NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 1042, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 1042) to authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Pending:

Graham amendment No. 2515, relating to the review of the status of detainees of the United States Government.

Warner/Frist amendment No. 2518, to clarify and recommend changes to the policy of the United States on Iraq and to require reports on certain matters relating to Iraq.

Levin amendment No. 2519, to clarify and recommend changes to the policy of the United States on Iraq and to require reports on certain matters relating to Iraq.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, before the Senator from Florida leaves the floor, I wish to do two things. First, I want to thank him for the energy and the perception he has shown in pointing out some of the problems with this prescription drug benefit which was voted on.

He has a lot of seniors in his State, and he is uniquely aware of, sensitive to, and determined to see if we cannot make some changes in this process which will make what we have done a lot more friendly to seniors. I cannot think of anybody in this body who knows more about this subject or is more determined to make the changes necessary for the benefit of our seniors.

Because of the confusion out there, the uncertainty is rife. We do not have quite as many seniors in our State as they do in Florida, but our seniors are telling me pretty generally what the seniors down in Florida are saying to the Senator from Florida. I thank him and commend him for the leadership he is taking and for the proposed change he is proposing.

Secondly, I thank him for his service on the Armed Services Committee. We have a wonderful committee. It is a bipartisan committee. The Senator from Florida, Mr. NELSON, makes an important contribution to it. He is there all the time with very perceptive questions that are intended to support the men and women in our military. I thank him for his participation.

Mr. President, the Senator from New Mexico, I believe, now is ready to offer an amendment which is referred to in the unanimous consent agreement. I will yield to him 15 minutes, should he so need 15 minutes, on our side of the debate for that purpose.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, I thank my colleague from Michigan for yielding.

AMENDMENT NO. 2523 TO AMENDMENT NO. 2515

Mr. President, I send an amendment to the desk and I ask for its consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN] proposes an amendment numbered 2523 to amendment No. 2515.

Mr. BINGAMAN. 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 improve the amendment)

Strike subsection (d) and insert the following:

(d) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Except as provided in paragraph (2), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to consider an application for writ of habeas corpus filed by or on behalf of an alien outside the United States (as that term is defined in section 101(a)(38) of the Immigration and Naturalization Act (8 U.S.C. 1101(a)(38))—

(A) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(B) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specific by the Department of Defense.

(2) EXCEPTIONS.—This subsection does not apply to the following:

(A) An individual charged with an offense before a military commission.

(B) An individual who is not designated as an enemy combatant following a combatant status review, but who continues to be held by the United States Government.

(3) VENUE.—Review under paragraph (1) shall commence in the United States Court of Appeals for the District of Columbia Circuit.

(4) CLAIMS REVIEWABLE.—The United States Court of Appeals for the District of Columbia Circuit may not, in a review under paragraph (1) with respect to an alien, consider claims based on living conditions, but may only hear claims regarding—

(A) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the procedures and standards specified by the Secretary of Defense for Combatant Status Review Tribunals;

(B) whether such status determination was supported by sufficient evidence and reached in accordance with due process of law, provided that statements obtained through undue coercion, torture, or cruel or inhuman treatment may not be used as a basis for the determination; and

(C) the lawfulness of the detention of such alien.

(5) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this subsection shall cease upon the release of such alien from the custody or control of the United States.

(6) EFFECTIVE DATE.—This subsection shall apply to any application or other action that is pending on or after the date of the enactment of this Act.

Mr. BINGAMAN. Mr. President, before describing the amendment, let me talk briefly in opposition to Senator GRAHAM's amendment, the underlying amendment that was adopted by the Senate on Thursday, and address some of the mistaken claims that were made last week during the debate on that amendment.

There were a lot of statements made last week. It is important to be clear about what the Graham amendment does. The amendment, as drafted, as voted on last week in the Senate, would overrule a Supreme Court case issued earlier this year that recognized the longstanding right to file a petition for habeas corpus. This right is absolutely fundamental. It is the right of an individual who is being detained by the executive branch of our Government to question the legality of that person's detention.

Contrary to what Senator GRAHAM has said, I do not believe we are giving prisoners new rights in the amendment that I just sent to the desk or in the underlying bill. I believe we need to keep in place the rights that have already existed, that currently exist, and that the Supreme Court has recognized. We need to prevent the courts from being stripped of the authority they have and have always had.

Let me take a moment to address the notion that we should not care about these individuals because these individuals are terrorists. Frankly, I have no doubt that some of the individuals being detained at Guantanamo are a threat, and it is for this reason I have never advocated that we release these prisoners. But we need to recognize that not all of these prisoners are necessarily terrorists in the sense that we are debating that here.

There is a January 2005 Wall Street Journal article stating:

American commanders acknowledge that many of the prisoners shouldn't have been locked up here in the first place because they weren't dangerous and didn't know anything of value.

The article also quoted BG Jay Hood, the commander at Guantanamo, saying:

Sometimes, we just didn't get the right folks.

The deputy commander, GEN Martin Lucenti, was also quoted as saying:

Most of these guys weren't fighting. They were running.

My point is simple. It is reasonable to insist that when the Government deprives a person of his or her liberty—and in this case for an indefinite period of time—the individual have a meaningful opportunity to challenge the legality of their detention and challenge whether they are being wrongfully detained. This is not a radical proposition I have enunciated. It is enshrined in our Constitution. It was recently reaffirmed by our own Supreme Court in the Rasul decision.

That brings me to the second point. Last week, Senator KYL compared challenges by Guantanamo prisoners to a frivolous prisoner lawsuit filed by an inmate in Arizona who was unhappy

with the type of peanut butter he was being served at his meals.

Let's be clear. We are not talking about depriving a person of their right to eat a certain type of peanut butter. We are talking about individuals challenging their indefinite imprisonment. If a claim is filed that is frivolous, a court can simply refuse to hear the claim.

We are also not talking about suits against U.S. soldiers. There were statements made in last week's debate about ''we don't want these prisoners going and suing our soldiers.'' There is nothing in what I am proposing or what is currently in place that permits that. We are talking about suits challenging the legality of a person's imprisonment by our own Government. The right to challenge the legality of one's detention by the Government is one of the most fundamental human rights, the right to be free from being unlawfully detained by the Government.

It was also argued, last week, that by refusing to overrule the Rasul decision, which was issued by our Nation's highest Court this last year, we are giving Guantanamo prisoners access to rights that even our own soldiers do not enjoy.

Last week, Senator GRAHAM asserted:

Here is the one thing I can tell you for sure as a military lawyer. A POW or an enemy combatant facing law of armed conflict charges has not been given the right of habeas corpus for 200 years because our own people in our own military facing court-martials, who could be sentenced to death, do not have the right of habeas corpus. It is about military law. I am not changing anything. I am getting us back to what we have done for 200 years.

Frankly, that statement is completely an incorrect representation of what the Graham amendment does. If a U.S. soldier is detained for committing a crime, then that soldier is charged, provided an attorney, and tried pursuant to the Uniform Code of Military Justice. Military personnel can challenge a court-martial conviction by filing a writ of habeas corpus in a U.S. district court pursuant to 28 USC 2241. Cases such as Dodson v. Zeliz, which is a Tenth Circuit decision in 1990, demonstrate that they are provided such habeas corpus relief or the opportunity to file for habeas corpus.

One could also look at CPT Dwight Sullivan's article, ''The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases,'' in the Military Law Review, from 1994, to see that U.S. servicemen are also allowed to seek habeas review in death penalty cases.

Mr. President, I ask unanimous consent that a letter sent to me by the chief defense counsel for the Office of Military Commissions, COL Dwight Sullivan, that flushes out these points, be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. BINGAMAN. With regard to these Guantanamo prisoners, the administration has refused to apply the laws of war, and only a handful of the 500 prisoners held at Guantanamo have been charged. None have been tried as yet, and it is unreasonable to say that these prisoners are being granted more rights than our military personnel.

I would also like to take a moment to read to you the names of some of the many people who oppose the Graham amendment: John Hudson, a former Judge Advocate General of the Navy, has written to me indicating his strong opposition; John Gibbons, a former Nixon appointee who served on the Third Circuit Court of Appeals; Eugene Fidell, the president of the National Institute of Military Justice; Dwight Sullivan, the chief defense counsel for the Office of Military Commissions. And I have a long list of other distinguished former officials of our military. They have joined, and I will enter letters they have given to me as part of the RECORD in a moment.

These leaders have dedicated their lives to fighting for and preserving our freedom, democracy, human rights, and respect for the rule of law. They oppose the Graham amendment because they see it as contrary to the values and rights that the men and women of our armed services have fought for.

I have no doubt that some of my colleagues are concerned that if they vote against the Graham amendment, they would face 30-second attack ads accusing them of being soft on terrorism. But this is not about our resolve to defeat terrorists. This is about our resolve to maintain in place the legal protections on which our country was established. These are hard decisions. They are tough votes. This is the Senate. We have taken an obligation to uphold the Constitution of the United States, even in times of war.

The amendment I offer would maintain the right to seek a meaningful judicial review. Specifically, the amendment would allow individuals—any individual—to seek habeas review but would provide that the U.S. Court of Appeals for the District of Columbia Circuit would have exclusive jurisdiction to hear these claims. It would also limit the ability of a court to consider claims regarding one's living conditions, such as whether they were given peanut butter of a particular type or access to particular DVDs or whatever other frivolous claim might be envisioned. It would, however, allow a person to seek review regarding whether he or she is being unlawfully imprisoned. If a court determines that the detention is lawful, the court can simply deny the petitioner's application.

There are good provisions in the Graham amendment, but there are also some extremely problematic sections. Both the chairman and ranking member of the Judiciary Committee argued on the Senate floor, last Thursday, that this is an issue that needs careful consideration before the Senate Judiciary Committee. Unfortunately, it appears this proposal may have the votes to move forward.

The amendment I am offering will keep in place the necessary protections in our Constitution and in our common law, and it will also take the necessary steps to ensure there is a proper and expedited procedure for these proceedings.

Mr. President, let me, briefly, before I yield the floor, call my colleagues' attention to some of these letters that I think are extremely important and make the case extremely well. I have previously alluded to the letter I received from COL Dwight Sullivan, U.S. Marine Corps Reserve, Chief Defense Counsel for the Office of Military Commissions. This is the office that was established in the Department of Defense to defend people who are charged by military commissions.

Colonel Sullivan goes step by step through the various statements that have been made in support of the Graham amendment and refutes those contentions at every step.

I also have a letter from the National Institute of Military Justice, written by Eugene Fidell. Let me read it to my colleagues:

On behalf of the National Institute of Military Justice (and as a retired Lieutenant Commander in the U.S. Coast Guard Reserve), I am writing to express NIMJ's strong opposition to Senator Graham's amendment to the Defense Authorization Bill, withdrawing federal court authority to grant writs of habeas corpus on the petition of non-citizens in military custody as enemy combatants.

The proposed amendment would sanction unreviewable Executive detention that cannot be harmonized with our Nation's long-standing adherence to the rule of law. Military detention without due process is antithetical to our fundamental values, values that our men and women in uniform put their lives on the line to protect.

The practical effect of the amendment would be to validate actions by non-democratic countries around the world. Some of these countries may try to jail our citizens (including but not limited to GIs) on trumped-up grounds and then deny them access to judicial forums in which they might at least try to gain their freedom or fairer treatment. We should not take a step we would be unwilling to see others apply to our fellow citizens. We disable ourselves from objecting to flagrant lawlessness elsewhere when we shut the doors to our courts, which are the jewel in the crown of our democracy.

