever his name was--the President targeted him for assassination because he was an American citizen who went to Yemen

to engage in an act of terrorism against the United States. The President went through an Executive legal process, targeted him for assassination and a drone attack killed him and we are all better off. Because when an American citizen helps the enemy, they are no longer just a common criminal; they are a military threat and should be dealt with appropriately.

But my point is, wouldn't it be an odd result to have a law set up so that if they actually got to America and they tried to kill our people on our own soil, all of a sudden they have criminal status?

I would argue that the homeland is part of the battlefield, and we should protect the homeland above anything else. So it would be crazy to have a law that says if you went to Pakistan and attacked an American soldier, you could be blown up or held indefinitely, but if you made it back to Dulles Airport, you went downtown and started killing Americans randomly, we couldn't hold you and gather intelligence. The Supreme Court, in 1982, said that made no sense.

If a Senator, in 1942, took the floor of the Senate and said: You know those American citizens who collaborated with the Nazis, we ought not treat them as an enemy, they would be run out of town.

I am just saying, to any American citizen: If you want to help al-Qaida, you do so at your own peril. You can get killed in the process. You can get detained indefinitely. When you are being questioned by the CIA, the FBI or the Department of Defense about where you trained and what you did and what you know and you say to the interrogator: I want my lawyer, the interrogator will say: You don't have a right to a lawyer because you are a military threat.

This is not ``Dragnet.'' We are fighting a war. The Supreme Court of the United States has clearly said an American citizen who joins with the enemy has committed an act of war.

Senator Feinstein, who is the chairman of the Intelligence Committee, is a very good Senator. But her concerns about holding an American citizen under the law of war, her amendment, unfortunately, would change the law.

Does Senator Kyl agree with that?

Mr. KYL. Yes. Mr. President, that is the key point. There is a reason why you don't want to adopt the Feinstein amendment: It would preclude us from gaining all the intelligence we could gain by interrogating the individual who has turned on his own country and who would have knowledge of others who might have joined him in that effort or other plans that might be underway.

We know from past experience this interrogation can lead to other information to save American lives by preventing future attacks, and it has occurred time and time again. In a moment, I will put a statement in the Record that details a lot of this intelligence we have gathered. It is not as if an American citizen doesn't have the habeas corpus protection--which still attaches--whether or not that individual is taken into military custody.

The basic constitutional right of an American citizen is preserved. Yet the government's ability to interrogate and gain intelligence is also preserved by the existing law, by the status of the law that exists today. We would not want to change that law by something such as the Feinstein amendment.

Mr. GRAHAM. Simply stated, when the American citizens in question decided to give aid and comfort to the Nazis, I am very glad they were allowed to be held by the military and

interrogated about the plot and what they knew, because intelligence gathering is the best way to keep us safe.

I would be absolutely devastated if the Senate, for the first time in 2011, denied the ability of our military and intelligence community to interrogate somebody who came back from Pakistan and started killing people on the Mall--that we could no longer hold them as an enemy combatant and find out what they did and why they did it; that we would have to treat them as a common criminal and read them their Miranda rights. That is not the law.

If that becomes the law, then we are less safe because I tell you, as we speak, the threat to our homeland is growing. Homegrown terrorists are becoming the threat of the 21st century, and now is not the time to change the law that has been in place for decades. I do hope people understand what this means.

It means we would change the law so that if we caught somebody in America who went overseas to train and came back home, an American citizen who turned on the rest of us, no longer could we hold them as an enemy combatant and gather intelligence. That, to me, would be a very dangerous thing to do.

I ask the Senator, who determines what the Constitution actually means; is it the Congress or the Supreme Court?

Mr. KYL. Mr. President, ultimately the U.S. Supreme Court, when cases come before the Court that present these issues, determines what the law is. In this situation we have actually two specific cases, and there are others that are tangential, that do clarify what the Court believes what the Constitution would provide in this case.

Mr. GRAHAM. So the issue is pretty simple. Our courts at the highest level--the Supreme Court has acknowledged that the executive branch has the legal authority to hold an American citizen who is collaborating with an enemy as an enemy belligerent to gather intelligence to protect the rest of us; they recognize that power of the executive. Does the Senator agree with me that the amendment of Senator Feinstein would be a situation where the Congress does not recognize that authority and would actually try to change it?

Mr. KYL. Yes. One of the questions is this interplay between the executive and the legislative branch. When the legislative branch, as Congress has done here through the authorization of military force, has provided the legal basis for the administration to hold a person engaged in war against us, then it cannot be denied that that authority exists. There is a 1971 law that Congress passed that said you could hold people only pursuant to law. This was the precise holding of the Hamdi case, where the U.S. Supreme Court said they had the authority because of the authorization of military force. So the executive has that authority, the legislature has provided the basis for the authority, and the Supreme Court has upheld it by its ultimate jurisdiction.

Mr. GRAHAM. And to conclude this colloquy--I enjoyed the discussion--I am not saying our law enforcement or military intelligence community cannot read someone their Miranda rights. I will leave that up to them. I am saying Congress should not take off the table the ability to hold someone under the law of war to gather intelligence, and that is what we are about to do if this passes.

To those who believe that homegrown terrorists are a threat now and in the future, if you want to make sure we can never effectively gather intelligence, we only have one option, then that is what we are about to impose on the country.

Mr. KYL. If I might ask my colleague to yield for one other point I wish to make here.

Mr. GRAHAM. Absolutely.

Mr. KYL. In a criminal trial, the object is to do justice to an individual as it pertains to his alleged violation of law in the United States. In the case of the capture and detention of a combatant, someone who has taken action against the United States, the object first is to keep the United States safe from this individual's actions and, second, where possible, gain intelligence from that individual. That is the critical element that would be taken from our military, were the Feinstein amendment to be adopted.

I ask unanimous consent to have printed in the Record a statement that makes very clear where military detention is necessary: to allow intelligence gathering that will prevent future terrorist attacks against the American people.

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

Wartime Detention of Enemy Combatants--Including U.S. Citizens Who Join the Forces of the Enemy--Is An Established Practice That Is Clearly Constitutional

Unfortunately, in almost every major war that the United States has fought, there have been some U.S. citizens who have joined the forces of our Nation's enemies or who have otherwise collaborated with the enemy. These traitors and collaborators have always been treated as enemy combatants--and have been subjected to trial by military commission where appropriate.

The U.S. Supreme Court has consistently held that the President has the constitutional authority to detain enemy combatants, including U.S. citizens who have cast their lot with the enemy.

In its 2004 decision in Hamdi v. Rumsfeld, for example, the Supreme Court held that the detention of enemy combatants is proper under the U.S. Constitution. Moreover, the person challenging his military detention in that case was a U.S. citizen.

During World War II, the Supreme Court also upheld the military detention and trial of a U.S. citizen who had served as a saboteur for Nazi Germany and was captured in the United States. The Court made clear that ``[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency.'' That case is Ex Parte Quirin (1942).

In support of her amendment number 1126, Senator Feinstein yesterday cited a 1971 law, apparently arguing that the detention of an enemy combatant who is a U.S. citizen would be prohibited under that law.

That 1971 law is 18 U.S.C. 4001. It provides that ``no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.''

This is the very law that was at issue in the Hamdi case. And the precise holding of the U.S. Supreme Court in Hamdi was that the detention of a U.S. citizen as an enemy combatant through the duration of hostilities would not violate that law.

The Supreme Court stated: ``[Hamdi] posits that his detention is forbidden by 18 U.S.C. §4001(a). Section 4001(a) states that `[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.' ..... Congress passed §4001(a) in 1971. ..... [The government maintains] §4001(a) is satisfied because Hamdi is being detained pursuant

to an Act of Congress, the AUMF. ..... [W]e conclude that ..... the AUMF satisfied §4001(a)'s requirement that a detention be pursuant to an Act of Congress."

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Why Military Detention Is Necessary: To Allow Intelligence Gathering That Will Prevent Future Terrorist Attacks Against the American People

Some may ask, why does it matter whether a person who has joined Al Qaeda is held in military custody or is placed in the civilian court system? One critical reason is intelligence gathering. A terrorist operative held in military custody can be effectively interrogated. In the civilian system, however, that same terrorist would be given a lawyer, and the first thing that lawyer will tell his client is, ``don't say anything. We can fight this."

In military custody, by contrast, not only are there no lawyers for terrorists. The indefinite nature of the detention--it can last as long as the war continues--itself creates conditions that allow effective interrogation. It creates the relationship of dependency and trust that experienced interrogators have made clear is critical to persuading terrorist detainees to talk.

Navy Vice-Admiral Lowell Jacoby, who at the time was the Director of the Defense Intelligence Agency, explained how military custody is critical to effective interrogation in a declaration that he submitted in the Padilla litigation. He emphasized that successful noncoercive interrogation takes time--and it requires keeping the detainee away from lawyers.

Vice-Admiral Jacoby stated:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example--even if only for a limited duration or for a specific purpose--can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that: ``Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break--probably irreparably--the sense of dependency and trust that the interrogators are attempting to create."

In other words, military custody is critical to successful interrogation. Once a terrorist detainee is transferred to the civilian court system, the conditions for successful interrogation are destroyed.

Preventing the detention of U.S. citizens who collaborate with Al Qaeda would be a historic abandonment of the law of war. And, by preventing effective interrogation of these collaborators,

it would likely have severe consequences for our ability to prevent future terrorist attacks against the American people.

We know from cold, hard experience that successful interrogation is critical to uncovering information that will prevent future attacks against civilians.

On September 6 of 2006, when President Bush announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also described information that the United States had obtained by interrogating these detainees. Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks. This is information that the United States did not already know--and that we only obtained through the successful military interrogation of Zubaydah.

Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country--an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives--one while he was traveling to the United States.

Again, just imagine what might have happened if the Feinstein amendment had already been law, and if the Congress had stripped away the executive branch's ability to hold Al Qaeda collaborators in military custody and interrogate them. We simply would not learn what that detainee knows--including any knowledge that he may have of planned future terrorist attacks.

Under military interrogation, Abu Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States. K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17-member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London.

As President Bush stated in his September 6, 2006 remarks, ``[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies." The President concluded by noting that Al Qaida members subjected to interrogation by U.S. forces: ``have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that ..... has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

[Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved innocent lives."

If the Feinstein amendment were adopted, this is all information that we would be unable to obtain if the Al Qaeda collaborator that our forces had captured was a U.S. citizen. It would simply be impossible to effectively interrogate that Al Qaeda collaborator--the relationship of trust and dependency that military custody creates would be broken, and the detainee would instead have a lawyer telling him to be quiet. And we know that information obtained by interrogating Al Qaeda detainees has been by far the most valuable source of information for preventing future terrorist attacks.

Again, in every past war, our forces have had the ability to capture, detain, and interrogate U.S. citizens who collaborate with the enemy or join forces with the enemy. I would submit that in this war, intelligence gathering is more critical than ever. Al Qaeda doesn't hold territory that we can capture. It operates completely outside the rules of war, and directly targets innocent civilians. Our only effective weapon against Al Qaeda is intelligence gathering. And the Feinstein amendment threatens to take away that weapon--to take away our best defense for preventing future terrorist attacks against the American people.

Mr. KYL. I hope this statement clarifies in anyone's mind the point that by taking people in custody in the past we have gathered essential intelligence to protect the American people. That is the reason for the detention in the first place--A, to keep the American people safe from further attack by the individual, and, B, to gather this kind of intelligence. Nothing precludes the United States, the executive branch, from thereafter deciding to try the individual as a criminal in the criminal courts with all the attendant rights of a criminal. But until that determination, it cannot be denied that the executive has the authority to hold people as military combatants, gather intelligence necessary, and hold that individual until the cessation of hostilities.

The PRESIDING OFFICER. The time of the Senator has expired.

The senior Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I understand we are still in morning business?

The PRESIDING OFFICER. The time for morning business has expired.

Mr. LEAHY. I ask unanimous consent I be recognized for another 5 minutes as in morning business, and the distinguished Senator from Illinois be recognized for 10 minutes as in morning business.

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

Mr. LEAHY. Mr. President, earlier this week, one of this bill's lead sponsors said here on the floor of the United States Senate that the bill's detention subtitle would authorize the indefinite detention of U.S. citizens at Guantanamo Bay. That is a stunning statement. We should all pause to consider the ramifications of passing a bill containing such language. Supporters of the detention provisions in the bill continue to argue that such measures are needed because, they claim, ``we are a nation at war.'' That does not mean that we should be a Nation without laws, or a Nation that does not adhere to the principles of our Constitution.

One of the provisions in this bill, Section 1032, runs directly contrary to those principles. Section 1032 requires the military to detain terrorism suspects, even those who might be captured on U.S. soil. This provision is opposed by the very intelligence, military, and law enforcement officials who are entrusted with keeping our Nation safe--including the Secretary of Defense, the Director of National Intelligence, the Attorney General, the Director of the FBI, and the President's top counterterrorism advisor. As Chairman of the Judiciary Committee, I support the efforts of Senator Feinstein, the chair of the Senate Intelligence Committee, to modify Section 1032 so that it does not interfere with ongoing counterterrorism efforts or undermine our constitutional principles.

In the fight against al-Qaida and other terrorist threats, we should give our intelligence, military, and law enforcement professionals all the tools they need. But the mandatory military detention provision in Section 1032 actually limits those tools by tying the hands of the intelligence and law enforcement professionals who are fighting terrorism on the ground, and by creating operational confusion and uncertainty. This is unwise and unnecessary.

On Monday, Director Mueller warned that Section 1032 would adversely affect the Bureau's ability to continue ongoing international investigations. Secretary Panetta has also stated unequivocally that ``[t]his provision restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the coun□ter□ter□ror□ism tools that are now legally available.'' These are not partisan objections, but rather the significant operational concerns voiced by the Secretary of Defense and the Director of the FBI--both of whom were confirmed by this body with 100-0 votes. And yet these are the voices that supporters of this bill would ignore.

Supporters of this bill have argued that the new national security waiver and implementation procedures in this section provide the administration with the flexibility it needs to fight terrorism. The intelligence and law enforcement officials who are actually responsible for fighting terrorism and keeping our Nation safe, however, could not disagree more. As Director Mueller stated in his letter, these provisions are still problematic and ``fail to recognize the reality of a counterterrorism investigation.'' Director of National Intelligence Clapper has stated that ``the various detention provisions, even with the proposed waivers, would introduce unnecessary rigidity'' in the intelligence gathering process. Put differently, Lisa Monaco, the Assistant Attorney General for the National Security Division, recently stated that ``agents and prosecutors should not have to spend their time worrying about citizenship status and whether and how to get a waiver signed by the Secretary of Defense in order to thwart an al-Qaida plot against the homeland.''

We should listen to the intelligence and law enforcement professionals who are entrusted with our Nation's safety, and we should fix this flawed provision.

Senator Feinstein's amendment would ensure that the requirement of military detention of terrorism suspects does not apply domestically. As Chairman of the Judiciary Committee, I am proud to be a cosponsor of this amendment, and I urge all Senators to support its adoption.

I know Senator Durbin is next, but I now understand from Senator Durbin the distinguished Senator from Missouri is going next.

In any event, I yield the floor and thank my colleagues for their courtesy.

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The PRESIDING OFFICER. The assistant majority leader is recognized.

