The PRESIDING OFFICER. The Senator is correct.

Mr. GRAHAM. I ask unanimous consent to enter into a colloquy, and if the Chair could let me know when 10 minutes has expired.

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

DEFENSE AUTHORIZATION

Mr. GRAHAM. While we decide how we are going to move on the Defense bill, I appreciate Senator KYL coming to the floor. Senator KYL and I, along with Senators LEVIN and MCCAIN, have been working on detainee policy for years now. There is an issue that is before the Senate soon. It involves what to do with an American citizen who is suspected of collaborating with al-Qaida or an affiliated group.

Does the Senator agree with me that in other wars American citizens, unfortunately, have aided the enemies of their time?

Mr. KYL. Mr. President, yes. I would say to my colleague, unfortunately, it is the case that there probably hasn't been a major conflict in which at least some American citizen has decided to leave his country and side with the enemy.

Mr. GRAHAM. Is the Senator familiar with the efforts by German saboteurs who landed—I believe, in the Long Island area, but I don't know exactly where they landed—during World War II, and they were aided by American citizens to execute a sabotage plot against the United States?

Mr. KYL. Mr. President, yes. In fact, there is a famous U.S. Supreme Court case, Ex parte Quirin, decided in 1942, that dealt with the issue of an American citizen helping the Nazi saboteurs that came to our shores.

Mr. GRAHAM. Does the Senator agree with me that our Supreme Court ruled then that when an American citizen decides to collaborate and assist an enemy force, that is viewed as an act of war and the law of war applies to the conduct of the American citizen?

Mr. KYL. Mr. President, I would say to my colleague, yes. My colleague knows this case, I am confident. I think one quotation from the case makes the point clearly—in Ex parte Quirin the court made clear: ''Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency.''

In other words, if a person leaves their country and takes the position contrary, they side with the enemy, they become a belligerent against the United States, the fact that they are still a citizen does not protect them from being captured, from being held, and in this case even being tried by a military tribunal.

Mr. GRAHAM. So the law, at least since 1942, by the Supreme Court has been that if someone decides as an American citizen to join forces with enemies of the United States, they have committed an act of war against their fellow citizens. It is not a criminal event we are investigating or dealing with; it is an act of war, and the American citizens who helped the Nazis were held as enemy combatants and tried as enemy combatants?

Mr. KYL. Mr. President, yes. I would just qualify that statement this way. A person can be subject to military custody being a belligerent against the United States, even while being a U.S. citizen, be tried by military commission because of the act of war against the United States that they committed. One could also theoretically have been tried in a criminal court. But one can't reach the opposite conclusion, which is that they can only be tried in civilian court.

Mr. GRAHAM. In the Military Commission Act of 2009, we prohibited American citizens from being tried by military commissions. I am OK with that. But what we have not done—and I would be very upset if we chose to do that—is take off the table the ability to interrogate an American citizen who has chosen to help al-Qaida regarding what they know about the enemy and what intelligence they may provide us to prevent a future attack.

Since homegrown terrorism is a growing threat, under the current law, if an American citizen became radical, went to Pakistan and trained with al-Qaida or an affiliated group, flew back to Dulles Airport, got off the plane, got a rifle, went down to the Mall right behind us and started shooting people, does the Senator agree with me that under the law as it exists today, that person could be held as an enemy combatant, that person could be interrogated by our military and intelligence community and we could hold them as long as necessary to find out what they know about any future attacks or any past attacks and we don't have to read them their Miranda rights?

Mr. KYL. Mr. President, yes. The answer to the question, short, is, yes. It is confirmed by the fact that in the Hamdi case, the U.S. Supreme Court precisely held that detention would be lawful. Of course, with the detention being lawful, the interrogation to which my colleague refers could also be taken.

Mr. MCCAIN. Would the Senator yield for a question on that subject point?

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. MCCAIN. The individual who was an American citizen—Mr. Hamdi, the subject of the U.S. Supreme Court case—was an American citizen captured in Afghanistan; is that correct?

Mr. GRAHAM. Yes.

Mr. MCCAIN. Yet in the Supreme Court decision reference is made to an individual who was captured during World War II in the United States of America; isn't that correct? It was referenced in the Supreme Court decision.

Mr. GRAHAM. Yes. The In re Quirin case dealt with an American citizen helping the Nazis in America. The Hamdi case dealt with an American citizen helping the Taliban in Afghanistan.

Mr. MCCAIN. The reason why I raise the question is because the Senator from Illinois, and others, have cited the fact that Hamdi was an American citizen but captured in Afghanistan, not in the United States of America.

Yet isn't it a fact that the decision in Hamdi also made reference to a person who was apprehended in the United States of America?

This is what is bizarre about this discussion, it seems to me.

Mr. GRAHAM. The Hamdi case cited In re Quirin for the proposition that an American citizen who provides aid, comfort or collaboration with the enemy can be held as an enemy combatant. The In re Quirin case dealt with an American citizen helping the Nazis in New York. The Padilla case involves an American citizen, collaborating with al-Qaida, captured in the United States.

Mr. MCCAIN. So I guess my question is, it is relevant where the citizen of the United States was captured. Because the decision made reference to people captured both in the United States and outside the United States.