I will only add that oftentimes when NIMJ considers taking a position on a matter of public policy our directors and advisors have a range of views. That is one of our strengths as an organization. On this one, we are emphatically of one mind.

I also have letters from the Brennan Center for Justice in opposition to the Graham amendment, from the Franklin Pierce Law Center in opposition to the amendment, and a letter signed by nine former generals and admirals in the military indicating their opposition, also signed by Scott Silliman, former U.S. Air Force Judge Advocate, indicating their strong opposition to the Graham amendment unless it is changed as my amendment would change it.

I ask unanimous consent to print those letters in the RECORD.

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

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW,
New York, NY, November 9, 2005.

Re: Graham Jurisdiction-Stripping Amendment to Defense Appropriations Bill

DEAR SENATOR: The Brennan Center for Justice at New York University School of Law strongly urges you to oppose an amendment, sponsored by Senator Lindsey Graham, expected to be offered as early as today, that would strip all courts, including the United States Supreme Court, of jurisdiction to consider habeas corpus petitions or ''any other action challenging any aspect of the detention'' of foreign detainees held at Guantánamo Bay. We urge you to reject the Graham Amendment because it would violate key constitutional principles and would inflict great damage on both the reputation of the United States and our ability to persuade other countries to lend critical cooperation in counter-terrorism efforts.

The Brennan Center, founded in 1995, unites thinkers and advocates in pursuit of a vision of inclusive, effective, and just democracy. Our Liberty & National Security Project, initiated in July 2004, promotes thoughtful and informed debate about how to maximize security and safeguard civil liberties. It has published on the problem of classified evidence in terrorism trials and litigates on matters related to the Graham Amendment. Our scholarship and litigation experience suggest that the amendment neither reflects our long-standing constitutional traditions nor furthers our present counter-terrorism efforts.

In many ways, the war on terror is new. But it cannot justify shredding our oldest constitutional principles. Constant revelations of how the United States is treating detainees at Guantánamo and elsewhere have damaged our image around the world. It would be ironic indeed if the Congress's response were not to address the underlying problems but instead to make it more difficult for rights to be vindicated and facts to be learned.

In June 2004, the Supreme Court squarely rejected the federal government's position that Guantánamo Bay is a legal no-man's land, outside the reach of American courts. The rule of law now applies to Guantánamo Bay, and the federal courts have the authority to review government actions there to determine whether they are unconstitutional or otherwise illegal. Just last Friday, the Senate overwhelming and courageously voted to affirm the rule of law by bolstering the prohibition against government torture and cruel, inhuman, and degrading treatment. Yet the Graham Amendment would suspend the rule of law, including the anti-torture rule, for those detained at Guantánamo Bay. Even more troublingly, the amendment may extend to any and all aliens who lawfully reside in the United States.

Nothing is more emblematic of the rule of law than judicial review and the availability of habeas corpus in the courts. And nothing is a greater marker of the absence of the rule of law than the lack of judicial review of government action, especially the legality of executive detention. Stripping the courts of their historic habeas jurisdiction would violate separation-of-powers principles and undermine the checks-and-balances on which our Constitution rests.

This suspension of the rule of law has clear, long-term costs for our nation's efforts to combat terrorists. The Graham Amendment would terminate ongoing litigation on behalf of detainees at Guantánamo who have never had a fair hearing to prove their innocence. International condemnation of the perceived ''legal black hole'' of Guantánamo has been persistent and wide-ranging. Our allies have expressed broad concerns about the legality and morality of placing individuals beyond the rule of law. The Graham Amendment purports to achieve a short-term goal of minimizing government litigation but, rather, would only create a wave of new litigation. It would do this at the cost of tremendous damage to the United States' reputation overseas by sending the message that we cannot defend the decision to detain those at Guantánamo in a court of law.

The Brennan Center strongly urges you to reject the Graham Amendment to the Defense Department authorization bill. Please do not hesitate to call us at 212–992–8632 if you have any questions.

Sincerely,

MICHAEL WALDMAN,
Executive Director.
AZIZ HUQ,
Associate Counsel.

FRANKLIN PIERCE LAW CENTER,
Concord, NH, November 9, 2005.

Senator ARLEN SPECTER,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR SPECTER: As Dean of a law school and as former Judge Advocate General of the Navy, I am writing in strong opposition to the amendment which I understand Senator Graham intends to offer to S. 1042, the Defense Department Authorization Bill. Among other things, the proposed Graham Amendment would strip U.S. courts of jurisdiction to hear habeas corpus petitions from aliens who are detained by the United States or any other action which would challenge any aspect of their detention.

This amendment, however well-intentioned, is the wrong law at the wrong time. It appears aimed at fixing a problem that doesn't exist, and creates a raft of new problems of its own.

For generations, the United States has stood firm for the rule of law. It is not the rule of law if you apply it when it is convenient and toss it over the side when it is not. The Great Writ of Habeas Corpus has been at the heart of U.S. law since the first drafts of the Constitution. Indeed, it has been part of Western culture for 1000 years, since the Magna Carta. Creating broad exceptions that would categorically deny the writ to thousands of those subject to the full detention power of the U.S. Government should be done, if at all, only with the utmost care, serious debate and consideration, and attention to the practical effects of such a limit. The restriction on habeas contemplated by the Graham Amendment would be a momentous change. It is certainly not a change in the landscape if U.S. jurisprudence we should tack on to the Defense Department Authorization Bill at the last minute.

In any case, the practical effects of such a bill would be sweeping and negative. America's great strength isn't our economy or natural resources or the essentially island nature of our geography. It is our mission, and what we stand for. That's why other nations look to us for leadership and follow our lead. Every step we take that dims that bright, shining light undermines our role as a world leader. As we limit the rights of human beings, even those of the enemy, we become more like the enemy. That makes us weaker and imperils our valiant troops. I am proud to be an American. This Amendment, well intentioned as it may be, will diminish us.

More immediately, the Graham Amendment would be viewed by our allies and enemies alike as just another example of the United States taking a step down the slippery slope from the high road to the low road. It would increase the likelihood that our own troops, who daily face the risk of capture by any number of our enemies abroad, will be subject to ad hoc justice at the hands of those who would seize upon any excuse. I believe it is the duty of those who would put our troops in harm's way to deny our enemies any such an excuse.

I urge you to insist at the least upon full and forthright consideration of this Amendment by the Judiciary Committee. And I urge you to advocate vigorously for its defeat.

Sincerely,

JOHN D. HUTSON,
Dean and President.

NOVEMBER 14, 2005.

Honorable SENATOR,
U.S. Senate,
Washington, DC.

DEAR SENATOR: We understand that the Senate may revisit the issue of jurisdiction over habeas corpus petitions brought by aliens who are detained by the United States at Guantánamo Bay. We write to express our opposition to the court-stripping provisions of Amendment 2516 to S. 1042, the Defense Department Authorization Bill. We urge you to reject any proposal that would diminish the power of another branch of government and effectively suspend habeas corpus without thoughtful deliberation.

Amendment 2516 is the wrong law at the wrong time. It appears aimed at fixing a problem that doesn't exist, and creates a raft of new problems of its own.

For generations, the United States has stood firm for the rule of law. It is not the rule of law if you only apply it when it is convenient and toss it over the side when it is not. The Great Writ of Habeas Corpus has been at the heart of U.S. law since the first drafts of the Constitution. Indeed, it has been part of Western culture for 1000 years, since the Magna Carta. Creating broad exceptions that would categorically deny the writ to thousands of those subject to the full detention power of the U.S. Government should be done, if at all, only with the utmost care, serious debate and consideration, and attention to the practical effects of such a limit. The restriction on habeas contemplated by Amendment 2516 would be a momentous change. It is certainly not a change in the landscape of U.S. jurisprudence we should tack on to the Defense Department Authorization Bill at the last minute.

In any case, the practical effects of Amendment 2516 would be sweeping and negative. America's great strength isn't our economy or natural resources or the essentially island nature of our geography. It is our mission, and what we stand for. That's why other nations look to us for leadership and follow our lead. Every step we take that dims that bright, shining light diminishes our role as a world leader. As we limit the rights of human beings, even those of the enemy, we become more like the enemy. That makes us weaker and imperils our valiant troops. We are proud to be Americans. This Amendment, well intentioned as it may be, will diminish us.

More immediately, Amendment 2516 would be viewed by our allies and enemies alike as just another example of the United States taking a step down the slippery slope from the high road to the low road. It would increase the likelihood that our own troops—who daily face the risk of capture by any number of our enemies abroad—will be subject to ad hoc justice at best at the hands of

those who would seize upon any excuse. We believe it is the duty of those who would put our troops in harm's way to deny our enemies any such an excuse.

We urge you to insist at the least upon full and forthright consideration of the issues by the Judiciary Committee before allowing Amendment 2516 to become law and to exercise your role in oversight of the military. We urge you to advocate vigorously for full and fair judicial review.

Sincerely,

Lieutenant General Robert G. Gard, Jr., USA (Ret.); Lieutenant General Charles Otstott, USA (Ret.); Major General Fred E. Haynes, USMC (Ret.); Rear Admiral John D. Hutson, USN (Ret.); Brigadier General David M. Brahms, USMC (Ret.); Brigadier General James Cullen, USA (Ret.); Brigadier General Evelyn P. Foote, USA (Ret.); Brigadier General David R. Irvine, USA (Ret.); Scott L. Silliman, former United States Air Force Judge Advocate.

Lt. General Robert G. Gard, Jr., USA (Ret.)

General Gard is a retired Lieutenant General who served in the United States Army; his military assignments included combat service in Korea and Vietnam. He is currently a consultant on international security and president emeritus of the Monterey Institute for International Studies.

Lt. General Charles Otstott, USA (Ret.)

General Otstott served 32 years in the Army. As an Infantryman, he commanded at every echelon including command of the 25th Infantry Division (Light) from 1988–1990. His service included two combat tours in Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990–1992.

Major General Fred Haynes, USMC (Ret.)

General Haynes is a veteran of World War II, Korea and Vietnam. He was an infantry officer for 35 years and commanded the second Marine division and the third Marine division. He was also the senior member of the U.S. military at the U.N. military armistice at Pat, Mun Jom, Korea.

Rear Admiral John D. Hutson, USN (Ret.)

Admiral John D. Hutson served as the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Brigadier General David M. Brahms, USMC (Ret.)

General Brahms served in the Marine Corps from 1963–1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James Cullen, USA (Ret.)

General Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Brigadier General Evelyn P. Foote, USA (Ret.)

General Foote was Commanding General of Fort Belvoir in 1989. She was recalled to active duty in 1996 to serve as Vice Chair of the Secretary of the Army's Senior Review Panel on Sexual Harassment. She is President of the Alliance for National Defense, a non-profit organization.

Brigadier General David R. Irvine, USA (Ret.)

General Irvine is a retired Army Reserve strategic intelligence officer and taught prisoner interrogation and military law for 18 years with the Sixth Army Intelligence School. He last served as Deputy Commander for the 96th Regional Readiness Command, and currently practices law in Salt Lake City, Utah.

Scott L. Silliman, former United States Air Force Judge Advocate

Mr. Silliman served as a United States Air Force Judge Advocate for 25 years, from 1968–1993, before joining the faculty of Duke University School of Law as a professor of the Practice of Law. He is also the Executive Director of the Center on Law, Ethics and National Security at Duke University School of Law.

EXHIBIT NO. 1

DEPARTMENT OF DEFENSE, OFFICE OF THE CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS

Washington, DC, November 14, 2005.

Re Amendment No. 2515 of National Defense Authorization Act for Fiscal Year 2006.

