itself into a lighter, more modular, and more deployable fighting force. Originally and erroneously executed under a type of contract more fitting for smaller programs, the FCS was supposed to develop 18 manned and unmanned ground systems, including sensors, robots, UAVs, and vehicles, all connected by a complicated mobile electronic network. When work began on this program in 2000, the Army estimated that the first combat units would be equipped by 2011 and that all the Army's ground combat formations would be equipped by 2032. The Army initially estimated the entire effort would cost about $160 billion.

By 2006, independent cost estimators at the Pentagon pegged total procurement costs at upwards of $300 billion. And, from there, with the assistance of a fundamentally flawed fee structure that was not focused on objective results, FCS total costs kept growing. To make a long story short, in April 2009, then-Secretary Gates terminated most of the program and the problem.

While the Army has had its problems, the Navy's Littoral Combat Ship is another example of a fundamentally flawed acquisition process. Originally conceived by former Chief of Naval Operations Vern Clark as a revolutionary, new, affordable class of surface combatant—about the size of a light frigate or Coast Guard cutter—the LCS was to be able to conduct shallow-water and near-shore operations.

The first two LCS contracts set the cost of the sea frame at $188 million each. After spiking to over $730 million, the cost is now about $400 million per hull. In December of 2010, the Pentagon's chief tester gave LCS poor performance ratings, saying that ''LCS is not expected to be survivable in terms of maintaining a mission capability in a hostile combat environment.''

I continue to be very troubled by the Navy's decision late last year to set aside then-pending competition and award contracts to each of the bidders on this program.

The F–22 raptor program. The F–22 was supposed to maintain air superiority in the face of the Soviet threat during the Cold War. The F–22 obtained full operational capability 20 years later, well after the Soviet Union dissolved. When it finally emerged from its extended testing and development phase, the F–22 was recognized as a very capable tactical fighter, probably the best in the world for some time to come. But plagued with development and technical issues that caused the costs of buying to go through the roof, not only was the F–22 20 years in the making, but the process has proved so costly that the Pentagon could ultimately afford only 187 of the planes rather than the 750 it originally planned to buy. To make a long story short, the F–22 has not flown in combat since its inception.

The DDG–1000 Zumwalt Class Destroyer was supposed to cost $1.1 billion each. It is now expected to cost $3.5 billion each.

The Airborne Laser effort is to be canceled. The fantastic story of the VH–71 new Presidential Helicopter Replacement Program was canceled only after it became more expensive than a full-size 747.

What can we do?

I know it is time for us to get on with the Defense authorization bill.

We need to have transparency. We need to have accountability. We have to use competition to encourage industry to produce desired outcomes and better incentivize the acquisition workforce to do more with less. We have to do a lot of things. We have clearly failed to abide by the warning President Eisenhower issued in his speech 50 years ago, but I do find some comfort that times of fiscal restraint and austerity can drive desired change, even in the face of daunting systemic obstacles such as the military-industrial-congressional complex. We must do better.

Mr. President, I yield the floor. I thank my friend from Michigan for his indulgence.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC, December 1, 2011.

Hon. LEON PANETTA,
Secretary of Defense,
Pentagon, Washington, DC.

DEAR SECRETARY PANETTA: I was very troubled to read recently in USA Today that the Air Force allowed a retired general officer who was then-serving as an executive in The Boeing Company to participate as a ''mentor'' in a war game involving the aerial refueling tanker that Boeing was at the same time competing to build for the Air Force under a multibillion dollar procurement program. This, in my view, warrants serious inquiry.

According to the article, the retired general officer previously served as the chief of U.S. Transportation Command and Air Force Mobility Command, which would have given him keen insight into the Air Force's plans to replace its aerial refueling tanker fleet. It appears that what this mentor did for the Air Force in this case directly related to one of Boeing's largest potential contracts with the Air Force. This makes the story particularly alarming. No less disturbing is that the Air Force apparently withheld publicly disclosing this information from a Freedom of Information Act (FOIA) request for approximately two years.

This latest revelation plainly validates my concerns that I conveyed last year about the potential for conflicts-of-interests associated with military mentor programs. It is also another example of the revolving door between the Department and private industry and the prevalence of the military-industrial complex in the Department's planning and procurement processes, which has plagued the Air Force's attempts to replace its aerial refueling tanker fleet from day-one.

Although there appears to be general comfort that the contract for the KC–46A was awarded properly and that the contracting strategy for the development of these tankers is viable, whether any misconduct somehow biased the program at its inception towards a particular outcome must be taken very seriously.

With this in mind, please answer the following questions.

1. After the individual cited in the article, retired Lieutenant General Charles Robertson, retired from the Air Force, during what period of time did he serve as an advisor, consultant or mentor, or in any other similar capacity, to the Air Force?

2. Describe, with specificity, General Robertson's duties, responsibilities and activities while serving in the foregoing capacity during this period.

3. Identify, with specificity, what project(s) General Robertson served on in the foregoing capacity, including but not limited to, as a mentor.

4. Describe, with specificity, what relationship these projects had with any program or process in which Boeing had a direct or indirect interest.

5. Describe, with specificity, the activity cited in the article described above (i.e., a ''war game'') and what relationship, if any, that this activity had with the pending Air Force program to replace its aerial refueling tanker fleet.

6. Describe what was happening with the Air Force's program to replace its aerial refueling tanker fleet while the foregoing activity was conducted.

7. What direct or indirect input or influence did General Robertson have in the outcome of the activity for which he was serving as a mentor (or in any similar capacity) or the overall program or process that this activity was intended to support?

8. How much per year and in total compensation was General Robertson paid for his service as an advisor, consultant or mentor, or in any other similar capacity, to the Air Force?

9. Please provide a copy of his employment contract(s) with the Air Force for his service in the foregoing capacity.

10. Explain why it reportedly took two years to provide the information described above where this information was responsive to a properly presented FOIA request.

11. What is the current status or the Department of Defense's mentor program?

12. If the program is still extant at all, what controls are in place today that will ensure against conflicts-of-interests and the appearance of impropriety by its participants?

Thank you for your cooperation and your attention to this serious matter.

Sincerely,

JOHN MCCAIN,
Ranking Member.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012—CONFERENCE REPORT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of the conference report to accompany H.R. 1540, which the clerk will report.

The assistant legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1540), 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, having met, after full and free conference, have agreed that the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment, and the Senate agree to the same, signed by a majority of the conferees on the part of both Houses.

(The conference report is printed in the House proceedings of the RECORD of December 12, 2011.)

The PRESIDING OFFICER. There will be up to 3 hours of debate equally divided between the leaders or their designees.

The Senator from Michigan.

Mr. LEVIN. Mr. President, I yield myself 20 minutes.

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

Mr. LEVIN. Mr. President, on behalf of the Senate Armed Services Committee, I am pleased to bring to the Senate the conference report on H.R. 1540, the National Defense Authorization Act for fiscal year 2012. This conference report, which was signed by all 26 Senate conferees, contains many provisions that are of critical importance to our troops. This will be the 50th consecutive year in which a National Defense Authorization Act has been enacted into law.

I thank all of the members and staff of the Senate Armed Services Committee—and especially our subcommittee chairs and our ranking members—for the hard work they have done to get us to this stage. Every year we take on tough issues and we work through them on a bipartisan basis, consistent with the traditions of our committee. This year was a particularly difficult one because of the severely condensed timeline for floor consideration and conference on the bill.

I particularly thank my friend Senator MCCAIN, our ranking minority member, for his strong support throughout the process. I know both of us thank the chairman and ranking member of the House Armed Services Committee, BUCK MCKEON and ADAM SMITH, for their commitment to this bill and to the men and women of our Armed Forces.

The conference report we bring to the floor today authorizes $662 billion for national defense programs. While it authorizes $27 billion less than the President's budget request and $43 billion less than the amount appropriated for fiscal year 2011, I am confident this conference report, nonetheless, provides adequate support for the men and women of the Armed Forces and their families and provides them with the means they need to accomplish their missions.

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

I ask unanimous consent that a list of some of the more significant provisions be printed in the RECORD at the close of my remarks.

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

(See exhibit 1.)

Mr. LEVIN. Probably the most discussed provision in the conference report is the provision relative to military detention for foreign al-Qaida terrorists. This provision was written to be doubly sure there is no interference with civilian interrogations and other law enforcement activities and to ensure that the President has the flexibility he needs to use the most appropriate tools in each case. The bill as passed in the Senate addressed this issue by including language that: No. 1, left it to the President to adopt procedures to determine who is a foreign al-Qaida terrorist and therefore subject to presumed military detention; No. 2, required that those procedures not interfere with ongoing intelligence, surveillance, or interrogations by civilian law enforcement; No. 3, left it to the executive branch to determine whether a military detainee who will be tried is tried by a civilian court or a military court; and No. 4, gave the executive branch broad waiver authority.

The conference report retains that language and adds additional assurances that there will be no interference with civilian interrogations or other law enforcement activities. In particular, the conferees added language that says the following:

> Nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with respect to a covered person, regardless of whether such covered person is held in military custody.

It also modifies the waiver language to give the President, rather than the Secretary of Defense, the authority to waive the requirements of the provision.

Under the provision in the conference report, law enforcement agencies are not restrained in apprehending suspects or conducting any investigations or interrogations. If a suspect is apprehended and is in law enforcement custody, the suspect can be investigated and interrogated in accordance with existing procedures. If and when a determination is made that a suspect is a foreign al-Qaida terrorist, that person would be slated for transfer to military custody under rules written by the executive branch. Again, however, any ongoing interrogations are not to be interrupted, and the President also has a waiver authority. If the suspect is transferred to military custody, all existing law enforcement and national security tools remain available to the FBI and other law enforcement agencies, and even if the suspect is held in military custody, it would be up to the Attorney General, after consulting with the Secretary of Defense and the Director of National Intelligence, to determine whether the suspect will be tried in Federal court or before a military commission. The bill provides the Attorney General with broad discretion to ensure that whatever consultation is conducted does not impede operational judgments that may need to be made to pursue investigative leads, effect arrests or file charges.

The language in the Senate bill and in the conference report is intended to preserve the operational flexibility of law enforcement and national security professionals in the executive branch. Nothing in the language limits the President as to when he can waive the provision or for whom he can waive it.

For example, he is not required to wait for a coverage determination to be made before deciding to waive the requirements of the provision. Similarly, he is not precluded from waiving the provision with regard to more than one individual at a time—for example, with regard to a group of conspirators or potential codefendants.

In short, the waiver language in the conference report is broad enough to reflect circumstances in which it is in the national security interests of the United States for a President to waive the requirements of the provision with respect to a category of covered persons, if he so determines, in order to preserve the flexibility of counterterrorism professionals and operators to take expeditious action.

With the exception of those assurances, the detainee provisions in the conference report are largely unchanged from the provisions in the bill that was approved by the Senate on a 93-to-7 vote just 2 weeks ago. Those who say we have written into law a new authority to detain American citizens until the end of hostilities are wrong. Neither the Senate bill nor the conference report establishes new authority to detain American citizens—or anybody else.

The issue of indefinite detention arises from the capture of an enemy combatant at war. According to the law of war, an enemy combatant may be held until the end of hostilities. Can an American citizen be held as an enemy combatant? According to the law of war, an enemy combatant may be held until the end of hostilities. But, again, can an American citizen be held as an enemy combatant? I believe that if an American citizen joins a foreign army or a hostile force such as al-Qaida that has declared war and organized a war against us and attacks us, that person can be captured and detained as an enemy combatant under the law of war.

In 2004, the Supreme Court held in the Hamdi case that ''there is no bar to this Nation's holding one of its own citizens as an enemy combatant.''

The Court cited with approval its holding in the Quirin case, in which an earlier court held that ''citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.''

But despite that view of mine, which I clearly expressed on the Senate floor a couple weeks ago, neither the Senate bill nor the conference report takes a position on this issue. Both the Senate bill and the conference report include

the language of the Feinstein amendment, which we drafted together and passed 99 to 1. That amendment leaves this issue to the executive branch and the courts by providing the following:

Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

The more difficult issue for me—and I believe it goes to the heart of the concern of the detention policy—is the kind of war we are in with al-Qaida, and that issue is when does the detention end? In other words, when are the hostilities over? In this kind of nontraditional war, we are not likely to sign a peace treaty or receive a formal surrender or even reach an agreement on a cease-fire.

Under these circumstances, it is appropriate for us to provide greater procedural rights to enemy detainees than we might in a more traditional war. We have done so in this conference report. The conference report, for instance, requires periodic reviews of detainee cases in accordance with an executive order issued earlier this year to determine whether detainees pose a continuing threat or safely can be released. Under the conference report, enemy combatants who will be held in long-term military detention are told, for the first time, they will get a military judge and a military lawyer for their status determination.

The conference report includes many other important provisions.

It includes new sanctions against the financial sector of Iran, including the Central Bank of Iran. These sanctions would, among other actions, require foreign financial institutions to choose between maintaining ties with the U.S. financial system or doing business with the Central Bank of Iran.

It includes provisions addressing the problem of counterfeit parts that can undermine the performance of military weapons systems and endanger our men and women in uniform. This is one of the most important additional provisions we have in our bill; that is, the provisions relative to these counterfeit parts that are flooding our defense system with electronic parts that are counterfeited and come mainly from China. We were able to identify approximately 1,800 cases of suspect counterfeit electronic parts, covering more than 1 million individual parts, with most of them, again, coming from China. This conference report includes comprehensive reforms to keep counterfeit electronic parts out of the defense supply chain and provides proper accountability when suspect parts make it through that chain.

In particular, the conference report relative to this subject does the following:

It clarifies acquisition rules to ensure that the cost of replacement and rework that is required by the use of suspect counterfeit parts is paid by the contractor, not by the taxpayer.

It requires the Department of Defense and Department of Defense suppliers to purchase electronic parts from manufacturers and their authorized dealers or from trusted, certified suppliers.

It requires Department of Defense officials and Department of Defense contractors that become aware of counterfeit parts in the supply chain to provide written notification to the government.

It requires the Department of Defense and its largest contractors to establish systems and procedures to detect and avoid counterfeit parts.

It requires the Secretary of Homeland Security to consult with the Secretary of Defense on the sources of counterfeit electronic parts in the military supply chain and establish a risk-based program of enhanced inspection of imported electronic parts.

It authorizes Customs to share information from electronic parts inspected at the border with manufacturers to help determine whether the parts are counterfeit.

It strengthens criminal penalties for counterfeiting military goods or services.

We are very grateful for the support of Members of this body for that provision.

Relative to the strengthening of criminal penalties, I wish to add our thanks to Senator WHITEHOUSE for his work on this subject, for his provisions relative to additional criminal penalties for counterfeiting military goods that are a part of this bill, and they are a very important part.

The conference report requires sound planning—this is another provision of this bill—and justification before we spend more money on troop realignment from Okinawa to Guam and on tour normalization in Korea. Those provisions follow detailed oversight that Senators WEBB, MCCAIN, and I have conducted.

On some other provisions: The conference report requires that the next lot of F–35 aircraft—lot 6—and all subsequent aircraft, be purchased under fixed-price contracts, with the contractor assuming full responsibility for any costs above the target cost specified in the contract.

Our conference report fences 75 percent of the money available for the Medium Extended Air Defense System—MEADS—until the Secretary of Defense submits a detailed plan to use those funds to close out the program or pay contract termination costs.

The conference report includes Senator LANDRIEU's bill to extend the Small Business Innovative Research—SBIR—Program for an additional 6 years. It has been about 6 years since we reauthorized this vitally important program, which provides a huge benefit to our small businesses so they can effectively participate in research programs that are funded by the Federal Government. In the defense arena, SBIR has successfully invested in innovative research and technologies that have contributed significantly to the expansion of the defense industrial base and the development of new military capabilities.

As to Pakistan, the conference report limits to 40 percent the amount of the Pakistan Counterinsurgency Capability Fund that can be obligated until the Secretary of Defense provides Congress with a strategy on the use of the fund and on enhancing Pakistan's efforts to counter the threat of improvised explosive devices, those IEDs which kill so many of our troops and so many civilians.

Finally, the Department of Defense has informed us it does not need an exemption from section 526 of the Energy Independence and Security Act of 2007 because that section does not apply to purchases at market prices from generally available fuel supplies and does not preclude the Department from purchasing any fuel it needs or expects to purchase in the foreseeable future.

We are in the final stages of withdrawing our combat troops from Iraq, but we continue to have almost 100,000 U.S. soldiers, sailors, airmen, and marines on the ground in Afghanistan. While there are issues on which we may disagree, we all know we must provide our troops the support they need as long as they remain in harm's way. The enactment of this conference report will improve the quality of life for our men and women in uniform. It will give them the tools they need to remain the most effective fighting force in the world. Most important of all, it will send an important message that we as a nation stand behind our troops and we deeply appreciate their service.

In conclusion, I would, once again, thank Senator MCCAIN, all our Members, and our majority and minority staff, led by Rick DeBobes and Dave Morriss, for their hard work on this bill. We could not have done this without them.

I ask unanimous consent that a full list of our majority and minority staff, who gave so much of themselves and their families, be printed in the RECORD.

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

SENATE ARMED SERVICES COMMITTEE STAFF

Richard D. DeBobes, Staff Director; David M. Morriss, Minority Staff Director; Adam J. Barker, Professional Staff Member; June M. Borowski, Printing and Documents Clerk; Leah C. Brewer, Nominations and Hearings Clerk; Christian D. Brose, Professional Staff Member; Joseph M. Bryan, Professional Staff Member; Pablo E. Carrillo, Minority Investigative Counsel; Jonathan D. Clark, Counsel; Ilona R. Cohen, Counsel; Christine E. Cowart, Chief Clerk; Jonathan S. Epstein, Counsel; Gabriella E. Fahrer, Counsel; Richard W. Fieldhouse, Professional Staff Member; Creighton Greene, Professional Staff Member; Ozge Guzelsu, Counsel; John Heath, Jr., Minority Investigative Counsel.

