basically says to seniors: Whatever you are spending money on—if you are buying apples, for instance, then you could buy bananas. My staff says bananas are cheaper. We had an argument about that, whether bananas are cheaper per calorie and per weight and all that. But, nonetheless, they say to seniors, under this chained CPI thing—some conservative think tank, some corporate-funded, insurance company, drug company-funded think tank, I assume, came up with this bizarre idea of CPI chained—they say to seniors: You can pay less for things because you can do substitutions of food—from beef to chicken or from apples to bananas or from something to something—and save money.

Most seniors have already made those substitutions in their buying habits because they are already squeezed because the cost-of-living adjustment has not kept up with their health care costs. That is the whole point. So instead of our moving to reduce the cost-of-living adjustment, going to this chained Consumer Price Index, chained CPI, we should move away from CPI-W, based on wages, to CPI-E, meaning what elderly people's costs are as their health care goes up.

It will mean several hundred dollars in the monthly benefit a senior receives. Let me give those numbers, and then I will wrap up.

For the average person who retired in 1985, that person would get about an $887 increase, if it was the way Senator MERKLEY and Senator MIKULSKI and I want to change Social Security. That CPI, that increase, would then go up a little bit over time, so seniors would, in fact, be able to keep up with their health care costs. That is the importance of this change. That is the importance of our legislation. We cannot go the other way, chained CPI.

The last point I will make is, these conservatives who do not much like Social Security—some of them are Presidential candidates, I might add—they will say: We cannot afford this. The budget deficit is not because of Social Security. It is because of a bunch of other factors. Social Security is not part of this budget deficit. We know how to do minor changes to fix Social Security long term and take care of seniors and their health care needs and their increased costs.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MERKLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BROWN of Ohio). Without objection, it is so ordered.

Mr. MERKLEY. Mr. President, I am pleased to rise this morning to support the adoption of a consumer price index for Social Security that would accurately reflect the costs our senior citizens actually face.

I am delighted to join the Presiding Officer, Senator BROWN of Ohio, in this effort, along with Senator MIKULSKI of Maryland. Social Security is a promise, a bond between our government and our senior citizens.

Our senior citizens have worked hard their whole life and paid into Social Security every step of the way. They expect Social Security will be there for them when they retire.

Over the past few years, I have heard from many Oregon seniors who are making ends meet on a fixed income. They ask me: Why is it we are not getting a cost-of-living adjustment, a COLA? Because our costs are rising. They have been deeply disturbed to know, with these fixed incomes and these rising costs, they are being squeezed in the middle.

I explain to them in these townhalls it is because the COLA is calculated not on what seniors face in their costs but upon what a broad cross-section of working people face. They tell me: Senator, that is different than the costs we face. We are at a different point in our lives. Health care becomes a huge component. They tell me: I can tell you, Senator, health care costs are not going down.

Some in this Chamber are coming forward with a proposal that would make it even harder for our seniors. It would use a new calculation: not this standard ''cross-section of America COLA'' we are currently using but what is referred to as a chained CPI. That chained CPI says: If the price of this goes up, you can buy that. Actually, what it does is go in the wrong direction in terms of accurately reflecting the costs our seniors face in retirement.

If we take someone who is 65 today and we look down the road, by the time they are 75, this chained CPI would cost them $560 per year—roughly a month's rent. By the time the average 85-year-old has their payment calculated, the chained CPI would cost them $984 per year; the average 95-year-old: $1,392 per year.

At a time when the best off Americans are paying less than ever before, it is simply wrong to shift costs on to our seniors and the most vulnerable in our society.

There is an alternative. It is called the CPI-E. The Consumer Price Index for our seniors or elderly. I prefer to think of it as the CPI-E for ''experienced.'' Our most experienced citizens face different costs than the rest of us. The CPI-E would track inflation specifically based on the basket of goods those aged 62 and older are purchasing.

It is simply a fairer and more accurate way to calculate the benefits for our seniors. If their costs are rising slower than the overall costs for society, it would reflect that. If their costs are rising higher than the overall pace of inflation, then that would be reflected. Either way, it is fair.

We have to ensure we are keeping our promise to our senior citizens in a way that accurately reflects the reality of living in this country. This bill for the CPI-E or Consumer Price Index for the experienced is the best way to achieve that.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of S. 1867, which the clerk will report by title.

The bill clerk read as follows:

A bill (S. 1867) to authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, the Republican leader is on the floor. He is going to offer an amendment. The one on this side is not ready. There has been an agreement, and I ask unanimous consent that Senator MCCONNELL be allowed to lay down his amendment. When the one on the Democratic side is laid down, which will be momentarily, it will be considered the first amendment in order.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Republican leader.

AMENDMENT NO. 1084

Mr. MCCONNELL. I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Kentucky [Mr. MCCONNELL], for Mr. KIRK, proposes an amendment numbered 1084.

Mr. MCCONNELL. I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To require the President to impose sanctions on foreign financial institutions that conduct transactions with the Central Bank of Iran)

At the end of subtitle C of title XII, add the following:

SEC. 1243. IMPOSITION OF SANCTIONS ON FOREIGN FINANCIAL INSTITUTIONS THAT CONDUCT TRANSACTIONS WITH THE CENTRAL BANK OF IRAN.

Section 104 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8513) is amended—

(1) by redesignating subsections (h) and (i) as subsections (i) and (j), respectively; and

(2) by inserting after subsection (g) the following new subsection:

''(h) IMPOSITION OF SANCTIONS ON FOREIGN FINANCIAL INSTITUTIONS THAT CONDUCT TRANSACTIONS WITH THE CENTRAL BANK OF IRAN.—

''(1) IN GENERAL.—Subject to paragraphs (2), (3), and (4), not later than 30 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2012, the President shall—

''(A) prohibit the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly conducted any financial transaction with the Central Bank of Iran; and

''(B) freeze and prohibit all transactions in all property and interests in property of each such foreign financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

''(2) EXCEPTION FOR SALES OF FOOD, MEDICINE, AND MEDICAL DEVICES.—The President may not impose sanctions under paragraph (1) on a foreign financial institution for engaging in a transaction with the Central Bank of Iran for the sale of food, medicine, or medical devices to Iran.

''(3) APPLICABILITY.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), paragraph (1) applies with respect to financial transactions commenced on or after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2012.

''(B) PETROLEUM TRANSACTIONS.—Paragraph (1) applies with respect to financial transactions for the purchase of petroleum or petroleum products through the Central Bank of Iran commenced on or after the date that is 180 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2012.

''(4) WAIVER.—

''(A) IN GENERAL.—The President may waive the application of paragraph (1) with respect to a foreign financial institution for a period of not more than 60 days, and may renew that waiver for additional periods of not more than 60 days, if the President determines and reports to the appropriate congressional committees every 60 days that the waiver is necessary to the national security interest of the United States.

''(B) FORM.—A report submitted pursuant to subparagraph (A) shall be submitted in unclassified form, but may contain a classified annex.

''(5) FOREIGN FINANCIAL INSTITUTION.—For purposes of this subsection, the term 'foreign financial institution' includes a financial institution owned or controlled by a foreign government.''.

Mr. MCCONNELL. Mr. President, I am offering this amendment on behalf of the Senator from Illinois, MARK KIRK, because the time has come for our country to sanction the Central Bank of Iran.

It has become commonplace for political leaders to state that an Iranian regime armed with nuclear weapons is unacceptable. President Obama has stated that an Iranian regime armed with a nuclear weapon is unacceptable. Unfortunately, the Iranian regime has not been deterred from conducting activities relevant to the development of such an explosive device.

The report of the IAEA of November 8, 2011, makes clear that Iran has worked on the development of an indigenous design of a nuclear weapon, including the testing of components, and that Iran has yet to answer all of the IAEA's questions concerning the military dimensions of Iran's nuclear program.

Last month, the world learned of the Quds Force plot to assassinate the Ambassador of Saudi Arabia to the United States.

Iran remains undeterred, and the United States is left with fewer options for dealing with the Iranian nuclear program as time elapses.

This amendment by Senator KIRK from Illinois would add to the current sanctions against Iran by targeting the central bank of that country. This, in my judgment, is one of the few remaining actions, short of an embargo of Iranian shipping and military intervention, to slow or end the Iranian nuclear program. It is worth supporting and pursuing.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, on behalf of the Senate Armed Services Committee, I am pleased to bring S. 1867, the National Defense Authorization Act for fiscal year 2012, to the Senate floor. The Armed Services Committee approved the bill by a unanimous vote of 26 to 0. This is the 50th consecutive year that our committee has reported a defense authorization act. Every previous bill has been enacted into law.

I would like to thank all of the members and the staff of the Senate Armed Services Committee for the commitment they have shown to the best interests of our men and women in uniform as we have developed this legislation. Every year, we take on tough issues, and we work through them on a bipartisan basis consistent with the traditions of our committee. I particularly thank Senator MCCAIN, our ranking minority member, for his strong support throughout the process. The unanimous committee vote in favor of this legislation would not have been possible without his cooperation and support.

We were delayed in getting this year's bill to the Senate floor by two issues that have arisen since the time the Armed Services Committee approved the first version of this bill, S. 1253, in late June.

First, Congress enacted the Budget Control Act of 2011, which mandated deep reductions in discretionary spending, including defense spending. The initial bill reported by the Armed Services Committee would have cut the President's budget request for national defense programs by more than $6 billion. The Budget Control Act, which was adopted after our initial bill was reported, requires an additional $21 billion in reductions.

Second, the administration and others expressed misgivings about the detainee provisions in the initial bill, although the provisions in our initial bill represented a bipartisan compromise that was approved by the committee on a 25-to-1 vote. Many of these concerns were based on misinterpretations of the language in that bill; nonetheless, we have worked hard to address these concerns.

First, relative to the additional $21 billion in budget cuts, we consulted closely with the Department of Defense before identifying these cuts. We believe the reductions we decided upon can be accomplished without an adverse impact on our troops or their vital mission, and without significant increase in risks to our national security.

The committee report which accompanied the initial bill, Senate Report 112–26, did not address these cuts but is otherwise applicable to this bill as well. So the new cuts are not addressed in that Senate report because these new reductions came after that Senate report was made.

For this reason, I ask unanimous consent that a summary of the cuts be printed in the RECORD immediately following my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. LEVIN. Second, the new bill would modify the detainee provisions to address concerns and misconceptions about the provisions in our initial bill. In particular, the new bill first modifies section 1031 of the bill, as requested by the administration, to assure that the provision that provides a statutory basis for the detention of individuals captured in the course of hostilities conducted pursuant to the 2001 authorization for use of military force, the AUMF, to make sure that those provisions and that statutory basis are consistent with the existing authority that has been upheld in the courts and neither limits nor expands the scope of the activities authorized by the AUMF.

It also modifies sections 1033 and 1034 of the bill, as requested by the administration, to impose 1-year restrictions rather than permanent limitations on the transfer of Gitmo detainees to foreign countries and on the use of Department of Defense funds to build facilities in the United States to house detainees who are currently at Gitmo.

We were unable to agree to the administration's proposal to strike section 1032, the provision that requires military detention of certain al-Qaida terrorists subject to a national security waiver. We did, however, adopt a number of changes to the provision. In particular, we modified the provision so that it clarifies that the President gets to decide who makes the determinations in coverage, how they are made and when they are made, ensuring that executive branch officials will have flexibility to keep any covered detainee in civilian custody or to transfer any covered detainee for civilian trial at any time.

Second, we clarify that there is no interruption of ongoing surveillance and intelligence-gathering activities or of ongoing law enforcement interrogation sessions. There have been misstatements, misimpressions, and misinterpretations of the provisions of our bill relative to those issues. We clarify them to make sure it is clearly understood by this body and the American people that—repeating, it is the executive branch, it is determined by the President, the people he appoints who will make determinations of coverage, how they are made, when they are made, so that it ensures the flexibility that the executive branch wants to keep any covered detainee in civilian custody or to transfer any covered detainee for civilian trial at any time.

It has been suggested that ongoing surveillance and intelligence-gathering activities by law enforcement people would be interrupted, or that their interrogation might be interrupted. It is very explicitly clear in this bill that there is no such interruption, there is no such interrogation session interruption or surveillance interruption or intelligence-gathering activities interruption. The process to make sure that doesn't happen is in the President's hands.

The administration officials reviewed the draft language for this provision the day before our markup and recommended additional changes. We were able to accommodate those recommendations, except for the administration request that the provision apply only to detainees who are captured overseas. There is a good reason for that. But even here, the difference is relatively modest, because the provision already excludes all U.S. citizens. It also excludes all lawful residents of the United States, except to the extent permitted by the Constitution. The only covered persons left are those who are illegally in this country or who arrive as tourists or on some other short-term basis, and that is a small remaining category, but an important one, because it includes the terrorists who clandestinely arrive in the United States with the objective of attacking military or other targets here.

Contrary to some statements I have seen in the press, the detainee provisions in our bill do not include new authority for the permanent detention of suspected terrorists. Rather, the bill uses language provided by the administration to codify existing authority that was adopted by both the Bush administration and the Obama administration and that has been upheld in the Federal courts.

Moreover, the bill requires for the first time that any detainee who will be held in long-term military custody anywhere in the world would have access to a process that includes a military judge and a military lawyer.

I want to repeat that. For the first time, this bill provides that, in determining a detainee's status, the detainee will have access to a lawyer and to a military judge. That is not the case now. Nor would the bill preclude the trial of terrorists in civilian courts, as some have erroneously asserted. As a matter of fact, it is the contrary. The bill expressly authorizes the transfer of any military detainee for trial in the civilian courts at any time. An amendment that eliminated that authority was defeated in the Armed Services Committee on a bipartisan 19-to-7 vote during the markup of the initial bill.

The bill would not require the interruption of ongoing surveillance operations or ongoing law enforcement interrogations of suspected terrorists, as some have incorrectly asserted. The opposite is the case, as I have said, because we have included language in the bill that specifically precludes those possibilities.

The bill also provides that the President, not Congress, will decide who makes determinations of whether a detained person is in the narrow class covered, and the President will decide how and when these determinations are made.

The bill would not require that al-Qaida terrorists who are captured on American soil be transferred to military custody, because it includes an easily effectuated national security waiver. With this waiver authority, executive branch officials may keep any detainee in civilian custody or move any detainee to civilian custody if they choose to do so.

That provision provides the executive branch flexibility to choose the most appropriate course of action for al-Qaida terrorists whom we capture, including detention in civilian custody. That was the intent of the original language, and it has been clarified in the bill before us. I recognize that the administration remains unsatisfied with this provision, but we have gone a long way to address their concerns.

What about the dollar provisions in this bill? The bill we bring to the floor today would authorize $662 billion for national defense programs—$27 billion less than the President's budget request, and $43 billion less than the amount appropriated for fiscal year 2011. I am pleased we were able to find these savings without reducing our strong commitment to the men and women of our Armed Forces and their families, and without undermining their ability to accomplish their important national security missions. In this time of fiscal problems for our Nation, every budget must be closely examined to identify savings, and the Department of Defense budget is no exception.

This bill contains many important provisions that will improve the quality of life of our men and women in uniform, provide needed support and assistance to our troops on the battlefield, and make the investments we need to meet the challenges of the 21st century, and provide for needed reforms in the management of the Department of Defense.

First and foremost, the bill before us continues the increases in compensation and quality of life our service men and women and their families deserve as they face the hardships imposed by continuing military operations around the world.

For example, the bill would authorize a 1.6-percent across-the-board pay raise for all uniformed military personnel and extend over 30 types of bonuses and special pays aimed at encouraging enlistment, reenlistment, and continued service by active-duty and Reserve military personnel.

The bill provides that annual increases in TRICARE Prime enrollment fees in future years will not exceed the percentage increase in retired pay. The bill authorizes $30 million in supplemental impact aid and related education programs for the children of servicemembers. The bill authorizes service Secretaries to carry out programs to provide servicemembers with job training and employment skills training to help prepare them for the transition to private sector employment. It authorizes the service Secretaries to waive maximum age limitations to enable certain highly qualified enlisted members who served in Iraq or Afghanistan to enter the military service academies.

The bill also includes important funding and authorities needed to provide our troops the equipment and support they will continue to need as long as they remain on the battlefield in Iraq and Afghanistan.

For example, the bill fully funds the President's request for $3.2 billion for the development, testing, production, and sustainment of the MRAP vehicles and new MRAP all-terrain vehicles, which are needed to protect our troops against improvised explosive devices.

The bill authorizes $11.2 billion to train and equip the Afghan National Army and the Afghan police, the funding level recommended by the commander of U.S. Central Command after consultation with the commander of U.S. and coalition forces in Afghanistan. The purpose here is to grow the capability of those Afghan security forces to prepare them to take over increased responsibility for Afghanistan's security as we begin reductions in U.S. forces.

The bill provides $400 million for the Commanders' Emergency Response Program in Afghanistan and $400 million for the Afghanistan Infrastructure Fund to support projects that enhance the counterinsurgency campaign.

The bill extends the authority of the Department of Defense to conduct a program for the reintegration of former insurgent fighters into Afghan society.

The bill establishes a new Joint Urgent Operational Needs Fund to allow the Department to rapidly field new systems in response to urgent operational needs identified on the battlefield, and it provides the Central Command—CENTCOM—commander new

contracting authorities needed to stop the flow of money through U.S. contracts to persons who are actively opposing U.S. forces in Afghanistan.

The bill also contains a number of provisions that will help improve the management of the Department of Defense and other Federal agencies. For example, the bill would address shortcomings in the Department of Defense's management of operating and support costs, which are estimated to constitute 70 percent of the lifecycle costs of major weapons systems.

The bill freezes DOD spending on contract services at fiscal year 2010 levels and requires the Department of Defense to take a number of commonsense steps to achieve savings in this area.

The bill adds $32 million for the Department of Defense's corrosion prevention and control and requires implementation of the recommendations of a recently congressionally mandated report on corrosion control on the F–22 and F–35 programs.

The bill improves the management of defense business systems by strengthening the authority of the Department of Defense's chief management officers in the investment review process and ensures that this process covers existing systems as well as new ones.

The bill also adds $43 million to enable the Department of Defense IG to provide more effective oversight and to help identify waste, fraud, and abuse in defense programs, especially in the area of procurement.

In light of the budget constraints we face this year, the committee worked hard to keep funding increases of any kind to a minimum. We added the following items: $66 million for unfunded requirements identified by military leaders, $90 million for investments in programs such as the DOD IG and corrosion control that have high payback rates, $63 million for critical investments in intelligence and cyber security improvements, $497 million for increased funding needed to ensure the efficient execution of ongoing Department of Defense programs, and $270 million for a handful of broad-based competitive programs needed to help us keep our leadership in military technology.

I continue to believe it would be wrong for us to give up the power of the purse given Congress in the Constitution. I don't believe the executive branch has a monopoly on good ideas. In fact, I think we are more often receptive to creative new ideas that can lead to advances in the national defense than the defense bureaucracy is. Nonetheless, there are no earmarks in this bill.

Finally, I would like to discuss four major issues in the bill that were the subject of extended debate in the course of our markup this year.

First, this bill includes provisions that would require sound planning and justification before we spend more money for Marine Corps realignment from Okinawa to Guam and on tour normalization in Korea. These provisions follow detailed oversight that Senators WEBB, MCCAIN, and I have conducted over the past years. In particular, the bill prohibits the expenditure of funds for Marine Corps realignment from Okinawa to Guam until we receive an updated force laydown and a master plan detailing construction costs and schedule of all projects necessary to carry it out.

The bill requires the Department of Defense to study moving Marine Corps aviation assets currently at Marine Corps Air Station Futenma to Kadena Air Base, and the feasibility of relocating some or all Air Force assets currently at Kadena Air Base, rather than building a replacement facility at Camp Schwab that is unrealistic and unaffordable.

The bill prohibits the obligation of funds for tour normalization on the Korean Peninsula until the Secretary of the Army provides Congress with a master plan, including all costs and schedule projections to complete the program, and the Director of Cost Assessment and Program Evaluation performs an analysis of alternatives justifying the operational need.

The Department of Defense current plans for Okinawa, Guam, and Korea were developed years ago in a different fiscal environment and are projected to cost billions of dollars more than anticipated. At a time of tight budgets, we owe it to the Department of Defense and to the taxpayers to insist on a close examination and strong justification before we proceed.

Second, the committee adopted an amendment to strike all funding for the Medium Extended Air Defense System, MEADS. In February, the Department of Defense announced that after investing more than $1.5 billion in the MEADS Program, the program remained a high risk and the additional funding needed to field the system was unaffordable. However, the Department declined to terminate the program because the memorandum of understanding with our allies on which the program is based commits us to continued funding even if we withdraw from the program. For this reason, the Department requested over $400 million in funding for the continued development of a system that it has no intention of fielding. The committee amendment eliminates this funding. We recognize that under the memorandum of understanding, our decision not to fund this program could require the United States to pay for a program in which it is no longer a participant. However, the committee concluded that the course proposed by the Department is untenable and that the Department should explore all options with our allies before continuing to fund a program which we no longer need.

Third, our committee members share both a deep concern about the rising cost of the Joint Strike Fighter Program, on which we are now projected to spend more than $1 trillion—which includes operation and sustainment costs—and a strong belief that the Department of Defense must take stronger action to contain these costs.

The committee unanimously adopted an amendment requiring that the next JSF contract be entered on a fixed-price basis and that the contractor assume full responsibility for all costs above the target cost specified in the contract. This amendment puts the contractor on notice that we have lost patience with continued overruns on the program and we are determined to protect the taxpayer from further cost increases, without unnecessarily jeopardizing the heavy investment we have already made in the program by prematurely terminating the program. Senator MCCAIN has taken, really, the active lead in this effort, and it is a very critically important effort for our taxpayers.

Finally, the bill includes a bipartisan compromise regarding detainee matters—as I have made reference to before—that would address a series of important issues that relate to detainees. It is worth summarizing the detainee-related provisions in the bill.

First, the bipartisan compromise would codify the military's existing detention authority, as stated by both the administration of President Bush and the administration of President Obama and approved in the courts.

Second, the bill would require military detention for a core group of detainees who are part of al-Qaida—or an associated force that acts in coordination with or pursuant to the direction of al-Qaida—and who participate in planning or carrying out attacks or attempted attacks against the United States or its coalition partners. That is a defined core group of detainees.

This provision includes a national security waiver and includes language expressly authorizing the transfer of detainees for trial in civilian courts. It continues the conditions on the transfer of Gitmo detainees to foreign countries, including certification requirements to be met before a transfer may take place. Contrary to what some have said, this provision does not prohibit transfers from Gitmo. In fact, it is less restrictive of such transfers than legislation passed in the last Congress and signed by the President. In particular, this year's provision includes a national security waiver that is designed to address concerns expressed by the Secretary of Defense about a similar restriction which was included in last year's authorization and appropriations act.

The bill contains the same limitation on the use of Department of Defense funds to build facilities in the United States to house Gitmo detainees that has been included in past authorization and appropriations acts. This provision applies only to Department of Defense funds. It does not prohibit the use of Department of Justice funds that might be needed in connection with a

transfer for the purpose of a criminal trial, and it does not prohibit the closure of Gitmo.

The provision requires the Department of Defense to issue procedures addressing ambiguities in the review process established for Gitmo detainees. The provision clarifies but does not overturn the Executive order issued by the President earlier this year.

The provisions require the Department of Defense to establish procedures for determining the status of detainees, including, as I indicated before, for the first time, a military judge and a military lawyer for a detainee who will be held in long-term military custody.

The bill clarifies procedures for guilty pleas in trials by military commission. This provision would require a separate trial on the penalty, with a unanimous verdict needed to impose the death penalty. So while a death penalty could be imposed by a commission, the detainee would have no assurance of that result, for those detainees who want that assurance so they can make themselves martyrs.

As I have already indicated, these provisions have been substantially modified as a result of extensive discussion with administration officials. We did not make every change requested by the administration, although we adopted many of them—probably most of them—and made additional changes to address specific concerns raised by administration officials.

Mr. President, as we are here today, we have over 96,000 U.S. soldiers, sailors, airmen, and marines on the ground in Afghanistan, with 23,000 more remaining in Iraq. While there are issues on which we may disagree, we all know we must provide our troops with the support they need as long as they remain in harm's way.

Senate action on the national defense authorization bill for fiscal year 2012 will improve the quality of life of our men and women in uniform. It will give them the tools they need to remain the most effective fighting force in the world. Most important of all, it will send an important message that we as a nation stand behind them and appreciate their service.

We look forward to working with our colleagues to promptly pass this important legislation. And as I yield the floor, I again want to thank Senator MCCAIN and all the members of our committee for their hard work on this bill, as well as our staffs for their extraordinary capability. But I want to thank personally Senator MCCAIN for everything he has done to make it possible for us to get to the floor at this time.

EXHIBIT 1

SUMMARY OF $21 BILLION IN ADDITIONAL CUTS RESULTING FROM SECOND MARKUP OF NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

AIRLAND SUBCOMMITTEE

Army Programs: The bill would cut an additional $2.8 billion in Army Procurement and $800 million in RDTE. This includes over $1 billion in reductions proposed by the Army, and over $2 billion for programs that had unjustified or excessive growth, misaligned schedules, fact of life changes including terminations, or other management challenges. These recommended reductions include $518.7 million for the Joint Tactical Radio System, $224.0 million for Warfighter Information Network-Tactical, $172.5 million for Ground Soldier System-Nett Warrior, and $157.3 for HMMWV recapitalization programs. The bill would also transfer over $600 million from the base request to the overseas contingency operations accounts for capabilities directly or closely related with military operations in Iraq and Afghanistan such as increased ISR, mine protected vehicles, armoring kits, and base defense and force protection systems.

Navy Programs: The bill would cut an additional $724.5 million in Navy Procurement and $55.9 million in RDTE. This includes $532.1 million for programs that had unjustified or excessive growth, misaligned schedules, fact of life changes including terminations, or other management challenges. These recommended reductions include $163.5 million for the E–2D Advanced Hawkeye, $159.9 million for spares and repair parts, $69.9 million for AMRAAM, and $99.7 million for the F/A–18E/F Hornet.

Air Force Programs: The bill would cut an additional $910.2 million in Air Force Procurement and $596.0 million in RDTE for programs that had unjustified or excessive growth, misaligned schedules, fact of life changes including terminations, or other management challenges. These recommended reductions include $145 million for the A–10, $120 million for AFNET, $103 million for initial spares and repair parts, and $101 million for the AMRAAM. The bill would also transfer $87.2 million from the base request to the overseas contingency operations accounts for activities directly or closely related with military operations in Iraq and Afghanistan such as war consumables.

EMERGING THREATS AND CAPABILITIES SUBCOMMITTEE

Program Delays and Under-Execution: The bill would reduce funding for science and technology and information technology by $216 million due to excessive program growth and program delays; reduce funding for U.S. Special Operations Command by $135 million due to unjustified growth and items already funded in recent reprogramming actions; reduce funding for counter-drug programs by $128 million based on a DOD assessment that this funding is excess to need; reduce funding for counter-proliferation programs by $43 million due to slow execution; reduce funding for the Joint IED Defeat Organization (JIEDDO) by $85 million based on unjustified program growth; and reduce funding for the Chemical and Biological Defense Program by $40 million due to under-execution and program delays.

PERSONNEL SUBCOMMITTEE

Military Personnel Funding: The bill would reduce funding for military personnel by $100.6 million, by taking an additional $42.6 million in unobligated balances and using updated CBO estimates for savings attributable to a change in the calculation of hostile fire pay.

Defense Health Care: The bill includes a $330.0 million cut to private sector care under the Defense Health Program, based on an assessment of historical under execution rates for private sector care.

Military Spouse Career Advancement Accounts (MyCAA): The bill reduces funding for the program by $120 million. This reduction was offered by the Department of Defense because although the President's budget request included $190 million for the program, DOD has indicated that as a result of its redesign of the MyCAA program, only $70 million is needed for execution in fiscal year 2012.

READINESS SUBCOMMITTEE

Military Construction: The bill would cut an additional $527 million in military construction funding. This includes three domestic projects valued at $83.1 million, the largest of which the Technology Center's Third Floor Fit Out, valued at $54.6 million does not need funding because NSA has indicated that it has sufficient unobligated balances to complete the project. The balance of the cuts are for: (1) overseas military construction projects in areas that are subject to an ongoing strategic review (including five projects in EUCOM valued at $179.6 million); (2) planning and design funds rendered unnecessary due to previous cuts; and (3) programs that are not fully budgeted for in the FYDP.

Operation and Maintenance: The bill would cut an additional $3.1 billion in operation and maintenance funding. This includes $1.5 billion in reductions proposed by the military services; $315 million for ammunition account cuts based on inefficient ammunition management and recommendations from the military services; $294 million for excess growth in service contractors and civilian employees; and $258 million in the OCO accounts for a transfer of Coast Guard support to the Department of Homeland Security.

Transfers to Overseas Contingency Operations Funding: The bill would transfer to OCO accounts $4.9 billion of operation and maintenance funding for activities closely associated with military operations in Iraq and Afghanistan, including MRAP vehicle sustainment, body armor sustainment, overseas security guards, theater security packages, depot maintenance and readiness funding in support of combat operations, and CENTCOM headquarters public affairs. Most of these activities have previously been funded from OCO accounts.

SEAPOWER SUBCOMMITTEE

Navy Programs: The bill would cut an additional $234.4 million in Navy Procurement and $496.7 million in RDTE for programs that had unjustified or excessive growth, misaligned schedules, fact of life changes including terminations and a Navy-requested realignment of the VXX Presidential Helicopter program, or other management challenges. The recommended reductions include $120 million for JTRS, $70 million for the Future Unmanned Carrier-Based Strike System, $63 million for ship contract design and live fire T&E, and $58 million for the Standard Missile.

Marine Corps Programs: The bill would make additional reductions of $101.0 million in Procurement, Marine Corps due to slow program execution or contract award delays.

Air Force Programs: The bill would cut an additional $108.6 million in Air Force Procurement for unnecessary post production funding for the C–17 program and $45.9 million in RDTE for programs that had contract delays or where the programs were being rephased.

STRATEGIC SUBCOMMITTEE

Space: The bill would reduce funding for space programs by $233 million due to slow execution in the development of the Family of Advanced Line of Sight Terminals (FAB–T) used in conjunction with the Advanced Extremely High Frequency (AEHF) satellite system; by $300 million by dropping authorization for the long term lease of a commercial satellite by the Defense Information

Systems Agency due to a lack of an analysis of alternatives; and by $105 million in connection with delays in contract awards associated with GPS systems under development.

Department of Energy: The bill would reduce funding for environmental cleanup at former atomic weapons production sites by $356 million due to slow program execution; reduce the NNSA nonproliferation program by $168 million due to cost overruns for a pit disassembly facility to produce mixed oxide fuel, which is now developing a new program base line; and for NNSA program management by $45 million due to an excessive rate of growth.

Missile Defense: The bill would reduce funding by $55 million for the procurement of Standard Missile-3 Block IB missiles due to a test failure which requires an investigation, correction, and retest, delaying production (an additional $260 million of funding would be moved from procurement to the R&D account to facilitate the fixes); and reduce funding for the Terminal High Altitude Area Defense (THAAD) missile defense system by $120 million to reflect the reality of slower production rates due to delays in the program. A few joint or Army programs would be reduced by $47 million for underexecution.

Intelligence Funding: The bill includes a number of reductions to the Military Intelligence Program because of late contract awards, slow execution rates, program delays, and changes in programs since markup; it also includes reduced funding for the National Intelligence Program reflecting cuts agreed to by the two intelligence committees.

