

# CONGRESS AND THE ADMINISTRATION AGREE: THE GOVERNMENT CAN INDEFINITELY DETAIN US CITIZENS

I've got a long post mostly written on the debate between two awful positions on the detainee provisions in the Defense Authorization.

But let me make something clear. Both sides have already bought off on one principle: that the Administration can indefinitely detain US citizens.

Dianne Feinstein made this clear in her comments yesterday in the Senate (in which she was reading from a letter SJC and SSCI Democrats wrote).

Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force, especially because it would authorize the indefinite detention of American citizens without charge or trial ....

And yet while in the rest of her speech, DiFi laid out problems she had with sections 1032 (mandating military detention in most cases), 1033 (requiring certification before DOD transfers detainees to a third country), and 1035 (giving DOD precedence in detainee decisions), she made not a peep objecting to (as opposed to raising cautions about) this ability to indefinitely detain American citizens.

In response to DiFi's speech and the Administration's veto threat, Carl Levin revealed that the Administration's complaints

about the language authorizing military detention don't stem from any squeamishness about indefinitely detaining Americans. Indeed, as Levin made clear, the Administration asked that limitations on applying the section to Americans be taken out of the bill.

The committee accepted all of the Administration's proposed changes to section 1031. As the Administration has acknowledged, the provision does nothing more than codify existing law. Indeed, as revised pursuant to Administration recommendations, the provision expressly "affirms" an authority that already exists. The Supreme Court held in the *Hamdi* case that existing law authorizes the detention of American citizens under the law of war in the limited circumstances spelled out here, so this is nothing new.

The initial bill reported by the committee included language expressly precluding "the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States." **The Administration asked that this language be removed from the bill.** [my emphasis]

And given that SASC already voted to support this section by significant margins, it appears clear it has plenty of support.

So make no mistake. As I'll show in my longer post, there are clear differences between the two sides (though I find both sides problematic). But whether or not the government can indefinitely detain Americans is not one of them.

Update: I took out "militarily," as 1032 exempts automatic military detention for US citizens.