Mr. DURBIN. Mr. President, I thank my colleague from Missouri, and I concur with his comments about our American military. We have the best in the world. These men and women serve us well with courage and honor every day, and we are fortunate to have them. We are fortunate--those of us who enjoy the blessings of liberty and the safety of this Nation--to have men and women willing to risk their lives for America.

This Defense authorization bill is a bill that authorizes the continued operations of our military, and every year we pass this bill, as we should, in a timely manner. I have supported it consistently over the years with very few exceptions and believe the work product brought to us by Senators Levin and McCain is excellent, bipartisan, and moves us in a direction toward an even safer America, and I thank them for all the work they put into it.

There are provisions within this bill today which trouble me greatly. There are provisions on which I hope Members of the Senate will reflect, one in particular that I will address at this time. Senator Feinstein is offering amendment No. 1125, which I am cosponsoring. I would say this amendment raises a serious question about section 1032 in this bill. I am concerned this section would limit the flexibility of any President to fight terrorism. I am concerned it will create uncertainty for law enforcement, intelligence, and our military regarding how to handle suspected terrorists. I think it raises fundamental and serious constitutional concerns.

This provision, 1032, would, for the first time in the history of the United States, require our military to take custody of certain terrorism suspects in the United States. On its face, that doesn't sound offensive, but, in fact, it creates a world of problems. Where do we start this debate?

We understand the responsibility of Congress in passing laws and the President with the option to sign those laws or veto them and the courts with the responsibility to interpret them. When it comes to the protection of this country in fighting terrorism, most of us have believed this is primarily an executive function under Presidents of both political parties. We may disagree from time to time on the PATRIOT Act and other aspects of it and debate those issues, but, by and large, I think we have ceded to Presidents of both parties the power to protect America.

My colleague and friend, Senator Lindsey Graham, a Republican of South Carolina, on September 19, 2007, stated--and he states things very colorfully and clearly--

The last thing we need in any war is to have the ability of 535 people who are worried about the next election to be able to micromanage how you fight the war. This is not only micromanagement, this is a constitutional shift of power.

That was Senator Graham's statement in 2007. Although I would carefully and jealously guard the constitutional responsibility of Congress when it comes to the declaration of war, even the waging of war, I do believe there is a line we should honor. We should not stop our President and those who work for him in keeping America safe by second-guessing decisions to be made.

Today, again, on the Republican side of the aisle came colleagues who make the argument that it is a serious mistake for us to take a suspected terrorist and put them into our criminal justice system. They argue the last thing in the world we want to do is to take a suspected terrorist and read them their constitutional rights: the right to remain silent, everything you say can be used against you, the right to counsel. They argue that is when terrorists will clam up and stop talking. Therefore, they argue, suspected terrorists should be transferred to military jurisdictions where

Miranda rights will not be read. On its face it sounds like a reasonable conclusion. In fact, it is not. It is not.

Since 9/11, we have arrested and detained 300 suspected terrorists, read them their Miranda rights, and then went on to prosecute them successfully and incarcerate them. They cooperated with the Federal Bureau of Investigation, gave information, and in many cases gave volumes of information even after having been read their rights. So to argue that it cannot be done or should not be done is to ignore the obvious. Three hundred times we have successfully prosecuted suspected terrorists, and America has remained safe for these 10 years-plus since 9/11. How many have been prosecuted under military tribunals in that period of time? Six, and three have been released. We are keeping this country safe by giving to the President and those who work for the President in the military intelligence and law enforcement community the option to decide the best course of action when it comes to arresting, detaining, investigating, and prosecuting an individual.

Remember the man who was on the plane flying into Detroit a couple of years ago? He tried to detonate a bomb on the plane. His clothing caught fire, and the other passengers subdued him, restrained him. He was arrested, investigated by the FBI, and read his Miranda rights. Within a day his parents were brought over. The following day he decided to cooperate with the United States and told us everything he knew. At the end of the day, he was prosecuted, brought to trial, and pled guilty. He went through our regular criminal court system, though he was not an American citizen, and he was successfully prosecuted. President Obama had the right to decide what best thing to do to keep America safe, and he did it. Why would we want to tie his hands?

Now let me talk about this section 1032 and why it is a serious mistake. Section 1032 in this bill would for the first time in American history require the military to take custody of certain terrorism suspects in the United States. From a practical point of view, it could be a deadly mistake for us to require this. Listen to what was said by the Justice Department in explaining why:

While the legislation proposes a waiver in certain circumstances to address concerns, this proposal inserts confusion and bureaucracy when FBI agents and coun□ter□ter□ror□ism prosecutors are making split-second decisions. In a rapidly developing situation--like that involving Najibullah Zazi traveling to New York in September of 2009 to bomb the subway system--they need to be completely focused on incapacitating the terrorist suspect and gathering critical intelligence about his plans.

Instead, this provision, 1032, written into this law, would require a handoff of terrorism suspects to military authorities. So what does our military think about this?

Well, the Secretary of Defense Leon Panetta made it

abundantly clear when he said:

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

What we have seen, then, as our Secretary of Defense tells us, ceding to the military this authority could compromise America's security at a critical moment when every second counts, when the gathering of intelligence could literally save not just a life but thousands of lives.

Senator Feinstein's amendment makes it clear--as the administration wants to make it clear--that those terrorism suspects who are arrested abroad will be detained by the military. But within the United States we are told by this administration this provision will jeopardize the security of our country, will require a procedure now to hand off these individuals to the military side in places where they could not possibly be handed off quickly or seamlessly.

We have 10,000 FBI agents dedicated to the security of this country when it comes to these national security issues and 56 different offices. We don't have anything near that capacity when it comes to the military picking up the interrogation of an individual who may have knowledge that if we can glean it from that person could save thousands of lives.

Why in the world do we want to tie the hands of law enforcement? Why do we want to tie the hands of the intelligence community? Why do we want to create this situation of giving to the military this responsibility when they are not prepared at this moment to take it?

I think Senator Feinstein is doing the right thing for the protection of this country. Her position is supported by the Attorney General, by the Secretary of Defense, and by the intelligence community. They have done a good job in keeping America safe. They have asked us: Please, do not micromanage. Do not presume, do not create another hurdle for us when it comes to gathering information that can save lives in America.

Why would we do that? After more than 10 years of success and avoiding another 9/11, let's not make the situation worse by this 1032, this section of the bill that is being presented to us.

I know we will hear arguments on the Senate floor, well, there are opportunities for a waiver. So if a person is detained by the Federal Bureau of Investigation and then it is determined that this is a suspect who falls in the category and needs to go to military detention and then we need to turn to the executive side for a waiver of that military detention, how much time will be lost? Will it be minutes, hours, days? Could we afford that if what is at stake is the potential loss of thousands of American lives? Why? Why make it more complex?

I cannot understand why the other side of the aisle is now so determined with this President to micromanage the defense of this country when it comes to terrorism. When it was a Republican President any suggestions along those lines were dismissed as unpatriotic and unwise and illogical. Now, under this President, everything is fair game. They want to change the rules, rules which have successfully protected the United States for more than 10 years.

I urge my colleagues to support Senator Feinstein's amendment No. 1125 and amend this section 1032 and make sure that our Defense Department, military and law enforcement, as well as intelligence community have the tools they need to continue to keep America safe.

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

Mr. CORNYN. Mr. President, I ask unanimous consent that I be recognized to speak as in morning business for up to 10 minutes.

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

Mr. LEVIN addressed the Chair.

The PRESIDING OFFICER. The senior Senator from Michigan.

Mr. LEVIN. Mr. President, I ask unanimous consent that when we return to the bill, which will be after Senator Cornyn speaks, we move immediately to Feinstein amendment No. 1125, and

that there be a 30-minute debate evenly divided and that the vote would occur immediately following that.

I withdraw my request.

…

Mr. LEVIN. I ask unanimous consent that the Senate proceed to the consideration of the pending Feinstein amendment No. 1125; that there be 30 minutes of debate equally divided and controlled in the usual form; that upon the use or yielding back of time, the Senate proceed to vote in relation to the Feinstein amendment, with no amendments in order prior to the vote.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

…

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 1867, which the clerk will report.

The bill clerk read as follows:

A bill (S 1867), to authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

…

AMENDMENT NO. 1125

The PRESIDING OFFICER. Under the previous order, there will be 30 minutes of debate on the Feinstein amendment.

The Senator from Arizona.

Mr. McCAIN. Madam President, before we begin the debate, and with the Senator from California on the floor, for the benefit of our colleagues and the chairman, there are two pending Feinstein amendments, as I understand it. The Senator from California has agreed to the half hour equally divided as the chair just said, and then I understand the Senator from California has agreed to the second amendment at 4 p.m.; is that correct?

Mrs. FEINSTEIN. That is correct.

Mr. McCAIN. So prior to that, I would ask my friend the chairman if we could have an hour of debate starting at 3 o'clock equally divided before the vote at 4:00 on the second Feinstein amendment.

The PRESIDING OFFICER. Is there objection?

Mr. LEVIN. Reserving the right to object, I just want to know if the Senator from California understands that the vote on the second Feinstein amendment would be at 4:00 and that the debate would begin at 3:00, with that hour equally divided.

Mrs. FEINSTEIN. I do. I have a four corners meeting on the Energy and Water appropriations bill. That is my problem. So the later it is, the better it is for me.

Mr. LEVIN. So is a 4 o'clock vote after an hour of debate acceptable?

Mrs. FEINSTEIN. Yes. My understanding is the House chairman only has until 3 o'clock, but I anticipate we will take all that time. So I can't change that.

Mr. LEVIN. So it is agreeable, then, that there will be an hour of debate on the second amendment starting at 3 o'clock with a vote at 4 o'clock?

Mrs. FEINSTEIN. Yes.

Mr. LEVIN. I also ask unanimous consent that there be no second-degree amendments to the Feinstein amendment.

The PRESIDING OFFICER. Is there objection?

Mr. CORNYN. I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Arizona.

Mr. McCAIN. If we can then--obviously, we can call a vote at any particular time. So I would suggest again that we try to dispose of other amendments after the vote on the first Feinstein amendment, and then we will try to dispose of additional amendments between the disposition of the first Feinstein amendment and the second one, with the hour of debate equally divided, and Senator Feinstein can begin.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, I rise to ask my colleagues to support amendment No. 1125, which will limit mandatory military custody to terrorists captured outside the United States. This amendment is cosponsored by Senators Leahy, Durbin, Udall, Kirk, Lee, Harkin and Webb.

This is a very simple amendment. It adds only one word--the word ``abroad''--to section 1032 of the underlying bill. I strongly believe if it is not broke, do not fix it. The ability to have maximum flexibility in the United States is very important, and I totally support the Executive having that flexibility.

This bill creates a presumption that members or parts of al-Qaida or associated forces will be held in the military system. That is what concerns me because the military system has not produced very well over the last 10 years.

I want to take a moment to contrast some cases.

On this chart, we have sentences--five of them from military commissions and five or six from Federal courts. The Federal courts have actually convicted over the last 10, 11 years not 300 people but 400 people.

Military commissions are limited to some six convictions. Let's take a look at what they are.

A very famous one is Salim Hamdan because he brought a Supreme Court case. He was bin Laden's driver. He was acquitted of conspiracy and only convicted of material support for terrorism. He received a 5-month sentence by the military commission and was sent back to his home in Yemen to serve the time before being released in January of 2009.

No. 2: David Hicks entered into a plea on material support for terrorism and was given a 9-month sentence, mostly served back home in Australia.

Omar Khadr pled guilty in exchange of an 8-year sentence, but he will likely be transferred to a Canadian prison.

Ibrahim Ahmed Mahmoud al-Qosi pled guilty to conspiracy and material support to terrorism. His final sentence was 2 years pursuant to a plea deal.

Noor Uthman Muhammed pled guilty to conspiracy and material support to terrorism. His final sentence will be less than 3 years pursuant to his plea agreement.

Ali Hamza al-Bahlul received a life sentence after he boycotted the entire commission process.

On the other hand, you have sentences from the Federal courts.

You have Richard Reid, the Shoe Bomber--life in prison.

``Blind Sheik'' Omar Abdel Rahman--life in prison for the plot to bomb New York City.

Twentieth Hijacker Zacarias Moussaoui--life in prison.

Ramzi Yousef--life in prison for the 1993 World Trade Center bombing and the Manila Air plot.

Umar Farouk Abdulmutallab--probably life in prison; will be sentenced in January 2012.

Najibullah Zazi--potential life in prison. This is the man, with conspirators, who was going to bomb the New York subway.

There is definitive evidence that is irrefutable that the Federal courts have done a much better job than the military commissions.

Why this constant press, that if it is not broke we are going to fix it anyway, I do not understand. Why the constant push to put people in military custody rather than provide the flexibility so that evidence can be evaluated quickly? This person will get life in a Federal court versus an inability or a problem in a military commission or vice versa. I think the Executive should have that.

I think the last 10 years have clearly shown that this country is safer than it has ever been. Terrorists are behind bars where they belong and plots have been thwarted, so the system is working.

This amendment would make clear that under section 1032, U.S. Armed Forces are only required to hold a suspected terrorist in military custody when he is captured abroad. All the amendment does is add one word--that is the word ``abroad''--to make clear that the military will not be roaming our streets looking for suspected terrorists. The amendment does not remove the President's ability to use the option of military detention or prosecution inside the United States.

The administration has threatened to veto this bill, and has said:

[It] strongly objects to the military custody provision of section 1032 [because it] would tie the hands of our intelligence and law enforcement professionals.

Perhaps, most importantly, addressing the issue of this amendment specifically, on November 15, Defense Secretary Leon Panetta wrote this:

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

The Director of National Intelligence, Jim Clapper, also wrote a letter on November 23, to say that he opposes the detainee provisions of this bill because they could--and I quote--``restrict the ability of our nation's intelligence professionals to acquire valuable intelligence and prevent future terrorist attacks."

The administration suggested this change to the Armed Services Committee, but it was rejected. So the administration has had to threaten a veto on the bill. Who knows whether they will. I certainly do not know. This amendment limiting mandatory military custody to detainees outside the United States is a major improvement to the bill, and I ask my colleagues to support it.

I have a very hard time because I have watched detainees carefully as part of the Senate Intelligence Committee, and we are doing a study on the detention and treatment of high-value detainees. This has been going on for 2 years now. It is going to be a 4,000-page document, and it is going to be classified. But it will document what was actually done with each of the high-value detainees and what was learned from them. It shows some very interesting things. But the upshot of all of this is that we should keep military custody to people arrested abroad and have the wide option in this country, which is the case now, and not mandate--mandate--that military custody and military commission trial must be for everyone arrested in the United States.

You will hear that anyone who comes to the United States who carries out a criminal act, a terrorist act under the laws of war, should be subject to military custody. The problem is, 10 years of experience has not worked. How many years' experience do we need? How many sentences--six cases--and this is all there is in 10 years.

I know the other side got very upset when Abdulmutallab was Mirandized. The fact of the matter is, every belief is Abdulmutallab is going to do a life sentence in a Federal prison, put away somewhere in a place where he cannot escape and where the treatment is very serious.

