are—if they pose a threat to the security of the United States of America, they should not be allowed to continue that threat. I think that is the opinion of the American public, especially in light of the facts I continue to repeat to the Senator from Kentucky—that 27 percent of the detainees who were released got back in the fight and were responsible for the deaths of Americans. We need to take every step necessary to prevent that from happening. That is for the safety and security of the men and women who are putting their lives on the line in the armed services.

I yield the floor.

Mr. DURBIN. Mr. President, is morning business time still pending?

The ACTING PRESIDENT pro tempore. Yes.

Mr. DURBIN. I ask unanimous consent that all morning business time be yielded back unless there is a request on the floor.

The ACTING PRESIDENT pro tempore. Is there objection?

Without objection, it is so ordered.

Mr. DURBIN. I yield the floor.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 1867, which the clerk will report.

The legislative 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:

Levin/McCain amendment No. 1092, to bolster the detection and avoidance of counterfeit electronic parts.

Paul/Gillibrand amendment No. 1064, to repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002.

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 Armed Forces to detain citizens of the United States under section 1031.

Udall (CO) amendment No. 1107, to revise the provisions relating to detainee matters.

Landrieu/Snowe amendment No. 1115, to reauthorize and improve the SBIR and STTR programs, and for other purposes.

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

Cardin/Mikulski amendment No. 1073, to prohibit expansion or operation of the District of Columbia National Guard Youth Challenge Program in Anne Arundel County, MD.

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.

Begich amendment No. 1149, to authorize a land conveyance and exchange at Joint Base Elmendorf-Richardson, Alaska.

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.

Collins/Shaheen amendment No. 1180, relating to man-portable air-defense systems originating from Libya.

Inhofe amendment No. 1094, to include the Department of Commerce in contract authority using competitive procedures but excluding particular sources for establishing certain research and development capabilities.

Inhofe amendment No. 1095, to express the sense of the Senate on the importance of addressing deficiencies in mental health counseling.

Inhofe amendment No. 1096, to express the sense of the Senate on treatment options for members of the Armed Forces and veterans for traumatic brain injury and post-traumatic stress disorder.

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. 1098, to require a report on the impact of foreign boycotts on the defense industrial base.

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. 1101, to strike section 156, relating to a transfer of Air Force C–12 aircraft to the Army.

Inhofe amendment No. 1102, to require a report on the feasibility of using unmanned aerial systems to perform airborne inspection of navigational aids in foreign airspace.

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. 1215, to require a certification on efforts by the Government of Pakistan to implement a strategy to counterimprovised explosive devices.

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. 1066, to modify the Financial Improvement and Audit Readiness Plan to provide that a complete and validated full statement of budget resources is ready by not later than September 30, 2014.

McCain (for Ayotte) modified amendment No. 1067, to require notification of Congress with respect to the initial custody and further disposition of members of al-Qaida and affiliated entities.

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 full-time National Guard duty without a break in Active service.

McCain (for Brown (MA)) amendment No. 1089, to require certain disclosures from post-secondary institutions that participate in tuition assistance programs of the Department of Defense.

McCain (for Wicker) amendment No. 1056, to provide for the freedom of conscience of military chaplains with respect to the performance of marriages.

McCain (for Wicker) amendment No. 1116, to improve the transition of members of the Armed Forces with experience in the operation of certain motor vehicles into careers operating commercial motor vehicles in the private sector.

Udall (NM) amendment No. 1153, to include ultralight vehicles in the definition of aircraft for purposes of the aviation smuggling provisions of the Tariff Act of 1930.

Udall (NM) amendment No. 1154, to direct the Secretary of Veterans Affairs to establish an open burn pit registry to ensure that members of the Armed Forces who may have been exposed to toxic chemicals and fumes caused by open burn pits while deployed to Afghanistan or Iraq receive information regarding such exposure.

Udall (NM)/Schumer amendment No. 1202, to clarify the application of the provisions of the Buy American Act to the procurement of photovoltaic devices by the Department of Defense.

McCain (for Corker) amendment No. 1171, to prohibit funding for any unit of a security force of Pakistan if there is credible evidence that the unit maintains connections with an organization known to conduct terrorist activities against the United States or U.S. allies.

McCain (for Corker) amendment No. 1172, to require a report outlining a plan to end reimbursements from the Coalition Support Fund to the Government of Pakistan for operations conducted in support of Operation Enduring Freedom.

McCain (for Corker) amendment No. 1173, to express the sense of the Senate on the North Atlantic Treaty Organization.

Levin (for Bingaman) amendment No. 1117, to provide for national security benefits for White Sands Missile Range and Fort Bliss.

Levin (for Gillibrand/Portman) amendment No. 1187, to expedite the hiring authority for the defense information technology/cyber workforce.

Levin (for Gillibrand/Blunt) amendment No. 1211, to authorize the Secretary of Defense to provide assistance to State National Guards to provide counseling and reintegration services for members of Reserve components of the Armed Forces ordered to Active

Duty in support of a contingency operation, members returning from such Active Duty, veterans of the Armed Forces, and their families.

Merkley amendment No. 1239, to expand the Marine Gunnery Sergeant John David Fry Scholarship to include spouses of members of the Armed Forces who die in the line of duty.

Merkley amendment No. 1256, to require a plan for the expedited transition of responsibility for military and security operations in Afghanistan to the Government of Afghanistan.

Merkley amendment No. 1257, to require a plan for the expedited transition of responsibility for military and security operations in Afghanistan to the Government of Afghanistan.

Merkley amendment No. 1258, to require the timely identification of qualified census tracts for purposes of the HUBZone Program.

Leahy amendment No. 1087, to improve the provisions relating to the treatment of certain sensitive national security information under the Freedom of Information Act.

Leahy/Grassley amendment No. 1186, to provide the Department of Justice necessary tools to fight fraud by reforming the working capital fund.

Wyden/Merkley amendment No. 1160, to provide for the closure of Umatilla Army Chemical Depot, Oregon.

Wyden amendment No. 1253, to provide for the retention of members of the Reserve components on Active Duty for a period of 45 days following an extended deployment in contingency operations or homeland defense missions to support their reintegration into civilian life.

Ayotte (for Graham) amendment No. 1179, to specify the number of judge advocates of the Air Force in the regular grade of brigadier general.

Ayotte (for McCain) modified amendment No. 1230, to modify the annual adjustment in enrollment fees for TRICARE Prime.

Ayotte (for Heller/Kirk) amendment No. 1137, to provide for the recognition of Jerusalem as the capital of Israel and the relocation to Jerusalem of the U.S. Embassy in Israel.

Ayotte (for Heller) amendment No. 1138, to provide for the exhumation and transfer of remains of deceased members of the Armed Forces buried in Tripoli, Libya.

Ayotte (for McCain) amendment No. 1247, to restrict the authority of the Secretary of Defense to develop public infrastructure on Guam until certain conditions related to Guam realignment have been met.

Ayotte (for McCain) amendment No. 1246, to establish a commission to study the U.S. force posture in East Asia and the Pacific region.

Ayotte (for McCain) amendment No. 1229, to provide for greater cyber security collaboration between the Department of Defense and the Department of Homeland Security.

Ayotte (for McCain/Ayotte) amendment No. 1249, to limit the use of cost-type contracts by the Department of Defense for major defense acquisition programs.

Ayotte (for McCain) amendment No. 1220, to require Comptroller General of the United States reports on the Department of Defense implementation of justification and approval requirements for certain sole-source contracts.

Ayotte (for McCain/Ayotte) amendment No. 1132, to require a plan to ensure audit readiness of statements of budgetary resources.

Ayotte (for McCain) amendment No. 1248, to expand the authority for the overhaul and repair of vessels to the United States, Guam, and the Commonwealth of the Northern Mariana Islands.

Ayotte (for McCain) amendment No. 1250, to require the Secretary of Defense to submit a report on the probationary period in the development of the short takeoff, vertical landing variant of the Joint Strike Fighter.

Ayotte (for McCain) amendment No. 1118, to modify the availability of surcharges collected by commissary stores.

Sessions amendment No. 1182, to prohibit the permanent stationing of more than two Army brigade combat teams within the geographic boundaries of the U.S. European Command.

Sessions amendment No. 1183, to require the maintenance of a triad of strategic nuclear delivery systems.

Sessions amendment No. 1184, to limit any reduction in the number of surface combatants of the Navy below 313 vessels.

Sessions amendment No. 1185, to require a report on a missile defense site on the east coast of the United States.

Sessions amendment No. 1274, to clarify the disposition under the law of war of persons detained by the Armed Forces of the United States pursuant to the Authorization for Use of Military Force.

Levin (for Reed) amendment No. 1146, to provide for the participation of military technicians (dual status) in the study on the termination of military technician as a distinct personnel management category.

Levin (for Reed) amendment No. 1147, to prohibit the repayment of enlistment or related bonuses by certain individuals who become employed as military technicians (dual status) while already a member of a Reserve component.

Levin (for Reed) amendment No. 1148, to provide rights of grievance, arbitration, appeal, and review beyond the adjutant general for military technicians.

Levin (for Reed) amendment No. 1204, to authorize a pilot program on enhancements of Department of Defense efforts on mental health in the National Guard and Reserves through community partnerships.

Levin (for Reed) amendment No. 1294, to enhance consumer credit protections for members of the Armed Forces and their dependents.

Levin amendment No. 1293, to authorize the transfer of certain high-speed ferries to the Navy.

Levin (for Boxer) amendment No. 1206, to implement commonsense controls on the taxpayer-funded salaries of defense contractors.

Chambliss amendment No. 1304, to require a report on the reorganization of the Air Force Materiel Command.

Levin (for Brown (OH)) amendment No. 1259, to link domestic manufacturers to defense supply chain opportunities.