GENERAL PROVISIONS

Troop Reductions in Afghanistan: The bill would reduce OCO funding by $5.0 billion due to the President's decision to withdraw the 33,000 U.S. surge force from Afghanistan, with 10,000 to be withdrawn by December 2011 and the remaining 23,000 to be withdrawn by next summer. The Department of Defense has informed us that the $5.0 billion is no longer needed as a result of the planned Afghanistan troop reduction.

Afghanistan Security Forces Fund: The bill would reduce funding for the Afghanistan Security Forces Fund (ASFF) to $11.2 billion, a $1.6 billion reduction from the President's request. The Commander, U.S. Central Command, has determined that FY2012 ASFF funding can be reduced by $1.6 billion because of efficiencies and cost avoidances achieved by the NATO Training Mission in Afghanistan in its plans for building and sustaining the Afghan Army and Police.

AMENDMENT NO. 1092

(Purpose: To bolster the detection and avoidance of counterfeit electronic parts)

Mr. LEVIN. Mr. President, pursuant to a unanimous consent request which was previously entered into on this matter, I send to the desk an amendment on behalf of myself and Senator MCCAIN.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Michigan [Mr. LEVIN] for himself and Mr. MCCAIN, proposes an amendment numbered 1092.

Mr. LEVIN. I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

Mr. LEVIN. Mr. President, I call for regular order with respect to the amendment.

The PRESIDING OFFICER. The amendment is now pending.

Mr. LEVIN. Is it now pending first in line?

The PRESIDING OFFICER. It is now pending first in line.

Mr. LEVIN. I thank the Presiding Officer, and I want to make one quick comment about this amendment.

This is a bipartisan amendment that addresses the massive issue created by counterfeit parts getting into the defense supply system. It is something our staffs have investigated heavily.

Senator MCCAIN and I are introducing this bipartisan amendment. We hope it has strong support in this Senate. It will address a critically important issue we have now seen in the defense supply system with millions of counterfeit parts—mainly from China—getting into our defense system and threatening the security of our troops, the effectiveness of their mission, and costing the taxpayers a heck of a lot of money.

The PRESIDING OFFICER. The senior Senator from Arizona is recognized.

Mr. MCCAIN. Mr. President, I ask unanimous consent to engage in a brief colloquy with the chairman, Senator LEVIN.

The PRESIDING OFFICER (Mrs. HAGAN). Without objection, it is so ordered.

Mr. MCCAIN. First of all, I wish to thank the Chairman for the long years of work we have had together. This is the culmination of this year's work which is coming to the floor after great difficulty and a lot of obstacles. I want to thank the Senator again for the spirit of bipartisanship, which is a long tradition in the committee which was practiced by our predecessors. Obviously, we know on occasion that we have differences of views, and sometimes we—especially I—express those in perhaps a passionate manner. But the fact is, at the end of the day, we continue to come together and work together for the good of this Nation's security.

The reason I ask the Senator is because I think our colleagues ought to understand the context of this bill. First of all, it is a new bill, and it has a reduction of some $20 billion in authorization in order to keep with the Budget Control Act, a total now of a $27 billion reduction, which is a significant amount of money. It seems to me our colleagues should understand this $9.8 billion cut in defense procurement, $3.5 billion cut in research, development, test, and evaluation, $1.6 billion cut in military construction, $6.7 billion in overseas—these are significant reductions already in what we had originally envisioned as necessary for our Nation's defense capability.

I would ask the chairman, these are painful decisions we had to make. For those who somehow believe it is business as usual in the Department of Defense and on the Defense authorization, it simply is not correct. We have already made significant reductions, I ask my colleague.

Mr. LEVIN. I agree with my friend from Arizona. We literally worked months to get to the first reduction which was in our original bill. Then when the Congress adopted the Deficit Reduction Act, which required additional reductions, these are very difficult decisions to make because they in many cases will increase risks which we don't want to increase but nonetheless have got to accept some additional degree of risk on some of our programs in order to do the fiscally responsible thing. I agree with my friend.

Mr. MCCAIN. Could I ask my colleague, also, two more points. One is that we also have planned for an additional well over $400 billion reductions in the next decade, and those will again entail at some point an increase in risk. So in that context, I would appreciate again an expression of the chairman's view of a Draconian cut that would take place as a result of sequestration. The Secretary of Defense has testified before our committee of the ''devastating effects,'' as have our military leaders.

Mr. LEVIN. These cuts that would result from sequestration are massive not just in defense but also in nondefense discretionary areas. The purpose of that threat is to hopefully prevent it from taking place, as with any other kind of a sword of Damocles held over people's heads—our heads—that if we don't reach some kind of an agreement with our special committee, the group of 12 that is working so hard to come up with a reduction that will meet the requirements of the bill, we would then have a sequestration, across-the-board cuts, which are not the rational way to budget, are massive, Draconian—to use the word which the Senator from Arizona quoted. And that is true in both defense and nondefense. But, again, the purpose of having that sequestration process in place is, hopefully, an incentive so that it doesn't take place.

Mr. MCCAIN. Finally, I would ask the chairman, we have met the requirements of the Appropriations Committee with this additional $20 billion reduction in this ''new'' legislation. Then it seems it would be only appropriate that the Appropriations Committee meet the provisions of authorization that are in the authorization bill.

In other words, I am told there are some differences in the Appropriations Committee's bill as far as what the authorizing committee's responsibilities are. I hope the Appropriations Committee would address those differences in deference to our role as authorizers.

Mr. LEVIN. That is always our hope. It doesn't work out the way we wish frequently, but it is always our hope that the way it should work—at least theoretically—around here is that should be what the appropriators do.

That has not worked out that way in I don't know how many recent years. The Senator and I have had some discussions about that. When I first got here, many years ago, that was an issue which had not been resolved. But I think what the Senator sets out is the hope that the appropriators would look at our authorizations and follow our authorizations.

Mr. MCCAIN. I thank the Senator from Michigan.

I finally wish to comment. I am more than hoping. I intend to identify those areas of difference between the authorizing committee and the Appropriations Committee, and fully expect the appropriating committee—unless there is some overriding reason—to conform with the authorization bill.

Again, I thank Senator LEVIN and his staff for the work we are doing. And I thank the leadership. I thank Senator REID for bringing the bill to the floor. I know he has a lot of important priorities, but I believe it is very important that we continue an over half-century tradition of the Senate taking up, passing, and then finally seeing enacted into law the Defense authorization bill.

I think it is a valid statement to say that there is no greater priority the people's representatives have than to take every measure we can possible to ensure the security of our Nation and the men and women who serve in it. This legislation is the result of literally thousands of hours of discussion, debate, hearings, input to make sure we do the very best job we can to protect our Nation.

As I mentioned earlier, with the committee's action earlier this week we have ensured that our authorization top line of $526 billion for the base Defense budget complies with the budget allocation levels adopted by the Senate Appropriations Committee for fiscal year 2012.

We have worked with the administration over the past several weeks to address their concerns with the detainee provisions in our bill. We understand the administration is still not satisfied with the committee work. We have made many clarifications, modifications at the request of the administration to the detainee provisions as they were reported from the committee in June. As a result, we were able to report out the bill again this week with an overwhelming bipartisan vote of 26 to 0.

We will be glad to continue our discussions with the administration. I am grateful the administration reached out to us and that because of that discussion in negotiations with Mr. Brennan and others from the White House we were able to make some changes. I regret they haven't been sufficient to overcome their objections, but we will continue to work with them. This is a very important issue.

Obviously, our collective goal is to make sure that members of terrorist organizations, specifically al-Qaida, do not return to the fight, and that we make sure we are able to treat al-Qaida members who are captured in keeping with international law, but at the same time in keeping with the priority interests of America's national security. So I understand there will be an amendment on that issue or amendments. We look forward to debating and discussing that aspect.

Whatever additional concerns that may remain with the detainee provisions should be dealt with, as they will be, through debate and amendment. But, importantly, all of the aspects of this bill are of such vital importance to supporting the men and women of our Armed Forces and their families. We have already started to work on amendments that we know our colleagues are preparing to offer on this bill, and I encourage all my colleagues to file their germane amendments as quickly as possible.

Obviously, I repeat, the legislation is extremely important to our Nation's defense and the men and women in uniform. I know all of my colleagues appreciate that fact.

I would hope that this year, unlike in recent previous years, we will not add to this bill policy riders that are not relevant to the bill.

The committee bill before the Senate is the culmination of 11 months of hard work conducted through 71 hearings and meetings this year on the full range of national security priorities and issues. This tradition of deliberative review and oversight is typical of what the Defense authorization bill has provided our Nation's military for over 50 years, without fail. The committee's priorities this year and every year start with our bipartisan commitment to improve the quality of life for the men and women of the all-volunteer force—active duty, National Guard, and Reserves—and their families, through fair pay, improved policies, benefits commensurate with the sacrifices of their service, and by addressing the needs of the wounded, ill, and injured servicemembers and their families.

To do these things, this bill authorizes a 1.6-percent across-the-board pay raise for all members of the uniformed services, authorizes pay incentives for recruitment and retention of our most highly skilled and highly sought-after men and women, and improves the Uniformed Code of Military Justice to more effectively respond to accusations of certain types of misconduct. This bill provides essential resources, training, technology, equipment, and force protection our military needs to succeed in their missions, including authorizing a 6-percent increase in funding for our enormously important professional and dedicated special operations forces who play such a large role in our counterterrorism operations worldwide, and over $2.4 billion for the Department of Defense counter-improvised explosive device activities. I cannot overemphasize the importance of the timely funding of these counter-IED funds given the increase in the use of this kind of attack against our troops, first in Iraq and now in Afghanistan.

The bill enhances the capability of our military and that of our allies to conduct counterinsurgency operations, including the authority to provide support to those aiding U.S. Special Operations in combating terrorism in Yemen and East Africa, authorization of $400 million for the Commanders Emergency Response Program—known as CERP—in Afghanistan, and authorization of $11.1 billion to train and equip the Afghan security forces for the security of the Afghan people.

The bill strengthens and accelerates nuclear nonproliferation programs while maintaining a credible nuclear deterrent, reducing the number of nuclear weapons, and ensuring the safety, security, and reliability of the nuclear stockpile, the delivery systems, and the nuclear infrastructure. In this regard, the bill authorizes $1.1 billion to continue development of the Ohio-class submarine replacement program to modernize the sea-based leg of the nuclear triad of delivery platforms. It improves our ability to counter nontraditional threats, focusing on terrorism and cyber warfare; in part by requiring DOD to acquire and incorporate capabilities for discovering previously unknown cyber attacks and establishing a new Joint Urgent Operational Need Fund to allow the Department to rapidly field new systems in response to battlefield requirements. It authorizes DOD to immediately void a contract if a contractor has been determined by the commander, U.S. Center Command, to be actively opposing U.S. forces in Afghanistan.

A related provision would provide enhanced audit authority to assist in the enforcement of this provision. It authorizes over $13 billion for new construction of critical facility projects that have a direct impact on the readiness and operations of our military while also providing much needed construction jobs in a struggling economy.

In contrast to these enhancements and new authorities, the committee also had to make some very difficult decisions. The President's budget request of $553 billion was cut by nearly $27 billion in recognition of the difficult budget situation our country faces. These difficult funding reductions include: $10 billion cut in the operation and maintenance accounts for the military services used to fund readiness and training activities. This was done mainly by scaling back the growth in service contracts while also reducing certain accounts for daily operating activities and training; a $9.8 billion cut in defense procurement accounts for programs that had more money than could be efficiently put under contract this year and programs that were not able to meet production milestones; a $3.5 billion cut in the research, development, test and evaluation accounts by examining the performance of hundreds of programs and

identifying those that showed excessive cost growth or a lack of performance; $1.6 billion in cuts in military construction projects, mostly at overseas locations, to allow for a review of our U.S. military force posture worldwide. In addition, the bill cuts $6.7 billion from the President's budget request of $118 billion for overseas contingency operations, known as OCO, due to a forecast of reduced operations in Afghanistan during 2012.

These cuts are the first step in what will be an extremely critical debate on the right amount of defense spending over the next 10 years. We will need to make some very difficult decisions that will undoubtedly increase risk as we decide whether to continue or terminate costly and, in some cases, troubled and overdue programs. We will need an informed and honest debate on which defense requirements and capabilities most effectively and efficiently protect the full range of our Nation's interests.

As such, this committee's review and curtailment of troubled, wasteful or unnecessary programs is not only essential to ensure proper stewardship of taxpayer funds but also stays true to the intent of preserving funds for war fighter priorities. Along these lines, this bill proposes to cut: $452 million for the Enhanced Medium Altitude Reconnaissance and Surveillance System due to program delays; $192 million from related Brigade Combat Team Modernization projects due to a program termination by the Army; $200 million for the Joint Tactical Radio System due to program delays; $406 million for the Medium Extended Air Defense Systems, known as MEADS, which is a high-risk joint program for air defense with Germany and Italy which the Army has decided not to deploy operationally; $519 million for the Joint Tactical Radio System, called JTRS, as a result of program execution and cost concerns; $244 million for Warfighter Information Network-Tactical; $173 million for Ground Soldier System-Net Warrior; $157 million for HMMWV recapitalization programs; $108 million for unnecessary postproduction funding for the C–17 Program; $233 million due to slow execution in the development of the family of Advanced Line Of Sight Terminals used in conjunction with the Advanced Extremely High Frequency Satellite System; $300 million by curtailing authority for long-term lease of a commercial satellite by the Defense Information Systems Agency due to a lack of an analysis of alternatives; $105 million in connection with delays in contract awards associated with GPS systems under development.

Even after this long list of cuts to troubled programs, I would have liked to have done more.

I wish to point out that in the days when we were increasing defense spending, it was one thing not to be in sync with the appropriations committee. In the days of reductions in defense spending, it is absolutely vital that the Appropriations Committee follow the guidance and authorization of the authorizing committee. I intend to do everything in my power to make sure that happens.

An example of what I would have liked to have seen more of is the Joint Strike Fighter or the F–35 Programs. I offered an amendment during the committee's markup that would have put the program on a 1-year probation if the costs under the fixed-price contract for the fourth lot of early production aircraft grew by more than 10 percent over their target cost by the end of the year. My goal was to send a strong, simple, and powerful message to the Pentagon and to Lockheed Martin, a message that we will no longer continue down the road of excessive cost growth and schedule slips on this program just because other alternatives are hard to come by.

We now are faced with a prospect of the first $1 trillion weapons system in history, which it certainly was not originally designed to be.

As it turned out, the amendment did not go forward as a result of a tie vote in committee. An alternative provision offered by Chairman LEVIN will instead require that the fifth lot of early production F–35 aircraft be procured under a fixed-price contract and that Lockheed Martin bear the entire responsibility for any cost overrun other than certain limited costs needed to make specific changes that the government requests. Because I feel it is essential to use fix-price contracts for large Pentagon weapons programs, I supported the chairman's amendment during the markup and I support it now.

Today, as we speak, the Pentagon is negotiating with Lockheed Martin on who will bear the cost of changes to the design and manufacturing of the aircraft that could come down the road as a result of thousands of hours of flight testing that lie ahead. In this sense, the excessive overlap between development and production that is called concurrency is now coming home to roost. The Defense Department quite rightly says it will not sign any contract for the next lot until Lockheed Martin agrees to pay a reasonable share of these concurrency costs, and Lockheed Martin doesn't want to bear the risk of new discoveries.

Let me be clear. I strongly support the Department of Defense position. I think it reflects exactly the congressional view reflected in our markup. As we agree to buy more early production jets while most of the development testing has yet to be done, Lockheed Martin must be held increasingly accountable for cost overruns that come as a result of wringing out necessary changes in the design and manufacturing process for this incredibly expensive aircraft.

How does this legislation affect pending negotiations? It means on the next production lot, Congress expects the Department to negotiate a fixed-price contract that requires Lockheed Martin to assume an increased share of any cost overruns. It requires a ceiling price for that lot that is lower than the previous contract for the last lot purchased. It ensures a shared responsibility for reasonable concurrency cost increases.

In other words, the deal we negotiate on this next production lot must be at least as good, if not better, than the deal we negotiated under the previous one. Otherwise, we are moving in the wrong direction and it will only be a matter of time before the American people and the U.S. Congress lose faith in the F–35 Program, which is already the most expensive weapons program in the history of this country.

I look forward to having the opportunity to address this and other significant national security policies related to detainee policies, cyber operations, Iranian aggression, Pakistan, acquisition reform, and the way we buy space programs and launch services, further limiting the use of fixed-price contracts for procurement, reducing the cost of military health care, counterfeit parts, and the future of our military in the face of major budget reductions.

On the issue of counterfeit parts, I commend the initiative of the chairman to address this critical issue. The proliferation of counterfeit parts threatens the safety of our men and women in uniform, our national security, and our economy. We cannot risk a ballistic missile interceptor missing its target or a helicopter pilot unable to fire his or her weapons or display units failing in aircraft cockpits or any other system failure, all because of a counterfeit electronic part. Nor can we keep affording the hundreds of thousands, even millions, of dollars to fix the systems they penetrate.

Our committee has been conducting an investigation for the past year, and we will have an amendment—there is one already pending—as a result of this outstanding work.

I also plan to offer amendments that will start us on the course of an updated plan for U.S. military forces in the Pacific theater. The current plan to move 8,700 marines, 9,000 family members from their current bases on Okinawa to Guam is now estimated to require spending between $18 and $23 billion on Guam to build up its capabilities as a permanent base. This is an increase of well over $10 billion from the original estimate. I believe the pricetag will continue to rise. As a result, I, along with Chairman LEVIN and Senator WEBB and other colleagues, view this program as unworkable, unaffordable, and an unnecessary strain on the relations between our government and the Government of Japan. Recognizing this strain, both the Armed Services Committee and the Military Construction and Veterans Affairs' Committee of the Appropriations Committee have stopped funding Guam

military construction projects until the Department of Defense provides a master plan and considers alternatives that may provide the needed Marine forward presence at much less expense.

Let's face it, we simply are at a level we cannot afford under the present plan. I also understand our relations with Japan are very important in this whole move. We cannot send a signal that America is leaving the area. In fact, I was very pleased to see the agreement the President of the United States signed with the Prime Minister of Australia just yesterday that provides for a joint operating base in Australia. But we must understand the delicacy of our relations with the Government and people of Japan, especially in the time of rising concern about some of the behavior that has been exhibited by the Chinese.

I believe we need to take advantage of this pause to convene a congressional commission of experts in Asian affairs, with multilateral input, to review our national security interests in the Pacific region over the next 30 years and charter that commission to propose a posture for our military forces that will both strengthen our traditional alliances while offering opportunities for cooperative efforts with emerging partners and allies to solidify our mutual interests in the region.

In the face of the doubt about the scope and timing of the Pacific realignments, we also need to ensure that this pause in potentially unnecessary spending is extended in 2012 to the use of defense funds to activities that have no direct impact on military functions or missions on Guam, such as the purchase of civilian school buses and an artifact repository and a mental health clinic on Guam. While these projects may have legitimate value to the Government of Guam to address current needs for citizens of Guam, they simply are not my idea of top defense priorities in the fiscal environment we face.

In addition, despite the efforts of Congress to ban earmarks and special interest projects, this bill contains almost $850 million in authorizations of funding for items and programs not requested by the administration. The full Senate needs to consider the merits of these unrequested spending items and to determine whether they are top defense priorities in today's fiscal environment.

The bill also cuts $330 million for private sector care under the Defense Health Program, based on an assessment of historical underexecution rates. This is the first step in an important progress in helping the Department of Defense control spiralling health care costs. It is the other challenges we face in this bill where we could have and should have done more.

Secretary Panetta, speaking at the Woodrow Wilson Center, said:

> The fiscal reality facing us means we also have to look at the growth in personnel costs, which are a major driver of budget growth and are, simply put, on an unsustainable course.

The Secretary concludes:

> If we fail to address [these costs], then we won't be able to afford the training and equipment our troops need in order to succeed on the battlefield.

Providing the Department with the authority to adjust Tricare PRIME enrollment fees based on a realistic index of national health expenditures per capita, as the administration requested, would have been the right thing to do. Instead, this bill limits all future enrollment fee increases to the cost-of-living adjustment for military retired pay.

Military retirees and their families deserve the best possible care and nothing less in return for a career of military service. But we cannot ignore the fact that health care costs will undermine the combat capability and training and readiness of our military if we don't begin to control the cost growth now. Our committee report reflects the desire of the committee to review options for phasing in more realistic future adjustments beginning in fiscal year 2014, and that is exactly what we must do.

I wish to emphasize a point here. I am solemnly aware of the commitment this Nation has made to the men and women who have served in the military regarding health care and benefits. This Nation has made promises for many years and has endeavored to keep those promises. But we are faced with a set of dire circumstances regarding the long-term viability of entitlement programs that threatens to undermine a whole range of promises we have made to every American.

I am also keenly aware that in this unprecedented fiscal crisis facing this country, providing for our national defense is the most important responsibility that our or any government has. It is our Nation's insurance policy. And in a world that is more complex and threatening than I have ever seen, we cannot allow arbitrary budget arithmetic to drive our defense strategy in spending. We have to look at every program to determine what risks we can afford to take without risking the lives and welfare of those brave young Americans who volunteered to serve in the military.

As such, some of the defense cuts being discussed—particularly as a result of sequestration—would do grave harm to our military and our Nation's security. The immediate impact of a sequester, according to Secretary Panetta, who previously served as chairman of the House Budget Committee and Chief of Staff to President Bill Clinton, could be a 23-percent across-the-board cut to our Nation's defense programs. Shipbuilding and construction contracts would have to be curtailed. Civilian personnel and contractors would have to be furloughed. The end results of these cuts after 10 years would be ''the smallest ground force since 1940, the smallest number of ships since 1915, and the smallest Air Force in its history.'' The United States would face ''substantial risk of not being able to meet our defense needs.''

Defense spending is not what is sinking this country into fiscal crisis, and if the Congress and the President act on that flawed assumption, they will create a situation that is truly unaffordable—the decline of U.S. military power and a hollow military. We cannot let this happen. Despite a significant decline in defense spending, the growing threats we face around the world demand a strong and resolute U.S. military that continues as the first line of protection for peace, freedom, justice, and democracy around the world.

I have had the privilege of a long career in public service, but in all my years I don't think I have ever seen a geopolitical environment as complex and as multidimensional as the one we face today. This will only increase in the years to come. The rise of China is one of the most seminal events in world history, but it is not an isolated occurrence. Other nations across the Asia-Pacific—most notably India—are also growing rapidly and using their newfound wealth to enhance their comprehensive national power, especially new military capabilities.

The challenge for the United States is this: How do we, as a historic Pacific power, use the next few years—despite the necessary cuts that will have to be made in our defense spending—to make smart, strategic investments that set us up to shape the future of the coming Pacific century? That means a more geographically dispersed and operationally resilient regional force posture. It means developing new operational concepts, such as the Defense Department's AirSea Battle concept, which aims to enable us to operate effectively in an anti-access and area-denial environment. It means taking advantage of the many opportunities we face to enhance the capabilities and interoperability of our alliances and partnerships. And perhaps most of all, it means making some difficult and at times painful choices about where we can go, what we do, and what we can do without. We all must take responsibility for these choices.

When we talk about our increasing focus on the Asia-Pacific region, what this does not mean and cannot mean is a lack of commitment to the broader Middle East. After all, the United States still has a capacity to do at least two things at once, and we cannot afford to allow that to change.

The Middle East and north Africa are undergoing perhaps the most consequential period of upheaval since the collapse of the Ottoman Empire. Governments with long patterns of authoritarian control—some of them our partners—are falling under the popular pressure of millions of citizens who desire dignity, freedom, and opportunity. Our old and dear ally Israel faces a more tumultuous and potentially threatening position than it has in decades. At the same time, new regional

leaders, such as Turkey and Qatar and the UAE, are playing a more confident and assertive role in shaping the events of the region despite the failure of leadership that led us to the full withdrawal of U.S. troops in Iraq. The success of that country remains a critical national security interest of the United States. We must remain committed to Iraq's success and stability. And all the while, the Iranian regime continues to threaten the security of the region and that of the United States.

Amid all of these complicated and important global trends, it is absolutely vital that the Members of this body be allowed to engage in a fulsome and serious debate about the vital national security interests contained in this bill. I hope there will be a generous opportunity to offer amendments and debate them. I am confident we can do this while still moving diligently and quickly along.

We have given the majority leader the commitment that we will work to ensure Senate consideration of this bill on an expedited basis. This Chamber must have the opportunity to complete this bill and then send it to the conference with the House. We need to have a conference report before the end of the year.

We cannot continue to place critical authorizations in appropriations bills or continuing resolutions because we cannot get the Defense authorization bill done in a timely manner. As an example, this bill includes extensions for several important counternarcotics authorities that expired at the end of fiscal year 2011. The expiration of these authorities has had a direct impact on DOD efforts to combat illicit trafficking networks where proceeds often directly fund the activities of terrorists and other criminal organizations that pose a significant threat to U.S. security interests. Timely passage of the Defense authorization bill will ensure that these counternarcotics missions can continue in places such as Afghanistan, Colombia, and along our southern border.

I, for one, am not proud of the 9-percent approval rating in the performance of Congress determined by various polls. They are right—we need to do more for the American people. I hope we can reverse this downward trend in our approval by tackling the critical national security challenges facing this country in an efficient and effective manner.

I look forward to working with Senator LEVIN to pass this bill as quickly as possible and get it into law for the benefit of our military and our country. I would ask our colleagues—as we usually do—to get their amendments to us so we can have them considered and have as prompt action as possible on them.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Let me thank my friend from Arizona for his great work on this bill and the way in which he and our members, our brothers and sisters on the committee, including the Presiding Officer, worked so well together on a bipartisan basis and the way our staffs worked together. We are now in a position where we can consider amendments, as the Senator from Arizona said, pending the receipt of amendments for our consideration.

I yield the floor.

Mr. MCCAIN. Madam President, what is the pending business before the Senate?

The PRESIDING OFFICER. The pending business is the McCain-Levin amendment No. 1092.

Mr. MCCAIN. I think that is the Levin-McCain amendment.

The PRESIDING OFFICER. That is correct.

Mr. MCCAIN. I would like to discuss that amendment. This amendment is a result of the effort made by our committee staff and other members of the committee to identify a very serious problem that can affect our Nation's security; that is, the counterfeiting of critical components that end up in our defense systems—in some cases, helicopters; in some cases, aircraft; in some cases, missiles—literally every high-tech aspect of our Nation's defense systems.

We traced, in hearings under Senator LEVIN's leadership, the way in which, through different shell companies, these parts that originate in China that are counterfeit end up, through various establishments and then by our major parts suppliers, in our weapons systems. There already have been occasions where there have been system failures, and there have also been situations which have inhibited or reduced readiness and further capabilities. So far, thank God, it has not resulted in any casualties or deaths, but there is very little doubt that this counterfeiting poses a serious threat. According to our findings, some 70 percent of these counterfeit parts come from China.

It has to be stopped. We don't know, to tell my colleagues the truth, if all the parts of this amendment will stop it because it is a huge money-making business, but I think this initial amendment will move us in the right direction to try to bring at least under some control the flow of these counterfeit parts into our Nation's defense.

So I hope that with the help of my colleagues we could adopt this amendment as rapidly as possible and move on to the next one. I know of no one who objects to it. I know there are other members of the committee who were involved in the examination of this situation, and perhaps they would like to come and speak on it. But I would recommend to the chairman that we move on this amendment as quickly as possible.

Mr. LEVIN. Madam President, I thank the Senator from Arizona. I very briefly described this amendment before, but I will take a few minutes now to describe it in some greater length because it is very significant. It is going to totally change the way we buy replacement parts for our weapons systems to avoid the absurdity that we have so many counterfeit parts, including used parts, where we need new parts on these weapons systems.

The investigative staff of our committee looked at just a slice of the Defense chain for getting replacement parts. In that one slice of that supply chain, they identified 1,800 examples of where counterfeit parts were in our weapons systems. There were 1,800 different examples, but they involve millions of parts.

What happens here is that these used computers that originate from China, which are called e-waste, are sent back to China where they are pulled apart. The electronic parts are then washed, frequently in a stream—and there are pictures of these parts being washed in streams—dried out in the open, and then they go mainly to one place in China, Shantou. The surfaces of these parts are then sanded down, new surfaces are put on them, and a number is placed on them to make them look like new parts. Then, those parts, through various ways, get into the supply chain. That is what we have to stop.

This is dangerous for our troops. It jeopardizes their missions. We believe we are losing approximately 11,000 American jobs that would be making these parts if they weren't counterfeited overseas. That is just one estimate by the Semiconductor Industry Association. Our semiconductor manufacturers suffer about $7.5 billion in lost revenue. So there is a safety issue and a mission threat issue here, first and foremost, but this is also an unnecessary and unfair blow to the American economy and to American jobs.

This is what this amendment does. We are requiring the Secretary of Homeland Security to establish a program of enhanced inspection of electronic parts imported from any country that is determined by the Secretary of Defense to be a significant source of counterfeit parts in the DOD supply chain.

This amendment requires the Department of Defense and its suppliers to purchase electronic parts from original equipment manufacturers and their authorized dealers, or from trusted suppliers who meet established standards for detecting and avoiding counterfeit parts. It establishes requirements for notification, inspection, testing, and authentication of electronic parts that are not available from such suppliers.

It requires the Department of Defense and DOD contractors who become aware of counterfeit parts in the supply chain to provide written notification to the Department of Defense inspector general, the contracting officer, and the Government-Industry Data Exchange Program—GIDEP—or a similar program designated by the Secretary of Defense.

The amendment would authorize Customs to share information with original component manufacturers from electronic parts inspected at the border to the extent needed to determine whether an item is a counterfeit.

It requires large Department of Defense contractors to establish systems for detecting and avoiding counterfeit parts in their supply chains, and it authorizes the reduction of contract payments to contractors who fail to develop adequate systems.

The amendment requires the Department of Defense to adopt policies and procedures for detecting and avoiding counterfeit parts in its own direct purchases, and for assessing and acting upon reports of counterfeit parts from Department of Defense officials and DOD contractors.

The amendment authorizes the suspension and debarment of contractors who repeatedly fail to detect and avoid counterfeit parts or otherwise fail to exercise due diligence in the detection and avoidance of counterfeit parts.

The amendment also includes a bill Senator WHITEHOUSE introduced that was passed out of the Judiciary Committee to toughen criminal sentences for counterfeiting military goods or services.

Finally, the amendment requires the Department of Defense to define the term ''counterfeit part'' which is a critical and long overdue step toward getting a handle on the problem.

We also make it clear that it is the supplier of the counterfeit part who is going to pay for its replacement, and not the taxpayers of the United States.

This amendment touches the jurisdiction of two or three other committees, so we have sent this amendment to the other committees to try to clear this amendment. The Judiciary Committee is one, and I think Homeland Security is another, and I believe the Finance Committee is the third. We are hoping we can get prompt, positive response, but obviously we want to make sure those other committees are consulted and that they concur. If not, we would have to then make changes in the amendment, probably, in order to accommodate what those concerns are. But there are some jurisdictional issues here which we are currently working out.

I had an opportunity this morning, with Senator MCCAIN, to talk to Senator LEAHY, who was before our committee introducing a nominee, to alert him to the fact that we had this amendment which touched on the jurisdiction of his committee. I hope by now the language of the amendment has been shared with the staffs of those three committees—and I think I have them all—but we intend to do exactly that.

