

# Reason Magazine

## The Senate's Unconstitutional Support for Indefinite Detention

The government should not be allowed to imprison people indefinitely.

Sheldon Richman | December 5, 2011

Permit me to state the obvious: The government shouldn't be allowed to imprison people indefinitely without charge or trial. It shouldn't be necessary to say this nearly 800 years after Magna Carta was signed and over 200 years after the Fifth Amendment was ratified.

Yet this uncomplicated principle, which is within the understanding of a child, is apparently lost on a majority in the U.S. Senate. Last week the Senate voted 61-37 in effect to authorize the executive branch to use the military to capture and hold American citizens *indefinitely without trial*—perhaps at Guantanamo—if they are merely *suspected* of involvement with a terrorist or related organization—and even if their suspected activity took place on U.S. soil.

The provision, which is included in the National Defense Authorization Act, was drafted without a public hearing by Sens. Carl Levin (D-Mich.) and John McCain (R-Ariz.). Sen. Mark Udall (D-Colo.) sponsored an amendment to remove the power, but the amendment was defeated. A related provision *requires* that terrorism suspects who are not citizens be held by the military rather than being tried in a civilian criminal court. (The executive branch can waive this requirement after certifying to Congress that the waiver is a matter of national security.)

The right of *habeas corpus* is preserved for citizens, but this is the barest minimal protection of a suspect's rights.

The act passed last Friday (December 2) and has to be reconciled with the House version.

### Undermining Criminal Justice

What we have here is a shameful move to further undermine two or more pillars of the traditional American criminal justice system (to the extent it still exists). Suspects are just that: *suspects*. Before being imprisoned, they are entitled to

notice of the charges and a proper trial before a jury in which the government has the burden of proof.

Moreover, the United States has an old principle of law that severely restricts the military's involvement in domestic law enforcement. As Gene Healy of the Cato Institute [notes](#), the 1887 Posse Comitatus Act sets “a high bar for the use of federal troops in a policing role. That reflects America’s traditional distrust of using standing armies to enforce order at home, a distrust that’s well-justified.” (See Healy’s *Freeman* article “[Blurring the Civilian-Military Line.](#)”) Some downplay the significance of the Levin-McCain provision because it merely would codify powers already exercised by Presidents Obama and George W. Bush. Perhaps. But these are powers no president should have ever possessed. So they shouldn’t enshrined in law.

Udall says the provision [goes further](#) than mere codification: “[T]he secretary of defense, the directors of national intelligence and the FBI, and the White House—along with numerous defense experts—have said this would amount to a significant expansion of the military’s detention authority. . . . These changes to our laws would also authorize the military to exercise unprecedented power on U.S. soil.”

Regardless, make no mistake about the scope of the provision: “[T]he statement of authority to detain does apply to American citizens and it designates the world as the battlefield, including the homeland,” [said Sen. Lindsey Graham](#) (R-S.C.) in defense of the provision.

## **Veto Possible**

The White House suggested a veto of the bill is possible because of the detainee provisions. According to a [White House statement](#):

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

This could be a cover for other objections, such as restrictions on presidential power. After all, Obama has never forsworn the power to treat Americans the barbaric way José Padilla, an American citizen, was treated by the Bush administration. Indeed, Obama claims the power to execute American citizens without due process—and has done so in the case of Anwar al-Awlaki. Still, a veto is a veto.

Sen. Rand Paul (R-Ky.) made his own attempt to kill the detention section. (In [this video](#) of his Senate speech, he explains why such power is both wrong and unnecessary.) “Should we err today and remove some of the most important checks on state power in the name of fighting terrorism,” Paul said, “well then the

terrorists have won.... [D]etaining American citizens without a court trial is not American.”

Paul also helped [kill an amendment](#) that would have permitted the indefinite detention of an American citizen accused of terrorism *even after acquittal at trial*.

Rep. Justin Amash (R-Mich.), called the provision “one of the most anti-liberty pieces of legislation of our lifetime.”

Levin and McCain answered their critics in a *Washington Post* op-ed, [writing](#), “[T]he administration has broad authority to decide who is covered by this provision and how and when such a decision is made.”

Are we supposed to be comforted by unchecked presidential discretion? As I recall, the American revolution had something to do with an objection to arbitrary power.

“Essentially,” [writes](#) Andrew Napolitano, “this legislation would enable the president to divert from the criminal justice system, and thus to divert from the protections of the Constitution, any person he pleases.”

### **Crime or Act of War?**

Should terrorism be handled as a criminal act or an act of war? Those who know government’s inherent threat to individual freedom must insist on the former, if for no other reason than that, under cover of war, government can always be counted on to assume tyrannical powers, as it has since September 11, 2001. Perpetual war—in which America itself is considered a battlefield—is hardly conducive to liberty of any kind.

“No nation could preserve its freedom in the midst of continual warfare,” James Madison said.

The free market, and the free society in general, cannot be understood without also understanding their indispensable political, legal, and moral conditions. Freedom from government whim is one of those conditions, despite its inconvenience for those who lust after power.