Levin (for Brown (OH)) amendment No. 1260, to strike 846, relating to a waiver of ''Buy American'' requirements for procurement of components otherwise producible overseas with specialty metal not produced in the United States.

Levin (for Brown (OH)) amendment No. 1261, to extend treatment of base closure areas as HUBZones for purposes of the Small Business Act.

Levin (for Brown (OH)) amendment No. 1262, to clarify the meaning of ''produced'' for purposes of limitations on the procurement by the Department of Defense of specialty metals within the United States.

Levin (for Brown (OH)) amendment No. 1263, to authorize the conveyance of the John Kunkel Army Reserve Center, Warren, OH.

Levin (for Leahy) amendment No. 1080, to clarify the applicability of requirements for military custody with respect to detainees.

Levin (for Wyden) amendment No. 1296, to require reports on the use of indemnification agreements in Department of Defense contracts.

Levin (for Pryor) amendment No. 1151, to authorize a death gratuity and related benefits for Reserves who die during an authorized stay at their residence during or between successive days of inactive-duty training.

Levin (for Pryor) amendment No. 1152, to recognize the service in the Reserve components of the Armed Forces of certain persons by honoring them with status as veterans under law.

Levin (for Nelson (FL)) amendment No. 1209, to repeal the requirement for reduction of survivor annuities under the Survivor Benefit Plan by veterans' dependency and indemnity compensation.

Levin (for Nelson (FL)) amendment No. 1210, to require an assessment of the advisability of stationing additional DDG–51 class destroyers at Naval Station Mayport, Florida.

Levin (for Nelson (FL)) amendment No. 1236, to require a report on the effects of changing flag officer positions within the Air Force Materiel Command.

Levin (for Nelson (FL)) amendment No. 1255, to require an epidemiological study on the health of military personnel exposed to burn pit emissions at Joint Base Balad.

Ayotte (for McCain) amendment No. 1281, to require a plan for normalizing defense cooperation with the Republic of Georgia.

Ayotte (for Blunt/Gillibrand) amendment No. 1133, to provide for employment and reemployment rights for certain individuals ordered to full-time National Guard duty.

Ayotte (for Blunt) amendment No. 1134, to require a report on the policies and practices of the Navy for naming vessels of the Navy.

Ayotte (for Murkowski) amendment No. 1286, to require a Department of Defense inspector general report on theft of computer tapes containing protected information on covered beneficiaries under the TRICARE program.

Ayotte (for Murkowski) amendment No. 1287, to provide limitations on the retirement of C–23 aircraft.

Ayotte (for Rubio) amendment No. 1290, to strike the national security waiver authority in section 1032, relating to requirements for military custody.

Ayotte (for Rubio) amendment No. 1291, to strike the national security waiver authority in section 1033, relating to requirements for certifications relating to transfer of detainees at U.S. Naval Station Guantanamo Bay, Cuba, to foreign countries and entities.

Levin (for Menendez/Kirk) amendment No. 1414, to require the imposition of sanctions with respect to the financial sector of Iran, including the Central Bank of Iran.

The ACTING PRESIDENT pro tempore. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, I ask unanimous consent that the time between now and 12:15 be equally divided between myself, working with Senator MCCAIN in opposition to the Udall amendment, and controlled by Senator UDALL.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. LEVIN. I understand there is a pending UC that Senator UDALL is to be recognized.

The ACTING PRESIDENT pro tempore. Yes. Under the previous order, the Senator from Colorado is recognized.

AMENDMENT NO. 1107

Mr. UDALL of Colorado. Mr. President, I rise this morning to speak in

favor of amendment 1107. First, let me say that I know how hard Chairman LEVIN and Ranking Member MCCAIN have worked to craft a Defense Authorization Act to provide our Armed Forces with the equipment, services, and support they need to keep us safe. I also thank my colleagues from the Armed Services Committee, a number of whom I see on the floor this morning, for their diligence and dedication to this important work.

With that, let me turn to the amendment itself. I want to start by thanking the cosponsors of the amendment. They include the chairwoman of the Intelligence Committee, Senator FEINSTEIN; the chairman of the Judiciary Committee, Senator LEAHY; and Senator WEBB, a former Secretary of the Navy, someone whom I think we all respect when it comes to national security issues.

I also point out that this amendment is bipartisan. Senator RAND PAUL joined as a cosponsor this morning and gave a very compelling floor speech a few minutes ago. Senators WYDEN and DURBIN have also recently cosponsored it. I recognize their leadership as well.

Let me turn to the amendment itself. A growing number of our colleagues have strong concerns about the detainee provisions in this bill. At the heart of our concern is the concern that we have not taken enough time to listen to our counterterrorism community and have not heeded the warnings of the Secretary of Defense, Director of National Intelligence, and the Director of the FBI, who all oppose these provisions. Equally concerning, we have not had a single hearing on the detainee matters to fully understand the implications of our actions.

My amendment would take out these provisions and give us in the Congress an opportunity to take a hard look at the needs of our counterterrorism professionals and respond in a measured way that reflects the input of those who are actually fighting our enemies. Specifically, the amendment would require that our Defense intelligence and law enforcement agencies report to Congress with recommendations for any additional authorities or flexibility they need in order to detain and prosecute terrorists. My amendment would then ask for hearings to be held so we can fully understand the views of relevant national security experts.

In other words, I am saying let's ask our dedicated men and women who are actually fighting to protect Americans what they actually need to keep us safe. This is a marked departure, in my opinion, from the current language in the bill, which was developed without hearings, and seeks to make changes to the law that our national security professionals do not want and even oppose, as I pointed out.

Like other challenging issues we face here in the Senate, we should identify the problem, hold hearings, gather input from those affected by our actions, and then seek to find the most prudent solution. Instead, we have language in the bill, which, while well intended—of that there is no doubt—was developed behind closed doors and is being moved rather quickly through our Congress. The Secretary of Defense is warning us we may be making mistakes that will hurt our capacity to fight terrorism at home and abroad. The Director of National Intelligence is telling us this language will create more problems than it solves. The Director of the FBI is telling Congress these provisions will erect hurdles that will make it more difficult for our law enforcement officials to collaborate in their effort to protect American citizens. And the President's national security staff is recommending a veto of the entire Defense authorization bill if these provisions remain in the bill.

With this full spectrum of highly respected officials and top counterterrorism professionals warning Congress not to pass these provisions, we are being asked to reject their advice and pass them anyway—again, without any hearings or further deliberation. I don't know what others think, but I don't think this is what the people of Colorado expect us to do, and it is not how I envision the Senate operating.

The provisions would dramatically change broad counterterrorism efforts by requiring law enforcement officials to step aside and ask the Department of Defense to take on a new role they are not fully equipped for and do not want. And by taking away the flexible decisionmaking capacity of our national security team, by forcing the military to now act as police, judge, and jailer, these provisions could effectively rebuild walls between our military law enforcement and intelligence communities that we have spent a decade tearing down.

The provisions that are in the bill—to me and many others—appear to require the DOD to shift significant resources away from their mission to serve on all fronts all over the world. This has real consequences, because we have limited resources and limited manpower. Again, I want to say that I don't think we would lose anything by taking a little more time to discuss and debate these provisions, but we could do real harm to our national security efforts by allowing this language to pass, and that is exactly what our highest ranking national security officers are warning us against doing.

You will note I am speaking in the broadest terms here, but I did want to speak to one particular area of concern, to give viewers and my colleagues a sense of what we face.

The provisions authorize the indefinite military detention of American citizens who are suspected of involvement in terrorism—even those captured here in our own country, in the United States—which I think should concern each and every one of us. These provisions could well represent an unprecedented threat to our constitutional liberties. Let me explain why I think that is the case.

Look, I agree if an American citizen joins al-Qaida and takes up arms against the United States that person should be subject to the same process as any other enemy combatant. But what is not clear is what we do with someone arrested in his home because of suspected terrorist ties. These detainee provisions would authorize that person's indefinite detention, but it misses a critical point. How do we know a citizen has committed these crimes unless they are tried and convicted? Do we want to open the door to domestic military police powers and possibly deny U.S. citizens their due process rights? If we do, I think that is at least something that is worthy of a hearing, and the American people should be made aware of the changes that will be forthcoming in the way we approach civil liberties. But since our counterterrorism officials are telling us these provisions are a mistake, I am not willing to both potentially limit our fight against terrorism and simultaneously threaten the constitutional freedoms Americans hold dear.

As I begin my remarks, I hope I have projected my belief we have a solemn obligation to pass the National Defense Authorization Act, but we also have a solemn obligation to make sure those who are fighting the war on terror have the best, most flexible, most powerful tools possible. To be perfectly frank, I am worried these provisions will disrupt our ability to combat terrorism and inject untested legal ambiguity into our military's operations and detention practices.

We will hear some of our colleagues tell us not to worry because the detainee provisions are designed not to hurt our counterterrorism efforts. We all know the best laid plans can have unintended consequences. While I am sure the drafters of this language intended the provisions to be interpreted in a way that does not cause problems, the counterterrorism community disagrees and has outlined some very serious real world concerns. Stating in the language there will not be any adverse effects on national security doesn't make it so. These are not just words in a proposed law. And those who will be chartered to actually carry out these provisions are urging us to reject them. Shouldn't we listen to their serious concerns? Shouldn't we think twice about passing these provisions?

I have not received a single phone call from a counterterrorism expert, a professional in the field, or a senior military official urging us to pass these provisions. We have heard a wide range of concerns expressed about the unintended consequences of enacting these detainee provisions but not a single voice outside of Congress telling us this will help us protect Americans or make us safer.

In addition to our national security team, which is urging us to oppose these provisions, other important voices are also asking us to stop, to slow down, and to consider them more

thoroughly. The American Bar Association, the ACLU, the International Red Cross, the American Legion, and a number of other groups have also expressed a wide range of serious concerns.

