Madam President, I wish to share a few thoughts on a

matter of concern; that is, our national security and the procedure by

which we are handling people we arrest who are attacking this country.

It will be a bit of a follow-on to what Senator Bond of Missouri had to

say. I disagree with my distinguished colleague, Senator Durbin, the

assistant Democratic leader in the Senate. He is a member of the

Judiciary Committee. I think he is wrong about that. I serve on the

Judiciary Committee, too, and I would like to share a few thoughts.

First, there has been a full-scale attempt to assert that President

Bush tried most of the terrorists or terrorism-related cases that

developed over the years in the normal civilian courts. That is true to

some degree. I notice that in the 195 cases Senator Durbin said were

tried in the Federal courts, he counted the Unabomber and Terry

Nichols, one of the ones who blew up the Oklahoma City Federal

Building. There is a big distinction: The Unabomber was not officially

at war with the United States, had not declared war on the United

States as al-Qaida has, and the United States had not declared war on

him or on Terry Nichols, who was unknown, I suppose, to anybody at the

time he committed that crime and was tried. A lot of the other cases

deal with such things as aiding a terrorist by providing money to some

terrorist organization that supports terrorism, violating various

complex Federal laws, and they are tried in Federal courts. They are

American citizens, and they are tried here. That is the reason some of

the cases that have been cited were tried in Federal court.

Another reason of significant import that cases were tried in Federal

court rather than in military commissions was not because President

Bush and his staff desired it but because we ended up with full-scale

challenges of the military commissions as they were set up originally

after 9/11. It took some time to get them set up. They were challenged.

The U.S. Supreme Court concluded that a number of procedures conducted

in the military commissions did not meet constitutional muster, did not

comply with international agreements that the United States was a party

to, and they said: You have to stop. So the military revamped what it

was doing. The Congress passed the Detainee Act to legitimize the

military commission trials and make sure it complied with the Supreme

Court so we could get on with it.

We had some 5,700 people in Guantanamo. It was never the plan of the

Bush administration, ever, to try those people in civilian courts. In

fact, Congress appropriated the money. We built courtrooms with video

cameras and security at the Guantanamo base and prison. We had them set

up so trials could be conducted, press people could come and see the

trials, subject to national security questions that may arise, and do

those trials in that fashion.

But after President Obama got elected, he directed that Attorney

General Holder evaluate whether we should do that anymore or not.

First, he stopped them--he issued an order to stop it--and then he

asked that a review be conducted. Mr. Holder conducted a review and he

decided, and that report was, it would be presumed the people being

held in Guantanamo--many of whom, most of whom were captured on the

battlefield in Iraq and Afghanistan and other places in that area of

the world--would be tried in civilian courts. This was an absolute

reversal of that.

Last year, I offered legislation that was passed by both Houses of

Congress and signed by the President that said, if you are part of al-

Qaida, you are presumed to be at war with the United States, and it is

not necessary, in a military commission trial, to put on all kinds of

testimony, take weeks to prove we are at war with al-Qaida. That is

simply already a fact; we have declared war. Congress has authorized

the use of military force against al-Qaida, and they are attacking us.

That is what war is.

So John Brennan, the President's Deputy National Security Adviser,

which apparently in this administration is a pretty big position--I

guess these kind of personal Presidential staff people are what you

make of them--has been very public. He has made a series of statements

which demonstrate this administration has learned no lessons from their

mishandling of the Christmas Day bomber--Umar Farouk Abdulmutallab--who

was captured on Christmas Day, attempting to blow up a plane. Not only

did Mr. Abdulmutallab have recent intimate knowledge of terrorist

operations in Yemen, but, in fact, he came directly from Yemen, having

been provided a bomb by al-Qaida, as they claimed credit for and

apparently he has acknowledged.

He was an operative of al-Qaida. He had no legal claim to protections

of the American criminal justice system, in any case. Even if he had

been a citizen of the United States, which he was not a citizen, he had

no right to be tried in civilian court in the United States because he

was an agent and an operative and an unlawful combatant directly

connected with al-Qaida. So this is a big deal. This is a matter that

has to be analyzed and thought through, and I am concerned the

administration is not listening.

The combination of these factors about his background made his

capture a unique intelligence opportunity--one of the most important

opportunities since 9/11 because al-Qaida had moved a large part of its

operation to Yemen, using it as a training base. We did not know enough

about it. It is very important we learn everything we can about how

they are operating in Yemen, who the leaders are, and how they could be

attacked and neutralized. So the decision to treat him as a civilian

was very wrong.

