Would authorize such retirees to receive full concurrent receipt of veterans disability compensation and military retired pay on October 1, 2009.

Reserve Health Care:

Provides eligibility for TRICARE to all reservists and their families who continue service in the Selected Reserve. Estimated cost: 5-yr: $880M; 10-yr: $2.3B (Compared to Taylor-Graham proposal: 5-yr: $3.8B; 10-yr: $12B). Three eligibility categories:

Involuntarily mobilized reservists (as in current law): 1 year TRICARE eligibility for every 90 days of mobilized service. DOD cost share: 72 percent.

Persons without employer provided health care, unemployed, self-employed. DOD cost share: 50 percent.

Any person not meeting the above criteria. DOD cost share: 15 percent.

Uniform Code of Military Justice:

Strengthens the Uniform Code of Military Justice by revising the offenses relating to rape, sexual assault, and other sexual misconduct and setting interim maximum punishments for the respective offenses.

Also establishes and defines stalking as a separate offense under UCMJ.

Mr. WARNER. I thank our respective leaders, the majority leader and the distinguished Senator from Nevada, and my good friend and partner, our dear Senator LEVIN, and all members of the Armed Services Committee, and particularly our staff that made this bill possible. It has had a long journey. But we are here.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006—CONFERENCE REPORT

The PRESIDING OFFICER. The clerk will report the conference report.

The assistant legislative clerk read as follows.

A conference report to accompany H.R. 1815 to authorize appropriations for the 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 military personnel strengths for such fiscal year, and for other purposes, having met, have agreed that the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, signed by a majority of the conferees on the part of both Houses.

The PRESIDING OFFICER. The Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of December 18, 2005.)

Mr. WARNER. Mr. President, will the Chair advise the Senate with regard to any time allocation for remarks in connection with the pending matter?

The PRESIDING OFFICER. There was not a time allocation.

Mr. LEVIN. Mr. President, I congratulate Senator WARNER. Without his leadership we would not be here. We had a record number of amendments which we had to deal with in a record short period of time. He showed incredible tenacity and patience and wisdom, as he always does in bipartisanship. I commend him and particularly our staffs.

Mr. President, I thank our leadership as well for their staying with us on this one. There was a time earlier this year when we didn't think we were going to get an authorization bill, and except for the efforts of our leaders we would not be here either. I want to particularly thank them.

Mr. LEVIN. Mr. President, I am pleased to join my good friend and colleague, Senator WARNER, the Chairman of the Senate Armed Services Committee, in urging the adoption of the conference report on H.R. 1815, the National Defense Authorization Act for Fiscal Year 2006. Getting this conference report to the Senate required the labors of Hercules, the patience of Job and the magic of Merlin. We would not have been able to complete conference on this important bill—made so very urgent by the fact that we are nation at war—without the tireless efforts of Senator WARNER.

First, a word on the extraordinary events of the last few days.

On the Senate side, every one of our conferees—including all 11 Democrats on the Armed Services Committee—signed the conference report. Each of these Senators signed on the basis of the text of the conference report that was agreed to between the Senate and House conferees.

As is our usual practice, we delivered our Senate signature sheets to the House on Friday afternoon, with the understanding that the conference report would be filed first in the House and acted upon first by that body. The Senate stood ready to take up the conference report as soon as it came over from the House and to pass it after 1 hour of debate.

Unfortunately, the conference report was not filed on either Friday or Saturday, because the House Republican leadership was considering adding an extraneous bill to the conference report. This bill was not a part of our conference, is not in the jurisdiction of our committee, and was never considered by any of the conferees. The bill was not a part of the conference report that was agreed to by our conferees on either side of the aisle.

Senator WARNER and I strongly objected to a procedure so totally destructive of bedrock legislative process. When we learned that such an attempt might be made, we joined together and retrieved the Senate signature sheets from the House. Only after we were assured on Sunday afternoon that the conference report would be voted on in the House of Representatives as agreed, with no effort to insert additional material, did we return the Senate signature sheets to the House.

I will ask unanimous consent that a copy of the cover letter that we sent to the House be inserted in the RECORD. I would also make reference to Senator WARNER'S remarks in the RECORD on this subject last Friday, and my remarks last Saturday.

Even before the events of the last weekend, the Armed Services Committee faced obstacles and hurdles in completing this bill that we have never faced before. For example:

It took us over 2 months from the time we reported the bill to the Senate on May 15 to the time debate initially began on July 20.

Then, after only 5 days of debate, our bill was pulled down by the majority leader on July 26 when the Senate failed to invoke cloture on the bill. We had to wait over 3 months and negotiate a very complicated unanimous consent agreement which limited the number of amendments before we were able to resume debate on the bill on November 4.

We debated the bill for an additional 7 days and finally passed it by a unanimous 98 to 0 vote on November 15, but not before disposing of a total of 261 amendments—more amendments ever considered to any Defense authorization bill since Congress passed the first annual Defense authorization bill back in 1961.

As far as completing conference this session, there were a lot of people who doubted it could be done because of the sheer size and complexity of this legislation, leaving aside some of its very contentious issues. Over the past 10 years, we have averaged a total of 70 days in conference with the House on this massive bill. Last year alone, we were in conference with the House for a total of 85 days. We completed this conference in under 1 month—29 days, to be exact. We compromised on a lot of issues, but we didn't compromise the quality of this legislation just for the sake of getting it done quickly. In short, we did it right and we are very proud of that. This year, we have produced a true holiday gift for our troops and our Nation.

This conference report contains provisions that provide well-deserved support for our military personnel and their families. In particular, the conference report will:

Increase basic pay by 3.1 percent, a half percent higher than inflation;

Increase the death gratuity for all active duty deaths from $12,400 to $100,000, retroactive to the beginning of Operation Enduring Freedom;

Authorize a new special pay of $430 a month during hospitalization for service members while rehabilitating from an injury or disease incurred in a combat zone;

Authorize a new leave of up to 21 days when adopting a child;

Provide $30 million in impact aid to local school districts, including a new $10 million authorization for schools that have a large increase or decrease in students due to rebasing, activation of new military units, or base realignment and closure;

Increase funding for military childcare services by $50 million, and for family assistance services by $10 million; and

Create a mental health task force to help military members and families deal with an increasing number of mental health issues.

The bill also contains several provisions especially designed to benefit our

National Guard and Reserve personnel and their families:

Every member of the Selected Reserve will have access to government-subsidized health care under the military TRICARE Standard medical program for themselves and their families.

Tier 1 is the TRICARE Reserve Select program that we authorized last year. National Guard and Reserve personnel who are mobilized can use this benefit for a year for each period of mobilized service, as long as they remain in the Selected Reserve. The Government pays 72 percent of their health care premium—they pay only 28 percent.

Tier II includes members of the Selected Reserve who do not have access to health insurance through their civilian employment. The Government pays 50 percent of their premium; and

Tier III includes members of the Selected Reserve who have access to health insurance through their employer but choose TRICARE. The Government pays 15 percent of their premium, they pay the remaining 85 percent.

National Guard and Reserve members who suffer an income loss when mobilized will be paid an income replacement payment after 18 months of active duty, upon completion of 24 months of active duty in a 5-year period, or when mobilized within 180 days of an earlier mobilization.

Reservists who are ordered to active duty for more than 30 days will receive a full housing allowance rather than the current 140 days.

In the bill we authorize the following end strengths for our active-duty forces: Army—512,400, an increase of 10,000 soldiers from last year's authorized end strength; Navy—352,700, 13,200 less than last year, in accordance with the Department's request; Marine Corps—179,000, an increase of 1,000 Marines; and Air Force—357,400, 2,300 less than last year's authorization, again in accordance with the Department's request.

We are very concerned about the Army's ability to recruit enough enlistees to make the end strength that we authorized. This bill gives the Army new tools to help it meet its recruiting goals:

A new bonus of up to $1000 for soldiers who refer a successful recruit to the Army;

New authority to experiment with innovative recruiting incentives;

Authorization for matching contributions to the Thrift Savings Plan during a service member's initial enlistment; and

An increased maximum enlistment bonus of up to $40,000.

This bill does not include everything that I fought for. For example, I am very disappointed that we were not able to eliminate the requirement that survivor benefit plan annuity payments be reduced by the amount of dependency and idemnity compensation received from the Veterans' Administration. I am also disappointed that we were not able to immediately repeal the 10-year phase-in of the concurrent receipt of military retired pay and VA disability compensation for military retirees with less than a 100 percent disability who are considered ''totally disabled'' because their disability renders them unemployable.

Before I comment further on a number of other issues in the conference report relating to support for our men and women in uniform, weapons systems and nonproliferation programs, I want to comment on provisions relating to the treatment of detainees and the sense of the Congress on United States policy on Iraq.

I am pleased that the conference report contains the full text of the McCain amendment on torture, without change. This language firmly establishes in law that the United States will not subject any individual in our custody, regardless of nationality or physical location, to cruel, inhuman, or degrading treatment or punishment. The amendment provides a single standard—''cruel, inhuman, or degrading treatment or punishment''—without regard to what agency holds a detainee, what the nationality of the detainee is, or where the detainee is held. With the enactment of this amendment, the United States will put itself on record as rejecting any effort to claim that these words have one meaning as they apply to the Department of Defense and another meaning as they apply to the CIA; one meaning as they apply to Americans and another meaning as they apply to our enemies; or one meaning as they apply in the United States and another meaning as they apply elsewhere in the world.

The McCain amendment is not only an important statement of law, it is a reaffirmation of one of the core values of our system of government and a restatement of who we are as Americans. I would not have signed or supported any conference report that did not include these provisions.

Despite repeated efforts by administration officials and their allies in the House of Representatives to amend this language, the conference report does not allow the President to authorize actions that violate the standards in the McCain amendment, or to immunize individuals who engage in such actions from either criminal prosecution or civil suit. Despite repeated efforts by administration officials and their allies in the House, the conference report does not authorize the U.S. government to indemnify individuals who are found to be liable for violating the standards in the McCain amendment, and it does not make reckless or wanton behavior a prerequisite to such liability.

The conference report would add a new section establishing a defense in any legal action against a person who engages in specific operational detention and interrogation practices that were officially authorized at the time that they were conducted, if the defendant did not know that the practices were unlawful and a person of ordinary sense and understanding would not have known that they were unlawful. This is not a new defense: it is virtually identical to the defense already available under the Manual for Courts-Martial for military members who act in reliance upon lawful orders.

It has never been my understanding that the McCain amendment would, by itself, create a private right of action. I do not believe that the amendment was intended either to create such a private right of action, or to eliminate or undercut any private right of action—such as a claim under the alien tort satute—that is otherwise available to an alien detainee. Rather, the McCain amendment would establish a legal standard applicable to any criminal prosecution or a private right of action that is otherwise available under law. That would not be changed in any way by the affirmative defense added in the new section. Nor would the McCain amendment be undermined in any way by any of the other detainee provisions in the conference report.

I opposed the initial amendment addressing the legal rights of Department of Defense detainees at Guantanamo Bay, Cuba when Senator GRAHAM offered it on the Senate floor, because it would have stripped federal courts of jurisdiction to hear habeas corpus challenges—including pending cases—brought by Guantanamo detainees. Unfortunately, the Senate approved that amendment by a 49-to-42 vote.

Following the Senate vote, I worked with Senator GRAHAM to build back protection into his amendment. We did so in three ways:

First, the jurisdiction-stripping provision in the initial Graham amendment would have applied retroactively to all pending cases in Federal court—stripping the Federal courts of jurisdiction to consider pending cases, including the Hamdan case now pending in the Supreme Court. The revised amendment adopted by the Senate—the so-called Graham-Levin-Kyl amendment—does not apply to or alter any habeas case pending in the courts at the time of enactment.

Under the Supreme Court's ruling in *Lindh* v. *Murphy*, 521 U.S. 320, the fact that Congress has chosen not to apply the habeas-stripping provision to pending cases means that the courts retain jurisdiction to consider these appeals. Again, the Senate voted affirmatively to remove language from the original Graham amendment that would have applied this provision to pending cases. The conference report retains the same effective date as the Senate bill, thereby adopting the Senate position that this provision will not strip the courts of jurisdiction in pending cases.

Let me be specific.

The original Graham amendment approved by the Senate contained language stating that the habeas-stripping provision ''shall apply to any application or other action that is pending on

or after the date of the enactment of this Act.'' We objected to this language and it was not included in the Senate passed bill.

An early draft of the Graham-Levin-Kyl amendment contained language stating that the habeas-stripping provision ''shall apply to any application or other action that is pending on or after the date of the enactment of this Act, except that the Supreme Court of the United States shall have jurisdiction to determine the lawfulness of the removal, pursuant to such amendment, of its jurisdiction to hear any case in which certiorari has been granted as of such date.'' We objected to this language and it was not included in the Senate-passed bill.

A House proposal during the conference contained language stating that the habeas-stripping provision ''shall apply to any application or other action that is pending on or after the date of enactment of this Act.'' We objected to this language and it was not included in the conference report.

Rather, the conference report states that the provision ''shall take effect on the date of the enactment of this Act.'' These words have their ordinary meaning—that the provision is prospective in its application, and does not apply to pending cases. By taking this position, we preserve comity between the judicial and legislative branches and avoid repeating the unfortunate precedent in Ex parte McCardle, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court.

Second, the initial Graham amendment would have provided for direct judicial review only of status determinations by Combat Status Review Tribunals, CSRTs. By contrast, the revised Graham-Levin-Kyl amendment adopted by the Senate provided for direct judicial review of both status determinations by CSRTs and convictions by military commissions. The amendment does not affirmatively authorize either CSRTs or military commissions—instead, it establishes a judicial procedure for determining the constitutionality of such processes.

Again, this improvement is preserved in the conference report, which retains the Senate language authorizing direct review of both status determinations by CSRTs and convictions by military commissions.

Third, the initial Graham amendment would have provided only for review of whether a tribunal complied with the Department's own standards and procedures. By contrast, the revised amendment adopted by the Senate would authorize courts to determine whether the standards and procedures used by CSRTs and military commissions are consistent with the Constitution and laws of the United States.

This language has been revised in conference only to state what the intent of the amendment already was—that it was not intended to grant to an alien detainee any rights under the Constitution and laws of the United States that the detainee does not already have. Otherwise, the improved language remains intact in the conference report: The courts would be expressly authorized to determine whether the standards and procedures used in a status determination or the trial of an alien detainee at the Guantanamo are consistent with the Constitution and laws of the United States, as they apply to that detainee.

We expect that final decisions in both the CSRT process and under the military order for trials will be reached in an expeditious manner to ensure judicial review within a reasonable period of time. The statement of managers makes this point expressly with regard to CSRT determinations, because the amendment requires that CSRT procedures be submitted to Congress. The statement of managers does not make this point with regard to military commissions only because the procedures for military commissions are not in any way addressed in the conference report.