I have, again, a hard time knowing why if it is not broke we need to fix it, and why we need to subject everybody who might be arrested in this country to a record that is like this: 5-month sentence, 9-month sentence, 8-year sentence, 2-year sentence, 3 years pursuant to a plea agreement, and one life sentence, when you have 400 cases that have been disposed of in a prompt way in a Federal court, who are serving long sentences in Federal prison.

I wish to hold the remainder of my time and have an opportunity to respond to the distinguished chairman and ranking member.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. Madam President, I wish to yield----

Mr. LEVIN. Before the Senator yields time to the Senator----

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Will the Senator refrain for 1 minute? While Senator Feinstein is here, I understand it is now preferable from our leader that the vote be at 2 o'clock, not immediately following this half-hour debate.

Mrs. FEINSTEIN. If that is possible, that would be helpful. But it is whatever Senators want.

OK. All right.

Mr. McCAIN. Does the Senator want to unanimous-consent that?

Mr. LEVIN. Madam President, I ask unanimous consent that the vote, which was previously scheduled to occur at the end of the half hour of debate on this amendment, now be rescheduled for 2 o'clock.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. LEVIN. Madam President, relative to the time between that half hour and 2 o'clock, that time, hopefully, would be used. It will be by me for my remarks on this amendment, by the way, because after the 30 minutes, if it is used totally, I would want an opportunity to speak during that time, if necessary in morning business. But there are other amendments we believe can be voice voted during that period of time, I believe my friend from Arizona would agree. So that time will be fruitfully used. But the time now is 2 o'clock for the vote on that first Feinstein amendment.

I thank my friend.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. Madam President, the vote will be at 2 o'clock. The Senators from New Hampshire and South Carolina wish to speak. I do not know if the chairman wishes to be before or during that or in between. But, also, it does not change the agreement we have, which has not been agreed to but we have agreed we will attempt to have a vote on the second Feinstein amendment at 4 o'clock still. Is that correct? We will attempt to do that?

Mr. LEVIN. It will continue to be our intent. It was objected to before. But we hope that objection will be removed. If it is not removed, we will have to have all these votes at the end of the day instead of during the day.

Mr. McCAIN. So beginning at 3, whether we have a unanimous consent agreement--because the Feinstein amendment is very important--I would ask, informally, if we do not have a unanimous consent agreement, that we have an hour equally divided beginning at 3 so we can debate the second Feinstein amendment.

In the meantime, as the chairman said, we will try to dispense with voice votes and other agreed-upon amendments, and perhaps even maybe a recorded vote if necessary on one of the amendments.

I would remind my colleagues, we run out of time at 6 o'clock this evening, and we would rather do it in a measured fashion, allowing recorded votes or debate before those recorded votes, because those pending amendments will be voted on after 6 p.m. tonight.

I hope I did not say anything the chairman does not agree with.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. No. I agree with what the Senator said and what the intent is here; that, hopefully, we could have an hour debate starting at 3 o'clock. We will try to lock that in at a later time, after giving folks notice. But if there is objection to votes before the time runs out, the 30-hour clock runs out, then we will have to have all those votes after the 30-hour clock runs out, and it does

not make any sense to do that. But if there is going to be an objection, then that is the way it will have to be.

What Senator McCain is saying--and I totally agree with him--is, even if we are put in that position, which I hope we are not, that at least we could use the time between now and then for debate on those amendments which we would have to vote on at a later time. I totally agree with my friend from Arizona.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. Madam President, I yield 7 minutes to the Senator from New Hampshire and 8 minutes to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. Madam President, I rise in opposition to the amendment offered by the Senator from California, amendment No. 1125. I would start with this: We have heard repeatedly--not only from the Senator from California but also from the Senator from Illinois--about the number of cases in our civilian system where we have tried terrorists versus the number of military commissions.

I think there is one thing that needs to be clarified upfront here; that one of the first acts the President took when he came into office was to actually suspend all military commissions for about 2 years. So to compare the number of cases in our civilian system versus the number of military commission trials we have had is a false comparison when we suspended these trials for over 2 years. I want to say that upfront.

But I think the chart the Senator shows actually misses the point of why we have this amendment before us; that is, we need to gather intelligence. When we have captured a member of al-Qaida who is planning an attack against the United States of America, the first goal has to be, obviously, getting that person away from where he can threaten us again to kill Americans, but also, just as importantly, to gather intelligence to protect America. The criminal justice system is set up to see that justice is served in a particular case, not to see that we have the maximum tools in the hands of our intelligence officials to gather information.

Yet it seems to me that if you look in the context of Senator Feinstein's amendment 1126 that we have already talked about on the floor, she wants to limit the administration. The case law of our Supreme Court that is going back to World War II would take us before 9/11. And heaven forbid if we had an American citizen who was one of the participants in an incident such as we had occur on our soil on 9/11. Our military would not be permitted to hold that person and to question them to get the maximum amount of information and protect our country.

With respect to this amendment she has pending before the Senate, 1125, I want to point out that the amendment would lead to a very absurd result. Essentially what it would say is if you are a member of al-Qaida, planning or committing an attack against the United States of America, a foreigner, and you make it to our soil, as the 9/11 conspirators did who committed that horrible attack on our country, then you cannot be held in military custody. There is no mandatory military custody under those circumstances. Yet we will hold you in mandatory military custody if you are found overseas. So, in other words, please, their goal is unfortunately to come to the homeland, to come to our country to attack us here, and in our country we need the authority to, in the first instance--the presumption should be to hold those individuals in military custody so that we are not reading them Miranda rights. To tell a terrorist: You have the right to remain

silent is counter to what we need to do to protect Americans and make sure that--for example, I will use the Christmas Day Bomber as an example because it has been cited so many times here on this floor.

That day, when he was found on the plane, after 50 minutes of questioning, he was read his Miranda rights and he invoked his Miranda rights and remained silent. It was only 5 weeks later after we tracked down his parents and convinced him to cooperate that he actually provided more information.

We are very fortunate that he was only involved in one event, that it was not a 9/11-type event where there were multiple events on American soil planned. But what if after that 50 minutes we waited 5 weeks to get more information, yet there had been more events coming that day? That is what is at issue here. Let's bring ourselves back to September 11. What if we had caught the individuals who were on one of those planes before it took off on 9/11? What if in that instance we would not hold those members of al-Qaida in military custody that instant to make sure that we could get the maximum amount of information from them to hopefully, God forbid, prevent the lifting off of the other flights and what happened on that horrible day in our country's history?

I have to believe that if we were standing here immediately after the events of 9/11, I do not think we would be debating this amendment, deciding whether if you make it to our homeland we will not hold you in military custody in the first instance, to find out how much information you have, to make sure you are not part of multiple attacks on the United States of America.

If the amendment of the Senator from California passes, what kind of message are we sending to members of al-Qaida, foreigners who are planning attacks against the United States of America? We are laying out, unfortunately in my view, a welcome mat to say: If you make to it America, you will not be held in military custody. But if you attack us overseas, then you will be held in military custody. Why would we create a dual standard where we should be prioritizing protecting our homeland, protecting the United States of America? This leads to an absurd result.

I would hope my colleagues would reject the Senator's amendment to say that only those members of al-Qaida who do not make it to our homeland to attack us right here on our soil will be held in the first instance in mandatory military custody. Because our goal has to be here to protect Americans and to make sure we do not create a dual standard where if you are captured over there, we are going to hold you in military custody, but if you are captured and if you make it here, you are going to be getting greater rights, we will process you in the civilian system, and we will tell you you have the right to remain silent. We should not be telling terrorists they have the right to remain silent. We should be protecting Americans. If we were to pass this amendment, it would create an absurd standard where you get greater rights when are you here on our soil. I think that makes us less safe.

I would urge my colleagues to reject both of the Senator's amendments, both 1126 that would deny the executive branch the authority to hold them----

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

Ms. AYOTTE. Madam President, I ask unanimous consent for 30 seconds to wrap up.

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

Ms. AYOTTE. Madam President, I would ask my colleagues to reject 1126 as well, which would take away the authority of the executive branch as allowed by our Supreme Court and would make us less safe in this country as well as 1125. We have to protect America and make sure we get the maximum information to prevent future attacks on this country.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 3 minutes remaining of the original 30 minutes.

Mrs. FEINSTEIN. Thank you very much.

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

Mrs. FEINSTEIN. Not on my time. On the Senator's time.

Mr. LEVIN. On my time. Quick question. After the 30 minutes expires, because we are not going to have a vote now, there would be additional time should the Senator need it after that 30 minutes.

Mrs. FEINSTEIN. I appreciate it. I may well use it.

Madam President, I object to the statement just made that this will make the United States of American less safe. Ten years of experience has shown it has not. Plot after plot after plot has been interrupted. I have served on the Intelligence Committee for 11 years now. We follow this closely. This country is much more safe because things have finally come together with the process that is working.

The FBI has a national security division with 10,000 people. There are 56 FBI offices. The military does not have offices to make arrests around this country. This constant push that everything has to be militarized--they were wrong on Hamdi, they were wrong on Hamdan. And it keeps going. And that it is terrible to protect people's rights. I do not think that creates a safe country. This country is special because we have certain values, and due process of law is one of those values. So I object. I object to holding American citizens without trial. I do not believe that makes us more safe. I object to saying that everything is mandatory military commission and military custody if anyone from abroad commits a crime in this country. The administration has used the flexibility in a way that they have won every single time. There have been no failures.

The Bush administration as well used the Federal courts without failure. They have gotten convictions. The military commissions have failed, essentially; 6 cases over 10, 11 years. I pointed out the sentences. So to say that what we are doing is to make this country less safe may be good for a 30-second sound bite, but it is not the truth.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. I say to my good friend from California, you are a patriot. You are here for all of the right reasons. We just have a strong disagreement about where we stand as a nation.

Nobody interrupted the Christmas Day Bomber plot. The people on the plane attacked the guy before he could blow it up. There was no FBI agent there. There was no CIA agent there. We are lucky, thank God, the passengers did it. So there is nothing to suggest that our intelligence

community does not need as many tools as possible because the guy got through the system. We are lucky as hell the bomb did not go off.

Mrs. FEINSTEIN. Would the Senator yield for a question?

Mr. GRAHAM. The Times Square Bomber, nobody interrupted that plot. The guy did not know how to set the bomb off. We are lucky as hell the bomb did not go off. So do not stand here and tell me that we have got it right, because we have not. And here is the point: We never will always get it right. I am not saying that as criticism. Because we are going to get hit again. We cannot be right and lucky all of the time.

To those who are trying to defend us, the one thing I do not want to do is micromanage the war. Here is the political dynamic. You have got people on the left who hate the idea of saying ``the war on terror.'' If you left it up to them, they would never, ever use the military, they would always insist that the law enforcement model be used because they do not buy into the idea of we are at war. So you have got one part of the country, a minority, that wants to criminalize the war. If we ever go down that road, woe be unto us.

You have got people on my side--the Senator is right about this. They have gone the other way. If you left it up to people on my side, there would be a law passed tomorrow that you could never, ever read a Miranda right to a terrorist caught anywhere in the United States.

I do not agree with that way of thinking. To my fellow members of the U.S. military, you have not failed at Guantanamo Bay. You have not failed. Because you sentenced someone to 9 months to me validated the fact that those who are taking an oath to defend us, when they are put in a position of passing judgment on people accused of trying to kill us all, will be fair.

So when you say a military commission tribunal at Guantanamo Bay gave a 9-month sentence and that is a failure, I say, as a proud member of the military, I am proud of the fact that you can judge a case based on the facts and the law and not emotion. So I am very proud of the fact that military commissions can do their job as well as the civilian courts.

I say to our Federal prosecutors and our Federal juries and our Federal judges, I am proud of you too. We should be using an ``all of the above'' approach. There are times that Federal courts are better than military commissions. There are times that military commissions are better than Federal courts.

The 1032 language has nothing to do about what venue you choose. This provision is simple in its concept. It is a compromise between those on the left who say you must criminalize this war; we are not at war; you are going to have to use the law enforcement model; you can neither gather military intelligence, who do not believe that the military has a role on the homeland to gather intelligence, which is an absurd concept, never acknowledged before in any other war.

When American citizens helped the Nazis, collaborated with Nazis to engage in sabotage, not only were they held as enemy combatants during World War II, they were tried by military commissions. We no longer allow American citizens to be tried by military commissions. I think that is a reasoned decision. But what we do not want to do is prevent our intelligence community from holding an al-Qaida affiliated member and gathering intelligence.

If an American citizen went to Pakistan and got radicalized in a madrasah and came back to the United States and landed at Dulles Airport and got a rifle and started shooting everyone on the Mall, I believe it is in our national security interests to give our intelligence community the

ability to hold that person and gather intelligence about: Is another guy coming? What did you do? What future threats do we face? And not automatically Mirandize him. But if they choose to Mirandize him, they can. In this legislation, we presume military custody, but it can be waived.

That is the point I am trying to make. Senators Levin and McCain have struck a balance between one group that thinks the military can only be used and nobody else and another group that says we can never use the military. We have that balance. If we upset this balance, we are going to make us not only less safe, the Congress is going to do things on our watch that we have never done in any other war.

A word of warning to my colleagues: If we had a bill on the floor of the Senate saying we are not going to read Miranda rights to terrorists who are trying to kill us all, 70 percent of the American people would say: Heck yes.

I don't want this bill to come up. I believe the people who are best able to judge what to do is not any politician, they are the experts in the field fighting this war. We are saying we can waive the presumption of military custody, we can write the rules to waive it, but we believe we should start with that construct.

Let me read to you what the general counsel for the Department of Defense said today:

Top national security lawyers in the Obama administration say U.S. citizens are legitimate military targets when they take up arms with al-Qaida. The government lawyers, CIA counsel Stephen Preston, and Pentagon counsel Jeh Johnson, did not address the Awlaki case. But they said U.S. citizens don't have immunity when they are at war with the United States.

The President of the United States was right to target this citizen when he went to Yemen to help al-Qaida. I am glad we took him out. So would it not be absurd that we can kill him, but we cannot detain him? If he came here, we cannot question him for military intelligence gathering. So this is a compromise between two forces that are well intended but will take us into a bad policy position: the hard left who wants to say the military has no role in protecting us on the homeland and some people on my side who say the law enforcement community cannot be involved at all.

So Senator Levin and Senator McCain have constructed a concept that provides maximum flexibility, gives guidance to the law enforcement community, starts with a presumption that I like and can be waived and will not impede an ongoing investigation. That is the part of the bill that was changed.

To my good friend from California, we have the balance we have been seeking for 5 years. To me, this is what we should be doing as a nation--creating legislation that allows those who are fighting the war the tools they need. In this case, we start with the presumption of military custody because that allows us to gather intelligence. Under the domestic criminal law, we cannot hold someone and ask them about future attacks, because we are investigating a crime. Under military law, when somebody joins the enemy and engages in an act of war against the Nation, our military intelligence community can hold that person for as long as it takes to find out what they know about future attacks. If the guy gets off of plane and starts killing people at the mall, when we grab him and he says I want my lawyer, we can say: You are not entitled to a lawyer. We are trying to gather intelligence.