Again, I want to underline, although the language was crafted with the best of intentions, there are simply too many questions about the unintended consequences of these provisions to allow them to move forward without further input from national security experts through holding hearings and engaging in further debate.

I am privileged to be a member of the Armed Services Committee. I am truly honored. As I have implied, and I want to be explicit, I understand the importance of this bill. I understand what it does for our military, which is why, in sum, what I am going to propose with my amendment is that we pass the NDAA without these troubling provisions but with a mechanism by which we can consider in depth what is proposed and, at a later date, include any applicable changes in the law. It is not only the right thing to do policywise, it may very well protect this bill from a veto. The clearest path toward giving our men and women in uniform the tools they need is to pass this amendment and then send a clean National Defense Authorization Act to the President.

In the Statement of Administration Policy, the President says the following—and I should again mention in the Statement of Administration Policy there is a recommendation the President veto the bill.

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

These are striking words. They should give us all pause as we face what seems to be a bit of a rush to pass these untested and legally controversial restrictions on our ability to prosecute terrorists.

I want to begin to close, and in so doing I urge my colleagues to think about the precedent we would set by passing these provisions. We are being told these detainee provisions are so important we must pass them right away, without a hearing or further deliberation. However, the Secretary of Defense, at the same time, along with the Director of National Intelligence and the Director of the FBI, are all urging us to reject the provisions and take a closer look. Do we want to neglect the advice of our trusted national security professionals? I can't think of another instance where we would rebuff those who are chartered with keeping us safe.

If we in the Congress want to constrain the military and give our servicemembers new responsibilities, as these provisions would do, I believe we should listen to what the Secretary of Defense has had to say about it. Secretary Panetta is strongly opposed to these changes, and I think we all know before he held the job he has now, Secretary of Defense Panetta was the Director of the CIA. He knows very well the threats facing our country, and he knows we cannot afford to make any mistakes when it comes to keeping our citizens safe. We have to be right every time. The bad guys only have to be right once.

This is a debate we need to have. It is a healthy debate. But we ought to be armed with all the facts and expertise before we move forward. The least we can do is take our time, be diligent, and hear from those who will be affected by these new and significant changes in how we interrogate and prosecute terrorists. As I have said before, it concerns me we would tell our national security leadership—a bipartisan national security leadership, by the way—that we will not listen to them and that Congress knows better than they do. It doesn't strike me that is the best way to secure and protect the American people.

That is why I filed amendment No. 1107. I think my amendment is a commonsense alternative that will protect our constitutional principles and beliefs while continuing to keep our Nation safe. The amendment has a clear aim, which is to ensure we follow a thorough process and hear all views before rushing forward with new laws that could be harmful to our national security. It is straightforward, it is common sense, and I urge my colleagues to support the amendment.

Mr. President, I thank you for your attention, and I yield the floor.

The ACTING PRESIDENT pro tempore. Who yields time?

The Senator from Michigan.

Mr. LEVIN. Mr. President, we have approximately a half hour on each side. I am wondering how much time Senator GRAHAM needs?

Mr. GRAHAM. Ten minutes. Is that too much? Five minutes.

Mr. LEVIN. Could you do 5 minutes?

Mr. GRAHAM. Seven?

Mr. LEVIN. We have, I think, seven speakers on this side.

Mr. GRAHAM. I will try to be quick.

Mr. LEVIN. Can you try to do 8 minutes?

Mr. GRAHAM. I will try to do it as quickly as I can.

Mr. LEVIN. I yield 8 minutes.

Mr. MCCAIN. I object. We have had a long time from the sponsor of the amendment, the chief proponent; we are going to have 10 minutes from the Senator of Illinois. So I yield to the Senator from South Carolina 10 minutes.

Mr. LEVIN. The Senator from Arizona will control, if this is all right with the Senator, half of our time. Will that be all right?

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. GRAHAM. If the Chair will let me know when 5 minutes has passed, because there are a lot of voices to be heard on this issue, and I want them to be heard. I am just one.

The ACTING PRESIDENT pro tempore. The Chair will so advise.

Mr. GRAHAM. Let me start with my good friend from Colorado. I respect the Senator; I know his concerns. I don't agree.

I can remember being told by the Bush administration: We don't need the Detainee Treatment Act. Everybody said we didn't need it, but they were wrong. I remember being told by the Vice President's office during the Bush administration: It is OK to take classified evidence, show it to the jury, the finder of fact, and not share it with the accused, but you can share it with his lawyer.

How would you like an American soldier tried in a foreign land, where they are sitting there in the chair wondering what the jury is talking about and can't even comment to their own lawyer about the allegations against them?

I have been down this road with administrations and we worked in a bipartisan fashion to change some things the Bush administration wanted to do and I am glad we did it. We are working in a bipartisan fashion to change some things this administration is doing, and I hope we are successful, because if we fail, we are all going to be worse for it.

Here are the facts: Under this provision of mandatory military custody, for someone captured in the United States, if they are an American citizen, that provision does not apply to them. But here is the law of the land right now: If they are an American citizen suspected of joining al-Qaida, being a member of al-Qaida, they can be held as an enemy combatant.

The Padilla case in South Carolina, where the man was held 5 years as an enemy combatant, went to the Fourth Circuit Court of Appeals, and here is what that court said: You can interrogate that person in an intelligence-gathering situation. The only thing you have to do is provide them a lawyer for their habeas appeal review.

So here are the due process rights: If our intelligence community or military believe an American citizen is suspected of being a member of al-Qaida, the law of the land the way it is today, an American citizen can be held as an enemy combatant and questioned about what role they play in helping al-Qaida, and they do get due process. Everybody held as an enemy here, at Guantanamo Bay, captured in the United States, goes before the Federal judge, and the government has to prove, by a preponderance of the evidence, that the person is, in fact, an enemy combatant. There is due process. We don't hold someone and say: Good luck. They have to go before a judge—a Federal court—and prove their case as the government.

Here is the question for the country. Is it OK to hold, under military control, an American citizen who is suspected of helping al-Qaida? You had better believe it is OK.

My good friend from Colorado said this repeals the Posse Comitatus Act. The Posse Comitatus Act is a prohibition on our military being used for law enforcement functions, and it goes back to reconstruction.

This is the central difference between us. I don't believe fighting al-Qaida is a law enforcement function. I believe our military should be deeply involved in fighting these guys at home and abroad. The idea of somehow allowing our military to hold someone captured in the United States is a repeal of the Posse Comitatus Act, you would have to conclude that you view that as a law enforcement function, where the military has no reason or right to be there. That is the big difference between us. I don't want to criminalize the war.

To Senator LEVIN, thank you for helping us this time around craft a bipartisan solution to a very real problem. The enemy is all over the world and here at home. When people take up arms against the United States and are captured within the United States, why should we not be able to use our military and intelligence community to question that person as to what they know about enemy activity? The only way we can do that is hold them in military custody, and this provision can be waived. It doesn't apply to American citizens. But the idea that an American citizen helping al-Qaida doesn't get due process is a lie. They go before a Federal court and the government has to prove they are part of al-Qaida.

Let me ask this to my colleagues on the other side. What if the judge agrees with the military or the intelligence community making the case? Are you going to require us to shut down the intelligence-gathering process, read them their rights, and put them in Federal court? That is exactly what you want, and that will destroy our ability to make us safe. If an American citizen is held by the intelligence community or the military and a Federal judge agrees they were, in fact, a part of the enemy force, that American citizen should be interrogated to find out what they know about the enemy, in a lawful way, and you should not require this country to criminalize what is an act of war against the people of the United States. They should not be read their Miranda rights. They should not be given a lawyer. They should be held humanely in military custody and interrogated about why they joined al-Qaida and what they were going to do to all of us. So this provision not only is necessary to deal with real-world events; it is written in the most flexible way possible.

To this administration, the reason we are on the floor today is it was your idea to take Khalid Shaikh Mohammed and put him in New York City and give him the rights of an American citizen and criminalize the war by taking the mastermind of 9/11 and making it a crime and not an act of war.

The ACTING PRESIDENT pro tempore. The Senator has spoken for 5 minutes.

Mr. GRAHAM. Thank you. I will wrap up.

To Senator LEVIN and Senator MCCAIN, what they are accusing the Senators of doing is not true. They are codifying a process that will allow us to intelligently and rationally deal with people who are part of al-Qaida, not political dissidents.

If someone doesn't like President Obama, we are not going to arrest them. I am getting phone calls about that. That is a bunch of garbage. A person can say anything they want about the President or me, they just can't join al-Qaida and expect to be treated as if it were a common crime. When someone joins al-Qaida, they haven't joined the Mafia. They are not joining a gang. They are joining people who are bent on our destruction, and they are a military threat. If you don't believe they are a military threat, vote for Senator UDALL. If you believe al-Qaida represents a threat to us at home and abroad, give our intelligence and military agencies statutory guidance and authority to do things that need to be clear rather than uncertain.

We are 10 years into this war. Congress needs to speak. This is your chance to speak. I am speaking today. Here is what I am saying to my colleagues on the other side and to the world at large: If you join al-Qaida, you suffer the consequences of being killed or captured. If you are an American citizen and you betray your country, you are going to be held in military custody and you are going to be questioned about what you know. You are not going to be given a lawyer if our national security interests dictate that you not be given a lawyer and go into the criminal justice system because we are not fighting a crime, we are fighting a war.

There is more due process in this bill than at any other time in any other war. I am proud of the work product. There are checks and balances in this bill that we have been working on for 10 years. The mandatory provisions do not apply to American citizens. They can be waived if they impede in an investigation. We are trying to provide tools and clarity that have been missing for 10 years. This is your chance to speak on the central issue 10 years after the attacks of 9/11. Are we at war or are we fighting a crime? I believe we are at war, and the due process rights associated with war are in abundance and beyond anything ever known in any other war.