Mr. MCCAIN. Madam President, will the Senator yield for a question?

Mr. LEVIN. Surely.

Mr. MCCAIN. Is it not also true that as the Senator mentioned, and I wish to emphasize, that Senator WHITEHOUSE's Combating Counterfeiting Military Act is a part of this bill, so that would hopefully satisfy at least the Judiciary Committee? I see the distinguished Senator from Iowa here. He does not intend to address this issue, but I hope we can get the committees of jurisdiction involved in this as quickly as possible. I think this is an issue we should not delay too much longer.

Mr. LEVIN. Well, we do need to consult with those committees. That is underway. I am hopeful the committees and their leaders will take a prompt look at this and see if there is any problem with the language from the perspective of their committees.

Mr. MCCAIN. If the chairman will further yield briefly, so we will not voice vote this until we get the signoff of the relevant committees; is that correct?

Mr. LEVIN. That is correct.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. I ask unanimous consent to address the Senate as in morning business.

The PRESIDING OFFICER (Mr. MANCHIN). Without objection, it is so ordered.

CONSTITUTIONALITY OF PPACA

Mr. GRASSLEY. Mr. President, I am pleased the Supreme Court has agreed to hear the arguments in three cases challenging the constitutionality of the health care reform law Congress passed 2 years ago. I appreciate that the Obama administration asked the Supreme Court to hear this question. In light of the importance of these cases, I have written to Chief Justice Roberts asking him to provide live audio and video coverage of the oral arguments.

The constitutionality of the health care law was the subject of a hearing in the Judiciary Committee last February. Regrettably, the Judiciary Committee would not hold such a hearing until after the bill became law. Those who voted for that law should have given these constitutional questions more attention before they voted for the bill. Today I wish to discuss the issues that are presented in the cases, focusing primarily on the constitutionality of the individual mandate and another recent appellate court ruling on that topic.

When Congress passed this law last year, we were told it would be very popular and truly and clearly constitutional. Neither is true. Polls show that the law remains unpopular. The law's individual mandate provision requires nearly all Americans who do not otherwise have health insurance to purchase such insurance or to pay a monetary penalty. That provision also raises serious constitutional questions about the scope of congressional power to regulate interstate commerce.

Normally, the Supreme Court grants only 1 hour for oral argument. Here, the constitutional questions associated with the bill are so difficult that the Supreme Court has decided to devote 5½ hours to oral argument. The answers to the questions are not clear. Besides considering the commerce clause question, the Court will also hear oral arguments on three other questions. The first is severability: Will the remainder of the law stand if the individual mandate is struck down? Normally, the Court does not even consider severability until it has decided that a part of a statute is, in fact, unconstitutional. The fact that at least four Justices have voted to hear arguments on this question should cause uneasiness among those who are confident that the law is constitutional. The second issue is the constitutionality of the law's expansion of the Medicaid Program upon the States. The third is whether procedurally the law can be challenged in the courts before it actually takes effect.

There is always the possibility that after all the briefs, all the arguments, and all the public expectations, the Supreme Court will finally resolve whether the health care law is, in fact, constitutional. Conversely, the Court could determine that it is too soon for it to rule on the issue because the law hasn't fully gone into effect.

Before the Supreme Court agreed to hear these cases, the U.S. Court of Appeals for the DC Circuit ruled that the individual mandate was within the constitutional power to regulate interstate commerce. That court concluded that this result followed from existing Supreme Court decisions. It also ruled that Congress could, therefore, require private individuals to purchase any product that Congress chose. The majority opinion was written by Judge Laurence Silberman.

I respect Judge Silberman, but I strongly dispute his ruling and I wish to take this opportunity to outline my disagreements with Judge Silberman.

I think Judge Silberman has selectively read Supreme Court decisions. For instance, he noted that no Supreme Court has ever held the commerce clause authority is limited to people who are currently engaging in an activity that involves interstate commerce, but it is equally true that no Supreme Court case has ever held that the commerce clause covers people who are not engaging in an activity and may never do so in the future. It is not clear why Judge Silberman focused only on the first formulation and did not consider the second. This omission is even more peculiar when compounded by his omission of the Supreme Court's repeated skepticism of congressional claims that it can exercise a power that it never before discovered in more than 200 years of our constitutional history. The Court has always been wary when a new power is claimed.

Judge Silberman recognized that the power claimed here to require that the purchase of a product or service is novel, but he did not continue with the next step that the Supreme Court

would have taken. Instead, the judge concluded that the argument against the power was equally novel.

I think it is common sense no one would have made such an argument if Congress had not claimed this power. For instance, when the Supreme Court in the Plaut case ruled that Congress could not reinstate a statute of limitations once it had expired, it pointed out that Congress had never done that. It did not belittle the argument against the practice by characterizing it, as Judge Silberman did, as novel. In fact, the argument against the novel claimed power won.

Judge Silberman stated that Congress cannot regulate noneconomic behavior based on a weak link to interstate commerce. He ruled that Congress cannot regulate intrastate economic activity that in the aggregate does not substantially affect interstate commerce. Agreeing with Judge Silberman, so far so good. But then he found that decisions whether to purchase health insurance do affect interstate commerce. However, the Supreme Court has never ruled that Congress can regulate decisions—in other words, thoughts—on whether to purchase a good or service. The Court for decades has referred to the power of Congress to regulate activities that affect interstate commerce.

Since Congress cannot regulate noneconomic activities or intrastate economic activities that have no combined effect on commerce, then it follows naturally that Congress cannot regulate at all inactivity—such as refraining from buying a product.

Judge Silberman considered the ''activity'' argument and, in my mind, he repeated an earlier error. He concluded that no Supreme Court case had ever said that existing activity was necessary for Congress to exercise its power to regulate interstate commerce.

But it is just as true that many Supreme Court cases have described the kinds of activities Congress may regulate under the commerce clause. Judge Silberman could have as accurately found that no Supreme Court case has ever held that Congress has the power to regulate commerce in the absence of an activity.

Another way Judge Silberman selectively read the Supreme Court precedents is that he could have struck down the individual mandate consistent with all Supreme Court precedents.

This point was confirmed in the Judiciary Committee hearing we held in February. I asked the witnesses whether the Supreme Court could strike down the individual mandate without overruling any of these precedents. The Republicans' witnesses both responded that the Court could do so. The Democrats' witnesses identified no cases that would have to be overturned. So not only is the individual mandate unconstitutional, but the Supreme Court could strike it down without overturning any of its precedents.

Judge Silberman disagreed. He said the mandate here is close to the facts of Wickard v. Filburn, a famous 1942 Supreme Court decision that broadly read the powers of Congress to regulate interstate commerce. The Court then upheld the second Agricultural Adjustment Act. Under that law, a farmer could be penalized for growing wheat on his own farm even for the use of his own family and livestock. He could not grow that wheat if he exceeded his wheat quota. The homegrown wheat substituted for the wheat the farmer otherwise would have had to purchase on the open market, so the Court concluded that would depress the price of wheat when combined with the actions of similar farmers all across the country. So, obviously, in Filburn, that farmer affected interstate commerce. That may not make sense to us today, but it made sense in 1942, and it is still a precedent.

Judge Silberman, however, ruled that the regulation at issue in that case is very similar to the individual mandate, which is an inactivity if you decide not to purchase it, and that any activity involved in the Wickard case was incidental to simply owning a farm.

I take issue with that. The Wickard case differs conceptually from the individual mandate. Farmer Filburn, in 1942, could avoid the regulation by ceasing to farm, by no longer engaging in the regulated activity. In fact, that is true in all of the cases Judge Silberman cited. A person can avoid laws penalizing cultivation of marijuana by not cultivating marijuana. A person can avoid laws criminalizing child pornography by not downloading child pornography. A person can avoid public accommodation regulations by not operating a public accommodation. Those are activities Congress can constitutionally regulate under the commerce clause.

But that is not the case with the individual mandate. You cannot avoid being subject to that mandate. If you exist, if you are alive, an individual in this country, you are regulated. And, of course, that is not the situation with respect to any other decisions Judge Silberman cited. It is why he is, respectfully, wrong to find that the infringements on liberty are the same in those cases as they are in the individual mandate. The liberty of avoiding the regulation was preserved in the laws at issue in those cases. Liberty would prevail because you did not have to abide by the law if you were not in that business, but not so with the individual mandate under the health care reform bill.

Moreover, I disagree with Judge Silberman's assertion that it is for political reasons and not constitutional ones that it took until 2010 for Congress to conclude that the Constitution allows it to force people to buy goods or services. If this power truly existed, Congress would have exercised it frequently and long ago.

Why would Congress pass tax incentives to encourage people to buy hybrids if Congress could simply order you or anybody else to buy hybrids? Why would Congress give strong incentives for farmers not to grow wheat so as to keep the price up when it could force people—the consumer—simply to buy wheat? Why could it not raise the price of beef by requiring vegetarians to purchase it, so long as it did not require them to eat that beef? Why would Congress take the political heat for raising taxes when it could order some people to pay third parties for goods and services?

Even more sinister, Members of Congress could use this supposed power under the commerce clause to entrench ourselves in office. Congress could require that the goods and services Americans must purchase be limited to those providers who contribute to the political party of the Members. Or it could prohibit purchases from those providers who contribute to the other political party. It could require people to buy houses or cars or other products in areas where that political party has its base of support. Sounds a little bit like Mussolini's Italy, doesn't it?

Before the Supreme Court's Lopez decision, there were people who believed Wickard v. Filburn, since 1942, gave Congress the ability to regulate anything Congress chose to regulate. Then, in the Lopez case, the Supreme Court ruled that the commerce clause did not permit Congress to regulate the possession of handguns near schools. At the time, there was widespread fear among liberals that the power of Congress to regulate interstate commerce would be jeopardized. Those fears did not materialize. Similarly, today, people such as Judge Silberman again believe that Wickard v. Filburn gives Congress the ability to regulate nearly anything it chooses and, therefore, the individual mandate must be upheld. I do not agree.

Where I give Judge Silberman credit—and if you knew the man, you would know this is his character—is in his intellectual honesty. Unlike the Obama administration, Judge Silberman recognizes the truth. If Congress can force people to buy health insurance, he admits, it can force people to buy any goods or services. It can regulate inactivity because it can affect interstate commerce. This is consistent with the opinion of the Congressional Budget Office, which wrote in a 1994 memorandum that ''a mandate-issuing government'' could lead ''[i]n the extreme'' to ''a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services. . . . '' That is not the America our Constitution writers envisioned.

At the oral arguments in the DC Circuit, the judges asked the Obama administration lawyer if Congress could require Americans to buy broccoli, or to buy cars to keep General Motors in business, or to set up mandatory retirement accounts in place of Social

Security. The lawyer weaseled an answer, saying that ''It would depend.'' That is not a principled position on the nature of the supposed powers of Congress, which has no limit.

Judge Silberman is a former Ambassador to what used to be Yugoslavia. He understands the difference between a command economy and a free market economy. What his decision implicitly states is that Wickard v. Filburn permits Congress to enact a command economy with no individual economic freedom whatsoever. But our Constitution provides protections for private property and for contracts. It establishes some form of a free market system. Judge Silberman's interpretation may imply that Wickard v. Filburn was wrongly decided and should be overturned, but I do not believe it is necessary to overrule that decision, any more than it was necessary to reverse the Filburn case when they decided the Lopez case.

Apart from cases, we need to go back to the basics. We should consider first principles in evaluating the constitutionality of the individual mandate in the health care reform bill. The people are sovereign in our country. The government serves the people, not the other way around. That is enforced through our Constitution. And that Constitution gives Congress just limited powers.

In the Federalist Papers, James Madison wrote that the powers of the Federal Government are few and are defined, and the powers of the States are many and are undefined. Although there is much more interstate commerce in today's economy than there was in 1787, the power is still limited. If Congress can require Americans to purchase goods and services that Congress chooses, without a limiting principle, then there is no limited Federal Government. There would be no issue that Congress could not address at the Federal level. There would be no range of State powers that the Federal Government cannot usurp. And there would be no individual economic autonomy that the Federal Government must respect. Surely, the Constitution would not have been ratified if Americans had understood it to permit such a result.

The upcoming Supreme Court decisions on the constitutionality of the individual mandate are important, not only for the fate of that provision but for their effect on the powers of the Federal Government and for the very survival of individual economic activity.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

AMENDMENT NO. 1084

Mr. KIRK. Mr. President, I wish to speak on the pending amendment. I rise in support of the Kirk-Manchin-Heller and Blunt amendment regarding Iran. What we know with regard to Iran is that they have persecuted 330,000 Baha'is in their country, registered their houses, kicked their kids out of university, made sure that they can do no business with the Iranian Government.

We know Iran is the chief sponsor of the terrorist group Hezbollah that has had a grip on southern Lebanon. We know Iran jumped the Shiite divide to also support the terrorist group called Hamas in the Sunni community.

We know Iran has been a state sponsor of terror as certified by Presidents Carter, Reagan, Bush, Clinton, Bush, and Obama.

We know Iran recently sentenced an Iranian actress to 90 lashes for appearing in an Australian movie without a headdress.

We know Iran recently arrested 70 of its fashion designers, for crimes I cannot even imagine that they would have committed.

But, most importantly, we know the International Atomic Energy Agency has certified that now Iran has enriched uranium far beyond what it needs to run a civilian reactor program; that Iranian military personnel have been involved in acquiring information on the design of nuclear weapons; that the Iranians are working on the details of a warhead for their Shahab-3 missile that fits all of the profiles of a nuclear weapon.

Finally, we know, according to the Attorney General of the United States, Eric Holder, that Iran and its Iranian Revolutionary Guards Quds force established a bomb plot with the Mexican cartel, the Zetas, to blow up a Georgetown restaurant, to kill a number of Americans, even talked about possibly killing Senators, in an effort to assassinate the Saudi Arabian Ambassador to the United States here in Washington, DC.

I think it is clear with this bipartisan amendment that we all recognize we are at a turning point and that we need new sanctions against Iran. Without crippling sanctions, I believe we have then turned the international community on the path toward war, likely between Iran and our allies, in Israel.

This would cause a needless loss of life. It would lead to higher energy prices for the West, an increase in instability in Europe when we can least afford it. Therefore, we need to level crippling sanctions, especially against the Iranian center of gravity, the Central Bank of Iran.

The Central Bank of Iran is the principal funder of the Ahmadinejad regime itself. It is probably the source of funds so substantially provided to terrorist groups by Iran to Hamas and Hezbollah. It is the Central Bank of Iran that is supporting operations in Afghanistan and Iraq against our allies there.

It is the Central Bank of Iran that is the principal underlying financial support for the Iranian nuclear program, and the Central Bank of Iran that is the paymaster for the Iranian Revolutionary Guards force, especially their Quds force. Likely the money that was planned for the Zetas to carry out the bomb plot in Washington, DC, had its origin point with the Central Bank of Iran.

That is why 92 Senators, Republicans and Democrats, despite these partisan times, have joined to say we should level this crippling sanction against the Central Bank of Iran.

I thank the 92 Senators who signed the Schumer-Kirk letter. Indications are that the Obama administration is going to take further actions on the Central Bank of Iran. This amendment lays out the full roadmap for what we should do.

What does the amendment do? It is patterned after the bipartisan amendment adopted under the authorship of Democratic California Congressman HOWARD BERMAN, unanimously adopted in the House Foreign Affairs Committee, that says for any business, if you do business with the Central Bank of Iran, you cannot do business with the United States of America.

We know that world financial arrangements and especially oil markets are complicated instruments, so under this bipartisan amendment we have a 180-day timeclock to make sure that especially key allies and friends of the United States can unhook from Iranian oil and the financial ties that bind them to Iran. This is particularly important for Turkey, for Sri Lanka, for Italy, and for Greece, who would all use that time under this amendment to unhook from Iran.

In this, I think we are going to have a very willing partner in the Government of Saudi Arabia, recently obviously focused on, because the Iranians tried to kill their Ambassador to the United States. I will be meeting with that Ambassador tomorrow. I think this amendment lays the groundwork not just to work with Israel, not just to work with Saudi Arabia, but our allies, to collapse the Central Bank.

Without action, I think we turn the Middle East and especially the Persian Gulf toward war. That is why we should take every nonmilitary action possible to avoid that conflict, to collapse the Central Bank of Iran.

There are a number of bipartisan heroes in this story—Senator LIEBERMAN, who has been a key actor on these issues and a partner with me on many of these issues; Senator GILLIBRAND also who has helped out; obviously Senator SCHUMER, who was the coauthor of the 92-Senator letter on the Central Bank of Iran; Senator MENENDEZ, who also has an outstanding idea on creating an Iranian oil-free zone; and obviously my bipartisan partner on this and best friend in the Senate, Senator MANCHIN, who joined me on this effort.

Together, we can have a clear statement about what has happened with the IAEA and the Iranian nuclear program, with their record on human rights, with their record on support for terrorism and, most importantly, according to the Attorney General, with a brazen attempt to attack the United States directly with this bomb plot.

I urge Members of this Chamber to vote for this amendment, which is now pending to the National Defense Authorization Act, because it puts a clear statement forward, levels the toughest nonmilitary sanction we had, helps reduce the chance for war or market and oil instability and higher prices, and has such a strong bipartisan pedigree behind it.

I yield the floor.

Mr. MCCAIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Ms. AYOTTE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. AYOTTE. Mr. President, as a member of the Senate Armed Services Committee and as the ranking member of the Readiness Subcommittee, I wish to speak for a few moments and comment on the National Defense Authorization Act.

I will begin by thanking the majority leader for honoring his commitment to bring the National Defense Authorization Act to the floor for debate, amendment, and passage. As Leader REID pointed out this morning, this would have been the first time in a half century in which we would not have passed a national defense authorization bill. In the midst of two wars, with our brave sons and daughters and husbands and wives fighting in Iraq and Afghanistan, with our country facing a serious threat from radical Islamist terrorists, that would have been unacceptable.

I very much thank Chairman LEVIN and Ranking Member MCCAIN for their leadership. In this era that has been characterized by gridlock and partisanship in Washington, the Armed Services Committee has represented a welcome exception. The Senate Armed Services Committee has a long-enjoyed, well-deserved reputation for professionalism and bipartisanship as we work across party lines to support our troops and their families who sacrifice so much for our country to keep us safe.

This bipartisan spirit is reflected by the fact that the Armed Services Committee unanimously reported the initial Defense authorization bill out of committee this summer, and did so again this week, after reducing the authorization levels consistent with the requirements we need to meet, in light of the fiscal crisis our country faces, and after revising the detainee compromise to take into consideration some of the administration's concerns.

This year, once again, the quality of Senator LEVIN's and Senator MCCAIN's leadership is reflected in the quality of the legislation the Armed Services Committee has produced. This bill will ensure that our war fighters have what they need to accomplish their missions, protect themselves, and defend our country.

I am especially proud of the work of the Readiness Subcommittee. It has been a pleasure to work with Chairman MCCASKILL. Our committee made significant, well-informed reductions that achieve taxpayer savings without endangering our military readiness.

However, going forward, I wish to raise one issue. We have to guard against excessive cuts to our readiness accounts that will leave our troops and our Nation less prepared for future contingencies. In light of the supercommittee meeting in Washington, we have to come to an agreement to avoid what Secretary Panetta has described as catastrophic and a deep concern for our national security if those sequestration cuts occur.

I am particularly pleased key provisions of the Brown-Ayotte ''no contracting with the enemy'' legislation are included in the bill. This provision will make it easier for the Defense Department, contracting officials in Central Command area operations, to void contracts with contractors that, unfortunately, in some instances, have funneled taxpayer dollars to our enemies.

Let me conclude by saying that, again, I very much appreciate the leadership and bipartisan nature of the work done on the Armed Services Committee. This is a very important bill that I am very glad we are going to take up and fully debate in the Senate. I certainly urge my colleagues to pass this bill.

AMENDMENT NO. 1065

Ms. AYOTTE. Mr. President, I ask unanimous consent to set aside the pending amendment and call up amendment No. 1065.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will report.

The bill clerk read as follows:

The Senator from New Hampshire [Ms. AYOTTE], for herself, Mr. MCCAIN, and Mr. REED, proposes an amendment numbered 1065.

Ms. AYOTTE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: Relating to the force structure for strategic airlift aircraft)

At the end of subtitle C of title I, add the following:

SEC. 136. STRATEGIC AIRLIFT AIRCRAFT FORCE STRUCTURE.

Section 8062(g)(1) of title 10, United States Code, is amended—

(1) by striking ''October 1, 2009'' and inserting ''October 1, 2011''; and

(2) by striking ''316 aircraft'' and inserting ''301 aircraft''.

Ms. AYOTTE. Mr. President, the amendment I have just offered to the Defense authorization bill is an amendment that Senator REED from Rhode Island is joining me in sponsoring.

The amendment itself would allow the Air Force to reduce its strategic airlift aircraft inventory to what they need to meet our readiness needs. It would save $1.2 billion of taxpayer money in the next few years, without compromising the readiness we need to protect our Nation.

Our Nation's strategic air fleet provides global air mobility to the U.S. military. As GEN Raymond Johns, commander of the Air Force Air Mobility Command, said in his statement in a hearing before the Armed Services Committee, where we had this amendment addressed:

The strategic airlift is a national asset allowing America to deliver hope, to fuel the fight, and to save lives anywhere in the world within hours of getting the call.

In order to meet this need, the United States uses C–5s and C–17s as their strategic airlift capability, and current Federal law sets the Air Force's minimum number of strategic aircraft at 316. However, the Air Force and the administration—when the Department of Defense submitted their budget request, they made very clear that we don't need to keep the minimum requirement at 316 to meet the needs of our country; that only a minimum requirement of 301 aircraft are needed to meet the strategic airlift capacity requirements of our country. The requirement to maintain the bottom-line limit of 316 is a situation where Congress is requiring the Air Force to maintain planes it does not need to protect the readiness of our country. So it was the Air Force that wanted this amendment to be brought forward to ensure we can save taxpayer dollars—over $1 billion.

This is very important at a time when we are asking our military, as a result of the Budget Control Act, over the next 10 years, to reduce spending by close to $450 billion. So they have to look at areas where we are spending money we don't need or where we are maintaining assets we do not need to meet our readiness.

That is why I brought this amendment forward. It is a commonsense amendment that I am so pleased Senator REED has joined me on. I hope my colleagues will support it in this time of great fiscal challenges. But the need remains ever present to protect our national security against those who would want to harm Americans and our allies for what we believe in.

We have to allow the Air Force and our Armed Forces to make sensible decisions on where they need to put resources to protect our country. That is what this amendment does. I will say we had a full hearing in the subcommittee of the Armed Services Committee on the strategic airlift aircraft requirement. The military testified uniformly that reducing the number of the strategic airlift from 316 to 301 would put us in a very strong position to meet every contingency that we can anticipate going forward, including multiple contingencies around the world, as well as homeland events.

This area has been studied very carefully. It will allow us to continue to

protect our country, but again, will save $1.2 billion in taxpayer money over the next few years.

I urge my colleagues to support this amendment.

Mr. MCCAIN. Will the Senator yield for a question?

Ms. AYOTTE. I will yield to the Senator.

Mr. MCCAIN. Is it correct that the U.S. Air Force not only supports this but considers it one of their very high priorities?

Ms. AYOTTE. Yes, this is a very high priority of the Air Force, because in this difficult time when they are making reductions, this is an area where they can meet our national security needs. Yet Congress has actually asked the Air Force to maintain more planes than it needs. So this is a commonsense provision that is very important to our Air Force.

Mr. MCCAIN. In these times of very difficult budgetary decisions that are having to be made, is it not true also the President's budget in 2011 had included a plan to retire 17 C–5As in 2011 and 5 in 2012?

Ms. AYOTTE. Yes. Actually, this amendment I am bringing forward is consistent with the administration's budget request they submitted for the Congress's consideration. So this is a situation where, after a careful hearing we had before a subcommittee of the Armed Services Committee, and after the administration had submitted its request, and after the Air Force asked for this, it makes complete sense that we would allow them to reduce this strategic airlift capacity.

Mr. MCCAIN. May I ask if any State where these aircraft are presently stationed would lose that mission or whether the older C–5s would convert to new C–17s? Is that pretty much the conclusion the Senator would draw from the Air Force plan?

Ms. AYOTTE. This is not going to be a diminishment for States. This is just going to be a right-sizing of the fleet.

What I am concerned about is if we don't pass amendments such as this, where the administration has asked for it, where all of the data supports that we don't need to keep the level at 316, and where we can save $1.2 billion by doing it, how can we then ask our military to make significant reductions if we don't allow them to take such commonsense action such as this?

Mr. MCCAIN. I thank the Senator from New Hampshire, and I hope we can dispose of this amendment. I don't know if a recorded vote would be required by any of the Members, but I hope we can voice vote it.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, first, let me thank the Senator from New Hampshire for not only her comments about the committee work and myself and Senator MCCAIN personally, but I want to tell her, and tell anyone within the sound of my voice, what a valuable member of our committee she is. She is someone who is there all the time, and I very much value the input she gives to us because of her regular presence at our hearings and our meetings. So I thank her for that as well as her comments.

I also thank her for this amendment. It is a good amendment. I understand from my staff, and from what the Senator said as well, there was a hearing held specifically on this subject, and that Senator REED, as chairman, made a commitment to hold that hearing, as I understand it. He is a cosponsor of the amendment of Senator AYOTTE. As far as I can see, it is a good amendment, a sound amendment, and it does what Senator MCCAIN said, as well as what the Senator from New Hampshire has said. It avoids spending money on something we can't afford to spend money on.

I don't know of any objection on this side, and I support the amendment.

Ms. AYOTTE. I thank the Senator.

The PRESIDING OFFICER. Is there further debate on the amendment?

The Senator from Arizona.

Mr. MCCAIN. Is it true we are trying to clear the amendment on both sides at the moment?

Mr. LEVIN. I don't know of an objection on this side. As far as I am concerned, if there is no further debate, the Presiding Officer can put the question.

Mr. MCCAIN. I ask the Chair to put it to a vote.

The PRESIDING OFFICER. If there is no further debate, without objection, the amendment is agreed to.

The amendment (No. 1065) was agreed to.

Ms. AYOTTE. I thank the chairman.

Mr. LEVIN. Mr. President, I move to reconsider the vote.

Mr. MCCAIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Connecticut.

Mr. BLUMENTHAL. Mr. President, I thank the chairman, Senator LEVIN, and the ranking member, Senator MCCAIN, for the immensely important work they have done on the bill we are considering, S. 1867, the National Defense Authorization Act. It is a massively important bill, a big bill, and I want to focus on one part of it—a seemingly small section but a vitally important provision of the bill—that enables our Department of Defense to more effectively counter improvised explosive devices, known as IEDs, which have been a major source of attacks against United States and coalition forces in the wars of Iraq and Afghanistan and threaten not only our troops there but all around the world as well as our coalition partners.

I thank particularly one of my colleagues, Senator BOB CASEY, who has been a champion of these efforts against the IEDs or roadside bombs for some time. He has been a relentless and tireless leader in this effort and has included me and others, and I am proud to join him in seeking more effective measures.

This summer saw the highest volume of IED incidents ever recorded in Operation Enduring Freedom, approximately 1,800 a month. That is a staggering and alarming number, and they continue. These devices are deadly and devastating, killing and maiming our troops and causing loss of limbs, traumatic brain injury, posttraumatic stress, and other horrific injuries that are the signature wounds of the ongoing wars. In fact, roadside bombs cause 60 percent of all casualties in Afghanistan. They are the hidden killers in this war.

I speak with the urgency of an elected official whose State citizens are at risk and who are returning with these signature wounds of war and whose lives and limbs can be preserved if we act effectively. I speak as a citizen who has visited the hospitals and the troops who have come back. We have all visited our constituents and their families, their loved ones, their friends and neighbors who have been victims of these terrible weapons of destruction.

Most IEDs in Afghanistan, in fact more than 80 percent, are made with materials originating in Pakistan. There is no magic bullet or panacea to solving this problem or addressing the challenge. It will take a comprehensive fight. Both the provisions contained in the Foreign Operations appropriations bill with regard to Pakistan and the vital force protection equipment in the Defense authorization bill are essential to shutting down the sources of bomb-making materials in Pakistan. They include steps to interdict bomb-making materials at the border and to provide the armor and force protection against the IED threat.

Roadside bombs in Afghanistan are typically made with calcium ammonium nitrate, a very common fertilizer. It is a seemingly innocent product but capable of detonation when processed and packaged in these roadside bombs and then placed in areas where our troops go. This fertilizer from Pakistan accounts for more than 80 percent of the IEDs in Afghanistan. Every day bags of this fertilizer are smuggled to Afghanistan from Pakistan, sometimes hidden in the convoys of goods that cross the open 1,500-mile border. The fertilizer pellets are boiled down and the material is put in a package or container with an explosive detonator that is often linked to a simple trigger system—something such as a tripwire buried in the sand awaiting the tire of a passing vehicle or the foot of an American soldier on patrol. At this moment, thousands of our soldiers and Marines have been injured. Thousands of these bombs are buried in Afghanistan soil and, sadly, many more will be planted in the coming weeks and months.

Again, my colleague from Pennsylvania, Senator CASEY, has been a leader in the Senate and, indeed, led a bipartisan group of Senators, including

myself, in writing to the Secretary of State to request a greater diplomatic effort by our government to encourage Pakistan to stem the flow of bomb-making materials into Afghanistan. Then, in August, we went on an official trip, a CODEL, to take the message straight to the Government of Pakistan. We met with the most senior leaders of Pakistan and we urged stronger action against the misuse of everyday materials by terrorist groups in making the bombs that kill and maim our troops in Afghanistan. We took this message to officials of Pakistan at the highest level, and they responded with a plan that is supposedly being implemented.

The fact is, stronger measures are needed. We need a crackdown and a shutdown on the bomb-making materials, the fertilizer, and the calcium ammonium nitrate that is transported and smuggled across the border so that it can be made into bombs and maim and kill troops from Connecticut and from across the country—troops who are innocent victims—and the people of Pakistan and Afghanistan themselves who have become victims.

We saw firsthand how our troops seek to protect themselves from these IEDs. In fact, at a sand-swept compound in Helmand Province in Afghanistan our congressional delegation saw the most common types of protective practices and devices, including how our soldiers and marines wear body armor, lie face down in the dirt and drag a 10-foot pole with a hook on the end on the ground to look for the telltale signs of an IED. Other measures range from the use of dogs that sniff out bombs to huge armor vehicles and more advanced technology. But even with the most effective and advanced means of detection and disarming bombs, body armor is still essential to protecting our troops.

Pakistan's plan to address the IED smuggling supply chain, which is a threat to its own people as well as our soldiers and marines, has yet to prove effective. The plan addresses border security, regulation of fertilizer materials, and promoting public awareness of the threat posed by these IEDs. But we cannot rely on Pakistan's goodwill to ensure this important work is given the priority it requires.

There can be no ambiguity, no doubt, no uncertainty in our relationship with Pakistan, and that is why I support the even stronger measures Senator CASEY has championed in a process he has suggested that would withhold any assistance if verification cannot be accomplished. The Pakistanis need to prove with action, not mere plans or conferences, that they are stemming and stopping the flow of fertilizer. They need to prove more than good will or good intentions but effective action to stem and stop the flow of all of the bomb-making materials across the border.

We also must support efforts by the Department of Defense to procure and deploy body armor and equipment, such as this bill does, that protects all our troops in harm's way. We are all familiar with the force protection development such as enhanced ceramic plates and redesigning vehicles with V-shaped hulls to deflect blast impact. These advances, make no mistake, came at great expense in terms of blood and treasure to our Nation. We learned how to properly equip our troops in some respects for these measures. But even as the end of Operation Enduring Freedom is now in sight, the requirement to develop even better protection continues and it must be relentless and tireless.