Gary J. Howard, Systems Administrator; Paul C. Hutton IV, Professional Staff Member; Jessica L. Kingston, Research Assistant;

Jennifer R. Knowles, Staff Assistant; Michael J. Kuiken, Professional Staff Member; Kathleen A. Kulenkampff, Staff Assistant; Mary J. Kyle, Legislative Clerk; Gerald J. Leeling, Counsel; Daniel A. Lerner, Professional Staff Member; Peter K. Levine, General Counsel; Gregory R. Lilly, Executive Assistant for the Minority; Hannah I. Lloyd, Staff Assistant; Mariah K. McNamara, Staff Assistant; Jason W. Maroney, Counsel; Thomas K. McConnell, Professional Staff Member; William G. P. Monahan, Counsel; Lucian L. Niemeyer, Professional Staff Member.

Michael J. Noblet, Professional Staff Member; Bryan D. Parker, Minority Investigative Counsel; Christopher J. Paul, Professional Staff Member; Cindy Pearson, Assistant Chief Clerk and Security Manager; Roy F. Phillips, Professional Staff Member; John H. Quirk V, Professional Staff Member; Robie I. Samanta Roy, Professional Staff Member; Brian F. Sebold, Staff Assistant; Russell L. Shaffer, Counsel; Michael J. Sistak, Research Assistant; Travis E. Smith, Special Assistant; William K. Sutey, Professional Staff Member; Diana G. Tabler, Professional Staff Member; Mary Louise Wagner, Professional Staff Member; Barry C. Walker, Security Officer; Richard F. Walsh, Minority Counsel; Bradley S. Watson, Staff Assistant; Breon N. Wells, Staff Assistant.

Mr. LEVIN. I yield the floor.

EXHIBIT 1

SELECTED HIGHLIGHTS OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

—Authorizes a 1.6 percent across-the-board pay raise for all uniformed military personnel and extend over 30 types of bonuses and special pays aimed at encouraging enlistment, reenlistment, and continued service by active-duty and reserve military personnel;

—Extends authorities needed to fairly compensate civilian employees and highly qualified experts who are assigned to work overseas in support of contingency operations;

—Clarifies provisions of the Uniform Code of Military Justice relating to the offenses of rape, sexual assault, and other sexual misconduct to address constitutional deficiencies in the existing law;

—Extends the authority of U.S. Special Operations Forces to provide support to regular forces, irregular forces, and individuals aiding U.S. special operations to combat terrorism;

—Freezes the Department's spending on contract services at fiscal year 2010 levels, to ensure that cost reductions and savings are spread across all components of the DOD workforce;

—Authorizes the Department to void a contract in Afghanistan, if the contractor or its employees are determined to be actively working with the enemy to oppose U.S. forces in that country;

—Implements cost-saving programs to address rapidly escalating costs for the operation and support of weapon systems, including costs incurred as a result of corrosion; and

—Enhances the role of the National Guard by including the Chief of the National Guard Bureau as a member of the Joint Chiefs of Staff.

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

The PRESIDING OFFICER (Mrs. HAGAN). The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. MCCAIN. Madam President, I fully support the conference report and the national defense authorization bill for fiscal year 2012. This is the 50th year the Congress will pass this, and I am now confident this bill will be signed into law by the President of the United States.

It is an important piece of legislation. I appreciate the participation of all Members, as we went through this bill in a relatively short period of time. There certainly was a lot of participation by almost every Member.

I am most appreciative, of course, of Senator LEVIN, whom I have had the honor of serving with for many years. Quite often we have spirited discussions on various issues, but my admiration and appreciation for his leadership is very large. He is a man of incredible patience—a quality some accuse me of lacking, I think correctly.

Senator LEVIN and his staff and our staff work very closely together throughout the year as we bring forth this Defense authorization bill. Obviously this bill provides for defense policy guidance and funding that is vital to our national security, provides the clearest indication to our men and women in uniform that the Congress cares about them and their families.

In testament to the importance of this legislation, as I mentioned, we have passed a defense authorization bill every year since 1961.

Let me remind my colleagues of the hard work that went into this bill. The bill is a product of 11 months of legislative effort in the Senate, 71 hearings and meetings on the full range of national security priorities. We reported our bill out of the committee with a 26-to-0 vote. We debated nearly 40 hours, disposed of 139 amendments, and the bill was overwhelmingly passed 93 to 7. After Senate passage on December 1, our staffs have worked around the clock for 9 days to put this together.

As Senator LEVIN mentioned, it authorizes $662.4 billion for national defense, which is $26.6 billion less than the President's request. It authorizes $530 billion for the base budget for the Department of Defense, and it goes on. We authorize a 6-percent increase in funding over last year's request for our special operations forces, who play a lead role in counterterrorism operations. We authorize over $2.4 billion to counter improvised explosive device activities. The IEDs still plague the men and women who are serving in Afghanistan.

Let me also mention some noteworthy provisions in this legislation.

The conference report includes strong, unambiguous language that recognizes that the war on terror extends to us at home and that we must address it as such. The language the Senate adopted regarding detainees recognizes both that we must treat enemy combatants who seek to do us harm as such and that we must be able to gain as much information from such individuals as possible regarding their plans to wage war against our citizens—I want to emphasize—without violating the rules of war, without violating the Geneva Conventions, without engaging in torture or waterboarding or any of the kinds of techniques that have stained America's honor in the 21st century.

I strongly believe the detainee provisions in the bill are constitutional and in no way infringe upon the rights of law-abiding Americans. Unfortunately, rarely in my time have I seen legislation so consistently misunderstood and misrepresented as these detainee provisions. The hyperbole used by both the left and the right regarding this language is false and misleading.

Let me be clear. The language in this bill will not affect any Americans engaging in the pursuits of their constitutional rights. The language does recognize that those people who seek to wage war against the United States will be stopped, and we will use all ethical, moral, and legal methods to do so.

I am very pleased that the administration has finally recognized that the language we have adopted merits the President's signature and will soon be signed into law. While we have made some technical changes to the detainee provisions, they remain substantially the same as passed by the Senate Armed Services Committee.

The Congress, in strong bipartisan majorities, especially in the Committee on Armed Services, is deeply concerned by the administration's flawed handling of detainees in the fight against terrorism.

It was Congress that took up this vital national security issue and drafted all the versions of these provisions and led the negotiations on all of the major compromises. Yes, we listened to the administration's concerns, as we should, and we took many of them into account. Unfortunately, the administration has fought these provisions every step of the way. They tried to have these provisions stripped from the Senate bill as a condition for bringing it to the floor for debate. When that did not work, they tried to have these provisions dropped from the bill through amendments on the floor. When that did not work, they urged the conferees to drop these provisions in conference or at least water them down into nothingness. Again and again, the administration failed. So for them now to try to claim credit for these provisions flies in the face of the historical record. Facts are stubborn, and when it comes to these detainee provisions, the fact is this: Congress has led and defined the debate, and the administration has finally conceded to that reality.

Let's establish once again what these detainee provisions do and do not do.

They would, among other things, reaffirm the military's existing authority to detain individuals captured in the course of hostilities conducted pursuant to the authorization of the use of military force.

The ''authority to detain provision'' in the conference report confirms that nothing in this section of the bill should be ''construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.'' There could be nothing clearer than that statement.

This confirmation of the intent of the bill was inserted as a result of floor debate and negotiations with the Senator from California, Mrs. FEINSTEIN, to make absolutely clear what Chairman LEVIN and I and members of the committee who have supported this legislation have said throughout—that this provision does not and is not intended to change the existing state of the law with regard to detention of U.S. citizens. This section simply restates the authority to detain what has already been upheld by the Federal courts. We are not expanding or limiting the authority to detain as established by the 2001 authorization for the use of military force.

The conference report also includes a provision requiring military detention for foreign al-Qaida terrorists who attack the United States—something this administration has been not only hesitant but completely unwilling to even consider until this legislation highlighted the inconsistency between claiming the authority to kill an al-Qaida member with drones overseas but not being willing to hold a captured al-Qaida member in military custody in the United States, even in a situation where the al-Qaida terrorist had penetrated our defenses and had carried out or attempted an attack inside the United States.

The authority to hold al-Qaida members in military custody, while completely consistent with the law of war that applies to enemy combatants, is not a straitjacket but is as flexible as the President desires to make it.

While we in Congress have given the President a statutory authority to use military custody for al-Qaida members as a tool to ensure that we are able to obtain timely, actionable intelligence, the President can exercise a broad national security waiver to this requirement—a broad national security waiver. Most important, this provision requiring military detention explicitly excludes U.S. citizens and lawful resident aliens.

The military custody provision in the final compromise authorizes the transfer of any detainee to civilian custody for trial in civilian court and leaves it up to the President to establish procedures for determining how and when persons determined to be subject to military custody would be transferred. The provision adopted in the conference report requires that such determination must not interfere with ongoing intelligence, surveillance, or interrogation operations.

All of this flexibility was added to the bill even before we began negotiations with the White House to make it clear that the intent of the Senate's provisions was not to tie the administration's hands but to give them additional means to defeat the most serious type of threat from al-Qaida to our country. The result of these Senate modifications to the original form of the provisions ensures that the executive branch has complete flexibility in how it first determines and then how it applies military custody for al-Qaida members who are captured after having attacked the United States or while planning or attempting such an attack.

Moreover, after meeting with FBI Director Robert Mueller, the Senate conferees added language in conference in response to his concerns about the impact on FBI operations confirming that nothing in this provision may be ''construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation, or any other domestic law enforcement agency, with regard to a covered person, regardless whether such covered person is held in military custody.''

It is the intent of the Senate conferees, in agreement with House colleagues on a bipartisan basis, that the FBI continue to execute the full range of its investigative and counterterrorism responsibilities and that any shift to military custody will be an administrative measure that does not limit in any way the FBI's authority.

I acknowledge that these issues were very controversial with some Members. These provisions were debated extensively—as thoroughly as any matter I have seen in recent memory—but I believe we have addressed in a positive way and have been responsive to concerns raised by the administration. Indeed, the Senate made changes both on the floor and during conference to ensure that the intent of the provisions was fully understood by the administration and others even before negotiations over the final form of the text began.

In many ways, as Chairman LEVIN has pointed out in many of his public statements and speeches on these detainee provisions, rarely has such misinformation, speculation, and outright misrepresentation been greater over what a bill actually does compared to what some from the left and right claim it does than has been the case with these detainee provisions. Whether 2012 campaign politics played a role in the characterization of these provisions or whether this was simply a case of not fully understanding the intent of the authors of these provisions I will leave to others to decide.

I point out again that I think my friend from Michigan Senator LEVIN displayed a great deal of courage in formulating what he thought was best for our Nation's security.

Regardless of the motivation that may have colored the debate until now, I believe that, by any responsible reading, these provisions will not impair the flexibility of the President or national security officials in protecting the United States and its citizens. The military custody provision, which has been the focus of much of this debate, provides flexibility to use either a civilian track or a military track for custody and eventual trial and leaves the details of implementation in the hands of the executive branch, as it is appropriate to do so. It preserves the current state of the law as it applies to the rights of U.S. citizens and lawful resident aliens.

In terms of FBI authority to conduct investigations and interrogations, as well as use other instruments of the investigative and criminal process, these provisions preserve all of the FBI's role and authority under existing law.

The conference report also includes, virtually unchanged, the Senate provision requiring a plan to normalize U.S. defense cooperation with Georgia and the sale of defensive weapons. U.S. defense cooperation with the Republic of Georgia has been stalled ever since Russia invaded that country 3 years ago. While there has been slow and minor progress to enable Georgia's armed forces to deploy to Afghanistan—which they have done in greater numbers than most of our NATO allies—precious little has been done to strengthen Georgia's ability to defend its government, people, and territory.

This provision would require the Secretary of Defense, in consultation with the Secretary of State, to develop a plan for the normalization of our defense cooperation with Georgia, especially the reestablishment of U.S. sales of defensive weapons. It puts the Congress on record as demanding a more normal U.S. defense relationship with Georgia, particularly on defensive arms sales.

The conference report includes a strong and important provision to sanction the Central Bank of Iran, to curtail Iran's ability to buy and sell petroleum through its Central Bank, and to prevent foreign financial institutions that deal with the Central Bank of Iran from continuing their access to the U.S. financial system. This provision, which was adopted on the Senate floor by a vote of 100 to 0, and the attempted assassination of the Saudi Ambassador here in Washington, DC, had a very positive and forceful effect on this bill being enacted by the Senate. This provision would force foreign financial institutions to make an important choice: Do they want to deal with the U.S. economy or with Iran's Central Bank?

The Treasury Department urged the conferees to make a series of changes to this provision, some of which would have narrowed its scope and weakened

it. We rejected that course of action. We made some minor technical changes but kept the provision as the authors, Senators MENENDEZ and KIRK, intended. The conferees did, however, provide the Treasury Department the ability to more effectively implement this legislation by imposing strict conditions on foreign financial institutions that maintain ties to the Central Bank of Iran.

The conference report directs the Secretary of Defense to pause further spending on Guam in support of the relocation of 8,500 U.S. marines from Okinawa until Congress and the administration have had an opportunity to review and assess the impact of an estimated $20 billion spending initiative on Guam in the context of the full range of our national interests in the Pacific region. This pause will allow Congress to ensure that the taxpayer funds invested in overseas military force posture and basing will afford us the best opportunity to continue our strong alliances in the region, while pursuing new arrangements with emerging partners that support security and economic development.

The final agreed-upon provision includes a requirement for an independent study to offer views and suggestions from a range of regional experts on current and emerging U.S. national security interests in the Pacific and options for the realignment of U.S. military forces in the region. The conference report would restrict the use of $33 million in operation and maintenance funds for items on Guam that do not directly support military requirements, such as civilian schoolbuses, the construction of museums, and mental health facilities.

This provision should not be interpreted as a lack of U.S. commitment to realignment. The President has stated that we are shifting a lot of our attention to the Pacific region, and we understand the importance of the Pacific region in the 21st century.

Finally, the conference report includes a provision to require that the contract for the sixth slot of ''low-rate initial production'' for the Joint Strike Fighter be executed on a firm fixed-price basis. The Pentagon has thus far failed to incentivize the prime contractor to control costs. So a tougher measure, as embodied in the report, is warranted.

While I would have preferred the original Senate position that would have made the fixed-price requirement apply to the fifth lot currently being negotiated, I strongly support this provision. The chairman and I are committed to a close monitoring of this weapons system. We understand its importance. We also understand that the kinds of cost overruns that have characterized this system cannot be continued.

I am gratified that there are no earmarks in this bill. Unfortunately, it still contains over $1.4 billion in spending that was never requested by the President or by our military and civilian leaders in the Pentagon. Examples of funding authorized by this conference report include $255 million for additional M–1 tank upgrades the Army didn't want in order to keep the M–1 production line hot despite no compelling need to upgrade more tanks at this time; $325 million for Army National Guard and Reserve equipment not requested by the Army; $8.5 million for an Air Force R&D program called the Metals Affordability Initiative that the Air Force didn't consider a high enough priority to fund; $30 million for an industrial base innovation fund that the Pentagon didn't ask for; $200 million for the Rapid Innovation Program—created by Congress in last year's Defense authorization bill—that the Pentagon never asked for and which has about $439 million in funds left over from last year it hasn't figured out how to spend.

The bottom line is this: Congress will pump over $1.4 billion into things the Pentagon never requested and didn't think were a priority. The American taxpayers are not fooled by this exercise, and they have long ago lost patience with it. For all the many good things this conference report did, we still fell short of providing only the most essential needs and priorities of the Department of Defense as identified by our civilian and military leaders. A total of $1.4 billion is real money and could make an enormous difference to many Americans if properly applied to real priorities.

Those criticisms aside, as we look forward to the holidays ahead, I want all Senators to think about whom this report is really for—the men and women of our Armed Forces, who have served our Nation so bravely and so selflessly during the past 10 years of war. We owe it to them to pass this bill to demonstrate our support for them and the burden they carry for all of us and to show in a concrete way that the American people and the Congress stand with them and appreciate what they do for us. Passing this bill is really the very least we can do for so many who are willing to give all they have to defend us and our great country.

Finally, I thank Chairman LEVIN and Chairman MCKEON and Ranking Member SMITH for their dedication and cooperation in getting through the conference in a rapid but comprehensive and collegial manner. It is an honor to work with Senator LEVIN on such an important cause for the American people and for our men and women serving around the world in the Department of Defense, who risk their lives for us every day. They deserve positive action and your vote on this conference report.

I urge my colleagues to vote for the conference report of the fiscal year 2012 national defense authorization bill.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, I spoke at some length before, but I want to repeat one sentiment in the statement that has to do with Senator MCCAIN and his staff. The way in which he and our staff work together is in the finest tradition of this body. Our committee has had that reputation. It is a well-earned, well-deserved reputation that we are able to work on a bipartisan basis.

Senator MCCAIN continues in a great tradition on the Republican side, and I would hope I strive at least to do the same on our side. We have had some great leaders of our committee over the decades, and Senator MCCAIN is one of those leaders in that tradition, and I want to say what a great pleasure it is to work with him.