Hon. JEFF BINGAMAN,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR BINGAMAN: I am the Chief Defense Counsel for the Office of Military Commissions. Please note that I am writing in my capacity as Chief Defense Counsel for the Office of Military Commissions and I do not purport to speak for the Department of Defense.

Please accept my congratulations for your arguments in opposition to certain portions of Amendment No. 2515. I also wholeheartedly endorse your proposal to eliminate detainees being tried by military commission from the class of detainees whose access to habeas relief would be abolished. I am writing to provide specific legal support for some of the points you raised in your debate with Senator Graham and to point out some of the specific errors in Senator Graham's arguments.

In his initial floor speech supporting the Amendment, Senator Graham stated, ''Never in the history of the law of armed conflict has an enemy combatant, irregular component, or POW been given access to civilian court systems to question military authority and control, except here.'' 151 Cong. Rec. S12656 (daily ed. Nov. 10, 2005). That claim simply is not true. As discussed in greater detail below, the Supreme Court considered habeas petitions filed on behalf of seven of the eight would-be German saboteurs in Ex parte Quirin, 317 U.S. 1 (1942), and on behalf of a Japanese general who was a prisoner of war in In re Yamashita, 327 U.S. 1 (1946). Senator Graham also described Ex parte Quirin by stating, ''We had German POWs who tried to come into Federal court, and our court said: As a member of an armed force, organized against the United States, you are not entitled to a constitutional right of habeas corpus.'' 151 Cong. Rec. at S12663. In fact, the Supreme Court said nothing of the sort. Rather, the Court said almost the exact opposite. Again, Senator Graham erred when he stated that ''[i]t has been the history of the law of armed conflict that when you have somebody tried for a violation of law of armed conflict, you don't go to Federal court.'' Id. at S12664.

Contrary to Senator Graham's arguments, the Supreme Court bas held repeatedly held that enemy combatants can pursue federal habeas litigation to challenge their susceptibility to trial by military commission. In Ex parte Quirin, which dealt with the trial of the would-be German saboteurs who were captured in 1942, the Supreme Court considered the merits of the enemy combatants' habeas petition. Ex parte Quirin, 317 U.S. 1 (1942). While the Court ultimately denied the petitioners' applications for leave to file petitions for habeas corpus, the Court specifically observed that neither President Roosevelt's military order convening the commission ''nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.'' Id. at 25 (emphasis added). Quirin has been celebrated for giving the individuals the right to file such habeas corpus petitions, even though the President had tried to bar it. See. e.g., Louis Fisher, Nazi Saboteurs on Trial 173 (2003).

In re Yamashita similarly involved an application for leave to file a petition for writ of habeas corpus with the Supreme Court. 327 U.S. 1 (1946). General Yamashita, who had commanded the Imperial Japanese Army's Fourteenth Army Group in the Philippines, was tried by a U.S. Army military commission, found guilty, and sentenced to death. Id. at 5. After unsuccessfully seeking a writ of habeas corpus from the Supreme Court of the Philippine Islands, Yamashita sought both a writ of certiorari and an original writ of habeas corpus from the United States Supreme Court. Citing Ex parte Quirin, the Supreme Court reemphasized that in considering such a request for habeas relief arising from trial by military commission, ''[w]e consider . . . only the lawful power of the commission to try the petitioner for the offense charged.'' Id. at 8. So, while the Supreme Court emphasized the limited scope of review, it reemphasized that the federal courts we available to consider habeas petitions filed by enemy combatants challenging trial by military commission. In language specifically relevant to the debate over Amendment No. 2515, the Supreme Court observed, ''The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner.'' Id. The Court added: ''Finally, we held in Ex parte Quirin, [317 U.S. at] 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf Ex: parte Kawato, 317 U.S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.''

Id. at 9. In fact, in his dissent Justice Murphy went out of his way to praise the majority for doing exactly the opposite of what Senator Graham said—for providing the unlawful combatants the right to habeas corpus: ''This Court fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war. Jurisdiction properly has been asserted to inquire ''into the cause of restraint of liberty'' of such a person. 28 U.S.C. §452. Thus the obnoxious doctrine asserted by the Govermnent in this case, to the effect that restraints of liberty resulting trom military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably. This does not mean, of course, that the foreign affairs and policies of the nation are proper subjects of judicial inquiry. But when the liberty of any person is restrained by reason of the authority of the United States the writ of habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited. The conclusive presumption must be made, in

this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced. On that basis judicial inquiry into these matters may proceed within its proper sphere.''

In re Yamashita, 327 U.S. at 30 (Murphy, J., dissenting).

Additionally, in response to a point made by Senator Levin, Senator Graham stated: ''Here is the one thing I can tell you for sure as a military lawyer. A POW or an enemy combatant facing law of armed conflict charges has not been given the right to habeas corpus for 200 years because our own people in our own military facing court-martials, who could be sentenced to death, do not have the right of habeas corpus.

Again, Senator Graham's argument is factually incorrect. U.S. servicemembers do have a right to challenge court-martial proceedings through habeas petitions, in addition to the direct appeal rights provided by Articles 66, 67, and 67a of the Uniform Code of Military Justice. In Burns v. Wilson, which was a habeas challenge to an Air Force capital court-martial, the Supreme Court observed: ''In this case, we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications.'' Burns v. Wilson, 346 U.S. 137, 139 (1953) (plurality opinion). Interestingly, in reaching this conclusion, the Supreme Court cited In re Yamashita, 327 U.S. 1, 8 (1946), thus drawing a historical parallel to the right of a U.S. servicemember to seek a writ of habeas corpus and the right of an enemy combatant detained by the United States military to do the same. Federal courts continue to review habeas challenges to court-martial convictions and occasionally grant relief. See, e.g., Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) (ordering petitioner's release from the United States Disciplinary Barracks due to constitutionally-deficient reasonable doubt instruction); Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990) (finding a due process violation where the military judge's sentencing instructions did not require the members to reach a three-fourths majority vote in order to impose life imprisonment).

An important policy consideration also suggests the need to reassess the amendment. In its current form, Amendment No. 2515 would provide detainees seeking review of Combatant Status Review Tribunals (CSRTs) with greater access to federal courts than a detainee who has been sentenced to imprisonment for life, or even death, by a military commission. This result is anomalous for two reasons. First, generally due process protections increase in direct proportion to the magnitude of the interest at stake. Because military commissions are literally empowered to take a life, the recourse to Article III courts for those sentenced by these tribunals should be at least equal to that of individuals who are merely challenging their susceptibility to continued detention. Second, the burden on the federal judiciary is far greater in the case of review of CSRTs than the review of commission proceedings. During the floor debate, Senator Graham noted that there are currently 160 habeas petitions filed by or on behalf of Guantanamo detainees pending in federal courts. But only three individuals being tried by military commissions have filed habeas petitions challenging those trials. The total number of individuals with approved charges before military commissions is only nine. There can be little doubt that nowhere near 160 of the Guantanamo detainees will ever face trial by military commission. Accordingly, while the federal courts' burden of resolving habeas challenges to continued detention might be large, the burden of resolving habeas challenges to military commission proceedings will be quite minimal. The resources that will be devoted to the District of Columbia Circuit's review of CSRTs will likely dwarf the resources that would be necessary to litigate every habeas petition that has or will be filed by an accused before a military commission.

I will be happy to provide any additional information that might be helpful. You can reach me at my office, at home, or by e-mail. Unfortunately, I am currently scheduled to leave for Guantanamo Bay on the morning of Tuesday, November 15. If you or a member of your staff would like to reach me after today, please leave a voice mail on my work phone and I will return your call.

Very Respectfully,

DWIGHT H. SULLIVAN,
Colonel, USMCR, Chief Defense Counsel, Office of Military Commissions.

Mr. BINGAMAN. How much time remains of the 15 minutes I am allotted?

The PRESIDING OFFICER. One minute.

Mr. BINGAMAN. I retain that minute and yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, I will be glad to get a letter from the prosecutor at the military commission about the procedures. I will bet $100 he will say they are great. The point is, we are talking about two different things. My amendment is designed to get us back to what we have been doing for a couple hundred years. What I am concerned about is that an enemy prisoner, not someone charged with a crime, is having access to Federal courts to sue our own troops about the food, about the mail, about whether they should have Internet access, about whether they should get DVDs. There are 160 lawsuits now in Federal court suing to stop interrogations unless a Federal judge oversees the interrogation.

Never in the history of the law of armed conflict has a military prisoner, an enemy combatant, been granted access to any court system, Federal or otherwise, to have a Federal judge come in and start running the prison and determining what is in bounds and what is out. The military is the proper body to determine who an enemy combatant is and how to run a war and how to interrogate people, not Federal judges who are not trained in the art of military science.

Here is what these lawsuits are about. Here is why I am so adamant that we stop it. No. 1, what are we stopping? We are not stopping a constitutional right that exists under our law for an enemy prisoner in our hands to be able to question their detention through Federal court action. There is no constitutional right under habeas corpus in American jurisprudence for an enemy prisoner to go to Federal court and challenge whether they should have Internet access or DVD access, all the other things they are suing the people for, medical malpractice. That has never been the case. None of the Germans in World War II who were housed in the United States, and the Japanese prisoners, were allowed to go to Federal judge to come in and oversee their treatment. We don't allow that. That is not part of the law of armed conflict.

Habeas petitions are not coming from the Constitution. They are coming from an interpretation of section 2241. The Rasul case was a Supreme Court case that said that contrary to the Government's argument, Guantanamo Bay, Cuba is in the effective control of the United States, even though it is not part of our own territories. Because of the lease arrangements and because the Department of Defense is an agency covered by the jurisdiction of the Federal courts, the argument that it is outside the jurisdiction of Federal courts because of its location was defeated. That led to the decision that since you are within the control of our jurisdiction at Guantanamo Bay, section 2241 applies unless Congress says otherwise.

Here is the question I will ask every Member of this body: Does the Senate want enemy terrorists, al-Qaida members being detained at Guantanamo Bay, to have unlimited access to our Federal courts to sue our troops about the following:

A Canadian detainee, who threw a grenade that killed an American Army medic in a firefight and who comes from a family of longstanding al-Qaida ties, moves for preliminary injunction forbidding interrogation of him or engaging in cruel, inhumane, or degrading treatment of him. That was a lawsuit brought in a Federal court by a person who blew up one of our medics, who wanted a Federal judge to supervise his military interrogation. If we start doing that, we might as well close Guantanamo Bay down.

These are not people being charged. They are being kept off the battlefield because they have been captured on the battlefield, and they have been labeled enemy combatants. The procedures I am trying to get in place will comply with the law of armed conflict. Twelve of the people have been let go at Guantanamo Bay. Over 200 in total have been let go. They have been found no longer to have intelligence value or to be a threat to the United States. Once those two determinations are made, they are let go, even if they are an enemy combatant. Twelve of them have been recaptured. A couple of them have been killed. They have gone back to the fight.

The people at Guantanamo Bay are captured as part of the war on terror, and some of them may be running. The point is, when you join al-Qaida, whether you stand or fight or run, you have lost your rights to be considered anything other than what you are—an enemy combatant taking up arms against the United States.

Here is my message to the terrorists: If you join a terrorist organization taking up arms against the United States and you get involved in combat, you are likely to get killed. If you get captured, you will be taken off the battlefield as long as necessary to make sure our country is protected from you.

Under the law of armed conflict, there is no right to try them or let them go. Shaikh Mohammed, the mastermind of 9/11, is in U.S. control right now. He is not a criminal, but you have to charge within 90 days or let go. He is an enemy combatant, the mastermind of 9/11, and 9/11 was an act of war. It was not a crime. The law of war needs to apply. Anybody who suggests that Shaikh Mohammed should have unlimited access to the Federal courts to get a Federal judge to supervise his interrogation is fundamentally changing the law of war and making us less safe. He will not be let go. If you don't want to be captured and detained for a long time, don't join al-Qaida.