We cannot abandon our efforts. We simply cannot abandon this fight to protect our troops in the field. The lessons learned will serve to honor our commitment to ensure that the brave men and women who protect our freedom and protect our safety and security have the best protection we can provide them.

Enhanced ballistic armor, including underwear protection—or blast boxers—are essential to combatting the threat of roadside bombs. When an IED detonates against dismounted troops, it blasts sand and fragments that shred skin, literally tears apart the skin of our troops. Covering their legs and groin area with flexible armor can prevent amputation of a limb or worse.

I have asked and been informed about delivery of this equipment. To date, 165,000 of the tier 1 sets of blast protection have been delivered into theater. The Marine Corps received 15,000 sets of tier 2-level protection, delivered 4 days ahead of schedule. By the middle of next month, the Army will also receive its complete requirement of tier 2-level sets.

This armor was adapted from one of our allies, British forces, and the Army has now established domestic production of the equipment. I am hopeful that additional types of protection will also be processed and produced and sent and I hope it will be expeditiously.

When I learned of this lifesaving equipment and the challenges involved in delivery, I wrote to the Department of Defense urging swift delivery of the body armor. I was joined by colleagues Senators CASEY, BENNET, and WHITEHOUSE. I am hopeful this program will be an example of our body armor procurement system working effectively. I am hopeful it will set an example and provide a model for this body armor being provided expeditiously, as it is needed. I look forward to our passing the Defense authorization bill, which continues these efforts to supply body armor and equipment needed for troops in Afghanistan.

This bill provides also for the equipment needed to interdict IEDs, from the small backpacks carried by our troops to UAVs to giant Buffalo vehicles. Interdiction also requires the right specialized equipment to detect materials to make those IEDs as they are smuggled across the porous Afghan-Pakistan border. This effort also requires training and awareness of both our military personnel and our allies in this fight. As of September 2011, the Afghan border police had 20,852 personnel. This growth is encouraging.

But the border police have problems with endemic corruption, and they are effective only to the extent that our special forces augment this effort. Our special forces, our special operators, should be encouraged and enabled to continue this effort. Interdiction is an integral part to larger efforts to understand battles based in this region. Force alone can't solve this problem. We need better intelligence and the right detection equipment, combined with the efforts of our special forces. It must be truly a comprehensive effort, as the Defense authorization bill clearly recognizes. We need to show all who live on both sides of this border that the cost of supplying the ingredients of these bombs that kill and maim our troops is too high for them, just as it is too high for us to tolerate.

Let me again thank chairman Senator LEVIN and ranking member Senator MCCAIN for their recognition of this problem. Our Nation has spent more than $½ trillion in support of the war in Afghanistan. We have sustained more than 2,800 coalition casualties. An Afghanistan that is stable and self-sufficient certainly is our goal, and it depends upon the tactical success of these efforts.

IEDs remain the weapon of choice of our enemy. Should we not learn to successfully counter the threat of IEDs, we will see this asymmetrical threat repeated on the battlefield, wherever our troops are deployed around the world.

Given the enormity of this challenge, I urge my colleagues to remain committed to this goal, remain true to this strategy, and counter these IEDs. We must authorize both our foreign operations expenses and this bill and I thank my colleagues for their truly bipartisan support of these efforts.

I yield the floor.

Mr. CARDIN. As to the floor privileges, Mr. President, let me just comment how valuable these Navy fellows are in our offices. I am very grateful for LCDR Knisley's service in my office, and I know Senator WICKER feels the same.

LCDR Shane Knisley will be leaving my office next month, and I wish to thank him very much for the service he has provided in the Senate.

UNANIMOUS CONSENT REQUEST—EXECUTIVE CALENDAR

Mr. CARDIN. Mr. President, in a moment, I am going to be asking unanimous consent that the Senate take up to confirm the nomination of Ken Kopocis to be Assistant Administrator for the Office of Water for the Environmental Protection Agency.

Before I make that unanimous consent request, I wish to just take a moment to say a few words about this nominee and the process that has taken place in Senate.

I have known Ken Kopocis since I was first elected to Congress in 1986 and have worked personally with him on a number of water-related issues. Ken has extensive background in water policy and legislative issues, having worked at the Congress for 25 years. I worked with him first when I was in the House of Representatives. I know the Presiding Officer also, when he was in the House, remembers the good work Ken did for the House of Representatives. He has now worked, of course, in the Senate.

He has played a role in crafting and defending numerous pieces of environmental legislation, including the Clean Water Act. At a time when there are so many controversial issues concerning water issues in the Congress, I think it is important we have someone at the helm who has the confidence of Senators on both sides of the aisle.

I have the honor of chairing the Subcommittee on Water and Wildlife in the Environment & Public Works Committee. Ken Kopocis enjoys the confidence of all the members of our committee.

When his nomination was considered in the Environment & Public Works Committee back in July—that is when we took it up—Ken was praised by both Republicans and Democrats alike. Most of my colleagues have had the opportunity to work with him, and they are enthusiastic about his credentials and his levelheaded bipartisan approach to every issue.

It is time the Senate take up this confirmation. It is the right thing to do.

Mr. President, I ask unanimous consent that the Senate proceed to executive session to consider Calendar No. 403, that the nomination be confirmed with no intervening action or debate; that no further motions be in order to the nomination; that any statements related to the nomination be printed in the RECORD; that the President be immediately notified of the Senate's action and the Senate then resume legislative session.

The PRESIDING OFFICER. Is there objection?

The Senator from Wyoming.

Mr. BARRASSO. Mr. President, reserving the right to object. There are still questions that need to be answered and information that needs to be provided by Mr. Kopocis.

I am concerned about the depth of his past involvement to change the scope of the Clean Water Act beyond congressional intent. To me, this nominee still needs to explain his views on public and stakeholder input on regulations he would be in charge of and explain his understanding—his understanding—of the role of Congress versus the role of the Environmental Protection Agency in terms of who makes the laws in this country.

Until those issues are clarified, I do not believe it is appropriate for this nominee to move forward.

Therefore, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. MCCAIN. Mr. President, I ask for regular order.

The PRESIDING OFFICER. The Senator from Maryland has the floor.

Mr. CARDIN. Mr. President, I am going to yield the floor in just a moment.

Let me say to my friend from Wyoming, I am going to do my best to make sure the Senator gets all the information he needs. I wish to make sure every Senator has all the information they need. I think this is a very important position to be filled. Mr. Kopocis has the qualifications and confidence. I wish to make sure that is done as quickly as possible. I respect my colleague's views, and I will work to make sure he gets all the information he needs.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, it is my understanding that the Senator from Colorado, Mr. UDALL, is coming over to propose an amendment and I hope that will happen momentarily and I hope Members will be prepared with other amendments that we can dispose of this afternoon.

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. WICKER. Mr. President, I rise this afternoon in support of the fiscal year 2012 national defense authorization bill.

As ranking member on the Seapower Subcommittee, I wish to thank both Chairman LEVIN and Ranking Member MCCAIN for their leadership. It is somewhat of an achievement in actually getting the bill to the floor at this time, and I appreciate their determination.

As we approach the Thanksgiving holiday next week, I would like to take a moment to honor the men and women of our Armed Forces. We are grateful for their service, and our thoughts and prayers are with those now deployed at sea and ashore. My own State of Mississippi is home to many brave servicemembers. Their sacrifices are matched, of course, by those of their families who have supported them day in and day out as they selflessly serve this country.

As ranking member of the Seapower Subcommittee, I have had the pleasure of working with my friend Senator REED of Rhode Island, who is chairman of that subcommittee. We both worked to ensure that this bill meets a wide range of procurement, sustainment and research and development needs for the Navy and the Marine Corps.

Our deliberations were informed by, among other things, a series of hearings we held that addressed force structure and modernization for the Department of the Navy. This process has resulted in a bill that contains provisions which will deliver important capabilities and support our sailors and marines.

The bill before us is supportive of the President's shipbuilding budget request and contributes to the continued vitality of our shipbuilding industrial base which is very important. At a time when we are concerned about job creation, the last thing we want to do is let our industrial base be chipped away.

The fiscal year 2012 shipbuilding budget funds new construction for various types and classes of ships, including an aircraft carrier, amphibious ships, submarines, and large and small surface combatants, totaling more than $15 billion.

From our discussions during the Seapower Subcommittee meetings, it has become abundantly clear that members are concerned about challenges in maintaining fleet capacity among many classes of ships and the capability gaps that exist that have a real effect on the sailors who crew these ships. From amphibious ships to aircraft carriers to destroyers and to submarines, our Navy must maintain an adequate balance among all classes of ships to ensure our Navy can execute these responsibilities.

Through classified briefings we have received from senior officials in the Navy and in the intelligence community, the Seapower Subcommittee also is well aware of the imminent and emerging threats facing our sea services. America must maintain its capability to project power and uphold our obligations to our friends and allies throughout the world. This means robust investment in seapower, and I am heartened that this bill contains such an investment.

With the Deficit Reduction Committee's recommendations due to Congress in less than 1 week, I know all my colleagues agree that cutting our deficit and reducing our national debt responsibly is a must. Failing to act will put the burden on our children and grandchildren. We must make tough decisions now on spending because our current track is unsustainable.

I hope the Deficit Reduction Committee is able to come to an agreement on spending priorities because the alternative is unacceptable cuts in national defense. We must remember that national defense is solely a Federal responsibility. Failure to reach consensus would have grave consequences for our military. Marine Corps Commandant GEN James Amos cautioned about such cuts earlier this week.

In conclusion, I believe the national defense authorization bill reaffirms our commitment to national security and to our men and women in uniform.

I urge my colleagues to act quickly on this important piece of legislation, and once again I thank and commend my friends, Chairman LEVIN and Ranking Member MCCAIN.

I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. UDALL of Colorado. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. UDALL of Colorado. Mr. President, I come to the floor to comment on the NDAA, the bill in front of us today. I want to start my remarks by acknowledging the leadership of Chairman LEVIN and Ranking Member MCCAIN. Under their tutelage and leadership the committee has worked tirelessly to craft a Defense Authorization Act that provides our Armed Forces with the equipment, the services, the training, and the overall support they need to keep us safe while they themselves are being protected. I thank the chairman and ranking member, my colleagues, and, most important, the wonderful staff that works for us for their diligence and dedication to this important work.

I also come to the floor to speak out against a proposed change that I think would alter what has been a very effective set of terrorist detention policies and procedures. I believe to make those changes would complicate our capacity to prosecute the war on terror and call into question the principles we as Americans hold dear.

I filed an amendment, No. 1107, that would take a look at what is proposed in the NDAA. We have a solemn obligation to pass the National Defense Authorization Act. But we also have a solemn obligation to make sure those who are fighting the war on terror have the best, most flexible, most powerful tools possible. I have to say again, and I will say it more than two times in my remarks, I am worried these changes we are about to push through would actually hurt our national security.

I am a proud member of the Senate Armed Services Committee. As I have implied, and I want to be explicit, I understand the importance of this bill. I understand what it does for our military, which is why, in sum, what I am going to propose with my amendment is that we pass the NDAA without these troubling provisions but with a mechanism by which we can consider what is proposed and perhaps at a later date include any applicable changes in the law.

We need to hear from the Department of Defense, our intelligence community, and the administration more broadly on what our men and women in the field actually need to effectively prosecute the war on terror, especially before we change detainee policies that are already working. As I am saying, I have serious concerns about the detainee provisions that have been included in the bill.

In my opinion, and in the opinion of many others—and I will share those opinions and insights with my colleagues—these provisions disrupt the capacity of the executive branch to enforce the law, and they impose unwise and unwarranted restrictions on our ability to aggressively combat international terrorism. In so doing, they inject legal uncertainty and ambiguity that may only complicate the military's operations and detention practices.

I am not the only one who has serious concerns. The Secretary of Defense has urged us to oppose these new provisions. Both chairmen of the Intelligence and Judiciary Committees strongly oppose them. The President's team is recommending a veto. These are people whose opinions should be carefully considered before we put these new proposals into our legal framework.

In the Statement of Administration Policy the White House states:

> We have spent 10 years since September 11, 2001, breaking down the walls between intelligence, military and law enforcement professionals; Congress should not now rebuild those walls and unnecessarily make the job of preventing terrorist attacks more difficult.

Those are striking words that should give us all pause as we face what seems to me a bit of a rush to submit these untested and legally controversial restrictions on our ability to prosecute terrorists.

I ask unanimous consent to have the entire Statement of Administration Policy printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. UDALL of Colorado. Mr. President, these are complex issues that have far-reaching consequences for intelligence, civilian law enforcement agencies, and our intelligence community as they work to keep Americans safe from harm. Despite this fact, the Department of Defense and the national security staff, as far as I know, had little opportunity to review or comment on the final language in the provisions. As a result, these provisions restrained the ''Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.''

That quote comes directly from a letter addressed to the Armed Services Committee from Secretary Panetta. I think we all know that before he held the job he has now, Secretary of Defense, Mr. Panetta, was the Director of the CIA. He very well knows the threats facing our country, and he knows we cannot afford to make mistakes when it comes to keeping our citizens safe.

I also ask unanimous consent that Secretary Panetta's letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. UDALL of Colorado. Mr. President, the provisions I am speaking to are well intended. I have much admiration for my colleagues who propose them, but I think we need to take some more time to consider the ramifications. The United States, our country, can currently choose from several options when prosecuting terrorists. That flexibility has allowed us to try, convict, and imprison hundreds of terrorists, and it allows the government to select the venue that will provide the highest likelihood of obtaining a conviction. The current detention provisions in the bill we are debating would strip away that flexibility and potentially impair our capacity to successfully prosecute and convict terrorists. It is not clear to me why, after 10 years of successfully prosecuting terrorists and preventing another 9/11-like attack, why we would want to limit our options while our enemies are constantly adapting their tactics and expanding their efforts to do us harm.

In a recent op-ed in the Chicago Times, a bipartisan group of three former Federal judges, including William S. Sessions, who was also the appointed Director of the FBI under President Reagan, said it best when describing these provisions:

> Legislation now making its way through Congress would seek to over-militarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects to the exclusion of the FBI and local and State law enforcement agencies. As former Federal judges, we find this prospect deeply disturbing. Not only would such an effort ignore 200 years of legal precedent, it would fly in the face of common sense.

And I ask unanimous consent that op-ed be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 3.)

Mr. UDALL of Colorado. I also point out these provisions raise serious questions as to who we are as a society and what our Constitution seeks to protect. One section of these provisions, section 1031, could be interpreted as allowing the military to capture and indefinitely detain American citizens on U.S. soil. Section 1031 essentially repeals the Posse Comitatus Act of 1878 by authorizing the military to perform law enforcement functions on American soil. That alone should alarm my colleagues on both sides of the aisle. But there are other problems with these provisions that must be resolved.

These detainee provisions are unnecessary, counterproductive, and potentially harmful to our counterterrorism efforts. I know I have said this a couple of times already, but it feels as though they are being rushed through in a manner that does not serve us well. The Department of Defense has had little input. There have been no hearings. Earlier this week the changes were presented to us in the Armed Services Committee just hours before we were asked to vote on them. These are just too important a set of questions to let them pass without a thorough review and far greater understanding of their

effect on our national security and our fight against terrorism. It feels to this Senator that we are rushing hastily to address a solution in search of a problem. We ought to hear from the Department of Defense, the intelligence community, our colleagues, and other relevant committees before we act. Do we believe this Congress—again, let me underline that after 10 years of successfully prosecuting the war on terror—should substitute its views for that of our Defense, intelligence, and Homeland Security leadership without careful analysis?

I recently received a letter signed by 18 retired military leaders in opposition to these provisions. The letter states that: ''Mandating military custody would undermine legitimate law enforcement and intelligence operations crucial to our security at home and abroad.'' I could not agree more.

I would ask unanimous consent that this letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 4.)

Mr. UDALL of Colorado. We are already trying and convicting terrorists in both civilian courts and under military commissions. The provisions that are in this bill would require the DOD to shift significant resources away from their mission, to act on all the fronts all over the world, and they would become a police force and jailer. This is not what they are good at. This is not what we want them to do. I think it has potentially dangerous consequences because we have limited resources and limited manpower. We would not lose anything by taking a little bit more time to discuss and debate these provisions, but we could do real harm to our national security by allowing this language, unscrutinized, to pass, and that is exactly what our highest ranking national security officers are warning us against doing.

This is a debate we need to have. It is a healthy debate, but we ought to be armed with all of the facts and expertise before we move forward. The least we can do is take our time, be diligent, and hear from those who will be affected by these new limitations on our ability to prosecute terrorists.

It concerns me that we would tell our national security leadership—a bipartisan national security leadership, by the way—that we would not listen to them and that Congress knows better than they do. It doesn't strike me that that is the best way to secure and protect the American people. That is why I have filed amendment No. 1107. I think it is a commonsense alternative that will protect our constitutional principles and beliefs while also allowing us to keep our Nation safe. The amendment has a clear aim, which is to ensure we follow a thorough process and hear all views before rushing forward with new laws that could be harmful to our national security.

What is in the amendment? It is straightforward. Specifically the amendment would require that our Defense, intelligence, and law enforcement agencies report to Congress with recommendations for any additional authorities or flexibility they need in order to detain and prosecute terrorists. In other words, let's not put the cart before the horse or fix something that is not broken. Let's first hear from the stakeholders as to what laws they believe need to be changed to give them better tools to do their job.

My amendment then asks for hearings to be held so we can fully understand the views of respected national security experts. Moreover, it would require input from each of the relevant committees to ensure that we have carefully considered the benefits and consequences of our actions. The chairmen of our Judiciary and Intelligence Committees have deep concerns about the detainee provisions in the pending legislation. And, of course, as we underwent this process, the existing laws that guide our actions today would remain in place. They have been successful.

I see some of my colleagues who I think share my views who have come to the floor. They also made the compelling case that it is a system that is working. Why would we change it without thinking it through? It is straightforward, it is common sense, and it allows us to make sure we will win the war on terror.

Mr. DURBIN. Will the Senator from Colorado yield for a question, through the Chair?

Mr. UDALL of Colorado. Yes.

Mr. DURBIN. I thank the Senator from Colorado for his strong statement and totally support his position. This change in the Defense authorization bill goes beyond a military decision. It goes to the fundamental questions of principles of our Constitution and our body of law. As a member of the Senate Judiciary Committee, I believe this matter should have been considered as well by the Senate Judiciary Committee, and I believe Senator FEINSTEIN has expressed the feeling that it should have been considered as well by the Senate Intelligence Committee.

I wish to use one example to ask the Senator from Colorado a question. When we had the so-called Underwear Bomber, the passenger on a commercial aircraft who tried to detonate a bomb—and thank God was unsuccessful—he was subdued, arrested, and interrogated by the Federal Bureau of Investigation in Detroit. After that investigation was underway—and he surrendered some information—he stopped talking, at which point the FBI investigators read him his Miranda rights.

Then later, working with his parents, he resumed talking to the investigators and literally—according to the FBI—gave a dramatic amount of information helpful to us in keeping America safe and stopping terrorism. He was then prosecuted in the criminal courts of America, article 3 courts, and ultimately, weeks ago, pled guilty.

Mr. MCCAIN. Will the Senator state his question.

Mr. DURBIN. I am going to. I would say to the Senator from Arizona, I think it is important we take some time on this important issue.

Mr. MCCAIN. I would say it is important that all voices be heard.

Mr. DURBIN. Senator MCCAIN, of course, as the ranking member, will have ample opportunity to express his point of view.

What I am asking the Senator from Colorado is this: Taking into consideration the language that is now being presented in this Defense authorization bill, particularly section 1032, it is my understanding the Federal Bureau of Investigation could not have continued their interrogation of this suspected terrorist without first contacting our military and bringing them in to determine whether they had jurisdiction over this matter. In other words, time would have been lost, opportunities would have been lost, information might have been lost by following the new section in the bill.

I am asking the Senator from Colorado if this is a decision which he believes we should make in the haste of a Defense authorization bill or ought to step back and work with the President of the United States, the FBI, the military, and our intelligence forces to make sure we do not lose an opportunity to catch an alleged terrorist, to interrogate them, and to keep this country safe.

Mr. UDALL of Colorado. I thank the Senator from Illinois for his question. My understanding is the Senator from Illinois is correct, that provision 1032 would change the way in which interrogations would unfold. There may be some in the Senate who would see it differently, but that is all the more reason to adopt my amendment, which would allow a thorough process of hearing from the very experts who interrogated the Underwear Bomber and other experts who have been on the front lines in fighting terrorism. We ought to go slow. We should not fix something that is working fine right now.

I thank the Senator for his question.

Mr. DURBIN. If the Senator from Arizona will forgive me, I would ask one more question through the Chair. The question goes back to the point the Senator made: Section 1031, as I understand it, would be a departure from current law and would say that those who are American citizens can be detained indefinitely if they are suspected of certain terrorist conduct. I ask the Senator from Colorado: Is that the point the Senator made in his statement?

Mr. UDALL of Colorado. The Senator from Illinois is correct. Mr. President, 1031 would do just that, and it would come directly at a piece of law, posse comitatus, which dates back to the Civil War, that is held dear by all of us in America because it distinguishes between the military used to protect us

against foreign foes and how we manage our own civil affairs here at home.

Also, as the Senator alludes to, it causes questions to be raised about something that is very sacred in our system of law, which is the writ of habeas corpus. You have to prove why you hold someone. You cannot detain an American citizen indefinitely in any other circumstance.

I thank the Senator for his questions.

Mr. LEVIN. Would the Senator yield for a question?

Mr. UDALL of Colorado. I would be happy to yield for a question.

Mr. LEVIN. We explicitly wrote into this bill the following language: that the procedures providing for the determination that somebody is an Al-Qaida terrorist or related, affiliated one is not required to be implemented until after the conclusion of the interrogation session, which is ongoing at the time the determination is made.

Is the Senator familiar with that language which explicitly says that the President will adopt the procedures—whatever procedures the President determines—to make sure there is no interference with an ongoing interrogation by the civilians as it appears in section 2(c) on page 363? Is the Senator familiar with that?

Mr. UDALL of Colorado. I am familiar with the language in the general way it has been introduced. I would say to the chairman of the Armed Services Committee that we had a chance to review this language starting about 48 hours ago.

One of the reasons I think my amendment is important is it would give those voices, which are being heard more and more as of today, who have concerns with this provision—they are not sure how it applies—that that is all the more reason to slow this down, to keep the existing law in place, and go through a more thorough process to understand the ramifications of the waiver provision and the other provisions the chairman and ranking member——

Mr. LEVIN. Is it not true, however, that the language which is in this bill that I just read clearly provides there will not be any interference with an interrogation session, that those procedures are to be determined by the President, and that it explicitly says there will not be any interference with the interrogation and the procedures will guarantee there will not be? That is the point of this language.

I don't understand how the statement could be made that this language in this bill interferes with the interrogation by civilian authorities and the FBI when the very language here says they will not interfere with that interrogation. I wonder if the Senator could explain to me his agreement with the Senator from Illinois that something in this bill would result in an interference with an interrogation.

Mr. UDALL of Colorado. What I would say to my friend is that just having had an opportunity to review this language in the last 48 hours, I have no question about his intent, but I have heard from people with much greater expertise than I have that there are questions that are still unanswered. Maybe this provision is appropriate and will do what the chairman says it will do. But, again, that is why I think it would be well worth our time to take a further look at what is involved in these provisions.

Mr. LEVIN. I do appreciate the Senator's response. I have one other question, and that has to do with an American citizen who is captured in the United States and the application of the custody pending a Presidential waiver to such a person. I wonder whether the Senator is familiar with the fact that the language which precluded the application of section 1031 to American citizens was in the bill we originally approved in the Armed Services Committee, and the administration asked us to remove the language which says that U.S. citizens and lawful residents would not be subject to this section.

Is the Senator familiar with the fact that it was the administration which asked us to remove the very language which we had in the bill which passed the committee, and that we removed it at the request of the administration that this determination would not apply to U.S. citizens and lawful residents? Is the Senator familiar with the fact that it was the administration which asked us to remove the very language, the absence of which is now objected to by the Senator from Illinois?

Mr. UDALL of Colorado. I am familiar now because the Senator from Michigan has shared that fact with me. I am also familiar with the fact that the administration has other questions and concerns which has caused it to issue a set of provisions and issues they wish to further consider.

Mr. LEVIN. I thank my friend.

Mr. LEAHY. Would the Senator yield for a question?

Mr. UDALL of Colorado. I would be happy to yield to my friend from Vermont.

Mr. LEAHY. Is the Senator from Colorado aware that the administration has raised real concerns—both DOD and the White House—saying that requiring the President to devise the kind of procedures discussed in this bill creates all kinds of problems, and that this is one of the reasons why both the Senate Intelligence Committee and the Senate Judiciary Committee have asked to have the opportunity to hold hearings on a section that obviously involves the jurisdiction of both the Senate Intelligence and Senate Judiciary Committees?

Mr. UDALL of Colorado. I am. The Senator from Vermont is correct. That knowledge on my part is, in part, one of the reasons I filed the amendment we are discussing right now.

Mr. LEAHY. I thank the Senator.

Mr. UDALL of Colorado. I thank the Senator from Vermont.

I yield the floor.

EXHIBIT 1

EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET,

Washington, DC, November 17, 2011.

STATEMENT OF ADMINISTRATION POLICY

S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012—(SEN. LEVIN, D–MI)

The Administration supports Senate passage of S. 1867, the National Defense Authorization Act for Fiscal Year (FY) 2012. The Administration appreciates the Senate Armed Services Committee's continued support of our national defense, including its support for both the base budget and for overseas contingency operations and for most of the Administration's initiatives to control spiraling health costs of the Department of Defense (DoD).

The Administration appreciates the support of the Committee for authorities that assist the ability of the warfighter to operate in unconventional and irregular warfare, authorities that are important to field commanders, such as the Commanders' Emergency Response Program, Global Train and Equip Authority, and other programs that provide commanders with the resources and flexibility to counter unconventional threats or support contingency or stability operations. The Administration looks forward to reviewing a classified annex and working with the Congress to address any concerns on classified programs as the legislative process moves forward.

While there are many areas of agreement with the Committee, the Administration would have serious concerns with provisions that would: (1) constrain the ability of the Armed Forces to carry out their missions; (2) impede the Secretary of Defense's ability to make and implement decisions that eliminate unnecessary overhead or programs to ensure scarce resources are directed to the highest priorities for the warfighter; or (3) depart from the decisions reflected in the President's FY 2012 Budget Request. The Administration looks forward to working with the Congress to address these and other concerns, a number of which are outlined in more detail below.

Detainee Matters: The Administration objects to and has serious legal and policy concerns about many of the detainee provisions in the bill. In their current form, some of these provisions disrupt the Executive branch's ability to enforce the law and impose unwise and unwarranted restrictions on the U.S. Government's ability to aggressively combat international terrorism; other provisions inject legal uncertainty and ambiguity that may only complicate the military's operations and detention practices.

Section 1,031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107–40) (the ''AUMF''). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express

military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

The Administration strongly objects to the military custody provision of section 1032, which would appear to mandate military custody for a certain class of terrorism suspects. This unnecessary, untested, and legally controversial restriction of the President's authority to defend the Nation from terrorist threats would tie the hands of our intelligence and law enforcement professionals. Moreover, applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets. We have spent ten years since September 11, 2001, breaking down the walls between intelligence, military, and law enforcement professionals; Congress should not now rebuild those walls and unnecessarily make the job of preventing terrorist attacks more difficult. Specifically, the provision would limit the flexibility of our national security professionals to choose, based on the evidence and the facts and circumstances of each case, which tool for incapacitating dangerous terrorists best serves our national security interests. The waiver provision fails to address these concerns, particularly in time-sensitive operations in which law enforcement personnel have traditionally played the leading role. These problems are all the more acute because the section defines the category of individuals who would be subject to mandatory military custody by substituting new and untested legislative criteria for the criteria the Executive and Judicial branches are currently using for detention under the AUMF in both habeas litigation and military operations. Such confusion threatens our ability to act swiftly and decisively to capture, detain, and interrogate terrorism suspects, and could disrupt the collection of vital intelligence about threats to the American people.

Rather than fix the fundamental defects of section 1032 or remove it entirely, as the Administration and the chairs of several congressional committees with jurisdiction over these matters have advocated, the revised text merely directs the President to develop procedures to ensure the myriad problems that would result from such a requirement do not come to fruition. Requiring the President to devise such procedures concedes the substantial risks created by mandating military custody, without providing an adequate solution. As a result, it is likely that implementing such procedures would inject significant confusion into counterterrorism operations.

The certification and waiver, required by section 1033 before a detainee may be transferred from Guantánamo Bay to a foreign country, continue to hinder the Executive branch's ability to exercise its military, national security, and foreign relations activities. While these provisions may be intended to be somewhat less restrictive than the analogous provisions in current law, they continue to pose unnecessary obstacles, effectively blocking transfers that would advance our national security interests, and would, in certain circumstances, violate constitutional separation of powers principles. The Executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. Section 1034's ban on the use of funds to construct or modify a detention facility in the United States is an unwise intrusion on the military's ability to transfer its detainees as operational needs dictate. Section 1035 conflicts with the consensus-based interagency approach to detainee reviews required under Executive Order No. 13567, which establishes procedures to ensure that periodic review decisions are informed by the most comprehensive information and the considered views of all relevant agencies. Section 1036, in addition to imposing onerous requirements, conflicts with procedures for detainee reviews in the field that have been developed based on many years of experience by military officers and the Department of Defense. In short, the matters addressed in these provisions are already well regulated by existing procedures and have traditionally been left to the discretion of the Executive branch.

Broadly speaking, the detention provisions in this bill micromanage the work of our experienced counterterrorism professionals, including our military commanders, intelligence professionals, seasoned counterterrorism prosecutors, or other operatives in the field. These professionals have successfully led a Government-wide effort to disrupt, dismantle, and defeat al-Qa'ida and its affiliates and adherents over two consecutive Administrations. The Administration believes strongly that it would be a mistake for Congress to overrule or limit the tactical flexibility of our Nation's counterterrorism professionals.

Any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation would prompt the President's senior advisers to recommend a veto.

Joint Strike Fighter Aircraft (JSF): The Administration also appreciates the Committee's inclusion in the bill of a prohibition on using funds authorized by S. 1867 to be used for the development of the F136 JSF alternate engine. As the Administration has stated, continued development of the F136 engine is an unnecessary diversion of scarce resources.

Medium Extended Air Defense Systems (MEADS): The Administration appreciates the Committee's support for the Department's air and missile defense programs; however, it strongly objects to the lack of authorization of appropriations for continued development of the MEADS program. This lack of authorization could trigger unilateral withdrawal by the United States from the MEADS Memorandum of Understanding (MOU) with Germany and Italy, which could further lead to a DoD obligation to pay all contract costs—a scenario that would likely exceed the cost of satisfying DoD's commitment under the MOU. Further, this lack of authorization could also call into question DoD's ability to honor its financial commitments in other binding cooperative MOUs and have adverse consequences for other international cooperative programs.

Overseas Construction Funding for Guam and Bahrain: The Administration has serious concerns with the limitation on execution of the United States and Government of Japan funds to implement the realignment of United States Marine Forces from Okinawa to Guam. The bill would unnecessarily restrict the ability and flexibility of the President to execute our foreign and defense policies with our ally, Japan. The Administration also has concerns over the lack of authorization of appropriations for military construction projects in Guam and Bahrain. Deferring or eliminating these projects could send the unintended message that the United States does not stand by its allies or its agreements.