I know our staffs work beautifully together, and we are grateful for that. The Senator was right in pointing out who we are doing this for—it is the men and women in uniform—but we couldn't do that without our great staffs, and I know he joins me, and has already in his statement, in a tribute to our staffs.

Mr. MCCAIN. Madam President, I say to my friend from Michigan, I guess in our many years together we have seen the ups and downs and back and forth, but during our more than a quarter of a century of service we have always seen the bill coming to fruition and we have carried on in that tradition.

I wish also to point out to my colleagues, in a rather drab and dreary landscape of gridlock and acrimony, it is kind of nice to show that every once in a while there is a little ray of sunshine. So I hope we have been able to provide it for our colleagues, and I look forward to a unanimous, if not near unanimous, vote on the part of this body.

I hope if there are other colleagues who wish to come and speak on the bill—I know we have planned a colloquy on a provision of the bill concerning depots—so, hopefully, our colleagues who are very concerned about that issue might want to arrange to come to the floor so we can dispose of that.

I don't know of any other except, I think, Senator UDALL, who wishes to come.

Mr. LEVIN. I think one on our side.

While we are talking about rays of lightness, we thank Senator HAGAN, our Presiding Officer, who is a member of our committee. She provides a ray of light—one of the many rays of light on our committee. I see her presiding and smiling over this effort, and I wanted to acknowledge that she is an important part of it and to recognize her contribution as well.

Mr. MCCAIN. I happen to know for a fact that Senator HAGAN is a strong defender of the men and women who serve her State, which has a very large military presence. I know they are very appreciative of her advocacy and service.

Before we get too hokey around here, maybe we should suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

SECTION 1022

Mr. LEVIN. Mr. President, section 1022(d) of the conference report states that ''nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody.'' Would the Senator agree with me that this language is intended to ensure that the provision does not interfere with ongoing civilian interrogations and other law enforcement activities and that the President has the flexibility he needs to decide on the most appropriate law enforcement and intelligence tools for each individual case?

Mr. MCCAIN. Yes. That was the intention of the provision we wrote in committee, and it has been clarified by the addition of subsection (d). The statement of managers specifically states that the law enforcement and national security tools that are not affected by the provision include, but are not limited to, grand jury subpoenas, national security letters, and actions pursuant to the Foreign Intelligence Surveillance Act.

Mr. LEVIN. Section 1022 applies only to a person who is ''a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda.'' The statement of managers states that this language intentionally excluded the Taliban. Would the Senator agree with me that the requirements of section 1022—including the transfer restrictions applicable under that provision—do not apply to individuals detained by our forces in Afghanistan?

Mr. MCCAIN. Yes. Our forces in Afghanistan can continue to transfer detainees to the host nation in accordance with existing agreements. This provision does not apply to battlefield transfers in—Afghanistan.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Madam President, for the benefit of my colleagues, there is a bit of interesting news today. When the demonstrations began in Moscow, I tweeted—I am a big believer in tweets—and said, ''Dear Vlad, the Arab Spring is coming to a neighborhood near you.''

Apparently, Mr. Putin was not amused, because an Associated Press headline read: ''Putin rejects any redo of fraud-tainted vote.'' The article also mentioned he was apparently on a program where he answered some questions. To quote the article:

> The harsh comments and his insistence that the December 4 election was valid will likely fuel anger and may draw even bigger crowds of protest later this month.
>
> Putin also lashed out at U.S. Senator John McCain, who had goaded him with a Twitter post saying ''the Arab Spring is coming to a neighborhood near you.''

Quoting Putin now, the article continues:

> ''He has the blood of peaceful civilians on his hands, and he can't live without the kind of disgusting, repulsive scenes like the killing of Gadhafi,'' Putin said, referring to McCain's role as a combat pilot and prisoner of war in Vietnam.

He went on to say:

> ''Mr. McCain was captured and they kept him not just in prison, but in a pit for several years,'' he said. ''Anyone (in his place) would go nuts.''

I know my friend from Michigan may think there is some veracity to the last sentence from Putin's comments, but I would mention that, in the context of the National Defense bill, in my view, the reset with Russia has not gone as we had hoped and it is an argument for some missile defense provisions in this bill in particular.

I think the reason why Mr. Putin reacted in the way he did is that I believe he has been shaken, as he should have been, by the massive demonstrations that have taken place in Moscow and other cities in Russia. It will be very interesting on December 24 to see how large or whether there will be demonstrations concerning a government that in many ways has turned into a cryptocracy, and the abuse of human rights, including the case of Mr. Magnitsky, who died in prison; and Mr. Khodorkovsky, who was again sentenced to more time in prison, and what Mr. Khodorkovsky and others have described as a death sentence.

These are very interesting times in which we live, and the world is a very interesting place. I think it argues for the United States of America to maintain its defenses, as we have in the consideration of this bill.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, I had not seen those remarks of Mr. Putin, but referring to his last comment, read by Senator MCCAIN, I guess people would go nuts in the setting Senator MCCAIN found himself in the Vietnam war. He probably is perhaps, only in that line, accurate that most people, indeed, could not have survived that experience. I know Senator MCCAIN does not raise this matter, but those of us who work with him appreciate all he has done for this country and for this body. I wish we had a chance to straighten out Mr. Putin about Senator MCCAIN. I don't think we will have that opportunity, but maybe his own people will do so in a free election someday.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. HAGAN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

Mrs. HAGAN. Mr. President, I ask unanimous consent that all time in the quorum call be divided equally.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant 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.

DEPOT PROVISIONS

Mr. LEVIN. Mr. President, I now ask unanimous consent that the following Senators be recognized for up to 4 minutes each to address the depot provisions in the bill, and at the end of their remarks Senator MCCAIN and I be recognized to address the same issue. This was the order we were given. They may want to change it: Senator SESSIONS, Senator CHAMBLISS, Senator INHOFE, Senator SHAHEEN, Senator AYOTTE, and Senator HAGAN.

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

The Senator from Oklahoma.

Mr. INHOFE. Mr. President, let me thank the chairman of the committee. I appreciate the opportunity to have this colloquy because something has happened that shouldn't have happened. It happened over on the House side, and we had no control over it.

While I support and will vote for the fiscal year 2012 Defense authorization bill, this is the third year in a row we have bypassed the formal conference process. I am pleased we finished the bill, but this broken process allows for abuse, and we have certainly had some abuse that I will allude to here. If the proper procedure had been followed, some of these problems would not have happened.

On December 3, the House Armed Services Committee staff inserted new language into the conference that would impact how DOD maintains its ships, maintains its aircraft, maintains its ground vehicles—private and public—impacting thousands of jobs in a number of States. That was December 3. It wasn't until the morning of December 7 that I, along with several other Senators, were shown the new language. That was just 6½ hours before we were to have our first conference. We were going to be asked to support the new language without a full vetting from the concerned Members' offices or from the depots and shipyards, arsenals, the Shipbuilders Council of America, the Virginia Ship Repair Association, and all of the rest of these stakeholders and those who were concerned. That was November 7.

Then on November 9, 2 days later, I, along with Senators CHAMBLISS, SESSIONS, AYOTTE, COLLINS, HAGAN, and SHAHEEN sent a letter to Chairman LEVIN and Chairman MCKEON from the House and ranking members MCCAIN and SMITH opposing the new House Armed Services Committee language and asked that it not be included in the conference.

That was on December 9. We assumed they dropped the language, but they didn't. The new language was put in the bill at the insistence of staff, apparently, from all we can determine. Several Members of the Senate complained that the new language was not in either the House or the Senate bill, so it should not have been able to be dropped in.

They took the position that this was just a clarification of language that was already in, when in fact that wasn't the case because the new language was a complete and comprehensive rewrite of depot language contained in the original House bill. Stakeholders were not included in drafting the language. Senators were not included. Nobody knew.

The problem we had at that point—that was done on December 9. We were all committed to passing out the bill at that time, and many of the House Members had already signed the conference report. Then there was a rollcall vote, so they all disappeared. So our choice was to go back and open up everything again and nobody wanted to do that.

So we had language contained in the Senate bill, but it was dropped out in conference. That language specifically called for DOD to provide their inputs by March 1, 2012, on a recent study on the capability and efficiency of the depots before—and I emphasize this—before any change in legislation because the study alone does not provide Congress with a comprehensive view. This is what we requested.

I thank Senators LEVIN and MCCAIN for their support of this colloquy. I wish we had time to take care of this in conference, but I hope that by doing this we can slow down the implementation of the new language contained in the bill until the Senate has had time to fully vet these changes.

I certainly don't blame Chairman MCKEON. His staff told him—because he stated this in the meeting—his staff told him the new language was fully vetted, but it was not, and we were not contacted. So the process is wrong. I have to say this is the first time in my 8 years in the House on the House Armed Services Committee and my 17 years in the Senate that I have seen anything such as this happen. I hope we can delay implementing these changes until we in the Senate can be heard. That is what this colloquy is all about.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I wish to thank the chairman for his willingness to enter into this colloquy. We had a discussion, as Senator INHOFE said, during the conference meeting last week in which it now is apparent that the process through which the depot language was inserted was not proper. Senator LEVIN has been very up front and straight forward with us, and I appreciate his willingness to do this today. I know the chairman has already acknowledged there are problems, and I appreciate his commitment to not only discuss it today but to revisit these issues as soon as the next Senate session convenes and address this issue through a truly inclusive process during which all Members and stakeholders can express their views.

Clearly, there was a process problem related to how these provisions wound up in the bill, and I think we can all agree that for issues that are as central to so many Members as the definitions of ''depot maintenance'' and ''core,'' the process needs to be inclusive and extensive and both Houses of Congress need to be equally involved. That simply did not happen in this case.

Specifically, related to the substance of the provisions, I am extremely concerned the rewrite of the 10 USC 2464 ''core'' statute replaces all references to ''core logistics'' functions in the original statute with ''depot maintenance and repair'' functions. This basically redefines ''core'' to be depot maintenance only, to exclude other logistics functions such as supply chain management and product support. This does constitute a very significant change, and I would argue that it is exactly in these areas of logistics functions beyond simple depot maintenance where the government has the greatest interest in protecting their own capabilities. Yet the bill defines these activities out of the core definition. This could very easily result in the government's ability to employ and therefore maintain expertise in areas such as program management, supply chain management, and product support management atrophying.

I have no doubt that private industry applauds this change because they would be the ones to presumably pick up this work. However, we should not kid ourselves into thinking industry would be cheaper. If the government loses this or any other depot-related capability, they will have an extremely hard time rebuilding that expertise, and this will only incentivize industry to charge more for their efforts. This is clearly a problem and one of the issues we need to address next year.

Secondly, the waiver in the 2464 rewrite is much broader than previously and allows for a waiver for military equipment that is not an enduring element of the national defense strategy. Perhaps this could make sense at some level if we knew what this meant, but we don't. What an ''enduring element of the national defense strategy'' is has never been defined; hence, we will be at the mercy of the subjective interpretation of the Department of Defense. That is not the way it should be, and we need to fix that.

The current ''core'' waiver in 2464 is much narrower and more defined. The presumption and philosophy in the current waiver is that work, other than work on commercial items, will be considered core, and only considered not core when it is clear it no longer needs to be. The committee's rewrite changes that presumption based on new standards which are unclear.

In addition to the two specific issues I have raised, there may be other unintended consequences to these changes of which we are unaware since we have had limited time, as Senator INHOFE said, to vet them and are just now receiving feedback from some of the stakeholders.

During the chairman's remarks and in response, I would appreciate his commitment to revisit these issues as soon as we can next year. I encourage DOD to go slowly in implementing any changes since there is a good chance we will make additional changes next year. I appreciate as well his commitment to include a legislative package in next year's national defense authorization bill that gets it right.

Again, I thank both Senator LEVIN and Senator MCCAIN for allowing us to address this issue and for their willingness to cooperate as we move forward next year to clear this matter up.

The PRESIDING OFFICER. The Senator from North Carolina.

Mrs. HAGAN. Mr. President, I wish to thank the chairman and the ranking member for allowing this colloquy to take place. I also wish to state that I believe the Senator from Oklahoma laid out a little bit of the groundwork of what we are discussing now.

I rise to discuss the depot maintenance issues associated with the House-adopted language in the conference. We must avoid doing anything that may upset the existing balance between DOD's internal depots, logistic centers, arsenals and specialty facilities, and the industrial base. The House-adopted provision can disrupt that delicate balance and have unintended consequences. We just don't know who may be impacted. We need time to get this right, and we need to ensure a transparent process in which all stakeholders can make their position known to Members of Congress.

The sensitivity associated with maintenance workload is at an all-time high. Disrupting the balance of depot-level maintenance comes at a time when our economy is struggling and when DOD is consolidating depot source-of-repair work for current and emerging weapons systems. Additionally, prematurely disrupting the readiness of our weapons systems fleet is not an option, especially with the operational tempo of our military.

It is critically important to preserve the capability and competencies of DOD's internal depot-level maintenance facilities while also sustaining the defense industrial base in order to

preserve our technological advantages and readiness on the battlefield. Both face considerable challenges within a fiscally constrained environment. Both the depots and the defense industrial base are reshaping and restructuring their operations in anticipation of this.

As our military said, ''It's one team, one fight.'' The research, development, and manufacturing communities within DOD, as well as in our universities, small businesses, and large corporations, are essential partners in our national security. That being said, we need to acknowledge the fragile nature of DOD's depot-level maintenance facilities and the defense supply chain within a heavily consolidated defense industrial sector. Our country simply cannot lose skilled manufacturing research and development expertise to global competitors.

Congress needs to do our due diligence to address the concerns of DOD's internal base involving maintenance, repair, and overhaul of the military equipment. At the same time, we need to facilitate public-private partnerships and healthy competition that will be mutually beneficial to the Department and the industrial base.

I know my colleagues are concerned about the impact this language may have in their States. I wish to highlight Fleet Readiness Center-East in North Carolina. Reducing FRC-East's workload is not an option. It would negatively impact the quality and cost-effective maintenance and logistics support for Navy and Marine Corps aviation. The operational readiness and availability of deployable Navy and Marine Corps aircraft would be undermined without preserving FRC-East's capabilities.

I certainly understand the incredible pressure the chairman and the ranking member were under trying to resolve hundreds of issues in conference over a very short period of time, and I certainly do appreciate their willingness to engage members of the committee and other interested stakeholders in a more comprehensive process next year so we can be sure we get this right.

Thank you, Mr. President. I yield the floor to the Senator from Alabama.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I appreciate and share the comments made by the distinguished Senator from North Carolina. I believe it is important. Having come here 15 years ago and having confronted the question of depots and how they operate, I was surprised to learn the intensity of the feelings and the difficulty of the issue.

We worked on it for some time, and for the most part, it has been quiet under Senator LEVIN and Senator WARNER. We kind of worked out how this thing should be handled. I thought things were rocking along well and have been very disappointed that the House Members have taken an initiative at a point where we were told it was too late to make any changes in the process. That alters that understanding, and I am not comfortable with it.

I feel I have engaged in these issues. We have a depot in my State, and we should have given it better consideration. I do not believe it is correct, the language as it is. I do believe we need to make changes. So it is a concern that the delicate balance created by the current definition of ''core depot-level maintenance'' between government facilities and industry could be altered and at risk.

We have all worked on this issue for a number of years. We have a more efficient and productive model today than we had when I first came here because of a lot of hard work and intense effort. So that is a problem for me.

Another troubling element of this new definition is the potential treatment of commercial items. The notion that perhaps an engine or other major assembly of a major end item such as a tank or aircraft could be considered a commercial item and not part of our depot core mission is very problematic and would be contrary to the way we have been operating for many years.

I would like to point out that because of the hasty way this language came into the bill, we do not know the second- and third-level effects of this language. That in itself is another reason to make sure we get the policy right in a very deliberative and collaborative process.

I hope we have a solution that will work. I say to Chairman LEVIN and Senator MCCAIN, the ranking member, I appreciate your willingness to work to correct the error in the process—and I believe there was a process error—and to ensure that due diligence is done as we work to codify the definition of ''core depot-level maintenance.''

So I look forward to your leadership in conducting subcommittee hearings, full committee hearings, working sessions, and whatever it takes to make sure we get the language right before we get to the markup and consideration of the fiscal year 2013 National Defense Authorization Act.

I will conclude by saying we had some very important issues to deal with in the Defense bill. A lot of them were very difficult. Under Chairman LEVIN's leadership and Senator MCCAIN, we either reached an agreement or reached an agreement not to agree, and moved the bill forward. I think it is over 50 years now that this bill has moved forward every year. I think it is something to be proud of.

The only real controversy that came out of it is this depot matter. So it sort of went against the way we felt we should operate, the way that has resulted in settlements of disputed issues and moving the bill forward. For that reason, I think it is appropriate we ask that this issue be redealt with next year.

I yield the floor.

Ms. COLLINS. Mr. President, I would like to voice my concerns regarding two provisions included in the conference report, sections 321 and 327. These provisions constitute a major rewrite of depot policies and laws.

These sections have not been sufficiently vetted. They could potentially hurt competition in acquisition programs, harm our public depots, and cause unintended consequences that could significantly affect not only depots, but also the private sector industrial base and the thousands of employees in both sectors.

In February, the Logistics Management Institute, LMI, delivered a report to Congress making recommendations to modify the depot statutes. Both Armed Services Committees asked DOD to offer input on the LMI study, but the Department did not do so.

The Senate held DOD to account in the committee report accompanying this very bill, which states:

> The committee is concerned that a lack of Department of Defense input regarding the findings and recommendations of the LMI study does not provide Congress with a comprehensive view prior to enacting legislation that could have unintended consequences.