What this amendment does is it destroys the central concept that we are trying to present to the body and to the country; that we are facing an enemy—and not a common criminal organization—that will do anything and everything possible to destroy our way of life. Let's give our law enforcement and military community the clarity they have been seeking and I think now they will have.

To the administration, with all due respect, you have engaged in one episode after another to run away from the fact that we are fighting a war and not a crime. When the Bush administration tried to pass policies that undercut our ability to fight this war and maintain our values, I pushed back. I am not asking any more of the people on the other side than I ask of myself. When the Bush administration asked me, and others, to do things that I thought undercut our values, I said no. Now we have an opportunity to tell this administration we respect their input, but what we are trying to do needs to be done, not for just this time but for the future.

Ladies and gentlemen, either we are going to fight this war to win it and to keep us safe or we are going to lose the concept that there is a difference between taking up arms against the United States and being a common criminal.

In conclusion, Khalid Shaikh Mohammed and all those who buy into what he is selling present a threat to us far different than any common criminal, and our laws should reflect that.

Senators LEVIN and MCCAIN have created a legal system for the first time in 10 years that recognizes we are fighting a war within our values. I hope we get a strong bipartisan vote for the tools in this bill.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Colorado.

Mr. UDALL of Colorado. Mr. President, how much time do we have remaining?

The ACTING PRESIDENT pro tempore. The Senator has 15½ minutes.

Mr. UDALL of Colorado. Before I recognize Senator DURBIN for 8 minutes, I just wish to respond to my friend, the Senator from South Carolina.

Mr. MCCAIN. Mr. President, how much time is on this side?

The ACTING PRESIDENT pro tempore. There is 5 minutes remaining.

Mr. UDALL of Colorado. The Senator from South Carolina is broadly admired in the Senate. If I am ever in court, I want him to be my lawyer.

I would point out, however, that what I am proposing wouldn't destroy the system we have in place—a system, by the way, that has resulted in the convictions of numerous terrorists with life sentences. What I am asking is to listen to those who are on the frontlines who are fighting against terrorists and terrorism who have said they have concerns about this new proposal and would like a greater amount of time to vet it and consider it.

I yield 8 minutes to the Senator from Illinois.

The ACTING PRESIDENT pro tempore. The Senator from Illinois.

Mr. DURBIN. Mr. President, I have the greatest respect for Senator CARL LEVIN and Senator JOHN MCCAIN. They have done an extraordinary job on the Defense authorization bill. I would say, by and large, this bill would not have engendered the controversy that brings us to the floor today but for this provision, because it is a critically important provision which has drawn the attention not just of those in the military community—which they, of course, would expect in a Defense authorization bill—but also the attention of those in the intelligence community and the law enforcement community across the United States, as well as the President of the United States.

The provision which they include in this bill is a substantial and dramatic departure in American law when it comes to fighting terrorism. I salute Senator UDALL for bringing it to the attention of the committee and now to the floor; that before we take this step forward, we should reflect and pass the Udall amendment which calls for the necessary agencies of government—law enforcement, intelligence, and military—to reflect on the impact of this decision, not just on the impact of America's security but on America's commitment to constitutional principles. This is a fundamental issue which is being raised, and it should be considered ever so seriously. We need to ask ourselves, 10 years after 9/11, why are we prepared to engage in a rewrite of the laws on fighting terrorism?

Thank God we meet in this Chamber today with no repeat of 9/11. Through President George Bush and President Barack Obama, America has been safe. Yes, there are people who threaten us, and they always will, but we have risen to that challenge with the best military in the world, with effective law enforcement, and without giving away our basic values and principles as Americans.

Take a look at the provision in this bill which Senator UDALL is addressing. Who opposes this provision? I will tell you who opposes it. Secretary of Defense Leon Panetta, who passed out of this Chamber with a 100-to-0 vote of confidence in his leadership, has told us don't do this; this is a mistake in this provision.

Secondly, the law enforcement community, from Attorney General Eric Holder to the Director of the Federal Bureau of Investigation, has told us it is a mistake to pass this measure, to limit our ability to fight terrorism. And the intelligence community as well; the Director of National Intelligence tells us this is a mistake.

Is it any wonder Senator UDALL comes to the floor and others join him from both sides of the aisle saying, before we make this serious change in policy in America, ask ourselves: Have we considered the impact this will have on our Nation's security, our ability to interrogate witnesses, and our commitment to constitutional principles?

When I take a look at the letter that was sent to us by the Director of the Federal Bureau of Investigation, Robert Mueller, I have to reflect on the fact that Director Mueller was appointed by President George W. Bush and reappointed by President Barack Obama. I respect him very much. He has warned this Senate: Do not pass this provision in the Defense authorization bill. It may adversely impact ''our ability to continue ongoing international terrorism investigation.''

If this provision had been offered by a Democrat under Republican George W. Bush, the critics would have come to the floor and said: How could you possibly tie the hands of the President when he is trying to keep America safe?

The Director of the Federal Bureau of Investigation has made it clear the passage of this provision in this bill will limit the flexibility of the administration to combat terrorism. It will create uncertainty for law enforcement, intelligence, and defense officials regarding how they handle suspected terrorists and raise serious constitutional concerns. Listen, all those things are worthy of debate were it not for the record that for 10 years America has been safe. It has been safe because of a Republican President and a Democratic President using the forces at hand to keep us safe. If we were coming here with some record of failure when it comes to keeping America safe, it is one thing, but we have a record of positive success. This notion that there is no way to keep America safe without military tribunals and commissions defies logic and defies experience.

Since 9/11, over 300 suspected terrorists have been successfully prosecuted in article III criminal courts in America. Yes, they have been read the Miranda rights, and, yes, they have been prosecuted and sent to prison, the most recent being the Underwear Bomber, who pled guilty just weeks ago in the article III criminal courts. During this same period of time, when it comes to military commissions and tribunals, how many alleged terrorists have been convicted? Six. The score, my friends, if you are paying attention, is 300 to 6. President Bush and President Obama used our article III criminal courts effectively to keep America safe, and in those instances where they felt military tribunals could do it best, they turned to them with some success.

I might add, to those who want to just change the law again when it comes to military tribunals, this is the third try. Twice we have tried to write the language on military tribunals and commissions. It has been sent ultimately across the street to the Supreme Court and rejected. They told us to start over. Do we want to risk that again? Do we want to jeopardize the prosecution of an alleged terrorist because we want to test out a new legal and constitutional theory? I hope not.

I ask unanimous consent to have printed in the RECORD the letter from the Director of the FBI.

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

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, November 28, 2011.

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

DEAR MR. CHAIRMAN: I am writing to express concerns regarding the impact of certain aspects of the current version of Section 1032 of the National Defense Authorization Act for Fiscal Year 2012. Because the proposed legislation applies to certain persons detained in the United States, the legislation may adversely impact our ability to continue ongoing international terrorism investigations before or after arrest, derive intelligence from those investigations, and may raise extraneous issues in any future prosecution of a person covered by Section 1032.

The legislation as currently proposed raises two principal concerns. First, by establishing a presumption of military detention for covered individuals within the United States, the legislation introduces a substantial element of uncertainty as to what procedures are to be followed in the course of a terrorism investigation in the United States. Even before the decision to arrest is made, the question of whether a Secretary of Defense waiver is necessary for the investigation to proceed will inject uncertainty as to the appropriate course for further investigation up to and beyond the moment when the determination is made that there is probable cause for an arrest.

Section 1032 may be read to divest the FBI and other domestic law enforcement agencies of jurisdiction to continue to investigate those persons who are known to fall within the mandatory strictures of section 1032, absent the Secretary's waiver. The legislation may call into question the FBI's continued use or scope of its criminal investigative or national security authorities in further investigation of the subject. The legislation may restrict the FBI from using the grand jury to gather records relating to the covered person's communication or financial records, or to subpoena witnesses having information on the matter. Absent a statutory basis for further domestic investigation, Section 1032 may be interpreted by the courts as foreclosing the FBI from conducting any further investigation of the covered individual or his associates.

Second, the legislation as currently drafted will inhibit our ability to convince covered arrestees to cooperate immediately, and provide critical intelligence. The legislation introduces a substantial element of uncertainty as to what procedures are to be followed at perhaps the most critical time in the development of an investigation against a covered person. Over the past decade we have had numerous arrestees, several of whom would arguably have been covered by the statute, who have provided important intelligence immediately after they have been arrested, and in some instances for days and weeks thereafter. In the context of the arrest, they have been persuaded that it was in their best interests to provide essential information while the information was current and useful to the arresting authorities.

Nonetheless, at this crucial juncture, in order for the arresting agents to proceed to obtain the desired cooperation, the statute requires that a waiver be obtained from the Secretary of Defense, in consultation with the Secretary of State and the Director of National Intelligence, with certification by the Secretary to Congress that the waiver was in the national security interests of the United States. The proposed statute acknowledges that this is a significant point in

an ongoing investigation. It provides that surveillance and intelligence gathering on the arrestee's associates should not be interrupted. Likewise, the statute provides that an ongoing interrogation session should not be interrupted.

These limited exceptions, however, fail to recognize the reality of a counterterrorism investigation. Building rapport with, and convincing a covered individual to cooperate once arrested, is a delicate and time sensitive skill that transcends any one interrogation session. It requires coordination with other aspects of the investigation. Coordination with the prosecutor's office is also often an essential component of obtaining a defendant's cooperation. To halt this process while the Secretary of Defense undertakes the mandated consultation, and the required. certification is drafted and provided to Congress, would set back our efforts to develop intelligence from the subject.