At the end of the day, use military commission trials, use Federal courts, and read Miranda rights when we think it makes sense; but we don't have to because the law allows us to hold

people, under military custody, who represent a military threat. The law allows us to kill American citizens who have joined al-Qaida abroad. That has been the law for decades. I hope this compromise that Carl Levin and John McCain have crafted--and I say to Carl Levin, I have been in his shoes. When John and I were on the floor saying don't waterboard people--gather intelligence but don't become like the enemy--a lot of Americans believed we should waterboard these people, do whatever we need to do because they are so vicious and hateful. But John McCain knows better than anybody in this body what it is like to be tortured.

I wish to protect America without changing who we are. It has always been the law that when an American citizen takes up arms and joins the enemy, that is not a criminal act; that is an act of war. They can be held and interrogated about what they did and what they know because that keeps us safe. If we take that off the table, with homegrown terrorism becoming the greatest threat we face, we will have done something no other Congress has done in any other war.

The PRESIDING OFFICER. The original 30 minutes has expired.

Mr. GRAHAM. Madam President, I thank Senators Levin and McCain for drafting a compromise that I think speaks to the best of this country. To my colleagues, please don't upset this delicate balance. If you do, you will open a Pandora's box.

Mr. McCAIN. Madam President, I say to both Senators while they are on the floor, if it had not been for their invaluable effort, this legislation would not have come about. I thank them for their incredibly important contributions, using the benefit of the experience that both Members have.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, I wonder if I might take a few minutes to make a couple statements.

The PRESIDING OFFICER. Is there objection?

Mr. LEVIN. Madam President, I have no objection.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, I wished to say with respect to Abdulmutallab, what was very new there was that an explosive had been invented that could go through a magnetometer without detection. It is, to my knowledge, the first time anyone came into the United States--this young Nigerian from a very prominent Nigerian family--wearing a diaper that had enough of this PETN, this new explosive, to blow up the plane. He missed in detonation and it caught on fire and the fire was put out.

There have been other incidents of trying to smuggle this PETN in cartridges of computers and they even had dogs going to the airport and they could not smell the explosive inside the computer cartridge. That was in Dubai. It is a very dangerous explosive. It is new, and it has been improved. It is something we need to be very wary of.

I also wish to point out that there is a public safety exception to Miranda. We do not have to Mirandize someone or we could continue to question them, if there is a public safety risk. So Mirandizing an individual is not a point in this argument, in my view, because we can continue the interrogation.

What is a point, in my argument, is that the FBI now has competence; that there is a group of special experts who can be flown to a place where someone is arrested and do initial interrogation. They are specifically trained and, to the best of my knowledge, they are effective at interrogating. My point is, the system is working, and we should keep it as it is.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. While Senator Graham is on the floor, I ask unanimous consent to have a colloquy with him about this section 1032, the section at issue.

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

Mr. LEVIN. I very much appreciate Senator Graham's remarks. He said the provision provides for military custody as a beginning or starting point. I wonder whether he would agree that not only is it a beginning point, but it is only for a narrow group of people who are determined to be al-Qaida or their supporters.

Mr. GRAHAM. Yes. It is not only a presumption that can be waived, based on what the experts in the field think is necessary; the waiver provision is incredibly flexible. You do not have to stop an interrogation to get the waiver. The executive branch can write the procedures. Not only is it a presumption that can be waived, it is also limited to a very narrow class of people. It has nothing to do with somebody buying gold. I don't know about Senator Levin, but people call me, who are on the right, saying: Don't let Obama put me in jail because I think he is a socialist or are you going to be able to grab me because of my political views? I tell my staff to be respectful and read them the language. The only people who need to worry about this provision are a very narrow group of people who are affiliated with al-Qaida, engaged in hostile acts.

Mr. LEVIN. Would the Senator also agree with me that under the provision in the bill, on page 360--we were told that civilian trials are preferable to military trials, preferable to the detention of an unlawful combatant. Does the Senator agree that every one of those options is open to the executive branch and that there is no preference stated, one way or the other, for which approach is taken to people who are detained?

Mr. GRAHAM. Not only would I agree that 1032 and 1031--the compromise language about statement of authority to detain and military detaining as a presumption--has nothing to do with the choice of venue, there are people on my side who are champing at the bit to prohibit civilian courts from being used in al-Qaida-driven cases; is the Senator familiar with that?

Mr. LEVIN. Yes.

Mr. GRAHAM. I am of the view that we are overly criminalizing the war. I don't want to adopt that policy. There is nothing in this language that has anything at all to do with how you try somebody and what venue you pick. I am in the camp--and I think Senator Levin is too--of an all-of-the-above approach. I am proud of our civilian courts and our military courts. The Senator and I are probably not in the best position to determine that. Let's let the experts do it.

Mr. LEVIN. That is exactly the point. This language, when it is described as language that says somehow or other it works against using civilian courts, is from folks who haven't read our language. The language is explicit. On page 360, lines 3 through 14 in the bill, it says the disposition of a person under the law of war may include the following--and then they talk about

detention under the law of war, trial under title X, which is the military trial, transfer for trial by an alternative court or competent tribunal having lawful jurisdiction; that is, article III courts, and transfer or return of custody to the country of origin. There are no others. There is no preference stated for which of those venues would be selected by the executive branch.

Mr. GRAHAM. Is this a fair statement: If it was your goal to prevent military commissions from ever being used, you didn't get your way in this legislation. If it was your goal to mandate that military commissions are the only venue to be used, you didn't get your way in this legislation because this legislation doesn't speak to that issue at all.

Mr. LEVIN. That is absolutely true. Senator Graham brought to the floor something that was stated this morning by the top lawyer for the Obama administration. I think everybody ought to listen to this. There has been so much confusion about what is in the bill and what isn't. Right now, there is authority to detain U.S. citizens as enemy combatants. That authority exists right now. That is not me saying it, that is the Supreme Court that has said it as recently as Hamdi, when they said there is no bar to this Nation holding one of its own citizens as an enemy combatant. That is current law. That is the Supreme Court saying that. Then, the Supreme Court also said in Hamdi that they see no reason for drawing a line because a citizen, no less than an alien, can be part of supporting forces hostile to the United States or coalition partners and engaged in armed conflict against the United States.

Top lawyers for the President, this morning, acknowledged this. I wish every one of our colleagues could hear what Senator Graham brought to the floor. Top national security lawyers in the administration say U.S. citizens are legitimate military targets when they take up arms with al-Qaida.

Are we then going to adopt an amendment that says to al-Qaida that if you attack us overseas, you are subject to military detention; but if you come here and attack us, you are not subject to military detention?

That is what the first Feinstein amendment says.

Mr. GRAHAM. If I may just add--not only is that the effect, that would be a change in law because the Senator agrees with me that in other conflicts, prior to the one we are in today, American citizens, unfortunately, have been involved in aiding the enemy; is that correct?

Mr. LEVIN. I am sorry, I was distracted.

Mr. GRAHAM. Does the Senator agree with me that in prior wars American citizens have been involved in aiding the enemy of their time?

Mr. LEVIN. They have, and they have been held accountable.

Mr. GRAHAM. Yes. And the In re Quirin case, which Hamdi cited and affirmed, was a fact pattern that went as follows: We had German saboteurs, some living in America before they went back to Germany--I think one or two may have been an American citizen--who landed on our shores with a plot to blow up different parts of America. During the course of their efforts, American citizens aided the Nazis. The Supreme Court said when an American citizen chose to help the Nazis at home, on our homeland, they were considered to be an enemy belligerent regardless of their citizenship, and we could detain one of our own when they sided with the enemy.

Mr. LEVIN. There was a naturalized citizen involved in Quirin, who was arrested, as I understand it, on Long Island, and who was charged with crimes involving aiding and supporting the enemy.

Mr. GRAHAM. Let's talk about the world in which we live today.

Mr. LEVIN. And military detention.

Mr. GRAHAM. Military detention and tried by a military commission.

Mr. LEVIN. Exactly. By the way, I think executed.

Mr. GRAHAM. And executed. The Senator from Michigan and I have said, along with our colleagues, that military commissions cannot be used to try American citizens.

Mr. LEVIN. That is correct.

Mr. GRAHAM. Our military has said they do not want that authority. They want to deal with enemy combatants when it comes to military commission trials. But our military CI and FBI have all understood their power to detain for intelligence-gathering purposes is an important power. It is not an exclusive power.

So let's talk about today's threat. The likelihood of homegrown terrorism is growing. Does the Senator agree that the homegrown terrorist is becoming a bigger problem?

Mr. LEVIN. It is an issue, absolutely.

Mr. GRAHAM. So in a situation where an American citizen goes to Pakistan and gets radicalized in a madrasah, gets on a plane and flies back to Dulles Airport, gets off the plane and takes up arms against his fellow citizens, then goes to the mall and starts randomly shooting people, the law we are trying to preserve is current law, which would say if the experts decide it is in the Nation's best interests, they can hold that American citizen as they were able to hold the American citizen helping the Nazis and gather intelligence.

That is a right already given. Senator Feinstein's amendment, even though I don't think it is well written, could possibly take that away. That is 1031. But what we are saying is, we want to preserve the ability of the intelligence community to hold that person under the law of war and find out: Is anybody else coming? Are you the only one coming? What do you know? What madrasah did you go to? How did you get over? How did you get back?

We want to preserve their ability to hold that person under the law of war for interrogation. But we also concede, if they think it is better to give them their Miranda rights, they can. That is what the legislation we create will do. Does the Senator agree with that?

Mr. LEVIN. I do. And the top lawyers of the administration acknowledged as much this morning when they said U.S. citizens are legitimate military targets when they take up arms with al-Qaida.

The provisions we are talking about in section 1032, which Senator Feinstein would modify so that it is only al-Qaida abroad who would be subject to this presumption of a military detention, but al-Qaida who come here--and, by the way, American citizens are not even covered under 1032. But the foreign al-Qaida fighters who come here to attack us are not going to be subject to that presumption of military detention which, again, can be waived. It has nothing to do with in what venue they are tried. The administration, the Executive, has total choice on that. It is just

whether we are going to start with an assumption if they are determined to be al-Qaida, if they are a foreign al-Qaida person, they sure as heck ought to be subject to that same assumption whether they attack us here or whether they attack us overseas.

Mr. GRAHAM. Wouldn't it be kind of hard to explain to our constituents that our top lawyers in the Pentagon and CIA said today that once an American citizen decides to help al-Qaida they can be killed in a drone attack, but the Congress somehow says, OK, but they can't be detained?

Mr. LEVIN. I wouldn't want to try to hold that position.

Mr. GRAHAM. Does the Senator believe America is part of the battlefield in our global war on terror?

Mr. LEVIN. It has been made part of the battlefield without any doubt. On September 11, the war was brought here by al-Qaida. How do we suggest that a foreign al-Qaida member should not be subject to an assumption to begin with, if they are determined to be al-Qaida, that they are going to be detained--that we should not start with that assumption--subject to procedures which the administration adopts. It is totally in their hands. It cannot interfere with a civilian interrogation. It cannot interfere with civilian intelligence. We are very specific about it. The procedures are written by the executive branch. They can try them anywhere they want.

But if they bring a war here--they bring a war here--we are going to create an assumption that they can be subject, and are going to be subject, to military detention.

Mr. GRAHAM. Well, my belief is that most Americans would want our military being able to combat al-Qaida at home as much as they would abroad. I think most Americans would be very upset to hear that the military has no real role in combatting al-Qaida on our own shore, but we can do anything we want to them overseas.

Frankly, there are very good people on our side who want to mandate that the military has custody, and no one else, so we never have to read Miranda rights. Quite frankly, there are people on the left, libertarians, well-meaning people, who want to prevent the idea of a person being held under military custody in the homeland because they do not think we are at war and this is really not the battlefield.

What the Senator and I have done is to start with the presumption that focuses on intelligence gathering because the Senator and I are more worried about what they know about future attacks than how we are going to prosecute them.

Under domestic criminal law, we can't hold someone indefinitely. The public safety law I will talk about in a bit, but I say to my good friend from California, the public safety exception was a very temporary ability to secure a crime scene. It was not written regarding terrorism. So our law enforcement officials cannot use the public safety exception to hold an al-Qaida operative for days and question them. The only way to do that legally is under the law of war. In every other war we have had that right, and we are about to change that.

Mr. LEVIN. If I can interrupt, we have that right abroad against members of al-Qaida. But under this approach we would not be able to assume that military detention at home, again, subject to waiver and subject to all the other protections we have.

Mr. GRAHAM. Right. Well, let's keep talking about it because the more we talk about it the more interesting the whole concept becomes.

The last time I looked, there were no civilian jails overseas. So when we capture a terrorist overseas, the only place we can detain them is in military custody. If they make it at home to say the military can't hold a person and

interrogate them under the law of war, the only way we can hold an al-Qaida operative who made it to America is under the law enforcement model. This is not ``Dragnet.'' We are trying to make sure both systems are preserved, starting with the presumption of intelligence gathering.

Here is the key distinction. To my colleagues who worry about how we prosecute someone, that is really the least of my concerns. I am worried about intelligence gathering. I have confidence in our civilian system and confidence in our military system. But shouldn't we be concerned, most of all, Senator Levin, that when we capture one of these operatives on our shores or abroad that we hold them in a humane fashion but a fashion to gather intelligence?

Imagine if we got one of the 9/11 hijackers. Wouldn't it have been nice to have been able to find out if there was another plane coming and hold them as long as necessary to get that information humanely? To say we can't do that makes us a lot less safe.

Mr. LEVIN. We could do that if we captured them in Afghanistan, but here we are going to be treating them differently. It ought to probably be worse. In other words, people who bring the war here, it seems to me, at a minimum ought to be subject to the same rules of interrogation as they would be if they were captured and part of al-Qaida in Afghanistan.

I don't understand the theory behind this. As a matter of fact, when we adopted the authorization for use of military force, it would seem to me the first people we would want to apply the authority of that authorization to would be al-Qaida members who attack this country.

Mr. GRAHAM. That is the only group subject to this provision; is that correct?

Mr. LEVIN. The only group that is protected.

Mr. GRAHAM. But this provision we wrote only deals with that.

Mr. LEVIN. Exactly.

Mr. GRAHAM. No one is going to be put in jail because they disagree with Lindsey Graham or Barack Obama. We are trying to fight a war.

I would say something even more basic. It is in my political interest, quite frankly, being from South Carolina--a very conservative State, great people--to be able to go home and say I supported legislation to make sure these terrorists trying to come here and kill us never hear the words ``you have the right to remain silent.'' Most people would cheer.

It would have been in my interest years ago, quite frankly, to have gone back and said: You know what. I wish the worst thing that could happen to our guys caught by these thugs and barbarians is that they would get waterboarded. They get their heads cut off. Yet we have all these people worried about how we treat them in trying to find out a way to protect the country. That would be in my political interest, and I am sure it would probably be in your political interest to say: Wait a minute, we don't want to militarize this conflict.

At the end of the day, what I wanted to say about the Senator and Senator McCain is that one of you is a warrior who has experienced worse than waterboarding and doesn't want that to be part of his country's way of doing business. The other is someone who has been a very progressive, solid, left-of-center Senator for years. I am a military lawyer who comes from a very

conservative State, but I want to fight this war--I don't believe we are fighting a crime--but I want to fight it in a way that doesn't come back to haunt us. I don't want to create a system on our watch that could come back and haunt our own people. I don't want to say that every enemy prisoner in this war has to go to trial because what if one of our guys is captured in a future war? Do we want them to be considered a war criminal just because they were fighting for the United States?