The Senate bill also contained a provision that would require the Secretary of Defense to submit to Congress a report on the procedures used by combat status review tribunals and administrative review boards for determining the status of the detainees held at Guantanamo Bay and the need to continue to hold such detainees. This provision has been expanded in the conference report to require that the report also address procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense.

Nothing in the conference report is intended to in any way authorize, endorse or approve either these procedures or Military Commission Order No. 1, which establishes Department of Defense procedures for the trial of detainees. Nor does anything in the conference report authorize, endorse or approve the administration's position on the President's authority to treat any alien or category of aliens as ''enemy combatants'' or ''unlawful combatants''. All that it does is to require that certain DOD procedures be submitted to the Congress and establishes an orderly process for the review of those procedures in the courts to determine whether they are consistent with the Constitution and laws of the United States. The conference report does not attempt to prejudge the outcome of that review.

Throughout the conference, we were pressed by administration officials and their allies in the House to make changes to the Senate language. We were asked to strip the courts of jurisdiction over pending cases; to eliminate any review of the constitutionality of procedures established by the Department of Defense; to expand the habeas limitations to detainees held anywhere in the world; to expand these provisions to strip legal rights from detainees held by the CIA and other agencies; to bar detainees from ever bringing any legal action challenging any aspect of their detention; to prohibit the courts from providing legal relief for detainees who are found to be improperly held; and to grant immunity to individuals engaged in detention and interrogation operations. We successfully opposed all of these changes.

The conference report does make two changes to the Senate language which are more complex.

First, the Senate-passed provision would have established an exclusionary rule prohibiting CSRTs from considering evidence obtained through ''undue coercion''. I was troubled by the phrase ''undue coercion'', because of the implication that there might be such a thing as ''due''—or appropriate—coercion. I do not believe that coerced testimony is ever appropriate.

We were able to modify the provision in the conference report to eliminate the word ''undue'', an improvement over the Senate language. At the same time, however, the provision was modified so that it only provides for an ''assessment'' of whether the testimony was obtained through cruel, inhuman or degrading treatment and, if so, requires the tribunal to decide if there is any probative value to the testimony. We do not authorize such testimony to be used: a reviewing court will make that determination.

It is a centuries-old principle of Anglo-American law, enshrined in the fifth amendment to the Constitution, that no person shall be compelled to be a witness against himself. Regardless whether this rule of law is expressly incorporated into CSRT procedures, I hope and believe that the courts will enforce the generally accepted rule of law and ensure that evidence obtained through coercion is excluded from any administrative or judicial proceedings.

Second, while the Senate-passed provision would have eliminated federal court jurisdiction only for habeas corpus actions, the conference report would eliminate such jurisdiction for ''any other action against the United States or its agents'' relating to detention at Guantanamo Bay, Cuba. This new language is limited to detainees who either: (1) remain in military custody at Guantanamo; or (2) although they have been released from Guantanamo, have been determined by the United States Court of Appeals (subject to Supreme Court review) to have been properly detained as enemy combatants. This language places a limitation on legal recourse available to detainees. While we do not know whether any legal remedies other than habeas corpus actions would have been available to detainees, I would have preferred not to have this limitation in the bill.

In sum, administration officials and their allies in the House have sought at every turn to deny legal rights or recourse to detainees at Guantanamo and

elsewhere. I do not believe that we should have gone down the road of limiting legal remedies for detainees in the manner that we did. However, once the Senate voted over my objection to eliminate habeas corpus relief, my effort turned toward: (1) building back access to the courts on direct appeal of administrative determinations of status or criminal conduct; (2) avoiding stripping the courts of jurisdiction over pending cases; and (3) ensuring that the provisions on detainee rights would not be used to undermine the McCain amendment.

I believe that we succeeded on all three issues. The conference report preserves a meaningful opportunity for detainees to challenge the legality of their detention or any criminal conviction in federal court. It ensures that the provisions eliminating habeas corpus jurisdiction will be prospective in their application and will not apply to pending cases. And of course we worked with Senator MCCAIN to preserve his amendment intact and to shape the Graham-Levin language so as to avoid undermining the McCain amendment.

The conferees endorsed with minimal change the provision on United States policy on Iraq which garnered overwhelming bipartisan support from over three-quarters of the Senate. This provision shows that both houses of Congress, and both political parties, have come together with a common message to our troops, to the administration, to the American people, and, most importantly, to the Iraqi people.

Expressing the heartfelt gratitude of the American people to our troops and their families for their unwavering devotion to duty, service to the Nation, and selfless sacrifice, Congress in this conference report reiterates its support for them and for a successful conclusion to their mission.

Congress, in the provision in the conference report, notes that calendar year 2006 should be a period of significant transition to full Iraqi sovereignty, with Iraqi security forces taking the lead for the security of a free and sovereign Iraq, thereby creating the conditions for the phased redeployment of United States forces from Iraq.

Congress expresses its view that the administration should tell the leaders of all groups and political parties in Iraq that they need to make the compromises necessary to achieve the broad-based and sustainable political settlement that is essential for defeating the insurgency in Iraq, within the schedules they set for themselves.

Congress directs the administration to provide Congress and the American people specific information on its strategy in Iraq, principally the diplomatic, political, economic, and military measures that are being undertaken; whether the Iraqis have made the compromises necessary to achieve the broad-based and sustainable political settlement that is essential for defeating the insurgency; and the conditions that must be met in order to provide for the transition of additional security responsibility to Iraqi security forces, along with a plan for meeting such conditions, and an assessment of the extent to which such conditions have been met.

This provision, which has garnered broad bipartisan support, is a significant win for the American people, and a large step forward for policy for Iraq. The messages that it sends are important, and the information it demands is crucial, for establishing and advancing a strategy for completing the mission in Iraq successfully, for beginning the process of redeployment of our military forces, and for doing so in a manner that will hopefully enhance U.S. national security.

The conference report also authorizes $50 billion in supplemental funding for fiscal year 2006 to support our troops on the ground in Iraq and Afghanistan. This is consistent with the budget resolution. Included in this $50 billion is funding to support increased Army and Marine Corps personnel, funding to buy additional armor for their vehicles and to repair or replace the equipment that our troops rely on. It also includes $1 billion for our No. 1 force protection priority, the Joint Improvised Explosive Device or IED Task Force.

This bill authorizes military construction and family housing projects that will improve the quality of life of our men and women in uniform and their families. It also authorizes $1.5 billion to begin implementing the decisions of the 2005 base realignment and closure round. These funding authorizations are consistent with the military construction appropriations enacted in November and will allow those projects to proceed.

The conferees agreed to the Army's request to relax the punitive restrictions on military construction at Fort Buchanan, Puerto Rico that were enacted 5 years ago in light of the protests over Vieques. The Army activities at Fort Buchanan are not now and never were related to the Navy's activities at Vieques, and I am pleased that the conferees agreed to address these unjust restrictions.

With respect to nonproliferation programs, although I would have preferred the amendment that Senator LUGAR added to the Senate-passed bill, which would have repealed all of the various conditions that the Cooperative Threat Reduction, CTR, program must meet before spending money in any given year, I am pleased that we have included permanent authority to waive on an annual basis the requirement to certify that the various conditions have been met by each country recipient of CTR funds.

The CTR program and the nonproliferation programs at the Department of Energy are all funded at the budget request. Within the Department programs we were able to address some urgent requirements by providing additional funds to accelerate the shutdown of the last plutonium-producing reactor in Russia and to accelerate the security of nuclear weapons storage at key Russian sites.

The agreement includes $4.0 million in Air Force accounts that the Air Force and the Department of Defense have the option to use to study and improve the performance of conventional, nonnuclear, penetrator weapons. I hope and urge the Department to use at least the $4.0 million to support conventional, nonnuclear weapons development.

The conference report includes a series of provisions designed to improve the management of the Department of Defense. These include provisions that would:

Help protect the Federal employee workforce from unfair competition by codifying an important set of historic precedents and commonsense principles for public-private competition;

Improve the management of DOD's major defense acquisition programs by requiring the Department to establish more realistic and achievable cost and performance estimates and tighten oversight requirements for programs that are experiencing problematic cost growth;

Improve the management of $70 billion a year of DOD contracts for services by requiring the Department to establish a new management structure for such contracts and requiring strict review of interagency contracting mechanisms that have been abused in the past;

Reduce the risk of abusive acquisition practices like those seen in the proposed tanker lease contract by requiring the Secretary of Defense or the Deputy Secretary of Defense to personally approve any proposal to purchase a major weapon system as a commercial item; and

Prohibit the Department from wasting hundreds of millions of dollars on unneeded audits of financial management systems that must be replaced because they are incapable of producing timely, accurate and complete financial data for management purposes.

I am particularly pleased that the conference report also includes a provision for disaster relief for small business concerns damaged by drought. In the same way that floods, hailstorms, tornadoes, and other natural phenomena can devastate small businesses, the harm caused by unusually low water levels on the Great Lakes can be irreparable to businesses that depend on the waterways. The Small Business Act already provides disaster assistance to businesses have been victim to a number of natural disasters, so I am grateful that we have been able to broaden eligibility for that assistance to include businesses that have been hurt by below-average water levels on the Great Lakes.

With respect to the Navy's shipbuilding accounts, the conference agreement incorporates reasonable

cost caps on Virginia-class attack submarines in the Future Years Defense Program, the fifth DD(X) land attack destroyer, to be bought in 2010, and the fifth and sixth littoral combat ships, to be bought in 2008 or 2009. The conferees did not include a cost cap on the LHA because too little is known yet about the final design. The conference agreement also reflects the fact that the House has agreed to the Senate provision preventing the Navy from conducting a winner-take-all competition for the next generation destroyer program called the DD(X). Finally, the conferees agreed to a provision requiring the Navy to maintain 12 aircraft carriers and provided funding to overhaul the USS *John F. Kennedy* that the Navy had planned to retire.

The conferees dealt with the Navy's program to buy a new presidential helicopter, called the VXX, by adopting compromise language that would: (1) allow production of the pilot production helicopters to go forward; and (2) require that the Secretary of the Navy submit an acquisition strategy for the full rate production aircraft, Increment Two, by March 15, 2006. This strategy would be required to include one phase of operational testing before initiation of full rate production for VXX. The agreement would fence 25 percent of the Fiscal Year 2006 R&D funding until the Secretary submits that strategy.

The conferees also dealt with the Army's future combat systems by agreeing that the entire Army future combat systems program, including the manned ground vehicles project, should remain in system development and demonstration, rather than having large portions revert to the technical base. This is a recognition of the importance of the Army's only modernization program to both the future Army, and to the spinout of FCS technologies to the current force, as well as a recognition of the need for the future combat systems to be developed as an integrated system of systems as quickly as possible.

The bill also demonstrates the conferees continued strong support for the Department's special operations, counterdrug and humanitarian operations. In particular the conferees enhanced DOD's ability to combat terrorism and the production and trafficking of illegal drugs, including: authorizing and funding five additional National Guard Chemical, Biological, Radiological, Nuclear and High Yield Explosive (CBRNE) Enhanced Response Force Package teams, in addition to sustaining the existing 12 teams—which provide support to civilian authorities in the aftermath of a WMD incident; directing the Department to report on the use of DOD aerial reconnaissance assets to support the Department of Homeland Security; authorizing use of counterdrug funding for 2 years for joint task forces combating terrorism and narcotics production and trafficking, and; designating the Chairman of the Joint Chiefs of Staff as the principal military advisor to the Homeland Security Council. The conferees also agreed to authorize increased funding for humanitarian operations, including $40 million in a future supplemental for Pakistan, and expanding the medical assistance to include related education, training, and technical assistance.

In science and technology, this year's conference report includes a number of provisions and funding measures that support the transformation of our military while improving our ability to rapidly move new technologies out of the laboratory and onto the battlefield. The conference report authorizes over $11.3 billion for science and technology research programs, an increase of $840 million over the President's budget request. It also makes permanent the SMART, Science, Math, and Research for Transformation, Scholarship for Service Program to help the DoD educate, train, and employ the highest quality technical workforce. In order to better utilize the innovative talents of our nation's small businesses, the bill establishes a pilot program to promote the transition of technologies from the Small Business Innovative Research program into DoD acquisition programs. Finally, the conference report increases funding for and establishes mechanisms to accelerate and better coordinate research in a number of priority areas including robotics, unmanned ground vehicles, IED detection and defeat, the diagnosis and treatment of blast injuries, semiconductor microelectronics, and the development and deployment of advanced fuel cell vehicles.

I ask unanimous consent that the letter I referred to be printed in the RECORD.

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

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC, December 18, 2005.

Hon. DUNCAN HUNTER,
Chairman, Armed Services Committee, and National Defense Authorization Act for Fiscal Year 2006 Conference, House of Representatives, Washington, DC.

DEAR DUNCAN: On Friday, December 16, we joined you and Ike Skelton in conducting the final meeting of the conferees along with other Members of the Senate and House.

At the conclusion of the meeting, the ''base bill'' was agreed upon and signatures of Republican and Democratic Committee Members were requested and affixed to the Conference Report with the expectation that the House, following the customary procedure, would be the first chamber to file. It was our further understanding that this would be done Friday evening.

We are returning to you the signatures of the Senate conferees on the condition that there are no changes made in the ''base bill'' and Conference Report and that the House obtain a Rule which precludes any further amendment.

You have shown strong leadership during this very brief and unusual conference period and we have confidence that you can achieve passage in the House of the ''base bill''. We believe it is in the interest of the Nation and the men and women of the Armed Forces that our Conference Report as agreed to on December 16 becomes law.

Sincerely,

CARL LEVIN,
Ranking Member.
JOHN WARNER,
Chairman.

Mr. LEVIN. My particular thanks to my staff for their extraordinary work: Rick DeBobes, Peter Levine, Jon Clark, Chris Cowart, Dan Cox, Madelyn Creedon, Brie Eisen, Evelyn Farkas, Richard Fieldhouse, Creighton Greene, Bridget Higgins, Mike Kuiken, Gary Leeling, Mark McCord, Bill Monahan, Arun Seraphin.

Also to Charlie Abell and others of Senator WARNER'S staff.

COMMENTS ON FINAL PASSAGE

Mr. KYL. I would like to say a few words about the now-completed National Defense Authorization Act for fiscal year 2006, and in particular about section 1405 of that act, which expels lawsuits brought by enemy combatants from United States courts. I see that my colleague, the senior Senator from South Carolina, is also on the floor.

I would like to begin by commenting on the need for this legislation. This provision originally was added to the bill in an amendment that was offered by Senator GRAHAM and of which I was a cosponsor, as well as Senator CHAMBLISS.

Keeping war-on-terror detainees out of the court system is a prerequisite for conducting effective and productive interrogation, and interrogation has proved to be an important source of critical intelligence that has saved American lives.