But even without DOD input, the House went ahead and included changes to depot provisions when it passed its bill in May.

The Senate-passed bill also included a provision to prohibit any change to the definition of depot maintenance until after the Defense Business Board conducted its own study as well.

Given the concern identified by the Senate Armed Services Committee and the requests for additional fact-based analysis, you can imagine my alarm when I learned that such a rewrite was being considered for inclusion in the conference report.

What surprised me even more was that the proposed rewrite differed significantly even from the provision in the original House-passed bill.

The Senator from Oklahoma, Senator INHOFE, and I voiced our concerns about this in a meeting of the conferees. After that, six Senators and I sent a letter to the leadership of both committees warning of the unintended consequences of including these provisions in the conference report. I ask unanimous consent to have our letter printed in the RECORD.

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

U.S. SENATE,
Washington, DC, December 9, 2011.

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

Hon. JOHN MCCAIN,
Ranking Member, Senate Armed Services Committee, Washington, DC.

DEAR CHAIRMAN LEVIN AND RANKING MEMBER MCCAIN: As conferees to the Fiscal Year 2012 National Defense Authorization Act Conference, we write to voice our concerns with the HASC proposal regarding Sections 321 and 322 of the House bill. While we appreciate the attempt to improve the depot and shipyard related statutes, none of our offices were advised or consulted regarding these last minute changes being proposed by the

HASC or consulted during the last several months as these provisions were apparently being crafted.

Only a few conferees received the new proposed language on December 7th, but we are all now being asked to support new language that will have far reaching implications on aviation depots, shipyards, arsenals, and ammunition plants across the United States. It is inappropriate to attempt legislative changes that could affect more than 100,000 jobs, public and private, across the United States without careful vetting and ensuring there will be no unintended consequences.

While we support improvements to operations at our depots, shipyards, arsenals, and ammunition plants, the HASC proposed changes to the definitions of depot level maintenance could have profound and enduring negative consequences to the industrial base and ultimately the readiness of our force. Given the lack of transparency and abbreviated conference timeline, we request that you not include Sections 321 and 322 of the House bill in the FY12 NDAA Conference Report. We further recommend that we begin to work together as soon as possible regarding the possibility of incorporating a more thoroughly considered version of this language in the Fiscal Year 2013 NDAA.

Thank you for your consideration in this matter. A similar letter has been sent to Chairman McKeon and Ranking Member Smith.

Respectfully,

JAMES M. INHOFE.
JEFF SESSIONS.
SUSAN COLLINS.
JEANNE SHAHEEN.
KAY HAGAN.
SAXBY CHAMBLISS.
KELLY AYOTTE.

Ms. COLLINS. The two provisions raise a number of unanswered questions, questions that remain unanswered by the advocates of these provisions, and which could lead to significant consequences for public and private sector components of the industrial base. Let me share two examples.

First, the provision expands the definition of depot maintenance to include the installation of modifications and upgrades to end-items—a measure potentially harmful to competition.

There is a concern that the Army may be required by this provision to direct work related to the Modernized Expanded Capacity Vehicle, MECV, program to the public sector without a full and open competition allowing experienced private entities to bid.

It is my view that the MECV is much more than a modification to a weapon system because it is an acquisition program. I understand this view is shared by the Army, which has consistently said the source selection for the MECV will be full, open, and fair.

Those who have invested in this program deserve to know that this language does not restrict competition or introduce, in any way, an incentive to favor the public or the private sector as it relates to acquisition programs, and the MECV program in particular.

While depot maintenance work is an important component of both the public and private sector industrial base, Congress has consistently supported a strong core requirement at the depots for national security reasons. For example, vital submarine overhauls, refueling, and maintenance work are performed at the Portsmouth Naval Shipyard in Kittery, ME.

It is unclear if the ramifications of the conference report will lead to work flowing away from our public depots, thus jeopardizing the government's core repair capability.

I would ask the chairman to closely reevaluate these provisions to ensure that the two concerns I described, as well as the concerns of other interested Senators, are fully addressed.

This process should allow Members adequate time to reach out to interested parties and a committee hearing to understand the ramifications of these legislative changes to the defense industrial base.

I would also ask the chairman to commit to modifying or repealing these provisions, if necessary, in next year's NDAA.

I would also ask the chairman to ensure that any future proposals pertaining to these sensitive issues be addressed in a more inclusive and deliberate manner.

Finally, given the uncertainty and confusion surrounding these critical depot issues, I would hope that the Department of Defense would exercise much care and refrain from making dramatic changes in its policies.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mrs. SHAHEEN. Mr. President, I come to the floor to echo the comments and concerns we have heard in the last few minutes from my colleagues on the Armed Services Committee regarding this House-inserted language on our Nation's military depots, arsenals, and shipyards.

I wish to begin by saying to Chairman LEVIN how much I appreciate his assurances, as well as those of Ranking Member MCCAIN, and Chairman MCKEON and Ranking Member SMITH in the House, that there are no intended changes to the current law under this language. I think that is very important for us to say to our constituents so they are reassured.

I also appreciate Chairman LEVIN's commitment to examine this issue closely in the coming year to prevent any unintended consequences that this language might have on our Nation's industrial repair facilities, including the Portsmouth Naval Shipyard, which my home State of New Hampshire shares with Maine and which is very important to us in the Northeast and I think to our military capabilities.

With that said, I have to say I share the concern that has been expressed about the manner in which this language was inserted. While I understand that the House has been working on this issue for some time, including holding roundtable discussions at the National Defense University, I believe there is much more that should have been done.

On Friday, December 9, my staff was made aware that this language from the House could be included in the final NDAA report—a measure we have all been working on for the past 11 months. So along with six other members of the committee, I signed a letter that very day—so 1 week ago tomorrow—indicating our concerns and frustration over including such language without adequate Senate review or input. Despite the concerns expressed in our letter, the language was included.

On such an important issue as this, usually we have had a very collaborative, transparent process in our committee, on the Senate side anyway, and I appreciate that. I think that has been one of the reasons for the great success of Senator LEVIN and Ranking Member MCCAIN in being able to get a bill out year after year on which there has been consensus agreement.

Unfortunately, that did not happen with respect to this language. As such, we now face a situation where the committee will need to spend a significant amount of time examining the language and its implementation over the next year to ensure no changes result.

The reason we as a nation maintain the 50–50 rule—where all maintenance work is split between the public and private sectors—is to ensure that in times of conflict, the Federal Government will have the critical capabilities necessary to repair our Nation's combat equipment.

Advanced technical repair work, such as the work done on nuclear submarines at the Portsmouth Naval Shipyard, requires highly skilled and specialized technicians. Any changes to the way we structure workload for these facilities has to be closely examined and should include input from the individual stakeholders who understand this issue best.

Generations of Americans have invested significant resources in our Nation's military to ensure our men and women in uniform have the most advanced equipment in the world to keep us safe.

I say to the chairman of the committee, I very much appreciate your assurance that we will continue to take a close look at this issue, including holding a hearing next year, if necessary. So I thank the Senator very much for his cooperation to work with us.

With that, I yield the floor.

The PRESIDING OFFICER. The junior Senator from New Hampshire.

Ms. AYOTTE. Mr. President, I would like to join in the comments of my colleague from New Hampshire and the concerns she has expressed, along with my other colleagues who serve on the Armed Services Committee.

But, first of all, I thank Chairman LEVIN and Ranking Member MCCAIN again for their tremendous leadership on the Defense authorization bill. We have conducted a tremendous amount of work in a short period of time, continuing the long-running, proud tradition of the Senate Armed Services

Committee of professionalism and bipartisanship in support of our troops and our national security.

This is a bill of which we can be proud. In a time of war, this bill supports the men and women of our Armed Forces and their families and authorizes the equipment, training, and resources our servicemembers need to complete their missions.

While I am very proud of this bill and pleased that many of my provisions to reduce wasteful spending and maintain military readiness have been included in the final conference report, I also share the concerns of my colleague from New Hampshire, Senator SHAHEEN, and other colleagues who serve on the Senate Armed Services Committee—both substantive and procedural concerns—regarding the depot provisions, sections 321 and 327, that were included by the House in the conference report.

When we were informed of this significant language—only last week—I joined a bipartisan group of Senators, including my colleague JEANNE SHAHEEN, to express our concern and our opposition to including the depot provisions in the final Defense bill.

As ranking member of the Senate Armed Services Readiness Subcommittee—which has oversight over depots, shipyards, arsenals, and ammunition plants—I am troubled that such a significant rewrite of depot statutes was hastily included in the final bill without consulting with key stakeholders and without conducting more complete analysis involving the Senate.

In the coming years, as we ask the Department of Defense to do more with less, the role of our depots and shipyards will become even more important. This is certainly true for our four public shipyards, including the Portsmouth Naval Shipyard, where many of my constituents work on a daily basis to sustain the world's best submarine force.

I share the pride my colleague from New Hampshire Senator SHAHEEN and my colleague from Maine Senator COLLINS feel about the Portsmouth Naval Shipyard. Portsmouth conducts maintenance on the Los Angeles- and Virginia-class submarines. In fact, Portsmouth has led the way for the entire Navy with the first-in-class maintenance availability on the USS Virginia.

While I am troubled by the process through which the depot provisions were included in the conference report, I am encouraged that both Chairman LEVIN and Ranking Member MCCAIN have expressed similar concerns and have committed to addressing these concerns in the coming months.

This process should include an inclusive and thorough vetting of the provisions to ensure we understand all the ramifications of what was included by the House.

As ranking member of the Readiness Subcommittee, I plan to propose to Chairman MCCASKILL that we hold a hearing on these depot provisions at the earliest opportunity next year.

The capabilities of our depots and shipyards and their role in sustaining military readiness are too important to hastily adopt such potentially far-reaching provisions.

Let me conclude by again thanking my colleagues on the Senate Armed Services Committee. Despite the partisanship that often characterizes Washington, it is encouraging to see that bipartisanship continues to prevail in the Senate Armed Services Committee. That is largely due to the leadership of Chairman LEVIN and Ranking Member MCCAIN.

I am proud of this bill, and I look forward to it becoming law in the coming days.

I thank my colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I join the chairman in the acknowledgment that many Members of the Senate have concerns with both the process and substance of the changes adopted in the Defense authorization conference report regarding statutes for depot activities in the Department of Defense. The protection of a core logistics capability within the Department has been a very controversial issue for many years, as the Department's depot enterprise employs over 77,000 personnel with an annual operating budget exceeding $30 billion. As we draw down from two wars which have consumed so much in resources and equipment, there will be much concern and debate about the continued workload and jobs at depots, shipyards, and arsenals, particularly in light of declining defense budgets.

I agree this debate and deliberation should have included all interested parties. While I support legislation that would have the clear intent of improving the effectiveness and efficiency of the Department's industrial activities, I was not and am not in support of moving forward on changes that have not been addressed with all members of the committee. The concerns expressed to us by Senator INHOFE, Senator CHAMBLISS, Senator COLLINS, Senator AYOTTE, Senator SHAHEEN, and others need to be reviewed in an open and transparent process.

As to the substance of the concerns, from what I can tell, there are opinions on the impact of these two provisions on both sides of the issue—from private industry and from the depots and their government civilian workers and unions.

I am aware some are very concerned that the changes in the conference report will upset the balance currently maintained between public and private performance of these activities, which could affect readiness. Changes to the definition of depot-level maintenance and repair have the potential to result in the shift of workload at shipyards. Changes to this provision should not be construed to restrict competition or to create any incentive to favor the public or the private sector as it relates to acquisition programs.

The narrowing of the statutes from core logistics to corps depot-level maintenance could be interpreted as congressional intent to eliminate the identification of core activities in the defense supply chain affecting arsenals and ammunition plants.

On the other hand, the inclusion of an expansive waiver provided to the Secretary of Defense to waive core requirements is very unsettling for every depot activity. Such a waiver could move significant amounts of depot work to the private sector.

Revisions to the definitions of ''commercial items'' to be exempted from core determinations could have an immediate detrimental impact to those depots that work on commercially available items of equipment, such as engines and transmissions of ground combat vehicles.

So many depots that do this sort of work are concerned about the impact. I agree we need to fully understand the impacts, real and unintended, from the implementation of these provisions. We will need to work closely with the Department of Defense to ensure that whatever changes or repeals we make are in the best interests of our military with the priority placed on readiness as well as efficiency of operations and fiscal responsibility.

I support the chairman and commit to giving this issue focused attention in the year ahead to ensure the measures taken in this year's bill are the right outcome for the Department of Defense and the taxpayers.

I yield the floor.

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

Mr. LEVIN. Mr. President, I appreciate and I understand the Senators' concerns about this issue as they have been expressed here this afternoon. I also very much appreciate their understanding relative to the extremely short period for conference this year where we worked through hundreds of provisions with our House colleagues in about a week, a process that usually takes a month or more.

While I am proud of what we were able to accomplish in this bill as a whole, it was probably likely that some language would need more consideration because of the time constraints we were operating under. Before I continue, I want to state my appreciation to the Members who spoke here this afternoon and members of the Armed Services Committee. They make major contributions to this committee.

I listened carefully to what our colleagues have had to say about the depot maintenance issue. I believe their concerns are substantive and merit careful consideration from the Armed Services Committee. This is an issue that was brought to our conference in the House bill.

The depot maintenance provisions that were approved by the House last

May arose out of a congressionally mandated independent review of the statutes, regulations, and policies guiding depot maintenance performance and reporting. The House conferees then proposed modifications to their own provisions based on the results of a series of discussions with stakeholders held throughout the summer at the National Defense University. We were told this process was comprehensive, that all stakeholders were invited, and that the resulting recommendations were widely accepted by all interested parties.

In particular, we understood the Department of Defense, private industry, and the House Depot Caucus had reached consensus on the revised House language. While those statements were made in good faith, it turns out they were not accurate. A number of key players, including stakeholders in government, private industry, and labor, did not participate in the process at National Defense University and were apparently unaware of the results.

Senators with a strong interest in the issue were not aware of the modified House language that was presented in our conference until it was too late to consider changes. I am aware that the depot maintenance issue has long been a sensitive one to our Nation and to many of our Members, and that the precise words in these provisions matter. The existing statutes, regulations, and practices have served to sustain both core logistics capabilities and the defense industrial base over the last decade, so any changes need to be fully understood.

I understand there are a number of unanswered questions about the provisions in the conference report that could have significant effects. For example, first, the new language substitutes the term ''core depot level maintenance'' for the existing term ''core logistics.'' Does this change impact National Guard readiness, sustainment maintenance sites, and other DOD facilities that are not depots? Does the change impact requirements for supply chain management and other logistics functions that are not performed by depots?

Second, the new language changes the wording regarding modifications in the definition of core depot level maintenance. Does this change impact planned public-private competitions for modifications and upgrades programs? Does the change preserve the distinction between modifications and upgrades on the one hand and acquisition programs on the other? Is this an expansion of core functions that will be required to be performed in the public sector with an adverse impact on the defense industrial base?

Third, the new language changes the wording of the exclusion for commercial items. Is this a change to the existing exclusion or merely a recodification? Will it impact maintenance requirements for commercial derivative aircraft and other major defense systems that are based on commercial technology?

Fourth, the new language includes a waiver rather than an exemption from core requirements for nuclear aircraft carriers. Will the new language result in any change in requirements for the maintenance and modifications of nuclear aircraft carriers?

Fifth, the new language includes the authority to waive core requirements for any weapons system that is ''not an enduring element of the national defense strategy,'' rather than an exclusion for a workload that is ''no longer required for national defense reasons.'' Does this new language mean something different from the existing language? If so, will it change the balance of work between the depots and the private sector?

I am committed to have the Armed Services Committee revisit the modifications to the depot maintenance laws included in this conference report and to give full consideration to the concerns our Members have raised. Over the coming months we will engage with interested Members and their staffs to review the language in detail. Together we will reach out to interested parties through a process that will include a full committee hearing if we determine one is needed. We will then take action to repeal or modify anything that needs to be repealed or modified in these provisions during our consideration of next year's National Defense Authorization Act. Many of my colleagues heard Chairman BUCK MCKEON make a similar commitment at our final conference meeting.

During the next year, while this review process is underway, I join my colleagues in urging the Department of Defense to proceed with caution in implementing this legislation. In particular, I urge the Department to make as little change as possible in the status quo with regard to these functions during the next year. It would be unfortunate if the Department were to change significant functions from one form of performance to another this year only to be required to change the decision again the year later.

Our objective has always been and always will be to ensure the Nation's depot maintenance system is structured and supported in a manner that efficiently and effectively provides for the readiness of our Armed Forces and our national security. I know this is a critically important issue. I look forward to working with Senators over the next year to take the steps we have discussed here today.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, let me speak to some of the provisions of the National Defense Authorization Act especially concerning nuclear modernization and the implementation of the New START treaty. This is in the context of the omnibus appropriations bills that we will consider later this week, which appear to include funding reductions from the President's request for nuclear weapons modernization activities for the year 2012.

Earlier this year I introduced the New START Implementation Act because other Senators and I believed it is necessary that the Congress codify the agreement made between the President and Congress regarding the commitment to the modernization of our nuclear deterrent. Indeed, it is fair to say the Senate's support for the ratification of New START was contingent on modernization of the remaining nuclear arsenal.

One of the critical features of that legislation was the link between funding of the administration's 10-year nuclear modernization program to any U.S. nuclear force reductions in a given year. The language that appeared in the House-passed version of the Defense bill was good policy because it limited the reductions in warheads the United States otherwise would make pursuant to the New START treaty if Congress failed to provide the funding prescribed each year under the so-called 1251 modernization plan. In other words, warhead reductions were based on adequate funding.