So what we are trying to do is to create policy that is as flexible as possible but understands the difference between fighting a war and fighting a crime.

Mr. LEVIN. Mr. President, I understand there are other Senators who may be coming over to speak, and I will be happy to yield the floor whenever that happens because this is the time which is not structured before the scheduled vote at 2 p.m. But if I can continue, then, until another Senator comes to the floor, I want to just expand on this one point which has been made which has to do with whether there is something in this section of ours that would allow our military to patrol our streets. We have heard that.

Well, we have a posse comitatus law in this country. That law embodies a very fundamental principle that our military does not patrol our streets. There is nothing in section 1032 or anywhere else in this bill that would permit our military to patrol our streets.

I think Senator Graham is probably more familiar with what I am going to say than perhaps any of our colleagues. We have a posse comitatus statute in this country. It makes it a crime for the military to execute law enforcement functions inside the United States.

That is unchanged. That law is unchanged by anything in this bill.

Mr. GRAHAM. Does the Senator know why that law was created?

Mr. LEVIN. I think we had a fear a couple hundred years ago that that might happen.

Mr. GRAHAM. One of the things you learn in military law school is the Posse Comitatus Act, because if a military member or a unit is asked to assist in a law enforcement function, that is prohibited in this country. Why is that? We don't want to become a military state. We have civilian law enforcement that is answerable to an independent judiciary.

The Posse Comitatus Act came about after Reconstruction, because during the Reconstruction era the Union Army occupied the South. They were the judge, jury, and law enforcement. They did it all because there was no civilian law enforcement. After the South was reconstructed, a lot of people felt that was not a good model to use in the future; that we don't want to give the military law enforcement power; they are here to protect us against threats, foreign and domestic; law enforcement activities are completely different.

Now we have National Guard members on the border. That is not a law enforcement function. That is the national security function. But I have been receiving calls that say our legislation overturns the Posse Comitatus Act. Here is why that is completely wrong.

Surveilling an al-Qaida member, capturing and interrogating an al-Qaida member is not a law enforcement function; it is a military function. For the Posse Comitatus Act to apply, you would have to assume that a member of al-Qaida is a common criminal and our military has no legal authority here at home to engage the enemy if they get here.

You talk about perverse. You would be saying, as a Congress, that an al-Qaida member who made it to America could not be engaged by our military. What a perverse reading of the Posse Comitatus Act.

The reason al-Qaida is a military threat and not a common criminal threat is because the Congress in 2001 so designated. I think most Americans feel comfortable with the idea that the American military should be involved in fighting al-Qaida at home, and that is not a law enforcement function.

Mr. LEVIN. That is why we have very carefully pointed this provision 1032 to a very narrow group of people--people who are determined to be members of or associated with al-Qaida.

Then the question becomes, Well, how is that determination made? What are the procedures for that? The answer is it is left up to the executive branch to determine those procedures. Can there be any interference with the civilian law enforcement folks who are interrogating people that they arrest? If someone tries to blow up Times Square and they are being interrogated by the FBI, is there any interference with that interrogation? None. We explicitly say that there is no such interference.

What about people who are seeking to observe illegal conduct? Is there any interference with that? There is none. We specifically say those procedures shall not interfere with that kind of observation, seeking intelligence. We are not interfering with the civilian prosecution, with the civilian law enforcement at all.

The rules to determine whether someone is a member of al-Qaida are rules which the executive branch is going to write. They can't say, Well, this thing authorizes the interference with civilian interrogation when, as a matter of fact, it specifically says it won't, and the procedures to determine whether somebody is governed by this assumption are going to be written by the FBI and the Justice Department and the executive branch. And, on top of that, there is a waiver.

Mr. GRAHAM. May I add something. I want to respond to one of my good friends, Senator Paul, who said, Well, that is all good, but sometimes in democracies you let in very bad people and I don't want to give broad power to the executive branch that could result in political persecution.

I would tell you--Senator Levin may find this hard to believe--there are people on my side who don't trust President Obama and his administration. Some of them don't think he is an American. Some of them believe that if we pass this law, you are going to give the Obama administration the power to come on and pick them up because they go to a rally somewhere.

All I can say to Senator Paul and others: I share the concern about unlimited executive power. I support the Posse Comitatus Act. I don't support the idea that the military can't fight al-Qaida when they come here. We are not talking about law enforcement functions.

But here is what happens: If someone is picked up as a suspected enemy combatant under this narrow window, not only does the executive branch get to determine how best to do that--do you agree with me that, in this war, that every person picked up as an enemy combatant--citizen or not--here in the United States goes before a Federal judge, and our government has to prove to an independent judiciary outside the executive branch by a preponderance of the evidence that you are who we say you are and that you have fit in this narrow window? That if you are worried about some abuse of this, we have got a check and balance where the judiciary, under the law that we have created, has an independent review obligation to determine whether the executive

branch has abused their power, and that decision can be appealed all the way to the Supreme Court?

Mr. LEVIN. That guarantee is called habeas corpus. It has been in our law. It is untouched by anything in this bill. Quite the opposite; we actually enhance the procedures here. The Senator from South Carolina has been very much a part of the effort here.

Mr. GRAHAM. Much to my detriment.

Mr. LEVIN. With all the risks that are entailed of being misunderstood and all the rest. That is something the Senator from South Carolina has engaged in, to try to see if we can put down what the detention rules are--by the way, ``are''--because as the administration itself said in its statement of administration policy, the authorities codified in this section--authorities codified in section 1031 they are referring to--those authorities already exist.

Mr. GRAHAM. In this case where somebody is worried about being picked up by a rogue executive branch because they went to the wrong political rally, they don't have to worry very long, because our Federal courts have the right and the obligation to make sure the government proves their case that you are a member of al-Qaida and didn't go to a political rally. That has never happened in any other war. That is a check and balance here in this war. And let me tell you why it is necessary.

This is a war without end. There will never be a surrender ceremony signing on the USS Missouri. So what we have done, knowing that an enemy combatant determination could be a de facto life sentence, is we are requiring the courts to look over the military's shoulder to create checks and balances. Quite frankly, I think that is a good accommodation.

Mr. LEVIN. Not only is what the Senator said accurate, but we have done something else in this bill. There is an Executive order that was issued some years ago that said there should be a periodic review process for folks who are being detained under the law of war. Because it is so unclear as to when this war ends, there is real concern about that. What do we do about that? So in this bill what we require the executive branch to do--and I am now quoting from section 1035--is to adopt procedures for implementing a periodic review process. Those procedures don't exist now. They are not formalized. So we want to formalize them for the very reason that the Senator from South Carolina addressed: because we want to make sure that since we don't know when this particular war is going to end, it is kind of hard to define it and everyone is concerned about that, you have got to have review procedures. The greatest review procedure of all is habeas corpus. But there are also requirements in the Executive

order for a periodic review process of whether somebody is still a threat or not a threat, for instance. The war may still be going on, but the person may no longer be a threat.

Should there be an opportunity for the person to say that? Well, there should be. There surely should be a regular review process. The Senator from South Carolina has been very much involved in this kind of due process. But what we put into our bill--which would have been eliminated, by the way, if the Udall amendment had been adopted yesterday--is a requirement that the Executive order's procedures be adopted, because so far we haven't seen that.

Mr. GRAHAM. I would say why I wanted to do that. I want to be able to say--and not to my political advantage. But I want to be able to tell people post-Abu Ghraib, post-early Guantanamo Bay, we have cleaned up our act. We are trying to get the balance we didn't have originally. I want to be able to tell people we no longer torture in America. That is why you and I wrote the

Detainee Treatment Act, with Senator McCain, the War Powers Act that clearly bans waterboarding.

I want to be able to tell anybody who is interested that no person in an American prison--civilian or military--held as a suspected member of al-Qaida will be held without independent judicial review. We are not allowing the executive branch to make that decision unchecked. For the first time in the history of American warfare, every American combatant held by the executive branch will have their day in Federal court, and the government has to prove by a preponderance of the evidence you are in fact part of the enemy force. And we did not stop there. Because this could be a war without end, we require an annual review process where each year the individual's case is evaluated as to whether they still maintain a threat or they have intelligence that could be gathered by longer confinement.

What I would say to our colleagues is that we have tried to strike that balance. There are a lot of people who don't like the idea that you give these terrorists Federal hearings and lawyers and all that other stuff. There are a lot of people who don't like the fact that we do have now humane interrogation techniques. But I like that, because I want to win this war on our terms, not theirs. So I couldn't be more proud of this bill.

To my colleagues on the right who want to mandate military custody all the time and you never can read them their Miranda rights, I am sorry, I can't go there. To our friends on the left who want to say the military has no role in this war at home, I am sorry, I can't go there. Military commissions make sense sometimes, sometimes Federal courts make sense.

I will end on this note. This compromise that we have come up with I think will stand the test of time. Unfortunately, most likely radical Islam as we know it today is not going to be defeated in our lifetime, and I hope to have created on my watch as a Senator a legal system that has robust due process, that adheres to our values, but also recognizes we are at threat like any other time in recent memory and allows us to protect ourselves within the values of being an American. I cannot tell you how much I appreciate working with the Senator and Senator McCain, and I think we have accomplished that after 10 years of trying.

Mr. LEVIN. Mr. President, I yield the floor.

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The PRESIDING OFFICER. The Senator from Colorado.

AMENDMENT NO. 1125

Mr. UDALL of Colorado. Mr. President, I wanted to rise at this time in support of the Feinstein amendment No. 1125, which would modify the requirement that the Armed Forces detain suspected terrorists by adding the word ``abroad'' to ensure that we aren't disrupting domestic counterterrorism efforts. And I would like to correct the record because some of the opponents of the amendment have stated that by inserting the word ``abroad,'' we would be preventing the military from detaining al-Qaida terrorists on U.S. soil, and that is simply not true.

The President knows and my colleagues know that I am not comfortable with the detention provisions in this bill because I think they will undermine our fight against terrorism. But this would be an important change, a narrowly focused change in the provisions that have already been put on the floor.

Mr. President, is the vote imminent?

The PRESIDING OFFICER (Mr. Sanders). It is.

Mr. UDALL of Colorado. Mr. President, I rise in support of the Feinstein amendment No. 1125, which would modify the requirement that the Armed Forces detain suspected terrorists by adding the word ``abroad'' to ensure we are not disrupting domestic counterterrorism efforts. I wish to correct the Record, because some of the opponents of this amendment have stated that by inserting the word ``abroad'' we would be ``preventing the military from detaining al Qaeda terrorists on U.S. soil.'' This is simply not true.

I am not comfortable with the detention provisions in this bill because I think they will undermine our fight against terrorism. While section 1031 of this legislation will authorize the military to detain terrorists, section 1032 requires that the military detain certain terrorists even if the FBI or local law enforcement is in the middle of a larger investigation that would yield the capture of even more dangerous terrorists.

This may disrupt the investigation, interrogation, and prosecution of terrorist suspects by forcing the military to interrupt FBI, CIA, or other counterterrorism agency operations--against each of these organizations' recommendations, including the military's. This would be an unworkable bureaucratic process that would take away the ability to make critical and split-second decisions about how best to save Americans lives. That is why the director of the FBI and the director of National Intelligence have strongly opposed the underlying provisions.

The Feinstein amendment would simply provide the needed flexibility for the FBI and other law enforcement agencies to work to fight and capture terrorists without having to stop and hand over suspects to the military. However, even with the Feinstein modification, with the authorization in section 1031 the military could still detain a suspected terrorist but would not have to step in and interrupt other domestic counterterrorism operations.

In other words, the Feinstein amendment would do nothing to prevent the military from acting, it would simply take away the mandate that they interrupt other investigations. I still do not believe we should enshrine in law authorization for the military to act on U.S. soil, but to argue that adding ``abroad'' to section 1032 would take away from the authority given in this bill is just wrong.

Clarifying that the military is only required to detain suspected terrorists abroad is the best approach to address the FBI's concerns about this legislation, and it is the best approach for our national security. What we are doing is working. We should not take away the flexibility that is necessary to keep us safe.

Passing this amendment would be welcome news to Secretary of Defense Panetta, Director of National Intelligence Clapper, FBI Director Mueller, and CIA Director Petraeus--who oppose the intrusive restrictions on their counterterrorism operations that the underlying bill would create.

The other side has argued that this is fundamentally about whether we are fighting a war or a crime. I think that is a false choice and it does a disservice to our integrated intelligence community that is fighting terrorism successfully using every tool it possibly can. We can debate this in theoretical, black-and-white terms about whether this is a war or a crime. Or we can get back to the business of taking on these terrorists in every way we know how, including by using our very effective criminal justice system. At the end of the day, it is about protecting Americans, protecting this country. Why on Earth would we want to tie our hands behind our back?

Our national security leadership has said the detention provisions in this bill could make us less safe. We should listen to their concerns and pass this amendment to preserve the U.S. Government's current detention and prosecution flexibility that has allowed both the Bush and Obama Administrations to effectively combat those who seek to do us harm.

Again, I encourage my colleagues to support the Feinstein amendment, to keep faith with the Directors of the FBI, the DNI, the Secretary of Defense, and our Attorney General, who say these provisions could create unwanted complications in our fight against terrorism.

Let's adopt the Feinstein amendment. It will help us win the war against terror.

Thank you, Mr. President.

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to a vote on the Feinstein amendment No. 1125.

Mr. BARRASSO. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the amendment.

The clerk will call the roll.

The bill clerk called the roll.

The result was announced--yeas 45, nays 55, as follows:

…

The amendment (No. 1125) was rejected.

Mr. LEVIN. Mr. President, I move to reconsider the vote.

Mrs. BOXER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

…

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

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

AMENDMENT NO. 1126

Mr. CHAMBLISS. Mr. President, I rise in opposition to the second Feinstein amendment, No. 1126, I believe. I have the privilege as serving as vice chairman on the Intelligence Committee with Chairman Feinstein. We have a good working relationship and agree on most every issue

that comes before the committee. I know the diligence and seriousness with which she takes every issue but particularly this one.

We have had a number of discussions about the fact that we have a lack of a detainee and interrogation policy in this country now, and I know she is concerned about that and is trying to make the situation better. I remain committed to work with her on a solution.

Unfortunately, I am going to have to oppose her amendment today because of my concerns about the limitation it imposes on the authority to detain Americans who have chosen to wage war against America. My first concern is that it appears, from the debate yesterday, that there is confusion among some Members about what this amendment does. For example, my colleague and friend from Illinois, Senator Kirk, argued that he is in favor of robust and flexible U.S. military action overseas, including against American citizens such as Anwar al-Awlaqi. Senator Kirk said he supports the Feinstein amendment, however, because he believes in a zone of protection for citizens inside the United States.

But the Feinstein amendment does not apply to only those American citizens who commit belligerent acts inside the United States; it would also prohibit the long-term military detention of American terrorists such as Anwar al-Awlaqi, who committed terrorist acts outside the United States. As a result, this amendment would have the perverse effect of allowing American belligerents overseas to be targeted in lethal strikes but not held in U.S. military detention until the end of hostilities. That makes no sense whatsoever.

