



Written by [Joe Wolverton, II, J.D.](#) on November 20, 2011

## Senate Committee Grants Military Absolute Power Over Detainees

Another aspect of the clause in question makes Attorney General Eric Holder the final arbiter of whether suspects are tried in federal district courts or before military tribunals.

Rancorous debate over the various provisions contained in the bill have [raged for months](#), but all argument was finally quelled by an accord reached by committee Chairman Senator Carl Levin (D-Mich.) Levin and ranking GOP committee member John McCain (R-Ariz.).

Despite the bipartisan support for the measure, President Obama has [promised to veto](#) the bill over his disagreement with the delegation of power over the cases of detainees.

The White House has repeatedly affirmed its desire that the Federal Bureau of Investigation (FBI) should have plenary power over the disposition of issues related to the custody and prosecution of all terror suspects detained domestically.

The Obama administration insists that cutting out the FBI would reduced the overall effectiveness of investigations, as well as hamstring the efforts of intelligence officers from gathering reliable intel from those believed to be fighting against the United States in Afghanistan or Iraq.

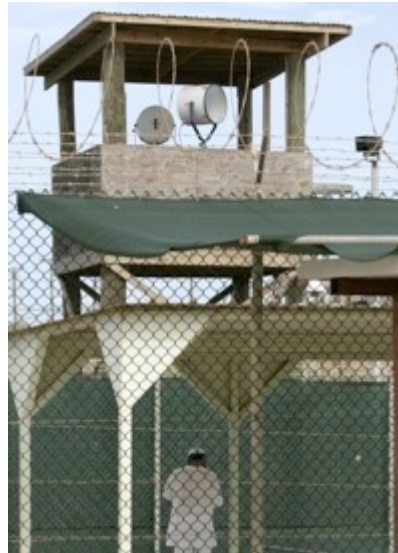
The tweaks made to the provision by Senators Levin and McCain will likely not be sufficient to change the mind of the President, but Levin is satisfied with their accomplishments and its addressing of the problems presented by the president.

"Issues which have been raised I believe have been addressed," said Levin, who indicated that the Senate could consider the measure this week. He insisted that "there are all kinds of misconceptions" about the detainee provisions.

One concession made by the committee makes clear the intent that the legislation cause no disruption to current operations working to gather intelligence, maintain surveillance of suspects, or interrogate those already in custody believed to have valuable information relating to the war against al-Qaeda, the Taliban, and other affiliated organizations.

Unchanged in the all the cutting and compromising is the provision in the underlying bill that governs the transfer of prisoners from the facility at Guantanamo Bay to any site outside of the United States or its territories. There will be a one-year restriction on such movements, as opposed to the permanent restriction suggested by some.

The *New York Times* published a [brief summary](#) of some of the changes to the package by the





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committee.

Among the changes: a section affirming that the United States government can hold terrorism suspects without trial would delete a paragraph saying that it does not apply to citizens or lawful residents for their actions on domestic soil “except to the extent permitted by the Constitution of the United States.” Instead, it would be silent on whether or not such Americans can be held without trial.

The draft would also delete language imposing a potential limit on that detention authority: that the person must have been “captured in the course of hostilities.” The Defense Department had objected that such language might call into question whether it could detain Qaeda suspects who were captured far from the so-called “hot battlefield” of Afghanistan, and who were not accused of taking part in specific plots.

A section that would mandate military custody for noncitizen terrorism suspects is said to have been modified to add in that it does not apply to lawful residents, either, but that it does apply to people “captured in the course of hostilities.” The people describing the provision said it was ambiguous how that could be interpreted — including whether people “arrested” inside the United States would count.

The larger legislative package will now move to the floor of the Senate where fierce deliberations are likely to be rekindled. Beyond that obstacle lies the very real prospect that President Obama will remain reticent in his opposition to the detention issue.

A [story](#) in the Associated Press reports the following on the details of the legislation.

The overall bill totals \$663 billion and would authorize spending for military personnel, weapons systems and the wars in Iraq and Afghanistan in the fiscal year that began Oct. 1. The committee had approved the bill in June but met behind closed doors Tuesday to cut about \$21 billion to fulfill new budget requirements.

Before the final vote was taken, several Democrats on the Committee, including Senators Feinstein (D-Calif.), Leahy (D-Vt.), and Udall (D-Colo.), worked to scuttle the controversial provision, but were ultimately unsuccessful.

Udall expressed concern that the pragmatic effect of the arrangement regarding detainees will threaten the security of the United States and its citizens.

"I do not believe that the consequences of the provisions have been adequately considered, and it should be noted that the Department of Defense strongly objects to their inclusion," he said.

Defense Secretary Leon Panetta echoed Senator Udall's reservations in a [brief letter](#) sent to Senator Levin. In the letter, Panetta expressed “concerns” with the version of the Act, particularly the language dealing with handling of detainees.

Panetta cites Section 1032 of the Act, claiming that the requirement that certain individuals be held by the military “restrains the Executive Branch’s options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.”

The precise definition of what constitutes a tool that is “legally available” to the Executive Branch in prosecuting the current foreign conflicts is the subject of an [amendment](#) to the Defense Authorization Act authored by Senator Rand Paul (R-Ky.). In a [press release](#) accompanying his announcement, Senator Paul's office wrote:



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On several occasions this year, Congress has been ignored or remained silent while the President committed our forces to combat. It is my intention to urge Congress to reclaim its constitutional authority over the decision to go to war, or to end a war – it is one of the body's most important powers. It is right that we wrest it back from a President who has shown he cannot be trusted to obey the Constitution or powers prescribed to Congress in it.

At the heart of Senator Paul's persuasive argument is the irrefutable fact that the Constitution empowers the legislative branch with the sole power to declare war, making no such enumeration to the president.

If approved, Senator Paul's amendment would effectively and immediately end the war in Iraq. Paul concluded his introductory remarks saying: "Americans should celebrate the safe return of our soldiers, thank those who served, and mourn those we lost. We should honor them by committing to a return to a more rational and constitutional foreign policy."

*Photo of Guantanamo: AP Images*



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