We appreciate that Congress has sought to address our concerns in the latest version of the bill, but believe that the legislation as currently drafted remains problematic for the reasons set forth above. We respectfully ask that you take into account these concerns as Congress continues to consider Section 1032.

Sincerely,

ROBERT S. MUELLER III,
Director.

Mr. DURBIN. Let me also say that section 1031 of this bill is one that definitely needs to be changed, if not eliminated. It will, for the first time in the history of the United States of America, authorize the indefinite detention of American citizens in the United States. I have spoken to the chairman of the committee, who said he is open to language that would try to protect us from that outcome. But the language as written in the bill, unfortunately, will allow for the indefinite detention of American citizens for the first time. The administration takes this seriously. We should too. They have said they will veto the bill without changes in this particular provision.

I hope we will step back and look at a record of success in keeping America safe and not try to reinvent our Constitution on the floor of the Senate. I believe we ought to give to every President, Democratic and Republican, all of the tools and all of the weapons they need to keep America safe. Tying their hands may give us some satisfaction on the floor of the Senate for a moment, but it won't keep America safe.

I reserve the remainder of my time.

I yield the floor.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from Michigan.

Mr. LEVIN. Mr. President, I yield myself 10 minutes.

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

Mr. LEVIN. There have been so many misstatements and facts that have been made, it is hard to keep up with them. Let me just take the last statement the Senator from Illinois made about changing military tribunal law. There is no change in military tribunal law whatsoever made in this bill. I am going to address the other misstatements that have been made by my friends and colleagues, but that was the most recent, so I just want to take on that one first.

In terms of constitutional provisions, the ultimate authority on the Constitution of the United States is the Supreme Court of the United States. Here is what they have said in the Hamdi case about the issue both of our friends have raised about American citizens being subject to the law of war.

A citizen—the Supreme Court said this in 2004—no less than an alien can be part of supporting forces hostile to the United States and engaged in armed conflict against the United States. Such a citizen—referring to an American citizen—if released, would pose the same threat of returning to the front during the ongoing conflict. And here is the bottom line for the Supreme Court. If we just take this one line out of this whole debate, it would be a breath of fresh air to cut through some of the words that have been used here this morning—one line. ''There is no bar to this Nation's holding one of its own citizens as an enemy combatant.'' That is not me, that is not Senator GRAHAM, and that is not Senator MCCAIN. That is the Supreme Court of the United States recently. ''There is no bar to this Nation's holding one of its own citizens as an enemy combatant.''

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

Mr. LEVIN. I would rather not at this point.

There are a number of sections in this bill. My dear friend Senator UDALL says ''these sections'' as though there are a whole bunch of sections that are at issue. There is really only one section that is at issue here, and that is section 1032, and that is the so-called mandatory detention section which has a waiver in it.

Section 1031 was written and approved by the administration. Section 1031, which my friend from Illinois has just said is an abomination, was written and approved by the administration. Now, section 1031 is the authority section. This authorizes. It doesn't mandate anything with the waiver; section 1032 does. Section 1031—and now I am going to use the words in the administration's own so-called SAP, or Statement of Administration Policy. This is what the administration says about section 1031: The authorities codified in this section already exist. So they don't think it is necessary—1031—but they don't object to it. Those are their words—the authorities in 1031 already exist. They do. What this does is incorporate already existing authorities from section 1031—unnecessary in the view of the administration, yes, but they helped write it and they approved it. We made changes in it.

We have made so many changes in this language to satisfy the administration, I think it all comes down to one section: 1032. Section 1032 is the issue, not all of the sections, by the way, that would be stricken by the Udall amendment. The Udall amendment would strike all the sections, but it really comes down to section 1032.

In 1032 is the so-called mandatory provision, which, by the way, does not apply to American citizens. I better say that again. Senator GRAHAM said it, but let me say it again. The most controversial provision—probably the only one in this bill—is section 1032. Section 1032 says: The requirement to detain a person in military custody under this section does not extend to the citizens of the United States. I guess that is the second thing I would like for colleagues to take away from what I say, is that section—and Senator GRAHAM said the same thing. Section 1032—the mandatory section that has the waiver in it—does not, by its own words, apply to citizens of the United States. It has a waiver provision in it to make this flexible.

The way in which 1032 operates is it says that if it is determined that a person is a member of al-Qaida, then that person will be held in military detention. They are at war with us, folks. Al-Qaida is at war with us. They brought that war to our shores. This is not just a foreign war. They brought that war to our shores on 9/11. They are at war with us. The Supreme Court said—and I will read these words again—that there is no bar to this Nation holding one of its own citizens as an enemy combatant. They brought this war to us, and if it is determined that even an American citizen is a member of al-Qaida, then you can apply the law of war, according to the Supreme Court. That is not according to the Armed Services Committee, our bill, or any one of us; that is the Supreme Court speaking.

Who determines it? We say, to give the administration the flexibility that they want, the administration makes that determination. The procedures to make that determination—who writes those procedures? We don't write them. Explicitly, the executive branch writes those procedures. Can those procedures interfere with an ongoing interrogation or investigation? No. By our own language, it says they shall not interfere with interrogation or intelligence gathering. That is all in here. The only way this could interfere with an operation of the executive branch is if they themselves decided to interfere in their own operation. They are explicitly given the authority to write the procedures.

I think we ought to debate about what is in the bill, and what is in the bill is very different from what our colleagues who support the Udall amendment have described. Yes, we are at war, and, yes, we should codify how we handle detention, and this is an effort to do that. And as the administration itself says, we are not changing anything here in terms of section 1031. We are simply codifying existing law.

The issue really relates to 1032, and that is what we ought to debate.

Should somebody—when it has been determined by procedures adopted by the executive branch—who has been determined to be a member of an enemy force who has come to this Nation or is in this Nation to attack us as a member of a foreign enemy, should that person be treated according to the laws of war? The answer is yes. But should flexibility be in here so the administration can provide a waiver even in that case? Yes.

Finally, as far as civilian trials, I happen to agree with my friend from Illinois, and he is a dear friend of mine. Civilian trials work. There is nothing in this provision that says civilian trials won't be used even if it is determined that somebody is a member of al-Qaida. Not only doesn't it prevent civilian trials from being used, we explicitly provide that civilian trials are available in all cases. It is written right in here. I happen to like civilian trials a lot. I participated in a lot of them, and they are very appropriate, and we have a good record. In the case the Senator from Illinois mentioned, that case was a Michigan case. I know a lot about that case. It was the right way to go. I prefer civilian trials in many, many cases. This bill does not say we are going to be using military commissions in lieu of civilian trials. That is a decision we leave where it belongs—in the executive branch.

But we do one thing in this bill in section 1031 that needs to be said. We are at war with al-Qaida, and people determined to be part of al-Qaida should be treated as people who are at war with us. But even with that statement, we give the administration a waiver. That is how much flexibility we give to the executive branch.

Mr. President, how much time have I used?

The PRESIDING OFFICER. The Senator has 3½ minutes remaining.

Mr. LEVIN. I yield the floor.

Mr. MCCAIN. Mr. President, how much time remains on both sides?

The PRESIDING OFFICER. The Senator from Arizona has just over 5 minutes. The Senator from Colorado has 8 minutes.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. UDALL of Colorado. Mr. President, I want to clarify for the record before I recognize Senator WEBB for 5 minutes that some here have claimed that the Supreme Court's Hamdi decision upheld the indefinite detention of U.S. citizens captured in the United States.

It did no such thing. Hamdi was captured in Afghanistan, not the United States. Justice O'Connor, the author of the opinion, was very careful to say that the Hamdi decision was limited to ''individuals who fought against the United States in Afghanistan as part of the Taliban.'' I think that is important to be included in the RECORD.

I yield to Senator WEBB for 5 minutes.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WEBB. Mr. President, I would like to say that I believe the Senator from Colorado has a good point. I say that as someone who is a strong supporter of military commissions, who in many cases has aligned himself with my good friend the Senator from South Carolina and Senator MCCAIN as well on these issues. To me, this is not a jurisdictional issue, and it is not an issue about whether we should be holding people under military commissions under the right cases or under military detention under the right cases.

My difficulty and the reason I support what Senator UDALL is doing is in the statutory language itself. I say this as someone who spent a number of years drafting this kind of legislation as a committee counsel. I have gone back over the last 2 days again and again, reading these sections against each other—1031 and 1032 particularly—and I am very concerned about how this language would be interpreted, not in the here and now, as we see the stability we have brought to our country since 9/11, but what if something were to happen and we would be under more of a sense of national emergency and this language would be interpreted for broader action.

The reason I have this concern is we are talking here about the conditions under which our military would be sent into action inside our own borders. In that type of situation, we need to be very clear and we must very narrowly define how they would be used and, quite frankly, if they should be used at all inside our borders. I think that is the concern we are hearing from people such as the Director of the FBI and the Secretary of Defense.

I am also very concerned about the notion of the protection of our own citizens and our legal residents from military action inside our own country. I think these protections should be very clearly stated. There is a lot of vagueness in this language.

What the Senator from Colorado is proposing is that we clarify these concepts—that we take this provision out and clarify the concepts. Protections are in place in our country. We are not leaving our country vulnerable. In fact, I think we are going to make it a much more healthy legal system if we do clarify these provisions.

That is the reason I am here on the floor to support what Senator UDALL is saying. I know the emotion and the energy Senator LEVIN has put into this, and I respect him greatly. I happen to believe we need to do a better job of clarifying our language.

I spent 16 years, on and off, writing in Hollywood. One of the things that came to me when I was comparing these sections is that this is kind of the danger we get in when we get to the fourth or the fifth screenwriter involved in a story. We want to fix one thing and we are not fixing the whole thing.