Mr. GRAHAM. Exactly. I would add, and get Senator KYL's comment. Wouldn't it be an absurd result if you can kill an American citizen abroad—Awlaki—whatever his name was—the President targeted him for assassination because he was an American citizen who went to Yemen to engage in an act of terrorism against the United States. The President went through an Executive legal process, targeted him for assassination and a drone attack killed him and we are all better off. Because when an American citizen helps the enemy, they are no longer just a common criminal; they are a military threat and should be dealt with appropriately.

But my point is, wouldn't it be an odd result to have a law set up so that if they actually got to America and they tried to kill our people on our own soil, all of a sudden they have criminal status?

I would argue that the homeland is part of the battlefield, and we should protect the homeland above anything else. So it would be crazy to have a law that says if you went to Pakistan and attacked an American soldier, you could be blown up or held indefinitely, but if you made it back to Dulles Airport, you went downtown and started killing Americans randomly, we couldn't hold you and gather intelligence. The Supreme Court, in 1982, said that made no sense.

If a Senator, in 1942, took the floor of the Senate and said: You know those American citizens who collaborated with the Nazis, we ought not treat them as an enemy, they would be run out of town.

I am just saying, to any American citizen: If you want to help al-Qaida, you do so at your own peril. You can

get killed in the process. You can get detained indefinitely. When you are being questioned by the CIA, the FBI or the Department of Defense about where you trained and what you did and what you know and you say to the interrogator: I want my lawyer, the interrogator will say: You don't have a right to a lawyer because you are a military threat.

This is not ''Dragnet.'' We are fighting a war. The Supreme Court of the United States has clearly said an American citizen who joins with the enemy has committed an act of war.

Senator FEINSTEIN, who is the chairman of the Intelligence Committee, is a very good Senator. But her concerns about holding an American citizen under the law of war, her amendment, unfortunately, would change the law.

Does Senator KYL agree with that?

Mr. KYL. Yes. Mr. President, that is the key point. There is a reason why you don't want to adopt the Feinstein amendment: It would preclude us from gaining all the intelligence we could gain by interrogating the individual who has turned on his own country and who would have knowledge of others who might have joined him in that effort or other plans that might be underway.

We know from past experience this interrogation can lead to other information to save American lives by preventing future attacks, and it has occurred time and time again. In a moment, I will put a statement in the RECORD that details a lot of this intelligence we have gathered. It is not as if an American citizen doesn't have the habeas corpus protection—which still attaches—whether or not that individual is taken into military custody.

The basic constitutional right of an American citizen is preserved. Yet the government's ability to interrogate and gain intelligence is also preserved by the existing law, by the status of the law that exists today. We would not want to change that law by something such as the Feinstein amendment.

Mr. GRAHAM. Simply stated, when the American citizens in question decided to give aid and comfort to the Nazis, I am very glad they were allowed to be held by the military and interrogated about the plot and what they knew, because intelligence gathering is the best way to keep us safe.

I would be absolutely devastated if the Senate, for the first time in 2011, denied the ability of our military and intelligence community to interrogate somebody who came back from Pakistan and started killing people on the Mall—that we could no longer hold them as an enemy combatant and find out what they did and why they did it; that we would have to treat them as a common criminal and read them their Miranda rights. That is not the law.

If that becomes the law, then we are less safe because I tell you, as we speak, the threat to our homeland is growing. Homegrown terrorists are becoming the threat of the 21st century, and now is not the time to change the law that has been in place for decades. I do hope people understand what this means.

It means we would change the law so that if we caught somebody in America who went overseas to train and came back home, an American citizen who turned on the rest of us, no longer could we hold them as an enemy combatant and gather intelligence. That, to me, would be a very dangerous thing to do.

I ask the Senator, who determines what the Constitution actually means; is it the Congress or the Supreme Court?

Mr. KYL. Mr. President, ultimately the U.S. Supreme Court, when cases come before the Court that present these issues, determines what the law is. In this situation we have actually two specific cases, and there are others that are tangential, that do clarify what the Court believes what the Constitution would provide in this case.

Mr. GRAHAM. So the issue is pretty simple. Our courts at the highest level—the Supreme Court has acknowledged that the executive branch has the legal authority to hold an American citizen who is collaborating with an enemy as an enemy belligerent to gather intelligence to protect the rest of us; they recognize that power of the executive. Does the Senator agree with me that the amendment of Senator FEINSTEIN would be a situation where the Congress does not recognize that authority and would actually try to change it?

Mr. KYL. Yes. One of the questions is this interplay between the executive and the legislative branch. When the legislative branch, as Congress has done here through the authorization of military force, has provided the legal basis for the administration to hold a person engaged in war against us, then it cannot be denied that that authority exists. There is a 1971 law that Congress passed that said you could hold people only pursuant to law. This was the precise holding of the Hamdi case, where the U.S. Supreme Court said they had the authority because of the authorization of military force. So the executive has that authority, the legislature has provided the basis for the authority, and the Supreme Court has upheld it by its ultimate jurisdiction.

Mr. GRAHAM. And to conclude this colloquy—I enjoyed the discussion—I am not saying our law enforcement or military intelligence community cannot read someone their Miranda rights. I will leave that up to them. I am saying Congress should not take off the table the ability to hold someone under the law of war to gather intelligence, and that is what we are about to do if this passes.

To those who believe that homegrown terrorists are a threat now and in the future, if you want to make sure we can never effectively gather intelligence, we only have one option, then that is what we are about to impose on the country.

Mr. KYL. If I might ask my colleague to yield for one other point I wish to make here.

Mr. GRAHAM. Absolutely.