I am also concerned about the ambiguity in the amendment's language and the uncertainty it will cause our operators, especially those overseas. The amendment exempts American citizens from detention without trial until the end of hostilities. But short of the end of hostilities, the amendment appears to allow detention without trial. Is it the Senator's intent to allow for some long-term detention of Americans without trial?

This is troubling because we don't know how the prohibition will be interpreted by our operators or the courts that will hear inevitable habeas challenges. Would the military be permitted to hold a captured belligerent for a month, a few months, or a few years, as long as it was not until the end of hostilities? Or would the military interpret the amendment as a blanket prohibition against military detention of Americans for any period of time? If the military rounded up American terrorists such as Adam Gadahn or Adnan Shukrijumah among a group of terrorists, would they have to let these Americans go because the military would not be permitted to detain them? Would more American belligerents be killed in strikes if capture-and-detain operations were perceived to be unlawful? I don't believe we can leave our operators with this kind of uncertainty.

Finally, we should all remember the provisions of the National Defense Authorization Act do not provide for a new authority to hold U.S. citizens in military detention. American citizens can be held in military detention under current law. Contrary to some claims that were made yesterday and debated on this floor, these Americans would be given ample due process through their ability to bring habeas corpus challenges to their detention in Federal court. The Supreme Court has held in the Hamdi case that the detention of enemy combatants without the prospect of criminal charges or trial until the end of hostilities is proper under the AUMF and the Constitution. Hamdi is a U.S. citizen. This is not a new concept. In reaching its decision, the Hamdi Court cited the World War II case, Ex parte Quirin, in which the Supreme Court held:

[C]itizenship in the United States as an enemy belligerent does not relieve him from the consequences of a belligerency.

In conclusion, I understand Senator Feinstein's motivation, but I just don't believe this amendment does what she wants it to do, and there will be unintended consequences that could seriously hamper overseas capture operations. Mr. President, I urge my colleagues to oppose the Feinstein amendment.

Mr. President, I yield the floor.

…

AMENDMENT NO. 1358

Madam President, if I may very briefly also address the importance of the Global Hawk with a brief overview of amendment No. 1358. This amendment simply states that it is the sense of Congress that the Secretary of the Air Force should continue to abide by the guidelines set forth in the acquisition decision memorandum issued June 14, 2011 from the Office of the Secretary of Defense. That memorandum on Global Hawk, the RQ-4 Global Hawk, found that the Global Hawk UAS is essential to national security and that there is no other program that can provide the benefits to the warfighter that the Global Hawk can provide.

The Global Hawk is a vital intelligence surveillance and reconnaissance asset. The Global Hawk flies at high altitude. It can fly at extended ranges and for long periods of time, and it can carry a wide array of sensors simultaneously.

We have invested a lot of time and a lot of money in this platform and it is paying fast dividends. The Global Hawk is flown in a wide variety of missions all over the world in support for things such as CENTCOM operations, humanitarian relief efforts in Japan and Haiti, and extensively for operations in Libya. For these reasons and many more, my amendment stresses that the Air Force must continue to heed the conclusions of the June 14, 2011 acquisition decision memorandum on the RQ-4 Program. The RQ-4, which is Global Hawk, remains essential for United States national security and is irreplaceable.

The bottom line is America needs to support and continue the Global Hawk. Our commanders require as much information about the battlefield as they can get. The RQ-4 represents a new generation of ISR aircraft with unprecedented capabilities.

Finally, we must invest in this essential capacity precisely because budgets are tight. As the Pentagon concluded in June, the Global Hawk represents the most cost-effective way to meet the requirements of our warfighters now and in the future.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

AMENDMENT NO. 1274

Mr. SESSIONS. Madam President, I wish to address amendment 1274, which would clarify what I believe is existing law that the President has authority to continue to detain an enemy combatant under the law of war, following a trial before a military commission or an article III court, and regardless of the outcome of that trial. Let me explain what I mean.

As I said yesterday, even under the law of war the President has the authority to detain an enemy combatant, a prisoner of war, a captured enemy soldier, a belligerent. The President can detain him through the duration of the hostilities. The President is not required--the Commander in Chief is not required to release an individual whose sworn duty it is to return to his military outfit and commence hostilities again against the United States. That individual could be killed on the battlefield, but if captured, you are not required, under all laws of war that I am aware of and certainly the Geneva Conventions--you can maintain that individual in custody to prevent him from attacking you. But you can also try an individual who has been captured if that individual violated the rules of war.

For example, a decent soldier from Germany--many of them were held in my State of Alabama. They behaved well. They made paintings of American citizens, they did a lot of things, and did not cause a lot of trouble. They were in uniform and they complied with the rules of war and they were not tried as illegal enemy combatants.

But many of the terrorists today do not wear uniforms, deliberately target innocent men, women, and children, and deliberately violate multiple rules of war. Those individuals are subject, in addition to being held as a combatant, as an unlawful combatant. They can be prosecuted and they should be prosecuted. In World War II a group of Nazi saboteurs in the Ex parte Quirin case were let out of a submarine off, I think, of Long Island. They came into the country with plans to sabotage the United States. They were captured and tried by military commissions. Several were American citizens. A number of them--most of them, frankly--after being tried and convicted, were executed. The Supreme Court of the United States approved that procedure.

But recent cases demonstrate the potential problem we have today. One Guantanamo Bay detainee has already raised the question I have discussed before the military commission where he is being tried. Abd al-Rahim al-Nashiri, the alleged mastermind of the USS Cole bombing, was arraigned before a military commission on November 9. He was held not only as an al-Qaida, or a belligerent against the United States, but he was charged with a violation of the rules of war.

This was a group that sneaked into the harbor pretending to be innocent people and ran their boat against the Cole, killing a number of U.S. sailors.

I remember being at a christening of one of the Navy ships at Norfolk not long after this. I walked out of that area and I heard one of the sailors cry out: Remember the Cole. The hair still stands up on my neck when I hear it.

We have an obligation to defend our men and women in

uniform. When they are out on the high sea or they are in a neutral port, they expect to be treated according to the laws of war and then they are murdered by an individual such as this.

This individual's lawyers filed a motion asking the military judge to clarify the effect of an acquittal, should the commission acquit him. He argued that the members of the committee had a right to know what would happen if he were acquitted because they might object to taking part in what he called a show trial if it turned out that he would continue to be detained at Guantanamo Bay.

There is another case in which the administration was almost confronted with the problem a year ago, in the case of a former Guantanamo detainee, an al-Qaida member named Ahmed

Ghailani, who was responsible for the 1998 embassy bombings in Kenya and Tanzania. Most of us remember those early al-Qaida bombings against our embassies in Africa.

After the Justice Department chose to prosecute Ghailani in an article III civilian court and directed the United States Attorney not to seek the death penalty--I am not sure why that ever happened; we don't know--but the jury acquitted him on 284 out of 285 counts. Luckily, he received a life sentence on the single count of conspiracy, for which he was convicted.

But what if he had not been convicted? What if there was insufficient evidence to prove he committed a crime, but not insufficient evidence to prove he was a combatant against the United States? Al-Qaida has declared war against the United States, officially and openly. The U.S. Congress has authorized the use of military force against al-Qaida, which is the equivalent of a declaration of war.

What if he had received a modest sentence after being convicted and had credit for time served? What if he had been acquitted on all 285 counts? Would the President have been required to release him into the United States, if the government could not get some country to take him? That would be wrong. He was at war against the United States. He was a combatant against the United States. Like any other captured combatant, he can be held as long as the hostilities continue.

By the way, let me note, military commissions are open. If they decide to try one of these individuals--not just hold him as a prisoner of war but hold him and try him for violation of the laws of war--they get lawyers, they get procedural rights. The Supreme Court has established what those rights are. Congress has passed laws effectuating what the Supreme Court said these trials should consist of, and a mechanism has been set up to fairly try them.

But enemy combatants are not common criminals. If a bank robber is denied bail, he remains in jail awaiting a trial, a speedy public trial, with government-paid lawyers. Enemy combatants are not sitting in Guantanamo Bay awaiting trial by a military commission, or by an article III court. They are held in military custody precisely because they are enemies, combatants against the United States. They should continue to be held there as long as the war continues and as long as they do not remain a threat to return to the battlefield against the United States.

This is an important point, considering that 27 percent of the former Guantanamo detainees who have been released--161 out of 600--have returned to the battlefield, attacked Americans. This Nation has no obligation to release captured enemy prisoners of war when we know for an absolute fact that 27 percent of them have returned to war against the United States. How many others have but we do not have proof of it? That is what the whole history of warfare is.

Lincoln ceased exchanging prisoners with the South after he realized they had more soldiers in the South. It was not to his advantage to release captured southern soldiers who would return to the fighting, so he held them until the war was over. Under the laws of war, the President has the authority to prevent an enemy combatant from returning to the battlefield. That is consistent with all history.

This amendment--please, Senators, I hope you would note--would make it clear that the President simply has authority to continue to detain enemy combatants held pursuant to the rules of war, even though they may have been tried, regardless of where that trial would be held and what the outcome was, as long as, of course, they could prove they were an enemy combatant and violating the rules of war.

I would note one thing.

I see my friend, the Senator from California, is here and probably is ready to speak.

On the question of citizenship, can a citizen be held in this fashion? The Supreme Court has clearly held they may. But the Senator is offering legislation that might change that. My amendment does not answer that question. It simply says a combatant should be able to be held under the standard of a prisoner of war, a combatant, even if they had been prosecuted for violation of the laws of war and acquitted.

It is common sense. I believe the courts will hold that, but it is an issue that is out there. I think Congress would do well to settle it today.

I urge my colleagues to do so.

I thank the Chair, and I yield the floor. I note the absence of a quorum.

…

Mr. LEVIN. Mr. President, I ask unanimous consent that upon the conclusion of the postcloture time, the pending germane Feinstein amendment, No. 1126, be the pending business; that the Senate proceed to vote in relation to the following Feinstein amendments in the order listed: Feinstein amendment No. 1126, Feinstein amendment No. 1456; that there be 2 minutes equally divided in the usual form prior to the second vote--there will be more time than that prior to the first vote; that no amendment be in order to either amendment prior to the votes, and that all postcloture time be considered expired at 6 p.m.

The PRESIDING OFFICER. Is there objection?

Mr. McCAIN. Reserving the right to object, and I will not object, for the benefit of our colleagues, after spirited discussions for a long period of time we have reached a compromise with the Senator from California on language concerning detainees and there are certain Members on my side who wanted a vote on the original amendment as written. We modified it, so that there will be a vote on the original Feinstein amendment and then on the one which is modified by agreement among most of the people involved. There may be some who will still oppose it, but we have reached an agreement among the Senator from California, the chairman, myself, the Senator from Idaho, the Senator from South Carolina and others, that I think will be agreeable to the majority of the Members.

I suggest to my friend, the chairman, that when the vote starts at 6, perhaps we can line up the other remaining amendments, on some of which we hope to get voice votes, some of which will require recorded votes, as is the procedure under postcloture.

Mr. LEVIN. Mr. President, this has not yet been ruled on. I want to modify very slightly what I said in the unanimous consent request. I said that the Senate proceed to votes in relation to the following Feinstein amendments. I should have said the Senate proceed to votes on the Feinstein amendments in the order listed.

The PRESIDING OFFICER. Is there objection to the request, as modified?

Without objection, it is so ordered.

Mr. LEVIN. Mr. President, I have two other unanimous consent requests before we turn this over to the Senator from California. I ask unanimous consent that it be in order to make a point of order en bloc against the list of amendments in violation of rule XXII that is at the desk.

The PRESIDING OFFICER. Is there objection?

Without objection, the points of order are sustained and the amendments fall.

The nongermane amendments are as follows:

Amendments Nos. 1255, 1286, 1294, 1259, 1261, 1263, 1296, 1152, 1182, 1184, 1147, 1148, 1204, 1179, 1137, 1138, 1247, 1249, 1248, 1118, 1117, 1187, 1211, 1239, 1258, 1186, 1160, 1253, 1068, 1119, 1089, 1153, 1154, 1171, 1173, 1099, 1100, 1139, 1200, 1120, 1155, 1097, 1197; as being dilatory: No. 1174: as being drafted in improperly: No. 1291

Mr. McCAIN. Mr. President, in the minutes remaining between now and 6 p.m. I hope we could roughly divide time on the amendment between the two sides.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. I would hope and I ask the time between now and 6 o'clock be divided between the two sides. We will yield immediately to Senator Feinstein.

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

Mr. LEVIN. Mr. President, I have one more unanimous consent.

The PRESIDING OFFICER. The Senator from Michigan.

AMENDMENTS NOS. 1290 AND 1256 WITHDRAWN

Mr. LEVIN. I ask unanimous consent that the following amendments be withdrawn: Rubio amendment No. 1290 and Merkley amendment No. 1256.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The amendments are withdrawn.

AMENDMENT NO. 1126

Mr. LEVIN. I thank the Presiding Officer and all those who have been involved in working out this approach that allows us now to vote on two amendments, the original Feinstein amendment that is pending, plus an alternative which I think, hopefully, will command great support.

Mr. McCAIN. I ask how much time is remaining?

The PRESIDING OFFICER. Eight minutes on each side.

Mr. McCAIN. I wish to give 3 minutes to the Senator from South Carolina, preceded by 2 minutes from the Senator from Idaho, and 2 minutes for the Senator from New Hampshire if she arrives.

Mrs. FEINSTEIN. Shall I go first?

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I wish to explain what has happened this long afternoon. Originally some of us, namely Senators Leahy, Durbin, Udall of Colorado, Kirk, Lee, Harkin, Webb, Wyden, Merkley, and myself, realized that there was a fundamental flaw in section 1031 of the bill.

There is a difference of opinion as to whether there is this a fundamental flaw. We believe the current bill essentially updates and restates the authorization for use of military force that was passed on September 18, 2001. Despite my support for a general detention authority, the provision in the original bill, in our view, went too far. The bill before us would allow the government to detain U.S. citizens without charge until the end of hostilities. We have had long discussions on this.

The disagreement arises from different interpretations of what the current law is. The sponsors of the bill believe that current law authorizes the detention of U.S. citizens arrested within the United States, without trial, until ``the end of the hostilities'' which, in my view, is indefinitely.

Others of us believe that current law, including the Non-Detention Act that was enacted in 1971, does not authorize such indefinite detention of U.S. citizens arrested domestically. The sponsors believe that the Supreme Court's Hamdi case supports their position, while others of us believe that Hamdi, by the plurality opinion's express terms, was limited to the circumstance of U.S. citizens arrested on the battlefield in Afghanistan, and does not extend to U.S. citizens arrested domestically. And our concern was that section 1031 of the bill as originally drafted could be interpreted as endorsing the broader interpretation of Hamdi and other authorities.

So our purpose in the second amendment, number 1456, is essentially to declare a truce, to provide that section 1031 of this bill does not change existing law, whichever side's view is the correct one. So the sponsors can read Hamdi and other authorities broadly, and opponents can read it more narrowly, and this bill does not endorse either side's interpretation, but leaves it to the courts to decide.

Because the distinguished chairman, the distinguished ranking member, and the Senator from South Carolina assert that it is not their intent in section 1031 to change current law, these discussions went on and on and they resulted in two amendments: our original amendment, which covers only U.S. citizens, which says they cannot be held without charge or trial, and a compromise amendment to preserve current law, which I shall read:

On page 360, between lines 21 and 22, insert the following:

Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens or lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.

