Mr. President, I wish to address a subject that I hope we

will be able to address soon and that is an amendment that Senator

Graham of South Carolina has filed and, hopefully, we will debate soon.

It relates to conditions that have been placed in the underlying bill,

relating to the treatment of detainees captured in Afghanistan and

Iraq.

I urge my colleagues to think very carefully about the damage that

would

be brought on the global war against terrorists and future wars that we

may have to fight if we go forward with the language that is in the

bill, specifically in section 1023 of the bill. That essentially would

return us to a law enforcement approach to terrorists that, frankly,

failed us before 9/11 and, once Osama bin Laden and others declared war

on us, would obviously not work in the post-9/11 context.

Senator Graham's amendment strikes these harmful provisions in the

bill and would replace them with commonsense measures to provide a more

fair process in dealing with detainees at Guantanamo. I remind my

colleagues for a moment about the nature of these terrorists whom we

are talking about, and then I will go through specific provisions of

the bill that need to be removed--specifically three: a requirement

that al-Qaida terrorists held in Iraq and Afghanistan be given lawyers;

the authorization to demands discovery and compel testimony from

service members; and the requirement that al-Qaida and Taliban detainees

be provided access to classified evidence.

To review the nature of the detainees that we are holding, not just

at Guantanamo Bay but also in Iraq and Afghanistan, these are not nice

people. At least 30 of the detainees released from Guantanamo Bay have

since returned to waging war against the United States and our allies;

12 of these released detainees have been killed in battle by U.S.

forces and others have been recaptured; two released detainees became

regional commanders for Taliban forces; one released detainee attacked

U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers;

one released detainee killed an Afghan judge; one released detainee led

a terrorist attack on a hotel in Pakistan and a kidnapping raid that

resulted in the death of a Chinese civilian, and this former detainee

recently told Pakistani journalists he planned to

The provisions of section 1023 would make it very difficult, if not

impossible, for the United States to detain these committed terrorists

who have been captured while waging war against us. No nation has, in

the history of armed conflict, imposed the kinds of limits that the

bill would impose on its ability to detain enemy war prisoners. War

prisoners released in the middle of an ongoing conflict, such as

members of al-Qaida, will return to waging war. We have already seen

this happen 30 times with detainees released from Guantanamo Bay. If

section 1023 of the bill is enacted into law, we could expect that

number to increase sharply. If section 1023 is enacted, we should

expect that more civilians and Afghans and Iraqi soldiers will be

killed, and it may be inevitable that our own soldiers will be injured

or killed by such released terrorists. This is a price our Nation

should not be forced to bear.

Let me talk first about the requirement in the bill that al-Qaida

terrorists held in Iraq and Afghanistan must be provided with lawyers.

This cannot be executed. It would require the release of detainees.

Here is why: The Defense bill requires that counsel be provided and

trials be conducted for all unlawful enemy combatants held by the

United States, including, for example, al-Qaida members captured and

detained in Iraq and Afghanistan if they are held for 2 years. We hold

approximately 800 prisoners in Afghanistan and tens of thousands in

Iraq. None of them are lawful combatants and all would arguably be

entitled to a trial and a lawyer under the bill. Such a provision would

at least require a military judge, a prosecutor, and a defense

attorney, as well as other legal professionals.

That scheme is not realistic. The entire Army JAG Corps only consists

of approximately 1,500 officers, and each is busy with their current

duties. Moreover, under the bill, each detainee would be permitted to

retain a private or volunteer counsel. Our agreements with the Iraqi

Government bar the United States from transferring Iraqi detainees out

of Iraq. As a result, the bill would require the United States to train

and transport and house and protect potentially thousands, or even tens

of thousands, of private lawyers in the middle of a war zone during

ongoing hostilities. That is impossible.

That proposal is half baked at best. It would likely force the United

States to release thousands of enemy combatants in Iraq, giving them

the ability to resume waging war against the United States. Obviously,

this would tie up our military. By requiring a trial for each detainee,

this provision would also require U.S. soldiers to offer statements to

criminal investigators, needing later to prove their case after they

captured someone. They would need to carry some kind of evidence kits

or combat cameras or some other method of preserving the evidence and

to establish its chain of custody. They would need to spend hours after

each trial writing after action reports, which would need to be reviewed

by commanders. Valuable time would be taken away from combat operations

and soldiers' rest.

It would be a bad precedent for the future. Aside from the war in

Iraq, this provision would make fighting a major war in the future

simply impossible. Consider this: During World War II, the United

States detained over 2 million enemy war prisoners. It would have been

impossible for the United States to have conducted a trial and provided

counsel to 2 million captured enemy combatants. So the bottom line is

that the bill, as written, would likely be impossible to implement in

Iraq and, in the context of past wars, it is patently absurd.