Mr. KYL. In a criminal trial, the object is to do justice to an individual as it pertains to his alleged violation of law in the United States. In the case of the capture and detention of a combatant, someone who has taken action against the United States, the object first is to keep the United States safe from this individual's actions and, second, where possible, gain intelligence from that individual. That is the critical element that would be taken from our military, were the Feinstein amendment to be adopted.

I ask unanimous consent to have printed in the RECORD a statement that makes very clear where military detention is necessary: to allow intelligence gathering that will prevent future terrorist attacks against the American people.

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

WARTIME DETENTION OF ENEMY COMBATANTS—INCLUDING U.S. CITIZENS WHO JOIN THE FORCES OF THE ENEMY—IS AN ESTABLISHED PRACTICE THAT IS CLEARLY CONSTITUTIONAL

Unfortunately, in almost every major war that the United States has fought, there have been some U.S. citizens who have joined the forces of our Nation's enemies or who have otherwise collaborated with the enemy. These traitors and collaborators have always been treated as enemy combatants—and have been subjected to trial by military commission where appropriate.

The U.S. Supreme Court has consistently held that the President has the constitutional authority to detain enemy combatants, including U.S. citizens who have cast their lot with the enemy.

In its 2004 decision in *Hamdi v. Rumsfeld*, for example, the Supreme Court held that the detention of enemy combatants is proper under the U.S. Constitution. Moreover, the person challenging his military detention in that case was a U.S. citizen.

During World War II, the Supreme Court also upheld the military detention and trial of a U.S. citizen who had served as a saboteur for Nazi Germany and was captured in the United States. The Court made clear that ''[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency.'' That case is *Ex Parte Quirin* (1942).

In support of her amendment number 1126, Senator FEINSTEIN yesterday cited a 1971 law, apparently arguing that the detention of an enemy combatant who is a U.S. citizen would be prohibited under that law.

That 1971 law is 18 U.S.C. 4001. It provides that ''no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.''

This is the very law that was at issue in the *Hamdi* case. And the precise holding of the U.S. Supreme Court in *Hamdi* was that the detention of a U.S. citizen as an enemy combatant through the duration of hostilities would not violate that law.

The Supreme Court stated: ''[Hamdi] posits that his detention is forbidden by 18 U.S.C. § 4001(a). Section 4001(a) states that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant

to an Act of Congress.' . . . Congress passed §4001(a) in 1971. . . . [The government maintains] §4001(a) is satisfied because Hamdi is being detained pursuant to an Act of Congress, the AUMF. . . . [W]e conclude that . . . the AUMF satisfied §4001(a)'s requirement that a detention be pursuant to an Act of Congress.''

WHY MILITARY DETENTION IS NECESSARY: TO ALLOW INTELLIGENCE GATHERING THAT WILL PREVENT FUTURE TERRORIST ATTACKS AGAINST THE AMERICAN PEOPLE

Some may ask, why does it matter whether a person who has joined Al Qaeda is held in military custody or is placed in the civilian court system? One critical reason is intelligence gathering. A terrorist operative held in military custody can be effectively interrogated. In the civilian system, however, that same terrorist would be given a lawyer, and the first thing that lawyer will tell his client is, ''don't say anything. We can fight this.''

In military custody, by contrast, not only are there no lawyers for terrorists. The indefinite nature of the detention—it can last as long as the war continues—itself creates conditions that allow effective interrogation. It creates the relationship of dependency and trust that experienced interrogators have made clear is critical to persuading terrorist detainees to talk.

Navy Vice-Admiral Lowell Jacoby, who at the time was the Director of the Defense Intelligence Agency, explained how military custody is critical to effective interrogation in a declaration that he submitted in the Padilla litigation. He emphasized that successful noncoercive interrogation takes time—and it requires keeping the detainee away from lawyers.

Vice-Admiral Jacoby stated:

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.''

In other words, military custody is critical to successful interrogation. Once a terrorist detainee is transferred to the civilian court system, the conditions for successful interrogation are destroyed.

Preventing the detention of U.S. citizens who collaborate with Al Qaeda would be a historic abandonment of the law of war. And, by preventing effective interrogation of these collaborators, it would likely have severe consequences for our ability to prevent future terrorist attacks against the American people.

We know from cold, hard experience that successful interrogation is critical to uncovering information that will prevent future attacks against civilians.

On September 6 of 2006, when President Bush announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also described information that the United States had obtained by interrogating these detainees. Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks. This is information that the United States did not already know—and that we only obtained through the successful military interrogation of Zubaydah.

Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country—an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives—one while he was traveling to the United States.

Again, just imagine what might have happened if the Feinstein amendment had already been law, and if the Congress had stripped away the executive branch's ability to hold Al Qaeda collaborators in military custody and interrogate them. We simply would not learn what that detainee knows—including any knowledge that he may have of planned future terrorist attacks.

Under military interrogation, Abu Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States. K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17–member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London.

As President Bush stated in his September 6, 2006 remarks, ''[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies.'' The President concluded by noting that Al Qaida members subjected to interrogation by U.S. forces: ''have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that . . . has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

[Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved innocent lives.''

If the Feinstein amendment were adopted, this is all information that we would be unable to obtain if the Al Qaeda collaborator that our forces had captured was a U.S. citizen. It would simply be impossible to effectively interrogate that Al Qaeda collaborator—the relationship of trust and dependency that military custody creates would be broken, and the detainee would instead have a lawyer telling him to be quiet. And we know that information obtained by interrogating Al Qaeda detainees has been by far the most valuable source of information for preventing future terrorist attacks.