Provisions Authorizing Activities with Partner Nations: The Administration appreciates the support of the Committee to improve capabilities of other nations to support counterterrorism efforts and other U.S. interests, and urges the inclusion of DoD's requested proposals, which balance U.S. national security and broader foreign policy interests. The Administration would prefer only an annual extension of the support to foreign nation counter-drug activities authority in line with its request. While the inclusion of section 1207 (Global Security Contingency Fund) is welcome, several provisions may affect Executive branch agility in the implementation of this authority. Section 1204 (relating to Yemen) would require a 60–day notify and wait period not only for Yemen, but for all other countries as well, which would impose an excessive delay and seriously impede the Executive branch's ability to respond to emerging requirements.

Unrequested Authorization Increases: Although not the only examples in S. 1867, the Administration notes and objects to the addition of $240 million and $200 million, respectively, in unrequested authorization for unneeded upgrades to M–1 Abrams tanks and Rapid Innovation Program research and development in this fiscally constrained environment. The Administration believes the amounts appropriated in FY 2011 and requested in FY 2012 fully fund DoD's requirements in these areas.

Advance Appropriations for Acquisition: The Administration objects to section 131, which would provide only incremental funding—undermining stability and cost discipline—rather than the advance appropriations that the Administration requested for the procurement of Advanced Extremely High Frequency satellites and certain classified programs.

Authority to Extend Deadline for Completion of a Limited Number of Base Closure and Realignment (BRAC) Recommendations: The Administration requests inclusion of its proposed authority for the Secretary or Deputy Secretary of Defense to extend the 2005 BRAC implementation deadline for up to ten (10) recommendations for a period of no more than one year in order to ensure no disruption to the full and complete implementation of each of these recommendations, as well as continuity of operations. Section 2904 of the Defense Base Closure and Realignment Act imposes on DoD a legal obligation to close and realign all installations so recommended by the BRAC Commission to the President and to complete all such closures and realignments no later than September 15, 2011. DoD has a handful of recommendations with schedules that complete implementation close to the statutory deadline.

TRICARE Providers: The Administration is currently undertaking a review with relevant agencies, including the Departments of Defense, Labor, and Justice, to clarify the responsibility of health care providers under civil and workers' rights laws. The Administration therefore objects to section 702, which categorically excludes TRICARE network providers from being considered subcontractors for purposes of the Federal Acquisition Regulation or any other law.

Troops to Teachers Program: The Administration urges the Senate's support for the transfer of the Troops to Teachers Program to DoD in FY 2012, as reflected in the President's Budget and DoD's legislative proposal to amend the Elementary and Secondary Education Act of 1965 and Title 10 of the U.S. Code in lieu of section 1048. The move to Defense will help ensure that this important program supporting members of the military as teachers is retained and provide better oversight of 6 program outcomes by simplifying and streamlining program management. The Administration looks forward to

keeping the Congress abreast of this transfer, to ensure it runs smoothly and has no adverse impact on program enrollees.

Constitutional concerns: A number of the bill's provisions raise additional constitutional concerns, such as sections 233 and 1241, which could intrude on the President's constitutional authority to maintain the confidentiality of sensitive diplomatic communications. The Administration looks forward to working with the Congress to address these and other concerns.

EXHIBIT 2

THE SECRETARY OF DEFENSE,
Washington, DC, November 15, 2011.

Hon. CARL LEVIN,
Chairman, Committee on Armed Services, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write to express the Department of Defense's principal concerns with the latest version of detainee-related language you are considering including in the National Defense Authorization Act (NDAA) for Fiscal Year 2012. We understand the Senate Armed Services Committee is planning to consider this language later today.

We greatly appreciate your willingness to listen to the concerns expressed by our national security professionals on the version of the NDAA bill reported by the Senate Armed Services Committee in June. I am convinced we all want the same result—flexibility for our national security professionals in the field to detain, interrogate, and prosecute suspected terrorists. The Department has substantial concerns, however, about the revised text, which my staff has just received within the last few hours.

Section 1032. We recognize your efforts to address some of our objections to section 1032. However, it continues to be the case that any advantages to the Department of Defense in particular and our national security in general in section 1032 of requiring that certain individuals be held by the military are, at best, unclear. This provision restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.

Moreover, the failure of the revised text to clarify that section 1032 applies to individuals captured abroad, as we have urged, may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.

Next, the revised language adds a new qualifier to ''associated force''—''that acts in coordination with or pursuant to the direction of al-Qaeda.'' In our view, this new language unnecessarily complicates our ability to interpret and implement this section.

Further, the new version of section 1032 makes it more apparent that there is an intent to extend the certification requirements of section 1033 to those covered by section 1032 that we may want to transfer to a third country. In other words, the certification requirement that currently applies only to Guantanamo detainees would permanently extend to a whole new category of future captures. This imposes a whole new restraint on the flexibility we need to continue to pursue our counterterrorism efforts.

Section 1033. We are troubled that section 1033 remains essentially unchanged from the prior draft, and that none of the Administration's concerns or suggestions for this provision have been adopted. We appreciate that revised section 1033 removes language that would have made these restrictions permanent, and instead extended them through Fiscal Year 2012 only. As a practical matter, however, limiting the duration of the restrictions to the next fiscal year only will have little impact if Congress simply continues to insert these restrictions into legislation on an annual basis without ever revisiting the substance of the legislation. As national security officials in this Department and elsewhere have explained, transfer restrictions such as those outlined in section 1033 are largely unworkable and pose unnecessary obstacles to transfers that would advance our national security interests.

Section 1035. Finally, section 1035 shifts to the Department of Defense responsibility for what has previously been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason—and certainly none has been expressed in our discussions to date—to upset a collaborative, interagency approach that has served our national security so well over the past few years.

I hope we can reach agreement on these important national security issues, and, as always, my staff is available to work with the Committee on these and other matters.

Sincerely,

JOHN MCCAIN.

EXHIBIT 3

[From the Chicago Tribune, Oct. 7, 2011]

BEYOND GUANTANAMO

(By Abner Mikva, William S. Sessions and John J. Gibbons)

A new shift in philosophy has begun to emerge among lawmakers in Washington. Legislation now making its way through Congress would seek to overmilitarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects, to the exclusion of the FBI and local and state law enforcement agencies. As former federal judges, we find this prospect deeply disturbing. Not only would such an effort ignore 200 years of legal precedent, it would fly in the face of common sense.

The bill in question, the 2012 National Defense Authorization Act, would codify methods such as indefinite detention without charge and mandatory military detention, and make them applicable to virtually anyone picked up in anti-terrorism efforts—including U.S. citizens—anywhere in the world, including on U.S. soil. Such an effort to restrict counterterrorism efforts by traditional law enforcement agencies would sadly demonstrate that many members of Congress have very little faith in America's criminal justice system.

It is a fact that our criminal justice system is uniquely qualified to handle complex terrorism cases. Indeed, civilian courts have successfully overseen more than 400 terrorism-related trials, whereas military commissions have handled only six. While the use of military commissions may occasionally be appropriate under the Constitution, the Guantanamo military commissions remain subject to serious constitutional challenges that could result in overturned guilty verdicts. The simple truth is that existing federal courts operate under rules and procedures that provide all the tools necessary to prosecute terrorism cases and they are not subject to the same legal challenges as military commissions.

We need access to proven instruments and methods in our fight against terrorism. Stripping local law enforcement and the FBI of the ability to arrest and gather intelligence from terrorism suspects and limiting our trial options is counterintuitive and could pose a genuine threat to our national security. Furthermore, an expanded mandatory military detention system would lead to yet more protracted litigation, infringe on law enforcement's ability to fight terrorism on a local and state level, and invite the military to act as law enforcement within the borders of our states.

In the face of these disturbing developments, we are encouraged by the fact that the administration has expressed its own concerns. The Obama White House has raised strong objections to congressional efforts to undermine the use of our traditional criminal justice system, efforts that would effectively eliminate the administration's ability to leverage ''the strength and flexibility'' of the system to ''incapacitate dangerous terrorists and gather critical intelligence.'' In previous statements, President Barack Obama said he intends to oppose any attempt to extend or expand such restrictions in the future. We submit to the president that the future is now.

We firmly believe the United States can preserve its national security without resorting to sweeping departures from our constitutional tradition. We call on Obama and Congress to support a policy for detention and trial of suspected terrorists that is consistent with our Constitution and maintains the use of our traditional criminal justice system to combat terrorism. Further restricting the tools at our disposal is not in the best interest of our national security.

EXHIBIT 4

NOVEMBER 7, 2011.

DEAR SENATOR: We write today to thank you for signing on to the October 21, 2011 letter to Senator Reid regarding detainee provisions 1031–1033 in the National Defense Authorization Act. We are members of a nonpartisan group of forty retired generals and admirals concerned about the implications of U.S. policy regarding enemy prisoner treatment and detention. We have been following the public debate concerning the provisions closely and are troubled by the overreaching nature of the legislation that would allow for indefinite detention without trial, mandatory military custody of counterterrorism suspects and permanent transfer restrictions imposed on inmates already at GTMO, some of whom have been cleared for release.

We understand there has been significant disagreement about the provisions and exactly what their impact on national security would be; however, the fact that such disagreement exists underscores that further public debate is needed and the provisions should not go forward as a part of the NDAA.

Regardless of how one interprets the intent of the provisions, it does not cure the underlying defect: over-militarization of our counter terrorism response. Our military does not want nor seek to try all foreign terror suspects. Congress has wisely enacted dozens of criminal laws to incapacitate potential terrorists, and federal courts have convicted more than 400 of terrorism related crimes since 9/11. Using military commissions as a one-size-fits-all response threatens our security because commissions do not have the same broad array of criminal laws that our federal courts have.

Military custody may be an incident of battlefield operations, but mandating military custody would undermine legitimate law enforcement and intelligence operations crucial to our security at home and abroad. Providing an individualized waiver would only serve to politicize each decision and possibly paralyze effective national security response.

We thank you again for signing on to the October 21, 2011 letter to Senator Reid and your attention to these important issues. As former members of our armed forces, please

call on us as a resource as debate moves forward on detainee provisions as part of the NDAA

Sincerely,

General Joseph P. Hoar, USMC (Ret.); General Charles C. Krulak, USMC (Ret.); General William G. T. Tuttle Jr., USA (Ret.); Lieutenant General Robert G. Gard Jr., USA (Ret.); Vice Admiral Lee F. Gunn, USN (Ret.); Lieutenant General Charles Otstott, USA (Ret.);Rear Admiral Don Guter, USN (Ret.); Rear Admiral John D. Hutson, USN (Ret.); Major General William L. Nash, USA (Ret.); Major General Thomas J. Romig, USA (Ret.); Major General Walter L. Stewart, Jr., ANG (Ret.); Brigadier General James Cullen, USA (Ret.); Brigadier General Evelyn P. Foote, USA (Ret.); Brigadier General Leif H. Hendrickson, USMC (Ret.); Brigadier General David R. Irvine, USA (Ret.); Brigadier General John H. Johns, USA (Ret.); Brigadier General Murray G. Sagsveen, USA (Ret.); Brigadier General Stephen N. Xenakis, USA (Ret.).

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, for the sake and the accommodation of the schedules of my colleagues, I ask unanimous consent that following my remarks and whoever the speaker is on the other side designated by the chairman, Senator AYOTTE be recognized, and then after a speaker from the other side, if necessary, Senator CHAMBLISS, followed by a speaker on the other side, followed by Senator GRAHAM. I do that because of the time constraints of my colleagues. So I ask unanimous consent and agreement from the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Reserving the right to object, before we go into the series of speakers, I ask unanimous consent that I be allowed to just call up and then set aside amendment No. 1072, which is sponsored by myself and Senator GRAHAM, and there is a list of 67 cosponsors.

Mr. MCCAIN. Sure. I yield to the Senator from Vermont.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I thank my friend from Arizona.

AMENDMENT NO. 1072

(Purpose: To enhance the national defense through empowerment of the National Guard, enhancement of the functions of the National Guard Bureau, and improvement of Federal-State military coordination in domestic emergency response)

I ask unanimous consent to call up amendment No. 1072.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The legislative clerk read as follows:

The Senator from Vermont [Mr. LEAHY], for himself and Mr. GRAHAM, and others, proposes an amendment numbered 1072.

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

Mr. LEAHY. Mr. President, this is on behalf of myself, Senators GRAHAM, ROCKEFELLER, AYOTTE, BAUCUS, BEGICH, BENNET, BINGAMAN, BLUMENTHAL, BLUNT, BOOZMAN, BOXER, SCOTT BROWN, SHERROD BROWN, BURR, CANTWELL, CARDIN, CARPER, CASEY, COATS, CONRAD, COONS, CORKER, CRAPO, DURBIN, ENZI, FEINSTEIN, FRANKEN, GILLIBRAND, GRASSLEY, HAGAN, HARKIN, HELLER, HOEVEN, INHOFE, INOUYE, JOHANNS, RON JOHNSON, TIM JOHNSON, KLOBUCHAR, LANDRIEU, LAUTENBERG, LEE, LUGAR, MANCHIN, MCCASKILL, MENENDEZ, MERKLEY, MIKULSKI, MORAN, MURRAY, BEN NELSON, PRYOR, RISCH, SANDERS, SCHUMER, SHAHEEN, SNOWE, STABENOW, TESTER, MARK UDALL, VITTER, WARNER, WHITEHOUSE, and WYDEN. It has been called up, and I ask unanimous consent to have it set aside to deal with the pending matter.

The PRESIDING OFFICER. Without objection, it is so ordered.

Without objection, the foregoing request from the Senator from Arizona is——

Mr. LEVIN. Reserving the right to object, and I don't object because that is the way we should proceed, going back and forth, and usually we do that informally. I don't know whether there may be implications because I don't know who will be speaking.

Mr. President, I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCAIN. I thank my friend from Michigan. I do that for the convenience of my colleagues because I know there will also be others coming to speak on this important issue.

I wish to point out that the Senator from South Carolina—a member of the National Guard, one of the major authors of the Detainee Treatment Act, and a person who has tried hundreds of cases in military courts—brings a degree of knowledge and expertise on this issue.

The Senator from New Hampshire served as attorney general of her State for a number of years. She understands the Miranda rights. She has been a student and leader on this issue of detainee treatment.

Also, of course, Senator CHAMBLISS, in his role as the Republican leader on the Intelligence Committee, has a deep and longstanding involvement on detainee issues and the requirements for making our Nation safe.

I will be fairly brief except to say that by any judgment, the President's policy, the President's strategy, the President's movements concerning detainees have been a total and abysmal failure. If the President of the United States would have had a coherent policy that made any sense whatsoever to anyone, we would not have had to act in the Senate Armed Services Committee.

Let me point out a couple of facts. The President of the United States campaigned saying that he would close Guantanamo Bay. Guantanamo Bay remains open. The President of the United States also said we would have detainees tried in civilian as well as military courts, and that was a position he has held.

So they had a great idea: Let's take Khalid Shaikh Mohammed to New York City. That was a great idea. Let's have $300 million in security costs while they have a trial of one of the most notorious international criminals. Obviously, that one got the support it deserved.

Thanks to the release policy of Guantanamo, 27 percent of the detainees of Guantanamo who have been released are back in the fight, trying to kill Americans—only this time they have a red badge of courage and a degree of legitimacy because they spent time in Guantanamo Bay. Leaders of al-Qaida have been released from Guantanamo Bay under this administration. They were released under the Bush administration as well, to be fair, but we didn't know at that time how many of them would return to the fight. Some of the leaders in Yemen whom we are speaking about who are now doing everything they can to kill Americans were released from Guantanamo Bay. That can't be viewed as a successful policy. Thirty individuals in Guantanamo today are citizens of Yemen. We can't release them, obviously, back to Yemen.

So now what do we do in order not to have people go to Guantanamo Bay? We are now using U.S. naval ships to detain suspected terrorists. For 60 days, they kept a suspected al-Qaida member on board a ship. Now, when I support the construction of more Navy ships, I have a lot of missions in mind. Serving as a detainment facility for suspected terrorists is not one of them.

The Underwear Bomber was Mirandized 50 minutes into custody, and the Senator from Illinois forgot to mention that several weeks went by before the Underwear Bomber's family came and convinced him to cooperate. Suppose there had been an impending attack on the United States of America during the 50 minutes in captivity before he was Mirandized. Most Americans don't believe al-Qaida members should be Mirandized, as the Senator from New Hampshire, who has had a lot of experience with individuals who have exercised their Miranda rights, will point out.

So the administration policy has been a complete failure. What we are trying to do in this legislation—and we have tried and tried again to satisfy many of the concerns the administration has, including, I would point out, doing certain things such as making this legislation only for 1 year—not permanent but only for 1 year—and we have put into this legislation a national security waiver which is a mile wide. If the President of the United States decides that an individual should be given a trial in civilian court, he has a waiver that all he has to do is exercise. So I am not exactly sure why the administration feels so strongly about a 1-year restriction, with a national security waiver that is a mile wide. We made a couple of other changes at the request of the administration. So I can only assume that

somehow this has some sort of political implications—and I don't say that lightly—as most of the actions concerning this whole detainee issue seem to be driven by.

So there were hearings held in the Senate Armed Services Committee. There was input from different sources. The Senator from Michigan has been fair and objective on this issue, and I am very appreciative of that. The vote in the Senate Armed Services Committee was, I believe, 26 to 0.

We feel very strongly that these provisions in this bill are necessary to keep Americans secure. We want to stop more than one out of every four of these detainees going back into the fight. We want to make sure the military court system applies here to people who are noncitizens and known members of al-Qaida. All of it seems to me to make perfect sense.

So obviously the administration ratcheted up the stakes today with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation's defense.

I yield the floor.

Mr. LEVIN. I wonder if we can amend the unanimous consent agreement. There is nobody that I know of on this side at the moment who wants to speak in support of the amendment, so I am wondering if it would be agreeable to the ranking member to have two Members on his side go and then two Members on our side, should that occur.

Mr. MCCAIN. That is not agreeable to me. I would say that they have the ability to walk over here if they are interested.

Mr. LEVIN. In that case, I note the absence of a quorum.

Mr. MCCAIN. I would agree to that, but it is not fair.

Mr. LEVIN. I don't want you to agree if you think it is not fair.

Mr. MCCAIN. You know it is not fair. If you have a speaker, bring them up.

Mr. LEVIN. I am in opposition to the amendment. I want to be fair.

The PRESIDING OFFICER. Does the Senator from Arizona agree with the revised unanimous consent request?

Mr. MCCAIN. I agree.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise in opposition to the motion of the Senator from Colorado. As the vice chairman of the Senate Intelligence Committee, let me just say in response to the statement from the distinguished chairman of the Judiciary Committee that there has not been a lack of discussion of this issue, both within the Armed Services Committee and within the Intelligence Committee. While I am not permitted to talk about what has gone on within the Intelligence Committee, I assure my colleagues that this has been a major issue from a discussion standpoint for a number of months. In fact, it has been a point of discussion for almost 3 years now. I will get into some of that in my comments.

Secondly, just in quick response to the comment of the Senator from Illinois, the assistant majority leader, when he talked about how we would treat U.S. citizens under this, I know how smart he is, and he is my friend, but he obviously hasn't read the bill. There is a specific exclusion for citizens of the United States being required to be detained by the military in this bill.

Over the past several years, there has been an ongoing debate concerning our Nation's ability to fully and lawfully interrogate suspected terrorists. One thing remains clear: After all of these years after 9/11, we still lack an unambiguous and effective detention policy. The consequences of that failure are very real. If we had captured bin Laden, what would we have done with him? If we had captured Anwar al-Awlaki, what would we have done with him? If today we capture Zawahiri, the leader of al-Qaida, what would we do with him? Many of us have posed these same questions to various administration officials, and the wide variety of responses only confirms that there is no policy. That is unacceptable, and that is why the detainee provisions in this bill are so absolutely critical.

I think it is fair to say that if we had captured bin Laden or Awlaki, we could have gained very actionable intelligence from either one of them, and that is our primary goal. But how would we have done that? We have no detainee policy; there is no place we could have taken them for long-term interrogation. The closest thing to a policy we have heard from the administration is that Guantanamo is off the table. But that is not helpful when they provide no other alternatives.

We have heard some administration officials say holding detainees on ships for brief periods of time solves this detention problem. Now, Senator MCCAIN just addressed that issue, and we have a great U.S. Navy. It is not the intention of the U.S. Navy to function in a way of sailing ships around the world and having terrorists brought to ships for detention. A state-of-the-art facility like Guantanamo Bay is off the table, but holding someone on a ship, never intended to be a floating prison and prohibited from long-term detention by the Geneva Conventions is somehow a humane replacement for Guantanamo? That simply does not make sense.

The intent behind the detainee provisions in this bill is very simple: We must be able to hold detainees for as long as it takes to get significant foreign intelligence information without them lawyering up, as the Christmas Day bomber did so famously after only 50 minutes of interrogation.

Again, to my friend from Illinois, who talked about the fact that once this young man's parents got involved, that after his Miranda rights had been given to him, he gave us an awful lot of intelligence—and that is true in his case—I doubt very seriously that Zawahiri's parents, who probably are not even alive, are going to step up and tell their son: You ought to go in and talk to these folks and give them all the details about the way you helped plan the September 11 attacks on the United States of America. We just know with high-value targets that is not going to happen on a wholesale basis, and we simply need to be in a position to gain actionable intelligence from every one of those individuals.

While I fully support the detainee provisions in this bill, I believe there are other improvements that can and should be made. For example, I am cosponsoring Senator AYOTTE's amendment which will allow our intelligence interrogators to use lawful interrogation methods beyond those set forth in the Army Field Manual.

We need to be clear on exactly what this means. This amendment does not authorize or condone torture, and every technique used in every interrogation must comply with our laws and treaty obligations. I believe there needs to be flexibility in how we interrogate terrorists. But even more so I believe it is foolish to publicize—as the Army Field Manual does—the specific techniques that can be used in interrogating a suspected terrorist.

Over the years, we have heard repeatedly from the intelligence community that the element of surprise is sometimes our greatest asset in gathering timely intelligence from detainees. Senator AYOTTE's amendment gives the intelligence community the ability to use techniques that have not been broadcast over the Internet. In my opinion, that makes a lot of sense. I hope my colleagues will agree because the folks we are dealing with in the terrorist world today—these guys who are the meanest, nastiest killers in the world; who wake up every morning trying to figure out ways to kill and harm Americans—are not stupid. They carry laptops. They know how to use the Internet. We gain valuable information oftentimes through the airwaves. We know how smart they are, and we know they have the capability of going on the Internet today and reviewing the Army Field Manual. They know exactly the way they are going to be interrogated and the type of techniques that are going to be used to gain intelligence from them.

The Armed Services Committee has worked very hard on a bipartisan basis to come up with legislation that will improve congressional oversight of detainee matters, as well as provide greater assurance that detainees who pose a threat to our national security are not released so they can return to the fight.

As the vice chairman of the Intelligence Committee, I have a specific interest in making sure our intelligence community has the ability to gather timely and actionable intelligence from detainees. I believe this bill will help our intelligence interrogators do exactly that, and I urge my colleagues

to support these provisions fully as was done on a unanimous basis within the Armed Services Committee when this issue was discussed, debated, and talked about thoroughly during the markup.

I yield to my friend from New Hampshire.

Mr. LEVIN. No. Yield the floor.

Mr. CHAMBLISS. I am sorry. I thought you gave us two, Mr. Chairman.

Mr. LEVIN. You had two, I believe. You were the second, I think.

Mr. MCCAIN. I think what the chairman meant was, there would be two if——

Mr. LEVIN. If we did not have somebody here, we were going to do it two at a time.

Mr. MCCAIN. Yes. I think it is the other side's turn.

The PRESIDING OFFICER (Mrs. MCCASKILL). The Senator from Rhode Island.

Mr. WHITEHOUSE. Madam President, I appreciate the courtesy of the Senator from New Hampshire. I will not speak long. I know she is here waiting to speak, as we go back and forth across the aisle in sequence.

I want to begin by thanking Chairman LEVIN and his ranking member, Senator MCCAIN, for the work they have done on this detention issue. I think they have made a lot of progress, and I look forward to continuing to work on the Senate floor to try to conclude what I hope will be a successful agreement for everyone.

AMENDMENT NO. 1092

But I am here to speak about amendment No. 1092 to the National Defense Authorization Act, which is the piece that has been put in that responds to the serious and ever-growing problem of counterfeit parts that appear in our military supply chain.

Our Nation asks a lot of our troops. We send them far away. We send them into danger. We ask them to suffer prolonged separation from their families. We ask them to put their life and limb in peril. In return, we have a high obligation to give them the best possible equipment to fulfill their vital missions and come home safely.

In order to assure the proper performance of our weapons systems, of our body armor, of our aircraft parts, and of countless other mission critical parts, we have to make sure they are legitimate and not counterfeit parts.

That was why I introduced the Combating Military Counterfeits Act, which was reported without objection by the Judiciary Committee on July 21 of this year. It is cosponsored by my colleague, Senator GRAHAM, whom I see on the floor; by the ranking member, Senator MCCAIN—again, my appreciation to him—Senator COONS; the chairman of the Judiciary Committee, Senator LEAHY; Senator KYL; Senator SCHUMER; Senator HATCH; Senator BLUMENTHAL; and Senator KLOBUCHAR. I thank all of those cosponsors for their support and leadership on this important issue.

I particularly want to thank Chairman LEVIN and Ranking Member MCCAIN for including this legislation in their amendment No. 1092, which was offered earlier today.

Senator LEVIN and Senator MCCAIN led an in-depth investigation in the Armed Services Committee into this problem of military counterfeits, and they have drawn on that investigation in making these important reforms that will protect military procurement from counterfeit parts. I am very glad they believe, as I do, the enhanced criminal penalties in my bill would provide a useful complement to those important changes.

Prosecutors have an important role to play in the fight against military counterfeiters. The criminals who sell counterfeit military products should not get off with light sentences. They knowingly sell the military, for instance, counterfeit body armor that could fail in combat, a counterfeit missile control system that could short-circuit at launch, or a counterfeit GPS that could fail under battlefield conditions.

The Combatting Military Counterfeits Act of 2011 makes sure appropriate criminal sanctions attach to such reprehensible criminal activity, first, by doubling the maximum statutory penalty for an individual who trafficks in counterfeits and knows the counterfeit product either is intended for military use or is identified as meeting military standards; and, second, by directing the Sentencing Commission to update the sentencing guidelines as appropriate to reflect our congressional intent that trafficking in counterfeit military items be punished seriously, sufficiently to deter this kind of reckless endangering of our servicemembers.

The administration has called for these increased sentences for trafficking in counterfeit military products. In the private sector, this legislation is supported by the U.S. Chamber of Commerce, the National Association of Manufacturers, the Semiconductor Industry Association, DuPont, the International Trademark Association, and the International AntiCounterfeiting Coalition. I thank all of them for their work and leadership on this issue.

One semiconductor manufacturer, ON Semiconductor, which has a development center in East Greenwich, in my home State of Rhode Island, has written a letter of support explaining that military counterfeits are a particular problem since ''[m]ilitary grade products are attractive to counterfeiters because their higher prices reflect the added costs to test the products to military specifications, specifications that include the full military temperature range.'' So it is a target area for counterfeiters.

I will say, without going on at any great length, the examples are shocking. The Defense Department, for instance, has found out in testing that what it thought was Kevlar body armor was, in fact, nothing of the sort and could not protect our troops the way proper Kevlar can. In another example, a supplier sold the Defense Department a part that it falsely claimed was a $7,000 circuit that met the specifications of a missile guidance system.

A January 2010 study by the Commerce Department quoted a Defense Department official as estimating that counterfeit aircraft parts were ''leading to a 5 to 15 percent annual decrease in weapons systems reliability.'' The investigation, led by Chairman LEVIN and Ranking Member MCCAIN, revealed countless other grave and sobering examples.

I am glad we are responding to the serious and ever-growing threat posed by counterfeit military parts. Again, I thank Chairman LEVIN and Ranking Member MCCAIN for their great work to eliminate counterfeit parts from the military supply chain, and I hope all my colleagues will support their amendment No. 1092.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, first, let me thank Senator WHITEHOUSE for the extraordinary effort he has made to go after counterfeit parts. We have incorporated his legislation in our legislation. It is a critically important part of our legislation. But his leadership has been early, often, and strong on this issue, and we commend and thank him for it. Hopefully, when this amendment gets passed, there will be a recognition of the critical role the Senator from Rhode Island played. It is an ongoing saga to stop counterfeiting coming in, mainly from China. This is a major effort to stem that flow.

Mr. WHITEHOUSE. I thank the chairman and the ranking member.

Mr. MCCAIN. Madam President, could I just add my words of appreciation, along with those of the chairman, for Senator WHITEHOUSE's hard work on this very important issue.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. Madam President, I rise in opposition to the amendment offered by the Senator from Colorado to strike the detainee provisions from the defense authorization markup—provisions that were agreed upon on an overwhelming bipartisan basis in the Armed Services Committee.

I would like to start first by revisiting the history of this and where we are because the reason the Armed Services Committee, in the first place, thought it was very important we discuss this issue in committee and address it is that having participated in hearings over the course of months and months in the Armed Services Committee, there has been witness after witness from our Defense Department who has come in and our military leaders with whom we have been talking about the detention policy and asking

them very important questions about where we are and how we are going to ensure that our military and intelligence community has the tools they need to protect America, and also asking them about this issue of detainees and how we are treating them.

Because one of the important facts my esteemed colleague from Georgia, as well as the ranking member, Senator MCCAIN, mentioned, is that we have a recidivism rate of 27 percent from Guantanamo—those who have reengaged our soldiers again and are back in theater. I was very concerned about this in the Armed Services Committee. That caused, over a series of months, us to ask about the administration's detainee policy.

I just want to share some of the comments that were made over that period of time in February. Secretary Michael Vickers said the administration is in the final stages of revising or establishing its detention policy.

Now, that was 8 months ago, and we are now 10 years into this war. In April I questioned GEN Carter Ham, the Commander of Africa Command, about what we would do if we captured a member of al-Qaida in Africa. Do you know what he told me. He said, ''We would need some lawyerly help on answering that one.''

So this is an area that cried out for clarification on a bipartisan basis because it is so important to ensure that while we remain at war with terrorists that we have the right policies in place to protect Americans. That is why the Armed Services Committee worked very hard.

I thank the chairman of the committee, Chairman LEVIN, for his diligent work, along with other members of the committee for coming forward with this provision—that the Senator from Colorado is seeking to strike—as well as the ranking member, Senator MCCAIN.

What ended up happening is, we brought forward a compromise that passed overwhelmingly out of committee originally in June. In fact, it passed out 25 to 1, and then the administration raised some concerns about it. In reaction to those concerns, I know the chairman of the Armed Services Committee, as well as the ranking member and some others of us, including myself, sat down with members of the administration to hear out their concerns and to try to accommodate their concerns while still making sure we had a policy that would give proper guidance, would protect Americans, and would fundamentally deal with this issue of making sure, in the first instance, that we reaffirmed our authority that we are at war with al-Qaida post 9/11; second, reaffirming that when we are at war the presumption is military custody because the priority has to be gathering intelligence to protect our country; and then, third, those who are released from Guantanamo, making sure there is a standard in place so they cannot reengage back into the battle to harm our troops, our partners, and our allies.

