Written by **Warren Mass** on April 24, 2013

Sen. Graham Would Still Try Boston Bomb Suspect as "Enemy Combatant"

In a joint statement issued as a press release on April 19, Senators Lindsey Graham (R-S.C.) and John McCain (R-Ariz.) stated that "The least of our worries is a criminal trial" and that "Under the Law of War we can hold this suspect [Dzhokhar Tsarnaev] as a potential enemy combatant not entitled to Miranda warnings or the appointment of counsel."

A second press release issued the following day by Graham's office in the names of Senators Graham, McCain, and Kelly Ayotte (R-N.H.), and Rep. Peter King (R-N.Y.) pursued the same theme, stating, in part:

- "The accused perpetrators of these acts were not common criminals attempting to profit from a criminal enterprise, but terrorists trying to injure, maim, and kill innocent Americans."
- "The suspect, based upon his actions, clearly is a good candidate for enemy combatant status. We do not want this suspect to remain silent."
- "A decision to not read Miranda rights to the suspect was sound and in our national security interests."
- "The public safety exception is a domestic criminal law doctrine that allows questioning of a criminal suspect without Miranda warnings for a limited time and purpose."
- "We hope the Obama Administration will consider the enemy combatant option because it is allowed by national security statutes and U.S. Supreme Court decisions."
- "American citizens who take up arms against our nation or collaborate with our enemies have been held as enemy combatants. This is well-established principle of American jurisprudence and authorized by congressional statute."
- "An enemy combatant held under the Law of War is not entitled to Miranda rights or appointment of counsel.
- "We will stand behind the Administration if they decide to hold this suspect as an enemy combatant."

"I strongly disagree with the Obama administration's decision to rule out the enemy combatant status for the suspect at this time. I believe such a decision is premature. It is impossible for us to gather the evidence in just a few days to determine whether or not this individual should be held for questioning under the law of war," Graham told reporters April 22 during a press conference at the Capitol.

Graham justified his determination of how Tsarnaev, an American citizen, should be classified on the basis of the suspect having been "inspired by radical Islamists."

Graham did make a distinction about how any evidence acquired during a preliminary investigation of an "enemy combatant" should be used, however, saying:

"No criminal defendant should ever be required to incriminate themselves in a criminal case. Every nation at war should have the ability to defend themselves by gathering intelligence. These are not mutually exclusive concepts."

During a speech on the Senate floor on April 23, Graham expanded his thoughts on the subject, saying: "Here's what we're suggesting, that the surviving suspect — due to the ties that these two have to radical Islamic thought and the ties to Chechnya, one of most radical countries in the world — that the president declare preliminarily that the evidence suggests that this man should be treated as an enemy combatant."

The *Huffington Post* reported that Graham has agreed that Tsarnaev should be tried in civilian court, but that President Obama had the power to detain Tsarnaev as an enemy combatant to see if he had any useful intelligence.

Graham did not elaborate further on why he believes that holding a suspect as an enemy combatant would produce more useful intelligence than interrogation of a suspect by the FBI. Perhaps it is because — unlike CIA or Defense Department interrogators in places like Guantanmo Bay and Abu Ghraib prison in Baghdad — FBI agents are not permitted to use "enhanced interrogation techniques" such as waterboarding.

Another statement that Graham made on April 23 suggested that "enhanced interrogation" just might be what Graham has in mind. He noted that the United States had "gathered so much good intelligence from enemy combatants at Guantanamo Bay."

In an article posted at antiwar.com on April 19, writer Jason Ditz suggested that the Tsarnaev case, if handled in the way that Senator Graham proposed, might provide a test of the 2012 National Defense Authorization Act amendment concerning the indefinite detention of American citizens captured on American soil as "enemy combatants."

Ditz writes:

> The NDAA has seen court challenges already from people who have a reasonable belief they might be summarily detained by this or future administrations, but the administration has fought, with mixed success, by claiming they have no intention of ever doing so, even if they totally could.

President Obama signed the renewal of the NDAA into law on January 2, despite having previously expressed misgivings about the legislation. As Joe Wolverton noted in his January 5 article for *The New American*: "He signed into law the renewal of his power to apprehend and detain Americans indefinitely on no more authority than his own suspicion of their complicity with enemies in the 'War on Terror.'"

The Feinstein-Lee Amendment, which protects Americans from indefinite detention and was passed by the Senate by a vote of 67-29, was stripped from the bill during the conference committee process to produce a measure acceptable to both houses.

Wolverton noted that "the relationship between [John] McCain's influence and the exclusion of the Feinstein-Lee Amendment from the conference report was not lost on Senator Rand Paul (R-Ky.), a chief co-sponsor of the Feinstein-Lee Amendment."

In a statement released on December 19, Senator Paul "did what few lawmakers ever do: named names," noted Wolverton. Paul stated:

> The decision by the NDAA conference committee, led by Sen. John McCain (R-Ariz.) to strip the National Defense Authorization Act of the amendment that protects American citizens against indefinite detention now renders the entire NDAA unconstitutional.
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> I voted against NDAA in 2011 because it did not contain the proper constitutional protections. When my Senate colleagues voted to include those protections in the 2012 NDAA through the Feinstein-Lee Amendment last month, I supported this act.
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> But removing those protections now takes us back to square one and does as much violence to the Constitution as last year's NDAA. When the government can arrest suspects without a warrant, hold them without trial, deny them access to counsel or admission of bail, we have shorn the Bill of Rights of its sanctity.
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> Saying that new language somehow ensures the right to habeas corpus — the right to be presented before a judge — is both questionable and not enough. Citizens must not only be formally charged but also receive jury trials and the other protections our Constitution guarantees. Habeas corpus is simply the beginning of due process. It is by no means the whole.
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> Our Bill of Rights is not something that can be cherry-picked at legislators' convenience. When I entered the United States Senate, I took an oath to uphold and defend the Constitution. It is for this reason that I will strongly oppose passage of the McCain conference report that strips the guarantee to a trial by jury.

Those who are unaware of the morphing of political labels in recent decades might still regard senators such as John McCain and Lindsey Graham as "conservatives," without giving serious thought to exactly what it is they "conserve." Certainly not the Constitution.

For this reason, many defenders of the Constitution who are in philosophical harmony with (for example) former Rep. Ron Paul and his son Sen. Rand Paul prefer to be called "constitutionalists."

Constitutionalists favor strict, literal adherence to the document from which they derive their name, because it was written to protect the rights of American citizens by setting limits on the power of the federal government. To adhere to the Constitution is not akin to being soft on crime or terrorism, but to be tough on the defense of rights, originating in English common law, that became embedded in our Bill of Rights.

Some who are justifiably appalled by the death and mayhem committed against the innocent victims at the Boston Marathon may believe that by committing such a horrendous act, Dzhokhar Tsarnaev has forfeited the protections provided by the Constitution. Though their sentiment is understandable, it is well to remember that the Bill of Rights exists to protect the innocent, not the guilty, and innocence or guilt is determined at the conclusion of a trial, not before.

Photo of Sen. Lindsey Graham (R-S.C.): AP Images