I believe this meets the concerns of the leadership of the committee and this is presented as an alternative. There are those of us who would like to vote for the original amendment, which I intend to do, as well as for this modifying amendment. They will appear before you as a side-by-side, so everyone will have the chance to vote yea or nay on the original or yea or nay on the compromise. As I said, I would urge that we vote yes on both.

This is not going to be the world as we see it postvote, but I will tell you this, the chairman and the ranking member have agreed that the modified language presented in the second vote will be contained in the conference; that they will do everything they can to contain this language in the conference.

In the original amendment--my original amendment--which affects only U.S. citizens, that is not the case. They are likely to drop that amendment. So I wish to make the point by voting for both, and I would hope others would do the same. I think a lot has been gained. I think a clear understanding has been gained of the problems inherent in the original bill. I think Members came to the conclusion that they did not want to change present law and they wanted to extend this preservation of current law not only to citizens but to legal resident aliens as well as any other persons arrested in the United States. That would mean they could not be held without charge and without trial. So the law would remain the same as it is today and has been practiced for the last 10 years.

I actually believe it is easy to say either my way or the highway. I want to get something done. I want to be able to assure people in the United States that their rights under American law are protected. The compromise amendment, which is the second amendment we will be voting on, does that. It provides the assurance that the law will remain the same and will not affect the right of charge and the right of trial of any U.S. citizen, any lawful legal alien or any other person in the United States. We have the commitment by both the chairman and the ranking member that they will defend that in conference.

There are those who say I wish to just vote for the original amendment. That is fine. I am not sure it will pass. I don't know whether it will pass, but in my judgment, the modification is eminently suitable to accomplish the task at hand and has the added guarantee of the support of the chairman, the ranking member in a conference committee with the House, which I think is worth a great deal. They have given their word, and I believe they will keep it. This Recordwill reflect that word.

AMENDMENT NO. 1456

I call up my amendment No. 1456, which is the modification.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from California [Mrs. Feinstein] proposes an amendment numbered 1456.

Mrs. FEINSTEIN. I ask unanimous consent that the reading of the amendment be dispensed with.

There are others who wish to speak.

The amendment is as follows:

On p 360, between lines 21 and 22, insert the following:

(e) Nothing in this section shall be construed to affect existing law or authorities, relating to the detention of United States citizens, lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.

I will yield the floor.

Mr. LEVIN. How much time is there on our side?

The PRESIDING OFFICER. One minute.

Mr. LEVIN. I wanted to have a couple minutes. I wonder if Senator McCain is here, if there is an objection to extending this by 10 minutes. Is there objection? I am not going to do that without him here.

Madam President, if the other side is ready to go, they can start using the time on their side.

Mr. GRAHAM. How much time do we have?

The PRESIDING OFFICER. Eight minutes. You were allotted 3 minutes.

Mr. GRAHAM. Will the Chair warn me when I use 2 minutes.

The PRESIDING OFFICER. Yes.

Mr. GRAHAM. To Senator Feinstein, I do believe the second provision is where we want to be, at least from my point of view. To my colleagues, I never intended by 1031 to change the law imposing a greater burden on American citizens or more exposure to military detention, nor did I wish to have additional rights beyond what exist today. The problem I have with Senator Feinstein's amendment is it says the authority 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.

Here is my concern. When you tell a judge, as a defense attorney: I want my client's rights preserved regarding a civilian trial guaranteed in this section--and the end of hostilities could be 30 years from now--Your Honor, if these rights mean anything, they need to attach now--if the civilian rights attach immediately upon detention, what I think would be a problem is that the military interrogation is lost. American citizens are not subject to a military commission trial. A lot of people on my side didn't like that.

I do want to make sure American citizens go into article III courts, but the law has been since World War II, if a person joins the enemy, even as an American citizen, they are subject to being detained for interrogation purposes. That is my goal and that has always been my goal. We can detain an American who has sided with al-Qaida, if they are involved with hostile acts, to gather intelligence, and that is a proper thing to have been doing. It was done in World War II when American citizens helped the Nazis. If an American citizen wants to help al-Qaida involved in a hostile act, then they become an enemy of this Nation. They can be humanely detained, and that is my concern about the Senator's amendment; that it would take that away.

We have common ground on the second amendment, and at the end of the day, the Senate has talked a lot about different things. This has been a discussion about something important and I, quite frankly, enjoyed it.

I yield my time.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. RISCH. First of all, let me say I think there has been an adequate compromise that has been reached, and we are to have a side-by-side to vote on which will give everybody the opportunity to express themselves. Let me say that every single one of us on this floor has a goal to protect the rights of U.S. citizens.

This country was founded by people who had just gone through some very difficult times with a government that was very oppressive on them, and they wrote the Constitution specifically to protect themselves and to protect individuals from the government. Those constitutional

provisions today are as good as they were then. Every single one of us wants to see that American citizens are protected; that is, protections that take place in the case of criminal cases.

In the case of a war, in the case where a U.S. citizen joins enemy combatants and fights against the United States, there is a different standard--although a delicate division--that exists. If we look at the provisions of section 1031, where covered persons are defined, it is very clear it applies only to people who participated in the September 11, 2001, attack on the United States, and it applies to people who are part of it or who have substantially supported al-Qaida and the Taliban or its associated forces and have actually committed a belligerent act or have directly participated in the hostilities.

This is drawn very carefully and very narrowly so a U.S. citizen can--as my good friend from Kentucky always says--be able to file a writ of habeas corpus in the U.S. district court and have the U.S. district judge determine whether a person is actually an enemy combatant. If that U.S. district judge turns it down, that person does not necessarily go free. The U.S. Government can then charge them with treason or any one of a number of crimes, but they will be tried in the U.S. district court.

On the other hand, if they are found to be an enemy combatant by a U.S. district judge whose decision is reviewable by the circuit court and if the Supreme Court chooses--by the Supreme Court, if they are found to be the enemy combatant, then they will, indeed, be subject to this.

So this has been very narrow. People who are watching this and who are concerned about the civil liberties of U.S. citizens, as I am, as people in Idaho are, as people in every State in America are, under those circumstances, those people will be well protected. We will have the amendment here that everybody will have the opportunity to express themselves on.

I will yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. LEVIN. Mr. President, I would ask that there be 5 additional minutes, evenly divided, so we could have 3 minutes left on our side. I would split that with the Senator from Illinois.

The PRESIDING OFFICER. Is there objection?

Mr. RISCH. We have no objection.

Mr. LEVIN. Mr. President, we are soon going to be voting on two amendments. The first amendment that is proposed, the first Feinstein amendment restricts the authority that was available and is available currently to the President of the United States under the laws of war. That authority is if an American citizen joins a hostile Army against us, takes up arms against us, that person can be determined to be an enemy combatant. That is not me saying that; that is the Constitution. That is the Supreme Court of the United States in the Hamdi case: ``There is no bar to this Nation's holding one of its own citizens as an enemy combatant.''

The problem with the Feinstein amendment is that current authority of the President to find and designate an American citizen who attacks us, who comes to our land and attacks us as an enemy combatant would be restricted. We should not restrict the availability of that power in the President. Now we have an alternative. In the second Feinstein amendment, which I ask unanimous consent to be a cosponsor of--

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

Mr. LEVIN. In the second amendment, we have an alternative because now it would provide the assurance that we are not adversely affecting the rights of the U.S. citizens in this language. Senator McCain, Senator Graham, and I have argued on this floor that there is nothing in our bill--nothing which changes the rights of the U.S. citizens. There was no intent to do it, and we did not do it.

What the second Feinstein amendment provides is that nothing in this section of our bill shall be construed to affect existing law or authorities relating to the detention of the U.S. citizens or lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.

It makes clear what we have been saying this language already does, which is that it does not affect existing law relative to the right of the executive branch to capture and detain a citizen. If that law is there allowing it, it remains. If, as some argue, the law does not allow that, then it continues that way. We think the law is clear in Hamdi that there is no bar to this Nation holding one of its own citizens as an enemy combatant, and we make clear whatever the law is. It is unaffected by this language in our bill.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I wish to thank my colleagues, Senators Graham and Levin, and particularly Senator Feinstein for working so hard to come to an agreement on section 1031. I was concerned that the United States would, for the first time in the history of this country, with the original language, authorize indefinite detention in the United States. But we have agreed to include language in this bill with the latter amendment that makes it clear that this bill does not change existing detention authority in any way.

It means the Supreme Court will ultimately decide who can and cannot be detained indefinitely without a trial. To this day, the Supreme Court has never ruled on the question of whether it is constitutional to indefinitely detain a U.S. citizen captured in the United States. Some of my colleagues see this differently, but the language we have agreed on makes it clear that section 1031 will not change that law in any way. The Supreme Court will decide who will be detained; the Senate will not.

I ask unanimous consent to be added as a cosponsor to the second pending amendment by Senator Feinstein.

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

All time has expired on the majority side.

Mr. GRAHAM. How much time do we have remaining?

The PRESIDING OFFICER. There is 4 1/2 minutes remaining.

Mr. GRAHAM. Mr. President, I would like to take the opportunity to end what I think has been a very good debate. Senator Feinstein--and I know she is busy--said something on the floor that I wish to reiterate: that the second amendment which Senator Durbin just suggested we have reached a compromise on, I am fully committed to making sure it stays in the conference report. Some folks in the House may have a problem, but I think it is good, sound law.

The goal for me has never been to change the law, to put an American citizen more at risk than they are today. It is just to keep the status quo and acknowledge from the point of view of the

Congress that the Obama administration's decision to detain people as enemy combatants lies within the President's power to do so. The Court has said in In re Quirin and in the Hamdi case that at a time of war the executive branch can detain an American citizen who decides to collaborate with the Nazis, as well as al-Qaida, as an enemy combatant. They can hold them for interrogation purposes to collect intelligence. We don't have to take anybody into court and put them on trial because the goal is to protect the Nation from another attack.

The law also says no one, including an American citizen, can be held indefinitely without going to an article III court. Every person determined to be an enemy combatant by the executive branch has to have their case presented to an independent judiciary, and the government has to prove to a Federal judge by a preponderance of the evidence that they fall within this narrow exception. The government has lost about half the cases and won about half the cases.

My concern with Feinstein 1 is that it would change the law; that the law would be changed for the first time ever, saying we cannot hold an American citizen who has collaborated with the enemy for intelligence gathering purposes. I think homegrown terrorism is growing. If an American citizen left this country and went to Pakistan, got radicalized in a madrasah, came back and started trying to kill Americans, I think we should have the authority to detain them as with any belligerent, just like in World War II, and gather intelligence as to whether somebody else may be coming.

So that is what I want to preserve. With all due respect to Senator Feinstein, I think her first amendment very much puts that in jeopardy. It is going to be confusing, litigation friendly, so let's just stay with what we believe the law is.

As to Senator Durbin, he has one view, I have another, but we have a common view; that is, not to do anything to 1031 that would change the law. The ultimate authority on the law is not Lindsey Graham or Dick Durbin, it is the Supreme Court of the United States. That is the way it should be, and that is exactly what we say here. We are doing nothing to change the law when it comes to American citizen detention to enhance it or to restrict whatever rights the government has or the citizen has. I think that is what we need to say as a nation.

One last word of warning to my colleagues, the threats we face as a nation are growing. Homegrown terrorism is going to become a greater reality, and we need to have tools. Law enforcement is one tool, but in some cases holding people who have decided to help al-Qaida and turn on the rest of us and try to kill us so we can hold them long enough to interrogate them to find out what they are up to makes sense. When we hold somebody under the criminal justice system, we have to read them their rights right off the bat under the law or we don't because the purpose is to gather intelligence. We need that tool now as much as at any other time, including World War II.

Thank you all for a great debate. I hope we can vote no on Feinstein 1 and have a strong bipartisan vote on Feinstein 2.

With that, I yield the floor.

The PRESIDING OFFICER. Is all time yielded back?

Mr. GRAHAM. If anybody wishes to speak, speak now.

All time is yielded back.

The PRESIDING OFFICER. Under the previous order, the question is on amendment No. 1126 offered by the Senator from California.

Mr. LEVIN. Could I just interrupt with a unanimous consent request that prior to each vote there be 2 minutes of debate equally divided in the usual form and that it start with the vote after this one.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. McCAIN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second.

The question is on agreeing to amendment No. 1126.

The clerk will call the roll.

The assistant legislative clerk called the roll.

The result was announced--yeas 45, nays 55, as follows:

… The amendment (No. 1126) was rejected.

Mr. LEVIN. Mr. President, I move to reconsider the vote.

Mr. MENENDEZ. I move to lay that motion on the table.

The motion to lay upon the table was agreed to.

AMENDMENT NO. 1456

The PRESIDING OFFICER (Mr. UDALL of Mexico). Under the previous order, there will be now be 2 minutes of debate equally divided prior to a vote on amendment No. 1456 offered by the Senator from California, Mrs. Feinstein.

The majority leader is recognized.

Mr. REID. I ask unanimous consent that all votes relating to the Defense authorization bill be 10 minutes in duration, including final passage.

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

The Senator from Michigan.

Mr. LEVIN. Mr. President, a number of my colleagues have asked where we are. We are going to have probably three or four more rollcall votes, hopefully including final passage. There is also a package--and everyone should listen to this because at least 70 of us are affected. There is a package of about 70 amendments which have been cleared. However, as of the moment, there is an objection to that package being adopted.

When I say the package has been cleared, what I am saying is there has been no objection to the substance of any of those 70 amendments. If there was an objection to the substance, they would not be cleared. So there is no objection to the substance of those approximately 70 amendments, but you should be aware, because most of us have amendments in that cleared

managers' package, that unless that objection is removed, we cannot get that package adopted tonight.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I wonder if I might be able to make a few comments.

This amendment is a compromise amendment. I think it is actually a very good amendment. I want to thank the chairman of the committee, the ranking member, and Senator Graham, who participated in a rather lengthy discussion, and this is the result.

The amendment--I will read it. It says:

Nothing in this section shall be construed to affect existing law or authority relating to the detention of United States citizens or lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.

There is a commitment from both the chairman and the ranking member and Senator Graham that they will defend this amendment in conference. So I hope everyone will vote for it because essentially it just supports present law, whether one supports the broad interpretation of present law, or one supports a more narrow interpretation of present law. There is no change in law.

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

The Senator from Michigan.

Mr. LEVIN. Mr. President, I very much support this amendment, I am a cosponsor, and I hope we can all vote for it. This does what we said--those of us who wrote this bill--the bill does and does not do all along. It does not change current law. This amendment reinforces the point that this bill does not change current law relative to this section of this bill. The section of this bill does not change current law relative to the detention of people in the United States.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. Mr. President, I will not repeat what the chairman said except that I would like to thank Senator Feinstein for her willingness to sit down and negotiate with us, and Senator Durbin, who has been a passionate advocate. I would also like to thank all of the people who came to the floor so often. I think the Senate is a better institution as a result of the debate, and I am sure the Senate and the American people are much better informed on this very important national security aspect of this bill.

I thank my colleagues. I urge an aye vote.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mrs. FEINSTEIN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

The result was announced--yeas 99, nays 1, as follows:

…

The amendment (No. 1456) was agreed to.