I greatly respect the legitimacy of the effort that is put into this. But when we read section 1031 against section 1032, there are questions about what would happen to American citizens under an emergency. Let's take, for instance, what happened in this country after Hurricane Katrina. It is not a direct parallel, but we can see the extremes people went to under a feeling of emergency and vulnerability. We had people who were deputized as U.S. marshals in New Orleans, and we could see them on CNN putting rifles inside people's cars, stopping them on the street, going into people's houses, making a decision—which later was rescinded—that they were going to take people's guns away from them. The vagueness in a lot of this language will not guarantee against these types of conduct on a larger scale if a situation were more difficult and dangerous than it is today.

Section 1031, which Senator LEVIN mentioned, may be clear to the administration but it is not that clear to me, when they talk about a covered person. This isn't simply al-Qaida, depending on how one wants to interpret it, in a time of national emergency. It is a person who is a part of or who substantially supported al-Qaida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act. We might be able to agree to what that means here on the Senate floor today, but we don't know how that might be interpreted in a time of national emergency. I am not predicting that it will; I am saying we should have the certainty that it will not.

The PRESIDING OFFICER. The Senator has consumed 5 minutes.

Mr. WEBB. OK. Similar concerns also revolve around the definitions in terms of the applicability of U.S. citizens and lawful resident aliens when we go to the words ''requirement does not extend.'' What about an option? These are the types of concerns I have. We should have language that very clearly makes everyone understand the conditions under which we would be using the U.S. military inside the borders of the United States.

I yield the floor.

Mr. LEAHY. Mr. President, the Udall-Webb-Leahy-Feinstein-Durbin-Paul-Wyden amendment would remove the very troubling detention subtitle from the National Defense Authorization Act for Fiscal Year 2012. I am a cosponsor of this amendment because I believe the detention subtitle is deeply flawed. We should hear from the Pentagon and other agencies about what they believe to be the appropriate role of the Armed Forces in detaining and prosecuting terrorism suspects. Unfortunately, the language in the bill before us blatantly disregards the concerns of these agencies.

Contrary to statements by the bill's authors, the current version of the detention subtitle, considered by the Senate Armed Services Committee, SASC

on November 15, contains virtually all of the same concerns as the earlier version of the bill. The changes made by SASC do not correct the problems that have been raised by the administration.

Since the SASC marked up the new version, we have received several letters from the administration in opposition to the new language. Secretary Panetta, Director of National Intelligence Clapper, and FBI Director Mueller, have all written to Senate leaders in opposition of the language. That means this language is opposed by each of the agencies whose officers in the field will be directly affected by it.

Just yesterday, Director Mueller wrote that the ''legislation introduces a substantial element of uncertainty'' into terrorism investigations. Secretary Panetta wrote that the legislation ''may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence.'' Director Clapper wrote that ''the various detention provisions . . . would introduce unnecessary rigidity'' into investigations. And we have a Statement of Administration Policy raising very strong objections to some of these provisions. I ask unanimous consent to place these letters and the Statement of Administration Policy in the RECORD.

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

THE SECRETARY OF DEFENSE,
DEFENSE PENTAGON,
Washington, DC, Nov. 15, 2011.

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

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

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

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

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

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

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

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

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

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

Sincerely,

LEON E. PANETTA.

DIRECTOR OF
NATIONAL INTELLIGENCE,
Washington, DC.

Hon. DIANNE FEINSTEIN,
Chairman, Select Committee on Intelligence, U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: I am writing in response to your letter requesting my views on the effect that the detention provisions in the National Defense Authorization Act for Fiscal Year 2012 could have on the ability of the Intelligence Community to gather counterterrorism information. In my view, some of these provisions could limit the effectiveness of our intelligence and law enforcement professionals at a time when we need the utmost flexibility to defend the nation from terrorist threats. The Executive Branch should have maximum flexibility in these areas, consistent with our law and values, rather than face limitations on our options to acquire intelligence information. As stated in the November 17, 2011, Statement of Administration Policy for S. 1867, ''[a]ny bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the nation would prompt the President's senior advisers to recommend a veto.''

Our principal objective upon the capture of a potential terrorist is to obtain intelligence information and to prevent future attacks, yet the provision that mandates military custody for a certain class of terrorism suspects could restrict the ability of our nation's intelligence professionals to acquire valuable intelligence and prevent future terrorist attacks. The best method for securing vital intelligence from suspected terrorists varies depending on the facts and circumstances of each case. In the years since September 11, 2001, the Intelligence Community has worked successfully with our military and law enforcement partners to gather vital intelligence in a wide variety of circumstances at home and abroad and I am concerned that some of these provisions will make it more difficult to continue to have these successes in the future.

Taken together, the various detention provisions, even with the proposed waivers, would introduce unnecessary rigidity at a time when our intelligence, military, and law enforcement professionals are working more closely than ever to defend our nation effectively and quickly from terrorist attacks. These limitations could deny our nation the ability to respond flexibly and appropriately to unfolding events—including the capture of terrorism suspects—and restrict a process that currently encourages intelligence collection through the preservation of all lawful avenues of detention and interrogation.

Our intelligence professionals are best served when they have the greatest flexibility to collect intelligence from suspected terrorists. I am concerned that the detention provisions in the National Defense Authorization Act could reduce this flexibility.

Sincerely,

JAMES R. CLAPPER.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, November 28, 2011.

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

DEAR MR. CHAIRMAN: I am writing to express concerns regarding the impact of certain aspects of the current version of Section 1032 of the National Defense Authorization Act for Fiscal Year 2012. Because the proposed legislation applies to certain persons detained in the United States, the legislation may adversely impact our ability to continue ongoing international terrorism investigations before or after arrest, derive intelligence from those investigations, and may raise extraneous issues in any future prosecution of a person covered by Section 1032.

The legislation as currently proposed raises two principal concerns. First, by establishing a presumption of military detention for covered individuals within the United States, the legislation introduces a substantial element of uncertainty as to what procedures are to be followed in the course of a terrorism investigation in the United States. Even before the decision to arrest is made, the question of whether a Secretary of Defense waiver is necessary for the investigation to proceed will inject uncertainty as to the appropriate course for further investigation up to and beyond the moment when the determination is made that there is probable cause for an arrest.

Section 1032 may be read to divest the FBI and other domestic law enforcement agencies of jurisdiction to continue to investigate those persons who are known to fall within the mandatory strictures of section 1032, absent the Secretary's waiver. The legislation may call into question the FBI's continued use or scope of its criminal investigative or national security authorities in

further investigation of the subject. The legislation may restrict the FBI from using the grand jury to gather records relating to the covered person's communication or financial records, or to subpoena witnesses having information on the matter. Absent a statutory basis for further domestic investigation, Section 1032 may be interpreted by the courts as foreclosing the FBI from conducting any further investigation of the covered individual or his associates.

Second, the legislation as currently drafted will inhibit our ability to convince covered arrestees to cooperate immediately, and provide critical intelligence. The legislation introduces a substantial element of uncertainty as to what procedures are to be followed at perhaps the most critical time in the development of an investigation against a covered person. Over the past decade we have had numerous arrestees, several of whom would arguably have been covered by the statute, who have provided important intelligence immediately after they have been arrested, and in some instances for days and weeks thereafter. In the context of the arrest, they have been persuaded that it was in their best interests to provide essential information while the information was current and useful to the arresting authorities.

Nonetheless, at this crucial juncture, in order for the arresting agents to proceed to obtain the desired cooperation, the statute requires that a waiver be obtained from the Secretary of Defense, in consultation with the Secretary of State and the Director of National Intelligence, with certification by the Secretary to Congress that the waiver was in the national security interests of the United States. The proposed statute acknowledges that this is a significant point in an ongoing investigation. It provides that surveillance and intelligence gathering on the arrestee's associates should not be interrupted. Likewise, the statute provides that an ongoing interrogation session should not be interrupted.

These limited exceptions, however, fail to recognize the reality of a counterterrorism investigation. Building rapport with, and convincing a covered individual to cooperate once arrested, is a delicate and time sensitive skill that transcends any one interrogation session. It requires coordination with other aspects of the investigation. Coordination with the prosecutor's office is also often an essential component of obtaining a defendant's cooperation. To halt this process while the Secretary of Defense undertakes the mandated consultation, and the required. certification is drafted and provided to Congress, would set back our efforts to develop intelligence from the subject.

We appreciate that Congress has sought to address our concerns in the latest version of the bill, but believe that the legislation as currently drafted remains problematic for the reasons set forth above. We respectfully ask that you take into account these concerns as Congress continues to consider Section 1032.

Sincerely,

ROBERT S. MUELLER III,
Director.

STATEMENT OF ADMINISTRATION POLICY

S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012

(Sen. Levin, D-MI, Nov. 17, 2011)

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

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

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

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

Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107–40) (the ''AUMF''). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

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

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

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

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

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

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

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

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

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

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

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

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

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

Troops to Teachers Program: The Administration urges the Senate's support for the transfer of the Troops to Teachers Program to DoD in FY 2012, as reflected in the President's Budget and DoD's legislative proposal to amend the Elementary and Secondary Education Act of 1965 and Title 10 of the U.S. Code in lieu of section 1048. The move to Defense will help ensure that this important program supporting members of the military as teachers is retained and provide better oversight of 6 program outcomes by simplifying and streamlining program management. The Administration looks forward to keeping the Congress abreast of this transfer, to ensure it runs smoothly and has no adverse impact on program enrollees.

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

Mr. LEAHY. So, contrary to what the bill sponsors claim, they have not incorporated the administration's requests, and the current language does not remove the risk of impeding intelligence investigations or prosecutions of terrorist suspects.

As currently written, the language in this bill would authorize the military to indefinitely detain individuals—including U.S. citizens—without charge or trial. I am fundamentally opposed to indefinite detention, and certainly when the detainee is a U.S. citizen held without charge. It contradicts the most basic principles of law that I subscribed to when I was a prosecutor, and it severely weakens our credibility when we criticize other governments for engaging in similar conduct.