In Rasul v. Bush, the U.S. Supreme Court interpreted section 2241 of title 28 to authorize enemy combatants held outside of the United States to file habeas-corpus petitions challenging their status in federal courts. Such a process is both without precedent and is utterly impractical.

Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities. Under the new Rasul-imposed system, shortly after al-Qaida and Taliban detainees arrive at Guantanamo Bay, they are informed that they have the right to challenge their detention in Federal court and the right to see a lawyer. Detainees overwhelmingly have exercised both rights. The lawyers inevitably tell detainees not to talk to interrogators. Also, mere notice of the availability of these proceedings gives detainees hope that they can win release through adversary litigation—rather than by cooperating with their captors. Effective interrogation requires the detainee to develop a relationship of trust and dependency with his interrogator. The system imposed last year as a result of Rasul—access to adversary litigation and a lawyer—completely undermines these preconditions for successful interrogation.

Navy VADM Lowell Jacoby expounded on the preconditions for effective interrogation in a declaration attached to the United States' brief in the Padilla litigation in the Southern District of New York. Vice Admiral Jacoby at the time was the Director of the Defense Intelligence Agency. He noted in the Declaration that:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that:

Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.

The system of litigation that Rasul has wrought is unacceptable.

Mr. GRAHAM. I agree entirely. If I could add one thing on this point: perhaps the best evidence that the current Rasul system undermines effective interrogation is that even the detainees' lawyers are bragging about their lawsuits' having that effect. Michael Ratner, a lawyer who has filed lawsuits on behalf of numerous enemy combatants held at Guantanamo Bay, boasted in a recent magazine interview about how he has made it harder for the military to do its job. He particularly emphasized that the litigation interferes with interrogation of enemy combatants. Ratner stated:

The litigation is brutal for [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 [for the U.S. military] to do what they're doing. You can't run an interrogation . . . with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?

When I read that quote, that for me was the last straw. I knew that something had to be done. On this issue, both the detainees' lawyers and the Defense Department seem to agree: involving enemy combatants in adversarial litigation in U.S. courts undermines effective interrogation of those detainees.

Mr. KYL. I am glad that we have been able to work together on this issue. I would add that interrogation of these detainees is important. In his Declaration to the Southern District of New York, DIA Director Jacoby described how interrogation has proven to be a critical intelligence tool—indeed, our most important intelligence tool—in past conflicts and in the current war on terror. Interrogation was our most valuable source of information in World War II and the gulf war, and has played a key role in stopping numerous terrorist attacks in the present conflict. Vice Admiral Jacoby stated in that declaration:

Interrogations are vital in all combat operations, regardless of the intensity of the conflict. Interrogation permits the collection of information from sources with direct knowledge of, among other things, plans, locations, and persons seeking to do harm to the United States and its citizens. When done effectively, interrogation provides information that likely could not be gained from any other source.

The Department of the Army's Field Manual governing Intelligence Interrogation, FM 34–52, dated 28 September 1992, provides several examples of the importance of interrogations in gathering intelligence. The Manual cites, for example, the United States General Board on Intelligence survey of nearly 80 intelligence units after World War II. Based upon those surveys, the Board estimated that 43 percent of all intelligence produced in the European theater of operations was from HUMINT, and 84 percent of the HUMINT was from interrogation. The majority of those surveyed agreed that interrogation was the most valuable of all collection operations.

The Army Field Manual also notes that during OPERATION DESERT STORM, DoD interrogators collected information that, among other things, helped to: develop a plan to breach Iraqi defensive belts; confirm Iraqi supply-line interdiction by coalition air strikes; identify diminishing Iraqi troop morale; and identify a United States Prisoner of War captured during the battle of Kafji.

Vice Admiral Jacoby also noted that interrogations of enemy combatants captured in the War on Terror have played a vital role in preventing numerous terrorist attacks. Again, quoting from his declaration in the Padilla litigation, Jacoby noted that interrogations of combatants such as those held at Guantanamo Bay have:

. . . provided vital information to the President, military commanders, and others involved in the war on Terrorism. It is estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts of the Intelligence Community and others.

In fact, Padilla's capture and detention were the direct result of such effective intelligence gathering efforts. The information leading to Padilla's capture came from a variety of sources over time, including the interrogation of other detainees. Knowledge and disruption of Al Qaida's plot to detonate a 'dirty bomb' or arrange for other attacks within the United States may not have occurred absent the interrogation techniques described above.

There are other examples of the importance of intelligence obtained from interrogation. In a recent new release, the Defense Department described valuable information that was obtained from interrogation of Mohamed al Kahtani, an enemy combatant being held at Guantanamo Bay. The Pentagon release noted that interrogation of Kahtani has yielded information that:

Clarified Jose Padilla's and Richard Reid's relationship with al-Qaida and their activities in Afghanistan; provided infiltration routes and methods used by al-Qaida to cross borders undetected; explained how Osama Bin Laden evaded capture by U.S. forces, as well as provided important information on his health; and provided detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo.

The Pentagon's news release concluded: ''the result of those interrogations [at Guantanamo Bay] has undoubtedly produced information that has saved the lives of U.S. and coalition forces in the field.''

Let me cite another example: a June 27, 2004 Washington Post story notes that on November 11, 2001, Pakistani forces captured Ibn al-Shaykh al-Libi, a Libyan national who ran the Khaldan paramilitary camp in Afghanistan. In January 2002, al-Libi was handed over to U.S. forces and interrogated. According the Post, interrogation of al-Libi:

. . . provided the CIA with intelligence about an alleged plot to blow up the U.S. Embassy in Yemen with a truck bomb and pointed officials in the direction of Abu Zubaida, a top al Qaeda leader know to have been involved in the September 11 plot. In March 2002, Abu Zubaida was captured. . . . [Interrogation of Zubaida] led to the apprehension of other al Qaeda members, including Ramzi Binalshibh, also in Pakistan. The capture of Binalshibh and other al Qaeda leaders—Omar al-Faruq in Indonesia, Rahim al-Nashiri in Kuwait, and Muhammad al Darbi in Yemen—were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials.

The bottom line is that keeping detainees out of court makes effective interrogation possible, and interrogation has proved to be an invaluable source of intelligence, allowing the United States to capture important terrorists, prevent future terrorist attacks, and save the lives of American soldiers in the field.

I should also say a few words about some of the attacks that have been made against our amendment. For example, some critics have suggested that our amendment is inconsistent with the McCain amendment—that it prevents detainees from suing to enforce the McCain amendment. The response to this criticism is relatively straightforward: our amendment does not take anything away because the McCain amendment does not create a private cause of action in the first place. That amendment directly regulates military officers and is enforced through the usual mechanisms of military discipline.

Mr. GRAHAM. You are absolutely correct Senator KYL. I must admit, I'm

a bit baffled by the assertion that our amendment is somehow internally inconsistent, that our provisions interfere with the McCain provisions in some way.

While we must ensure that detainees are treated humanely, and that is what we addressed so well with the McCain portion of our total package, directing our departments and agencies to refrain from cruel, inhumane, or degrading treatment; we also don't want to give these detainees the right to abuse our courts by going after our soldiers, sailors, airmen and marines based on how we have decided to treat them. In fact, while it is true that some physical abuses have occurred, we know that members of al-Qaida are trained to claim mistreatment to manipulate public opinion of the war.

I would like to remind all of my colleagues of some of the most egregious cases that prompted our amendments. For instance, a detainee who threw a grenade that killed an Army medic, a medic—someone trying to render medical assistance, and who often treats our enemies on the battlefield as well as our own troops.

In any event, the detainee who threw the grenade that killed an Army medic in a firefight, and who comes from a family with longstanding al-Qaida ties, filed for an injunction forbidding anyone from interrogating him or engaging in ''cruel, inhuman, or degrading'' treatment of him.

Now clearly, our reaffirmation of America's policy against treating anyone in a cruel, inhuman, or degrading way tells the world that we are not like our enemy. We do not allow our departments or agencies to treat people like that. And if our people do abuse people, we prosecute them to the fullest extent of the law.

However, to allow a detainee access to our courts to contest every aspect of his detention, a person who has fought against the very system he now seeks to make use of, is ludicrous. And for anyone to say that somehow our provisions undermine the McCain provisions or our overall amendment is just as wrong.

Senator MCCAIN, due to his service in our Nation's military, is uniquely qualified to take the lead on these issues. The McCain provisions are about us. How we behave. How we administer justice. It is another affirmative statement that the United States of America is that ''Shining City on the Hill'' President Reagan referred to. I am very proud to have been part of Senator MCCAIN's effort to retake the moral high ground in the war on terror.

The Graham-Kyl provisions are about them, the detainees, and what rights they do and, most importantly, do not have. And I am proud of the provisions we have made for the detainee's status to be reviewed by the Federal courts on the one time direct appeal. We allow for a just process, in the form of military tribunals and boards and commissions, a process based on Supreme Court precedent, modeled on the tribunals we have used in the past and created in accordance with Geneva Convention requirements. That is the process we have established for determining the status of detainees.

But I have gotten a little far a field here, let's get back to the lawsuits. Here is another of the crazy lawsuits out there: there's a suit out there by a detainee accusing military health professionals of ''gross and intentional medical malpractice'' in alleged violation of the 4th, 5th, 8th, and 14th Amendments, 42 U.S.C. 1981, and other, unspecified, international agreements. Now I don't know about the rest of you, but a detainee has no business in our courts suing the individual doctors and nurses that are making sure that that detainee is in good health.

Here is another one. There is one guy down there that we are trying to send home, and he's suing to keep us from sending him home. Imagine that, he is trying to stay.

One high level al-Qaida detainee lawsuit complains about the base security procedures, the speed of the mail, and his medical treatment. He is asking the courts to order the marines to transfer him into the ''least onerous conditions'' at Guantanamo and allow him to keep any books and reading material sent to him.

I think this one is the one that makes me the maddest. A high level al-Qaida member, who probably has the blood of 9/11 on his hands, complaining about the speed of his mail delivery. Complaining about how onerous the conditions are at Guantanamo.

With the McCain provisions of our amendment, we have, in addition to the President's order and other regulations already in place, directed the Department of Defense to treat him humanely. But under our provisions, he will receive the justice he deserves.

As you can see, these cases have nothing to do with cruel or inhumane treatment. They are abuses of our courts by the very people who are trying to kill Americans here and abroad. I don't know about you, Senator KYL, but I believe that when you raise arms against the United States, you should not be surprised when you lose the privilege of our court system. As the McCain amendment provisions state very clearly, we are not going to treat people inappropriately. And, Senator KYL, as our provisions state very clearly, we are not going to allow them to make a mockery of our courts, standing beside our own citizens at the courthouse door.

We have provided a fair alternative judicial process for the detainees with our provisions. In fact, we have been more than fair. We have given them more process than our own soldiers and marines would enjoy under the Geneva Convention. This in no way undermines the McCain provisions about how we will treat them and I would challenge anyone who thinks so to come to the Senate floor and debate us on that point.

Mr. KYL. To be clear, neither the CSRT nor the ARB process is designed to entertain grievance about the conditions of confinement. Is that your understanding as well?

Mr. GRAHAM. And those are the only channels that have been created where the detainee himself can pursue a remedy on his own in a semi-adversarial forum. These complaints about conditions of confinement, these are for the military itself to enforce through its own procedures and systems of accountability for monitoring its soldiers. And we have no reason to believe that those systems are not adequate to investigate and remedy abuses. For all the attention to cases such as Abu Ghraib, one thing that deserves emphasis is that it was our own military that discovered, investigated, and punished those abuses. That is as it should be. These standards of treatment are important, but they need to be enforced through the military's internal systems of accountability and Congressional oversight, not through lawsuits and adversarial proceedings brought by detainees. The military's own accountability systems ultimately, I think, will be more effective in monitoring our detention centers and in remedying abuses. All that litigation would do—letting these detainees into court—is undermine intelligence gathering through interrogation.

Mr. BROWNBACK. If I might interrupt, I would like to add that I share the understanding of my colleagues from Arizona and South Carolina. I supported the McCain amendments—I think that it is important to ensure that detainees are treated humanely. But I would not support allowing those detainees to file lawsuits against our armed forces, and I wasn't aware that anyone had even suggested that the McCain amendments allow detainees to file Bivens-type actions.

Mr. KYL. No one really argued that the McCain amendments do create a private cause of action, except that some groups have suggested that the Graham/Kyl amendment is somehow inconsistent with the McCain amendments, the implication being that the Graham amendment wiped out the forum for bringing some cause of action that otherwise was created. Obviously, if the McCain amendment did create a private right of action, our amendment would bar the courts from entertaining that action. But the fact alone that the same Congress that adopted the McCain amendment also adopted the Graham/Kyl amendment tends to confirm, I would think, that the McCain amendments never were intended to create a private right of action in the first place.

As a matter of fact, the Supreme Court recently has tightened the standards for spontaneously recognizing such actions in cases where Congress is silent on the matter—I believe it was in the recent case of Alexander against Sandoval. The McCain amendments do

not state that they create a private cause of action. They regulate the conduct our troops rather than creating rights. And we have alternative means of their enforcement—as my colleague mentioned, through the system of military discipline—and thus we do not need a private cause of action to be implemented. I would be pretty surprised if, under those circumstances, anyone were to argue that the McCain amendment created a private right of action. So the senior Senator from South Carolina is correct, the Graham-Levin-Kyl amendment does not take away any cause of action created elsewhere in this bill, because the bill does not create any rights of action. Some members have been arguing that the McCain amendment will establish a standard that perhaps could be employed in another cause of action. That is, of course, true. But if such a cause of action is to exist, Congress will have to create it in the future. No cause of action currently available could serve as a vehicle for enforcing the McCain amendment in a private lawsuit, and I think that all the backers of that amendment consistently agree that the McCain amendments themselves did not create a private right of action. Again, it would be strange to construe this Act as intending such a private action when by the same hand this Congress would take away any forum for asserting such action.

Mr. GRAHAM. I thank the Senator from Arizona for his comments. I'd also like to say a word about the timing of this bill because we drafted this section very carefully and I want our colleagues to know exactly what they will be agreeing to. While our language does respond to the Rasul decision by effectively reversing the Supreme Court's decision in that case, we wanted to respect the courts' role in this by addressing two different considerations.

First, as we stated before, we wanted the CSRT process to yield decisions which will be reviewed by the DC Circuit Court of Appeals. And we wanted to be sensitive to the Rasul court's concerns about a process for the detainees. So, what we did was make the substantive provisions governing the CSRTs and ARBs apply to all cases, those pending on or after the enactment date. This was to ensure that every detainee was provided with the same protections and review.

Second, regarding the modification of the jurisdiction of those courts currently hearing individual habeas or other actions that have been filed by the detainees, we wanted those cases to be recast as appeals of their CSRT determinations. We believe that is the best way to balance between allowing the detainees to challenge their status, and still allowing effective detention and interrogation techniques. As we all know, a court either has jurisdiction to hear a case or it doesn't. Jurisdiction doesn't attach for all time when the case is filed.