Listen to this: Kuwaiti detainees seek court orders that they be provided dictionaries in contravention of GTMO's force protection policy and that their counsel be given high-speed Internet access at their lodging on the base and be allowed to use classified DOD telecommunications facilities, all on the theory of the right to counsel. A motion by a high-level al-Qaida detainee complaining about base security procedures, speed of mail delivery, and medical treatment, seeking an order that he be transferred to the least onerous conditions at GTMO and asking the court to order that GTMO allow him to keep any books and reading materials sent to him and to report to the court on his opportunities for exercise, communication, recreation, and worship. A man captured on the battlefield, engaged in a war against the United States, because of 2241's interpretation where Congress hasn't spoken, is petitioning a court to supervise his opportunity to exercise, communicate, recreate, and worship, and where he should be housed.

In other words, Federal judges are going to determine how we run the war, not the people fighting the war. Never in the history of warfare has an enemy prisoner been allowed to do such things. It didn't happen in World War II. Why? Because we have a right, as a country capturing enemy prisoners, to take them off the battlefield. They are not common criminals. We have an obligation to treat them humanely under the law of armed conflict.

An emergency motion seeking a court order requiring GTMO to set aside its normal security policies and show detainees DVDs that are purported to be family videos. One hundred sixty of these cases, another 40 or 50 suing our own people, one for $100 million, suing the doctor who treated the guy. This is an absurd result.

I proudly stand before the Senate asking the Senate to fix this absurd result. The court in Rasul is asking the Senate and the House, do you intend for al-Qaida terrorists, enemy combatants, to have access to Federal courts under habeas rights to challenge their detention as if they were American citizens? The answer should be, no, we never intended that. That is what my amendment does. It says to the courts and to the world that an enemy combatant is not going to have the rights of an American citizen, and we are going to stop all these lawsuits undermining our ability to protect ourselves.

What have I done in place? I have stopped a procedure that has never been granted before because it is totally out of bounds of what we need to be doing and have done. I allow Federal courts to review each enemy combatant's determination at the Circuit Court of Appeals for the District of Columbia to look at whether the combat status review tribunal, the group deciding whether you are an enemy combatant, followed the procedures and standards we set up.

What do the Geneva Conventions give our own troops, if our own troops fall into enemy hands under the Geneva Conventions? If there is a question about their status, it says a competent tribunal has the ability to challenge. The combat status review tribunal that we have set up at Guantanamo Bay since August of 2004 is Geneva Conventions protection on steroids. They have a full-blown hearing, a right every year to have their status redetermined. And what do you look at? Were they an enemy combatant engaged in armed conflict against the United States? Do they present intelligence value or a continuing threat to the United States? That determination is made every year, a full-blown adversarial process way beyond what the Geneva Conventions require in such situations.

We have added to that Federal court oversight to see if the people at Guantanamo Bay are following the rules and procedures set up in accordance with the law of armed conflict.

Senator BINGAMAN is a very fine man, a fine Senator. I deeply disagree with him. And any letter that anybody writes, I have my own letters from JAGs.

It is a simple proposition. His amendment allows unlimited habeas petitions regarding detention to come to the Circuit Court of Appeals for the District of Columbia. The type lawsuits that we see now will continue: A motion by Kuwaiti detainees unsatisfied with the Koran they are provided and want another version, a filing by a detainee requesting a stay of litigation pending related appeals, an emergency motion by a detainee accusing military health professionals of gross and intentional malpractice.

They are swamping the system. Americans are losing their day in court because somehow we have allowed enemy combatants, people who have signed up to kill us all, to take us into Federal court and sue us about everything.

That is not part of the law of armed conflict. Our troops are not going to get that right if they are in the hands of someone else. What I am asking for is for us to treat enemy combatants humanely and in accordance with the law of armed conflict. I am asking for us to provide due process in accordance with the Geneva Conventions and then some. I am even allowing a Federal court review of the process down there. But I will not now or ever sit on the sidelines and give rights to enemy combatants who have been caught on the battlefield in the war of terror the unending, endless right to think of every reason in the world to take our own troops into court. We will keep having this debate and we will keep having this argument until the cows come home because I am not going to sit on the sidelines and watch that happen.

There has never been a constitutional right for that to happen. Section 2241 is what we are talking about here. Congress wrote it. Congress has restricted habeas rights for illegal immigrants. Congress has restricted habeas rights of its own citizens numerous times because these petitions can get out of control and take over a courtroom.

The question for this Congress is whether you, after 9/11, want to give enemy combatants detained at Guantanamo Bay who have been captured on the battlefield the unlimited right to go into any Federal court in this land and to sue over everything they can think of. If you do, then we have made a huge mistake in the war on terror. I suggest that you say no to Senator BINGAMAN's amendment and get us back to where we have been for 200 years. Apply the law of armed conflict. Once you have been determined to be an enemy combatant, you get the due process of the Geneva Conventions. We have done that and then some to allow a limited Federal court review, more than anybody has ever gotten in history. We get back on track. And when it comes to military commissions and those who will be charged with the law of armed conflict violations, I am working with Senator LEVIN and others to try to find a way to get a Federal court appeal right.

How much time do I have, Mr. President?

The PRESIDING OFFICER. The Senator has 2 minutes remaining.

Mr. GRAHAM. I will try to retain 1 minute.

Let it be said that the people who attacked us on 9/11 committed an act of war, not a crime, and they are going to be tried under military commissions, not in our Federal courts, because they are engaged in a war and they are violating the law of armed conflict. They will get their day in court and we will come up with a fair process to make sure they have their day in court, but we are not going to take a war and turn it into a crime.

I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, let me use the remaining 1 minute I have and then I will ask permission to speak for another 4 minutes, if possible.

Let me say that I think the Senator obviously hasn't read the amendment I have offered. The amendment I have offered makes it very clear that the Federal court is available only to hear claims regarding whether the determination of the combat status review tribunal is consistent with the procedures and standards specified by the Department of Defense, whether the status determination was supported by sufficient evidence, and to determine the lawfulness of the detention of the alien. They are not permitted under my amendment to consider whether the DVDs are the ones that the prisoner would like. They are not permitted to consider whether the peanut butter is the peanut butter the prisoner would like, or anything else.

To try to trivialize this debate by suggesting that is what we are talking about I think does a disservice to the issue.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. BINGAMAN. Mr. President, I ask unanimous consent to speak for an additional 4 minutes as if in morning business.

The PRESIDING OFFICER. Is there objection?

Mr. GRAHAM. I don't mind if the Senator wants 4 more minutes to speak on his amendment.

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

Mr. BINGAMAN. I appreciate my colleague's courtesy.

Mr. President, first let me say we have a real difference of opinion here as to what has been the law of this land for the last couple hundred years.

The Senator from South Carolina continues to say we have never recognized a right for people in conflict, armed conflict, to petition for habeas corpus. The truth is we have. The truth is the Supreme Court has—in the Ex parte Quirin case, the In re Yamashita case. There are a variety of cases where this has been the case. The Supreme Court has repeatedly held that enemy combatants can pursue Federal habeas litigation to challenge that you are susceptible to trial by military commission. It is very clear that that right has been there.

All I am trying to do is to be sure we do not strip the courts of the right to consider these types of petitions. If we strip the courts of the right to consider petitions in these cases, how many other areas can we find where we will deny people within the jurisdiction of our Federal court system the right to proceed with a petition for habeas corpus in the Federal judiciary?

This is the most fundamental right any of us can conceive of. When you start talking about imprisoning a person and not allowing that person any opportunity to have a court review of the legality of that imprisonment, you are talking about the most fundamental of rights.

Unfortunately, that is what the amendment by Senator GRAHAM would do. It would deny that right. It would be an unfortunate act by this Congress. It would be an extraordinary act by this Congress to do that, and I believe would be very contrary to the traditions this country was built on. I strongly urge my colleagues to support the amendment I have offered which maintains the right to petition for habeas corpus on the part of everybody because there is nothing in our Constitution, there is nothing in the history and tradition of this country that says this is only available for citizens. It is available for all individuals who become imprisoned within the confines of the United States and within the jurisdiction of the Federal courts. Our Department of Defense tried to locate these prisoners outside the jurisdiction of Federal courts and put them in Guantanamo and it argued to the Federal court they are now outside your jurisdiction, and the Federal court said, no, they are not. The United States Government is the sovereign in Guantanamo. We have a 100-year lease on that property, we operate that facility, and we are responsible for the treatment of those individuals.

So the Federal courts have authority to look at whether the detentions that occur there are legal or illegal. That is the law as it has always been in this country. That is the law today. We should not change that by allowing the Graham amendment to remain as it is. We need to adopt a refinement of that amendment, an improvement of that amendment, and that is the second-degree amendment I have offered at this point.

Mr. President, I will yield the floor. I think my colleague wants to respond.

Mr. GRAHAM. If I may have the same courtesy and have 4 minutes.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. No. 1, we have a fundamental difference. I do not want everyone to have habeas rights. I do not want the enemy combatant al-Qaida terrorist to be able to go in our courts and start to sue our own troops. I don't want it. I don't think people in this body want it. I do not think the American people want it. I want al-Qaida members to be detained in armed conflict. They should not have due process rights beyond what the Geneva Conventions ever envisioned.

As to Senator BINGAMAN's amendment, he talks about they can't base claims on living conditions, but listen to this: Whether the status determination was supported by sufficient evidence and reached in accordance with due process of law, provided that statements obtained through undue coercion, torture, or cruel or inhuman treatment may not be used as a basis for the determination, and consideration of lawfulness of the detention of such alien. You could drive an army of trucks through those legal exceptions. What it would do is legitimize this request by a Canadian detainee, who threw a grenade and killed an American medic, in moving for a preliminary injunction forbidding the interrogation of him or engaging in cruel, inhumane, or degrading treatment of him. In other words, under this amendment, that claim stands. He could come in and ask a Federal judge: I want you sitting there while they interrogate me. And we are turning the war away from military people to Federal judges. We can't do that. We will compromise our own defense, our own freedom.

As to the people at Guantanamo Bay who are going to be charged with a crime, I am working with Senator LEVIN to come up with a military commission model we all can be proud of. There are 490 enemy combatants down there who are not going to be charged with crimes, and if we allowed them unfettered freedom to have courts, to have judges control military interrogation and get into the bowels of running this war—not only has it never been done, but I challenge anybody to bring one case down here where an enemy prisoner has been able to go into Federal court and complain about their detention. Once you have a combatant charged with a crime, you are working with 490 of them who are going to have unfettered access under 2241 unless Congress acts. If you want to stop this kind of litigation and not turn over the war to Federal judges, then you need to tell the courts that 2241 does not apply. No law in the history of armed conflict has allowed this to happen and it needs to not happen now. Twelve people have been released down there under the procedures we already have, and they have gone back to try to kill us.

Nothing is perfect. Nothing is perfect. We may let some people go who go back to the fight, but what we are going to do is we are going to have a process we can be proud of that fairly determines who an enemy combatant is and who is not following the Geneva Conventions law of armed conflict. We are not going, with my amendment, to turn the al-Qaida member into an American citizen suing us for anything they can think of about due process of law and as to where they have been detained.

This is a fundamental moment in terms of values in the law of armed conflict. The American value system is being maintained by due process and then some. The American value system that you can allow people who are trying to kill you unfettered access to the Federal courts to sue your own troops—if that becomes our value, we are going to lose this war.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I yield 6 minutes to the Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I thank the Senator from Michigan.