The Department of Justice immediately began to treat him as a common

criminal being investigated by the FBI. They gave him his rights after

50 minutes. In truth, colleagues, as a prosecutor myself, he should

have been given his rights, probably--normally, you would expect them

immediately. There may be some exceptions that could have allowed this

not to occur immediately, but, normally, when a civilian is arrested

and you ask him a single question, that individual who is in custody is

entitled to Miranda rights then. Miranda rights are not just that you

have a right to remain silent. Miranda rights say you have a right to

remain silent, and we will appoint you a lawyer. You have a right to

have one, and we will appoint you one if you don't have the money.

People tend to clam up when they are told that.

So they offered him an attorney and did not treat him as the rare

intelligence asset he was. That decision, it is indisputable, I truly

believe--and this is not politics we are talking about--jeopardized the

kind of fresh, timely intelligence that saves lives and prevents

further attacks on the homeland of our country.

Mr. Brennan says one of the reasons the administration classified

Abdulmutallab as a civilian was because he was captured on U.S. soil.

This comment is truly startling and makes no sense. As Deputy National

Security Adviser to the President, Mr. Brennan ought to be aware that

because Abdulmutallab is an al-Qaida operative, he is an unprivileged

enemy belligerent--in our common, more current definition of the term--

and, thus, he is automatically eligible for a military trial.

Indeed, the amendment I offered last year to the Military Commissions

Act would permit this administration to do this without even having to

reestablish the obvious: that al-Qaida is at war with the United

States. So for the President, Mr. Holder or Mr. Brennan to persist in

arguing that the law or past precedent somehow justified their

treatment of Abdulmutallab as an ordinary criminal is wrong.

But Mr. Brennan has gone further than simply confusing the law. He

has confused reality. In his recent op-ed in USA Today, he defiantly

declares the administration made the right call on Abdulmutallab and

that providing captured terrorists with civilian due process, civilian

lawyers, and the right to remain silent has no negative impact on our

ability to gather intelligence.

I dispute that. That is totally illogical. I don't know how many

cases Mr. Brennan has prosecuted--not many. I prosecuted thousands;

supervised them and tried them myself--but there is no doubt that you

lose intelligence when you appoint a person a lawyer and tell them they

have a right to remain silent. We are virtually the only country in the

world that does this. It is not considered a constitutional right. It

is something the court thought would be a good idea, to keep people

from being abused by police, and so they set up this rule. It is not

part of fundamental due process. It wasn't even a rule until 50 years

ago. We never did that. Canada doesn't do it, France doesn't, Germany

or Italy. We don't have to give them.

Mr. Brennan says: ``There is little difference between military and

civilian custody other than an interrogator with a uniform.'' Not so.

He argues: ``The suspect gets access to a lawyer and the interrogation

rules are nearly identical.'' That is absolutely false.

I have been disappointed at the response the Attorney General has

given to members of our committee, but when the National Security

Adviser says something such as that--and I confronted him with it in a

hearing earlier and he persists in making that kind of statement.

Mr. Brennan has also said previously that ``there are no downsides or

upsides in particular cases'' and that because we are a nation of laws,

criminal courts are the preferred venue. Not so--at least that this is

a preferred venue. We are a nation of laws, and our laws and

international law allow for the trial of unlawful combatants in

military commissions. Attorney General Holder admitted that himself in

a hearing when answering questions asked of him. I said: Mr. Holder,

the decision to try these people in civilian court rather than military

commissions is a policy decision, and basically

he said yes to that. It is not required under our law.

I can tell you--and not with speculation and it is not a theory but a

fact--that criminal defendants will routinely stop talking and

providing information when you give them Miranda and appoint them a

lawyer. The first thing a lawyer is going to do, even in a case such as

this, is to advise his client not to make any more statements, if he

has made any. If he says he wants a lawyer, the questioning must stop

until one is produced. That is what it means to try a person in

civilian court. It is different.

You better believe terrorists who are trained to exploit our system

will do everything in their power to use that system against us, if we

let them. When Khalid Shaikh Mohammed--mastermind of the 9/11 attack,

that so horrible day--was captured, he immediately asked for a lawyer.