This is really no different than transferring a case from one court to another. But in this case, given the change in the substantive law as well, we were required to extinguish these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court and substantive legal change as well.

Mr. KYL. Right. It may not be quite right to characterize this bill's provisions as transferring jurisdiction. Rather, they extinguish one type of action—all of the actions now in the courts—and create in their place a very limited judicial review of certain military administrative decisions.

Mr. GRAHAM. Yes, that is correct. But we do still allow some types of judicial review to go forward—those cases asking for review, in accordance with section 1405, of military commissions or CSRTs. And the very last paragraph of section 1405—I believe that it is paragraph (h)(2)—adopts a compromise of sorts. It states that the bill's authorization for limited DC Circuit review of CSRTs and military commissions shall apply to pending cases. Obviously, no pending case seeks judicial review in the DC Circuit pursuant to section 1405. What this paragraph means is that, at the same time that the courts like the DC district courts kick these cases out of their courtrooms, they can also tell them where they should go next. And if, for example, a habeas action currently is in the DC Circuit, that court can simply construe that action as a request for review of the detainee's CSRT pursuant to subsection (e) of 1405, and allow that claim to go forward in that form.

Mr. KYL. The DC Circuit will have to give the petitioner leave to amend his claim, I assume?

Mr. GRAHAM. Yes, I assume that they will do so. No sense in kicking out a detainee's current habeas action in the DC Circuit just so that he has to refile a section 1405 review request—it would be better to let the current case go forward as a 1405 review request, as appropriately amended.

Mr. KYL. We agree on that point. The one thing that critics have said about this bill that is correct is that it is a jurisdiction stripping bill. It strips every court of jurisdiction to hear claims from detainees held in Guantanamo Bay. The courts' rule of construction for these types of statutes is that legislation ousting the courts of jurisdiction is applied to pending cases. It has to. We're not just changing the law governing the action. We are eliminating the forum in which that action can be heard. And there is no exception anywhere in this bill for keeping intact part of that forum to hear the case. The case simply has nowhere to be heard.

I have just been handed a memorandum on this subject. The governing cases on this question are the Landraf case, as well as *Hallowell* v. *Commons*, 239 U.S. at 506, and *Sherman* v. *Grinnell*, 123 U.S. at 679. As the Landraf court noted, these statutes ''speak to the power of the court rather than the rights or obligations of the parties.'' These cases articulate the rule that will govern the detainee habeas actions and other lawsuits that currently are in the courts: legislation removing jurisdiction applies to pending cases and removes those cases from the courts.

Mr. GRAHAM. Mr. President, if Senator KYL would be so kind, could he explain how our amendment will affect ongoing litigation? Specifically, my understanding is that the Supreme Court granted certiorari recently in a case.

Mr. KYL. Yes. The Constitution gives Congress the power to make ''exceptions'' and ''regulations'' to the Supreme Court's jurisdiction—or at least, to its appellate jurisdiction. It was Marbury v. Madison that held that Congress could not regulate original jurisdiction, but the court since then has made clear that even habeas actions filed directly in the Supreme Court are regarded as falling within a subspecies of the Supreme Court's appellate jurisdiction. This would be an interesting exam question for a law school class.

The Congress's authority to use this power was affirmed by the Supreme Court in the case of Ex Parte McCardle. That case involved, I believe, an even sharper use of this authority than this bill does—I believe that there the Supreme Court had even heard argument in that case before Congress stripped the court's jurisdiction over it. The Supreme Court upheld the statute and dismissed Colonel McCardle's case for want of jurisdiction.

Mr. GRAHAM. And we are confident that McCardle still is good law?

Mr. KYL. So long as the Constitution still is good law. I am not aware that the clause in Article III allowing Congress to make exceptions and regulations to Supreme Court appellate jurisdiction has been repealed.

I suppose that some might argue that stripping the Supreme Court of jurisdiction over a pending case is unconstitutional if it is driven by some impure motive. But I can't imagine that the court would take away an authority clearly granted to Congress by the Constitution, regardless of what motive one might attribute to us. I am a member of this body, and would have great difficulty describing some definitive motive or intent to every law that we enact. I don't know how the Supreme Court or any other court could accurately discern such a motive. The laws that we enact have meanings that can be discerned through ordinary rules of construction. I think the rule of law is much more secure when the meaning of legislation is governed by those universally accessible rules of construction rather than through some attempt to psychoanalyze Congress's motive. And in any event, as I recall, this amendment was filed before the Supreme Court even granted review in the Hamdan case. That makes it a little

hard to argue that the amendment was motivated by a desire to strip the court of its jurisdiction in that case. I don't think that the Constitution gives Hamdan a greater right to have his case go forward than it did to Colonel McCardle.

Mr. GRAHAM. So once this bill is signed into law, you anticipate that the Supreme Court will determine whether to maintain their grant of certiorari?

Mr. KYL. Yes, in my opinion, the court should dismiss Hamdan for want of jurisdiction. That is what they did in Ex Parte McCardle. I assume that we may see an unhappy dissent from the court's order from one or two of the Justices—there may be some members of the court who refuse to accept McCardle and article III. But I think that a majority of the court would do the right thing—to send Hamdan back to the military commission, and then allow him to appeal pursuant to section 1405 of this bill.

The court also may well request a round of briefing on the effect of the effect on the Hamdan case. I suppose that a lawyer in the SG's office can look forward to rereading Ex Parte McCardle and the debates on the case in Hart & Wechsler's. But again, I don't think that this will change the result.

As for legislative history, I think it usually is regarded as an element of the canons of construction. It gives some indication of what Congress at least understood what it was doing—the context in which a law was enacted. Although, I understand that Justice Scalia does not read legislative history. I suppose that for his sake, we will have to strive to be exceptionally clear in the laws that we write.

Mr. GRAHAM. Let me address another issue. As we worked through this language in conference, we received a lot of comments from our colleagues who were concerned not only about the frivolous cases being filed by al-Qaida terrorists at Guantanamo, but by people detained by our forces in Iraq.

I believe there are several cases that have been filed by those held in Iraq challenging their detention by American forces. Our language does not address these cases, and let me tell you why.

The Rasul v. Bush decision that we have talked so much about worked two significant changes in prior POW or detainee law. Prior to Rasul, the Eisentrager line of cases had governed whether foreign combatants had access to our courts. In 1950, the Eisentrager court held that a Federal district court lacked authority to hear habeas cases for some German POWs held by U.S. forces outside the U.S. These Germans had been tried and convicted of war crimes by an American military commission headquartered in Nanking, and then put in jail in Germany.

The Court stated six reasons for its decision. The German prisoners were: (1) Enemy aliens who (2) had never been or resided in the United States, (3) were captured outside U.S. territory and there held in military custody, (4) were there tried and convicted by the military (5) for offenses committed there, and (6) were imprisoned there at all times.

The Eisentrager line of cases is the reason the Bush administration chose to locate the al Qaida and Taliban holding facility at Guantanamo. The Bush administration relied upon the Eisentrager line of cases so as to prevent exactly what we have seen happen since Rasul: terrorists with lawyers. Now I'm a lawyer myself, and I think we can all agree that that is a bad combination.

In fact, if my colleagues will permit me a quick aside, I would remind them again of the statement by one of the lawyers for some of these terrorists, Michael Ratner. Mr. Ratner boasts about the fact that this litigation has undermined intelligence gathering in the war on terror. In an interview published in May of this year Mr. Ratner stated:

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

Now that is what we are facing. Terrorists with lawyers. I am pretty sure the American people expect more from their government than that.

But getting back to what I was saying about Eisentrager. The Bush administration relied on the Supreme Court's decision in Eisentrager when they located the detainees at Guantanamo, reasoning sensibly, at least I think it was sensibly, that since the al-Qaida and Taliban members were enemy aliens who were being held by U.S. forces outside the United States after being captured on the battlefield, that they would not have access to Federal courts.

But then the Supreme Court held in Rasul that the detainees could have access to our courts to challenge their detention. Would my colleague from Arizona care to comment on the Rasul decision?

Mr. KYL. Where to even begin? The U.S. has been accused before in its history of imperialistic behavior, but I think that this is the first time ever that a portion of a sovereign nation has been annexed to the United States by the U.S. Supreme Court.

Rasul begins with a discussion of two cases that were irrelevant to the question before the court, Ahrens v. Clark and the Braden case. Ahrens had adopted a strict rule that district courts may only hear cases within their territorial jurisdiction. Braden then softened that rule for particular circumstances—for cases where a defendant is in prison in one state but under indictment in another, allowing the defendant to bring a habeas action to challenge the indictment in the latter state's courts. Neither of these cases has anything to do with enemy combatants.

From a discussion of these relatively mundane decisions, the Rasul majority adopts a rather stunning non-sequitir: that ''because Braden overruled the statutory predicate to Eisentrager's holding, Eisentrager plainly does not preclude the exercise of section 2241 jurisdiction over petitioners' claims.''

It could almost be a rule of construction that when a lawyer says ''plainly'' or ''clearly,'' he usually is identifying the weakest point in his argument. Braden is a case concerned more with the technical aspects of judicial administration than with core questions of the scope of the writ. Eisentrager is different. The Nazi soldiers denied access to the writ in that case did not simply file in the wrong forum—Alabama instead of Kentucky—or at the wrong phase of their sentences. Eisentrager denied review to the Nazi soldiers because they were Nazi soldiers in the custody of the U.S. military in occupied Germany. It is not a case about how we administer the writ of habeas corpus, but about the power and nature of the writ and who may employ it. I doubt that there was any member of the court who participated in Braden who believed that the court in that case was destroying the foundation of Eisentrager.

So according to section III of Rasul, Braden killed the ''statutory predicate'' for Eisentrager and that's that. No more territorial jurisdiction requirement for habeas courts. Apparently even the Rasul court itself was unwilling to buy this argument, however, because section IV of the opinion goes on to explain that Guantanamo Bay, Cuba is really part of the territory of the United States—something which section III just told us irrelevant and unnecessary to the court's decision.

But territorial jurisdiction does matter—a point that the court seems to concede by attempting to annex Guantanamo Bay to the United States. But Cuba is not the United States. Eisentrager should be restored to its rightful place as the precedent that governs litigation attempted by enemy combatants outside of our territory—even for the special case of Guantanamo Bay. Eisentrager was the law of the land for over 50 years, until Rasul carved a hole into it. Through this act, Congress patches that hole and restores Eisentrager's role as the governing standard. We do this not because, or not just because, Rasul doesn't make sense and is wrong. We do it because Eisentrager's reasoning is compelling, and the rule that is established wards off much mischief.

Let me quote two key passages from Eisentrager that explain why enemy combatants outside the United States should not have access to U.S. courts. As that court began by noting, there has been:

. . . no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Not only has this always been the law, but it should remain so. Eisentrager explains rather clearly and eloquently why we do not let enemy combatants sue our soldiers in our courts:

A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term ''habeas corpus.'' And though production of the prisoner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists, Walker v. Johnston, we have consistently adhered to and recognized the general rule. Ahrens v. Clark. To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Other authorities also have emphasized that the Anglo-American common law tradition includes no place for habeas petitions filed by enemy aliens in military custody outside our territory. Law Professor Peter Lushing, in an internet posting commenting on the Graham amendment shortly after it passed the Senate, put the matter quite colorfully: ''the guys in the powdered wigs would have flipped over the idea that habeas extends to foreigners we are in combat with who have been captured and are being held by us abroad.'' He concludes: ''the Rasul decision has extended habeas far beyond what anybody alive during the ratification of the Constitution would have envisioned.''

Former U.S. Attorney General William Barr testified on the subject of detainees in the war on terror before the Senate Judiciary Committee on June 15 of this year. His testimony made a considerable impact on members of the committee—it persuaded several of us that something needed to be done legislatively to correct the current situation. Here is what Attorney General Barr had to say about the history of habeas and detainees:

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant.

Attorney General Barr went on to note:

World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant.

The concerns that were expressed in the passage from Eisentrager that I quoted earlier also have been expressed by other, more recent commentators, with the present conflict against Islamic extremism in mind. For example, in a 2003 article in George Washington Law Review, law professor John C. Yoo notes the special importance of ''interrogating enemy combatants for information about coming attacks'' in this conflict, and concludes:

. . . de novo judicial review threatens to undermine the very effectiveness of the military effort against al-Qaeda. A habeas proceeding could become a forum for recalling commanders and intelligence operatives from the field into open court; disrupting overt and covert operations; revealing successful military tactics and methods; and forcing the military to shape its activities to the demands of the judicial process.

Similarly, Andrew McCarthy, a former federal prosecutor who led the case against Sheik Omar Abdel Rahman, offered a stinging criticism of Rasual the day after the Supreme Court issued its opinion. He stated that:

How can it conceivably be appropriate to impose on our soldiers the burdens of stopping to collect evidence and write incident reports in the middle of fighting a war? Of course they do a measure of that now—after all, it is much in their interest correctly to sort out whom to hold and whom to release. But, until now, that has certainly not been done with the rigor anticipation of litigation will doubtless produce. It is not enough to say, hopefully, that U.S. courts will be indulgent given what's involved. Empirically, judicial demands on governmental procedural compliance become steadily more demanding over time, and government naturally responds by being even more internally exacting to avoid problems. In no time flat, what was once thought a trifling inconvenience becomes a major expenditure—in this case one that will inevitably detract from the military mission which is the bedrock of our safety.

McCarthy also summarized why the Rasul decision is at war with the role and duties of the Federal judiciary in our constitutional framework:

In the Framers' ingenious construct, the courts of the United States are supposed to be a bulwark protecting members of the uniquely American community—i.e., citizens of the United States and those aliens who, by their lawful participation in our national life, have immersed themselves into the fabric of American society—from the excesses of an oppressive executive or a legislature insufficiently heedful of their fundamental rights. It is the institution that ensures the law and order a free people must have in order to thrive.

Nevertheless, as manifested in Rasul, yesterday's case involving claims of foreign enemy combatants captured on faraway battlefields and held by the military in Guantanamo Bay, Cuba—an installation outside the jurisdiction of any U.S. court—the judiciary is no longer a neutral arbiter there to ensure that Americans get a fair shake from their government and its laws. Instead, it is evolving, or morphing, into a sort of United Nations with teeth. It has seized the mantle of international arbiter, ensuring that the world—including that part of it energetically trying to kill Americans—has a forum in which to press its case against the United States.

McCarthy went on to conclude: ''Rasul is a dangerous decision. Congress should slam the door on al-Qaeda today.''