The House language would also prohibit reduction of the nuclear stockpile hedge of nondeployed warheads until after we completed construction of the key nuclear facilities necessary to regain our production capacity. The reason for that, of course, is we have a hedge or a stockpile of these weapons that exists in the event we would need them since we do not have a production capacity right now to replace them. Until that capacity is created, probably in about a decade, we will need to continue to maintain that hedge capability.

The language that appears in the conference report now before us removes this explicit linkage, which I think is very unfortunate. The NDAA conference report addresses these concerns in some ways, though not as strongly as we originally intended. Here is what the compromise in the bill provides: First, in any year in which modernization is not fully funded, the President must report to Congress how he intends to address the shortfall and whether as a result of the shortfall it is still in the national interest to remain a party to the New START treaty. For the first time, the President will be compelled to detail his plans for U.S. nuclear force reductions over the next 5 years, which will provide Congress an opportunity to evaluate whether these reductions are in the national interest. This second provision is an important addition. Third, in any year in which the President seeks reductions in the nuclear stockpile, he must first seek from the Commander of U.S. Strategic Command a net assessment on the reductions, which, of course, puts the Commander of STRATCOM in a crucial position, and to provide that assessment to Congress unchanged. And, finally, the President must provide to

Congress any changes to the Nation's nuclear war plan and provide access to certain Members of Congress to these plans.

These are all important provisions, but without the House language, the possibility remains that we will draw down our warheads under START without adequate funding to ensure our remaining stockpile meets our requirements. As I said, this is quite unfortunate.

Let's recall why this modernization of our nuclear weapon program was necessary. The modernization program was painstakingly worked out, first within the Department of Defense, and the Department of Energy, our national laboratories, and then between the administration and Senators at the time of the New START treaty. It resulted in a 10-year $200 billion work plan to renovate our national laboratories, to extend the life of our nuclear weapons, to maintain their safety, the security and effectiveness of those warheads, and to sustain the modernization of the triad of our nuclear delivery systems, the ICBMs, bombers, and nuclear submarine force.

The plan was updated last November after a very thorough review by the Department of Defense and the Department of Energy, bringing the total 10-year funding figure to about $213 billion. There was little disagreement at the time about the need to modernize our nuclear facilities or about this amount which represented the cost over the 10-year period.

Indeed, between fiscal year 2005 and fiscal year 2010, the National Nuclear Security Administration, or NNSA, had lost about 20 percent of its purchasing power due to funding cuts. This, without the changes recommended in the 1251 report, would have been devastating to its modernization plan. Incredibly, funding for stockpile surveillance activities—these are activities which are necessary for the President to annually certify the safety and effectiveness of our nuclear warheads and bombs—had declined by 27 percent during this period of time. In other words, our ability to actually even understand what was going on in these weapons and determine whether changes had to be made was being degraded substantially. The situation was so dire that in February 2010, Vice President BIDEN gave a major address on the subject at the National Defense University and penned an op-ed in the Wall Street Journal that stressed:

The slow but steady decline in support for our nuclear stockpile and infrastructure—

And then noting that again—

For almost a decade, our laboratories and facilities have been underfunded and undervalued.

He concluded by observing that ''Even in a time of tough budget decisions, these are investments we must make for our security.''

Secretary of Defense Gates had earlier drawn attention to the neglect of our nuclear weapon complex. In 2008 he said, ''To be blunt, there is absolutely no way we can maintain a credible deterrent and reduce the numbers of weapons in our stockpile without either resorting to testing our stockpile or pursuing a modernization program.''

Of course, we have not resumed testing, which meant our only alternative was this modernization program which we then all agreed to. What is the linkage between modernization and the reductions in warheads called for under the START treaty? Well, it is pretty clear. As the President's National Security Advisor wrote to me in April of 2010, ''Support for the nuclear complex is fully consistent with and, indeed, an enabler of the nuclear reductions we seek to implement—a direct connection, in other words.

So critical was the need to reverse the decline in our nuclear weapon enterprise that the Senate included in its resolution of ratification for the New START treaty a condition No. 9, which stated:

The United States is committed to proceeding with a robust stockpile stewardship program, and to maintaining and modernizing the nuclear weapon production capabilities and capacities that will ensure the safety, reliability, and performance of the United States nuclear arsenal at the New START Treaty levels and meet requirements for hedging against possible international developments or technical problems.

The condition also stipulated that if appropriations are enacted that fail to meet the requirements set forth in the President's 10-year plan, then the President must tell Congress how he proposes to remedy the resource shortfall and whether the United States should remain a party to the treaty in light of such funding shortfalls.

That commitment to modernization was made explicit by the chairman and ranking members of the Senate Appropriations Committee and its Energy and Water Development Subcommittee, who wrote to the President on December 6, 2010, to express support for ''ratification of the New START treaty and full funding for the modernization of our nuclear weapons arsenal, as outlined by your updated report that was mandated by section 1251 of the Defense Authorization Act for Fiscal Year 2010.''

Despite this commitment, we are now faced with a reduction of some $400 million below the President's $7.6 billion request for nuclear weapon activity. It depends on the outcome of the appropriations process, but based upon the bill that was filed in the House last night, this appears to be the amount of reduction.

Senior officials from our national labs, the Department of Defense, and NNSA have all warned that cuts of this magnitude will delay construction activities for critical nuclear processing facilities, postpone critical life extension programs for our nuclear warheads, and could jeopardize our ability to certify the nuclear stockpile without testing.

In the words of Defense Secretary Panetta:

I think it's tremendously shortsighted if they reduce the funds that are absolutely essential for modernization. . . . If we aren't staying ahead of it, we jeopardize the security of this country. So for that reason, I certainly would oppose any reductions with regards to the funding for [modernization].

Likewise, General Kehler, the commander of U.S. Strategic Command, told Congress that, due to the impending NNSA budget cuts, ''we've got some near-term issues that will impact us in terms of life-extension programs for aging weapons.''

What are life extension programs? These are the ways in which we can take the nuclear warheads that need working and extend their life by refurbishing them or replacing some of the components and doing other things that generally the scientists understand are critical to maintain the safety, the surety, and the reliability of those weapons over the period of time in which they are needed.

We all understand that the appropriations committees were under immense budget pressures, especially after the Budget Control Act of 2011. Full funding for nuclear modernization, though, was a priority brought about by this Nation's pledge, made in the New START treaty, to reduce the levels of U.S.-deployed nuclear weapons. As such, it should have superseded other budgetary considerations. It should have been fully funded.

Few things are more important than ensuring that our Nation's nuclear deterrent is effective and reliable, especially as those forces are reduced to lower levels by the START treaty arms control agreement. Indeed, this was the view of the House and Senate Armed Services Committees, which fully authorized the President's request for nuclear modernization.

Senior DOD officials worked to secure adequate funding for the President's 10-year commitment to nuclear modernization. Among other things, the President submitted the budget that requested the full amount of funding called for in the 1251 report, and the Department initially transferred $8.3 billion in budget authority to NNSA for weapons activities over a 5-year period, which, unfortunately, is not fully reflected in the fiscal year 2012 Energy and Water appropriations bills.

In this case, the customer, the Department of Defense, was so concerned that the Energy Department could do this work that it transferred its own budget authority to accomplish it. Yet some of that money was drained away for other purposes.

Some of the $400 million shortfall could possibly be mitigated, however, if the Secretary of Defense exercises the transfer authority that is going to be granted in this fiscal year 2012 Defense authorization bill to transfer up to $125 million to NNSA for weapons activities. This is a very small amount of money for four critical top priorities identified by the Department of Defense; therefore, if it can find the

funds, it can utilize the transfer authority that has been granted in this legislation and get that money to the NNSA to do the work that is absolutely critical next year. I will be working with the Department of Defense and my colleagues in Congress to ensure that this happens.

I express my appreciation to the chairman and ranking members of the committees and the conference committee who saw to it that this language to allow the Defense Department to transfer these funds was included.

Finally, let me mention what the consequences of the $400 million reduction could mean in the future. First, it could send a message to OMB that Congress no longer considers itself bound to the 10-year modernization funding plan. This would be a huge mistake; it would be wrong. OMB then might direct less funding in the future for nuclear weapons in fiscal 2013 and following years than originally prescribed in the 1251 plan, which would be very wrong. But the problem is that any divergence between what was deemed necessary over the next 10 years and what is actually appropriated by Congress will continue to grow—maybe to the point where it becomes difficult to certify on an annual basis that the nuclear stockpile is safe, reliable, and effective.

Referring to such reductions, NNSA Administrator Tom D'Agostino reported this to Congress on November 2:

> This is the work to make sure these technologies are the ones that allow us to certify the stockpile on an annual basis without underground testing. Reductions in these areas will have a direct impact on the President today in the ability to certify the stockpile without underground testing.

For those who remain so opposed to underground testing, you cannot have it both ways. You cannot both oppose underground testing and prevent the Department from getting the money it needs to modernize the stockpile. We have to do one or the other. We are now $400 million below where we need to be.

A second impact: Life extension programs for nuclear warheads, already facing very tight schedules because of the delays over the years, would be further delayed and exacerbated. Warheads that are not refurbished in time are not going to be available for deployment. This would have serious consequences for the readiness of our nuclear deterrent at a future date, which, of course, could have serious implications for the credibility of our nuclear guarantees to our allies and partners.

Third, the revitalization of nuclear labs—including expensive but very necessary construction projects—will be further delayed, and, of course, costs will go up even more. Funding for science will be curtailed to support higher priority programs, thus starving the labs of important innovation and perhaps hampering recruitment of the scientists and engineers necessary to maintain the long-term viability of the nuclear weapons complex.

Fourth, this funding reduction will trigger the reporting requirement contained in Condition 9 of the New START resolution of ratification, requiring the President to explain the impact of the resource shortfall on the safety, reliability, and performance of our nuclear forces. We know what that report is going to say. It is serious. The President must also propose how he plans to resource the shortfall and, in light of the shortfall, whether and why it remains in the national interest of the United States to remain a party to New START. As a result, Members of Congress may seek to ensure, through annual defense authorization legislation, that any future New START-mandated reductions in the nuclear stockpile are tied to successful execution of the planned modernization program.

Finally, this funding reduction, which could well be a precursor to further cuts in the future, will dampen the enthusiasm of Senators to agree to any future arms control agreement. Senators who voted for New START on the basis of the 10-year modernization program will not be so easily swayed by such promises in the future.

I look forward to taking up and voting on the Defense authorization conference report. It has a lot of good things in it and some things that aren't as good. This report, as I said, is not as strong as was the House language, but it will contain some important provisions the Congress will try to enforce to ensure that the modernization of our nuclear weapons continues on schedule for the next 10 years, which is something that is critical to our future national security.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. UDALL of Colorado. Mr. President, I rise to speak on the National Defense Authorization Act conference report we will be voting on later today.

First, I wish to acknowledge that Chairman LEVIN and Ranking Member MCCAIN have worked tirelessly to craft the Defense authorization bill to provide our Armed Forces with the equipment and services they need to keep us safe. I thank them, their staffs, and all my colleagues for their diligence and dedication to this important work.

I also come to the floor because I want to share, as I have over the last few weeks, the concerns that many Americans—and especially the people I represent in Colorado—have expressed over the last few weeks about the detainee provisions that have been included in the Defense authorization bill. I wish to make it clear that I still have very strong concerns about these provisions, especially because they have been presented as a solution to alleged gaps that exist in our counterterrorism policy.

It is my strong belief that our military men and women, law enforcement officials, and counterterrorism professionals have done an outstanding job since 9/11 to keep our Nation safe. For 10 years we have killed, captured, and prosecuted terrorists, and I believe—in fact, I know—our system has been successful.

The professionals whom I just mentioned, who are in charge of waging this battle to keep us safe, agree that the detainee provisions are of real concern. That includes the Secretary of Defense, the Director of National Intelligence, and the Directors of both the FBI and CIA.

In speaking to these same concerns that I continue to hold, along with the people just mentioned, the administration has stated:

> 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.

I know many agree, especially Coloradans, who have contacted me in very impressive and large numbers. They believe, as I do, that these detention provisions could endanger our national security and that we ought to take a hard look at where we are heading.

I strongly objected to these detention provisions back in the summer when the Armed Services Committee first considered them. In fact, I was the only member of the committee who cast a ''no'' vote during the committee markup. I felt a little lonely at that point in time, but I think my judgment has been recognized by the outpouring of concern about where we may be headed.

Let me talk about what they do. The provisions could authorize the indefinite military detention of American citizens who are suspected of involvement in terrorism, without charge, even those captured in the United States. The point I have tried to make over and over again is that this concerns each and every one of us. If these provisions deny American citizens their due process rights under a nebulous, new set of directives, it would not only make us less safe, but it would serve as an unprecedented threat to our constitutional liberties.

Senator GRAHAM, my friend from South Carolina, has stated that if an American citizen takes up arms against the United States, he or she could be treated as an enemy combatant. I agree. However, the dangerous part of that proposition is as follows: How do we go about determining who those individuals are? No matter how serious the charge may be, the Constitution requires us to provide our citizens with due process before they are incarcerated—especially indefinite incarceration. If we start labeling our citizens as enemies of the United States without any due process, I think we will have done real damage to our system of justice in our country, which is admired all over the world.

My colleagues and I all agree that we have to take every action necessary to keep our Nation safe. But what separates us—what makes America exceptional—is that even in our darkest

hours, we ensure that our constitution prevails.

We do ourselves a grave disservice by allowing for any citizen to be locked up indefinitely without trial, no matter how serious the charges against them. Doing so may make us feel safer, it may be politically expedient, but we risk losing the principles of justice and liberty that have kept our Republic strong, and it does, frankly, nothing to make us safer. No terrorist, no weapon, no physical threat is powerful enough to destroy who we are as a people, and that is why we have to remain diligent in ensuring we hold true to the principles that make our country great.

I took note of this very principle in a powerful piece written by two retired four-star Marine Corps generals, General Krulak and General Hoar.

Mr. President, I ask unanimous consent to have printed in the RECORD the article written by these two generals.

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

[From the New York Times, Dec. 12, 2011]

GUANTÁNAMO FOREVER?

(By Charles C. Krulak and Joseph P. Hoar)

In his inaugural address, President Obama called on us to ''reject as false the choice between our safety and our ideals.'' We agree. Now, to protect both, he must veto the National Defense Authorization Act that Congress is expected to pass this week.

HOBBLING THE FIGHT AGAINST TERRORISM

This budget bill—which can be vetoed without cutting financing for our troops—is both misguided and unnecessary: the president already has the power and flexibility to effectively fight terrorism.

One provision would authorize the military to indefinitely detain without charge people suspected of involvement with terrorism, including United States citizens apprehended on American soil. Due process would be a thing of the past. Some claim that this provision would merely codify existing practice. Current law empowers the military to detain people caught on the battlefield, but this provision would expand the battlefield to include the United States—and hand Osama bin Laden an unearned victory long after his well-earned demise.

A second provision would mandate military custody for most terrorism suspects. It would force on the military responsibilities it hasn't sought. This would violate not only the spirit of the post-Reconstruction act limiting the use of the armed forces for domestic law enforcement but also our trust with service members, who enlist believing that they will never be asked to turn their weapons on fellow Americans. It would sideline the work of the F.B.I. and local law enforcement agencies in domestic counterterrorism. These agencies have collected invaluable intelligence because the criminal justice system—unlike indefinite military detention—gives suspects incentives to cooperate.

Mandatory military custody would reduce, if not eliminate, the role of federal courts in terrorism cases. Since 9/11, the shaky, untested military commissions have convicted only six people on terror-related charges, compared with more than 400 in the civilian courts.

A third provision would further extend a ban on transfers from Guantánamo, ensuring that this morally, and financially expensive symbol of detainee abuse will remain open well into the future. Not only would this bolster Al Qaeda's recruiting efforts, it also would make it nearly impossible to transfer 88 men (of the 171 held there) who have been cleared for release. We should be moving to shut Guantánamo, not extend it.

Having served various administrations, we know that politicians of both parties love this country and want to keep it safe. But right now some in Congress are all too willing to undermine our ideals in the name of fighting terrorism. They should remember that American ideals are assets, not liabilities.

Mr. UDALL of Colorado. Mr. President, these generals put it right to the point we all need to hear: Our ideals are assets, not liabilities. In that spirit, interestingly enough, we had a very robust debate about these detention provisions, and it bolstered my faith we could continue to have great and substantive debates in this body. Because of the concerns that were raised and serious questions that were presented about the provisions, we were able to secure some improvements that may reduce some of the grave concerns I have outlined here.

I see my good friend from Illinois, who I know is going to speak and who shares some of my concerns, so let me touch on a couple of the adjustments that have been made.

Senator FEINSTEIN's amendment clarified that detainee provisions are not to be interpreted ''to affect existing law or authorities relating to the detention of United States citizens.''

I was a member of the conference committee on this bill, and during the conference committee negotiations resulted in a clarification that was made to ensure these provisions are not to be interpreted to ''affect the existing criminal enforcement and national security authorities of the FBI or any other domestic law enforcement agency.'' These were helpful changes and, hopefully, will prevent the undermining of our constitutional liberties and the disruption of domestic counterterrorism efforts.