In March 2003, the brave men and women of our Armed Forces were sent into war in Iraq. Now, over 2½ years later, that war continues and those brave men and women are waiting for what they should have gotten long ago—a clear, realistic military mission with a flexible timetable for achieving that mission. And, of course, that timetable has to include a plan for withdrawing our troops from Iraq when their mission is done.

On Tuesday, the Senate can start to put our Iraq policy on the right course by demanding a public plan and a flexible timetable for achieving our military goals and bringing our troops home. The absence of any kind of timetable is not fair to our troops and their families. It is making the American people increasingly anxious. And it is hurting, not helping, our Iraq policy and our broader national security strategy.

Why is it hurting us? Well, for one thing, the perception that U.S. troops will be there indefinitely discourages Iraqi ownership of the political process. It also fuels the insurgency, which thrives on conspiracy theories about our intentions and presence in Iraq. The failure to put forth a timetable is helping the recruitment of foreign fighters and unifying elements of the insurgency that might otherwise turn on each other. Former Republican Defense Secretary and Wisconsin Congressman Melvin Laird recognized that when he said that ''our presence is what feeds the insurgency.'' GEN George Casey recognized that when he said that the perception of occupation in Iraq ''fuels the insurgency.'' So did one of the top military commanders I spoke with in Iraq, who told me off the record that nothing would take the wind out of the sails of the insurgents more than a public timetable for finishing the mission.

Drawing down our troops in Iraq is also essential if we are going to prevent the U.S. army from being hollowed out and ensure our military readiness. And it is essential if we are going to make sure that our Iraq policy is consistent with our broader national security priority—going after the global terrorist networks that threaten the U.S. Despite the administration's desperate efforts to link them, Iraq has been a dangerous and self-defeating diversion from that central fight against global terrorism.

Unfortunately, the President is one of the dwindling group of people who don't support a timetable. They argue that a timetable will embolden the insurgency. Actually, it will undermine the insurgency. They argue that fighting insurgents in Iraq means we won't have to fight them elsewhere. That is just wishful thinking, of course—the idea that all of our terrorist enemies will be irresistibly drawn to Iraq like bees to honey doesn't make a whole lot of sense. They argue that the insurgents will wait us out if we have a timetable. Of course, the insurgents could do that now if that is what they wanted—lay low and wait until we leave. They argue that if we leave prematurely, Iraq will fall into chaos. The only problem is that the insurgency isn't letting up and there is not much expectation it will, as long as our troops remain with no endgoal in sight.

For months, I have been calling on the President to provide a flexible, public timetable for our mission in Iraq. I am not calling for a rigid timetable—I mean one that is tied to clear and achievable benchmarks, with estimated dates for meeting those benchmarks. Today, I am pleased to join with some of my distinguished colleagues in the Senate in offering an amendment that demands just that. I hope that the Senate will finally tell the administration that ''stay the course'' isn't a strategy for success—it is not even a strategy. We need to correct the course we are on. To do that, we need openness, we need honesty, and we need clarity about our military mission in Iraq. The American people, and our troops in Iraq, have been waiting for that for far too long. We can't afford to wait any longer.

I yield the floor.

Mr. GRAHAM. Mr. President, I ask unanimous consent to have letters in support of my amendment printed in the RECORD.

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

Birmingham, AL, November 13, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: Congratulations on your success in obtaining Senate adoption of your amendment (Senate Amendment 2516 to S. 1042) to restrict the ability of terrorist detainees held at Guantanamo, to gain access to the U.S. Districts Courts through habeas corpus applications.

I understand that Amendment opponents will make an effort on Monday, November 14, to remove the habeas corpus restrictions in the Amendment so that detainees can continue to contest various issues regarding their detention and the conduct of the Global War on Terror in the U.S. Federal Court System.

While I strongly support Senator McCain's efforts to prohibit cruel and degrading treatment against detainees in American custody, I am not in favor of granting detainees' access to our civilian court system. There are effective and adequate procedures for detainees to question their status through the Combatant Status Review Tribunal and the Administrative Review Board without granting aliens outside the United States access to our federal civilian courts.

I urge you to make the strongest effort possible to resist efforts to weaken your amendment. If the habeas restrictions are removed we can expect a logjam of litigation with the attendant adverse effects on our ability to gather intelligence and prosecute the Global War on Terrorism.

Very Respectfully,

ROBERT W. NORRIS,
Major General, USAF (Ret.).

NOVEMBER 14, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: I support your efforts to keep Senate Amendment 2516 (the ''Amendment'') in S. 1042, the FY 06 National Defense Authorization Act.

Habeas corpus applications, brought on behalf of terrorist—Guantanamo detainees, to which the Amendment will put a stop, have become a means to advance efforts to frustrate the Global War on Terror. The detainees appear to have become secondary to anti-war efforts.

On the Senate floor, during last Thursday's debate on the Amendment, you appropriately cited the Michael Ratner interview in Mother Jones Magazine (The Torn Fabric of the Law: An Interview with Michael Ratner, Mother Jones Magazine, March 21, 2005.) I read Mr. Ratner's interview and I note that, to him, the disruptive results of litigation brought against the United States (under the guise of habeas corpus applications) appear to be more important than his detainee—clients. ''While we may not be having many victories in freeing people, we're winning heavily in the litigation.'' That litigation, according to Mr. Ratner, as you pointed out,

''. . . is brutal for them [the United States]. It's huge. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder to do what they're [the United States] doing. You can't run an interrogation and torture camp with attorneys. What are they [the United States] going to do now that we're getting court orders to get more lawyers down there?''

Thank you for your strong efforts made in securing adoption of the Amendment and in its preservation.

Thank you for your time and interest.

Very respectfully,

EDWARD F. RODRIGUEZ, Jr.,
Brig. Gen., USAFR (Ret.),
Air Force Judge Advocate '70–'99.

NOVEMBER 13, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: I write to support Senate Amendment 2516 (the ''Amendment'') to S. 1042, the FY 06 National Defense Authorization Act.

You proposed the Amendment to restrict the ability of Global War on Terror detainees, held at Guantanamo, to gain access to US District Courts through habeas corpus applications, among other things. On Thursday, November 10, you succeeded in persuading the Senate to adopt the Amendment by a vote of 49 to 42.

I understand that, when the Senate reconvenes on Monday, November 14, the Amendment's opponents will make a strong effort to strip away the habeas restriction. That will enable detainees to continue to contest all manner of issues related to their detention and the conduct of the Global War on Terror in the US civilian court system.

Detainees have ample opportunity to contest their combatant status through the Combatant Status Review Tribunal (''CSRT'') process, especially now since other provisions of the Amendment provide for the exclusion of statements made under undue coercion and for the appeal of adverse CSRT rulings to the US Court of Appeals for the DC Circuit.

I urge you to hold fast and to prevent any watering down of the Amendment. If the habeas restriction is struck from the Amendment, then the pending 160 habeas applications will be only the tip of the iceberg. This

is a true ''floodgates of litigation'' scenario. This is no way to run a terrorist detention facility and a war against foreign terrorists attacking our security. It would be a significant setback in our resolve to defeat terrorists who do not respect human rights and the rule of law.

It is ironic that we would knowingly facilitate foreign terrorists to have access to our Constitutional safeguards to condemn and attack them. The Constitutional safeguards and rights that we have and protect should not be a tool for foreign terrorists.

Thank you for your strong efforts made in securing adoption or the Amendment and in its preservation.

Very Respectfully,

BOHDAN DANYLIW,
Brig. Gen., USAF (Ret), Former Command Judge Advocate Air Force Systems Command.

NOVEMBER 12, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: Please know I support Senate Amendment 2516 (the ''Amendment'') to S. 1042, the FY 06 National Defense Authorization Act. The Amendment restricts the ability of Global War on Terror detainees, held at Guantánamo, to gain access to U.S. District Courts through habeas corpus applications, among other things. Yesterday the Senate adopted the Amendment by a vote of 49 to 42. However. I suspect this is not the end of the matter. The Amendment's opponents will most likely undertake efforts to strip away the habeas restriction so that detainees can continue to contest, in the U.S. civilian court system, every conceivable issue related to their detention and the conduct of the Global War on Terror.

Detainees have ample opportunity to contest their combatant status through the Combatant Status Review Tribunal (''CSRT'') process. This is especially true now, since other provisions of the Amendment provide for the exclusion of statements made under undue coercion and for tbe appeal of adverse CSRT rulings to the U.S. Court of Appeals for the DC Circuit.

I urge you to hold fast and to prevent any watering down of the Amendment. If the habeas restriction is struck from the Amendment, then the pending 160 habeas applications will be only the tip of the iceberg—a true ''floodgates of litigation'' scenario. This is no way to run a terror detention facility, much less a war.

Thank you for your strong efforts in securing adoption of the Amendment and in its preservation.

Very respectfully,

NOLAN SKLUTE,
Major General, USAF (Ret.).

LAW OFFICES OF
DRIANO & SORENSON,
Seattle, WA, November 11, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: I write to support Senate Amendment 2516 (the ''Amendment'') to S. 1042, the FY 06 National Defense Authorization Act.

You proposed the Amendment to restrict the ability of Global War on Terror detainees, held at Guantánamo, to gain access to U.S. District Courts through habeas corpus applications, among other things.

Yesterday, you succeeded in persuading the Senate to adopt the Amendment by a vote of 49 to 42.

I understand that, when the Senate reconvenes on Monday the Amendment's opponents will make a strong effort to strip away the habeas restriction so that detainees can continue to contest all manner of issues related to their detention and the conduct of the Global War on Terror in the U.S. civilian court system.

Detainees have ample opportunity to contest their combatant status through the Combatant Status Review Tribunal (''CSRT'') process, especially now since other provisions of the Amendment provide for the exclusion of statements made under undue coercion and for the appeal of adverse CSRT rulings to the U.S. Court of Appeals for the DC Circuit.

I urge you to hold fast and to prevent any watering down of the Amendment. If the habeas restriction is struck from the Amendment, then the pending 160 habeas applications will be only the tip of the iceberg. This is a true ''floodgates of litigation'' scenario. This is no way to run a terror detention facility, much less a war.

Thank you for your strong efforts made in securing adoption of the Amendment and in its preservation.

Very respectfully,

DOMINICK V. DRIANO,
Brig. Gen., USAF (Ret.).

NOVEMBER 11, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: I write to support Senate Amendment 2516 (the ''Amendment'') to S. 1042, the FY 06 National Defense Authorization Act.

You proposed the Amendment to restrict the ability of Global War on Terror detainees, held at Guantánamo, to gain access to U.S. District Courts through habeas corpus applications, among other things.

Yesterday, you succeeded in persuading the Senate to adopt the Amendment by a vote of 49 to 42.

I understand that, when the Senate reconvenes on Monday, the Amendment's opponents will make a strong effort to strip away the habeas restriction so that detainees can continue to contest all manner of issues related to their detention and the conduct of the Global War on Terror in the U.S. civilian court system.

Detainees have ample opportunity to contest their combatant status through the Combatant Status Review Tribunal. (''CSRT'') process, especially now since other provisions of the Amendment provide for the exclusion of statements made under undue coercion and for the appeal of adverse CSRT rulings to the U.S. Court of Appeals for the D.C. Circuit.

I urge you to hold fast and to prevent any watering down of the Amendment. If the habeas restriction is struck from the Amendment, then the pending 160 habeas applications will be only the tip of the iceberg. This is a true ''floodgates of litigation'' scenario. This is no way to run a terror detention facility, much less a war.

Thank you for your strong efforts made in securing adoption of the Amendment and in its preservation.