I fought against the Bush administration policies that left us in the situation we face now, with indefinite detention being the de facto administration policy, and I strongly opposed President Obama's Executive order on detention when it was announced last March because it contemplated, if not outright endorsed, indefinite detention.

I am also deeply troubled by the mandatory military detention requirements included in this bill, which I believe dangerously undermine our national security. In the fight against al-Qaida and other terrorist threats, we should be giving our intelligence, military, and law enforcement professionals all the tools they need—not limiting those tools. But limiting them is exactly what this bill does. Secretary Panetta has 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.'' Requiring terrorism suspects to be held only in military custody, and limiting the available options in the field, is unwise and unnecessary.

The language in the detention subtitle of this bill is the product of a process that has lacked transparency from the start. These measures directly affect law enforcement, detention, and terrorism matters that have traditionally been subject to the jurisdiction of the Senate Judiciary Committee and the Senate Select Committee on Intelligence, but neither committee was consulted about these provisions in July when the bill was first marked up, or earlier this month when it was modified.

The administration proposed revisions to significantly improve the detention provisions. However, rather than negotiate with the administration in good faith, the Armed Services Committee drafted a new version of the language behind closed doors and claimed that it had solved all of the issues raised by the administration. It is obvious from the letters we have received that this is not the case.

I can see no reason why these provisions were rushed through the Committee without the input of the Defense Department and Federal intelligence and law enforcement agencies that will be directly affected if this language is enacted.

We must allow a thorough review to determine the legal and practical consequences that these changes will have

on future counterterrorism and national security operations to ensure they are not hindered. That is what the Udall amendment does. I urge all Senators to support this amendment.

Ms. COLLINS. Mr. President, it is imperative that American citizens detained on U.S. soil be entitled to every protection guaranteed by the Constitution. I am concerned, therefore, that not all of the detainee provisions in the bill provide explicit exemptions for U.S. citizens who might be detained in the United States.

Had the amendment been more narrowly tailored to address that concern, I would support it. However, I unfortunately cannot support the amendment as a whole because it is too sweeping and would eliminate provisions that are important to preserve because they undoubtedly make our country safer. For instance, if this amendment were to pass, the Administration would be free to transfer detainees to countries where there are confirmed cases of detainees who have been released returning to fight against the United States. In addition, the amendment would eliminate a provision that would prevent foreign fighters captured overseas from taking advantage of the very constitutional rights I want to ensure for American citizens.

Mr. LEVIN. Mr. President, how much time is remaining?

The PRESIDING OFFICER. The Senator from Michigan has 4 minutes remaining.

The Senator from Arizona.

Mr. MCCAIN. Mr. President, I ask unanimous consent to yield 2 minutes to the Senator from New Hampshire, followed by time from Senator LEVIN for the Senator from Connecticut, and then what time I have remaining for the Senator from Georgia.

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

The Senator from New Hampshire.

Ms. AYOTTE. Mr. President, first of all, I wish to thank Chairman LEVIN and Ranking Member MCCAIN and remind everyone that this particular amendment addressing detainee provisions passed overwhelmingly on a bipartisan basis in the Armed Services Committee.

The reason we addressed this issue was because we heard witness after witness in a series of months before the Armed Services Committee from our Department of Defense tell us—for example, when I asked the commander of Africa Command, saying he needs some lawyerly help on how to answer what to do with a member of al-Qaida who is captured in Africa. This is an area that cried out for clarification, and that is the genesis of this amendment, which is a very important amendment.

Briefly, two issues. No. 1, the arguments that have been raised about section 1031, including the statement of authority, this is a red herring. This provision was drafted, as Senator LEVIN said very clearly, based upon what the administration wanted, and also codifies existing law on what the statement authority is in terms of the fact that we are at war with al-Qaida. If people want to disagree with that, that is certainly a policy discussion we can have. But we were attacked on our soil on 9/11, and this codifies the fact that we are at war with members of al-Qaida.

Section 1032 is the military custody provision. Let's be clear on what it does and what it does not do. No. 1, it is very clear on who it applies to. It only applies to members of al-Qaida or an associated force who are planning or carrying out an attack or attempted attack against the United States or its coalition partners. It does not apply to American citizens. We are only saying that if a person is a member of al-Qaida and they want to attack the United States, we are going to hold them in military custody. Why? I prosecuted cases in the criminal system. We don't want to have to——

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

Ms. AYOTTE. We don't ever want to have to read a terrorist their right to remain silent. That is the issue here.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. I yield 3 minutes to the Senator from Connecticut.

Mr. LIEBERMAN. I thank the Chair, and I thank my friend, the chairman of the Armed Services Committee. I rise respectfully to oppose the amendment the Senator from Colorado has offered, though in some measure I thank him for offering it because this has been an important and good debate.

My own position, stated briefly, is this: As Senator LEVIN has said, we are a nation at war. As such we were attacked on 9/11. We adopted in this Chamber the authorization for military force. That is about as close to a declaration of war as we have done since the Second World War. The comparison is exact because what happened to us on 9/11 was in some ways even worse than what happened in December of 1941 when we were attacked at Pearl Harbor.

A nation at war that seizes those who have declared themselves to be part of enemy forces and have attempted to attack the American people, or America, should be treated as enemy combatants, as prisoners of war, according to the law of war. To me, that is a matter of principle. Regardless of what statistics one can cite about how well prosecutions have gone in article III courts, that is, to me, not ultimately the point. If we are at war, the people who are fighting against us ought to be treated as prisoners of war.

In fact, we are without a policy now, as Senator AYOTTE said. The main reason I oppose what Senator UDALL is proposing is that he would remove the sections of the current bill that create a policy and send us back to where we are now, where our forces in the field don't know what to do if they capture a member of al-Qaida.

If I had my way, the provisions in this proposal on detainees would not have the waivers the President has. It would simply say, if you are apprehended—if you are a foreign member of al-Qaida, and you are captured planning or executing attacks against Americans or our allies in this war, you are put in military custody and you are tried in a military tribunal. This is not the law of the jungle; this is according to American law. These are the same courts in which American soldiers are tried when charges are brought against them, and, of course, we accept and abide by all of the provisions of the Geneva Conventions.

But that was not the will of the Armed Services Committee. The Armed Services Committee, in a good, reasonable, bipartisan compromise, has created a system here where the default position—the initial position is to transfer these enemy combatants to military custody. It is a good compromise. It is the kind of compromise that——

The PRESIDING OFFICER. The Senator's 3 minutes has expired.

Mr. LIEBERMAN.—doesn't happen around here enough. I didn't get everything I wanted out of it, but it is a lot better than the status quo. Therefore, I support the language in the bill and oppose the Udall amendment.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise to urge my colleagues to oppose the Udall amendment, which would eliminate the bipartisan detainee provision that the chairman, the ranking member, and committee members worked so hard to craft. These provisions are necessary to provide some certainty for our intelligence professionals in how our government will handle terrorist detainees and how long detainees can be questioned for intelligence-gathering purposes.

We have heard quite a lot over the past few days from administration officials about how our intelligence and law enforcement professionals need flexibility. In fact, Director of National Intelligence Clapper wrote to the Intelligence Committee arguing for flexibility and stressing the need for a process that, as he said, ''encourages intelligence collection through the preservation of all lawful avenues of detention and interrogation.'' With that, I agree wholeheartedly. The problem with the status quo, however, is that the administration refuses to use all of its lawful avenues of detention and interrogation available to it, choosing instead only to use one, and that is article III courts.

For nearly 3 years, Members of Congress have pressed the administration to establish an effective and unambiguous long-term detention policy, but they have refused. The intent behind these bipartisan provisions is simple:

We must hold detainees for as long as it takes to gather information our intelligence and law enforcement professionals need to take down terror networks and to stop attacks.

Frankly, the best place, in my opinion, for this is Guantanamo Bay, But when it comes to Gitmo, the administration is no longer concerned about ''flexibility.'' Instead, we hear that Guantanamo is ''off the table.''

In fact, in a hearing, when I asked the current Secretary of Defense, prior to the SEAL Team 6 takedown of Osama bin Laden: If you captured him, what would you do with him, he quizzically looked back and said: Well, I guess we would send him to Guantanamo. Well, we know that would not have happened had we not taken him down.

This is unfortunate because intelligence and law enforcement professionals, including some at high levels in the administration, acknowledge privately that what hampers intelligence collection from detainees is the administration's unwillingness to take new detainees to Guantanamo for questioning. When our operators overseas are unsure about where they would hold captured detainees, it causes delay, sometimes missed opportunities, and sometimes capture operations become kill operations.

We cannot afford this kind of uncertainty and the Udall amendment simply kicks the can down the road with a report about a problem we already understand. The time to act is now.

Without Guantanamo, long-term military detention elsewhere is the next best option and is the appropriate option for terrorists with whom we are at war. The detainee provisions in the Defense Authorization Act will ensure that the administration uses all of the detention options it says it wants, not just article III courts, and offer the flexibility the administration says it needs. I urge my colleagues to oppose the Udall amendment and give our intelligence professionals and military operators some certainty as they fight the war on terror.

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

Mr. CHAMBLISS. Mr. President, I urge a ''no'' vote on the Udall amendment.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I would like to thank all of my colleagues who have engaged in a very important debate.

I would also like to say to my friend from Michigan, the chairman, I have observed him for many years debate various issues on the floor of the Senate and in the Armed Services Committee. I have never seen him more eloquent than I have observed in his statements today and throughout this debate. I also appreciate the fact that there are many in his conference who do not agree with the position taken by the chairman, and I especially am admiring of that.

I yield.

Mr. LEVIN. How much time is remaining, Mr. President?