And again, former Attorney General Barr also commented on this same question—on the impracticality of applying judicial process and standards to questions of the detention of enemy combatants. Because of his authority and the force of his arguments, I quote from his June 15 testimony at length:

There appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in the zone of battle have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth Amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the Fifth Amendment does not have extra-territorial application to foreign persons outside the United States. As Justice Kennedy has observed, ''[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory.'' Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. And finally, the nature of the power being used against these individuals is not the domestic law enforcement power—we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws—rather, we are waging war against them as foreign enemies, a context in which the concept of Due Process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decision-making. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a ''neutral'' arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this—an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

These efforts flow from a fundamental error—confusion between two very distinct constitutional realms. In the domestic realm of law enforcement, the government's role is disciplinary—sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of ''the people.''

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or ''check'' on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national defense powers to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory—even at the cost of ''collateral damage'' that would be unacceptable in the domestic realm.

Attorney General Barr brought these concerns into relief with the following hypothetical example:

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens' Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Attorney General Barr goes on to consider the practical consequences of applying civilian due process concepts in the context of military detention of enemy combatants:

The imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual ''fault'' of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

Attorney General Barr also noted that ''Supreme Court's decision in Rasul was a statutory ruling, not a constitutional one.'' He went on to point out:

An important consequence follows: Congress remains free to restrict or even to eliminate entirely the ability of enemy aliens at Guantanamo Bay to file habeas petitions. Congress could consider enacting legislation that does so—either by creating special procedural rules for enemy alien detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from hauling military officials into court altogether.

Obviously, the Congress has taken the former Attorney General up on his suggestion, particularly the third variation of it.

I should also say a few words about military commissions. The Judiciary Committee also heard enlightening testimony on the history of these commissions. Former Attorney General Barr commented on them as follows:

Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. Shortly after the attacks of 9/11, the President established military commissions to address war crimes committed by members of al-Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military commissions.

As an aside, those disturbed by the tendency of some in the press and politics to take the side of the Guantanamo detainees—of those captured while at war with America—might find it interesting that the same phenomenon developed with regard to the Malmedy detainees. The Malmedy German soldiers were tried and convicted of massacring American POWs near the Belgian village of Malmedy during the Battle of the Bulge. This crime unquestionably occurred—the bodies of over 80 U.S. soldiers were recovered in a field, most of them shot in the head. Members of the German unit responsible for this crime later were captured and tried by a military commission. Over the years, these Nazi soldiers, at least some of whom unquestionably massacred American G.I.s, somehow managed to turn the tables on the U.S. military in the press and in political circles. Senator Joseph McCarthy took up their cause, as did other Senators. The most fanciful allegations of abuse made by these Nazi murderers were indulged by various prominent Americans, and the whole incident became a public relations embarrassment for the U.S. military. Eventually, this pressure campaign succeeded in winning the commutation of all death sentences given to the Malmedy killers, and all of the German soldiers involved—even their commander—were released from prison by the mid–1950s. For those who find it disturbing that the sympathies of the press (especially in Europe) and of various intellectuals have been misplaced on the side of the Guantanamo detainees, at least we can take comfort in the fact the perversions of truth and rank miscarriages of justice that have

resulted from such misplaced sympathy so far in this war pale in comparison to those that followed from Malmedy.

Perhaps first among those who would object to any sympathizing with the Guantanamo detainees would be Andrew McCarthy, the former Federal antiterror prosecutor. He has written often on this and other war-on-terror topics. I was pleased to see that shortly after the Graham/Kyl amendment first passed the Senate, he wrote a column for National Review Online lauding our efforts. It was titled ''Restoring Law and Order,'' and McCarthy's only complaint was that ''it has taken our national legislature nearly a year-and-a-half—during all of which we have been at war—to stir itself to address this serious national-security problem.'' So you can imagine my disappointment when, just two days later, Mr. McCarthy posted another column commenting on the final Senate language, which include some compromises to ensure bipartisan support. This column was titled ''Snatching Defeat from the Jaws of Victory.'' Some of its language I won't recite here. But its specific complaints bear scrutiny. Mr. McCarthy alleged that ''the senators resolved Tuesday that the ultimate decision about who is properly considered an 'enemy combatant,' should rest with federal judges, not our military commanders.'' As he characterized the final Senate language, ''a panel of robed lawyers will second-guess the determination of [our soldiers'] commanders on scene that certain captives warranted detention—that holding them would be beneficial to the war effort.'' Similarly, with regard to military commissions, Mr. McCarthy complained that ''everything that happens in the commission would be reviewed by judges if this measure passes.''

I do not think that these words are an accurate characterization of the Senate-passed language. I think that Mr. McCarthy probably relied on inaccurate characterizations of the language that were published in the press at the time rather than on the language itself. Nevertheless, Mr. McCarthy's complaints did cause me and others to take another look at the language, to make sure that it does what we intended.

Limited judicial review of the decisions of the CSRTs and military commissions is authorized by paragraphs 2 and 3 of subsection 1405(e) of the conference report. These paragraphs authorize the same two narrow judicial inquiries into the ''status determinations'' and ''final decisions'' of the CSRTs and military commissions. The difference in language here is not intended to connote any substantive difference in the scope of review—it simply attempts to accurately characterize the work of each entity: ''making status determinations'' for the CSRTs, and ''reaching final decisions'' for the military commissions.

The review authorized by each of these paragraphs goes only to the following questions: did the CSRTs and commissions use the standards and procedures identified by the Secretary of Defense, and is the use of these systems to either continue the detention of enemy combatants or try them for war crimes consistent with the Constitution and Federal law? The first inquiry I think is straightforward: did the military follow its own rules? This inquiry does not ask whether the military reached the correct result by applying its rules, or even whether those rules were properly applied to the facts. The inquiry is simply whether the right rule was employed.

As to the second inquiry, here the language has been further modified in order to make clear the narrow scope of the inquiry. The original Senate language spoke of whether ''subjecting'' an enemy combatant to the CSRT or commission systems was constitutional and legal. This formulation was somewhat illogical in that the detainee would not complain of the fact that he was forced to go through a CSRT—rather, he would want to challenge its adequacy as a means for justifying his continued detention. And in any event, our concern was to make clear that this language in no way invites a reevaluation of the correctness of the military's decision, even under a deferential standard of review. Nor does it invite an as-applied challenge. All that this language asks is whether using these systems is good enough for the ends that they serve—to justify continued detention or to try an enemy combatant for war crimes. The only thing that this provision authorizes is, in effect, a facial challenge. In fact, we anticipate that once the District of Columbia Circuit decides these questions in one case, at least so long as military orders do not substantially change, that decision will operate as circuit precedent in all future cases, with no need to relitigate this second inquiry in the future. In effect, the second inquiry—into the constitutionality and lawfulness of the use of CSRTs and commissions—need only be decided once by the court.

It bears quoting some of the thinking that undergirds the establishment of these review standards. Attorney General Barr, in his June 5 testimony before the Judiciary Committee, describes the philosophy and approach that paragraph 2's scope of review for CSRTs is designed to reflect:

> It seems to me that the kinds of military decisions at issue here—namely, what and who poses a threat to our military operations—are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that the office holds the final authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.
>
> I am not speaking here of ''deference'' to Presidential decisions. In some contexts, courts are fond of saying that they ''owe deference'' to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference—the point here is that the ultimate substantive decision rests with the President and that courts have no authority to substitute their judgments for that of the President.

And the thinking that underlies paragraph 3's scope of review for military-commission decisions is well articulated in Johnson v. Eisentrager:

> It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the Yamashita case, ''If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.'' ''We consider here only the lawful power of the commission to try the petitioner for the offense charged.

There is another matter that I should mention before I yield the floor to my colleague from South Carolina. Some have asked why the jurisdiction-removing language in the bill is limited to Guantanamo. The answer is that Rasul is only about Guantanamo. Although the opinion contains the discussion of Ahrens and Braden that undercuts the ''territorial-jurisdiction'' rule for habeas courts, in the end the decision appears to be based on the unique status of the naval station at Guantanamo Bay—the permanent nature of the lease, for example, which can only be terminated by the United States. Justice Kennedy adopted a similar focus in his concurring opinion. I believe that Justice Kennedy's concurrence goes so far as to declare that Guantanamo is in practical respects a U.S. territory.

Some have raised the concern that the logic of Rasul will be extended to U.S. military and intelligence detention facilities in Iraq or Afghanistan. I think that such an extension would be very foolish and I do not think that the court will go there. I do not think that the Supreme Court is going to declare parts of Afghanistan or Iraq to be the territory of the United States. If the court does do so, we can of course legislatively overrule it, as we legislatively overrule Rasul today. But I do not think that it is either necessary, or respectful of the court's capacity for common sense, to preemptively overrule such an outlandish hypothetical decision. Does the Senator from South Carolina agree?

Mr. GRAHAM. Yes, my friend from Arizona is correct, our language applies only to Guantanamo just because

we understand that the Supreme Court only extended the jurisdiction of the courts over the detainees held at Guantanamo. And since the Rasul decision was based on the habeas statute in the U.S. Code, I am very comfortable amending that statute as a proper congressional response to the Court's decision.

As I stated repeatedly to a number of my colleagues, we did not want to deprive the courts of jurisdiction to hear cases filed on behalf of detainees in Iraq because we are confident that, as the law stands now, those cases are already barred by previous Supreme Court decisions, which the Rasul decision left in place.

We should always be careful when dealing with our co-equal branches. Just as we do not appreciate it when they stray into our areas of constitutional responsibility, we should always be willing to refrain from straying into theirs unnecessarily. As I read the Rasul decision, these other cases from other parts of the world are still subject to the Eisentrager opinion and will not be considered by U.S. courts.

And so, our language is limited to Guantanamo. To my friends who counseled that we should extend our jurisdiction modification to those cases being filed on behalf of Iraqis held in accordance with the Geneva Convention, I would just counsel them to be patient. I cannot imagine the Court extending its jurisdiction halfway around the world to involve what is almost exclusively an executive branch function. However, should that become necessary, I am perfectly willing to modify our courts' jurisdiction again to ensure that does not happen. But again, in truth, especially after our very robust action here today, I cannot even conceive of such a decision by the Supreme Court.

Mr. KYL. Well, that is what I thought before Rasul was decided. But we can cross that bridge if we get to it.

Mr. GRAHAM. Mr. President, I would also like my esteemed colleague from Arizona, Senator KYL, to address the misunderstandings that seem to have made their way into the press. For instance, when I returned from Iraq this morning, I was surprised to see the New York Times editorial page making some fundamental mistakes about what our legislation does.

Mr. President, I would also request unanimous consent to have the New York Times editorial entitled Ban Torture. Period. from December 16, 2005 entered in the RECORD.

The first sentence reads, ''It should have been unmitigated good news when President Bush finally announced yesterday that he would back Senator JOHN MCCAIN's proposal to ban torture and ''cruel, inhuman or degrading'' treatment at United States prison camps. Nothing should be more obvious for an American president than to support a ban on torture.'' I agree, nothing should be more obvious. And I'd like to applaud the New York Times for finally endorsing the actions President Reagan took when we signed the Convention Against Torture on April 18, 1988, and the Senate ratified the Convention on October 21, 1994.

But since they appear to be laboring under some confusion, I would like to clarify how and when our antitorture statutes apply. First, torture has been illegal for quite some time. Indeed, Section 2340A of Title 18 of the United States Code specifically provides for the prosecution of people who torture overseas. And most of the techniques of torture, beatings, improper imprisonment, and threats have long been part of the criminal code of the United States.

I strongly supported Senator MCCAIN'S amendment each and every time it came up. I am extremely pleased it passed. But, make no mistake, it does not make torture illegal. Torture has long been illegal. What the McCain language does is make a very clear statement that we will treat people humanely while we have them in our custody. The McCain amendment is a very clear policy statement that is in accord with the best of American tradition. But it does not ban torture. Accordingly, the Graham-Levin-Kyl provisions do not equivocate in any way regarding torture. The Times editors, regrettably, for I appreciate the place the Times holds in our public discourse, do not appear to understand what they are talking about.

I would like to address one other statement the Times makes. They state, and I quote, that ''What is at stake here, and so harmful to America's reputation, is the routine mistreatment of prisoners swept up in the so-called war on terror.'' Now I take great exception to this baseless smear of our soldiers and marines. It is said off-handedly, almost as if everyone takes it for granted that the fine men and women of our armed services routinely mistreat our prisoners.

Well I will tell you, I for one don't take it for granted that the fine people who are putting their lives on the line to protect our Nation routinely mistreat the prisoners in their care. I believe they follow the orders that their superiors give them, orders based on such policy statements as Senator MCCAIN'S or the Army Field Manual, and they follow them to the best of their ability.

Now, are there going to be bad apples? As a former JAG prosecutor and defense counsel, I can tell you affirmatively, yes, there will be. And they will be arrested, tried, convicted, and will serve long sentences. Those few individuals who do not live up to the high standards of the vast majority of our honorable service members, will be held accountable for their actions.

Our troops do not deserve such a slander, and I call on the New York Times to take back the vile assertion they have made against the people who exemplify the best our Nation has to offer.

Mr. KYL. Mr. President, I see that we are nearing the end of our allotted time. If I could quickly address a few other minor issues and summarize briefly. It is important to note that the limited judicial review authorized by paragraphs 2 and 3 of subsection (e) are not habeas-corpus review. It is a limited judicial review of its own nature. All habeas actions are terminated by this bill. I hope that this change will also put to rest any arguments that extending habeas to prisoners also extends to them some type of substantive rights. I do not believe that supposition is correct because habeas is a vehicle for asserting rights, not a source of rights. The fact that an individual has access to habeas does not mean that he has any of the rights that he asserts. But in any event, because this bill leaves no habeas in place, that debate need not be rejoined.

Also, some have suggested that by vesting exclusive jurisdiction in the DC circuit for the paragraph 2 and 3 appeals, this bill bars even Supreme Court appellate review. That was not the drafters' intention, nor do I believe that it is a correct reading of the legislative language. Supreme Court review is implicit, or rather, authorized elsewhere in statute, for all judicial decisions. It is rarely mentioned expressly. In fact, when it is mentioned, it is sometimes to preempt Supreme Court review. Far example, the limit on successive federal habeas petitions for state prisoners in section 2244 bars petitions for certiorari following a three-judge panel's decision on a successive-petition application. The clear implication of these provisions is that Supreme Court review is implicitly allowed except where expressly barred, and thus since it is not barred here, it is allowed.

UNIFORM STANDARDS OF INTERROGATION FOR DETAINEES

Mr. MCCAIN. I would like to thank the chairman and the ranking member for their untiring work to bring the Defense authorization bill to closure. In doing so, Congress takes a major step in ensuring that America stays true to its fundamental values. By establishing uniform standards for the interrogation of Department of Defense detainees, and by ensuring that the United States will not subject any individual to cruel, inhuman or degrading treatment or punishment, we are better able to wage and win the war on terror. This would not have been possible without the work of the chairman, the ranking member, and other members of this committee, including most notably the Senator from South Carolina.