Again, in every past war, our forces have had the ability to capture, detain, and interrogate U.S. citizens who collaborate with the enemy or join forces with the enemy. I would submit that in this war, intelligence gathering is more critical than ever. Al Qaeda doesn't hold territory that we can capture. It operates completely outside the rules of war, and directly targets innocent civilians. Our only effective weapon against Al Qaeda is intelligence gathering. And the Feinstein amendment threatens to take away that weapon—to take away our best defense for preventing future terrorist attacks against the American people.

Mr. KYL. I hope this statement clarifies in anyone's mind the point that by taking people in custody in the past we have gathered essential intelligence to protect the American people. That is the reason for the detention in the first place—A, to keep the American people safe from further attack by the individual, and, B, to gather this kind of intelligence. Nothing precludes the United States, the executive branch, from thereafter deciding to try the individual as a criminal in the criminal courts with all the attendant rights of a criminal. But until that determination, it cannot be denied that the executive has the authority to hold people as military combatants, gather intelligence necessary, and hold that individual until the cessation of hostilities.

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

The senior Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I understand we are still in morning business?

The PRESIDING OFFICER. The time for morning business has expired.

Mr. LEAHY. I ask unanimous consent I be recognized for another 5 minutes as in morning business, and the distinguished Senator from Illinois be recognized for 10 minutes as in morning business.

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

Mr. LEAHY. Mr. President, earlier this week, one of this bill's lead sponsors said here on the floor of the United States Senate that the bill's detention subtitle would authorize the indefinite detention of U.S. citizens at Guantanamo Bay. That is a stunning statement. We should all pause to consider the ramifications of passing a bill

containing such language. Supporters of the detention provisions in the bill continue to argue that such measures are needed because, they claim, ''we are a nation at war.'' That does not mean that we should be a Nation without laws, or a Nation that does not adhere to the principles of our Constitution.

One of the provisions in this bill, Section 1032, runs directly contrary to those principles. Section 1032 requires the military to detain terrorism suspects, even those who might be captured on U.S. soil. This provision is opposed by the very intelligence, military, and law enforcement officials who are entrusted with keeping our Nation safe—including the Secretary of Defense, the Director of National Intelligence, the Attorney General, the Director of the FBI, and the President's top counterterrorism advisor. As Chairman of the Judiciary Committee, I support the efforts of Senator FEINSTEIN, the chair of the Senate Intelligence Committee, to modify Section 1032 so that it does not interfere with ongoing counterterrorism efforts or undermine our constitutional principles.

In the fight against al-Qaida and other terrorist threats, we should give our intelligence, military, and law enforcement professionals all the tools they need. But the mandatory military detention provision in Section 1032 actually limits those tools by tying the hands of the intelligence and law enforcement professionals who are fighting terrorism on the ground, and by creating operational confusion and uncertainty. This is unwise and unnecessary.

On Monday, Director Mueller warned that Section 1032 would adversely affect the Bureau's ability to continue ongoing international investigations. Secretary Panetta has also stated unequivocally that ''[t]his provision restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.'' These are not partisan objections, but rather the significant operational concerns voiced by the Secretary of Defense and the Director of the FBI—both of whom were confirmed by this body with 100–0 votes. And yet these are the voices that supporters of this bill would ignore.

Supporters of this bill have argued that the new national security waiver and implementation procedures in this section provide the administration with the flexibility it needs to fight terrorism. The intelligence and law enforcement officials who are actually responsible for fighting terrorism and keeping our Nation safe, however, could not disagree more. As Director Mueller stated in his letter, these provisions are still problematic and ''fail to recognize the reality of a counterterrorism investigation.'' Director of National Intelligence Clapper has stated that ''the various detention provisions, even with the proposed waivers, would introduce unnecessary rigidity'' in the intelligence gathering process. Put differently, Lisa Monaco, the Assistant Attorney General for the National Security Division, recently stated that ''agents and prosecutors should not have to spend their time worrying about citizenship status and whether and how to get a waiver signed by the Secretary of Defense in order to thwart an al-Qaida plot against the homeland.''

We should listen to the intelligence and law enforcement professionals who are entrusted with our Nation's safety, and we should fix this flawed provision.

Senator FEINSTEIN's amendment would ensure that the requirement of military detention of terrorism suspects does not apply domestically. As Chairman of the Judiciary Committee, I am proud to be a cosponsor of this amendment, and I urge all Senators to support its adoption.

I know Senator DURBIN is next, but I now understand from Senator DURBIN the distinguished Senator from Missouri is going next.

In any event, I yield the floor and thank my colleagues for their courtesy.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BLUNT. Mr. President, I ask unanimous consent to address the Senate for 10 minutes in morning business.

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

Mr. BLUNT. I appreciate my good friend from Illinois allowing me to go ahead and talk about the Defense bill at this time, but doing it in the context of where we are on the floor right now.

Mr. President, defending the country is the Congress's most important constitutional responsibility. Abraham Lincoln said that government should do for people only those things that people cannot better do for themselves. If there is anything at the top of that list, this is at the top of that list. So it is critical that we have this discussion, that we pass this bill as soon as possible in order to give our men and women in uniform the tools they need to do their job and the certainty we need to know how that job is going to be done from the point of view of what the Government can and needs to provide.