The PRESIDING OFFICER. The Senator from Michigan has 45 seconds. The Senator from Colorado has 1 minute.

Mr. MCCAIN. Mr. President, I ask unanimous consent that the Senator from Colorado be allowed——

Mr. LEVIN. He only needs 2 minutes.

Mr. MCCAIN. Two minutes, at least.

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

Mr. MCCAIN. Such time as he may need.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. UDALL of Colorado. Mr. President, I thank, again, the ranking member and the chairman of the Armed Services Committee for their hard work.

I want to close with a couple points. I want to, in the interest of clarifying the record, point out, on the heels of the chairman's comments about the Statement of Administration Policy, when it comes to section 1031, the full statement reads:

> Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country.

Second, there are questions that continue to be raised. I want to mention section 1033. The chairman said it is only section 1032 that is the focus of our attention, but there have been questions raised about section 1033. There is language in section 1033 that makes it clear that—we think it makes it clear that there is a provision that requires any receiving country is taking actions ''to ensure that the [detainee] cannot engage . . . in any terrorist activity.'' This is if we are releasing or transferring somebody who is detained.

I was in Afghanistan recently, at Bagram prison. We have 20,000 detainees there. There are some who believe section 1033 would restrict us from releasing those prisoners at Bagram as we begin to draw down our efforts in Afghanistan. That is just one of the many questions that are asked.

Finally, I listened to the passion that my friend from South Carolina Senator GRAHAM exhibited on the Senate floor. We are all in this together. We are going to prevail. The bad guys in the world are not going to win. We do have, however—and this is what makes our country strong—different points of view on how we prosecute this war. I believe the intent of what is being suggested in these provisions is well and good and at the highest level. But there are many people we trust and respect—including the FBI Director, the Secretary of Defense, the Secretary of Homeland Security—who believe what will happen, if we interpret the language, will not actually reflect our intent.

Therefore, let's set this aside, pass the NDA, send it to the President, and take the next 90 days to hold hearings and thoroughly vet what is in this set of provisions. I will be the first person to come to the floor if all of those individuals and our own experts tell us this is the right way to proceed, to say: Let's put this into the law.

But let's not rush to take these steps. We have something that is working. We have over 300 terrorists who have been prosecuted through our civil system who are in jail, many of them for life sentences, sentences that will outlast their lifespans. Let's not fix something that is not broken until we really understand what the consequences are.

I thank, again, my colleagues on the Senate Armed Services Committee. This has been a helpful and important debate.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, let me also thank our friend from Colorado for his contributions to the committee. He is a valuable member of our committee, and he is no less valuable because he is offering an amendment with which I happen to disagree.

Two quick factual points. One is, the language the Senator mentioned from section 1033 is exactly the same language as was in last year's bill and is in current law. The only difference is we have given greater flexibility this year to the President by making it waiveable. So our language is more flexible than the current law.

Finally, in terms of the Hamdi case, the Senator is correct. I believe it was Senator UDALL who said this was an American citizen who was captured in Afghanistan. That is true. But the Supreme Court, in Hamdi, relied on the Quirin case—which was an American citizen captured on Long Island and—quoted that case with approval when saying:

> There is no bar to this Nation's holding one of its own citizens as an enemy combatant.

That was the Quirin language—an American citizen captured on Long Island.

Mr. President, if I have any time left, I will yield it and yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, the pending amendment is the Udall amendment.

Am I correct, I ask the chairman, in that we would intend, depending on—there are several things that have to be resolved—but we would intend to have this vote at around 2:15 p.m., if things work out? Is that correct?

Mr. LEVIN. I wonder if Senator UDALL also heard that. I believe, and I think it is the intention of all of us, that we vote on this as soon as possible after 2:15.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

AMENDMENTS NOS. 1230 AND 1281, AS MODIFIED

Mr. MCCAIN. Mr. President, I ask unanimous consent that the pending McCain amendments Nos. 1230 and 1281 be modified with the changes at the desk.

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

The amendments, as modified, are as follows:

AMENDMENT NO. 1230, AS MODIFIED

On page 220, strike line 13 and all that follows through page 221, line 6, and insert the following:

''(c) ANNUAL ADJUSTMENT IN ENROLLMENT FEE.—(1) Whenever after September 30, 2012, and before October 1, 2013, the Secretary of Defense increases the retired pay of members and former members of the armed forces pursuant to section 1401a of this title, the Secretary shall increase the amount of the fee payable for enrollment in TRICARE Prime by an amount equal to the percentage of such fee payable on the day before the date of the increase of such fee that is equal to the percentage increase in such retired pay. In determining the amount of the increase in such retired pay for purposes of this subparagraph, the Secretary shall use the amount computed pursuant to section 1401a(b)(2) of this title.

''(2) Effective as of October 1, 2013, the Secretary shall increase the amount of the fee payable for enrollment in TRICARE Prime on an annual basis by a percentage equal to the percentage of the most recent annual increase in the National Health Expenditures per capita, as published by the Secretary of Health and Human Services.

''(3) Any increase under this subsection in the fee payable for enrollment shall be effective as of January 1 following the date on which such increase is made.

''(4) The Secretary shall publish in the Federal Register the amount of the fee payable for enrollment in TRICARE Prime whenever increased pursuant to this subsection.''.

(b) CLARIFICATION OF APPLICATION FOR 2013.—For purposes of determining the enrollment fees for TRICARE Prime for 2013 under subsection (c)(1) of section 1097a of title 10, United States Code (as added by subsection (a)), the amount of the enrollment fee in effect during 2012 shall be deemed to be the following:

(1) $260 for individual enrollment.

(2) $520 for family enrollment.

AMENDMENT NO. 1281, AS MODIFIED

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

SEC. 1243. DEFENSE COOPERATION WITH REPUBLIC OF GEORGIA.

(a) PLAN FOR NORMALIZATION.—Not later than 90 days after the date of the enactment of this Act, the President shall develop and submit to the congressional defense committees and the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a plan for the normalization of United States defense cooperation with the Republic of Georgia, including the sale of defensive arms.

(b) OBJECTIVES.—The plan required under subsection (a) shall address the following objectives:

(1) To establish a normalized defense cooperation relationship between the United States and the Republic of Georgia, taking into consideration the progress of the Government of the Republic of Georgia on democratic and economic reforms and the capacity of the Georgian armed forces.

(2) To support the Government of the Republic of Georgia in providing for the defense of its government, people, and sovereign territory, consistent with the continuing commitment of the Government of the Republic of Georgia to its nonuse-of-force pledge and consistent with Article 51 of the Charter of the United Nations.

(3) To provide for the sale by the United States of defense articles and services in support of the efforts of the Government of the Republic of Georgia to provide for its own self-defense consistent with paragraphs (1) and (2).

(4) To continue to enhance the ability of the Government of the Republic of Georgia to participate in coalition operations and meet NATO partnership goals.

(5) To encourage NATO member and candidate countries to restore and enhance their sales of defensive articles and services to the Republic of Georgia as part of a broader NATO effort to deepen its defense relationship and cooperation with the Republic of Georgia.

(6) To ensure maximum transparency in the United States-Georgia defense relationship.

(c) INCLUDED INFORMATION.—The plan required under subsection (a) shall include the following information:

(1) A needs-based assessment, or an update to an existing needs-based assessment, of the defense requirements of the Republic of Georgia, which shall be prepared by the Department of Defense.

(2) A description of each of the requests by the Government of the Republic of Georgia for purchase of defense articles and services during the two-year period ending on the date of the report.

(3) A summary of the defense needs asserted by the Government of the Republic of Georgia as justification for its requests for defensive arms purchases.

(4) A description of the action taken on any defensive arms sale request by the Government of the Republic of Georgia and an explanation for such action.

(d) FORM.—The plan required under subsection (a) shall be submitted in unclassified form, but may contain a classified annex.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:34 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. WEBB).

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012—Continued

The PRESIDING OFFICER. In my capacity as a Senator from Virginia, I suggest the absence of a quorum.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LEVIN. I ask unanimous consent there be 2 minutes of debate, equally divided, prior to a vote in relation to the Udall of Colorado amendment No. 1107; that upon the use or yielding back of time, the Senate proceed to vote in relation to the amendment, with no amendments in order prior to the vote.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Colorado.

AMENDMENT NO. 1107

Mr. UDALL of Colorado. Mr. President, this amendment strikes controversial detainee provisions that have been inserted in the National Defense Authorization Act. It would require that the Defense intelligence and law enforcement agencies report to Congress with recommendations for any additional authorities they need in order to detain and prosecute terrorists. The amendment would then ask for hearings to be held so we can fully understand the opposition to these provisions by our national security experts—bipartisan opposition, I might add—and hopefully avoid a veto of the Defense authorization bill.

In short, we are ignoring the advice and the input of the Director of the FBI, the Director of our intelligence community, the Attorney General of the United States, the Secretary of Defense, and the White House, who are all saying there are significant concerns with these provisions; that we ought to move slowly.

We have been successful in prosecuting over 300 terrorists through our civil justice system. Let's not fix what isn't broken until we fully understand the ramifications.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. I yield 30 seconds to Senator GRAHAM.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, section 1031 is a congressional statement of authority of already existing law. It reaffirms the fact this body believes al-Qaida and affiliated groups are a military threat to the United States and they can be held under the law of war indefinitely to make sure we find out what they are up to; and they can be questioned in a humane manner consistent with the law of war.

Section 1032 says if you are captured on the homeland, you will be held in military custody so we can gather intelligence. That provision can be waived if it interferes with the investigation.

These are needed changes. These are changes that reaffirm what is already in law.

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

The Senator from Michigan.

Mr. LEVIN. Mr. President, the Supreme Court has recently ruled—this is the Supreme Court talking:

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. A citizen, no less than an alien, can be