…

AMENDMENT NO. 1080 WITHDRAWN

The PRESIDING OFFICER. Under the previous order, there will now be 2 minutes of debate equally divided prior to a vote on amendment No. 1080, offered by the Senator from Vermont, Mr. Leahy.

The Senator from Michigan.

Mr. LEVIN. Mr. President, Senator Leahy authorized me and told me he was withdrawing this amendment relative to military custody because of all of the actions which have been previously taken. I am very confident that is what he told me, so I am going to withdraw that amendment on his behalf.

The PRESIDING OFFICER. Without objection, the amendment is withdrawn.

AMENDMENT NO. 1274

The PRESIDING OFFICER. Under the previous order, there will now be 2 minutes of debate equally divided prior to a vote on amendment No. 1274, offered by the Senator from Alabama, Mr. Sessions.

The Senator from Alabama.

Mr. SESSIONS. Mr. President, this amendment is crafted to simply clarify and affirm what appears to be the law, and logic tells us should be the law today.

If an individual is apprehended as a prisoner of war, they are detained under the laws of war until the conflict ends. But if, after being detained or when they are detained, it is determined they have committed crimes against the laws of war, they can be tried for those crimes.

There is a slight ambiguity. I think it is pretty clear the military would have a right to continue to detain them as a prisoner of war if they were not convicted of the much higher burden crime against the laws of war.

So the essence of this is simply to say what the judge said in the case involving the African Embassy bombing, the Ghailani case. The guy was acquitted of 284 out of 285 counts, and the judge said: You probably would be detained under the laws of war. So this would clarify that.

The PRESIDING OFFICER. Who yields time?

The Senator from Michigan.

Mr. LEVIN. Mr. President, I think this can be accepted on a voice vote. I have great problems with it, but I think there is probably a majority here that will favor it and a distinct minority perhaps that would not. But it is something which basically doesn't add to the existing law, which says this is theoretically possible, and all this does is say it is possible one could be acquitted of a criminal case and still be held as an enemy combatant.

Mr. PAUL. I object. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the amendment.

The clerk will call the roll.

The legislative clerk called the roll.

The result was announced--yeas 41, nays 59, as follows:

…

The amendment (No. 1274) was rejected.

…

Mrs. FEINSTEIN. Mr. President, I rise to respond to a colloquy yesterday that occurred between Senators Ayotte, Lieberman, and Graham regarding amendment No. 1068 offered by Senator Ayotte to the Defense authorization bill.

Senator Ayotte's amendment would eliminate measures that provide our interrogators with the guidance and clarity they need to effectively solicit actionable intelligence while upholding American values. In doing so, the amendment would override the better judgment of our military and intelligence professionals in a manner that will harm, not improve, our short- and long-term security.

Yesterday, Senator Lieberman said on the Senate floor that he wants prisoners taken captive by the United States to be ``terrified about what is going to happen to them while in American custody.'' He also said he wants ``the terror they inflict on others to be felt by them.'' I believe that such statements are antithetical to fundamental American values. I firmly believe that America will not and cannot lower itself to the level of terrorists. To do so would be to abandon our most cherished principles and what our country stands for.

There was also discussion of abuses at Abu Ghraib, which diminished America's standing and outraged the American public, and there was discussion about how there were a few isolated incidents at Abu Ghraib.

As chairman of the Select Committee on Intelligence, I can say that we are nearing the completion a comprehensive review of the CIA's former interrogation and detention program, and I can assure the Senate and the Nation that coercive and abusive treatment of detainees in U.S. custody was far more systematic and widespread than we thought.

Moreover, the abuse stemmed not from the isolated acts of a few bad apples but from fact that the line was blurred between what is permissible and impermissible conduct, putting U.S. personnel in an untenable position with their superiors and the law.

That is why Congress and the executive branch subsequently acted to provide our intelligence and military professionals with the clarity and guidance they need to effectively carry out their missions. And that is where the Army Field Manual comes in.

However, Senator Ayotte's amendment would require the executive branch to adopt a classified interrogation annex to the Army Field Manual, a concept that even the Bush administration rejected outright in 2006.

Senator Ayotte argued that the United States needs secret and undisclosed interrogation measures to successfully interrogate terrorists and gain actionable intelligence. However, our intelligence, military, and law enforcement professionals, who actually interrogate terrorists as

part of their jobs, universally disagree. They believe that with the Army Field Manual as it currently is written, they have the tools needed to obtain actionable intelligence from U.S. detainees.

As an example, in 2009, after an extensive review, the intelligence community unanimously asserted that it had all the guidance and tools it needed to conduct effective interrogations. The Special Task Force on Interrogations--which included representatives from the CIA, Defense Department, the Office of the Director of Intelligence, and others--concluded that ``no additional or different guidance was necessary.''

Since 2009, the interagency High Value Detainee Interrogation Group has briefed the Select Committee on Intelligence numerous times. The group has repeatedly assured the committee that they have all authority they need to effectively gain actionable intelligence. As a consummate consumer of the intelligence products they produce, I agree.

Unfortunately, amendment No. 1068 would overrule the judgments of these professionals--who have served under both the Bush and Obama administrations--and impede their important work.

If our intelligence community is telling us that the current guidelines and interrogation techniques are effective, why would we add secret interrogation methods?

Senator Ayotte's amendment would muddy the waters on what is and isn't permissible in interrogating U.S. detainees. Her amendment would overturn not only the Executive order on lawful interrogations but also roll back the McCain amendment passed in 2005--which the Senate approved in a 90-to-9 vote--by allowing some interrogators, including some military interrogators, to evade established interrogation protocols.

In creating unnecessary exceptions to existing interrogation guidance, Senator Ayotte's amendment would deprive our military and intelligence professionals of the clarity they deserve and threaten to reopen the door to secret techniques and other abuses of U.S. detainees.

While Senator Ayotte has insisted that her amendment would continue to prohibit cruelty, the colloquy on the floor suggests otherwise. When SenatorGraham asked her if the amendment was needed to bring back enhanced interrogation techniques--techniques we now know included induced hypothermia, slapping, sleep deprivation, and forced stressed positions she responded in the affirmative.

We cannot have it both ways. Either we make clear to the world that the United States will honor our values and treat prisoners humanely or we let the world believe that we have secret interrogation methods to terrorize and torture our prisoners.

The Ayotte proposal also ignores the dangerous practical implications for our intelligence and military partners overseas.

The colloquy between the Senators yesterday suggests they believe the United States will have some advantage by having a secret list of interrogation techniques and that this will have no negative implications, aside from giving interrogators more options.

Last year, GEN David Petraeus said it best when he unequivocally asserted that we should not return to so-called ``enhanced'' techniques because they ``undermine your cause'' and ``bite you in the backside in the long run.''

Current U.S. law and policy makes clear that America is committed to fundamental humane treatment standards. By overturning the status quo, the Ayotte amendment would create dangerous pockets of uncertainty to the detriment of our international standing, our intelligence collectors, and our national security.

Should this amendment ever come to the floor of the Senate, I urge my fellow Senators to oppose it.

…

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I ask unanimous consent that upon passage of S. 1867, the Armed Services Committee be discharged from further consideration of H.R. 1540 and the Senate proceed to its consideration; that all after the enacting clause be stricken and the text of S. 1867, as amended, and passed by the Senate, be inserted in lieu thereof; that H.R. 1540, as amended, be read a third time, passed, and the motion to reconsider be laid upon the table; that the Senate insist on its amendment, request a conference with the House on the disagreeing votes of the two Houses; and the Chair be authorized to appoint conferees on the part of the Senate, with the Armed Services Committee appointed as conferees; that no points of order be considered waived by virtue of this agreement; and all with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. LEVIN. I thank everybody and I thank the Chair.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill, as amended, pass?

Mr. McCAIN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

The result was announced--yeas 93, nays 7, as follows:

…

The bill (S. 1867), as amended, was passed.

(The text of the bill will be printed in a future edition of the Record.)

Mr. HARKIN. Mr. President, as a Senator, I have no greater responsibility than to work to ensure the security of the United States, and I believe the military should have all the tools they need to keep our Nation safe. I support the vast majority of the Defense authorization bill. However, because I believe we can protect our national security without infringing on critical constitutional values, I could not support this bill. The bill fails to clarify that under no circumstance can an American citizen be detained indefinitely without trial. And it mandates for the first time that suspects arrested in the United States will be detained by the military rather than domestic and civilian law enforcement, who since 9/11 have successfully convicted in

civilian courts over 400 terrorists. Finally, the bill would make it more difficult to close the detention center at Guantanamo Bay, for which I have long fought because the detention facility is a stain on our honor and a recruiting tool for terrorists around the world.

Not only do these provisions violate the core values upon which our freedom rests, but they won't make us safer. The Pentagon, CIA Director Petraeus, Intelligence Director Clapper, and FBI Director Mueller all said these provisions will needlessly hurt, rather than help, our national security.

The PRESIDING OFFICER (Mr. Udall of New Mexico). The Senator from Michigan.

Mr. LEVIN. Mr. President, I will be very brief for obvious reasons. But this is a golden moment for us. The proud tradition of the Senate Armed Services Committee has been maintained every year since 1961 and continues with the Senate's passage of the 50th consecutive national defense authorization bill. It always takes a huge amount of work to get a bill of this magnitude done. It could not happen without the support of all the Senators on the committee. I will not thank each and every one--the subcommittee chairs, the ranking members, our staff, the floor staff here, who do extraordinary work. But the bipartisanship of this committee dominates again, and we hope that flavor will continue to dominate forever in the committee and hope it will permeate this Senate.

We always have to work long and hard to pass this bill and no two of these bills are alike. But it's worth every bit of effort we put into it because it is for our security, for our troops, and for their families. I thank all Senators for their roles in keeping our tradition going.

Our committee's bipartisanship also makes this moment possible. I am proud to serve with Senator McCain and grateful for his partnership and friendship. I also want to thank our very dedicated and capable Senate floor staff on both sides of the aisle--Gary Myrick, Trish Engle, Tim Mitchell, and Meredith Mellody on the Democratic side and David Schiappa, Laura Dove, Ashley Messick, and Patrick Kilcur on the Republican side. They have all helped us get this bill across the finish line and we are very grateful to them and all others here on the floor and in both cloakrooms.

Finally, I thank all our committee staff members for their extraordinary drive and many personal sacrifices to get this bill done. Led by Rick DeBobes, our committee's staff director; Peter Levine, our general counsel; and Dave Morriss, our minority staff director, our staff really has given their all to get this bill passed. So to all of you and to all your families, thank you for your hard work. Take a few minutes to celebrate this moment and then put all your talents to work in conference with the House so we can bring a conference report back to the Senate before the holidays.

Mr. President, they all deserve recognition and, as a tribute to their professionalism and as a further expression of our gratitude, I ask unanimous consent that all staff members' names be printed in the Record.

There being no objection, the list was ordered to be printed in the Record, as follows:

Richard D. DeBobes, Staff Director; David M. Morriss, Minority Staff Director; Adam J. Barker, Professional Staff Member; June M. Borawski, Printing and Documents Clerk; Leah C. Brewer, Nominations and Hearings Clerk; Christian D. Brose, Professional Staff Member; Joseph M. Bryan, Professional Staff Member; Pablo E. Carrillo, Minority Investigative Counsel; Jonathan D. Clark, Counsel; Ilona R. Cohen, Counsel; Christine E. Cowart, Chief Clerk;

Jonathan S. Epstein, Counsel; Gabriella E. Fahrer, Counsel; Richard W. Fieldhouse, Professional Staff Member; Creighton Greene, Professional Staff Member.

Ozge Guzelsu, Counsel; John W. Heath, Jr., Minority Investigative Counsel; Gary J. Howard, Systems Administrator; Paul C. Hutton IV, Professional Staff Member; Jessica L. Kingston, Research Assistant; Jennifer R. Knowles, Staff Assistant; Michael J. Kuiken, Professional Staff Member; Kathleen A. Kulenkampff, Staff Assistant; Mary J. Kyle, Legislative Clerk; Gerald J. Leeling, Counsel; Daniel A. Lerner, Professional Staff Member; Peter K. Levine, General Counsel; Gregory R. Lilly, Executive Assistant for the Minority; Hannah I. Lloyd, Staff Assistant; Mariah K. McNamara, Staff Assistant.

Jason W. Maroney, Counsel; Thomas K. McConnell, Professional Staff Member; William G. P. Monahan, Counsel; Lucian L. Niemeyer, Professional Staff Member; Michael J. Noblet, Professional Staff Member; Bryan D. Parker, Minority Investigative Counsel; Christopher J. Paul, Professional Staff Member; Cindy Pearson, Assistant Chief Clerk and Security Manager; Roy F. Phillips, Professional Staff Member; John H. Quirk V, Professional Staff Member; Robie I. Samanta Roy, Professional Staff Member; Brian F. Sebold, Staff Assistant; Russell L. Shaffer, Counsel; Michael J. Sistak, Research Assistant; Travis E. Smith, Special Assistant; William K. Sutey, Professional Staff Member; Diana G. Tabler, Professional Staff Member; Mary Louise Wagner, Professional Staff Member; Barry C. Walker, Security Officer; Richard F. Walsh, Minority Counsel; Bradley S. Watson, Staff Assistant; Breon N. Wells, Staff Assistant.

Mr. LEVIN. To end my thanks--I do not see Senator McCain here. I think he had to leave for a few minutes.

He is here. Let me personally thank him. I thought Senator McCain had to leave.

I put in some thank-yous here on behalf of the committee, and I just want to tell the Senator how tremendous it is to work with him and how this tradition of bipartisanship in our committee has been maintained. The Senator is a very major part of the reason for that happening, and I thank him.

Mr. McCAIN. I thank the chairman. One of the things I look back on with great nostalgia and appreciation is the relationship we have developed over many years. I must say that we have had spirited discussions from time to time, but they have been educational, enlightening, and entertaining. I thank the Senator for his leadership.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, I ask unanimous consent that the next two votes be 10 minutes in duration.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. REID. As the order that is now before the Senate indicates, I have the ability to designate who will be the speakers. We have 1 minute on one and 1 minute on the other. Those 2 minutes will be used by the senior Senator from Pennsylvania, Mr. Casey.

The PRESIDING OFFICER. Under the previous order, the Armed Services Committee is discharged from further consideration of H.R. 1540 and the Senate will proceed to its consideration; all after the enacting clause is stricken and the text of S. 1867, as amended, is

inserted in lieu thereof; the bill, as amended, is considered read a third time and passed, and the motion to reconsider is made and laid upon the table.

The Senate insists on its amendment, and requests a conference with the House on the disagreeing votes of the two Houses, and the Chair appoints Mr.Levin, Mr. Lieberman, Mr. Reed, Mr. Akaka, Mr. Nelson of Nebraska, Mr. Webb, Mrs. McCaskill, Mr. Udall of Colorado, Mrs. Hagan, Mr. Begich, Mr. Manchin, Mrs.Shaheen, Mrs. Gillibrand, Mr. Blumenthal, Mr. McCain, Mr. Inhofe, Mr. Sessions, Mr. Chambliss, Mr. Wicker, Mr. Brown of Massachusetts, Mr. Portman, Ms.Ayotte, Ms. Collins, Mr. Graham, Mr. Cornyn, and Mr. Vitter conferees on the part of the Senate.

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