While this bill we are debating today is only about next year's defense program, we should not lose sight of the fact that our budget environment is more challenging all the time and whether the automatic budget cuts to future defense happen, we do know we are going to have to be more thoughtful, more cautious about how we get the most for our investment in defense. Everybody else in America has spent the last 20 years figuring out how you focus on a better result from less investment, and defense is going to have to be there as well. Still, that does not mean it is not a top priority for the Federal Government.

I appreciate the work my friends Senator LEVIN and Senator MCCAIN have done to get this bill to the floor. I am proud to represent a State that is involved in our national defense. Missouri is the home of Fort Leonard Wood, of Whiteman Air Force Base, of the Marine Corps Mobilization Command Center in Kansas City. We have dozens of National Guard and Reserve facilities in our State. Our State has 17,184 active-duty soldiers, marines, and airmen right now; 34,000 Guard and Reservists.

We are the home of large and small defense contractors that provide thousands of jobs in our State. Those defense contractors can do their work better and our defense dollars are better spent if we know what the plan is. The only real way to know what the plan is is to have an authorization bill that works.

Since the beginning of Operations Enduring Freedom and Iraqi Freedom, 134 Missourians have given their lives and over a thousand have been wounded in the line of duty. In fact, one of the amendments I have that I hope finds its way into this bill is research associated with rehabilitating those wounded warriors who have eye injuries. Thousands of vision-related injuries have occurred as a result of the wars we are fighting now. Tremendous work is being done by St. John's Hospital and Missouri State University in Springfield to see what can be done to develop better ways to deal with those eye wounds. With IEDs as a principal tool of our opponents, our enemies in this war, your eyes are the hardest thing ultimately to protect. Twelve percent of our wounded warriors have eye wounds. Hopefully we can look to see what we can do to provide greater protection and greater recovery from those wounds.

I join all Missourians in thanking those who serve. I think all of us will show greater commitment to those who serve by actually having a Defense authorization bill that sets out a plan for the future.

I am particularly pleased that this bill contains funding for modifications of the B–2 bomber's mixed load capacity. Most of our Stealth bombers operate out of Whiteman Air Force Base in Missouri and we discovered, as recently as the operation in Libya, that operations with our B–2 bombers are not as efficient as they need to be or could be, simply by making that loading capacity work differently. That is the kind of thing we are going to have to do as we look at more difficult-to-get defense dollars. We are going to have to figure out how we spend those defense dollars in the best possible way. I hope the Senate language as it is in the bill now prevails in a final bill.

I also want to call attention to the bill's full authorization of the development of the next generation long-range strike bomber and I am pleased with the funding in this bill for a vehicle maintenance facility at Fort Leonard

Wood and weapons storage at Whiteman.

I filed a few amendments to this bill and I will mention a couple of them. One I am working on with Senator GILLIBRAND is an amendment to ensure National Guard soldiers mobilized for domestic emergency operations are entitled to the same employment rights as others are when they come back. Senator GILLIBRAND and I also worked on a bill to ensure that people in the Guard and Reserve, and their families, have access to financial and marital and other kinds of counseling as they try to put their other life back together.

I thank my colleagues for bringing this bill to the floor. We face a wide variety of threats today, including some that are new and constantly evolving—cyber-warfare, WMD, all things that we need to take seriously. This is a principal responsibility of the Federal Government. I am looking forward to seeing this bill passing the Senate today and then to work with the House to get a bill on the President's desk so that all who are involved in the defense of the country know what the long-term plan is.

I yield the floor.

The PRESIDING OFFICER. The assistant majority leader is recognized.

Mr. DURBIN. Mr. President, I thank my colleague from Missouri, and I concur with his comments about our American military. We have the best in the world. These men and women serve us well with courage and honor every day, and we are fortunate to have them. We are fortunate—those of us who enjoy the blessings of liberty and the safety of this Nation—to have men and women willing to risk their lives for America.

This Defense authorization bill is a bill that authorizes the continued operations of our military, and every year we pass this bill, as we should, in a timely manner. I have supported it consistently over the years with very few exceptions and believe the work product brought to us by Senators LEVIN and MCCAIN is excellent, bipartisan, and moves us in a direction toward an even safer America, and I thank them for all the work they put into it.

There are provisions within this bill today which trouble me greatly. There are provisions on which I hope Members of the Senate will reflect, one in particular that I will address at this time. Senator FEINSTEIN is offering amendment No. 1125, which I am cosponsoring. I would say this amendment raises a serious question about section 1032 in this bill. I am concerned this section would limit the flexibility of any President to fight terrorism. I am concerned it will create uncertainty for law enforcement, intelligence, and our military regarding how to handle suspected terrorists. I think it raises fundamental and serious constitutional concerns.

This provision, 1032, would, for the first time in the history of the United States, require our military to take custody of certain terrorism suspects in the United States. On its face, that doesn't sound offensive, but, in fact, it creates a world of problems. Where do we start this debate?

We understand the responsibility of Congress in passing laws and the President with the option to sign those laws or veto them and the courts with the responsibility to interpret them. When it comes to the protection of this country in fighting terrorism, most of us have believed this is primarily an executive function under Presidents of both political parties. We may disagree from time to time on the PATRIOT Act and other aspects of it and debate those issues, but, by and large, I think we have ceded to Presidents of both parties the power to protect America.

