



Written by [Joe Wolverton, II, J.D.](#) on December 5, 2012

Sens. Lee and Paul: Feinstein-Lee Amdt. Not Touchdown, but Positive Play

Football, it is said, is a game of inches. And anyone who has played the game can tell you that a rush up the middle for three yards is usually more valuable than a 60-yard bomb that is almost caught for a touchdown.

In the case of the recently passed (and much maligned) Feinstein-Lee Amendment to the National Defense Authorization Act (NDAA), spokesmen for Senators Mike Lee (R-Utah) and Rand Paul (R-Ky.) see the measure they co-sponsored as a successful movement of the ball a little farther down the field toward the goal of restoring due process to all persons.



In an exclusive conversation with *The New American*, Doug Stafford, chief of staff for Senator Paul, and Rob Porter, general counsel for the office of Senator Lee, defended the Feinstein-Lee Amendment as a step in the right direction, though admitting that it did not go nearly as far as either lawmaker would prefer.

“Colored by our experience with the due process amendment to the NDAA we offered in 2012, we knew that we would have nowhere near the number of votes needed to pass an amendment that guaranteed due process for all persons detained under the NDAA,” Stafford explained.

Both men reiterated that they recognize that the Feinstein-Lee Amendment was not the ideal attack on the indefinite detention provisions of the NDAA. Senators Lee and Paul believe, the spokesmen assured *The New American*, that “the full panoply of due process rights should apply to all persons, not just American citizens.”

Why, then, the choice to restrict their protections to citizens and permanent legal residents?

In a word: strategy.

“We spent a year,” Stafford said, “convincing about a dozen Republicans that a vote for this amendment would not be a vote for terrorism.”

Until the vote was taken, neither Lee nor Paul knew whether they had the votes necessary to make even this intermediate step toward restoration of constitutional due process.

Many of these Republicans, the spokesmen said, are “not the most rock solid on civil liberties” and it took a committed and concerted effort by the senators and their staffs to convince enough of their colleagues on the GOP side of the aisle that a vote for their amendment would not be interpreted as being soft on terrorism.

Two senators notorious for screaming that any defense of due process for terrorists is paramount to joining al-Qaeda, tried to make just such an argument in the hours leading up to the vote on the Feinstein-Lee Amendment.



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Senators John McCain (R-Ariz.) and Lindsey Graham (R-S.C.) reportedly “threatened” Lee and Paul, accusing them of “loving the terrorists.” The two infamous warmongers then encouraged everyone to vote against the amendment co-sponsored by Lee and Paul. Then, about 10 minutes before the vote, the spokesmen report, someone told McCain and Graham that the vote was going to go Paul and Lee’s way, so they voted for it.

This despite the fact that all week, McCain argued against the amendment, even [apologizing to Democrats](#) for Rand Paul’s promise to filibuster the NDAA vote if the Feinstein-Lee Amendment was not brought before the body.

There are two problems with McCain’s anti-Paul harangue. First, Senator Paul’s threatened filibuster concerned an amendment dealing with the method of counting the families of military members deployed overseas, not with the Feinstein-Lee Amendment. Second, no apology should ever be made for trying to defend the Constitution.

Incidentally, Stafford reports that Senator Paul will not filibuster the vote on the NDAA.

Despite McCain and Graham being against the Feinstein-Lee Amendment before they were for it, how did the senators get enough votes to get the measure passed? Compromise. In exchange for some progress they would remove the most controversial language, that guaranteeing due process for all persons as set forth in the Constitution.

Regarding another section of the Feinstein-Lee Amendment that has drawn fire from the right, Stafford and Porter say the point has been missed by many writers.

“Prior to our amendment, Presidents Bush and Obama used the Authorization for the Use of Military Force (AUMF) and the NDAA as if the power to indefinitely detain Americans was inherent in the laws,” Porter said.

Such power is not explicit in either the NDAA or the AUMF, and, anticipating future legal challenges to the constitutionality of the relevant sections of the 2013 version of the NDAA, Lee and Paul included in their amendment a requirement that the Congress must explicitly authorize the exercise of those powers.

Although neither man said so, it would seem that the inclusion of the requirement for explicit authority to detain Americans in the Feinstein-Lee Amendment was intended as a sort of poison pill that would kill the chances of the NDAA to be upheld by the courts when and if someone files a complaint.

That explanation will not satisfy most constitutionalists, however. The fact of the matter is that the president has demonstrated that he will gladly use his “authority” to detain American citizens based on mere suspicion of associating with enemies of the United States, regardless of whether that authority is explicit or implied.

Returning to the football analogy, Senators Paul and Lee don’t see passage of the Feinstein-Lee Amendment as a win, but as a short but successful gain of yardage. “Although it was a small step, to get it passed was a huge victory,” said Stafford.

As with most everything on Capitol Hill, there was an element of realpolitik in the passage of the Feinstein-Lee Amendment.

Not everything that is believed by the sponsors of a bill, for example, can be packaged in a measure if that measure has any hope of being approved by members of the chamber.



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In [his speech defending the amendment](#), Rand Paul made it clear that to him due process is the right of all persons and not just American citizens. Quoting Senator [Robert “Fighting Bob” LaFollette](#), senator from Wisconsin from 1906 to 1925, Paul declared, “Let no man think we can deny civil liberties to others and hope to retain it for ourselves.”

By denying all persons their right to a trial by jury, we have “shorn the Bill of Rights of its sanctity,” Paul added, again quoting LaFollette.

Invoking the spirit of the signing of the Magna Carta on the field at Runnymede in 1215, Paul said that the right to jury has been a part of Anglo-American law for nearly 800 years and “should not be scrapped now.”

Nevertheless, Senator Paul, knowing that were he to push too hard he would lose the support of several fence-sitting Republicans and that no reduction in the denial of due process would be achieved, supported the Feinstein-Lee Amendment.

Stafford and Porter said that the fight for any positive step toward absolute removal from the NDAA of any diminution of the Sixth Amendment and the right of due process has been a long one, but there is progress.

They claim that before Rand Paul and Mike Lee arrived in the Senate, there would have been exactly zero Republican votes in favor of such an amendment. They then point out that 16 Republican senators voted for the Feinstein-Lee Amendment. This, they insist, is progress and that Lee and Paul should be applauded for their efforts to persuade their colleagues, not criticized for not doing enough.

Was the Feinstein-Lee Amendment a touchdown in the battle against the despotism of the NDAA? No. But, to their credit, Senators Lee and Paul recognize that. They read the defense, saw the coverage, and decided to run a quick short-yardage play up the middle that, while not a fantastic scoring play, would at least keep their team in the game.

Also, the representatives for both senators assured this writer that neither of their bosses would give up the fight until due process, including habeas corpus and the right to a trial by jury, was guaranteed to all persons, not just Americans.

Lee and Paul should be praised for moving the ball downfield, albeit only a couple of yards. Any progress toward the end zone is better than a sack. However, the senators should not be doused with Gatorade as there are still so many good plays that must be run successfully if the Constitution is to be preserved.

What Senators Lee and Paul must remember, moreover, is that in the game of liberty versus tyranny, it is now 4th and long, and there are only a few ticks left on the clock.



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