However, while I was pleased my colleagues were willing to acknowledge the language presented serious problems and left many questions unanswered, I still remain concerned about the detention provisions. Making changes to the law that have serious ramifications for our Constitution and our national security deserve serious thought and deliberation. Yet to this day we have not had a single hearing on these matters. Hearings would allow us to understand and mitigate the concerns of national security experts such as FBI Director Mueller. Director Mueller testified yesterday in front of the Senate Judiciary Committee and said that because of the requirements of this language, ''the possibility looms that we will lose opportunities to obtain cooperation from the persons in the past that we've been fairly successful in gaining.''

One of our primary goals in these cases is to gain actionable intelligence, and the FBI is very good—in fact, they are unbelievably good—at using a variety of techniques to gather the information we need—techniques, by the way, that fit within the Bill of Rights and the Uniform Code of Military Justice. Some of my colleagues believe that intelligence will be lost if a suspect receives a Miranda warning, but now we may be jeopardizing entire cases by adding new layers of bureaucracy and questionable legal processes.

These detention provisions, even as they are amended, will present numerous constitutional questions that the courts will inevitably have to resolve, and the provisions will present logistical problems that our national security experts will have to wade through. It sure feels to me as though these changes are being forced on an already nimble and effective counterterrorism community against their warnings, and I remain unconvinced of their benefit. I continue to believe the best course of action would be to separate these detention provisions from the Defense authorization bill so we can take our time, speak to experts in the field, and make sure we are effectively balancing our counterterrorism needs and the constitutional freedoms of American citizens. Most importantly, we need to understand and we need to ensure we are not damaging our national security. That is why I made it clear in signing the conference report that I do not support the two flawed detention provisions, sections 1021 and 1022.

All of that said, the Senate has a solemn obligation to our men and women in uniform to pass a Defense Authorization Act. As a proud member of the Senate Armed Services Committee, I understand the importance of this bill for our military and for their families, and while I continue to have serious reservations about the detention provisions and sought to separate them from the Defense authorization bill, we face a single vote on the entirety of the Defense bill, which includes the amended detention provisions. That is not how I wanted to proceed, but that is the choice in front of us.

For those who joined me in voicing opposition to the detention provisions, I thank you. We fought to ensure that the rights of American citizens are not trampled with ease, and we joined the counterterrorism community to demand the full use of existing tools to fight the enemy. We showed that such a debate was worth having and secured revisions to the language that will now help us continue the important work of ensuring that both our Constitution and our national security remain protected.

Although I intend to vote for final passage of the conference bill, I want to make clear I do not fully support the bill. I sincerely believe this debate is not over and there is much work left to do. Over the coming months and years, as a member of the Senate Armed Services Committee, I intend to hold this administration, and any further administration, accountable in

the implementation of these provisions.

I will also push the Congress to conduct the maximum amount of oversight possible as it relates to these provisions. We must apply a heightened level of scrutiny to ensure that what passes the Senate today does not deny U.S. citizens their due process rights and does not impede our counterterrorism efforts by hamstringing our military, the FBI, the CIA, or others who keep us safe. If these provisions stray in any way from that standard, I will be the first to demand hearings and changes to the law.

In conclusion, I believe we owe it to our men and women in uniform to pass a Defense authorization bill, but we also owe the American people a full and honest debate about our national security strategy that keeps us both safe and protects this document—the Constitution—we all have taken an oath to uphold.

With that, I yield the floor.

Mr. BINGAMAN. Mr. President, I rise today in strong opposition to several sections of the fiscal year 2012 Department of Defense authorization bill relating to detainees.

I have serious concerns regarding the detention provisions included in the final conference report. When this legislation was being discussed in the Senate, the Secretary of Defense, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation clearly stated that these provisions would undermine the ability of the government to bring suspected terrorists to justice. The language in the bill also raises significant issues regarding civil liberties, including the applicability of the indefinite detention provision to American citizens.

Section 1021 of the conference report provides the U.S. military with the authority to indefinitely detain, without trial, an individual suspected of involvement in hostilities against the United States. The ability to detain the person without charges could last until the ''end of hostilities''—a completely undefined period of time considering that we are confronting a long-term conflict with groups, such as al-Qaida, who will never sign a peace treaty ending the hostilities.

The final language does include an amendment offered by Senator FEINSTEIN that states that the provision should not be construed as affecting existing law with respect to the detention of U.S. citizens, but this language simply restates that the law is what the law is. The problem is that the law is unsettled. If Congress is going to enact provisions authorizing the indefinite detention of a person without a trial, frankly, I believe the sensible approach is to be very clear about whether or not it is the intent of Congress to include American citizens within this category.

Another problematic provision is section 1022, which mandates that the military detain suspected members of al-Qaida, including those captured within the United States. As I previously mentioned, military and Federal law enforcement officials have argued that this provision will hamper their ability to bring suspected terrorists to justice by limiting the flexibility of civilian law enforcement and creating a completely new and untested framework for dealing with suspected terrorists.

Proponents of this provision have argued that this section will not interfere with the ability of civilian law enforcement to do their job. They point to the fact that the President may waive the requirement and that the President must draft procedures within 60 days to mitigate any problems associated with implementing this section.

First, with regard to the waiver, if civilian law enforcement agents capture a suspected terrorist, the need to obtain a Presidential waiver for continued civilian detention could disrupt interrogations and intelligence gathering. Second, if there is an acknowledgement that the statute could interfere with Federal law enforcement's ability to interrogate and prosecute a suspected terrorist, it would seem more appropriate to just address the underlying problems with the statute rather than task the administration with coming up with procedures to deal with these shortfalls.

Just yesterday, the Director of the FBI, Robert Mueller, in testimony before the Senate Judiciary Committee, stated that the revised language did not fully address his concerns about the negative impact the military detention provision would have in interfering with the work of investigators.

The bottom line is that this section muddies the water and is completely unnecessary. The administration already has the discretion to prosecute foreign terrorists in civilian court or in military tribunals. We should maintain this flexibility to ensure the government is able to aggressively pursue terrorists in the forum that is the most effective in each specific case.

Lastly, I would like to briefly comment on the various provisions in the conference report aimed at limiting the ability of the administration to close the detention facility in Guantanamo Bay. It has been about 10 years since the Bush administration established the facility and its closure is long overdue.

As a recent article by Scott Shane of the New York Times pointed out, the government spends around $800,000 a year to house each of the 171 remaining prisoners at the military facility at Guantanamo. This is despite the fact that our Federal prison system has a strong record of safely holding individuals convicted of terrorism-related offenses—there are currently 362 of these individuals within the custody of the Bureau of Prisons.

Mr. President, I ask unanimous consent that the article be printed in the CONGRESSIONAL RECORD following my remarks.

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

(See exhibit 1.)

Mr. BINGAMAN. It is unfortunate that Congress continues to put in place restrictions preventing the transfer of inmates and the closure of the facility. I believe our Nation's handling of detainees will not be viewed kindly by history, and I look forward to the day we are able to close this regrettable chapter.

I supported an amendment offered by Senator MARK UDALL to remove all of the detainee provisions from the Senate bill. Unfortunately, the measure was not adopted. It was my hope that these matters would be dealt with as the legislative process moved forward, and I am disappointed that efforts to adequately address these concerns were unsuccessful. I will continue to support efforts to revise these provisions as Congress discusses detainee matters in the future.

EXHIBIT 1

[From the New York Times, Dec. 10, 2011]

BEYOND GUANTÁNAMO, A WEB OF PRISONS FOR TERRORISM INMATES

(By Scott Shane)

WASHINGTON.—It is the other Guantánamo, an archipelago of federal prisons that stretches across the country, hidden away on back roads. Today, it houses far more men convicted in terrorism cases than the shrunken population of the prison in Cuba that has generated so much debate.

An aggressive prosecution strategy, aimed at prevention as much as punishment, has sent away scores of people. They serve long sentences, often in restrictive, Muslim-majority units, under intensive monitoring by prison officers. Their world is spare.

Among them is Ismail Royer, serving 20 years for helping friends go to an extremist training camp in Pakistan. In a letter from the highest-security prison in the United States, Mr. Royer describes his remarkable neighbors at twice-a-week outdoor exercise sessions, each prisoner alone in his own wire cage under the Colorado sky. ''That's really the only interaction I have with other inmates,'' he wrote from the federal Supermax, 100 miles south of Denver.

There is Richard Reid, the shoe bomber, Mr. Royer wrote. Terry Nichols, who conspired to blow up the Oklahoma City federal building. Ahmed Ressam, the would-be ''millennium bomber,'' who plotted to attack Los Angeles International Airport. And Eric Rudolph, who bombed abortion clinics and the 1996 Summer Olympics in Atlanta.

In recent weeks, Congress has reignited an old debate, with some arguing that only military justice is appropriate for terrorist suspects. But military tribunals have proved excruciatingly slow and imprisonment at Guantánamo hugely costly—$800,000 per inmate a year, compared with $25,000 in federal prison.

The criminal justice system, meanwhile, has absorbed the surge of terrorism cases since 2001 without calamity, and without the international criticism that Guantánamo has attracted for holding prisoners without trial. A decade after the Sept. 11 attacks, an examination of how the prisons have handled the challenge of extremist violence reveals some striking facts:

—Big numbers. Today, 171 prisoners remain at Guantánamo. As of Oct. 1, the federal Bureau of Prisons reported that it was holding 362 people convicted in terrorism-related cases, 269 with what the bureau calls a

connection to international terrorism—up from just 50 in 2000. An additional 93 inmates have a connection to domestic terrorism.

—Lengthy sentences. Terrorists who plotted to massacre Americans are likely to die in prison. Faisal Shahzad, who tried to set off a car bomb in Times Square in 2010, is serving a sentence of life without parole at the Supermax, as are Zacarias Moussaoui, a Qaeda operative arrested in 2001, and Mr. Reid, the shoe bomber, among others. But many inmates whose conduct fell far short of outright terrorism are serving sentences of a decade or more, the result of a calculated prevention strategy to sideline radicals well before they could initiate deadly plots.

—Special units. Since 2006, the Bureau of Prisons has moved many of those convicted in terrorism cases to two special units that severely restrict visits and phone calls. But in creating what are Muslim-dominated units, prison officials have inadvertently fostered a sense of solidarity and defiance, and set off a long-running legal dispute over limits on group prayer. Officials have warned in court filings about the danger of radicalization, but the Bureau of Prisons has nothing comparable to the deradicalization programs instituted in many countries.

—Quiet releases. More than 300 prisoners have completed their sentences and been freed since 2001. Their convictions involved not outright violence but ''material support'' for a terrorist group; financial or document fraud; weapons violations; and a range of other crimes. About half are foreign citizens and were deported; the Americans have blended into communities around the country, refusing news media interviews and avoiding attention.

—Rare recidivism. By contrast with the record at Guantánamo, where the Defense Department says that about 25 percent of those released are known or suspected of subsequently joining militant groups, it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release. The government keeps a close eye on them: prison intelligence officers report regularly to the Justice Department on visitors, letters and phone calls of inmates linked to terrorism. Before the prisoners are freed, F.B.I. agents typically interview them, and probation officers track them for years.

Both the Obama administration and Republicans in Congress often cite the threat of homegrown terrorism. But the Bureau of Prisons has proven remarkably resistant to outside scrutiny of the inmates it houses, who might offer a unique window on the problem.

In 2009, a group of scholars proposed interviewing people imprisoned in terrorism cases about how they took that path. The Department of Homeland Security approved the proposal and offered financing. But the Bureau of Prisons refused to grant access, saying the project would require too much staff time.

''There's a huge national debate about how dangerous these people are,'' said Gary LaFree, director of a national terrorism study center at the University of Maryland, who was lead author of the proposal. ''I just think, as a citizen, somebody ought to be studying this.''

The Bureau of Prisons would not make any officials available for an interview with The New York Times, and wardens at three prisons refused to permit a reporter to visit inmates. But e-mails and letters from inmates give a rare, if narrow, look at their hidden world.

PAYING THE PRICE

Consider the case of Randall Todd Royer, 38, a Missouri-born Muslim convert who goes by Ismail. Before 9/11, he was a young Islamic activist with the Council on American-Islamic Relations and the Muslim American Society, meeting with members of Congress and visiting the Clinton White House.

Today he is nearly eight years into a 20-year prison sentence. He pleaded guilty in 2004 to helping several American friends go to a training camp for Lashkar-e-Taiba, an extremist group fighting Indian rule in Kashmir. The organization was later designated a terrorist group by the United States—and is blamed for the Mumbai massacre in 2008—but prosecutors maintained in 2004 that the friends intended to go on to Afghanistan and fight American troops alongside the Taliban.

Mr. Royer had fought briefly with the Bosnian Muslims against their Serbian neighbors in the mid-1990s, when NATO, too, backed the Bosnians. He trained at a Lashkar-e-Taiba camp himself. And in 2001, he was stopped by Virginia police with an AK–47 and ammunition in his car.

But he adamantly denies that he would ever scheme to kill Americans, and there is no evidence that he did so. Before sentencing, he wrote the judge a 30-page letter admitting, ''I crossed the line and, in my ignorance and phenomenally poor judgment, broke the law.'' In grand jury testimony, he expressed regret about not objecting during a meeting, just after the Sept. 11 attacks, in which his friends discussed joining the Taliban.

''Unfortunately, I didn't come out and clearly say that's not what any of us should be about,'' he said.

Prosecutors call Mr. Royer ''an inveterate liar'' in court papers in another case, asserting that he has given contradictory accounts of the meeting after Sept. 11. Mr. Royer says he has been truthful.

Whatever the facts, he is paying the price. His 20-year sentence was the statutory minimum under a 2004 plea deal he reluctantly took, fearing that a trial might end in a life term. His wife divorced him and remarried; he has seen his four young children only through glass since 2006, when the Bureau of Prisons moved him to a restrictive new unit in Indiana for inmates with the terrorism label. After an altercation with another inmate who he said was bullying others, he was moved in 2010 to the Supermax in Colorado.

He is barred from using e-mail and permitted only three 15-minute phone calls a month—recently increased from two, a move that Mr. Royer hopes may portend his being moved to a prison closer to his children. His letters are reflective, sometimes self-critical, frequently dropping allusions to his omnivorous reading. His flirtation with violent Islam and his incarceration, he says, have not poisoned him against his own country.

''You asked what I think of the U.S.; that is an extraordinarily complex question,'' Mr. Royer wrote in one letter consisting of 27 pages of neat handwriting. ''I can say I was born in Missouri, I love that land and its people, I love the Mississippi, I love my family and my cousins, I love my Germanic ethnic heritage and people, I love the English language, I love the American people—my people.

He said he believed some American foreign policy positions had been ''needlessly antagonistic'' but added, ''Nothing the U.S. did justified the 9/11 attacks.''

Mr. Royer rejected the notion that the United States was at war with Islam. ''Conflict between the U.S. and Muslims is neither inevitable nor beneficial or in anyone's interest,'' he wrote. ''Actually, I suppose it is in the interest of fanatics on both sides, but their interests run counter to everyone else's.'' He added an erudite footnote: '' 'Les extrémités se touchent' (the extremes meet)—Blaise Pascal.''

He expressed frustration that the Bureau of Prisons appears to view him as an extremist, despite what he describes as his campaign against extremism in discussions with other inmates and prison sermons at Friday Prayer, ''which they surely have recordings of.''

''I have gotten into vehement debates, not to mention civil conversations, with other inmates from the day I was arrested until today, about the dangers and evils of extremism and terrorism,'' Mr. Royer wrote in a yearlong correspondence with a reporter. ''Can they not figure out who I am?''

A SCORCHED-EARTH APPROACH

In 2004, prosecutors believed they knew who Mr. Royer was: one of a group of young Virginians under the influence of a radical cleric, Ali al-Timimi, whose members played paintball to practice for jihad and were on a path toward extremist violence. After Sept. 11, federal prosecutors took a scorched-earth approach to any crime with even a hint of a terrorism connection, and judges and juries went along.

In the Virginia jihad case, for instance, prosecutors used the Neutrality Act, a little-used law dating to 1794 that prohibits Americans from fighting against a nation at peace with the United States. Prosecutors combined that law with weapons statutes that impose a mandatory minimum sentence in a strategy to get the longest prison terms, with breaks for some defendants who cooperated, said Paul J. McNulty, then the United States attorney overseeing the case.

''We were doing all we could to prevent the next attack,'' Mr. McNulty said.

''It was a deterrence strategy and a show of strength,'' said Karen J. Greenberg, a law professor at Fordham University who has overseen the most thorough independent analysis of terrorism prosecutions. ''The attitude of the government was: Every step you take toward terrorism, no matter how small, will be punished severely.''

About 40 percent of terrorism cases since the Sept. 11 attacks have relied on informants, by the count of the Center on Law and Security at New York University, which Ms. Greenberg headed until earlier this year. In such cases, the F.B.I. has trolled for radicals and then tested whether they were willing to plot mayhem—again, a preemptive strategy intended to ferret out potential terrorists. But in some cases prosecutors have been accused of overreaching.

Yassin M. Aref, for instance, was a Kurdish immigrant from Iraq and the imam of an Albany mosque when he agreed to serve as witness to a loan between an acquaintance and another man, actually an informant posing as a supporter of a Pakistani terrorist group, Jaish-e-Muhammad. The ostensible purpose of the loan was to buy a missile to kill the Pakistani ambassador to the United Nations. Mr. Aref's involvement was peripheral—but he was convicted of conspiring to aid a terrorist group and got a 15-year sentence.

That was a typical punishment, according to the Center on Law and Security, which has studied the issue. Of 204 people charged with what it calls serious jihadist crimes since the Sept. 11 attacks, 87 percent were convicted and got an average sentence of 14 years, according to a September report from the center.