My colleague and friend, Senator LINDSEY GRAHAM, a Republican of South Carolina, on September 19, 2007, stated—and he states things very colorfully and clearly—

> The last thing we need in any war is to have the ability of 535 people who are worried about the next election to be able to micromanage how you fight the war. This is not only micromanagement, this is a constitutional shift of power.

That was Senator GRAHAM's statement in 2007. Although I would carefully and jealously guard the constitutional responsibility of Congress when it comes to the declaration of war, even the waging of war, I do believe there is a line we should honor. We should not stop our President and those who work for him in keeping America safe by second-guessing decisions to be made.

Today, again, on the Republican side of the aisle came colleagues who make the argument that it is a serious mistake for us to take a suspected terrorist and put them into our criminal justice system. They argue the last thing in the world we want to do is to take a suspected terrorist and read them their constitutional rights: the right to remain silent, everything you say can be used against you, the right to counsel. They argue that is when terrorists will clam up and stop talking. Therefore, they argue, suspected terrorists should be transferred to military jurisdictions where Miranda rights will not be read. On its face it sounds like a reasonable conclusion. In fact, it is not. It is not.

Since 9/11, we have arrested and detained 300 suspected terrorists, read them their Miranda rights, and then went on to prosecute them successfully and incarcerate them. They cooperated with the Federal Bureau of Investigation, gave information, and in many cases gave volumes of information even after having been read their rights. So to argue that it cannot be done or should not be done is to ignore the obvious. Three hundred times we have successfully prosecuted suspected terrorists, and America has remained safe for these 10 years-plus since 9/11. How many have been prosecuted under military tribunals in that period of time? Six, and three have been released. We are keeping this country safe by giving to the President and those who work for the President in the military intelligence and law enforcement community the option to decide the best course of action when it comes to arresting, detaining, investigating, and prosecuting an individual.

Remember the man who was on the plane flying into Detroit a couple of years ago? He tried to detonate a bomb on the plane. His clothing caught fire, and the other passengers subdued him, restrained him. He was arrested, investigated by the FBI, and read his Miranda rights. Within a day his parents were brought over. The following day he decided to cooperate with the United States and told us everything he knew. At the end of the day, he was prosecuted, brought to trial, and pled guilty. He went through our regular criminal court system, though he was not an American citizen, and he was successfully prosecuted. President Obama had the right to decide what best thing to do to keep America safe, and he did it. Why would we want to tie his hands?

Now let me talk about this section 1032 and why it is a serious mistake. Section 1032 in this bill would for the first time in American history require the military to take custody of certain terrorism suspects in the United States. From a practical point of view, it could be a deadly mistake for us to require this. Listen to what was said by the Justice Department in explaining why:

> While the legislation proposes a waiver in certain circumstances to address concerns, this proposal inserts confusion and bureaucracy when FBI agents and counterterrorism prosecutors are making split-second decisions. In a rapidly developing situation—like that involving Najibullah Zazi traveling to New York in September of 2009 to bomb the subway system—they need to be completely focused on incapacitating the terrorist suspect and gathering critical intelligence about his plans.

Instead, this provision, 1032, written into this law, would require a handoff of terrorism suspects to military authorities. So what does our military think about this?

Well, the Secretary of Defense Leon Panetta made it abundantly clear when he said:

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

What we have seen, then, as our Secretary of Defense tells us, ceding to the military this authority could compromise America's security at a critical moment when every second counts, when the gathering of intelligence could literally save not just a life but thousands of lives.

Senator FEINSTEIN's amendment makes it clear—as the administration

wants to make it clear—that those terrorism suspects who are arrested abroad will be detained by the military. But within the United States we are told by this administration this provision will jeopardize the security of our country, will require a procedure now to hand off these individuals to the military side in places where they could not possibly be handed off quickly or seamlessly.

We have 10,000 FBI agents dedicated to the security of this country when it comes to these national security issues and 56 different offices. We don't have anything near that capacity when it comes to the military picking up the interrogation of an individual who may have knowledge that if we can glean it from that person could save thousands of lives.

Why in the world do we want to tie the hands of law enforcement? Why do we want to tie the hands of the intelligence community? Why do we want to create this situation of giving to the military this responsibility when they are not prepared at this moment to take it?

I think Senator FEINSTEIN is doing the right thing for the protection of this country. Her position is supported by the Attorney General, by the Secretary of Defense, and by the intelligence community. They have done a good job in keeping America safe. They have asked us: Please, do not micromanage. Do not presume, do not create another hurdle for us when it comes to gathering information that can save lives in America.

Why would we do that? After more than 10 years of success and avoiding another 9/11, let's not make the situation worse by this 1032, this section of the bill that is being presented to us.

I know we will hear arguments on the Senate floor, well, there are opportunities for a waiver. So if a person is detained by the Federal Bureau of Investigation and then it is determined that this is a suspect who falls in the category and needs to go to military detention and then we need to turn to the executive side for a waiver of that military detention, how much time will be lost? Will it be minutes, hours, days? Could we afford that if what is at stake is the potential loss of thousands of American lives? Why? Why make it more complex?

I cannot understand why the other side of the aisle is now so determined with this President to micromanage the defense of this country when it comes to terrorism. When it was a Republican President any suggestions along those lines were dismissed as unpatriotic and unwise and illogical. Now, under this President, everything is fair game. They want to change the rules, rules which have successfully protected the United States for more than 10 years.