In that process, that is how this provision was derived that Senator UDALL from Colorado seeks to strike with his amendment. If we were to eliminate these provisions, we would be putting our country in a position where these important issues are not being addressed, and they need to be addressed just based on what we have heard from our military leadership over many months in the Armed Services Committee.

So I would also echo what Senator CHAMBLISS, who is the vice chairman of the Intelligence Committee, said. This is an issue that has been thoroughly discussed in this body and cries out for passage in the Defense Authorization Act. I want to point out a couple of very important parts to this. Now, I am someone who, on the recent appropriations bill, the CJS appropriations bill, brought an amendment that would have provided for military commissions trials for members of al-Qaida and associated forces who have committed an attack against us or our coalition partners because I am deeply concerned that this administration has been treating these types of cases as common criminal cases.

When I brought that amendment forward, it did not pass this body. I feel very strongly that the policy should be that we treat these cases for what they are, military cases, because we remain at war and our priorities should be to gather intelligence. But I point out the fact that after my amendment lost, I sat down with the chairman of the Armed Services Committee, the ranking member, and the administration to hear out their concerns.

So while this amendment—I would have gone further in my amendment—addresses many of the objections that were raised—in fact, I think all of the objections which were raised to the amendment I brought to the floor from the other side; that is, we have given the administration flexibility to make the decision on whether they believe it is appropriate, based on national security concerns, which has to be the primary concern and consideration of how to treat those who have committed an attack on our country who are members of al-Qaida or associated forces, and also who are not members of this country, so who are foreign citizens and are seeking to attack our country or have attacked our country in a way that the administration can decide it is best to handle them in a civilian court or a military system.

So all of the objections that were raised to my amendment—I stand by my amendment—but they are addressed in this compromise. And to hear the objection to it, that there is not flexibility, it is very clear that is just not true when you look at the language in this amendment because we adjusted the amendment to address the administration's concerns to say no interrogation will be interrupted based upon this amendment; that interrogations have to be the priority, and we are giving the administration maximum flexibility under this amendment.

So I do not understand why there are such objections continuing when this is as a result of a very good, strong good-faith effort to address any operational concerns that were raised based on the amendment I brought and even based on the prior language which, in my view, I think was very sufficient.

I want to point out something that is very important. In the course of the discussions we had with the administration on section 1031, which we have heard cited as a section that could be used to detain Americans indefinitely, this section was changed based on feedback from the administration. In fact, the administration asked us to actually strike a provision in it that would have said American citizens—it did not apply to American citizens, and, in fact, had to comply with the Constitution of the United States.

So I am a little bit apoplectic to understand why the administration is raising an objection about something they actually asked to be removed on a section they told us they were satisfied with and based on revisions that we made that they wanted. We said we would be happy to make these accommodations because we wanted to make sure we got this right.

So on that section, I do not understand why we are in a position where the Senator from Colorado is trying to remove it—the administration is objecting to it—when we took the language they gave us and incorporated it directly into the National Defense Authorization Act.

One point I think is being lost: So why is it that this amendment creates an initial presumption for military custody? This is the most important point. The priority has to be in protecting American citizens by gaining available intelligence to protect our country. The esteemed Senator from Illinois cited the case of the so-called Christmas Day or Underwear Bomber as an example of how cases have worked well.

Well, I think it is important to appreciate the facts of that case. This is a situation where the underwear bomber is caught with the explosives strapped to him, where there are hundreds of witnesses on the plane, and they were able to make their case in the absence of any interrogation or confession. What ended up happening is he was questioned at the scene for about 50 minutes? Then he was read his Miranda rights, one of those being: You have the right to remain silent.

Let's think about that for a second. We would want to tell terrorists: You have you have the right to remain silent. Common sense will tell you telling a terrorist they have the right to remain silent is counter to what we need to do to protect Americans. We do not want them to remain silent, we

want them to tell us everything they know. But continuing on with that case, the only reason he reengaged in providing information for our country is because his parents intervened. Weeks later, his parents convinced him he should cooperate with us; that he should provide information and tell us what he knew.

If our interrogation policy for people who commit attacks on our country is going to be, well, we hope a parent comes and intervenes to help us get information that will protect Americans, I think we are in trouble if that is our intelligence-gathering procedure.

So I wanted to point out, since that case is cited as an example by the Senator from Colorado and the Senator from Illinois as to why this section should be struck, if anything, I think that case points out why we need guidance in this area and why it is very important the priority be on gathering intelligence.

That is what this amendment does. It gives the administration sufficient flexibility, based on concerns they raised, operational concerns. If the FBI is conducting an interrogation, they do not have to stop it because of anything in this provision. That is very clear.

If the administration wants to treat someone in a civilian court, even though I do not think they should versus a military commission who is a member of al-Qaida who has attacked our country, that waiver is in here. That flexibility is in here.

This was a reasonable compromise where people like me who would have gone a lot further did not get what we wanted. But what we did do is get a very strong bipartisan compromise that came out of this committee overwhelmingly. When we had a vote at the beginning of the week, and the Senator from Colorado raised the very same amendment to strike this provision, it was rejected overwhelmingly on a bipartisan basis.

So I hope this Chamber will also overwhelmingly reject striking this very important provision from the National Defense Authorization Act.

Again, we cannot be in a position where we spend the next year in the Armed Services Committee again hearing from our military leaders: The administration is still in the final stages of revising or establishing its detention policy. I certainly do not want to hear again from one of our generals, when I ask him about our detention policy and what we are going to do with terrorists: I would need some lawyerly help in answering that one.

This amendment gives us the guidance we need. I would ask my colleagues to reject striking it from the authorization.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, I view the detention provisions of this bill as real pernicious, as an attack on the Executive power of the President, and contrary to the best interests of this Nation. So I rise to express my strong opposition to three specific detention provisions in the Defense authorization bill.

There was some discussion on the Senate floor that the Intelligence Committee had reviewed these. This is not true. I would like to read a letter that I sent to the majority leader that was signed by every Democratic member of the Intelligence Committee on October 21.

We write as members of the Senate Judiciary Committee—

Because there were some Judiciary Committee members on this.

and the Senate Select Committee on Intelligence, to express our grave concern with subtitle D, titled Defense Matters of title 10 of S. 1253, the National Defense Authorization Act for Fiscal Year 2012. We support the majority of provisions in the bill which further national security and are of great importance. But we cannot support these controversial detention positions.

Then we go on to say—and I will not read the whole letter. I will put the whole letter in the RECORD.

The executive branch must have the flexibility to consider various options for handling terrorism cases, including the ability to prosecute terrorists for violations of U.S. law in Federal criminal court.

Yet, taken together, sections 1031 and 1032 of subtitle (d) are unprecedented and require more rigorous scrutiny by Congress. Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force, especially because it would authorize the indefinite detention of American citizens without charge or trial . . .

I will stop reading here, but again, I want to emphasize this point. We are talking about the indefinite detention of American citizens without charge or trial. We have not done this at least since World War II when we incarcerated Japanese Americans. This is a very serious thing we are doing. People should understand its impact.

I want to outline the provisions in the Armed Services bill that would further militarize our counterterrorism efforts and ignore the testimony and recommendations of virtually all national security and counterterrorism officials and experts. We have heard from the Secretary of Defense, the Attorney General, the general counsel of the Defense Department, and John Brennan, the Assistant to the President for Homeland Security and Counterterrorism. Every one of them opposes these provisions. They have to carry them out. They are the professionals responsible for so doing. Yet, we are going to countermand them?

The first problematic provision, section 1032, requires mandatory military custody with no consideration of the details of individual cases. The bill mandates military detention of any non-U.S. citizen who is a member of al-Qaida, or an associated force, whatever that may be, and who planned or carried out an attack, or attempted attack, on this country or abroad. Here is the problem: The Armed Services Committee ignores the administration's request to have this provision apply only to detainees captured overseas. Therefore, any noncitizen al-Qaida operative captured in the United States would be automatically turned over to military custody.

Military custody for captured terrorists may make sense in some cases, but certainly not all. Requiring it in every case could harm our Nation's ability to investigate and respond to terrorist threats and create major operational hurdles. For example, the FBI has 56 local field offices around the country. It is staffed with agents who can arrest, interrogate, and detain. The military does not. As has been the policy of Republican and Democratic Presidents before and after 9/11, the decision about where to hold a prospective terrorist should be based on the facts of each case, and should be made by national security professionals in the executive branch.

In a letter, Secretary Panetta said this week that this provision ''restrains the executive branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.''

He added that the bill as written ''. . . may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.''

This is the man who ran the CIA and is now running the Department of Defense, and we are going to ignore him? Are we saying it doesn't make any difference what he says? I am not part of that school of thought. I think what he says does make a difference.

I ask unanimous consent to have Secretary Panetta's November 15 letter printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE SECRETARY OF DEFENSE,
Washington, DC, November 15, 2011.

Hon. CARL LEVIN,
Chairman, Committee on Armed Services, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write to express the Department of Defense's principal concerns with the latest version of detainee-related language you are considering including in the National Defense Authorization Act (NDAA) for Fiscal Year 2012. We understand the Senate Armed Services Committee is planning to consider this language later today.

We greatly appreciate your willingness to listen to the concerns expressed by our national security professionals on the version of the NDAA bill reported by the Senate Armed Services Committee in June. I am convinced we all want the same result—flexibility for our national security professionals in the field to detain, interrogate, and prosecute suspected terrorists. The Department has substantial concerns, however, about the revised text, which my staff has just received within the last few hours.

Section 1032. We recognize your efforts to address some of our objections to section 1032. However, it continues to be the case that any advantages to the Department of

Defense in particular and our national security in general in section 1032 of requiring that certain individuals be held by the military are, at best, unclear. This provision restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.

Moreover, the failure of the revised text to clarify that section 1032 applies to individuals captured abroad, as we have urged, may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.

Next, the revised language adds a new qualifier to ''associated force''—that acts in coordination with or pursuant to the direction of al-Qaeda.'' In our view, this new language unnecessarily complicates our ability to interpret and implement this section.

Further, the new version of section 1032 makes it more apparent that there is an intent to extend the certification requirements of section 1033 to those covered by section 1032 that we may want to transfer to a third country. In other words, the certification requirement that currently applies only to Guantanamo detainees would permanently extend to a whole new category of future captures. This imposes a whole new restraint on the flexibility we need to continue to pursue our counterterrorism efforts.

Section 1033. We are troubled that section 1033 remains essentially unchanged from the prior draft, and that none of the Administration's concerns or suggestions for this provision have been adopted. We appreciate that revised section 1033 removes language that would have made these restrictions permanent, and instead extended them through Fiscal Year 2012 only. As a practical matter, however, limiting the duration of the restrictions to the next fiscal year only will have little impact if Congress simply continues to insert these restrictions into legislation on an annual basis without ever revisiting the substance of the legislation. As national security officials in this Department and elsewhere have explained, transfer restrictions such as those outlined in section 1033 are largely unworkable and pose unnecessary obstacles to transfers that would advance our national security interests.

Section 1035. Finally, section 1035 shifts to the Department of Defense responsibility for what has previously been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason—and certainly none has been expressed in our discussions to date—to upset a collaborative, interagency approach that has served our national security so well over the past few years.

I hope we can reach agreement on these important national security issues, and, as always, my staff is available to work with the Committee on these and other matters.

Sincerely,

LEON E. PANETTA.

Mrs. FEINSTEIN. Let me explain why this proposal is bad policy.

Consider the case of Najibullah Zazi. He was arrested in September of 2009 as part of an al-Qaida conspiracy to carry out suicide bombings of the New York City subway system. The FBI arrested Zazi after they had followed him on a 24/7 basis. He began providing useful intelligence to the FBI once captured.

If the mandatory military custody in the Armed Services bill were law, all of the surveillance activities, all of what the FBI did would be in jeopardy. Instead of interrogating him about his coconspirators, or where he had hidden other bombs, the FBI would have squandered valuable time determining whether Zazi was a member or part of al-Qaida or an ''associated force.'' Requiring law enforcement and national security professionals to determine whether an individual meets a specific legal definition adds a delay—most people would have to admit this. Also a waiver process takes time as it proceeds through the President and Secretary of Defense, both of whom believe it unduly complicates the ability to immediately interrogate an individual or prevent another attack.

Suppose a terrorist such as Zazi were forced into mandatory military custody. Then the government could also have been forced to split up codefendants, even in cases where they otherwise could be prosecuted as part of the same conspiracy in the same legal system.

Zazi was a permanent legal resident. His coconspirators were both U.S. citizens. They would be prosecuted on terrorist charges in Federal criminal court, but Zazi himself would be transferred to military custody. Two different detention and prosecution systems would play out and could well complicate a unified prosecution.

Incidentally, in the Zazi case, prosecutors have obtained convictions against six individuals, including guilty pleas from Zazi, who faces life in Federal prison without parole.

What could be better than that? If it is not broke, don't fix it. What is happening now isn't broke. That is the point.

Guess what. I try to do my homework, I read the intelligence, and I try to know what is happening. It is working. The government has its act together. Now arbitrarily this is going to change because there is a predilection of some people in this body that the military must do it all—if they cannot do it all, a part of it. But what this does is essentially militarize certain criminal terrorist acts in the United States. I have a real problem with that. I don't understand why Congress would want to jeopardize successful terrorism prosecutions.

The former speaker was talking about Farouq Abdulmutallab, better known as the Underwear Bomber, from Christmas Day in 2009. Abdulmutallab was brought into custody in Detroit after failing to detonate a bomb on Northwest Flight 253. He was interrogated almost immediately by FBI special agents. And he talked.

Some critics contend that Abdulmutallab stopped talking later that day because he was Mirandized. That happens to be correct, at least temporarily. But what these critics don't mention is that he likely would have been even less forthcoming to military interrogators.

It was FBI agents who traveled to Abdulmutallab's home in Nigeria and persuaded family members to come to Detroit to assist them in getting him to talk. The situation would have been very different under Section 1032. Under the pending legislation, it would have been military personnel who were attempting to enlist prominent Nigerians to assist in their interrogation, and Abdulmutallab would have been classified as an enemy combatant and held in a military facility and, therefore, his family would not be inclined to cooperate. This is we have been told on the Intelligence Committee.

For the record, Umar Farouq Abdulmutallab pleaded guilty to all charges last month in a Federal criminal court in Michigan and will likely spend his life behind bars. What can be better than that? Where can the military commission come close to that effort? In fact, they can't. They had 6 cases, minor sentences, or released, plus 300 to 400 convictions in Federal Court.

To conclude on this mandatory military custody provision, the Defense Department has made clear it does not want the responsibility to take these terrorists into mandatory military custody. But do we know better? I don't think so.

The Department of Justice has said that approximately one-third of terrorists charged in Federal Court in 2010 would be subject to mandatory military detention, absent a waiver from the Secretary of Defense.

The administration contends that the mandatory military custody is unwise because our allies will not extradite terrorist suspects to the United States for interrogation and prosecution—or even provide evidence about suspected terrorists—if they will be sent to a military brig or Guantanamo.

Finally, the military isn't trained or equipped for this mission—they have plenty to do as it is—but the Department of Justice is.

As John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, said in March:

> Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. As they should be.

I agree.

> The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country. Nor should it.

I could add that our military doesn't spend its resources and expertise surveilling terrorists in the U.S. like Najibullah Zazi, as the FBI did, to know his every move, to know where he bought the chemicals, to know the amount of chemicals, to know what backpacks they had, and to follow him to New York. It makes no sense to me to have to transfer that jurisdiction.

The second problematic provision imposes burdensome restrictions to transfer detainees out of Guantanamo, section 1033. This provision essentially establishes a de facto ban on transfers of detainees out of Gitmo, even for the purpose of prosecution in U.S. courts or another country.

The provision requires the Secretary of Defense to make a series of certifications that are unreasonable—and, candidly, unknowable—before any detainee is transferred out of Gitmo.

Again, here is an example: The administration proposed eliminating the requirement that the Secretary of Defense certify that the foreign country where the detainee will be sent is not ''facing a threat that is likely to substantially affect its ability to exercise control over the individual.''

How can the Secretary of Defense certify that—facing a threat that is likely to not just affect, but substantially affect, its ability to exercise control over the individual? What does it mean for a nation to ''exercise control'' over a former Gitmo detainee? Does he have to be in custody? Can he have an ankle bracelet? Is he remanded to his home? Is he in some county facility somewhere? What does it mean?

The Secretary of Defense must also certify, in writing, that there is virtually no chance that the person being transferred out of American custody would turn against the United States once resettled.

I agree with the sentiment, but as it is written, this is another impossible condition to satisfy.

The administration tried to work with the Armed Services Committee to make this section more workable, but the input by professionals in the defense, law enforcement, and intelligence communities, quite frankly, was rejected.

The committee didn't address the concerns of the administration except to limit these restrictions to 1 year.

In his November 15 letter, Secretary Panetta wrote he was troubled this section remains essentially unchanged and that none of the administration's concerns or suggestions for the provision were adopted. This in itself is a concern. The views of the professionals who do this day in and day out should be considered. Congress is not on the streets, we are not shadowing terrorists, we are not putting together intelligence. So I find this just terribly imperious.

The third problematic detention provision reverses the interagency process of detention reviews for those detained at Guantanamo.

Let me begin by saying I support detention of terrorists under the law of war. There must be a way to hold people who would, if free, take up arms against us. But detention without charge, perhaps forever, is a power that must be subject to serious review to ensure it is applied correctly and that we are only holding people—in some cases for decades—with cause and careful consideration and review.

Incidentally, this would apply to U.S. citizens. Do we want to go home and tell the people of America we are going to hold them, if such a situation comes up, without any thorough and considered review? It is just not the American way.

In March, the President issued an executive order that laid out the process for reviewing each detainee's case to make sure indefinite detention continues to be an appropriate and preferred course. Section 1035 essentially reverses the interagency process created by the President's order.

Let me just say a few things about this process. The Secretary of Defense is in charge of the decision. He is allowed to reject the findings of an interagency review board that includes a senior official from the State Department, the Department of Defense, the Justice Department, DHS, the Office of the Director of National Intelligence, and the Office of the Chairman of the Joint Chiefs of Staff. They, together, review a case of a person who could be held forever without trial, without charge. They can deliberate on the kind of threat this individual continues.

There are people who are in Guantanamo—or I should say who were in Guantanamo—who were simply in the wrong place at the wrong time. That is possible for an American as well. Everything we are all about is to see that the system is a just system. This is not just and particularly not for a U.S. citizen. I don't care who they are, they have certain rights under the Constitution as a U.S. citizen.

Why should we place the Department of Defense above the unified judgment of five other departments on what is, at its heart, a question about the legality of continued detention, the assessment of the threat a detainee poses, and the options available to handle that individual?

Secretary Panetta is not requesting new authority in this section. Again, reading from the Secretary's November 15 letter, he says:

> Section 1035 shifts to the Department of Defense responsibility for what has been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason—and certainly none has been expressed in our discussions to date—to upset a collaborative, interagency approach that has served our national security so well over the past few years.

Let me conclude by saying I support the vast majority of provisions in this authorization. The bill improves our national security and it is essential to meet our commitment to the men and women of our Armed Forces. I understand all that, and I have voted for virtually every Defense authorization bill. But I intend to continue to oppose these three detention policy provisions.

I have not made up my mind, candidly, how I will vote on this bill. I guess maybe I see things a little differently than many in this body, because one of the things I have learned in my time here is the importance of the U.S. Constitution—and I have had 18 years on the Judiciary Committee—and what it means to have due process of law, and that means for everybody. That is for the poorest person on the street, the wealthiest person or whoever it is. Criminals are entitled to due process of law.

How can we do this? It may not stand the test of constitutionality. But be that as it may, despite having raised these concerns months ago and offered suggestions to address them, this bill does very little to resolve my three principal concerns and those of the administration about mandatory military custody and the possibility this bill will create operational confusion and problems in the field.

I look forward to the debate. Candidly, I hope sides haven't hardened. The three amendments I will offer will—one will strike the language, one will insert the word ''abroad,'' in section 1032, and one will carry with it the administration's proposal. I hope there will be the opportunity to offer these amendments.

I can't think of anything more serious that we are doing, and I must tell you a lot of effort has gone into putting the FBI in a position by creating a huge intelligence operation within the Federal Bureau of Investigation to be able to deal with terrorist threats in this country. We also have a Department of Homeland Security to do that as well. To now say the military is going to take over in certain situations is going to end up unworkable, if, in fact, this becomes the law and I hope it will not.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, I wonder if the Senator from California might offer those amendments right now and call them up so we can get a vote on them. We are trying to vote on amendments, and I am wondering if she could call up one of those amendments, we could debate it, and then vote on it.

Mrs. FEINSTEIN. I only found out this bill was coming up this morning, so the administration is reviewing the largest amendment at the present time.

The other two amendments, we may already have filed those.

We have filed those, but I would prefer to wait until we have the larger amendment, which is being reviewed by the administration, and then I will be making a decision as to which I want to go with.

Mr. LEVIN. Which amendment is the larger one?

Mrs. FEINSTEIN. This is the amendment currently being reviewed by the administration.

Mr. LEVIN. Is that one of the three?

Mrs. FEINSTEIN. Yes.

Mr. LEVIN. Which was the larger of the three; can the Senator describe it for us?

Mrs. FEINSTEIN. There are several amendments.

Mr. LEVIN. Which is the one currently being reviewed, if the Senator is able to share that with us.

Mrs. FEINSTEIN. This essentially would strike the detention provisions

and replace them with proposals from the executive branch. It reflects what the White House offered to Senators LEVIN and MCCAIN as compromise language on the detention provisions to address the opposition raised by the administration.

Mr. LEVIN. I thank the Senator.

Mrs. FEINSTEIN. I have more to say, but I am not sure.

Mr. LEVIN. That helps. I thank the Senator.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Madam President, one, I would like to begin by thanking Senators LEVIN and MCCAIN. I don't know how long Senator LEVIN and I have been working on this together—it seems like forever—trying to get a detainee policy in a post-9/11 world that the courts will accept and that lives within our values. I have just been thinking throughout the years about the journey we have taken—beginning with the Bush administration—where the idea of indefinite detention of unlawful enemy combatants originated by executive order.

I do believe, since 9/11, we have been in a state of undeclared war with organizations such as al-Qaida. The Congress created legislation early on—right after the attacks of 9/11—allowing the President to use military force against al-Qaida. Part of being able to engage someone militarily is to detain those we capture. But that has been years ago. This is the first time Congress has spoken since the early days of the war.

We tried during the Bush administration to work with the Bush people to create a law of war detention system by statute. We had a problem there. They felt the executive order was the way to go. I have always believed when the Congress and the White House work together, the courts appreciate it as being a more collaborative process. So we went from sort of one extreme—to where we had military commissions that were almost legislating a conviction—to a better product, and the end product was the 2009 bill we worked on with Senator LEVIN that got almost 80 votes. So we have come a long way.

About the detention issue. Here is what I have been trying to accomplish for years. I wish to make sure we understand the difference between fighting a war and fighting a crime. When it comes to al-Qaida operatives, whether they are captured in the United States or overseas, the first thing we should be doing as a nation is trying to find out what that person knows about the attack in question or future attacks. When we capture an enemy prisoner, the first thing our military does is turn the person over to the military intelligence community for questioning.

I am of the belief that we have the ability to question people under the law of war without congressional authorization. But when the Congress acts, it is better for us all. So in this bill, working with Senators LEVIN and MCCAIN, we have, as a body, said the President—this President and all future Presidents—will have the ability to detain a member of al-Qaida and other allied organizations, regardless of where they are captured in the world, and hold them as an enemy combatant.

Under the law of war, when we capture an enemy prisoner, there is no magic date we have to let them go. The problem with this war, unlike other wars, is there will not be a definable end. We had 400,000 German prisoners in military prisons inside the United States during World War II. We weren't going to let those folks go if they had been in jail 1 year. Not one of them got to go see a Federal judge saying: Let me out of here.

Under the law of war of our military, the executive branch of government has the authority to protect the Nation, and courts have not interfered with that 200-year right.

What is different about this war? There are no capitals to conquer, there is no air force to shoot down or navy to sink. So we have people who don't wear uniforms who are roaming the globe, and they don't have a home country, they have a home idea, and we are fighting an ideology. Sometimes they make it to our soil and sometimes they don't.

So here is what we are trying to do. We are trying to create a hybrid system, for lack of a better word. If you captured an al-Qaida member overseas in Afghanistan, Iraq, or Yemen, it is clear that they have no constitutional right to petition a judge in the United States: Let me go.

When we put people in Guantanamo Bay, the Bush administration argued that prison wasn't subject to legal review by our courts. And in the Hamdi case involving a U.S. citizen captured in Afghanistan, the Supreme Court held that we could hold an American citizen as an enemy combatant. They suggested to the Bush administration a procedure to ratify that decision. They pointed to an Army regulation, 190—I can't remember the number—and we tried to come up with a procedure that would allow us some due process as a nation for an enemy combatant, including an American citizen.

In the Boumediene case, the Court said: Wait a minute. We are going to allow a habeas petition by those held as enemy combatants—American citizens or non-American citizens—if they are at Guantanamo Bay because we have control over that facility. That is part of the United States in terms of our legal infrastructure.

So the law of the land is that if you are captured overseas, even if you are an American citizen, you can be held as an enemy combatant and questioned by our military with no right to proceed to a criminal venue. It is not a choice to try them or let them go. You can hold an unlawful enemy combatant for an indefinite period of time just like you could hold any other enemy prisoner in any other war. But what we have done differently in this war is we have said: Our courts will review the military's decision to declare you as an enemy combatant in a habeas procedure—not a criminal trial but a habeas procedure—as to whether there is sufficient evidence to label you as an unlawful enemy combatant.

So, to my colleagues on the other side, the law of the land by the Supreme Court is that an American citizen can be held as an enemy combatant. Like every other enemy combatant, they have habeas rights, but they don't have the right to say: Try me in a civilian court or military commission court, because when we capture someone, the goal is to gather intelligence.

The Christmas Day Bomber, the Times Square case—the reason many of us want military custody from the outset is that under domestic criminal law, other than a very narrow public safety exception, we don't have the right under criminal law to hold someone for an indefinite period of time without providing them a lawyer and telling them what their legal rights are or charging them in a court of law. And let me say, as a military lawyer, I would never want that to be the case. I don't want to change our domestic criminal system to allow us to grab someone and hold them indefinitely, pending criminal charges, without the right to a lawyer, the right to remain silent being presented to the defendant, and presentment to court, because that is what criminal law is all about. Under military law, whether it is here at home or abroad, you can hold someone suspected of being an enemy agent, enemy prisoner, and you can interrogate them humanely and lawfully—and we have good laws now governing interrogation procedures—without having to present them to a court. That is the difference between intelligence gathering and fighting a crime.

The Padilla case was an American citizen captured inside the United States. He was held for about 4 years in Charleston Naval Brig, and the Fourth Circuit Court of Appeals ruled that, yes, an American citizen captured within the United States can be held as an unlawful enemy combatant, but they have the right to counsel when it comes to presenting their habeas case. They don't have the ability to tell the interrogator and the military: I don't want to talk to you now. I want my lawyer.

When you are talking to a military interrogator or the FBI or the CIA trying to gather intelligence, you don't have a right to remain silent, you don't have a right to a lawyer because we are trying to defend ourselves against an enemy bent on our destruction. The day we decide to treat you as a common criminal, even a terrorist suspect, all those civilian rights attach.

So this bill is trying to create a process that if you are captured in the United States, this legislation says

that you will be presumptively put in military custody because that is the only way we can hold you and interrogate you because under domestic criminal law, that is not available, nor should it be.

There is a waiver provision here. If the administration believes that military custody is not the right way to go, they can waive that. But the day you turn someone over to civilian authorities for the purpose of prosecution, you have a very limited window to gather intelligence because all the criminal rules apply. And what we are trying to do is to make sure we can defend ourselves and not overly criminalize the war. That is why this is so important.

As to the White House concerns—they wanted to have that flexibility without any statutory involvement—I believe this will serve the Nation well long after President Obama leaves office. I don't know who the next President will be, but I do believe this: We will be under threat and siege by an enemy bent on our destruction.

So if you believe, as I do, that we are at war but it is a different kind of war, please give your Nation—our Nation—the ability to defend us. And the best way to be safe in the war on terror is to gather good intelligence and hit them and stop them before they hit you because they could care less about dying. So intelligence gathering is the way to keep us safe.

Most enemy prisoners captured in traditional wars never go to court. The last thing I am worried about is how you prosecute these guys. The first thing I worry about is, what do they know, and what is coming our way?

So the provisions of 1032 apply to captures within the United States. And we are saying that when an al-Qaida operative suspected of being involved in a terrorist act—a very limited class of cases, by the way—is captured on our soil, we would like them to be in military custody from the get-go. But we have provisions that say: You don't have to make that decision or interrupt an interrogation. There is a window of time in which you can deal with the case without having to make the waiver. We are not impeding interrogations, and we are not saying you have to stay in military custody forever because we give this administration and future administrations the flexibility to waive that provision if it makes sense.

To the Christmas Day Bomber—he was read his Miranda rights within an hour, his family was involved, and it turned out that he pled guilty. I am not a professional interrogator, but I do know this: You don't read an enemy prisoner their rights when you capture them on the battlefield in a war. The question is, Is the United States part of the battlefield? That is really what this is about. Are we going to allow the enemy to get here, and all of a sudden all the rules change because they made it to our homeland? I would argue that the closer they are to us, the more we want to know. So it would be an absurd outcome that if somehow the enemy could find a way to get to our homeland, all the rules change because if you capture one of these guys in Yemen, nobody is suggesting you have to give them a lawyer.

Well, when you get to the United States, what we are suggesting is that we have a legal system that understands the difference between fighting a war and fighting a crime, and if you are suspected of being an al-Qaida member, citizen or not, we are going to find out what you know through lawful interrogation techniques. That has to be done under the military system because civilian domestic criminal law doesn't allow that to be done.

That is what we created here—a bifurcated system with waivers. If we don't have this in place, we are going to lose intelligence and our Nation is going to be at risk. People are going to get killed if we lose good intelligence.

So, to me, the idea of reading someone their Miranda rights doesn't make a lot of sense, but you have the flexibility to do that, if you choose, out in the field. You just have to get a waiver. So when you capture somebody on the homeland, I don't want our people to think that you have to give them a lawyer and read them their rights and that you can't question them about what they know about attacks against our homeland. That is dumb. That doesn't make us a better people, that makes us less safe. Let's put them in military custody, with the right to waive that. Let's give our interrogators plenty of time to find out what is going on. Then we will make a decision about where to prosecute.

I believe Federal courts have a role in the war on terror. There have been plenty of cases involving terrorism that went to Federal court where you had a good outcome. There have been cases going to Federal court where you had less than a stellar outcome. The key is, if you are holding an enemy combatant for 4 or 5 years under the law of war, I don't think it makes sense to put them in civilian court. You should put them in military commissions. And we are talking about people we have been holding for a period of time because we looked at them as a military threat, not as a common criminal.

So the provisions in 1032 are good law that will stand the test of time. It will allow us on our homeland to do what we can do overseas. Wouldn't it be odd not to be able to protect yourself because the enemy got to the United States less than you could if you captured them overseas?

Now let's talk a little bit about American citizens. There are a few people—and I give them credit for having passionate, honest-held beliefs that the President of the United States doesn't have the authority to designate an American citizen who has now joined al-Qaida—to issue an order to kill him—this al-Awlaki guy who was in Yemen. The bottom line is, the President, through a legal process we created years ago, made a determination that an American citizen has joined the enemy forces, and he issued an order through a legal process that says: If you find this guy, you can capture or kill him.