Very respectfully,

WALTER A. REED,
M. Gen. USAF (Ret), AF Judge Advocate General (1977–1980).

NOVEMBER 14, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: A world in which non-state actors engaged in terrorist activities can be our greatest security threat requires legal mechanisms that allow us to deal effectively with these threats while remaining true to our values. I believe Senate Amendment 2516 to S. 1042 accomplishes these purposes.

When I was a Military Judge during the Viet Nam conflict, a defense counsel who regularly appeared before me said that he loved military juries. They always followed orders, and he said that when a judge told a court to acquit if there was reasonable doubt, they did their duty and would acquit regardless of how difficult that decision might be. The CSRT assures that detainee status decisions will be made by persons with both the backbone, and the background, to get it right. Simply stated, the members of the CSRT are in the best position to make the necessary findings, and any review process must take this into account.

Establishing the D.C. Circuit as the singular court for review of CSRT decisions will promote consistency and fairness. Similarly, the exclusion of statements made under undue coercion promotes the integrity of the decision process and is consistent with our core values.

I am pleased to offer my support for the Amendment.

Sincerely,

GILBERT J. REGAN,
Brig. Gen. USAF (Ret.).

NOVEMBER 11, 2005.

Hon. LINDSEY O. GRAHAM,
c/o Ms. Meredith Beck, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR GRAHAM: I write to support Senate Amendment 2516 (the ''Amendment'') to S. 1042, the FY 06 National Defense Authorization Act.

You proposed the Amendment to restrict the ability of Global War on Terror detainees, held at Guantánamo, to gain access to U.S. District Courts through habeas corpus applications, among other things.

Yesterday, you succeeded in persuading the Senate to adopt the Amendment by a vote of 49 to 42.

I understand that, when the Senate reconvenes on Monday, the Amendment's opponents will make a strong effort to strip away the habeas restriction so that detainees can continue to contest all manner of issues related to their detention and the conduct of the Global War On Terror in the U.S. civilian court system.

Detainees have ample opportunity to contest their combatant status through the Combatant Status Review Tribunal (''CSRT'') process, especially now since other provisions of the Amendment provide for the exclusion of statements made under undue coercion and for the appeal of adverse CSRT rulings to the U.S. Court of Appeals for the D.C. Circuit.

I urge you to hold fast and to prevent any watering down of the Amendment. If the habeas restriction is struck from the Amendment, then the pending 160 habeas applications will be only the tip of the iceberg. This is a true ''floodgates of litigation'' scenario. This is no way to run a terror detention facility, much less a war.

Thank you for your strong efforts made in securing adoption of the Amendment and in its preservation.

Very respectfully,

OLAN G. WALDROP, JR.,
Brig. Gen., USAF (Retired).

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I ask unanimous consent that in the absence of a speaker on the Republican side, the time between now and 4:30 p.m. be divided as follows: the Senator from Massachusetts be recognized for 30 minutes, then the Senator from Connecticut be recognized for 10 minutes. If, during that period, the floor manager on the Republican side indicates

time is required on the Republican side, we would then do our best to make arrangements for that to happen, perhaps delaying the 4:30 p.m. timetable. We are trying to accommodate two Senators, the Senator from Massachusetts, who needs a half hour, and the Senator from Connecticut, who needs 10 minutes.

Mr. GRAHAM. So I have to pick whom I like best?

Mr. LEVIN. We are trying to accommodate colleagues and make sure you are protected. I suggest the following: the Senator from Massachusetts speak for a half hour; the Senator from Connecticut speak for 10 minutes, unless the Senator from South Carolina knows of someone on his side; and then if our people or a person on their side, Mr. President, needs some time, the 4:30 p.m. shift to the appropriations bill be delayed by 5 or 10 minutes to accommodate the Republican side. I can't think of anything better without knowing exactly who wants to speak.

Mr. GRAHAM. I agree.

Mr. LEVIN. Mr. President, I ask unanimous consent that the Senator from Massachusetts be recognized for 30 minutes, the Senator from Connecticut for 10 minutes, and the remainder of the time between now and 4:30 p.m. not be assigned at this time, and we will do our best to accommodate the Republican side should there be speakers after the Senator from Connecticut speaks.

The PRESIDING OFFICER. Is there objection?

Mr. GRAHAM. No.

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

The Senator from Massachusetts.

Mr. KERRY. Mr. President, I thank the managers, particularly Senator GRAHAM and Senator LEVIN.

Veterans Day is a very special day in our country's history. There are a lot of veterans who believe Veterans Day is just plain sacred—a lot of families, Gold Star mothers, wives for whom it is a day set aside to memorialize the unbelievable sacrifice of generations of Americans who have given themselves for our country. Veterans Day is sacred. It is a day to honor veterans, not a day to play attack politics. The President, who is Commander in Chief, should know and respect this.

Veterans Day originally marked the 11th hour of the 11th day of the 11th month when the guns of World War I, the war to end all wars, finally fell silent. Instead of honoring that moment, instead of laying a wreath at the Tomb of the Unknown Soldier at Arlington, instead of laying out a clear plan for success in Iraq, the President laid into his critics with an 11th hour rhetorical assault that I believe dishonors that day and does a disservice to veterans and to those serving today. He did so even as he continued to distort the truth about his war of choice.

Perhaps most striking of all is that his almost desperate sounding Veterans Day attack on those who have told the truth about his distortion was itself accompanied by more distortion. Does the President really think the many generals, former top administration officials, and Senators from his own party who have joined over two-thirds of the country in questioning the President's handling of the war in Iraq—are they all unpatriotic, too? This is America, a place where we thrive on healthy debate. That is something we are trying to take to Afghanistan and Iraq. It is something we are trying to export to the rest of the world. The President does not have a monopoly on patriotism, and this is not a country where only those who agree with him support the troops or care about defending our country.

You can care just as much about defending our country and have just as much support for the troops by being a critic of policies. No matter what the President says, asking tough questions is not pessimism, it is patriotism. And fighting for the right policy for our troops sends them exactly the right message that all of us here take very seriously the decision to put them in harm's way and that our democracy is alive and well.

Ironically, the President even used the solemn occasion of Veterans Day to continue his campaign of misrepresenting the facts and throwing up smokescreens. His statement that Democrats saw and heard the same intelligence he did is just flat-out untrue, unless, of course, the President and the administration did not do their job and study the additional intelligence given only to them and not the Congress.

As the Washington Post said on Saturday, Bush and his aides had access to much more voluminous intelligence information than lawmakers who were dependent on the administration to provide the material. But that whole discussion is nothing more than an effort to distract attention from the issue that matters most and can be answered most simply: Did the administration go beyond what even the flawed intelligence would support in making the case for war? Did they use obviously inaccurate intelligence, despite being told clearly and repeatedly not to? Did they use the claims of known fabricators and rely on those claims of known fabricators? The answer to each and every one of these questions is yes. The only people who are now trying to rewrite that history are the President and his allies.

There is no greater breach of the public trust than knowingly misleading the country into war. In a democracy, we simply cannot tolerate the abuse of this trust by the Government.

To the extent this occurred in the lead-up to the war in Iraq, those responsible must be held accountable. That is precisely why Democrats have been pushing the Senate Intelligence Committee to complete a thorough and balanced investigation into the issue. When the President tried to pretend on Friday that the Intelligence Committee had already determined that he had not manipulated intelligence and misled the American public, he had to have known full well they have not yet reported on that very question. That is precisely why Democrats were forced to shut down the Senate in secret session and go into that secret session in order to make our colleagues on the other side of the aisle take this issue seriously.

When the President said his opponents were throwing out false charges, he knew all too well that these charges are anything but false. But the President and the Republicans seem far more interested in confusing the issue and attacking their opponents than in getting honest answers.

Let's be clear, Mr. President, let's be clear, my fellow Americans: There is no question that Americans were misled into the war in Iraq. Simply put, they were told that Saddam Hussein had weapons of mass destruction when he did not. The issue is whether they were misled intentionally.

Just as there is a distinction between being wrong and being dishonest, there is a fundamental difference between relying on incorrect intelligence and making statements that you know are not supported by the intelligence.

The bottom line is that the President and his administration did mislead America into war. In fact, the war in Iraq was and remains one of the great acts of misleading and deception in American history. The facts are incontrovertible.

The act of misleading was pretending to Americans that no decision had really been made to go to war and that they would seriously pursue inspections when the evidence now strongly suggests that they had already decided as a matter of policy to take out Saddam Hussein, were anxious to do it for ideological reasons, and hoped that inspections, which Vice President CHENEY had opposed and tried to prevent, would not get in their way.

The President misled America about his intentions and the manner in which he would make his decision. We now know that his speech in Cincinnati right before the authorization vote was carefully orchestrated window dressing where, again, he misled America by promising, ''If we have to act, we will take every precaution that is possible, we will plan carefully, and we will go with our allies.'' We did not take every precaution possible, we did not plan—that is evident for every American to see—and except for Great Britain, we did not go in with our allies.

The act of misleading was just going through the motions of inspections while it appears all the time the President just could not wait to kick Saddam Hussein out of power. The act of misleading was pretending to Americans the real concern was weapons of mass destruction when the evidence suggests the real intent was to finish

the job his father wisely refused and remove Saddam Hussein in order to remake the Middle East for modern times.

The act of misleading was saying in a Cincinnati speech that ''approving this resolution does not mean that military action is imminent or unavoidable,'' when the evidence suggests that all along the goal was always to replace Saddam Hussein through an invasion. For most of us in Congress, the goal was to destroy the weapons of mass destruction. For President Bush, weapons of mass destruction were just the first public relations means to the end of removing Saddam Hussein. For most of the rest of us, removing Saddam Hussein was incidental to the end of removing any weapons of mass destruction. In fact, the President was misleading America right up until 2 days before launching his war of choice when he told Americans that we had exhausted all other avenues.

The truth is that on the Sunday preceding the Tuesday launch of the war, there were offers of Security Council members to pursue an alternative to war, but the administration, in its race and rush to go to war, rebuffed them, saying the time for diplomacy is over.

By shortcutting the inspections process and sidestepping his own promises about planning, coalition building, and patience, the President used WMD as an excuse to rush to war, and that was an act of misleading contrary to everything the President told Americans about the walkup to war.

The very worst that Members of Congress can be accused of is trusting the intelligence we were selectively given by this administration and taking the President at his word. Imagine that, taking a President of the United States at his word. But unlike this administration, there is absolutely no suggestion that the Congress intentionally went beyond what we were told by the facts. That is the greatest offense by this administration. Just look at the most compelling justification for war: ''Saddam's nuclear program and his connections with al-Qaida.''

The facts speak for themselves. The White House has admitted that the President told Congress and the American public in his State of the Union Address that Saddam was attempting to acquire fuel for nuclear weapons despite the fact that the CIA specifically told the administration three times in writing and verbally not to use this intelligence. Obviously, Democrats did not get that memo. In fact, similar statements were removed from a prior speech by the President, and Colin Powell refused to use it in his presentation to the U.N. This is not relying on faulty intelligence as Democrats did, it is knowingly and admittedly misleading the American public on a key justification for going to war.

This is what the administration was trying so desperately to hide when it attacked Ambassador Wilson and compromised national security by outing his wife. It is shameful that to this day, Republicans continue to attack Ambassador Wilson rather than condemning the fact that those 16 words were ever spoken and that so many lies were told to cover it up.

How are the same Republicans who tried to impeach a President over whether he misled a nation about an affair going to pretend it does not matter if the administration intentionally misled the country into war?