I urge my colleagues to support Senator FEINSTEIN's amendment No. 1125 and amend this section 1032 and make sure that our Defense Department, military and law enforcement, as well as intelligence community have the tools they need to continue to keep America safe.

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

Mr. CORNYN. Mr. President, I ask unanimous consent that I be recognized to speak as in morning business for up to 10 minutes.

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

Mr. LEVIN addressed the Chair.

The PRESIDING OFFICER. The senior Senator from Michigan.

Mr. LEVIN. Mr. President, I ask unanimous consent that when we return to the bill, which will be after Senator CORNYN speaks, we move immediately to Feinstein amendment No. 1125, and that there be a 30-minute debate evenly divided and that the vote would occur immediately following that.

I withdraw my request.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I want to talk about something that is all too rare, and that is bipartisan support for an important piece of legislation that not only fulfills America's commitments to our ally, Taiwan, under the Taiwan Relations Act of 1979, but it helps stabilize a critical region of the world—that would be in Asia—and particularly the growing tensions between Taiwan and China. It also creates jobs in America by facilitating foreign military sales of things made here in America, by Americans, that we are going to sell to people in other countries—our friends in other countries—for cash and doesn't cost taxpayers a penny.

My amendment No. 1200 is pending before the Senate, and I was pleased in introducing this amendment to be joined by several of my colleagues on a bipartisan basis: Senator MENENDEZ from New Jersey, Senator INHOFE from Oklahoma, Senator LIEBERMAN from Connecticut, Senator WYDEN from Oregon, and Senator BLUMENTHAL from Connecticut.

This amendment is straightforward and simple. It would require the President to carry out the sale of 66 F–16C/D aircraft to Taiwan. These are American-made fighters our Democratic ally in Taiwan has been trying to purchase since 2007. As I said earlier, this is a win-win amendment. It reflects the right national security policy, and it is good for the American economy and jobs. We know Taiwan's Air Force continues to deteriorate.

First, let me just remind my colleagues what Taiwan is looking at in terms of the disparity in combat aircraft between Communist China and Democratic Taiwan.

Communist China has roughly 2,300 operational combat aircraft. Our ally and friend democratic Taiwan has 490 operational combat aircraft—obviously a growing imbalance in the Taiwan Strait. But that only tells part of the story because, as my colleagues also know, this chart indicates the incredible shrinkage of Taiwan's air force, that many of Taiwan's combat aircraft are F–5 aircraft which America has previously sold to Taiwan but which are now becoming older and more obsolete as time goes by, as well as French Mirage 2000 aircraft. As this chart indicates, around roughly 2020, maybe even before, these aircraft are going to become completely obsolete, and we will see the huge cliff and, in fact, exacerbate the disparity between Communist China and our democratic ally Taiwan.

This F–16 sale would be an export-driven job machine for our country at a time when unemployment is at 9 percent and when the No. 1 issue on America's agenda is job creation. People without jobs can't pay their mortgages, and they lose their homes due to foreclosure. Why in the world, when this sale would support jobs in 32 different States and the District of Columbia, would anyone object to this amendment? Indeed, as I indicated, I believe there is strong bipartisan support for it. This sale would support more than 60 job-years of employment and generate some $8.7 billion in economic output. It would also generate $768 million in taxes for the Federal Government.

As I indicated, Taiwan's air force is facing a looming fighter shortfall. The fact is, this falls squarely in Congress's wheelhouse. The Taiwan Relations Act that I referred to earlier was, in 1979, signed by President Jimmy Carter with bipartisan support. It requires the U.S. Government to provide Taiwan, our friend and ally, with the defense articles necessary for them to defend themselves against Communist Chinese aggression, and it instructs the President and the Congress to determine the nature and quantity of such defense articles based on their judgment of the needs of Taiwan.

Forty-seven Democrats and Republicans in the Senate—almost half—have signed a letter to the President of the United States supporting this sale. In the House of Representatives, 181 Democrats and Republicans have signed a letter to the President supporting this sale.

As my colleagues will recall, in September the Senate voted on an amendment like this in the trade adjustment authority assistance bill, which ended up in a 48-to-48 tie. Although the bill had strong bipartisan support, some of my colleagues said they preferred not to offer that amendment on that particular legislative vehicle but said that if I came back on an appropriate legislative vehicle, they would support it. And if there is a more appropriate legislative vehicle than the Defense authorization bill, I hope someone will point that out to me. This is the appropriate vehicle. This is the appropriate time. This is the right thing to do for job creation in America. It is the right thing to do in terms of our national security and stability in Asia. That is why I believe this is an appropriate time for us to take up this amendment.

I was advised by the Parliamentarian that my original amendment as drafted would not be germane postcloture. However, in consultation with the Parliamentarian, we have come up with a technical modification which essentially would strike what are called the findings that would support the need for the legislation. In essence, it strikes the A section and the B section and leaves only the C section remaining. This, of course, at this point in the proceedings would require unanimous consent.

In consultation with Senator MCCAIN, the ranking member of the Senate Armed Services Committee, I am advised that our friends across the aisle will not grant unanimous consent for us to modify what is really a technical modification for this amendment so we can get a vote on it. I realize that at this point we are in morning business and it is not appropriate, perhaps, for me to ask unanimous consent, but I will ask unanimous consent at a later and appropriate time because I would like to get an explanation from the distinguished chairman of the Armed Services Committee as to why in the world there would be an objection to an amendment that enjoys such broad bipartisan support on a clearly appropriate legislative vehicle.