He already knew. But he wasn't given one. Instead, he was interrogated

at length over a period of time as a military combatant. These

interrogations revealed critically important information that helped

foil other attacks that could have been levied against the United

States.

When Abdulmutallab was questioned, he was questioned for only 50

minutes before being given a lawyer, and then he stopped talking. So we

are told: Weeks later, he started talking again. Don't worry, Jeff.

Quit complaining. Five weeks later, now he has started talking. We got

his daddy to come in, and maybe we can do a plea bargain with him or

something and he will talk.

Well, you can do that if they are in military custody. That is not

only done in civilian custody, No. 1. No. 2, what did they have to

promise him to get him to provide information? Did they promise him

leniency? Did his lawyer demand it? Did his lawyer demand a written

plea agreement before he allowed him to speak?

That is what will happen in most cases. I don't know what happened in

this one. But we are not talking about just this case. We are talking

about the policy of whether it is better to treat somebody as an

unlawful combatant if they come from al-Qaida or in a civilian trial in

America. Fresh, immediate intelligence is awfully valuable many times,

and it can grow stale very quickly, although other intelligence can be

extremely important, even if the person you have captured waits 6

months to give it to you. You just never know. But the truth is, the

more intelligence, the sooner obtained, enhances our national security.

Things that are unnecessary, that are not required by law, that delay

the obtaining of intelligence and delay the amount you get is damaging

to our national security.

So that is the policy question we are dealing with--this decision to

put vitally important intelligence at great jeopardy. Nevertheless, Mr.

Brennan insists that military interrogations are the same as those

provided to civilians. But when a civilian asks that the interrogation

stop, it must stop at that moment. This is not true in the military

situation.

Well, let me back up a little bit. A person apprehended on the

battlefield, a prisoner of war, who is a lawful combatant, wearing a

uniform, fighting the United States in a lawful manner, according to

the laws of war, cannot be excessively interrogated, cannot be tried

for any crime but can be held until the war is over, whether it is 1

year or 10 years. That is the law of the world and the law of the

United States. But if they are unlawful combatants, as these malicious,

devious, murdering al-Qaida thugs are--they do not wear a uniform, they

do not comply with the laws of war, they attack innocent civilians

deliberately to spread terror--they are in violation of the rules of

war.

What would have happened to Abdulmutallab if he were handled by the

military? He would have been interrogated by people in short order who

were intimately familiar with the situation that was developing in

Yemen. They would have been able to ask him questions without a lawyer

being present. He did not have to have a lawyer. They could use the

legal interrogation techniques that Congress has passed into law and

directed the military to use in these kinds of interrogations--and no

more--or they would be in violation of the law. He would not be abused.

Then eventually he would be tried, or not tried, as the military and

the national security would dictate.

But if you arrest him and put him in a civil situation, he

immediately has to be advised of his rights, immediately given a

lawyer. He is then entitled to a speedy trial. He is entitled to demand

discovery and information from the government about how they caught him

and who provided the information. He could demand to go to trial and be

able to speak out and use it as a forum to promote their agenda. There

is a huge difference between the two.

For Mr. Brennan to act as if there is no difference, and for my

colleagues to say President Bush tried these people, before we ever got

the system up and running in a healthy way, is disingenuous. It is not

accurate. It is not correct in a rational discussion of how this would

be.

This is what President Obama said in an important ``60 Minutes''

interview about these terrorists:

Amen, Mr. President. Of course they are not entitled to Miranda

rights. Of course they are not entitled to be treated like a shoplifter

down the block. But when they decided to try Abdulmutallab in a

civilian court, that is exactly what they decided to do--to treat him

with all the rights and rules an American citizen would have who is

charged with a shoplifting offense.

We raised this issue last fall, back in September, with the Director

of the FBI, about Miranda.

In fact, you can't even ask him questions lawfully until you provide

him the Miranda rights. If he says anything that is of value to the

prosecution, it is dismissible.

Then what about this dramatic event in the Judiciary Committee?

Senator Lindsay Graham, a very experienced Senator who still remains a

JAG officer in the Air Force--after many years he still goes off to do

his duty 2 weeks a year--he asked this dramatic question to the

Attorney General.

He never gave a full answer.

I thank the Chair and believe we have to get our heads straight on

this matter and cease to provide the kind of due process rights that

American citizens get and provide the kind of legitimate due process

rights that a military commission provides--and they are great. But

they are not the same. Understand, we are at war, and it creates a

different dynamic in how the cases are processed.