The second point is authorizing al-Qaida detainees to demand

discovery and compel testimony from American soldiers. The underlying

bill would actually authorize unlawful enemy combatants, including al-

Qaida detained in Iraq and Afghanistan, to demand discovery and could

compel testimony from witnesses as we do in our criminal courts in the

United States. The witnesses would be the U.S. soldiers who captured

the prisoner. Under this bill, an American soldier could literally be

recalled from his unit at the whim of an al-Qaida terrorist in order to

be cross-examined by a judge or that terrorist.

Newspaper columnist Stewart Taylor describes the questions that such

a right would raise:

The questions abound. As the Supreme Court observed in Johnson v.

Eisenstrager, which is the law on this subject:

That is what the U.S. Supreme Court said in World War II when a

similar issue was raised. It would be difficult to conceive of a

process that would be more insulting to our soldiers. In addition, many

al-Qaida members who were captured in Afghanistan were captured by

special operators whose identities are kept secret for obvious reasons.

This would force them to reveal themselves to al-Qaida members,

therefore exposing themselves or to simply forgo the prosecution of the

individual, which is more likely what would happen.

Clearly, Americans should not be subject to subpoena by al-Qaida.

That brings me to the last point--the requirement that al-Qaida and

Taliban detainees be provided with access to classified evidence. The

bill requires that detainees be provided with

and that detainees' private lawyers

be given access to all relevant classified evidence.

Foreign and domestic intelligence agencies are already very hesitant

to divulge classified evidence to the CSRT hearings we currently

conduct. These are part of the internal and nonadversarial military

process today. Intelligence agencies will inevitably refuse to provide

sensitive evidence to detainees and their lawyers. They will not risk

compromising such information for the sake of detaining an individual

terrorist.

In addition, the United States already has tenuous relations with

some of the foreign governments, particularly in the Middle East, that

have

been our best sources of intelligence about al-Qaida. If we give

detainees a legal right to access such information, these foreign

governments may simply shut off all further supply of information to

the United States. These governments will not want to compromise their

evidence or expose the fact that they cooperated with the United

States. By exposing our cooperation with these governments, the bill

perversely applies a sort of policy toward our

Middle Eastern allies, which is likely to be as effective as when

applied to criminal street gangs in the United States.

A final point on this: We already know from hard experience that

providing classified and other sensitive information to al-Qaida

members is a bad idea. During the 1995 Federal prosecution in New York

of the ``Blind Sheikh,'' Omar Rahman, prosecutors turned over the names

of 200 unindicted coconspirators to the defense. The prosecutors were

required to do so under the civilian criminal justice system of

discovery rules, which require that large amounts of evidence be turned

over to the defense. The judge warned the defense that the information

could only be used to prepare for trial and not for other purposes.

Nevertheless, within 10 days of being turned over to the defense, the

information found its way to Sudan and into the hands of Osama bin

Laden. U.S. District Judge Michael Mukasey, who presided over the case,

explained,

That is what happens when you provide classified information in this

context.

In another case tried in the civilian criminal justice system,

testimony about the use of cell phones tipped off terrorists as to how

the Government was monitoring their networks. According to the judge,

This testimony alerted terrorists to

Government surveillance and, as a result, their communication network

shut down within days and intelligence was lost to the Government

forever--intelligence that might have prevented who knows what.

This bill--this particular section of the bill repeats the mistakes

of the past. Treating the war with al-Qaida similar to a criminal

justice investigation would force the United States to choose between

compromising information that could be used to prevent future terrorist

attacks and letting captured terrorists go free. This is not a choice

that our Nation should be required to make.

I will talk more about some provisions that Senator Graham would like

to substitute for these provisions that provide a more fair process for

detainees held at Guantanamo Bay--a process that would enable them to

have greater benefit of the use of counsel and of evidence in their

CSRT hearings.

I will wait until he actually offers that amendment to get into

detail. But the point is, we have bent over backward to provide the

detainees at Guantanamo the ability to contest their detention and to

have that detention reviewed and eventually have it reviewed in U.S.

courts. That is a very fair system, more fair than has ever been

provided by any other nation under similar circumstances and more than

the Constitution requires. So we are treating the people we captured

and are holding at Guantanamo in a very fair way.

What we cannot do is take those same kinds of protections and apply

them to anybody we capture in a foreign theater who is held in a

foreign theater and therefore is not, under current circumstances--and

never has been in the history of warfare--subject to the criminal

justice system of our country. To take that system and try to transport

it to the fields of Afghanistan or Iraq would obviously be not only a

breaking of historical precedent but a very bad idea for all of the

reasons I just indicated.

I ask my colleagues to give very careful consideration to the

dangerous return to the pre-9/11 notion of terrorism as a law

enforcement problem that is inherent in section 1023 of the bill. The

terrorists have made no secret that they are actually at war with us,

and we ignore this point at our peril.

I conclude by reminding my colleagues that the Statement of

Administration Policy on this bill indicates that the President would

be advised to veto it if these provisions remained. Therefore, I urge

my colleagues, when the opportunity is presented, to join me in

striking the provisions of the bill, not only as representing good

policy but to help us ensure that at the end of the day, there will be

a bill signed by the President called the Defense authorization bill.