Federal officials say the government's zero-tolerance approach to any conduct touching on terrorism is an important reason there has been no repeat of Sept. 11. Lengthy sentences for marginal offenders have been criticized by some rights advocates as deeply unfair—but they have sent an unmistakable message to young men drawn to the rhetoric of violent jihad.

The strategy has also sent scores of Muslim men to federal prisons.

SPECIAL UNITS

After news reports in 2006 that three men imprisoned in the 1993 World Trade Center bombing had sent letters to a Spanish terrorist cell, the Bureau of Prisons created two special wards, called Communication Management Units, or C.M.U.'s. The units, which opened at federal prisons in Terre Haute, Ind., in 2006 and Marion, Ill., in 2008, have set off litigation and controversy, chiefly because critics say they impose especially restrictive rules on Muslim inmates, who are in the majority.

The C.M.U.'s? You mean the Muslim Management Units?'' said Ibrahim Hooper, a spokesman for the Council on American-Islamic Relations.

The units currently hold about 80 inmates. The rules for visitors—who are allowed no physical contact with inmates—and the strict monitoring of mail, e-mail and phone calls are intended both to prevent inmates from radicalizing others and to rule out plotting from behind bars.

A Bureau of Prisons spokeswoman, Traci L. Billingsley, said in an e-mail that the units were not created for any religious group but were ''necessary to ensure the safety, security and orderly operation of correctional facilities, and protection of the public.''

An unintended consequence of creating the C.M.U.'s is a continuing conflict between Muslim inmates and guards, mainly over the inmates' demand for collective prayer beyond the authorized hourlong group prayer on Fridays. The clash is described in hundreds of pages of court filings in a lawsuit. In one affidavit, a prison official in Terre Haute describes ''signs of radicalization'' in the unit, saying one inmate's language showed ''defiance to authority, and a sense of being incarcerated because of Islam.''

One 2010 written protest obtained by The New York Times, listing grievances ranging from the no-contact visiting rules to guards ''mocking, disrespecting and disrupting'' Friday Prayer, was signed by 17 Muslim prisoners in the Terre Haute Communication Management Unit. They included members of the so-called Virginia jihad case of which Mr. Royer was part; the Lackawanna Six, Buffalo-area Yemeni Americans who traveled to a Qaeda camp in Afghanistan; Kevin James, who formed a radical Muslim group in prison and plotted to attack military facilities in Los Angeles; and John Walker Lindh, the so-called American Taliban.

An affidavit signed by Mr. Lindh, who is serving 20 years after admitting to fighting for the Taliban, complained that a correctional officer greeted male Muslim inmates with ''Good morning, ladies.'' (''No ladies were in the area,'' Mr. Lindh writes.) Prison officials say in court papers that Mr. Lindh has repeatedly challenged guards and violated rules.

Unlike those at the Supermax, inmates in the segregated units have access to e-mail, and some were willing to answer questions. Mr. Lindh, whose father, Frank Lindh, said his son believed the news media falsely labeled him a terrorist, was not. In reply to a reporter's letter requesting an interview, he sent only a photocopy of the sole of a tennis shoe. Since shoe bottoms are considered offensive in many cultures, his answer appeared to be an emphatic no.

There is some evidence that the Bureau of Prisons has assigned Muslims with no clear terrorist connection to the C.M.U.'s. Avon Twitty, a Muslim who spent 27 years in prison for a 1982 street murder, was sent to the Terre Haute unit in 2007. When he challenged the assignment, he was told in writing that he was a ''member of an international terrorist organization,'' though no organization was named and there appears to be no public evidence for the assertion.

Mr. Twitty, working for a home improvement company and teaching at a Washington mosque since his release in January, said he believed the real reason was to quash his complaints about what he believed were miscalculations of time off for good behavior for numerous inmates. ''They had to shut me up,'' he said.

Another former inmate at the Marion C.M.U., Andy Stepanian, an animal rights activist, said a guard once told him he was ''a balancer''—a non-Muslim placed in the unit to rebut claims of religious bias. Mr. Stepanian said the creation of the predominantly Muslim units could backfire, adding to the feeling that Islam is under attack.

''I think it's a fair assessment that these men will leave with a more intensified belief that the U.S. is at war with Islam,'' said Mr. Stepanian, 33, who now works for a Princeton publisher. ''The place reeked of it,'' he said, describing clashes over restrictions on prayer and some guards' hostility to Islam.

Yet Mr. Stepanian also said he found the ''family atmosphere'' and camaraderie of inmates at the unit a welcome change from the threatening tone of his previous medium-security prison, where he said prisoners without a gang to protect them were ''food for the sharks.'' When he arrived at the C.M.U., he said, he found on his bed a pair of shower slippers and a bag of non-animal-based food that Muslim inmates had collected after hearing a vegan was joining the unit.

He was wary. ''I thought they were trying to indoctrinate me,'' he said. ''They never tried.'' The consensus of the inmates, he said, ''was that 9/11 was not Islam.'' ''These guys were not lunatics,'' he said. ''They wanted to be back with their families.''

REFLECTION

It may be too early to judge recidivism for those imprisoned in terrorism cases after Sept. 11; those who are already out are mostly defendants whose crimes were less serious or who cooperated with the authorities. Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates or for Guantánamo releases.

For example, Mohammed Mansour Jabarah, a Kuwaiti Canadian who plotted with Al Qaeda to attack American embassies in Singapore and Manila, pleaded guilty in 2002 and began to work as an F.B.I. informant. But F.B.I. agents soon discovered he was secretly plotting to kill them—and he was sentenced to life in prison.

Nearly all of these ex-convicts, however, lie low and steer clear of militancy, often under the watchful eye of family, mosque and community, lawyers and advocates say. A dozen former inmates declined to be interviewed, saying that to be associated publicly with a terrorism case could derail new jobs and lives. As for Mr. Royer, he is approaching only the midpoint of his 20-year sentence.

Did he get what he deserved? Chris Heffelfinger, a terrorism analyst and author of ''Radical Islam in America,'' did a detailed study of the Virginia jihad case, and concluded that Mr. Royer's sentence was perhaps double what his crime merited. But he said the prosecution was warranted and probably prevented at least some of the men Mr. Royer assisted from joining the Taliban.

''I think a strong law enforcement response to cases like this is appropriate nine times out of 10,'' Mr. Heffelfinger said. Mr. Royer himself, in his long presentencing letter to Judge Leonie M. Brinkema, said he understood why he had been arrested. ''I realize that the government has a legitimate interest in protecting the public from terrorism,'' he wrote, ''and that in this post-9/11 environment, it must take all reasonable precautions.''

Today, Mr. Royer's only battle is to serve out his sentence in a less restrictive prison nearer his children. In what he called in a letter ''a heroic sacrifice,'' his parents, Ray and Nancy Royer, moved from Missouri to Virginia to be close to their son's children, now aged 8 to 12.

''I found it necessary to be a surrogate father,'' said Ray Royer, 70, a commercial photographer by trade, in an interview at the retirement community outside Washington where he and his wife now live. When his son, who still goes by Randy in the family, converted to Islam at the age of 18, his parents did not object. Later, when he headed to Bosnia, they chalked it up to his active social conscience. ''Religion is a personal thing,'' the elder Mr. Royer said. ''He'd never been in trouble.''

Ray Royer was at his son's Virginia apartment in 2003 when the F.B.I. knocked at 5 a.m., put him in handcuffs and took him away. Now, years later, he alternates between defending his son and expressing dismay at what Randy got himself into.

''He did help his buddies get to L.E.T.,'' or Lashkar-e-Taiba, the Pakistani militant group later designated as a terrorist organization. ''He admitted to it. He should pay the price.'' Still, he added, ''maybe he deserved five years or so. Not 20.''

Ray Royer sat at his home computer one recent evening, looking through a folder called ''Randy Pics''—photographs tracing his son's life from childhood, to fatherhood, to prison.

''He loved his family,'' the father said of his son. ''Why would he put this cause ahead of his family? I still don't really know what happened. I'm still trying to figure it out.''

Mr. WHITEHOUSE. Mr. President, I rise today to highlight important provisions of the National Defense Authorization Act conference report that will counter the serious and growing problem of counterfeit goods entering the military supply chain.

Section 818 of the conference report, which includes these provisions, reflects the leadership of Chairman LEVIN and Ranking Member MCCAIN of the Senate Armed Services Committee. I applaud their work to keep counterfeit parts out of the military supply chain. As I have said before, our Nation asks a lot of our troops. In return, we must give them the best possible equipment to fulfill their vital missions and come home safely. We must ensure the proper performance of weapon systems, body armor, aircraft parts, and countless other mission-critical products. Section 818 goes a long way toward protecting our troops from the dangers of counterfeit parts and the decreased combat effectiveness they cause.

I am particularly glad that section 818 includes a provision I introduced to increase criminal penalties for trafficking in counterfeit military goods. That provision, introduced as the Combating Military Counterfeits Act of 2011, S. 1228, was reported without objection by the Senate Judiciary Committee. It was cosponsored by Senators GRAHAM, LEAHY, MCCAIN, COONS, KYL, BLUMENTHAL, HATCH, KLOBUCHAR, and SCHUMER. I was very grateful that Chairman LEVIN and Ranking Member

MCCAIN included it in their anticounterfeiting amendment to the NDAA, and I greatly appreciate their leadership in ensuring that the provision remained in the conference report. I would also particularly like to thank Chairman LAMAR SMITH of the House Judiciary Committee, who introduced comparable language in the House. It was a pleasure working with him on the language included in section 818(h). I am very grateful that he was able to clear the provision on the House side, thereby enabling its inclusion in the conference report.

Prosecutors will be able to employ section 818(h) to deter criminals from trafficking in military counterfeits. This will help protect our national security and the safety of our troops. The U.S. Sentencing Commission also has a role to play. It should update relevant sentencing guidelines to ensure that they reflect the seriousness of these reprehensible crimes. I would particularly note that the Obama administration has called for an increase of the minimum base offense level for trafficking in counterfeit military goods to 14. I trust that the Sentencing Commission will give this recommendation substantial weight when it reconsiders the guidelines in light of the changes section 818(h) makes to the Criminal Code. As the administration has explained, a minimum offense level of 14 for trafficking in counterfeit military products would mean that a first-time offender with no criminal history would face at least a 10- to 16-month guideline range without any other aggravated conduct, after taking into account a reduction for acceptance of responsibility. Such penalties should be the bare minimum for offenses that put our troops' safety at risk.

I also would like to highlight a second provision within section 818 of the conference report. Our colleagues on the Finance and Judiciary Committees have been working diligently to clarify that Customs and Border Protection agents can share sufficient information with trademark holders to ensure that counterfeit products are stopped at the border. Chairman LEAHY, for example, amended his PROTECT IP Act to that end. Section 818(g) includes comparable language, and I applaud the conferees for recognizing the importance of this provision. It reaffirms the executive branch's authority to share necessary information with rights holders without fear of violating the Trade Secrets Act. It thereby will enable Customs and Border Protection to fulfill its responsibility to stop military counterfeits at the border. Under this provision, they will be able to share the same photographs and samples they currently share but with the serial numbers and other identifying information shown, not redacted. This simple change in practice should be implemented immediately, without the delay of unnecessary regulatory processes. Now is the time to protect our troops from the risk of dangerous counterfeit military parts entering our fighter jets, weapons, ships, and countless other mission-critical products.

I am glad to have the opportunity to vote in favor of these important provisions. I look forward to the future reduction in the number of dangerous counterfeit military products that are currently putting our troops' safety at risk and reducing combat effectiveness.

Mr. KERRY. Mr. President, I am voting to pass the conference report for the National Defense Authorization Act for Fiscal Year 2012, NDAA.

This is not a perfect piece of legislation. But it contains important hard-fought provisions that I am unwilling to jeopardize or risk denying to the brave men and women defending our Nation, and their families. Specifically, this bill represents the year's last opportunity to pass a 1.6 percent across-the-board pay raise for our men and women in the military. The bill also includes a bipartisan provision Senator COLLINS and I have been working on for over a year to get passed: an effort to protect victims of sexual assault in the military. As a veteran, I have been deeply troubled by what Senator COLLINS and our colleague in the House, Representative TSONGAS, have heard about the alarming incidences of sexual assault in the military—which is why we worked so hard through this bill to strengthen support for sexual assault prevention, legal protection for victims of sexual assault, and assistance for victims.

There are, however, problems with this bill which still concern me. When the bill was on the floor, I fought for amendments that would have stripped troubling detainee provisions out of the bill entirely. I also voted for other amendments that would have significantly narrowed the scope of the detainee provisions. Unfortunately, notwithstanding my votes, those amendments were not adopted by the Senate. The conferees, with our urging, and with the President's veto threat, made some progress in improving that part of the bill. I commend the conferees for working to address concerns of mine and many other Senators, senior administration officials, and the public over the detention-related provisions in the NDAA. While the provisions in the conference report are an improvement over their counterparts in the bill that the Senate passed last week, we need to continue to examine detention law and policy to ensure that the treatment of detainees is consistent with our national security and with core American values.

The progress made in conference on the detention-related provisions is significant enough that I am comfortable voting for the bill, and the White House has lifted its veto threat. Specifically, the conference report includes several changes to the detainee provisions, including a new paragraph that clearly states that nothing in the bill ''shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency,'' provisions that give the President additional discretion over implementation, and a transfer of the waiver authority from the Secretary of Defense to the President. In its totality, these changes led the White House to state that the ''the language does not challenge or constrain the President's ability to collect intelligence, incapacitate dangerous terrorists, and protect the American people, and the President's senior advisors will not recommend a veto.''

Given all this, as well as the fact that the detention-related provisions of the bill have been improved from a civil liberties perspective, and in light of the other urgent priorities contained in the overall bill, I am voting in favor of the conference report.

Mr. HARKIN. Mr. President, as a U.S. Senator, I have no greater responsibility than to work to ensure our Nation's security. In that regard, I believe our Armed Forces must have all the tools they need to keep our country safe. That is why I support the vast majority of the provisions in the National Defense Authorization Act.

The bill takes some small steps towards reining in runaway defense spending, which has nearly doubled in the past decade. This bill authorizes $26.6 billion less than requested at the beginning of the year, providing more than enough to defend our interests, while chipping away at the Pentagon's nonstop growth. It also lays the groundwork for reevaluating outdated Cold War-era overseas deployments in Europe and the Pacific that are both costly and increasingly unnecessary.

All of these provisions I support and believe are important. However, because I believe this bill infringes on critical constitutional values, I must oppose final passage. I believe we can do a better job of protecting our national security without compromising these important values.

This Nation has long been a beacon of liberty and a champion of rights throughout the world. Yet, since 9/11, in the name of security, we have repeatedly betrayed our highest principles. The past administration believed it could eavesdrop on Americans without a warrant or court order. It utilized interrogation techniques long considered immoral, ineffective, and illegal, regardless of laws and treaties. And, it intentionally sought to put detainees beyond the rule of law. Thankfully, the current administration has ended the worst abuses of these practices, despite the efforts of some of my colleagues to stymie these efforts.

However, I am deeply concerned that the conference report continues us on a dangerous path, which sacrifices long-held and durable principles at the altar of fear and short-term expediency.

To begin, this bill fails to make clear that under no circumstance can an American citizen be detained indefinitely without trial. I simply do not

believe that a person should be seized on American soil and indefinitely detained without charges and without due process of law.

Second, it mandates, for the first time, that non-American terrorist suspects arrested in the United States will be detained by the military rather than civilian law enforcement. Throughout our history, there has been a clear divide between our military—which fights wars abroad—and law enforcement in the United States, and that divide has worked. For example, since 9/11, over 400 terrorists have been successfully convicted in article III, not military, courts. For persons in this country, it is a dangerous precedent to not only authorize but actually require military custody.

Finally, the bill would make it much more difficult to close the detention center at Guantanamo Bay. There simply is no compelling reason to keep the facility open and not to bring these detainees to maximum security facilities within the United States. The detention center is a recruiting tool for those who wish to cause us harm and been a stain on our Nation's honor. I agree with former Secretary of State Colin Powell, who said that ''we have shaken the belief that the world had in America's justice system by keeping [the detention center at Guantanamo Bay] open. We don't need it and it's causing us far more damage than any good we get for it.''

In the immediate aftermath of 9/11, the administration declared a broad and open-ended ''war on terror.'' I have always considered this a flawed description of the challenge that confronted us after the 9/11 attacks. After all ''terror'' is an endlessly broad and vague term. And a ''war on terror'' is a war that can never end because terrorism and terrorists will always be with us. Because of the never-ending nature of this so-called war on terror, it offers a rationale for restricting civil liberties indefinitely. This is not healthy for our democracy or for our ability to inspire other countries to abide by democratic principles.

Mr. President, we will not overcome terrorism with secret prisons, with torture, with degrading treatment, with individuals denied basic rights; rather, we shall overcome it by staying true to our highest values and by insisting on legal safeguards that are the very basis of our system of government and freedom. Today is the 220th anniversary of the ratification of the Bill of Rights. The values embodied in that remarkable document have bound our Republic together for over 200 years and can bind us for 200 more if we hold them close.

Mr. LEAHY. Mr. President, the Senate today will pass the National Defense Authorization Act for the coming fiscal year. This vote is historic as Congress has enacted a national defense authorization act every year for the past half century. I commend the Senate for maintaining this steadfast support for our armed services, but this legislation will be remembered for reasons both bad and good. I regret the decision of the House and Senate conferees to include unnecessary and potentially harmful provisions related to the detention of terrorist suspects. However, I strongly support measures in the conference report that will empower the National Guard within the Department of Defense, enhance protections for military victims of sexual violence, increase transparency by limiting unnecessary exclusions from the Freedom of Information Act, improve mental health outreach to members of the National Guard and Reserves, and make many other changes to strengthen our national defense and take care of our men and women in uniform.