I would also like to thank the President and the national security advisor for their efforts in resolving the difficult issues underlying the amendment. In reaching agreement, we make sure that the world knows that the United States does not—and by law cannot engage in torture or cruel, inhuman or degrading treatment. During our talks, the administration raised legitimate concerns about legal claims

facing civilian interrogators. Based on these concerns, the bill includes language that will allow accused civilian interrogators—like military interrogators—a robust defense if a person of ordinary sense and understanding would have believed he was following a lawful directive. It further includes language providing legal counsel to interrogators. These provisions are modeled on provisions drawn from the Uniform Code of Military Justice.

With the detainee treatment provisions, Congress has clearly spoken that the prohibition against torture and other cruel, inhuman or degrading treatment should be enforced and that anyone engaging in or authorizing such conduct, whether at home or overseas, is violating the law. Sections 1402 and 1403 of Title XIV of this bill do not create a new private right ot action. At the same time, these provisions do not eliminate or diminish any private right of action otherwise available. It is our intent not to disable that in any way.

Mr. WARNER. To have worked from the beginning with Senator MCCAIN then with Senators GRAHAM, LEVIN and KYL was a privilege, and, to achieve legislation which was needed for all our Nation's citizens was a humble, but very fulfilling, experience. We realized both the necessity for action in this area and the vital importance of dealing with the increasing flow of litigation involving Guantanamo detainees.

This legislative history should document that the McCain provisions, sections 1402 and 1403 of the bill, do not create a private right of action. Title XIV of the bill does provide a new affirmative defense that may be applied to civil actions brought under other statutes and to criminal prosecutions. This is essential to give potential defendants fair rights to defend themselves. Further, language was included affording the same right to counsel and to payment of litigation costs at Government expense for non-military personnel, in both foreign and domestic courts, that is presently extended to members of the Armed Forces.

Mr. LEVIN. I am pleased that the conference report contains the full text of the McCain amendment on torture, without change. This language firmly establishes in law that the United States will not subject any individual in our custody, regardless of nationality or physical location, to cruel, inhuman, or degrading treatment or punishment. The amendment provides a single standard—for ''cruel, inhuman, or degrading treatment or punishment''—without regard to what agency holds a detainee, what the nationality of the detainee is, or where the detainee is held.

It has never been my understanding that the McCain amendment would, by itself, create a private right of action. I do not believe that the amendment was intended either to create such a private right of action, or to eliminate—or undercut any private right of action such as a claim under the Alien Tort Statute—that is otherwise available to an alien detainee. Rather, the McCain amendment would establish a legal standard applicable to any criminal prosecution or any private right of action that is otherwise available under law. That would not be changed in any way by the affirmative defense added in the new section.

Mr. GRAHAM. I was pleased to support this legislation and work toward its enactment from the beginning. Under section 1402, our troops now have one standard—the Army Field Manual—for their interrogations. In section 1403, we close the loophole in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As National Security Advisor Stephen Hadley said, ''those standards, as a technical, legal matter, did not apply abroad. And that is what Senator MCCAIN, in the second section of his legislation, wanted to address—wanted to make clear that those would apply abroad. We applied them abroad as a matter of policy; he wanted to make sure they applied as a matter of law. And when this legislation is adopted, it will.'' I agree that these sections do not create a new private right of action, but that they are binding on the executive and may be applicable to actions brought under other statutes.

Mr. KENNEDY. Mr. President, I ask unanimous consent to have a letter from Mr. Ed Tong printed in the RECORD for the consideration of the fiscal year 2006 Defense Authorization Act. The letter reflects the view of a supporter of the minority small business contracting program, which is reauthorized in this bill.

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

ASIAN, INC.
San Francisco, CA, December 19, 2005.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, DC.

DEAR SENATOR KENNEDY: I write to urge you to support the reauthorization of the Department of Defense 1207 program. The program has been repeatedly reauthorized since its original enactment, and it remains necessary today. Minorities have historically been disadvantaged with regard to the awarding of federal, state and municipal contracts. The impact of such discrimination and exclusion has been especially felt in Northern California—and specifically within the San Francisco Bay area.

The 1992 Minority Business Census of the U.S. Census Bureau reported that San Francisco has over 16,353 minority-owned businesses operating in the area. That statistic makes San Francisco the fourth largest business locale in the country for minority-owned businesses. Despite the large number of minority-owned business, discriminatory and harassing treatment is commonly experienced.

Specifically, Asian American construction firms in San Francisco, have encountered discriminatory and harassing treatment at the hands of the craft unions and city government through the San Francisco's Office of Labor Standards Enforcement (OLSE). OLSE was created in 2000, to enforce the prevailing wages of crafts set by the state's Department of Industrial Relations. In fact, OLSE has differentially chosen to conduct its audits and impose higher penalties against many of San Francisco's minority craft businesses. At its inception of enforcement, the OLSE specifically targeted Chinese businesses. The statistics at that time showed that Chinese businesses had around a 5% chance of obtaining a prime contract they bid on, but a 50% probability of their project being inspected and audited by the OLSE. At present, OLSE still disproportionately targets minority businesses, whether they are union or non-unionized construction companies. Left with no avenue through which to remedy its grievances, many Asian American businesses have turned to ASIAN, Inc. for assistance

In my role as ASIAN, Inc.'s Program Manager in our Business & Economic Development Division, I have had personal experience in speaking with Asian American businesses dealing with discriminatory treatment. ASIAN, Inc. is a nonprofit technical assistance and research organization that works to strengthen the infrastructure of Asian American communities in Northern California and to assist in their physical, economic, and social development. ASIAN, Inc. has been in operation for 34 years. Over the years, the organization has helped over 500 disadvantaged businesses obtain business loans through partnerships with the City of San Francisco's Office of Community Development, the State of California, the U.S. Department of Commerce Minority Business Development Agency, the U.S. Small Business Administration, and many banks and other private lenders. Still, discrimination continues to pose barriers for many of the businesses with which we work

Because ASIAN, Inc.'s role has been to provide strategic information and technical assistance in order to promote the ability of Asian Americans to compete in mainstream society—including achieving success for their businesses and participating in public decision-making—the organization has been in a position to witness the experiences of Asian American businesses in the San Francisco Bay Area.

Notably, several Asian American businesses came to ASIAN, Inc. for assistance after the OLSE imposed significant penalties upon their businesses, allowed those businesses no opportunity to rectify any alleged violations prior to making a finding, or to present their sides of the story. Initially there was no appeals process built into the Ordinance. To the presidents and owners of these businesses, it felt as if the OLSE was targeting them because they were minority owned and because of the ongoing disputes between Asian businesses and the trade unions in the area. The targeting of Asian American firms by OLSE for inspection and audits made obtaining contracts difficult when it became known that a business was being inspected by the OLSE.

ASIAN, Inc.'s work with the OLSE is by no means unique but rather signifies merely one of many types of discrimination experienced by the Asian American businesses that contact our organization. In fact, the OLSE situation is quite emblematic of the larger underlying problems that minority businesses face. Discrimination is not limited to the local or municipal level. Asian American businesses have experienced discrimination in the awarding of local agency contracts, the issuance of bonds and insurance policies, and the provision of necessary materials and material quotes by suppliers.

For example, I personally have heard of complaints/testimonials from minority businesses about:

The use of racial slurs or epithets against minority owners or employees, One Asian

firm owner used workers of Mexican ancestry on a job, and other white subcontractors challenged him and asked ''Why are your illegal workers on my job site.'' Also, an institution's administrator might use the phrase ''Your kind are the majority now.'' For another Asian American owner, when his workers took items from the trash bins he was told to stop his workers from doing so. As ''You may be a nice guy, but you are not one of us.''

The exclusion of minority businesses from informal business networks such as the Associated General Contractors. Or not invited to go golfing with them, even when the other group was looking for a foursome.

The refusal to use minority businesses on private jobs even when they are used on government jobs where minority business programs are in place. For example, Nibbi Brothers Construction will use numerous minority firms when doing public works projects (and the locale's program encourages minority participation) but not ask them to bid on their private works projects. This was also true for a general contractor (SJ Amoroso) that uses minority firms in their public works jobs but one white subcontractor almost exclusively for their roofing work, in their private works projects.

The existence of the old boys network to justify doing business with one's own cronies. For example, with Asian firms that have become prime contractors, white subcontractors often won't bid for the subcontracting work, or will hedge their bids and draw out the bidding process in deciding whether they want to work with a minority prime contractor

The non-enforcement of nondiscrimination requirements and disparate treatment by government inspectors. For example, when as the prime contractor and your project is audited, all certified payrolls are asked of your minority subs, but your white sub will not be asked to provide a certified payroll. In another case with an institution in the City, the inspector would not approve the work, and make additional demands that were not put it in writing. For example, he demand that a electrical panel be explosion proof though it was not required by the specs. He also demanded that materials be UL (Underwriters Laboratories) listed although the specs did not require it. Also, when the Asian prime contractor reported the error of his white subcontractor to the engineer, he was told that this was not acceptable. However, when the white subcontractor reported his error to the white engineer the error was allowed to stand without correction.

The bundling of contracts which minority businesses could bid for if not for bundling. For example, when work is required for a number of school sites, a number of 3–4 schools may be bundled even when the type of work in each school is different. This will bring the total project and bonding requirements to $10 million dollar when without bundling the individual projects would cost about $2–3 million dollars.

The tendency to pay minority contractors slower or not at all compared to white contractors. For example, San Francisco city departments and institutions have a poor reputation for paying in a timely manner and so the cumulative debt on a number of projects/contracts owed to Asian businesses has been in excess of $1 million dollars.

The provision of different quotes from suppliers to companies depending upon the race of the business owner, or to provide those supplies at an exorbitant rate to a minority contractor.

The refusal to provide higher capacity bonds.

Our nation's small businesses are the backbone of this country's economy and the obstacles that impede the successes of U.S. businesses have enormous impact on the local economies these businesses support as well as the nation at large. This is especially true for minority-owned businesses that not only contribute to the country's economic base but have also traditionally provided jobs for minority youth and adults in ways that majority-owned business have not. As such, removing obstacles facing minority businesses is critical not only for our economy but for our nation's minority youth.

Minority contractors have a right to expect unbiased treatment in the awarding of contracts. The 1207 Program is a valuable means by which the federal government demonstrates fairness and equity in the area of government contracts. It is vitally important that the federal government recognizes and rectifies some of the problems faced by minority businesses across the country. The government's commitment to equality in the economic marketplace is an ongoing responsibility of our government, and the reauthorization of 1207 not only is in keeping with the spirit of that commitment but provides leadership by example to local government, banks, customers and suppliers that interact with minority-owned businesses.

Respectfully submitted,

EDMUND Y. TONG,
Program Manager, Business & Economic Development Division.

Mrs. CLINTON. Mr. President, the Senate is considering today the Department of Defense authorization conference report for the 2006 fiscal year. As a member of the Senate Armed Services Committee, I have attended numerous hearings and participated in the markup of this legislation. And I want to commend the Chairman of the Senate Armed Services Committee, Senator WARNER, and the ranking member, Senator LEVIN, for the serious, bipartisan approach they took in preparing the Senate version of the bill.

The DOD authorization bill is critically important, particularly with our servicemen and women are serving bravely in Iraq, Afghanistan and around the world. We owe it to our men and women in uniform to do everything we can to support them.

While what has emerged from conference is not perfect, the bill contains a wealth of positive provisions in keeping with the responsibility of Congress to our men and women in uniform.

When we first considered the DOD authorization bill in July, the Senate accepted an amendment Senator GRAHAM and I offered to make Tricare available to all National Guard members and reservists during the House-Senate conference, we reached a compromise which will offer great opportunities for Guard members and reservists to join the Tricare Program.

At at time when approximately 40 percent of the men and women serving in Iraq are members of the National Guard and Reserve, and as Guard members and reservists are a serving in a new and expanding role in the global war on terror, we ought to do all we can to ensure that these men and women have the services and support they need and deserve. This bill marks further progress in this effort, increasing access to health benefits for our National Guard and Reserve and their families in New York and around the country. Providing the Guard and Reserves, as well as their families, with adequate support and benefits is the least that a grateful nation can do. Under the provision, all members of the Selected Reserve are eligible to enroll in the military health care program.The premiums are based on categories of eligibility:

Category 1: Members of the Selected Reserve who are called to active duty qualify for TRICARE Reserve Select, TRS. Under this program, established last year, a reservist would accumulate 1 year of TRS coverage for every 90 days of Active-Duty service. Monthly premiums during the years of accumulated eligibility are only 28 percent of the program cost. The Government picks up the remaining 72 percent. As has always been the case, coverage is free of charge while on active duty. This bill now permits accumulation of earned periods of coverage for frequently deployed personnel. In addition, it authorizes 6 months of transitional coverage for family members following the death of the Reserve member, if the member dies while in an inactive status.

Category 2: Members of the Selected Reserve who are not called to active duty and who otherwise do not qualify for health insurance due to unemployment or lack of employer-provided coverage are eligible to enroll in TRICARE for a 50-percent cost-sharing premium. The Government will pay the remaining 50-percent.

Category 3: Members of the Selected Reserve who do not fit into either of the above categories but would like to participate in TRICARE are eligible to do so for an 85-percent cost share. Employers are allowed and encouraged to contribute to the reservist's share. The Government contributes 15 percent of the costs.

This compromise is an important step forward in improving health care access for our Nation's guardsmen and reservists.

It is important to note as well that this expansion was the fruit of a bipartisan effort by Senator GRAHAM and myself, along with my colleagues Senator LEAHY and Senator DEWINE.

The conference report also includes another provision I offered, this one with Senator COLLINS, to improve financial education for our soldiers. It is a problem that has plagued military service men and women for years: a lack of general knowledge about the insurance and other financial services available to them.

This provision instructs the Secretary of Defense to carry out a comprehensive education program for military members regarding public and private financial services, including life insurance and the marketing practices of these services, available to them. This education will be institutionalized in initial and recurring training for

members of the military. This is important so that we don't just make an instantaneous improvement, but a truly lasting benefit to members of the military.

The legislation also requires that counseling services on these issues be made available, upon request, to members and their spouses. It is very important to include the spouses in this program because we all know that investment decisions should be made as a family. Too many times, a military spouse has to make these decisions alone, while a husband or wife is deployed.

This amendment requires that during counseling of members or spouses regarding life insurance, counselors must include information on the availability of Servicemembers' Group Life Insurance, SGLI, as well as other available products.

I am happy that my fellow Senators support this legislation and proud that the amendment was adopted in conference.

The legislation also includes a provision which will ensure the availability of special pay for members during rehabilitation from wounds, injuries, and illnesses incurred in a combat zone. Earlier this year, I learned of the story of Army SPC Jeffrey Loria, who was encountering pay problems while recovering at Walter Reed Army Medical Center. My inquiry to the Army in this matter corrected Specialist Loria's problems and also led to the discovery of pay problems for at least 129 other soldiers. I continued to follow up on the plight of wounded soldiers when I questioned each of the service secretaries about this topic in early March 2005, asking if they would support efforts to ensure that wounded Guard members and reservists did not lose their combat pay allowance while in a military hospital. Their unanimous answer was yes. I am proud to see the provision incorporated into the bill.