The State of the Union was hardly an isolated event. In fact, it was part of a concerted campaign to twist the intelligence, to justify a war that had already been decided was more preferable. Again playing on people's fears after 9/11, the administration made statements about the relationship between al-Qaida and Iraq that went beyond what the intelligence supported. As recently reported by the New York Times in the Cincinnati Address, the President said, We have learned that Iraq has trained al-Qaida members in bombmaking and poisons and deadly gases, despite the fact that the Defense Intelligence Agency had previously concluded that the source was a fabricator.

The President went on to say that Iraq has a growing fleet of unmanned and manned aerial vehicles that could be used to disburse chemical or biological weapons, despite the fact that the Air Force disagreed with that conclusion. As the Wall Street Journal reported: The Air Force dissent was kept secret, even as the President publicly made the opposite case before a congressional vote on the war resolution.

That is two more memos that the Congress never got. In fact, when faced with the intelligence community's consensus conclusion that there was no formal relationship between Saddam and al-Qaida, the administration then proceeded to set up their own intelligence shop at DOD to get some answers that were better suited to their agenda. Again, there is a fundamental difference between believing incorrect intelligence and forcing or making up your own intelligence.

Where would the Republicans and the President draw the line? How else would 70 percent of the American public be led to conclude that Saddam Hussein was involved in 9/11? That was not an accident. In fact, I remember correcting the President of the United States at our first debate when he said to America it was Saddam Hussein who attacked us.

Why else did Vice President CHENEY cite intelligence about a meeting between one of the 9/11 hijackers and Iraqis that the intelligence community and the 9/11 Commission concluded never took place? Why else make false statements about Saddam's ability to launch a chemical or biological weapon attack in under an hour without ever clearing that statement with the CIA, which in itself mistrusted the source and refused to include it in the National Intelligence Estimate? Why else would they say we would be greeted by liberators when their own intelligence reports said we could be facing a prolonged and determined insurgency? Why else tell Americans that Iraqi oil would pay for the invasion when they had to know that the dilapidated oil infrastructure would never permit that to happen?

What about the President's promises to Congress that he would work with allies, that he would exhaust all options, that he would not rush to war? If the President wants to use quotes of mine from 2002, he might just look at the ones that were not the result of relying on faulty intelligence and trusting the President's word. As I said in my former statement before the authorizing vote—I wish the President had read this—if we go it alone without reason, we risk inflaming an entire region, breeding a new generation of terrorists, a new cadre of anti-American zealots, and we will be less secure, not more secure, at the end of the day. Let there be no doubt or confusion about where we stand on this. I will support a multilateral effort to disarm him by force if we ever exhaust those other options, as the President has promised, but I will not support a unilateral U.S. war against Iraq unless that threat is imminent and the multilateral effort has proven not possible.

In my speech at Georgetown on the eve of the war, I said: The United States should never go to war because it wants to. The United States should go to war because we have to. And we do not have to until we have exhausted the remedies available, built legitimacy, and earned the consent of the American people.

We need to make certain that we have not unnecessarily twisted so many arms, created so many reluctant partners, abused the trust of Congress, or strained so many relations that the longer term and more immediate vital war on terror is made more difficult. I say to the President, show respect for the process of international diplomacy because it is not always right but it can make America stronger, and show the world some appropriate patience in building a genuine coalition. Mr. President, do not rush to war.

Today, our troops continue to bear the burden of that promise broken by this administration. We need to move forward with fixing the mess the administration has created in Iraq. I have laid out in detail on five or six occasions my views about exactly how we can accomplish that and how we can get our troops home within a reasonable period of time. But that does not excuse our responsibility to hold the administration accountable if they knowingly misled the country when American lives were at stake. We need to do both.

Those colleagues on the other side of the aisle need to stop pretending that it does not matter if the administration stretched the truth beyond recognition and they need to start working to find out the real answers that

the country deserves and the real leadership that our troops in Iraq deserve. They deserve it from a Commander in Chief, not just a ''campaigner in chief.''

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. ALEXANDER. I believe the Senator from Rhode Island had an inquiry.

Mr. REED. Parliamentary inquiry: What is the status of the floor?

The PRESIDING OFFICER. The routine is the Senator from Connecticut is due to be recognized for 10 minutes, followed by a Republican.

Mr. REED. Mr. President, I understand the Senator from Tennessee will seek recognition after the Senator from Connecticut. How much time did the Senator want?

Mr. ALEXANDER. Three minutes.

Mr. REED. I ask unanimous consent that at the conclusion of Senator DODD's time, Senator ALEXANDER be recognized for 3 minutes, and at the conclusion of Senator ALEXANDER's time I be recognized for 15 minutes.

The PRESIDING OFFICER. Is there objection?

Mr. GRAHAM. Reserving the right to object, how does this affect the debate on the Energy and Water conference report?

The PRESIDING OFFICER. If this request is approved, it would delay the beginning of consideration of the conference report.

Mr. GRAHAM. By how long?

The PRESIDING OFFICER. By approximately 6 minutes.

Mr. GRAHAM. I have no objection.

Mr. DODD. Reserving the right to object, what I think might be the appropriate way to do it, since I do not want to have my remarks on Iraq to necessarily go directly from that to the celebration of the year of dealing with premature babies, I suggest that at the conclusion of my remarks on the subject matter that I wish to speak on that we then turn to the Senator from Tennessee about the issue for 3 minutes, which I may ask him to yield for a minute of time just to comment because we worked together on this issue, and then turn to my colleague from Rhode Island. Is that all right?

Mr. REED. That is perfectly all right. I think to expedite consideration of the Energy bill, I revise my consent rather than 15 minutes, 10 minutes.

The PRESIDING OFFICER. As I understand, it is 10 minutes, 3 minutes, 10 minutes. Is there objection?

Without objection, it is so ordered.

The Senator from Connecticut.

Mr. DODD. Mr. President, in these 10 minutes I will address the issue of an amendment offered by my colleague from Michigan, and several others including this Senator, which we have worked on over the last week or so. This amendment will be voted on tomorrow, and we have tried here to come up with some ideas that could build bipartisan support for how we go from where we are today in Iraq to a successful conclusion of that conflict.

I think all of us recognize that we have ourselves in a mess in Iraq, no matter how one wants to characterize it. I was disappointed that the President used Veterans Day last week as an opportunity to attack those who have agreed with him at certain points and disagreed with him at others. It seems to me that what we need from the administration is far more clarity, a greater sense of vision, some concrete ideas on how we intend to conclude our involvement in Iraq, and a strategy for increasing the likelihood that the Iraqi people can build a stable government.

As we know, from the very beginning, the rationale for going to war in Iraq was filled with misrepresentations, deceits, and the falsification of many facts. There was no Iraqi purchase of uranium from Niger. There were no aluminum tubes being used to construct nuclear centrifuges. There were no stockpiles of biological and chemical weapons. We now know that allegations linking Iraqi officials to al-Qaida were untrue. To make matters worse, in my view, the administration's penchant for discarding international norms with respect to our missions in Iraq, Afghanistan and elsewhere, has unraveled decades of American diplomacy dedicated to enshrining the rule of law.

The course set by this administration has cost America its treasure, but it has also cost the lives of more than 2,000 of our service men and women. More than 14,000 others have sustained serious injuries. We are now spending somewhere around $4–$6 billion every month for U.S. military operations alone in that country.

There have been intangible costs as well most—significantly, the cost to America's favorable public image at home and abroad—a cost that has seriously impaired our ability to shape global responses to global challenges.

These challenges include North Korea's nuclear weapons, Iran's ambitions to develop its own weapons capability, genocide in Sudan's Darfur region, political instability in Lebanon and Syria, and a festering Arab-Israeli conflict. Anti-American nationalism is spreading throughout our own hemisphere as we saw in recent days during the summit meetings of the Americas; and the HIV/AIDS epidemic and the possibility of an avian flu epidemic all are being held hostage because of the missteps we have taken in Iraq.

These missteps have tarnished America's image, and have allowed the disaffected in Iraq and elsewhere to capitalize on these misfortunes and to distort our values and intentions, in order to inspire violence for their own purposes. We saw it in recent protests in Argentina. We are seeing it to a certain extent in the ongoing youth violence in France. We saw it several days ago in the tragic bombings in Amman, Jordan. We see it every day in Iraq as American and Iraqi soldiers and civilians are randomly attacked by angry, nameless, and faceless individuals. It is not enough to simply decry past mistakes or America's tarnished reputation. We have to do something to correct these mistakes and restore America's prestige.

In short, what we need is a plan for success in Iraq, and what better place to start than in that war-torn nation. Last month, while visiting Baghdad with my colleague from Rhode Island, Senator REED, I had the opportunity to meet with U.S. commanders on the ground and to visit with our men and women in uniform who in some cases are on their second or third tours of duty in that nation.

I cannot say how impressed I was with these heroes who risk their lives every single day in the service of our Nation, and with the senior military officers who lead them. We owe these brave Americans a huge debt of gratitude for their courage, sacrifice, and professionalism. But we owe them much more than that. We owe them a strategy and a framework for completing this mission. We owe them a sense of conviction that this is not going to be an indefinite struggle. That is why I joined with Senator LEVIN and others in crafting this amendment, which we hope will be embraced on a bipartisan basis. This amendment would require the President to publicly lay out for the first time a strategy and framework for our troops to follow so that they can successfully complete the mission in Iraq and come home.

Recently, the President told the American people that Iraq has made incredible political progress: from tyranny, to liberation, to national elections, to a new constitution in the space of 2½ years.

I agree with that assessment, but that is not a strategy for success. It is a statement of discrete events that have thus far occurred in Iraq, albeit positive events. Our troops and the American people deserve more than that, in my view. They certainly deserve more than simply being told that the strategy is: When they stand up, we will stand down. What our troops are looking for, what I believe the American people are looking for, what Iraq and Iraq's neighbors are looking for, is a clearly articulated strategy, a timetable which culminates in the election of a sovereign, inclusive Iraqi government with the expertise and experience to govern effectively. Thus far, the administration has failed to articulate such a strategy or such a timetable.

Before success can be a reality, however, competent Iraqi security and police forces, respectful of the civilian authority, must be at the ready to secure Iraq's borders and provide security within its territory.

And fundamental to achieving success, in my view, is ensuring that the vast majority of Iraqi Kurds, Sunnis, and Shi'as have bought into whatever political architecture emerges from the upcoming elections. At the moment, that is not a given.

Some but not all Iraqis have decided that the road to reconciliation and inclusion is the right road. Others remain mistrustful and uncertain. Although the latter may be a minority, it is painfully evident that they have the capacity to derail progress for all Iraqis.

With more than 160,000 American servicemen in Iraq, our presence and our policies are going to be pivotal in helping to shape Iraq's future. But the United States, despite all of its military strength, cannot, through force alone, remake Iraq. Moreover, the longer U.S. troops remain an occupying force there, the greater the hatred and disaffection among Iraqis and the larger attraction for foreign jihadists.

That is why it is especially important that the administration proceed with some sense of urgency in setting forth its strategy for involving Iraq's neighbors in addressing the political, ethnic, and tribal divisions that exist in Iraq and fuel instability, particularly so in light of the size of the ''no'' vote cast by Sunni voters against the new constitution.

The Levin amendment imbues the administration with that urgency. It states that U.S. forces should not remain in Iraq indefinitely. It establishes expectations that calendar year 2006 should be a period of significant transition to full Iraqi sovereignty, thereby creating the conditions for the phased redeployment of U.S. forces from Iraq. It stresses the need for compromise among Iraqis to achieve a sustainable sovereign government. And most important, it calls upon the President no later than 30 days after enactment of this bill to tell the American people his campaign plan and estimated dates for the redeployment of U.S. forces.