Now, wouldn't it be odd if you had a law that says you can kill somebody, but when you capture them, you can't hold them for a very long time, you can't indefinitely detain them? Well, death is pretty indefinite. So if you can kill a guy, why in the world can't you hold them and interrogate them to find out what they know about this attack or future attacks?

So let's be consistent. It makes sense to me that if an American citizen wants to join al-Qaida, they are no longer our friend, they are our enemy. And if the evidence is solid and it has gone through a legal process and this President or any other President determined that an American citizen is now operating abroad trying to harm us, joining al-Qaida, I believe they have the absolute legal and moral authority to identify that person as a threat to the United States; kill or capture. And if you don't agree with me, fine. I think about 80 percent of my fellow citizens do. It would be absurd not to be able to have that ability. Citizenship is something to be respected. It is something to be cherished. It is not a ''get out of jail free'' card when you turn on your fellow citizens.

So at the end of the day, we have a system in place now that I am very proud of.

To Senator LEVIN, we have negotiated and we have compromised because the administration had some legitimate concerns. They had some legitimate concerns about Congress overly mandating how you detain, interrogate, and try prisoners. What we have come up with is the balance I have been seeking for 5 years. If you capture someone in the United States, you start with the presumption that you are going to gather intelligence in a lawful manner and prosecution is a secondary concern. We give the executive branch the ability to waive that requirement, and we have conditions on that requirement that will not interrupt an interrogation.

But we need to let this President know, and every other President, that if you capture someone in the homeland, on our soil—American citizen or not—who is a member of al-Qaida, you do not have to give them a lawyer or read them the rights automatically. You can treat them as a military threat under military custody, just like if you captured them overseas.

So this provision that Senators LEVIN, MCCAIN AYOTTE, and all of us have worked on makes perfect sense to me. It is a balance between protecting our homeland, living within our values, and giving the executive branch the flexibility they need to protect us, but just using good old-fashioned common

sense. Under domestic criminal law, you cannot hold someone indefinitely without giving them a lawyer or reading them their rights, nor should you. But under military law, if you have evidence that the person is a military threat, you don't have to give them a lawyer. That makes no sense whether you capture them here or overseas.

Everyone held as an unlawful enemy combatant has the right to access our Federal courts. Under this bill, it is not just one time you get to go to court. We create an annual review process so that if you are held as an enemy combatant in military prison or civilian prison, you will get an annual review. We don't want you to go into a black legal hole. We don't want an enemy combatant determination to be a de facto life sentence.

I am proud of this work product. We go further than what the courts require. The courts require a habeas review of any person held as an enemy combatant. But at the end of the day, we say you have an annual review.

That requirement is for people captured in the United States, held at Gitmo. It doesn't apply to people held in Afghanistan. Thank God it doesn't. But in circumstances where someone is captured in the United States, held at Guantanamo Bay, every person will have their day in court to challenge the status of enemy combatant, and if they are going to be held indefinitely, they are going to get an annual review process as to whether it makes sense to hold them for 1 year.

Again, I wish to emphasize in war we do not have to let people go who are a danger. Most of these cases are intel cases. We are not fighting a crime, we are fighting a war. If the intelligence is good enough to convince a Federal judge that this person is a military threat, why in God's name would you want to let him go because of the passage of time? Our message to al-Qaida recruits is don't join al-Qaida because you could get killed or wind up dying in jail. Isn't that the message we want to send? Why in the world would we require our Nation to release somebody when the evidence presented to a Federal judge is convincing enough for him to sign off on what the military determined at an arbitrary point in time? That doesn't make us better people. It would make us less safe.

This bill is a very sound, balanced work product, and I will stand by it, I will fight for it, and I respect those who may disagree. But why did we take out the language Senator LEVIN wanted me to put in about an American citizen could not be held indefinitely if caught in the homeland? The administration asked us to do that. Why did they ask us to do that? It makes perfect sense. If American citizens have joined the enemy and we captured them at home, we want to make sure we know what they are up to, and we do not want to be required, under our law, to turn them over to a criminal court, where you have to provide them a lawyer at an arbitrary point in time. So the administration was probably right to take this out.

Simply stated, if you are an American citizen and you want to join al-Qaida: Bad decision; you could get killed or you could spend the rest of your life in military prison as a military threat or you could wind up in an article 3 court and maybe get the death penalty. I want people to know there is a downside to joining the enemy. I want to give our country the tools we need as a nation to fight an enemy and do it within our values. I don't want to waterboard people, but I don't want the only interrogation tool to be the Army Field Manual, online where anybody can read it. I wish to make sure everybody has a chance to say: I am not an enemy combatant. But I don't want to criminalize the war by capturing somebody on our soil and saying: You have a right to remain silent, when we would never read that right and present that to them if we captured them overseas.

We want to make sure we can gather intelligence, whether we capture them at home or abroad, whether they are an American citizen or not, if there is evidence they have joined al-Qaida.

To my colleagues, if you join al-Qaida, no matter where you join, no matter where you take up arms against the United States, we have every right in the world to treat you as a military threat. People who have joined al-Qaida are not members of a mob. They are not trying to enrich themselves. They are trying to put the world into darkness. Our laws need to distinguish the difference between a guy who robbed a liquor store and somebody who wants to blow up an airplane over Detroit or blow up innocent people in Times Square. If you do not understand that difference and if you do not have a legal system that can recognize that difference, then we have failed the American people.

This is a good work product. It has strong bipartisan support. We worked with the administration. But we are in a long war where a lot is at stake. I have tried to be as reasonable as I know how to be, and this work product is the best effort of a lot of well-meaning people, Republicans and Democrats. I will defend it. If you want to keep arguing about it, some people suggested we will talk a long time about this—yes, we will talk a long time about this. We will have a good discussion among ourselves as to whether an al-Qaida operative caught in the United States gets more rights than if we caught him overseas. We will have an argument among ourselves as to whether our military should be able to gather intelligence to protect us, regardless of where the person is captured, and the question for the nation is: Is America part of the battlefield? You better believe it is part of the battlefield. This is where they want to come. This is where they want to hurt us the most. If they make it here, they should not get more rights than they would get if they attacked us overseas.

They should not be tortured because it is about us, not about them. The reason I don't want to torture anybody is because I like being an American. I think it makes us stronger than our enemies. There are ways to get good intelligence from the enemy without having to mimic their behavior. I do believe the military's work product should be judged and reviewed in Federal court in a reasoned way. That is part of this legislation. I do not want anybody to be sitting in jail forever without some review process so that one day maybe they could get out.

But here is what I will not tolerate. I will not criminalize what is a war. I will not put this Nation in the box of having captured a terrorist, when the evidence is solid that we know they are part of the enemy trying to kill us and say we have to give them a lawyer or let them go because of the passage of time. That makes no sense.

Senator LEVIN, Senator MCCAIN, this is a product we should be proud of. We should fight for it, and we are going to fight. If you want to make it a long fight, it will be a long fight. We are not giving up.

Mr. MCCAIN. Will the Senator yield for a question?

The PRESIDING OFFICER (Mr. BEGICH). The Senator from Arizona.

Mr. GRAHAM. Yes.

Mr. MCCAIN. I am a little puzzled. Maybe the Senator from South Carolina has a response to this. Perhaps Chairman LEVIN does. We did give a national security waiver, which is very generous, in that the President just has to certify that it is in the national interest.

Mr. GRAHAM. Right.

Mr. MCCAIN. Why does he think that would not be acceptable if there were a case where an individual would be held by civilian authorities rather than military authorities?

Mr. GRAHAM. The only answer I can give to Senator MCCAIN is that there is a legitimate concern about encroaching on executive power. I have that concern. The executive branch is the lead agency in this war. They are the lead agency when it comes to prosecuting crime. But what I am trying to do, along with his help and that of Senator LEVIN, is to create statutory authority for this President and future Presidents that will serve the Nation well.

Congress has been too quiet and too silent. During the Bush years, we did not assert ourselves enough. We let things go. We were reluctant to get involved. Now we are involved in a constructive way.

What we have said as a Congress, if this bill passes, is that the executive branch has flexibility, but the Congress of the United States—which has powers when it comes to war—believes that an al-Qaida operative, those associated with al-Qaida, should be initially held in military custody because we are trying to gather intelligence. As I tried to

explain, if you turn them over to civilian authorities for law enforcement purposes, then the whole process of intelligence gathering stops. You have to read Miranda rights. There is a very limited public safety exception. We allow a waiver if that is in the best interests of our national security. We have requirements in the bill not to impede interrogation. That is why we are doing this, because we want a process that will allow us to deal with people caught in the United States in a consistent way from administration to administration and understand the distinction between gathering intelligence to defend yourself in a war and prosecuting a crime.

Mr. MCCAIN. Everyone we capture may not be as stupid as the couple who waived their Miranda rights. One of them is going to be pretty smart and certainly not waive their Miranda rights. Wouldn't that make sense over time?

Mr. GRAHAM. The Senator is absolutely right. The flexibility of whether to Mirandize somebody exists. I don't know what is the best way. I do believe the best start is to take the Christmas Day Bomber off the plane and interrogate him in terms of what he knows about future attacks, how he planned this attack, and worry about prosecution in a secondary fashion. The only way you can do that is through a military custody intelligence-gathering process.

At the end of the day, I do believe it makes a lot of sense for the Congress to weigh in. We have not done it before. We have balanced this out. The administration's concerns have been met as much as I know how to meet them, and I am very proud of the work product.

Mr. LEVIN. Will the Senator yield for a question?

Mr. GRAHAM. Yes.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. The Christmas Day Bomber, I believe he was taken off that plane in Detroit, he was interrogated by the FBI; is that correct?

Mr. GRAHAM. Yes, I believe so.

Mr. LEVIN. There was nothing wrong with that. That was the choice of the executive branch. It worked here.

Mr. GRAHAM. Nothing wrong with that.

Mr. LEVIN. We make it flexible. This is something which I heard today from the supporters of this amendment. They want flexibility.

Mr. GRAHAM. Right.

Mr. LEVIN. That is exactly what we provide in this amendment. That is the question Senator MCCAIN just asked: If this administration or any administration decides that they want to provide the civilians with opportunity to interrogate, for whatever length of time they want, they are going to set the procedures under this language in our bill; is that not correct? The President will determine the procedures. If he wants those procedures to be civilian control until some point, that is going to be up to the President. We may disagree with that or not.

Mr. GRAHAM. Exactly.

Mr. LEVIN. There are Members of our body who very strongly disagree with that.

Mr. GRAHAM. Right.

Mr. LEVIN. But that is not who is going to decide. We are not going to make the decision that the person is going to be given or not given civilian interrogation. That decision is going to be made by a President who sets the procedures for interrogation and will decide whether to provide a waiver; is that correct?

Mr. GRAHAM. That is contract. If I might continue the conversation for a minute, if you don't mind. Would the Senator agree with me that if we all of a sudden required our soldiers to read Miranda warnings to an al-Qaida operative caught in Afghanistan, people would think we were crazy?

Mr. LEVIN. I would think it would be a very bad policy.

Mr. GRAHAM. OK. What if we have the very same person who made it out of Afghanistan and makes it to America. I think most people would want us to gather intelligence to find out what is coming next. Would the Senator agree with me, if you put someone in civilian control for the purpose of prosecution, intelligence gathering becomes very difficult?

Mr. LEVIN. Not necessarily. I think there are occasions where the civilian interrogation may be actually more workable.

Mr. GRAHAM. OK. Fair enough. But does the Senator agree with me that you cannot indefinitely hold someone under domestic criminal law without presenting them to court or reading them Miranda rights?

Mr. LEVIN. That is correct—indefinitely. But how long that lasts is a procedure the President is going to determine.

Mr. GRAHAM. Right. But here is the point we are going to make. Some of us believe that presentment to a court and a Miranda warning may not be the best way to go, in terms of gathering intelligence. Under military custody for intelligence gathering there is no right to remain silent; does the Senator agree with that?

Mr. LEVIN. Under military custody, yes.

Mr. GRAHAM. So we are starting the game with military custody but for the reasons the Senator just said—and they may be good reasons, to say that is not the right way to go—they can go down another path. That is all we are trying to do. Because there is a sort of a gap when it comes to someone caught in the United States. We are trying to provide clarity, what to do with an al-Qaida member caught in the United States, to create flexibility but start the process with intelligence gathering because, in the United States, if you hold someone, under the law enforcement model, caught in the United States, you have to read them their rights. You have to present them to court.

If they are in military custody, you don't have to do that. But what system fits the situation best should be left to the executive branch. We are just creating an avenue for military custody that can be waived.

Mr. LEVIN. That is correct, providing flexibility which we should provide in order for the executive branch to have what they want, which is the flexibility. There, I think, many of our colleagues believe there is too much flexibility. But whether that is right or——

Mr. GRAHAM. Oh, yes, they are over here. There are plenty of them.

Mr. LEVIN. But whether they are right or wrong, the facts are in this bill there is flexibility. It is carefully laid out. The President will lay out the procedures and notify the Congress of those procedures. But the point is, we do provide the very flexibility that the President of the United States has sought. We give them that flexibility, and it seems to me for the characterization of this bill to be that there is no flexibility, that somebody must go into military detention, is inaccurate. We ought to debate policy, but we should not debate what the words of a bill are.

One other thing. Is it not correct that when it is said, as the Senator from California did, that this provision has unprecedented and new authority for indefinite detention of American citizens without trial, that as a matter of fact we had in section 1031, in the bill filed months ago, language which would have exempted American citizens? It was the administration that wrote 1031 the way it is now and has approved of that language; is that not correct?

Mr. GRAHAM. That is absolutely correct. Let's talk about indefinite detention and what it means. When someone is captured as a member of al-Qaida—the Bush administration has had people at Guantanamo Bay for years. They are being held under the law of war. Does the Senator agree with that?

Mr. LEVIN. I am sorry?

Mr. GRAHAM. The Bush administration has had prisoners held at Guantanamo Bay for years now who have not been prosecuted. They are held under the law of war.

Mr. LEVIN. That is correct.

Mr. GRAHAM. The Obama administration has continued to hold at least 48 under that same theory.

Mr. LEVIN. And believes they have that authority.

Mr. GRAHAM. I believe they are right. All the Congress is saying to the President—this one and future Presidents—is we agree with you, that if the person is a member of al-Qaida or an affiliated group, you can hold them as an enemy combatant without the requirement to let them go at an arbitrary point in time, but under the law, if they are at Guantanamo Bay or captured in the United States, they have a

habeas right to appeal that determination to a judge.

Under our bill, does the Senator agree with me, we have done more than that? We have created an annual review process so the person being indefinitely held will have some due process every year?

Mr. LEVIN. The Senator is correct. The Senator has led the way to have this kind of additional protection for those prisoners. There is greater protection in this bill because of that review process than there is without this bill.

Mr. GRAHAM. Right. And we should do that.

Mr. LEVIN. If I could, one other question, because the Senator is an expert on this subject. Is it also not true for the first time in terms of determining whether a person is, in fact, somebody who needs to be detained under the law of war—for the first time when that determination is made, that person is entitled to a lawyer and entitled to a military judge?

Mr. GRAHAM. Let me tell the Senator how he is dead right. I offered an amendment to the first bill we put on the table here on the floor about this, and I had a requirement of a military lawyer being given to the respondent at a combat status review tribunal. Every person being held as an enemy combatant by our military gets a combat status review tribunal. We are saying that tribunal has to be chaired by a military judge, and we are saying they can access a lawyer. That, to me, is a welcomed change.

The Obama administration and the Bush administration decided to put the military judge requirement in place. But this now is a statutory requirement, so the next President is going to be bound to do that. We are trying to create a process to allow a status tribunal hearing to be done in a more due-process friendly fashion. We require a judge and we provide access to counsel. To me that is a giant step forward.

Mr. LEVIN. And it is the law for the first time; is that not correct?

Mr. GRAHAM. For the first time it is now not the whim of the administration. It will be the law of the land.

Mr. MCCAIN. If this bill is enacted.

Mr. GRAHAM. If this bill is enacted.

Mr. MCCAIN. To kind of summarize this issue for our colleagues, we believe an al-Qaida operative is an enemy combatant and, therefore, the assumption should be that that enemy combatant should be under military custody whether it be in the United States or any place else?

Mr. GRAHAM. That is correct.

Mr. MCCAIN. I would argue especially in the United States since that poses the greatest threat. However, with our assumption that that person should be held under military custody, we still give a very wide waiver in case there are extenuating circumstances.

In other words, we are saying that we assume an al-Qaida operative, or a suspected al-Qaida operative, is an enemy combatant wherever they are on Earth and, therefore, they should be under military custody unless there is some reason that the President determines otherwise.

The counterargument we are hearing, in summary, is that because that al-Qaida operative is apprehended in the United States, therefore, they should fall under civil authority, thereby negating the assumption that he is an enemy combatant; he is a common criminal. This is a very important principle in this discussion we are having.

How do you treat a suspected al-Qaida terrorist who wants to, in the case of the Underwear Bomber, blow up a plane with 100 some-odd passengers on it? Shouldn't that person be treated as an enemy combatant and, therefore, subject to all of the rules of military people who are under the supervision of the military? Isn't that what we are debating here? The ACLU and the left, with all due respect, feel that person should be—first of all, that al-Qaida operatives should be treated under our criminal system rather than treated as an enemy combatant who wants to do great harm to the United States of America. Is that an accurate description of what we are talking about here?

Mr. GRAHAM. Yes, with one caveat. There is a line of thinking that we should be using Federal courts exclusively, that military commissions are not appropriate in any circumstance, and that we should be using the law enforcement model once we deal with an al-Qaida operative, particularly here in the United States.

What we are saying in this legislation is that the battlefield includes our own homeland. So that argument being made by the ACLU, I think, will bear that because most Americans feel we are not dealing with somebody who robbed a liquor store. These people present a military threat, and we should be able to gather intelligence in a lawful way.

The administration's concern was, are we overstepping Executive power. I have, quite frankly, said I am concerned about that. Peter was concerned about that; Dave was concerned about that; I have been concerned about that because I don't believe you can have 535 attorneys general or commanders in chief.

What we did to accommodate that concern is what the Senator from Arizona said, we started out with a military custody requirement that can be waived and the procedures to be waived are in the hands of the executive branch. As Senator LEVIN has indicated, this, to me, is very flexible and is so flexible that I feel very good about it.

If it were a mandate to put everybody in military custody and try them in military commissions, even though I think that is the best thing to do, I would object, because the flexibility to make those decisions needs to be had in the executive branch. There may be a time when an article 3 court is better than a military commission court for an al-Qaida operative. I don't want the Congress to say article 3 courts could never be used. I don't want the Congress to say military commissions are bad. We now have a good military commission system. We have a process where the homeland is part of the battlefield. The individual being captured on our homeland can be held to gather intelligence under military law. And if somebody is smarter than us and believes that is not the right model, they can change the model.

That is the best we can do, and that is the best I am going to do because I am very worried that in the future we are going to lock ourselves down into policies that would have an absurd outcome that if you made it to America, we cannot gather intelligence, which would be crazy. There is no good reason for that.

Mr. LEVIN. Would the Senator yield?

Mr. GRAHAM. Yes.

Mr. LEVIN. In addition to providing in this bill that the determination as to whether somebody is al-Qaida is to be made through procedures which the President will adopt, No. 1, which is flexibility.

Mr. GRAHAM. Right.

Mr. LEVIN. No. 2, that determination shall not interfere with any interrogation which is undertaken by civilian or any other authorities; is that not correct? And, finally, on top of that, there is a waiver that is provided. We have all of that protection. So the statements that are made on this floor and in some of the press that somehow or other we are pushing everybody who is determined to be al-Qaida into the military detention system is not accurate because we have those three protections, the procedures for that decision as to whether someone is al-Qaida, our procedures, which the President is going to adopt; secondly, we only apply this to al-Qaida, not to everybody who might be captured; and, third, we have a waiver for triple protection to protect what the Senator rightly is sensitive to, and that is there be flexibility in the executive branch.

All of us may say we want it done one way or another. We may presume it be done one way or another, we may wish that it be done one way, civilian or military. Some of us may have different opinions. That is not the point. That is not the issue. The issue is what does this bill provide. This bill provides a reasonable amount of flexibility and does not tell the President you must turn somebody who is suspected of being al-Qaida over to the civilians at any point or to the military at any point.

Mr. GRAHAM. If I may add another layer of process here. Some people on our side say that is way too much. You should throw these people in military—Senator LIEBERMAN, my dear friend, if you left it up to him, everybody caught as an al-Qaida operative would be thrown in military custody and would

be held as long as we need to hold them and would be tried by military commissions.

At the end of the day that is sort of where I come out, but I am not going to create a 535-commander-in-chief body here because there are times when that may not work. What we have done is what the Senator said. If you capture someone at home, it is as the Senator described. The reason, to my colleagues on this side, I wanted to build in the things the Senator described is because I am very worried about crossing over out of our lane into the executive lane. I think we have created a great process.

But here is what happens to that al-Qaida operative. Not only does the executive branch have the flexibility to go one way versus the other, starting with the idea of military custody, but all the things the Senator said are true.

What do they have beyond that? If someone is being held as an enemy combatant, there are regulations requiring that they be presented to a combat status review tribunal, now with a military judge, access to counsel—I think it is within 60—I cannot remember the time period. That is done. Then they have the right to take that decision and appeal it to a habeas Federal district court judge.

No one in America is going to be held as an enemy combatant who doesn't get their day in Federal court. But their day in Federal court is a habeas proceeding, not a criminal trial. If the judge agrees with the United States that you are, in fact, an enemy combatant, then you can be held indefinitely, but we require an annual review. If the judge lets you go, they have to let you go. This is the best we can do. This is a hybrid system. In no other war do you have access to a Federal court.

As I said before, this is war without end, and if we don't watch it, an enemy combatant determination can be a de facto life sentence because there will never be an end to these hostilities probably in my lifetime. I recognize that. And in working with the Senator from Michigan and Peter and others, we have come up with a process now that allows the Federal court to review the military decision. We will have an annual review process if the judge agrees with the military. That, to me, is due process that makes sense in a war without an end; something you would not do in World War II, but something we need to do here.

So to the critics, please read the damn bill. I apologize for saying it that way, but you are talking about things that don't exist. There is plenty of flexibility and waiver requirements in this bill. No one is being held indefinitely without due process. Not only is this due process you wouldn't get in any other war, this is due process beyond what exists today only if we can pass this bill.

I don't mind being considered by some of my colleagues as maybe too friendly to due process. The reason I am so passionate about this is what we do sets a precedent for the world and the future. If one of our guys is captured, I can look the other people in the eye—al-Qaida could care less, but other people might—and say we are a rule of law nation. I believe in the rule of law, but there is a difference between the rule of law of fighting a crime and fighting a war.

I am proud of the military legal system. I do believe the military justice system has a role to play in this war. In military commissions, the judges are the same judges who administer justice to our own troops, the same prosecutors, the same defense attorneys, the same jurors. I am proud of the military legal system. I am proud of the Federal court system. I want to use both.

Senator LEVIN, we have been working on this for years. This is the best work product I have seen. I hope my colleagues will understand we have thought long and hard about this, and if we don't get a process in place that has some definition, some certainty, some guidance, we are letting our Nation down.

This is a good bill, and I hope people will vote for it.

Mr. LEVIN. If this bill contained the provisions as described by our friend from California, I would vote against our bill.

Mr. GRAHAM. So would I, at my own detriment.

I don't want to mandate the executive branch to do everything as LINDSEY GRAHAM would like. I want to start with a theory that makes sense and provides flexibility to change it if that makes sense. I don't want anybody to be in jail because somebody in the military said they are an enemy combatant. I want a Federal judge involved in a sensible way. I want due process to make sure we can tell the world: You are not sitting in a jail because somebody said you were guilty of something. You had a chance to challenge that. But to the critics: I will not stand for the idea that we can't defend ourselves under the law of war, because I believe we are at war. In war, we have the right to hold enemy prisoners. We don't have to let them go to kill again. In war, you can hold people and gather intelligence in a human way.

That is what we are able to do under this bill—fight a war within our values.

I yield.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I see the Senator from Illinois on the Senate floor, whom I know is very heavily involved in this issue. I think we have been debating this amendment now for about 3 hours, at least, and we have had a number of speakers from both sides.

I hope that perhaps we can go ahead and vote on this amendment. I was informed and the chairman was informed by Senator REID that there is a limited amount of time that can be spent on this bill. I realize how important it is to him, but we have no further speakers right now. I know the Senator from Illinois wishes to speak on it. But would it be agreeable that after we have exhausted the number of speakers that we could go ahead and vote on the amendment?

Mr. DURBIN. No. It is not pending.

Mr. MCCAIN. It is too bad. Let me just say to the Senator from Illinois, this is an important issue, and I understand how important it is to him. But this legislation has a lot to do with defending this country. For the Senator to hold up the entire bill because he doesn't think it has been discussed enough is a disservice to the men and women in the military whose concerns and needs this bill addresses, as well as the needs of the Nation's security.

So we took up this amendment in the belief that we were going to go ahead and debate it and vote on it. So the Senator from Illinois, if we are forced to not be able to complete work on this legislation, I think bears a pretty heavy burden because we have a lot of other provisions in this bill that are also vitally important to the security of this Nation.

We have had spirited debate. I have been involved in this legislation of the national defense authorization bill for a quarter of a century. We have moved forward and we have had debate and we have had votes. I hope we can do that now so we can move forward to other issues.

The Senator from Kentucky is on the Senate floor with an amendment he would like to have debated and voted on, and we have about 100 more. So I say to the Senator from Illinois that after we have had sufficient debate, I hope we can go ahead and vote on the amendment.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I don't know—I now have the floor, so I will proceed.

First, let me thank the Senator from Arizona. We have served together in the House and in the Senate. I respect him very much. I certainly have the highest respect, as well, for the Senator from Michigan. But I will tell my colleagues this: If the argument is, if we don't vote on this amendment tonight the security of the United States is in peril, that is a little hard to make because we are not going to finish this bill tonight, No. 1. No. 2, it is pretty clear the administration opposes this particular amendment, at least I have been told they do. No. 3, if we are talking about something as fundamental as changing some laws in this country relative to the U.S. Constitution, I have to agree with Senator LEAHY, the chairman of the Judiciary Committee, and Senator FEINSTEIN, the chairman of the Intelligence Committee, that this great body should take the time, debate the issue, and vote on it in a timely fashion.

I am not here to filibuster this matter, but I am here to discuss it.

To those who have come to the floor and said it is imperative to move now to change the way we deal with terrorist detainees in the United States, I would like to make a record for them.

For the record, over the last 10 years we have dealt with alleged terrorists in the United States. During that 10-year period of time 300 alleged terrorists have been successfully prosecuted in the criminal courts of America and incarcerated safely in American prisons—300. During that same 10-year period of time, six—count them, six—have been subjected to prosecution through military tribunals. So the score is 300 to 6 for those who want to change the system, with 300 saying we have a pretty darn good Federal Bureau of Investigation, we have excellent lawyers at the Department of Justice, and the American court system has responded well to keep us safe. So the notion that this has to be changed tonight to keep America safe, I don't know there is any evidence to support that.

I listened to some of the arguments on the Senate floor, and I wish to call to the attention of my colleagues that this is not an insignificant change in the law. If section 1031 is enacted into law, for the first time we will be saying in the law that we can detain indefinitely an alleged terrorist who is an American citizen within the United States of America.

Mr. GRAHAM. Would the Senator yield?

Mr. DURBIN. I will yield after I complete my point. I believe most of us feel if someone is charged with terrorism—an American citizen—that normally they would be subjected to constitutional protections and rights as American citizens. For those who believe in military tribunals—and I know the Senator from South Carolina does because he has been engaged in them personally and feels they are an honorable and effective way of prosecuting individuals—he knows, as I do, we have gone through in the last 10 years a series of Supreme Court cases that have questioned whether we are handling military tribunals in the right fashion.

The law is not settled when it comes to military tribunals, but the law is clearly settled when it comes to article 3 criminal courts, to the point that 300 alleged terrorists have been successfully prosecuted and convicted.

So I think this is worthy of debate. It is a valid issue. The security of America will always be a valid issue on the floor of the Senate. But let's do it in a thoughtful way. This matter was not referred to the Senate Judiciary Committee. It was not referred to the Senate Intelligence Committee. It was decided by the Armed Services Committee. As good as they are, as great as the people are who serve on that committee, there are others who should have a voice in the process.

I yield to the Senator from South Carolina if he has a question he would like to direct through the Chair.

Mr. GRAHAM. I thank the Senator from Illinois. I wish to respond. No. 1, it is good to debate. It is good to have discussions about important matters. The Senator from Illinois is right. There is nothing more important than defending the homeland.

Now, let me just state the law as I understand it. The Hamdi case was an American citizen captured in—

Mr. REID addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Would my friend from South Carolina allow a unanimous consent request?

Mr. GRAHAM. Absolutely.

UNANIMOUS CONSENT AGREEMENT—CONFERENCE REPORT TO ACCOMPANY H.R. 2112

Mr. REID. I ask unanimous consent that the Senate now proceed to the consideration of the conference report to accompany H.R. 2112, an act making consolidated appropriations for the Departments of Agriculture, Commerce, Justice, Transportation, and Housing and Urban Development and related programs; that there be up to 90 minutes of debate, equally divided between the two leaders or their designees; that upon the use or yielding back of time, the Senate proceed to vote on the adoption of the conference report; further, that the vote on adoption be subject to a 60 affirmative-vote threshold.

Before there is a response to my request, I would tell everyone we are going to be in session tomorrow. I have spoken to the two managers of the bill. We will likely not have votes tomorrow. In fact, I don't think we will have votes tomorrow. But I would say to all Senators if they have amendments to offer, they should offer them because the time for the Defense authorization bill is winding down. People can't sit around and say we will do something next week because next week may be a lot shorter.

Mr. LEVIN. Will the leader yield for a question?

Mr. REID. I would like to change that from 90 minutes to 120 minutes.

The PRESIDING OFFICER. Is there objection?

The Senator from Kentucky.

Mr. PAUL. Mr. President, reserving the right to object.

Mr. LEVIN. Would the Senator yield for a question? I think I may be able to satisfy Senator PAUL, I hope.

Mr. PAUL. Yes.

Mr. LEVIN. Would the leader make that unanimous consent effective after there is 5 more minutes of discussion between ourselves?

Mr. REID. We can make it effective after a half hour of discussion.

Mr. LEVIN. And after Senator PAUL calls up an amendment and after Senator MERKLEY calls up an amendment and then lay them aside.

The PRESIDING OFFICER. Is there objection to the modified request?

Mr. LEVIN. Would that be acceptable?

Mr. REID. I accept the modification with pleasure.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Finally, we will get some people offering some amendments.

Mr. LEVIN. If I could just comment very quickly to my friend from Illinois.

Mr. REID. Can we get the consent?

Mr. LEVIN. I think the Chair ordered it.

The PRESIDING OFFICER. Yes.

Mr. REID. The Senator from South Carolina has the floor.

Mr. GRAHAM. I yield if it will make this proceed faster.

Mr. LEVIN. I just wanted to ask the Senator a question.

Mr. REID. I would say to my friend, my friend from South Carolina yielded to me for a unanimous consent request.

The PRESIDING OFFICER. The Senator from South Carolina has the floor.