Madam President, I see the distinguished chairman on the floor. So I would at this time, if it is appropriate, ask unanimous consent to modify my pending amendment, to strike the findings under section A and under section B, and to leave section C, which states in full:

Sale of aircraft. The President shall carry out the sale of no fewer than 66 F–16 C and D multirole fighter aircraft to Taiwan.

We have been advised by the Parliamentarian that this section is indeed germane and would be eligible for a vote with that modification. So I ask unanimous consent to so modify my amendment.

The PRESIDING OFFICER (Mrs. HAGAN). Is there objection?

Mr. LEVIN. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, there is objection on this side, and I will attempt to bring together Senator CORNYN and the objectors so he can hear from them why they object, but in the meantime I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Texas.

Mr. CORNYN. Madam President, I am disappointed, but more than disappointed, I look forward to that explanation. I hope there will be an opportunity to have a colloquy and a discussion here on the floor so the American people can see why a piece of legislation that enjoys such broad bipartisan support can't even get a vote.

When people watch what is happening in Washington these days, I think they are tempted to avert their gaze because they ask the question of me—and I am sure, when the Presiding Officer is back in North Carolina, of her as well—why can't people get anything done? Well, it is because, unfortunately, of things like this. These are technical objections that are not based on the substance or the merit of the legislation.

I respect the chairman of the Armed Services Committee, who says there is an objection on the Democratic side, and he personally is not making that objection but is on behalf of some unnamed other party. I hope that person will be named. I hope they will come to the floor. I hope they will explain to the American people and to our Democratic allies in Taiwan why it is they object to a vote on this amendment.

I believe that if we are able to get a vote on the Defense authorization bill, this has a high likelihood of passage, and I think it would send a strong message to our friends and allies around the world that, yes, you can count on your friend and ally, the United States of America. Conversely, if we are thwarted in our attempt to try to get this amendment voted on and passed, then this will send a countervailing message—that you cannot depend on America—and it will embolden bullies around the world.

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

The Senator from Michigan.

ORDER OF PROCEDURE

Mr. LEVIN. I ask unanimous consent that the Senate proceed to the consideration of the pending Feinstein amendment No. 1125; that there be 30 minutes of debate equally divided and controlled in the usual form; that upon the use or yielding back of time, the Senate proceed to vote in relation to the Feinstein amendment, with no amendments in order prior to the vote.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 1867, which the clerk will report.

The bill clerk read as follows:

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

Pending:

Merkley amendment No. 1174, to express the sense of Congress regarding the expedited transition of responsibility for military and security operations in Afghanistan to the Government of Afghanistan.

Feinstein amendment No. 1125, to clarify the applicability of requirements for military custody with respect to detainees.

Feinstein amendment No. 1126, to limit the authority of the Armed Forces to detain citizens of the United States under section 1031.

Franken amendment No. 1197, to require contractors to make timely payments to subcontractors that are small business concerns.

Begich amendment No. 1114, to amend title 10, United States Code, to authorize space-available travel on military aircraft for members of the Reserve components, a member or former member of a Reserve component who is eligible for retired pay but for age, widows and widowers of retired members, and dependents.

Shaheen amendment No. 1120, to exclude cases in which pregnancy is the result of an act of rape or incest from the prohibition on funding of abortions by the Department of Defense.

Collins amendment No. 1105, to make permanent the requirement for certifications relating to the transfer of detainees at U.S. Naval Station Guantanamo Bay, Cuba, to foreign countries and other foreign entities.

Collins amendment No. 1155, to authorize educational assistance under the Armed Forces Health Professions Scholarship Program for pursuit of advanced degrees in physical therapy and occupational therapy.

Collins amendment No. 1158, to clarify the permanence of the prohibition on transfers of recidivist detainees at U.S. Naval Station Guantanamo Bay, Cuba, to foreign countries and entities.

Inhofe amendment No. 1097, to eliminate gaps and redundancies between the over 200 programs within the Department of Defense that address psychological health and traumatic brain injury.

Inhofe amendment No. 1099, to express the sense of Congress that the Secretary of Defense should implement the recommendations of the Comptroller General of the United States regarding prevention, abatement, and data collection to address hearing injuries and hearing loss among members of the Armed Forces.

Inhofe amendment No. 1100, to extend to products and services from Latvia existing temporary authority to procure certain products and services from countries along a major route of supply to Afghanistan.

Inhofe amendment No. 1093, to require the detention at U.S. Naval Station Guantanamo Bay, Cuba, of high-value enemy combatants who will be detained long-term.

Casey amendment No. 1139, to require contractors to notify small business concerns that have been included in offers relating to contracts let by Federal agencies.

McCain (for Cornyn) amendment No. 1200, to provide Taiwan with critically needed U.S.-built multirole fighter aircraft to strengthen its self-defense capability against the increasing military threat from China.

McCain (for Ayotte) amendment No. 1068, to authorize lawful interrogation methods in addition to those authorized by the Army Field Manual for the collection of foreign intelligence information through interrogations.

McCain (for Brown (MA)/Boozman) amendment No. 1119, to protect the child custody rights of members of the Armed Forces deployed in support of a contingency operation.

McCain (for Brown (MA)) amendment No. 1090, to provide that the basic allowance for housing in effect for a member of the National Guard is not reduced when the member transitions between Active-Duty and