The pending amendment provides concrete ideas for completing our mission in Iraq successfully, for phased redeployment of U.S. combat forces, for reassuring Iraq and its neighbors that we have no ulterior motives with respect to Iraq's future, and for restoring America's influence and prestige.

A successful strategy for Iraq will free-up critical resources and personnel to enable America to address urgent homeland security priorities: protecting schools and hospitals, water and power stations, and other vital locations; equipping our firefighters and other first responders who are the first line of defense in our communities against acts of terror; and fortifying our Nation's transportation infrastructure.

Today, America is less secure than it was 5 years ago, as resources have been diverted from programs to maintain the readiness of our Armed Forces, and to strengthen our homeland security, in order to pay for the continuing occupation of Iraq. It is time for the Bush administration to make a major course correction in our policy in Iraq if we are going to be successful, one that will bring our military involvement nearer to a close. It is time for the administration to refocus attention and resources on our Nation's real priorities—keeping America strong, secure, and prosperous for the 21 century.

I urge my colleagues to take a good look at the Levin amendment. It has been worked on for the last week by a number of us who have tried to come up with a plan for success, recognizing the achievements that have occurred but also laying out a strategy of how to succeed in the coming months. We cannot continue on the path we are on indefinitely. It will not work. It has cost us dearly at home and abroad.

I think that this amendment is one that many of my colleagues could be drawn to. It doesn't lay out timetables definitely, but it does lay out a framework, a strategy for success. I urge my colleagues to vote to adopt this amendment when it comes to a vote tomorrow.

I yield the floor.

NATIONAL PREMATURITY AWARENESS DAY

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. ALEXANDER. While my friend, the Senator from Connecticut, is on the floor, I would like to change the subject for just 2 or 3 minutes and talk about the issue of babies born prematurely, an area he and I have been working on together. Premature infants are 14 times more likely to die in the first year of their lives. This is Prematurity Awareness Month. Tomorrow is Prematurity Awareness Day. It is the No. 1 cause of infant death in the first month of life in the United States. Premature babies who survive may suffer lifelong consequences, including cerebral palsy, mental retardation, chronic lung disease, vision and hearing loss. Half the cases of premature birth have no known cause, and any pregnant woman is at risk.

That is why the Senator from Connecticut and I have introduced the Prematurity Research Expansion and Education for Mothers Who Deliver Infants Early Act, which we call the PREEMIE Act. It expands research into the causes and prevention of prematurity and increases education and support services related to prematurity.

I ask unanimous consent that the following Senators be added to our legislation in honor of Prematurity Awareness Day, which is tomorrow: Senators BENNETT, BINGAMAN, CLINTON, BOND, COCHRAN, COLLINS, HAGEL, INOUYE, LIEBERMAN, LUGAR, OBAMA, LAUTENBERG, LINCOLN, and TALENT.

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

Mr. ALEXANDER. The March of Dimes is our partner, a strong advocate for the PREEMIE bill. It is leading the prematurity campaign. It will sponsor a symposium on prematurity research here in Washington, DC, on November 21 and 22.

Mr. GRAHAM. Would the Senator add my name, please?

Mr. ALEXANDER. I ask unanimous consent to add the name of the Senator from South Carolina.

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

Mr. ALEXANDER. It calls for a Federal research plan. I thank our colleagues for joining us in this effort. We hope the legislation will pass Congress this year.

With the permission of the Senator from Rhode Island, I ask unanimous consent that the Senator from Connecticut have a minute to make his comments on the legislation.

Mr. REED. I have no objection.

Mr. DODD. I thank my colleague. I am pleased to join with my colleague from Tennessee in this effort. I commend our colleagues from around the country who joined us, including our friend from South Carolina, the most recent cosponsor of this legislation.

One out of every eight babies in our country is born prematurely—that is 1,300 infants every day and over 470,000 every year. The problems associated with prematurity are legion. We are making incredible advances in how we treat these children, but we need to do a lot more. I am not going to go to great length here except to commend my colleague from Tennessee and tell him how much I have enjoyed working with him on this issue.

This is a critically important issue. It is the kind of issue that deserves more attention. We hope to get that attention with these efforts. I commend him for his leadership. I am pleased to be a partner in this effort, and I am grateful to my colleagues for joining us in this endeavor.

The PRESIDING OFFICER. The time of the Senator has expired.

The Senator from Rhode Island.

Mr. REED. Mr. President, I rise to express my strong support for the amendment offered by Senator LEVIN from Michigan. I was pleased to work with a number of my colleagues on this amendment, including Senator LEVIN, Senator BIDEN, Senator HARRY REID, Senator KERRY, Senator FEINGOLD, Senator KENNEDY, Senator DURBIN, and particularly Senator DODD. Senator DODD and I had the privilege of traveling together through Iraq just about 3 weeks ago. Our trip was very illuminating. His participation is one I deeply appreciated.

We all understand that there are over 160,000 American troops in Iraq. They are serving magnificently, and they have paid a difficult price for their service. We have lost soldiers and sailors and airmen and marines. We know how important it is to succeed in Iraq.

But the American people are concerned. A Pew Research poll conducted last week found that those polled believed that Iraq was the most important problem facing the country today. A second poll conducted by NBC News and the Wall Street Journal, however, found that 64 percent of those polled disapproved of the way President Bush is handling this situation in Iraq.

At the heart of that, I believe, is a sense that there is no plan. There are slogans—''Stay the course.'' There are

slogans—''When the Iraqis stand up, we stand down.'' But a slogan is not a plan, and the American people and this Congress should demand a plan.

That is the essence of the Levin amendment. We are not collectively a Commander in Chief. We should not presume to think so. He is responsible for such a plan, and he has to provide, not just to us but to the American people, a sense that there is a plan that is leading to an outcome which is successful in a timeframe which is feasible. What the American people are seeing, however, is chaos without a plan.

I did not vote to authorize the use of force in Iraq. At that time, my concerns were, after the initial decisive military victory, that we would be swept up in a difficult situation. That is what has come to pass. I thought the cost would be huge then, but I did not expect that we would enter the phase after military operations, the conventional attack, with essentially no plan. That was a surprise to me and a surprise to so many others.

According to an article in the Philadelphia Inquirer, when a lieutenant colonel briefed war planners and intelligence officers in March 2003 on the administration's plans in Iraq, the slide for the rebuilding operations or phase 4–C, as it is known in the military, was simply this: ''To be provided.'' We are still waiting. We are still waiting for a plan that works, that is measurable, and that will give the American public the confidence that our course ahead will lead to success.

We all know in February of 2003 when General Shinseki was asked about the troop strength we needed there, he said several hundred thousand soldiers. He was dismissed—and that is a kind word for the treatment he received. Secretary Rumsfeld said the estimate was '' . . . far from the mark.'' Secretary Wolfowitz called it ''outlandish.'' In fact, it was very accurate, very perceptive—prophetic, indeed, because after our initial entry into Iraq, after the first days of fighting, it became more and more obvious we needed more troops to, among other things, secure ammo dumps that were prolific throughout the country. Perhaps we have lost that window where more troops will make a difference, but we certainly have not gone past the point where a good plan will make a difference, and we need that good plan.

The Congressional Research Service has summarized dozens of reports and articles, cataloging mistake after mistake. In their words:

The lack of reconstruction plan; the failure to adequately fund reconstruction early on; unrealistic application of U.S. views to Iraqi conditions by, for example, emphasizing privatization policy; the organizational incompetence of the CPA; changing deadlines . . .

Et cetera, et cetera, et cetera.

I could add, a very unwise de-Baathification process and the disestablishment of the Iraqi army. But the litany goes on and on. It was ad hoc, off the cuff. It was not a plan that worked and it is not working today.

We need this plan. That is what the Levin amendment calls for. Give us a plan. Not just us, but give the American people a plan. We have made progress in Iraq. We have had elections. But that progress is fragile and reversible. We have to have a coherent way ahead. And again, hope is not a plan.

This amendment is not, as some would characterize it, cut and run. It asks the President to lay out conditions. It asks to define a mission. It asks to catalog the resources necessary. Then it anticipates—and I think this is prudent—that we would have a phased redeployment of troops.

Just today, in London, Prime Minister Blair talked about British troops coming out next year, 2006. Jalal Talabani, the Iraqi President, said the troops are coming out in 2006. British Defense Secretary John Reid—no relation—said that we are likely to see troops come out next year if conditions allow. So the idea of looking ahead with a good plan and making a good-faith estimate as to troop levels seems to me the appropriate thing to do. It is a campaign plan. It is a campaign plan which will give us an idea of how long we will be there.

We need not simply to reflect what is happening on the ground in Iraq. We cannot sustain indefinitely 160,000 American troops in Iraq.

It will bring our land forces, our Army, our Marines to their knees. They are overstretched. They have a billion dollars of built-up maintenance on helicopters and vehicles. And the personnel turmoil is excruciating. We owe it to them to have a plan. And we must be able to show how we are paying for this plan.

This plan would also ask the President to talk about a definition of ''success,'' talk about the conditions, talk about situations which would cause those conditions to be reevaluated. The Levin amendment is asking for the obvious. Show us the way ahead, not in a slogan but in concrete, measurable elements that will constitute a good plan. We have been waiting for 2½ years for such a plan.

What is the mission? It has changed. One of the initial missions was to deny the Iraqi Government weapons of mass destruction. We find they had none.

Then, of course, the mission was to root out terrorist insurgents that might be collaborating with Saddam Hussein's regime. The evidence strongly suggests there was no such material collaboration. But today there are thousands of hardened terrorists that we are in the process of rooting out—after the attack, not before.

Then, of course, there was the mission of creating a democratic oasis in Iraq that would be transformative of the entire region.

Is that still the mission? If it is the mission, we are going to need many decades, billions of dollars, and to mobilize the strength of this country, not just militarily but for technical and political assistance, and we haven't done that.

The President doesn't suggest—from everything I have heard and from everything I have seen—that he intended to do that.

What is the mission? What are the resources? We are spending about $4 billion to $6 billion a month in Iraq and Afghanistan. How long will we spend that much money, and when we finish how much will we have to spend to reconstitute our equipment, to reorganize our troops? Tell us. It is important because we make decisions on this floor that are based upon assumptions about how much we will be spending years ahead in Iraq, and we have to have those numbers. We need the conditions. More than that, we need all this tied into our troop strength in Iraq.

That is essentially what the American people are looking at very consciously.

How long will their sons and daughters be committed to this struggle?

I believe we have to succeed, and I am here because we can't succeed without a coherent plan, not one that is made up of slogans and good intentions but one that is premised on real conditions, hardnosed, and something that will help us and help the American people to understand our commitment and help us to succeed in that commitment.

I hope very strongly that the Levin amendment is agreed to. The Republican counterpart makes a few changes, but the critical change is it essentially takes out the notion of a plan.

The opposing amendment would strip out something vital in the Levin amendment; that is, a campaign plan that would help show, project, the phased redeployment of American troops. I think that is essential.

If Tony Blair can speak off the cuff in London today about the phased withdrawal of British troops, and Talabani, the Iraqi President can do it, and John Reid, the Defense Secretary of Great Britain can do it, then certainly the President of United States can do it. And we ask him to do it. In fact, if we agree to this amendment, it will require him to do it.

I yield the floor.

ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 2006—CONFERENCE REPORT

The PRESIDING OFFICER (Mr. THOMAS). The hour of 4:30 having arrived, the Senate will proceed to the consideration of the conference report to accompany H.R. 2419, which the clerk will report.

The legislation clerk read as follows:

The Committee of Conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill, H.R. 2419, making appropriations for energy and water development for the fiscal year ending