Mr. GRAHAM. If I may respond to my friend from Illinois, Hamdi was an American citizen captured in Afghanistan. He had joined al-Qaida—the Taliban, I guess in that case. We captured him when we went into Afghanistan. We brought him back and we held him as an enemy combatant for intelligence-gathering purposes. His case went to the Supreme Court. The Supreme Court said we could hold an American citizen as an unlawful enemy combatant, we just have to create procedures, a due process requirement. Eventually, the court said every unlawful enemy combatant has a habeas right.

The law of the land is clear that an American citizen helping the enemy overseas can be held indefinitely. But they have the right to petition a judge as to whether the initial determination was correct. If the habeas judge believes there is not enough evidence to hold this enemy combatant, then they have to release them. But if the judge agrees with the government that there is enough evidence to hold them as an enemy combatant, they can be held indefinitely. This President is holding 48 people at Guantanamo Bay who have never seen a criminal courtroom because of the theory of law of war.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I say to the Senator from South Carolina, I yielded for a question.

The PRESIDING OFFICER. That is correct.

Mr. DURBIN. Can the Senator bring it to a question?

Mr. GRAHAM. The question is—I forget what I said.

Mr. DURBIN. Let me just say to my colleague, whom I respect and count as a friend, the critical difference between the Senator from Michigan and the Senator from South Carolina is this: The Hamdi case involved an American citizen, part of the Taliban, arrested in Afghanistan, OK? The Senator from South Carolina made that point when he said the word ''overseas.'' Unfortunately, section 1031 does not create

that distinction. An American citizen arrested in the United States, charged with terrorism, without any connection to overseas conduct—having been arrested overseas, I should say—is still going to be subject to indefinite detention.

The only thing I would add is this: I think this is a good exchange, and I think we need more. The notion that we have to hurry up and get this done in the next 5 minutes is not, I don't think, an appropriate way to deal with this. I know Senator PAUL and Senator MERKLEY are waiting, and I am prepared to yield the floor at this point.

If this matter comes up again this evening, I hope we can engage in further discussion.

Mr. LEVIN. I just have a question, if the Senator would yield, of the Senator from Illinois.

Mr. DURBIN. Sure.

Mr. LEVIN. Is the Senator aware of the fact that section 1031 in the bill we adopted months ago in the committee had exactly the language that the Senator from Illinois thinks should be in this section 31, which would make an exception for U.S. citizens in lawful residence? That was in our bill. I am wondering if the Senator is aware that the administration asked us to strike that language from section 1031 so that the bill in front of us now does not have the very exception the Senator from Illinois would like to see in there.

Mr. DURBIN. I have the greatest respect for the Senator and the administration, but I think I am also entitled to my own conclusion.

Mr. LEVIN. No, I understand. But I am just asking the Senator, is the Senator aware it was the administration that asked us to strike that language, the exception for U.S. citizens?

Mr. DURBIN. Not being a member of the committee, I did not follow it as closely as the Senator did. I respect him very much and take his word.

Mr. LEVIN. I thank the Senator.

Mr. DURBIN. I yield the floor.

The PRESIDING OFFICER (Mr. FRANKEN). The Senator from Kentucky.

AMENDMENT NO. 1064

Mr. PAUL. Mr. President, I ask unanimous consent to set aside the pending amendment and call up my amendment No. 1064.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

The Senator from Kentucky [Mr. PAUL], for himself and Mrs. GILLIBRAND, proposes an amendment numbered 1064.

Mr. PAUL. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002)

At the end of subtitle B of title XII, add the following:

SEC. 1230. REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ.

The Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107–243; 116 Stat. 1498; 50 U.S.C. 1541 note) is repealed effective on the date of the enactment of this Act or January 1, 2012, whichever occurs later.

Mr. PAUL. Mr. President, this amendment will call for a formal end to the war in Iraq. Our Founding Fathers intended the power to commit the Nation to war be lodged in Congress, and that is what the Constitution says. The power to declare war is one of the most important powers given to Congress, and it should remain in Congress.

James Madison wrote at the beginning in the Federalist Papers that ''[t]he Constitution supposes what history demonstrates, that the Executive is the branch most prone to war . . . therefore the Constitution has with studied care vested that power [to declare war] in the Legislature.''

We are calling for a formal end to the war in Iraq as the troops come home, as the President has planned by January 1. This will reclaim the power to declare war that is vested in Congress. It allows for checks and balances and is an important milestone and an important retaining of power for Congress. So I will ask very careful deliberation of a formal end to the war in Iraq by supporting this amendment.

At this time, I would like to yield the floor to Senator MERKLEY.

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, just briefly, I would ask the indulgence of the Senator from Oregon. I just would ask the Senator from South Carolina if he would finish the response, and I am sure it would only take him 2 or 3 minutes to finish.

Mr. GRAHAM. I promise, I will.

Mr. MCCAIN. So I ask unanimous consent that Senator MERKLEY be recognized after the Senator from South Carolina speaks for a couple minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCAIN. I thank the Senator from Oregon.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, the exchange with Senator DURBIN was very good. The law of the land is pretty clear—unequivocal, in my view—that an American citizen captured overseas can be held as an enemy combatant, and every enemy combatant held at Guantanamo Bay or captured in the United States has habeas rights. The Padilla case involves an individual who was captured in the United States, suspected of being an al-Qaida operative, and was held for 4 years. He appealed his case to the Fourth Circuit, and the Fourth Circuit said: You have a right to a lawyer to prepare your habeas case, but you do not have a right to a lawyer to interrupt the interrogation. You can be held as an enemy combatant, and they can gather intelligence for an indefinite period.

That is the law of the land, and that is why the administration came over and said the provision that Carl and I were talking about really would change the law. They are preserving the ability, if they want to—they do not have to do this—basically, to hold an American.

Here is the thought process for the body and the Nation: If you capture somebody—not just involved in terrorism; that is not just what we are talking about—al-Qaida operatives involved in an attack on the United States, if they are an American citizen—who cares?—if they are doing that, we want to know what they know, interrogate them and hold them for prosecution, or just hold them so they will not go back to the fight. That is the law.

All we are doing is creating a procedure for that system to be followed. We are not doing anything different than already exists. This notion, somehow, that the homeland is not part of the battlefield is absurd. Why in the world would we give somebody rights who came to America to attack us different than we would if we caught them overseas, when the point is, they are involved with the enemy—American citizen or not. We are just creating a procedure that will allow that situation to be handled. So that is why the administration objected to our language, and I think they are right.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

AMENDMENT NO. 1174

Mr. MERKLEY. Mr. President, I ask unanimous consent to set aside the pending amendment and call up my amendment No. 1174.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

The Senator from Oregon [Mr. MERKLEY], for himself, Mr. LEE, Mr. UDALL of New Mexico, Mr. PAUL, and Mr. BROWN of Ohio, proposes an amendment numbered 1174.

Mr. MERKLEY. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To express the sense of Congress regarding the expedited transition of responsibility for military and security operations in Afghanistan to the Government of Afghanistan)

At the end of subtitle B of title XII, add the following:

SEC. 1230. SENSE OF CONGRESS ON TRANSITION OF MILITARY AND SECURITY OPERATIONS IN AFGHANISTAN.

(a) FINDINGS.—Congress makes the following findings:

(1) After al Qaeda attacked the United States on September 11, 2001, the United States Government rightly sought to bring to justice those who attacked us, to eliminate al Qaeda's safe havens and training camps in Afghanistan, and to remove the terrorist-allied Taliban government.

(2) Members of the Armed Forces, intelligence personnel, and diplomatic corps have skillfully achieved these objectives, culminating in the death of Osama bin Laden.

(3) Operation Enduring Freedom is now the longest military operation in United States history.

(4) United States national security experts, including Secretary of Defense Leon E. Panetta, have noted that al Qaeda's presence in Afghanistan has been greatly diminished.

(5) Over the past ten years, the mission of the United States has evolved to include a prolonged nation-building effort in Afghanistan, including the creation of a strong central government, a national police force and army, and effective civic institutions.

(6) Such nation-building efforts in Afghanistan are undermined by corruption, high illiteracy, and a historic aversion to a strong central government in that country.

(7) Members of the Armed Forces have served in Afghanistan valiantly and with honor, and many have sacrificed their lives and health in service to their country.

(8) The United States is now spending nearly $10,000,000,000 per month in Afghanistan at a time when, in the United States, there is high unemployment, a flood of foreclosures, a record deficit, and a debt that is over $15,000,000,000,000 and growing.

(9) The continued concentration of United States and NATO military forces in one region, when terrorist forces are located in many parts of the world, is not an efficient use of resources.

(10) The battle against terrorism is best served by using United States troops and resources in a counterterrorism strategy against terrorist forces wherever they may locate and train.

(11) The United States Government will continue to support the development of Afghanistan with a strong diplomatic and counterterrorism presence in the region.

(12) President Barack Obama is to be commended for announcing in July 2011 that the United States would commence the redeployment of members of the United States Armed Forces from Afghanistan in 2011 and transition security control to the Government of Afghanistan.

(13) President Obama has established a goal of removing all United States combat troops from Afghanistan by December 2014.

(b) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) the President should expedite the transition of the responsibility for military and security operations in Afghanistan to the Government of Afghanistan;

(2) the President should devise a plan based on inputs from military commanders, the diplomatic missions in the region, and appropriate members of the Cabinet, along with the consultation of Congress, for expediting the drawdown of United States combat troops in Afghanistan and accelerating the transfer of security authority to Afghan authorities prior to December 2014; and

(3) not later than 90 days after the date of the enactment of this Act, the President should submit to Congress a plan with a timetable and completion date for the accelerated transition of all military and security operations in Afghanistan to the Government of Afghanistan.

Mr. MERKLEY. Mr. President, I offer this amendment with several original cosponsors: Senator MIKE LEE, Senator RAND PAUL, Senator TOM UDALL, and Senator SHERROD BROWN. I would like to thank them for joining in this effort to address our military presence in Afghanistan and the fact that our military forces have done such an excellent job of completing the original missions of destroying al-Qaida training camps and bringing justice to those responsible for 9/11.

But over this past decade, our mission has changed to one of nation building—a mission that is obstructed by vast corruption, by extraordinary traditional cultural resistance to a strong central government, and by a very high illiteracy rate. These factors should have us rethinking how to have the most effective use of our military forces, our intelligence assets, in taking on the war on terror, and that we should be engaging in counterterrorist efforts using our resources wherever the terrorist threat emerges across the world rather than concentrating these vast resources in Afghanistan.

Our sons and daughters, fathers and mothers, sisters and brothers could not have done a better job in their military mission. But it is right that now we do less nation building abroad and we do more nation building at home. It is right that now we refocus our effort to have the most effective strategy to take on terrorism around the world. It is in that philosophy that we come together in a bipartisan fashion to propose this amendment. We ask that colleagues take a chance to consider it and join us in redirecting our efforts to be more effective.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, first, I ask unanimous consent to add Senators AKAKA, CHAMBLISS, BLUMENTHAL, INHOFE, GILLIBRAND, BEN NELSON, STABENOW, and MARK UDALL as cosponsors of amendment No. 1092, which is the pending Levin-McCain amendment on counterfeit parts.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. Secondly, Mr. President, we are going to move now, I believe, to the conference report. But I do want to remind folks of what Senator MCCAIN said; which is, we will be here tomorrow morning. We are here to try to clear amendments. We want to be able to give our colleagues as much opportunity as possible to debate and to clear amendments. But we have to move this bill. We are not going to be given a whole week after we come back to get this bill passed, hopefully.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, what is the pending business before the Senate?

The PRESIDING OFFICER. S. 1867 is still pending.

Mr. MCCAIN. Is not the Paul amendment the pending business?

The PRESIDING OFFICER. The Merkley amendment is pending.

Mr. MCCAIN. The Merkley amendment is pending.

Mr. President, I ask unanimous consent that the Paul amendment be the—

Mr. LEVIN. No. Regular order.

Mr. MCCAIN. OK, that the regular order be—

The PRESIDING OFFICER. The Levin amendment is now pending.

Mr. LEVIN. The Levin-McCain amendment.

The PRESIDING OFFICER. The Levin-McCain amendment is now pending.

Mr. MCCAIN. I thank the Presiding Officer.

AMENDMENT NO. 1064

I would just like to say a couple words about the Paul amendment. I would just like to point out, we will still have 16,500 Americans in Iraq for an extended period of time. Now, whether they should be there is the subject of another debate on another day. But to then not be able to do whatever is necessary to protect the lives and safety of those men and women who will continue to serve the country, sometimes in variously difficult circumstances—I think this amendment is unwarranted.

Finally, I would like to ask my colleagues who have further views on the detainee issue if they would come over and add their voices to the debate and discussion because we would like to dispose of this amendment. I respect the desire of the Senator from Illinois that everybody be allowed to speak. We have been now speaking on this single amendment for, I believe, well over 3 hours.

So if there is further discussion on the Udall amendment, I would very much like to have a vote on it so we can bring other important issues before the body.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, I ask unanimous consent to enter into a colloquy with my colleague from New Hampshire.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAHAM. We are talking about this amendment. Let's debate this amendment. Let's vote on this amendment. But the heart of the issue is whether the United States is part of the battlefield in the war on terror. The statement of authority I authored in 1031, with cooperation from the administration, clearly says someone captured in the United States is considered part of the enemy force regardless of the fact they made it on our home soil. The law of war applies inside the United States not just overseas. The authorization to use military force right after the war began allowed us to go into Afghanistan and use detention and capture and military force to deal with the enemy in Afghanistan and other places overseas.

To my colleague from New Hampshire, does she believe al-Qaida considers American soil part of the battlefield?

Ms. AYOTTE. In response to the Senator from South Carolina, I would say, unfortunately, our country is the goal for al-Qaida, and we saw that with September 11 and the horrible attacks on

our country that day that killed Americans.

They want to come here and harm us and hit us where it hurts us the most. So, unfortunately, America is part of the battlefield. To put ourselves in a position where we would not allow our military intelligence, law enforcement, to have the tools they need to gather the most intelligence to protect Americans on our soil would lead to an absurd result.

Mr. GRAHAM. Does the Senator agree that with Senator LEVIN and a very bipartisan work product we have now created a legal system that says the following: If a U.S. citizen, a non-U.S. citizen is involved in an al-Qaida attack on our Nation, and is captured within the United States, we are allowing our military the ability to hold them as part of the enemy force, to question and interrogate them for intelligence gathering, and that right we have overseas to hold somebody now exists in the United States because the threat is the same?

Ms. AYOTTE. I would say to my colleague from South Carolina, when he spoke on the floor he captured the most important part of this; that is, without the amendment we have been debating, we do not even give our military, law enforcement, intelligence officials the ability to decide which system is best in each incident. Rightly so, when you are in our country, when you are an American citizen, you are given your Miranda rights. You are told: You have the right to remain silent. You have the right to have a lawyer. We need to make sure we do not create a distinction where if you are captured abroad, you are treated one way—and we are giving our officials maximum flexibility to gather as much information as possible to protect our country—but if you make it here, the rules are different, and we do not give the officials who are set to protect us every day, both from a military and law enforcement end, the flexibility they need to gather maximum intelligence.

It would just be an absurd result to treat it differently. It would almost encourage: Come to America—unfortunately—to attack us because you will actually be given greater rights if the attack occurs here.

Mr. GRAHAM. Would the Senator agree that what we have been able to do on the committee is basically say, in law for the first time, that the homeland is part of the battlefield; that military custody is available to hold a suspected al-Qaida operative caught in the United States—American citizen or not—but we are going to allow the administration—this administration and all future administrations—to change that model if they believe it is best?

To me, we have created a right by our intelligence community, law enforcement community, to do at home what they can do overseas. If we do not do that, that would just not only be absurd, I think it would make us all less safe for no higher purpose. So to my colleagues who believe we are changing something, all we are trying to do is make sure that when the enemy makes it to America, we can hold them and gather intelligence to protect ourselves, no more and no less.

We start with the presumption of military custody. But if the experts in the field, this administration or future administrations, believe that model is not best, they can seek a waiver. That, to me, is what we should have been doing for years. Because the battlefield, to those who are listening, is an idea, not a country. We are battling an idea; that is, a terrible idea.

Their idea is, if you are a moderate Muslim seeking to worship God a different way, you are not worthy of living. If you are a Jew or a Gentile, you name it, if you do not bow to their view of religion, then you are going to live in hell. So that is what we are fighting. At the end of the day, this legislation creates a process to deal with the threats in our own backyard and, unfortunately, does the Senator from New Hampshire agree, that there is going to be further radicalization, that homegrown terror is where this war is going to?

Ms. AYOTTE. I would agree with the Senator from South Carolina that unfortunately there are threats we face within our own country from homegrown radicalism. But also let's not forget, this amendment, in terms of the military custody, applies to members of al-Qaida or associated forces who have planned an attack against our country or our coalition partners and are not U.S. citizens. So in this provision we are talking about foreigners coming to our country who are members of al-Qaida and who want to harm Americans, if we think about what happened on September 11.

I would also add, I think it is very important what is in this important provision of the Defense Authorization Act, in response to the Senator from California, who raised the case of Zazi as an example where she thought that case would be impacted by this amendment, that is simply, with all respect to the Senator from California, not the case.

Because if one looks at the language in our amendment, we have given flexibility to the executive branch to conduct the interrogations, to have surveillance. So in the Zazi case, there was surveillance undertaken. We put express language in here allowing the executive branch to allow law enforcement to conduct surveillance, to conduct interrogation.

I would point out that provision in terms of the amount of flexibility we have actually given the executive branch. But most importantly, we have dealt with the issue the Senator talked about, which is, in the absence of this provision, when terrorists come to our country and attack us, we are in a position where, under our law enforcement system, they have to give Miranda rights. They have the right to presentment. We are simply saying they have the option to make sure they can put intelligence gathering as the top priority.

So this, as the Senator has identified and talked about, is a very reasonable compromise. As the Senator knows, my colleague from South Carolina, I would have actually liked to have seen this go further. But it is very important that we bring this forward.

Mr. GRAHAM. I would add that Senator LIEBERMAN would have gone further than the Senator. There is nobody whom I respect more than Senator LIEBERMAN, but we are trying to find a balanced way.

So in summary, 1032, the military custody provision, which has waivers and a lot of flexibility, does not apply to American citizens, and 1031, the statement of authority to detain, does apply to American citizens. It designates the world as the battlefield, including the homeland.

Are you familiar with the Padilla case? That is a Federal court case involving an American citizen captured in the United States who was held for several years as an enemy combatant. His case went to the Fourth Circuit. The Fourth Circuit Court of Appeals said: An American citizen can be held by our military as an enemy combatant, even if they are caught in the United States, because once they join the enemy forces, then they present a military threat and their citizenship is not a sort of a get-out-of-jail-free card; that the law of the land is that an American citizen can be held as an enemy combatant. That went to the Fourth Circuit. That, as I speak, is the law of the land.

Ms. AYOTTE. That is right. That is the law of the land. That is what is reflected in this provision in the Defense Authorization Act. It is reflective of case law issued by our U.S. Supreme Court, which in not only that case but in subsequent cases basically said, in those instances, you do have to provide habeas-type relief.

Mr. GRAHAM. In the Padilla case, that went to the Fourth Circuit. The Hamdan case went to the Supreme Court. That was capture overseas. But the Fourth Circuit ruling stands that an American citizen captured in the United States can be held as an enemy combatant.

But 1032, requiring military custody, is only for noncitizens captured in the United States. So the bottom line is, I think we have constructed a very sound, solid system that deals with homeland captures and homeland threats. We have created due process that understands this is a war without end, that no one is going to be held in jail indefinitely without going to a Federal court to make their case that they are unfairly held, that if the Federal court rules with the government, there is an annual review process that would allow the opportunity to get out

in the future based on an evaluation of the case.

From a due process point of view, I am very proud of the work product. I think it makes sense. I think it is a balance between our right to be safe and our rights to provide individuals with due process. But the big breakthrough is that we are now, for the first time as a Congress, creating a system that not only will allow this President flexibility and guidance, but future Presidents, and it will help us in further court challenges.

Quite frankly, the Congress is saying, through this bill, if someone is caught in the United States, citizen or not, joining al-Qaida, trying to do harm to our Nation, we are going to create a system where you can be held, you can be prosecuted, you can be interrogated within our values, and we are not going to create an absurd result that if you make it here, none of that applies. That is all we are trying to do. Does the Senator agree with that?

Ms. AYOTTE. I would agree with that. The Senator has already pointed out how important it is to have these provisions in place to give the officials who do this work every day whom we have so much respect for the ability to gather intelligence.

We need this provision to protect our country from attacks on our homeland. It is so important. I would ask one question of the Senator from South Carolina. He is familiar with the military commissions.

Mr. GRAHAM. If I may, I think we need to move to the appropriations conference report. We will do it very quickly.

Ms. AYOTTE. I will ask the Senator quickly. The Senator from Illinois said we have only had six civilian trials with terrorists.

Mr. GRAHAM. Military commissions.

Ms. AYOTTE. Six military commission trials and hundreds of civilian trials of terrorists. I would ask the Senator, did the administration suspend military commission trials for a period of time?

Mr. GRAHAM. The reason we have not had more is because the Obama administration withdrew charges. Thank goodness they have reinstated charges. There are military commission hearings going on as we speak. I am in the camp of ''all the above.''

Sometimes article 3 courts are the best venue, sometimes military commissions. The Ghailani case was someone we held as an enemy combatant for years, took to Federal court and 200-and-something charges and got convicted on 1. Our Federal courts are not set up to deal with people who have been held as enemy combatants under the law of war, then tried in civilian systems.

The Christmas Day Bomber, it made perfect sense to me to put him in an article 3 court. We found out he was a low-level guy, not one of the higher-ups. But if we catch someone here at home or overseas who is involved deeply in terrorism in terms of what they know, then we would hold them for a period of time to question them.

Then, if you wanted to decide to prosecute, military commissions make the most sense. So the only reason we have not had more military commission trials is because they have been stopped. I am not saying Federal courts are not an appropriate venue sometimes. I am saying that when you hold someone under the law of war for years to gather intelligence, which you have a right to do, we need to keep them in the same system, and you see what happens when you mix systems.

I am very proud of the bill, great debate to have, long overdue. If we can get this enacted into law, I will say this: Americans can look anyone in the world in the eye and say: We have robust due process. We can also tell the people in this country whom we are sworn to protect that we have a system that recognizes the difference between an al-Qaida operative trying to kill us and destroy our way of life and a common criminal. We need to do both.

I yield the floor.

Mr. SHELBY. Mr. President, I rise to speak regarding the Agriculture-CJS-THUD Appropriations Conference Report that the Senate will be voting on today. I was the only conferee not to sign this conference report and I regret to say that I have serious concerns with provisions in this bill.

The conference report contains language that will raise the loan limits for FHA to over $729,000. I strongly oppose this language for three reasons. First, this change means that FHA, along with the GSEs will continue to crowd out the private sector. The government currently accounts for 96 percent of mortgage-backed security issuance in this country. We desperately need private sector investment to return so that we can finally achieve sustained growth in the housing market. Second, raising the loan limits for only FHA puts further pressure on the FHA and the taxpayer. Just this week, we learned that there is nearly a 50 percent chance the taxpayers will need to bail out the FHA. Increasing the loan limit only increases the risk that the taxpayer will have to bail out FHA. Finally, this will cause the American taxpayer to subsidize homes for wealthy buyers. Helping affluent people buy homes worth over three quarters of a million dollars is directly at odds with FHA's mission to develop affordable housing.

It is a shame that this bill contains these ill-advised provisions, as there is so much worthwhile contained elsewhere within the text. I particularly want to commend Chairman INOUYE and Vice Chairman COCHRAN, and CJS Subcommittee Chair MIKULSKI and Ranking Member HUTCHISON, for the great work they did in supporting the Space Launch System, SLS, NASA's heavy lift rocket. The bill we will vote on this evening provides $1.86 billion to support SLS, $60 million above the President's request. The bill puts us on a path towards regaining our rightful place as the world's lead spacefaring nation. SLS will take us beyond low Earth orbit, where we have been stuck for decades, and once again make the American space program the envy of the world.

It is only as a result of continual pressure from both houses of Congress that the U.S. has not completely forfeited space supremacy to the Russians and the Chinese. The Obama administration's 2009 plan would have abandoned NASA's focus on manned exploration and instead subsidized so-called ''commercial'' space companies to perform endless taxi missions to low Earth orbit. Apollo astronaut Eugene Cernan, rightfully called the Obama plan a ''pledge to mediocrity.''

Fortunately, Congress has pushed back hard. Many of my Senate colleagues and I joined to pass authorization and appropriations legislation requiring NASA to develop a 130 metric ton heavy lift vehicle that will take America's next generation of astronauts to the moon and beyond. In countless hearings and private meetings with NASA and the administration we have come to an agreement that the primary purpose of NASA is to expand human frontiers, not serve as a grant administrator for speculative private ventures. Thankfully, after more than 2 years of continual pressure from Congress and the American people, we appear to have achieved a breakthrough. NASA is moving ahead with SLS and this CJS Appropriations bill will ensure that they have the resources to implement the plans the Administrator has laid out.

It is important to note that the recently announced SLS acquisition strategy goes to great lengths to control cost and technical risk. The strategy makes maximum use of existing contracts and flight-tested hardware from the Constellation and Shuttle programs while leaving room for competition where appropriate. Neil Armstrong recently told a House panel: ''Predicting the future is inherently risky, but the proposed Space Launch System includes many proven and reliable components which suggest that its development could be relatively trouble free.''

Mr. President, SLS is a bold and workable plan with strong support in both chambers and both parties. Although I have serious reservations about the overall legislation, I thank my colleagues on the CJS Subcommittee for embracing American leadership and the promise of American ingenuity through their support for SLS.

AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES PROGRAMS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2012, AND FOR OTHER PURPOSES—CONFERENCE REPORT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of conference report to accompany H.R. 2112, which the clerk will report.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2112), making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2012, and for other purposes, having met, have agreed and do recommend to their respective Houses that the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment, and the Senate agree to the same; that the House recede from its disagreement to the amendment of the Senate to the title of the bill and agree to the same.

Ms. MIKULSKI. I ask unanimous consent that committee report be considered as read.

The PRESIDING OFFICER. The report is considered read. Under the previous order, there will be 2 hours of debate, equally divided, between the two leaders or their designees.

The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I rise to speak on behalf of the conference committee. I rise as the chair of the Subcommittee on Commerce, Justice, and Science, one of the three subcommittees in the conference report. The other is agriculture. Senator KOHL will be coming to the floor to speak on behalf of his bill that is part of the conference, and others will speak.

I wish to speak on the Commerce-Justice bill. I am pleased the Senate is considering the conference agreement on fiscal year 2012. As I said, I am CJS. Senator KOHL will speak on agriculture. Senator PATTY MURRAY managed the bill on transportation and housing. She is the chair, and I am sure either she or her designee will speak about a subcommittee we affectionally call THUD.

But let me talk about the CJS conference agreement. This is a great agreement. It is the product of bipartisan and bicameral compromise and cooperation. I wish to thank my ranking member, Senator KAY BAILEY HUTCHISON and her excellent staff. We worked hand in hand on this bill.

I wish to talk about our colleagues in the House. Much is made about the prickly situation sometimes between the House and the Senate. But I wish to thank Chairman FRANK WOLF and ranking member CHAKA FATTAH for their bipartisan support. There was give and take; sometimes stormy exchanges. But at the end of the day, we worked cooperatively and collegially.

So as we look at the process, what I wish to say is that the conference agreement itself is a good one. Our bill, the CJS bill, totals $52.7 billion in discretionary spending. We were frugal. It is $600 million below the 2011 level, and it is $5 billion below the President's request.

The purpose of this bill is to help create American jobs, make our streets and our neighborhoods safe from violent crime and terrorism, and to support innovation and technology so America can continue to be an exceptional Nation.

It also promotes trade. We do this through our Federal agencies: the Commerce Department, through its Economic Development Administration, Patent Office, International Trade Administration, and the Census Bureau. It also has important agencies related to innovation: the National Institutes of Standards and the National Oceanic and Atmospheric Administration.

Our bill also has in it the Department of Justice, NASA, and the National Science Foundation.

It has a lot of important things in it. It is also a bill that promotes justice, including the Commission on Civil Rights, the Equal Employment Opportunity Commission, and the Legal Services Corporation.

Within shrinking funding levels, the CJS conference agreement prioritizes activities that focused on creating jobs, saving lives, protecting communities, and looking out for the future of our country.

The subcommittee faced two very pressing problems that are critical to life and safety. One, our weather satellites. We had to come up with a substantial chunk of money to make sure we had those important new weather satellites that tell us about hurricanes, tornadoes, and other things that are coming. Also, we had a real challenge in providing adequate funding for America's prison population.

These activities are not considered mandatory for budget purposes, but they are not truly discretionary. We had an obligation to fund them. We also had an obligation to provide security funding to the two conventions, to help them underwrite their security concerns.

Together, the bare minimum needed for the new JPSS satellite and prison expenses is nearly $800 million—$350 million for prisons—and we were able to meet that obligation.

We also looked out for our law enforcement, for our State and local police departments. This bill provides $2.2 billion to support our Blue Line to keep our police safe, to protect them with the equipment they need, such as bulletproof vests, so they can protect us with modern tools relating to crime scene analysis, forensic science, and enough cops on the beat.

We funded Byrne grants at $370 million, a main Federal tool for State and local police operations.

In terms of Federal law enforcement, we met obligations to the FBI and funded them at $8 billion; our Drug Enforcement Agency at $2 billion; the Bureau of Alcohol, Tobacco, and Firearms and the Marshals Service, each at $1.2 billion. Our marshals no longer necessarily ride the planes, but what they are out there doing is serving the warrants that go after sexual predators and also make sure they fulfill their responsibility to protect our Federal judiciary at the courthouses. Those Federal law enforcement actions are at our borders, in our streets, in our communities, and in important task forces protecting our communities.

In terms of science and innovation, I am proud of what we did with NASA—from the space shuttle legacy to our new vehicles for space exploration. We also funded the James Webb Space Telescope, which will be the successor to the Hubble. It is 100 times more powerful and will assure America's place as a leader in astronomy for the next 30 years.

Our conference agreement was $17.8 billion. It is a balanced space program. It ensures the continuity or continuation of human space flight, does important work in space science, and also bold research in aeronautics, so we can be at the cutting edge.

We also funded the National Science Foundation, which continues to do that groundbreaking innovative work that the private sector works off of. This year, three Americans shared the Nobel Prize for physics. One was Dr. Adam Riess at Johns-Hopkins. He used the Hubble space telescope to look out for dark energy, to look at decaying supernovas, and found out that the expansion of the universe was speeding up.

The 2011 Nobel Prize in chemistry winner, Dr. Dan Shechtman, was working at the National Institute of Standards and Technology—which this bill also funds—when he discovered new subatomic particles. Both discoveries were considered unexpected and even game changers. These Nobel Prize winners were those wonderful Americans who make use of whether it was the Hubble telescope or the kind of work that goes on in our chemistry labs. So we are out there winning the Nobel Prizes, but our bill lays the groundwork for winning the markets.

On the floor is the chairman of the full committee, Senator INOUYE, and also Senator KOHL, who managed the bill and will speak for Agriculture. There are many things I could say about what we did in the bill, but I think I have summarized the basic themes.

I will be available to answer any questions from colleagues. I also want the chairman of the full committee to have an opportunity to speak and certainly Senator KOHL and Senator BLUNT. I want to say to Senator BLUNT, when Senator KOHL had to be temporarily off the floor, I thank him for working with me. We moved this bill and showed we knew how to govern and move legislation. If we work this way, we will get America moving again.