In addition, I am pleased that the House and Senate have agreed to provide hundreds of members of the National Guard who served at Ground Zero after the terrorist attacks the full Federal retirement credit for their service that they deserve. Many of the soldiers who served at Ground Zero, often for extended periods, were not officially put on Federal active duty and so did not receive Federal military retirement credit. I was proud to fight for this legislation as a House-Senate conferee, and I want to thank Congresswoman MALONEY and Congressman KING for their hard work to see the provision through the House of Representatives. I applaud Congress for accepting our arguments for those brave men and women of the National Guard who gave their all after the September 11 attacks and absolutely deserve this credit.

I am also glad to see that the final conference report includes no language to restrict the role that women can play in our Armed Forces. Women have a long history of proud service in our Armed Forces, and more than 200,000 women currently serve, making up approximately 17 percent of the total force. Thousands of women are currently serving bravely in Iraq, Afghanistan, and elsewhere. During my own visits to Iraq—as I am sure that many of my colleagues who have also visited Iraq can also attest—I witnessed women performing a wide range of tasks in a dangerous environment.

Our soldiers, both men and women, volunteered to serve their Nation. They are performing magnificently. There should be no change to existing policies that would decrease the roles or positions available to women in the Armed Forces. Earlier this year, I introduced, along with several of my colleagues, a sense-of-the Senate resolution stating that there should be no change to existing laws, policies, or regulations that would decrease the roles or positions available to women in the Armed forces.

Finally, I want to highlight several other provisions in the legislation that honor the commitment of this Congress to our men and women in uniform. The final bill includes a 3.1-percent pay raise for all military personnel as well as increases to the maximum amount of assignment incentive pay and hardship duty pay that our servicemen and servicewomen receive. The bill also calls for an increase of $60 million for childcare and family assistance services to support Active-Duty and Reserve military families.

Also included were measures to bolster the support and gratitude our Nation shows for the families of our men and women in uniform who have lost their lives in service to our country. The bill increases the survivor benefits to $100,000 for all Active Duty military decedents; payments would be retroactive, to include all those lost since the commencement of Operation Enduring Freedom. In addition, the conference report increases TRICARE benefits for the surviving children of those who have lost their lives while on active duty and calls for the establishment of a uniform policy on casualty assistance to improve the services provided to survivors and next of kin.

I am proud to support these provisions and proud to do all I can for these families.

Despite the positive sections of the conference report, many of which I have outlined above, there are also portions of the authorization bill that are deeply troubling. I fear that included in a bill that does so much to support our men and women in uniform are provisions that might also do a disservice to these brave Americans.

One in particular is the Graham-Levin-Kyl amendment, included in the conference report, governing the treatment of detainees at Guantanamo Bay.

Like all of my colleagues, I am deeply troubled by the circumstances that have opened our Federal courts to enemy combatants. Senator GRAHAM is correct that the present level of accessibility to our courts by individuals who would do us harm is unprecedented in our Nation's history.

However, the seeds of this situation were sown when the President chose our course for the war against terror. Rather than treating our detainees in accordance with the governing principles of military engagement, he chose to institute policies that demonstrate disrespect for the rule of law and have resulted in lowering our country's moral standing in the world. Had the President chosen instead to respect international conventions that provide due process protections, we would not be facing the unprecedented problem of having to make our courts open to our enemies.

I agree that this is an area long overdue for reform. Although it left much to be desired, I voted in favor of the Graham-Levin-Kyl amendment in its original form because it was an improvement over a harsh measure that would have eliminated almost entirely a detainee's ability to challenge his or her detention. In conference, however, House negotiators once again undermined much of the thoughtful deliberation that went into crafting the Graham-Levin-Kyl compromise, stripping out important provisions that would have prohibited the admission of evidence obtained through ''undue coercion'' and further limiting legal recourse available to detainees.

We must work toward a system that corrects the missteps made by the President and adopt a well-thought-out set of procedures that respects the rule of law and restores our Nation to its proper standing in the world. The system outlined by the Graham-Levin-Kyl amendment as provided in the DOD Authorization conference report falls short of this measure.

The Defense authorization conference report contains a great deal that we in this body can look to with pride. That is why I support the bill as a whole and why I voted in favor of it. We face real challenges and threats as a nation, and our men and women in uniform are, every single day, serving with courage on the front lines in defense of our values and our way of life. I do not vote without concern, however, in light of a few troubling provisions which I fear do not serve the interests of our country or our troops.

Mr. KERRY. Mr. President, the fiscal year 2006 Defense Authorization Act contains a number of provisions that take an important step towards the Military Family Bill of Rights I believe we need.

Among the final provisions, the legislation authorizes an increase of the death gratuity to $100,000 for all active-duty service members. I was pleased to originally offer this provision as an amendment to the fiscal year 2005 supplemental appropriations act earlier this year. I was happy to work with Senator LEVIN on this bill to bring this provision into reality.

I offered another amendment on the supplemental last spring to increase to 1 year the length of time surviving families of service members may reside in Government housing or receive the basic allowance for housing. It was signed into law then, but because it was part of the supplemental, it expired with the end of the fiscal year. The fiscal year 2006 National Defense Authorization Act makes this extension permanent.

I am also pleased that the final bill includes authorization for increased funding for Project Sheriff—an initiative of the Office of Force Transformation to provide our soldiers and marines with a full spectrum of lethal and nonlethal weapons when engaging enemies in an urban environment.

The Defense authorization bill includes other important provisions for our country: a 3.1-percent pay raise for military personnel; increased Army and Marine Corps end strength, and an expansion of TRICARE benefits for members of the Selected Reserve and their families.

Taken together, these provisions are important milestones. They are further testament of this Congress's and this country's determination to maintain the best trained, best equipped, best prepared, and most capable military on earth. It is also a recognition of the important contributions made by military families—families who give so much to this country.

When I voted for this legislation on the Senate floor, one essential aspect was that the limitations placed on the review of habeas corpus claims of Guantanamo Bay detainees were prospective only. I am pleased to say that the bill's effective date was not altered in conference. As a result, as the Supreme Court held in Lindh v. Murphy, it still employs the normal rule that our laws operate prospectively.

Mr. FEINGOLD. Mr. President, I am pleased that the Senate was finally able to debate and pass the Defense Authorization Act. It is indefensible that this important legislation was put on the backburner for so long; held back until the eleventh hour by the majority for various special interests and political reasons. The American people and the troops deserve better than that.

I am pleased that this bill includes important provisions for our men and women in uniform and their families. I am very pleased that we were able to include a 3.1 percent pay raise for all of our men and women in uniform as well as a host of bonus and incentive pays to help the military in its recruiting and retention efforts. The conference report also contains an important provision that permanently increases the death gratuity for those killed on active duty. Although the Senate's strong bipartisan efforts to make TRICARE available for the Guard and Reserve were again watered down in the conference report, the final bill still includes significant improvements in TRICARE access for all of our citizen-soldiers. These are just a few examples of the important provisions contained in this bill.

I am proud that the Congress has finally, definitively, sent such a strong message to the administration about the treatment of detainees by enacting the amendment of the senior Senator from Arizona. The lack of a clear policy regarding the treatment of detainees has been confusing and counterproductive. It has left our men and women in uniform in the lurch with no clear direction about what is and is not permissible. This failure on the part of the administration has sullied our reputation as a Nation, and hurt our efforts to promote democracy and human rights in the Arab and Muslim worlds. I have been proud to support Senator MCCAIN's amendment on interrogation policy because it should help to bring back some accountability to the process and restore our great Nation's reputation as the world's leading advocate for human rights.

Although I voted for the Department of Defense authorization bill, I am disappointed with the mixed messages that the Senate continues to send to the administration and the country on issues related to the detainees held at Guantanamo Bay. Even as we enact the important McCain amendment on torture, the conference report also includes the Graham amendment, which remains deeply troubling because of the restrictions it places on judicial review of detainees held at Guantanamo. However, it is important to note that the provision is limited in critical ways. The provision on judicial review of military commissions covers only ''final decisions'' of military commissions, and only governs challenges brought under that provision. In addition, the language in section 1405(e)(2) that prohibits ''any other action against the United States'' applies only to suits brought relating to an ''aspect of detention by the Department of Defense.'' Therefore, it is my understanding that this provision will not affect the ongoing litigation in Hamdan v. Rumsfeld before the Supreme Court because that case involves a challenge to trial by military commission, not to an aspect of a detention, and of course was not brought under this provision. Furthermore, it is important to make clear that this provision should not be read to endorse the current system of trial by military commission for those at Guantanamo Bay. This provision reflects, but certainly does not endorse, the existing status of those military commissions, which is that they are currently legal under a decision of the DC Circuit. However, the Supreme Court has not yet addressed the legality of such military commissions, and this amendment should not be read as any indication that Congress is weighing in on that issue. While I would have strongly preferred that this amendment not be included in the conference report, I think it is important to note these limitations on its practical effect.

I am pleased that the conference report contained a number of provisions I authored, including my amendment to enhance and strengthen the transition services that are provided to our military personnel by making a number of improvements to the existing transition and postdeployment/predischarge health assessment programs. The conference report also includes my amendment that corrects a flaw in the law that unintentionally restricted the number of families of injured servicemembers who qualify for travel assistance. The change in the law now ensures that families of injured servicemembers evacuated to a U.S. hospital get at least one trip paid for so that these families can quickly reunite and begin recovering from the trauma they have experienced.

The military's high operational tempo over the last 4 years led it to keep thousands of troops beyond their contractual separation dates through a policy often referred to as ''stop-loss.'' The Pentagon did a poor job of clearly disclosing to volunteers that they could be stop-lossed and so many who thought they had completed their military service found themselves deployed to a combat zone. It is not difficult to understand how this policy turned upside down the lives of the impacted troops and their families. The conference report includes an amendment I authored requiring the Department of Defense to report on the steps it is taking to clearly communicate the stop-loss policy to potential enlistees and re-enlistees. I hope that, by pushing the Department to report on the actions it is taken to ensure that potential recruits know the terms of their service, the Department will take quick action to address this problem.

Despite the unprecedented levels of defense spending, the Government Accountability Office recently found that the Department of Defense is not only doing a poor job in replacing equipment that is being rapidly worn out but is not even tracking its equipment needs. Military readiness has suffered as a result. I authored an amendment retained in the conference report requiring DOD to submit a comprehensive report in conjunction with the President's annual budget request that details DOD's program strategies and funding plans to ensure that DOD's budget decisions address these equipment deficiencies. Such a report will make DOD's equipment needs more transparent and will allow Congress to provide more effective oversight and hold the Department accountable.

I am disappointed that the conference report did not maintain the bipartisan amendment I authored establishing the Civilian Linguist Reserve Corps, CLRC, pilot project. Our Government is in desperate need of people with critical language skills and the CLRC model, which is strongly supported by the Defense Department, has

the potential of addressing this need in a fiscally responsible manner. It is unfortunate that the conferees chose to go another route.

In conclusion, I must note, as I have in all of the 13 years I have served in the Senate, my disappointment that we continue the wasteful trend of spending billions of dollars on Cold War-era weapons systems while not fully funding our current needs. This enormous bill could have been better. However, on balance this legislation contains many good provisions for our men and women in uniform and their families and that is why I support it.

Mr. CORNYN. Mr. President, I express my concern regarding the adoption of the McCain amendment as part of the National Defense Authorization Act. Although I am pleased the legislation now includes important protections for the brave men and women who are interrogating terrorists around the world, I am nevertheless concerned that this legislation may hinder our intelligence collection activities.

Many supporters of the amendment, including the mainstream media, claim that the legislation ''bans'' torture—leaving the impression that torture was somehow legal under our current laws. This is incorrect. Torture is prohibited under current U.S. law and treaty obligations, and President Bush has unequivocally stated that the United States will not engage in torture, and we will treat all detainees in a humane fashion. In fact, this legislation will likely prohibit current legal interrogation techniques that stop well short of torture and are providing valuable intelligence information.

We all agree that in order to achieve victory in the war on terror, the United States must have the very best intelligence we can acquire through technical means and the interrogation of captured terrorists. Many of these terrorists are highly trained to resist U.S. interrogation techniques. Although I adamantly oppose torture, I believe we must use every legal means—including aggressive interrogation methods that some may find objectionable—to get intelligence that will save American lives. I voted against the McCain amendment out of a deep concern that it would potentially limit certain interrogation methods that may be necessary to save American lives.

We know that aggressive—yet humane—interrogation techniques were instrumental in gaining valuable information from Khalid Sheikh Mohammed, a key architect of the 9/11 attacks, and other terrorists in U.S. custody. We must not abandon these important and legal questioning methods for the sake of political correctness. We must send a strong signal to terrorists everywhere that if they are captured by the United States, while they will be treated humanely, we will use every legal method to force them to reveal their designs on the United States.

Torture does not produce good intelligence. People who are tortured will tell their captors anything they want to hear and not the truth. More importantly, torture does not represent the values of America and all that we stand for as a Nation. However, we should not unnecessarily limit our military and intelligence agencies from aggressively interrogating those individuals who wish to kill innocent Americans. We must always remember that the terrorists who attacked America on 9/11 are relentless in their efforts to destroy us.

Finally, some have argued that the passage of the McCain amendment would have somehow prevented the heinous abuses that we saw at Abu Ghraib prison. This is patently false. The individuals who committed the abuses at Abu Ghraib knew their actions were against the law, yet they violated core American values. The perpetrators of these crimes are now being prosecuted, and the military has undertaken comprehensive reforms to prevent future abuses. As noted by the independent Schlesinger Panel in its report on detainee operations: ''There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'' Our military has detained over 80,000 individuals and the instances of detainee abuse are extremely rare and they are prosecuted when discovered. To imply that our military or intelligence services are torturing detainees as a matter of policy is a distortion of reality.

In our efforts to demonstrate to the world that the United States does not torture terrorists, we must not weaken our ability to prosecute the war on terror. Our military and intelligence personnel must have the tools—including aggressive interrogation techniques—to question captured terrorists. I remain concerned that the McCain amendment, although admirable in its intent, may hinder our efforts to collect vital intelligence, and I make no apologies for endorsing all legal means of obtaining actionable intelligence that will save American lives.

Mr. GRAHAM. Mr. President, today I rise to comment upon the recently passed Defense authorization bill. That bill contained a Graham-Levin-Kyl amendment which dealt with the Combatant Status Review Tribunals and Military Commissions at Guantanamo Bay. I was very pleased to join with Senators LEVIN and KYL and others to offer this amendment, and I want to thank them for working so hard on this issue.

In rising today, I address one particular section of our amendment, the requirement that the tribunals consider whether evidence was coerced. In drafting this section, we were compelled to recognize three basic facts.

First, we were compelled to recognize the impracticality of importing domestic criminal protections into a forum constructed to administer what are essentially enemy soldiers; combatants for a very unique enemy, an enemy without uniforms, capitals, or cohesive command structures, but combatants nonetheless.

Second, we were forced to address the necessity of relying on evidence without a complete picture of how it was obtained; evidence that might be obscured by the fog of war, derived from battlefield intelligence, from classified sources, or even through unknown circumstances.

Lastly, we were required by our constitutional responsibilities to err on the side of protecting the American people. In instances where there is some doubt as to the evidence or the status of the detainee, the benefit of the doubt must go to the government as it seeks to discharge its first duty, providing for the common defense of our people.

In our efforts to balance these interests, we initially included an exclusionary rule for evidence obtained through ''undue coercion.'' We felt that the term ''undue coercion'' reflected the reality that, in the national security context, there is some level of coercive interrogation that is acceptable. We also understand that, at some point, the reliability of the information can be questioned as a result of the methods used to obtain it. I believe Guantanamo Bay serves a unique and necessary purpose in the war on terror, but we need to ensure that we are holding the right people.

However, upon reconsideration, we came to believe that the term ''undue coercion,'' being a new term without legal precedent, might not be as instructive as we required. Furthermore, a number of the military judge advocates we consulted were concerned that the exclusionary rule could limit them from considering evidence tainted by only an allegation of mistreatment.

Therefore, after much consultation with legal professionals, we decided to eliminate the ''undue'' qualifier. Unfortunately, striking the qualifier also eliminated the consideration of whether the information was obtained by acceptable sources and methods. Accordingly, we decided to refrain from mandating the exclusionary rule. Instead, our language requires, for the first time, the panels to consider the source of the information and the information's reliability. I am very confident our language provides for the proper consideration.

Now, to be sure, our language also provides for the benefit of the doubt to go to the government. In granting this benefit, however, we recognize that we are fundamentally different from our adversaries. Though we may fail at times, we strive to be fair and just and honorable. And because our military men and women exemplify those values, we can trust them to fairly administer this process. In the end, we must remember that this is a military administrative process, and, with the proper congressional and judicial oversight provided by our amendment, we must trust our professional military officers to do their jobs.

In our amendment as a whole, we sought to protect our national security while still striking the proper balance between aggressively interrogating detainees and providing a competent military administrative process for their status determination. I am confident that this new evidentiary standard serves that goal.

Mr. DURBIN. Mr. President, I rise to speak about the Detainee Treatment Act of 2005, which is included in the Defense authorization conference report.

The Detainee Treatment Act includes two provisions that were adopted in the Senate version of the Defense authorization bill: the McCain antihuman torture amendment and the Graham-Levin Detainee Amendment.

I was an original cosponsor of the McCain Antitorture amendment. I have spoken at length about the vital importance of this amendment on several other occasions. At this time, I simply want to reiterate a couple of points.

Twice in the last year and a half, I have authored amendments to affirm our Nation's long standing position that torture and cruel, inhuman, or degrading treatment are illegal. Twice, the Senate unanimously approved my amendments. Both times, the amendments were killed behind the closed doors of a conference committee—at the insistence of the Bush administration.

I am pleased that the administration has changed its position. As a result, it will now be absolutely clear that under U.S. law all U.S. personnel are prohibited from subjecting any detainee anywhere in the world to torture or cruel, inhuman, or degrading treatment.

The amendment defines cruel, inhuman, or degrading treatment as any conduct that would constitute the cruel, unusual, and inhumane treatment or punishment prohibited by the U.S. Constitution if the conduct took place in the United States. Under this standard, abusive treatment that would be unconstitutional in American prisons will not be permissible anywhere in the world.

Let me give you some examples of conduct that is clearly prohibited by the McCain amendment.

''Waterboarding'' or simulated drowning is a technique that was used during the Spanish Inquisition. It is clearly a form of torture. It creates an overwhelming sense of imminent death. It amounts to a clear-cut threat of death akin to a mock execution, which is expressly called mental torture in the U.S. Army Field Manual.

Sleep deprivation is another classic form of torture which is explicitly called mental torture in the U.S. Army Field Manual. It has been banned in the United Kingdom and by a unanimous Israeli Supreme Court, and the U.S. Supreme Court has repeatedly declared it unconstitutional, once citing a report that called it ''the most effective form of torture.''

The amendment also clearly bans so-called stress positions or painful, prolonged forced standing or shackling. Again, the U.S. Army Field Manual expressly calls these techniques ''physical torture.'' Moreover, one of the most recent Supreme Court cases on the extent of the prohibitions on ''cruel and unusual'' punishments expressly outlawed the use of painful stress positions, denouncing their ''obvious cruelty'' as ''antithetical to human dignity.''

The amendment bans the use of extreme cold, or hypothermia, as an interrogation tactic. Hypothermia can be deadly. Clearly it is capable of causing severe and lasting harm, if not death, and consequently is banned by both the Field Manual and the Constitution.

The amendment bans punching, striking, violently shaking, or beating detainees. Striking prisoners is a criminal offense and clearly unconstitutional. Moreover, while assaults like slapping and violent shaking may not seem as dangerous as beatings, shaking did, in fact, kill a prisoner in Israel, and the tactic has been banned by the Israeli Supreme Court. Numerous U.S. Supreme Court cases likewise prohibited striking prisoners.

The amendment bans the use of dogs in interrogation and the use of nakedness and sexual humiliation for the purpose of degrading prisoners.

No reasonable person, given the text of the amendment, the judicial precedents, and common sense, would consider these techniques to be permitted. Any U.S. official or employee who receives legal advice to the contrary should think twice before defying the will of the Congress on this issue.

The McCain antitorture amendment will make the rules for the treatment of detainees clear to our troops and will send a signal to the world about our Nation's commitment to the humane treatment of detainees.

I want to express again my opposition to the Graham-Levin amendment.

The amendment would essentially eliminate habeas corpus for detainees at Guantanamo Bay. In so doing, it would apparently overturn the Supreme Court's landmark decision in Rasul v. Bush.

No one questions the fact that the United States has the power to hold battlefield combatants for the duration of an armed conflict. That is a fundamental premise of the law of war.

However, over the objections of then-Secretary of State Colin Powell and military lawyers, the Bush administration has created a new detention policy that goes far beyond the traditional law of war. The administration claims the right to seize anyone, including an American citizen, anywhere in the world, including in the United States, and to hold him until the end of the war on terrorism, whenever that may be. They claim that a person detained in the war on terrorism has no legal rights. That means no right to a lawyer, no right to see the evidence against him, and no right to challenge his detention.

In fact, the Government has argued in court that detainees would have no right to challenge their detentions even if they claimed they were being tortured or summarily executed.

U.S. military lawyers have called this detention system ''a legal black hole.''

Defense Secretary Rumsfeld has described the detainees as ''the hardest of the hard core'' and ''among the most dangerous, best trained, vicious killers on the face of the Earth.'' However, the administration now acknowledges that innocent people are held at Guantanamo Bay. In late 2003, the Pentagon reportedly determined that 15 Chinese Muslims held at Guantanamo are not enemy combatants and were mistakenly detained. Almost 2 years later, those individuals remain in Guantanamo Bay.

Last year, in the Rasul decision, the Supreme Court rejected the administration's detention policy. The Court held that detainees at Guantanamo have the right to habeas corpus to challenge their detentions in Federal court. The Court held that the detainees' claims that they were detained for years without charge and without access to counsel ''unquestionably describe custody in violation of the Constitution, or laws or treaties of the United States.''

The Graham amendment would protect the Bush administration's detention system from legal challenge. It would effectively overturn the Supreme Court's decision. It would prevent innocent detainees, like the Chinese Muslims, from challenging their detention.

However, I do want to note some limitations on the scope of the Graham-Levin Amendment.

A critical feature of this legislation is that it is forward looking. A law purporting to require a Federal court to give up its jurisdiction over a case that is submitted and awaiting decision would raise grave constitutional questions. The amendment's jurisdiction-stripping provisions clearly do not apply to pending cases, including the Hamdan v. Rumsfeld case, which is currently pending before the Supreme Court. In accordance with our traditions, this amendment does not apply retroactively to revoke the jurisdiction of the courts to consider pending claims invoking the Great Writ of Habeas Corpus challenging past enemy combatant determinations reached without the safeguards this amendment requires for future determinations. The amendment alters the original language introduced by Senator Graham so that those pending cases are not affected by this provision.

The amendment also does not legislate an exhaustion requirement for those who have already filed military commission challenges. As such, nothing in the legislation alters or impacts the jurisdiction or merits of the Hamdan case.

Nothing in the legislation affirmatively authorizes, or even recognizes,

the legal status of the military commissions at issue in Hamdan. That is the precise question that the Supreme Court will decide in the next months. Right now, the military commissions are legal under a decision of the DC Circuit, and this amendment reflects but in no way endorses that present status. It would be a grave mistake for our allies around the world to think that we are endorsing this system at Guantanamo Bay—a system that has produced not a single conviction in the 4 years since the horrible attacks of September 11, 2001.

This provision attempts to address problems that have occurred in the determinations of the status of people detained by the military at Guantanamo Bay and elsewhere. It recognizes that the Combatant Status Review Tribunal, CSRT, procedures applied in the past were inadequate and must be changed going forward. As the former chief judge of the U.S. Foreign Intelligence Surveillance Court found, in In Re Guantanamo Detainee Cases, the past CSRT procedures ''deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration,'' and allowed ''reliance on statements possibly obtained through torture or other coercion.'' Her review ''call[ed] into serious question the nature and thoroughness'' of the past CSRT process. The former CSRT procedures were not issued by the Secretary of Defense, were not reported to or approved by Congress, did not provide for final determinations by a civilian official answerable to Congress, did not provide for the consideration of new evidence, and did not address the use of statements possibly obtained through coercion.

To address these problems, this provision requires the Secretary of Defense to issue new CSRT procedures and report those procedures to the appropriate committees of Congress; it requires that going forward, the determinations be made by a Designated Civilian Official who is answerable to Congress; it provides for the periodic review of new evidence; it provides for future CSRTs to assess whether statements were derived from coercion and their probative value; and it provides for review in the DC Circuit Court of Appeals for these future CSRT determinations.

Mr. REID. In a statement on November 15 of this year, I explained my vote on amendments offered by Senators GRAHAM, LEVIN, and BINGAMAN regarding access to the Federal courts for detainees at Guantanamo Bay. Now that a conference report containing a revised version of these provisions is before us, I want to reiterate a few points.

I voted in favor of the Graham-Levin amendment because I believed it was better than the original Graham amendment. Similarly, I will vote in favor of this conference report because I favor the bill as a whole. But I have mixed views on the detainee provisions of the conference report, now in title X as the ''Detainee Treatment Act of 2005.''

On the one hand, I oppose stripping the courts of jurisdiction to hear habeas corpus petitions. The writ of habeas corpus is one of the pillars of the Anglo-American legal system, and limiting the Great Writ interferes with the independence of the judiciary and violates principles of separation of powers. The action we take today fails to address adequately the Bush administration's flawed policy of detaining suspects indefinitely, in secret, and without access to meaningful judicial oversight.

On the other hand, I support provisions in this bill that require improvements in the procedures and oversight of the Combatant Status Review Tribunals. It is important to ensure that status determinations of those detained at Guantanamo Bay and elsewhere are conducted in accordance with basic requirements of due process and fairness. The Defense Department must address the serious problems identified earlier this year by Judge Green, the former chief judge of the U.S. Foreign Intelligence Surveillance Court.

I am also pleased that the final law would allow courts to consider whether the standards and procedures used by the Combatant Status Review Tribunals are consistent with the Constitution and U.S. laws, that it does not apply retroactively to pending habeas claims that challenge past enemy combatant determinations reached without the safeguards this amendment requires, and that it would allow for court review of the actions of military commissions. I commend Senator LEVIN for his work on these issues.

On balance, I support the final detainee provisions with the following understandings:

First, I am pleased that Senator Graham's original language was altered so that the Supreme Court would not be divested of jurisdiction to hear the pending case of Hamdan v. Rumsfeld. In fact, subsection (h) of section 1005 makes clear that the DC Circuit and other courts will maintain jurisdiction to hear all pending habeas cases, in accordance with the Supreme Court's decision in Lindh v. Murphy.

Second, on a related but distinct point, I believe this act has no impact on the Supreme Court's ability to consider Hamdan's challenge at this preconviction stage of the military commission proceedings. As the DC Circuit held in Hamdan earlier this year, Ex Parte Quirin is a compelling historical precedent for the power of civilian courts to entertain challenges that are raised during a military commission process. Nothing in these sections requires the courts to abstain at this point in the litigation. Paragraph 3 of subsection 1005(e) governs challenges to ''final decisions'' of the military commissions and does not impact challenges like Hamdan's other cases not brought under that paragraph.

Third, this legislation does not represent congressional acquiescence in or authorization of the military commissions unilaterally established by the executive branch at Guantanamo Bay. Whether these commissions are legal is precisely the question the Supreme Court will soon decide in the Hamdan case. Rather, this legislation reflects the fact that the military commissions are currently legal under the DC Circuit's decision in Hamdan. We legislate against this backdrop in setting up a procedure to challenge the commissions, but we do not necessarily endorse the use of such commissions in this manner.

I hope that the Judiciary Committee soon considers legislation to define the rights of the detainees at Guantanamo with greater care and to develop sensible procedures for enforcing those rights. Congress should be guided by principles of human rights and the rule of law upon which this Nation was founded.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

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

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

The motion to lay on the table was agreed to.

EXTENSION OF THE USA PATRIOT ACT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to a bill at the desk relating to the extension of the PATRIOT Act which the clerk will report by title.

The legislative clerk read as follows:

A bill (S. 2167) to amend the USA PATRIOT Act, and for other purposes.

The Senate proceeded to consider the bill.

Mr. LEAHY. Mr. President, those of us working constructively to extend the USA PATRIOT Act have repeatedly offered to enter into a short-term extension while we work out the differences and improve this reauthorization legislation. The extension we are passing for 6 months is a commonsense solution that allows us to take a few more weeks to get this right for all Americans.

A majority of Senators—Republicans, Democrats, those Senators who voted for cloture, those who voted against cloture on the conference report that failed to pass the Senate—have joined on a letter urging the Republican leader to act on this commonsense offer by calling up a short-term extension bill.

As soon as it became apparent that the conference report filed by the Republican leadership would be unacceptable to the Senate, I joined on Thursday, December 8, in urging a 3-month extension to work out a better bill. On the first day the Senate was in session, Monday, December 12, Senator SUNUNU and I introduced such a bill, S. 2082. We