I continue to strongly oppose the detention related provisions in this conference report, which I believe are unwise and unnecessary. These provisions undermine our Nation's fundamental principles of due process and civil liberties and inject operational uncertainty into our counterterrorism efforts in a way that I believe harms our national security.

I strongly oppose section 1021 of this conference report, which statutorily authorizes indefinite detention. I am fundamentally opposed to indefinite detention and certainly when the detainee is a U.S. citizen held without charge. Indefinite detention 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.

Supporters of this measure will argue that this language simply codifies the status quo. That is not good enough. I am not satisfied with the status quo. Under no circumstances should the United States of America have a policy of indefinite detention. I fought against 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.

This is not a partisan issue for me. I have opposed indefinite detention no matter which party holds the keys to the jailhouse. I fought to preserve habeas corpus review for those detained at Guantanamo Bay because I believe that the United States must uphold the principles of due process and should only deprive a person of their liberty subject to judicial review.

Today, I joined Senator FEINSTEIN, Senator LEE, and others to introduce a bill titled the Due Process Guarantee Act. This bill will make clear that neither an authorization to use military force nor a declaration of war confer unfettered authority to the executive branch to hold Americans in indefinite detention. In the 2004 Supreme Court opinion in Hamdi v. Rumsfeld, Justice Sandra Day O'Connor stated unequivocally: ''We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.'' It is stunning to me that sponsors of the underlying Senate bill argued for the indefinite detention of U.S. citizens at Guantanamo Bay. We must make clear that our laws do not stand for such a proposition. We are a nation of laws, and we must adhere vigilantly to the principles of our Constitution. I urge all Senators to support this bipartisan effort to protect American values and cosponsor the Due Process Guarantee Act.

I am also deeply troubled by the mandatory military detention requirements included in section 1022 of this conference report. In the fight against al-Qaida and other terrorist threats, we should give our intelligence, military, and law enforcement professionals all the tools they need, not limit those tools. But limiting them is exactly what this conference report 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.

Supporters of the conference report claim that concerns about the mandatory military detention section are ''red herrings.'' They claim that they have modified the legislation in ways that give the President the flexibility he needs to apply the provisions without impeding investigations or undermining operations in the field. The changes are totally inadequate. The Statement of Administration Position, SAP, calls the mandatory military detention section ''unnecessary, untested, and legally controversial.'' The SAP goes on to state that ''applying this military custody requirement to individuals inside the United States . . . would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets.''

Some supporters of the conference report also claim that the national security waiver provision is ''a mile wide'' and provides the administration with sufficient flexibility. The intelligence professionals who work every day to keep our Nation safe disagree. The Director of National Intelligence, James R. Clapper, wrote to Senator FEINSTEIN that the ''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.''

As chairman of the Judiciary Committee, I am particularly concerned

that this provision fails to acknowledge or appreciate the vital role that law enforcement and the courts play in our counterterrorism efforts. In light of the hundreds of successful prosecutions of terrorism defendants in Federal courts, why would we want to remove this option from the table? As Jeh Johnson, the Pentagon's top lawyer, said recently, the Federal courts are ''well equipped to handle the prosecution of dangerous domestic and international terrorists,'' and ''the military is not the only answer.'' I could not agree more.

The implementation procedures required in the legislation are simply not enough to alleviate the potential for problems in the field. As Secretary Panetta stated in his recent letter to Senator LEVIN, this provision may ''needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.'' No one in the military, intelligence community, or law enforcement has asked for this provision, and rather than strengthening our national security, it makes us less safe.

During floor debate over the Senate bill, FBI Director Mueller wrote that the mandatory military provision would adversely affect the Bureau's ability to conduct counterterrorism investigations and inject ''a substantial element of uncertainty'' into its operations. He argued that the provision fails to take into account ''the reality of a counterterrorism investigation.'' The conference report modified the mandatory military detention section to preserve the existing law enforcement and national security authorities of the FBI, but the effect of that new language remains unclear. At our Judiciary Committee hearing on December 14, the FBI Director stated that the modified text ''does not give me a clear path to certainty as to what is going to happen when arrests are made in a particular case.'' The FBI Director is particularly concerned with how the legislation will affect the Bureau's ability to gain the cooperation of suspects. The FBI has a long and successful track record in the cultivation and use of cooperating witnesses. But as Director Muller stated, ''The possibility looms that we will lose opportunities to obtain cooperation from the persons in the past that we've been fairly successful in gaining.'' I cannot understand why the authors of this conference continue to insist upon language that will undermine the FBI in its use of this critical counterterrorism authority.

The language in the detention subtitle of this conference report 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 legislation was first considered by the Armed Services Committee, nor was either committee consulted earlier this month when it was modified. I also 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. On issues of such national significance, the American people deserve an open and transparent process.

Supporters of the detention provisions in the conference report continue to argue that such measures are needed because, they claim, ''we are a nation at war.'' That does not mean that we should be a nation without laws or a nation that does not adhere to the principles of our Constitution. We should prosecute those who commit crimes and terrorist acts and sentence them to long terms in prison. The Department of Justice has prosecuted more than 440 terrorists since September 11, 2001. We have a very strong record and nothing to fear from choosing a course that upholds American values and the rule of law. That is why I also oppose some of onerous funding and certification restrictions that make it virtually impossible to transfer individuals out of Guantanamo or to prosecute individuals detained there in Federal courts.

I also strongly oppose section 1029 of the conference report, which requires the Attorney General to consult with the Director of National Intelligence and Secretary of Defense before seeking an indictment of certain terrorism suspects. This provision was not considered or debated by the Senate and certainly not by the Senate Judiciary Committee, which I chair. I oppose this provision because it needlessly undermines the authority of the Attorney General and is an unprecedented infringement on the prosecutorial independence of the Department of Justice.

Regrettably, the detention language in this conference report remains fundamentally flawed. The detainee provisions will codify a practice of indefinite detention that has no place in the justice system of any democracy. They will cause further damage to our reputation as a nation that respects the fundamental right of due process, harm the efforts of intelligence and law enforcement officials in the field, and may limit their ability to track down terrorists and bring them to justice. My support for the Defense bill should not be construed as support for its detention provisions, which I oppose in the strongest possible terms.

Instead, my support for the bill reflects the inclusion of the National Guard Empowerment Act, a bill I drafted with Senator LINDSEY GRAHAM, as an amendment to its underlying text. The Guard empowerment provisions have been understandably overshadowed by the debate on other, more contentious provisions in the bill, but I nevertheless believe that these provisions will set the stage for dramatic changes to our military force structure in the years to come.

Beginning in May, a new national security consensus quietly formed in Congress around an issue at the core of our national security. Seventy-one senators from both parties steadily added their support to S. 1025, the bill that Senator GRAHAM and I called Guard Empowerment II. The provisions of our bill built upon the first Guard empowerment bill that I introduced with Senator Kit Bond of Missouri. That measure became law in 2008 and elevated the Chief of the National Guard Bureau to the rank of four-star general. This year's bill had as its headlining provision an effort to make the Chief a statutory member of the Joint Chiefs of Staff. Despite the vociferous opposition of Active component generals in the Pentagon—including all six sitting Joint Chiefs of Staff—a bipartisan congressional consensus formed around S. 1025 and Guard empowerment. I was pleased that the Senate included its provisions in our version of the National Defense Authorization Act late last month and that the conferees retained a majority of those provisions in the conference report.

The new consensus on the National Guard comes as the budget debates of this Congress have fractured the Cold War national security consensus of the last half century. While those fractures were an inevitable outcome of the end of the Soviet empire, what will replace the Cold War consensus remains unclear. Some Members of Congress argue for diplomatic and military retrenchment from every corner of the globe back to Fortress America. Others believe that we must expand, not shrink, our international footprint. Yet nearly everyone agrees that budgetary factors must mean a change in the way the Pentagon does business—and that change cannot wait.

The seeds of that change were sown a decade ago. In the days and weeks following 9/11, the former ''strategic reserve'' became, of necessity, fully operational. The National Guard and Reserve components, once a Cold War failsafe, were called into regular rotation in the wars in Iraq and Afghanistan. Our country simply could not field the forces we needed without calling on the Guard and Reserve. Simultaneously, America experienced domestic disasters on an unprecedented scale. In each situation, the President called on the National Guard as the military first responders to help citizens in need. Today, the metamorphosis from a strategic reserve to an operational reserve is complete.

Yet entrenched bureaucratic interests still resist what most Americans now accept as an accomplished fact. The Joint Chiefs fought our efforts to bring the Chief of the Guard Bureau into the ''Tank'' not because they misunderstand the value of the Guard and

Reserve, but precisely because they fear that value proposition may threaten the size and budget of their Active components in the years to come.

Nevertheless the Active component must shrink, both as a consequence of our current budgetary reality and to reflect the constitutional vision the Framers had of a small standing Army augmented by a larger cadre of citizen soldiers. Simultaneously, the Guard and Reserve must grow so that those cuts to the Active force can be quickly and easily reversed if the circumstances demand it. Just a year ago, no one predicted our operations to oust Muammar Qadhafi. In a world where military needs change day by day, we must not hollow out the force. To avoid that outcome in a period of austere budgets, we must depend more and more on the National Guard and Reserve.

To that end, the conferees included section 512 in this Defense bill which adds the Chief of the National Guard Bureau to the Joint Chiefs of Staff. It also reinforces the duties and responsibilities of the Chief as listed in 10 U.S.C. § 10502 in accordance with the listing of responsibilities of the Chief already in that section. This provision is historic and will dramatically improve the advice that the President and Secretary of Defense receive on matters of national security and the defense budget.

Section 511, ''Leadership of the National Guard Bureau,'' reestablishes the Vice Chief of the National Guard Bureau as a lieutenant general and excludes the positions of the Chief and the Vice Chief of the National Guard Bureau from limitations on the number of general and flag officers in the Department of Defense. Reinstating the Deputy position at the National Guard Bureau will give the Chief flexibility at a time when he sorely needs it and providing a third star for the position will give it more institutional clout.

Section 515 implements the outcomes of a negotiation between the Council of Governors and the Department of Defense by authorizing the President to order the Federal Reserve component to Active Duty to provide assistance in response to a major disaster or emergency. In addition to authorizing a Reserve forces callup for domestic disasters and emergencies, it codifies the dual-status title 10 and title 32 commander as the usual and customary command relationship for military operations inside the United States, a key victory for Federal-State integration of military command and control.

Section 518, ''Consideration of Reserve Component Officers for Appointment to Certain Command Positions,'' is a modified version of a provision of S. 1025 which would have reserved the positions of commander, Army North, and commander, Air Force North, for National Guard officers with an emphasis on the consideration of current and former adjutants general. Instead, the section requires that Guard and Reserve officers be considered for these positions whenever they are vacant.

Section 1085, ''Use of State Partnership Program Funds for Certain Purposes,'' includes a limited authorization of the State Partnership Program which is the major vehicle for the National Guard of the States to participate in international security assistance and capacity building missions at the request of the State Department chief of mission and geographic combatant commander.

Last but certainly not least, section 1080A, ''Report on Costs of Units of the Reserve Components and the Active Components of the Armed Forces,'' institutes the ''similar unit'' cost report proposed by S. 1025 with some added detail and while retaining the Comptroller General evaluation of the Department's report. That last requirement is important to keep the Department of Defense honest in its assumptions and analysis leading to conclusions about the relative cost of Active and Reserve units.

The Reserve component cost report will undergird efforts by the Senate National Guard Caucus in the years to come. While it has long been common knowledge that the National Guard and Reserves are cheaper to maintain in dwell than Active-Duty Forces, the report will prove that colloquial wisdom and bolster the arguments of the Congress in a future push to reduce the size of the Active component as we draw down from Iraq and Afghanistan while growing the size of the Reserve components.

I am also pleased that the conferees included my language to narrow the Freedom of Information Act, FOIA, exemption in the bill for Department of Defense critical infrastructure security information. This improvement adds a public interest balancing test requiring that the Secretary of Defense consider whether the public interest in the disclosure of this information outweighs the government's need to withhold the information when evaluating FOIA requests. The addition of this measure to the National Defense Authorization Act will help ensure that FOIA remains a viable tool for access to Department of Defense information that impacts the health and safety of the American public.

As I said at the outset, this National Defense Authorization Act will be remembered both for changing our process of detaining and prosecuting suspected terrorists and for empowering the National Guard. I continue to oppose the changes the act will make to our counterterrorism legal regime. But I nevertheless support how the act will improve the sourcing and fielding of military forces in the years to come. I will look to fix the former and further improve the latter in future legislation.

Mr. COONS. Mr. President, today I rise to express my deep concern that the 2012 National Department of Defense Authorization Act provisions pertaining to detainee treatment fail to strike the appropriate, important balance between national security, due process, and civil liberties. Sections 1021, 1022, and 1023 are the latest in a series of legislative proposals that provide ever-narrowing latitude for dealing with terrorism suspects, whether in the U.S. or abroad.

I am concerned, that these provisions take us one small, but significant, step down the road towards a state in which ordinary citizens live in fear of the military, rather than the free society that has marked this great nation since the Bill of Rights was ratified 220 years ago, in 1791.

The new detention authorities thrust upon our military in this bill are an assault on our civil liberties and do not belong on our books. They were not requested by the Pentagon, in fact they have been resisted by the President, the Secretary of Defense, the Attorney General, and the directors of National Intelligence and the FBI. They do not make us safer and, to the contrary, they will create dangerous confusion within our national security community.

Under these sections, a terrorism suspect must be remanded to U.S. military custody, even when that suspect presents no imminent threat to public safety and is being held under suspicion of committing a U.S. crime. The suspect may be held indefinitely. Indeed, if the suspect is transferred to Guantanamo, it may be a practical reality that the suspect must be held indefinitely, thanks to the onerous certification requirements contained in Section 1023. If not sent to Guantanamo, the suspect may be rendered to a foreign power, where he may be subject to coercive interrogation, torture, or death. Or, the individual may simply remain in custody of our own military, waiting for the cessation of an endless conflict against an idea.

As my colleagues from Vermont and Oregon, from Colorado and California, have already said so eloquently, these provisions reflect an unfortunate and unwise shift away from the current law, in which the criminal justice system is presumed to be sufficient for those who commit crimes on U.S. soil. No system is perfect, but the federal criminal justice system is considered by many around the world to be the gold standard for fairness, transparency and reliability. Since 9/11, the civilian criminal process has been successful in securing convictions and lengthy sentences against hundreds of terrorism suspects.

This is compared to just six convictions in military tribunals, and two of these individuals are walking free today. A third, Ibrahim al Qosi, was convicted of being a Taliban fighter. Under his sentence of 2 years, he would be due to be released next summer. But when he serves his sentence, he likely will not be released. Instead, he will be detained until our undefined hostilities against Islamic extremism and terrorism conclude. In other words, he

will be detained indefinitely. Criminal process like this is little better than no process at all. It ought to be reserved for the rarest cases where the civilian criminal justice system is not suitable. It should not be made the new standard.

If we are going to short-circuit the criminal justice system, we ought to at least have good reason to do so. At a minimum, I would expect the President, the Attorney General, the Secretary of Defense, or the Director of National Intelligence to make the case that military custody is the only way to appropriately handle terrorists. But that is not what happened here. No one is calling for these new powers. They are being thrust upon our military.

President Obama has said that these provisions will hinder his ability to prosecute the campaign against terrorists. The Attorney General and the Director of National Intelligence have said that these provisions threaten to undermine the collection of intelligence from suspected terrorists.

They don't want these authorities.

The military does not want them either. The Secretary of Defense has said that the provisions will unnecessarily complicate its core mission of protecting our nation and projecting military force abroad. These provisions do not make sense as a matter of defense policy, and, because the meaning of some of the key terms is deliberately unclear, we can not even predict the precise impact that they will have.

In the best-case scenario, we will end up in a situation with minor changes to an existing detainee policy that has already proven to inspire and sustain this and the next generation of extremists who wish to destroy this country. In the worst-case scenario, we make several significant changes that hinder our ability to find and destroy this current generation of extremists.

I do not accept the underlying assumption of these unnecessary new provisions that the threat the United States faces is one that can be defended by more guns, taller walls, and deeper holes that we ''disappear'' people into. In fact, defense from the threats of today and tomorrow called ''asymmetric'' because they do not attempt to meet us on the battlefield with equal capabilities requires a new paradigm, the concept of defense in depth. To address asymmetric threats, including networks of extremists determined to carry out acts of terrorism, law enforcement and the Defense Department must work cooperatively to protect U.S. interests using their respective strengths in authorities and levels of response.

Instead of strengthening our ability to confront asymmetric threats, these unwelcome new authorities reinforce the philosophy that the military is the only preeminent institution of national security, with law enforcement relegated to a limited support role. That may have been an appropriate philosophy for the world in 1961, but it did not help us in 2001, and will not help us in 2021. These new authorities do nothing to change that and will not make us any safer. The only effective comprehensive model for national security is one that strengthens both our law enforcement and military to fight threats within their respective areas of expertise.

Another deeply concerning aspect of the detainee provisions in the Defense Authorization bill is what they say about the ability of the military to detain U.S. citizens. Section 1021 expands the 2001 Authorization of the Use of Military Force to include the authority to detain and hold indefinitely any person, even a U.S. citizen, if the military suspects that such a person has supported any force associated with al-Qaeda.

While I believe it acceptable for lethal military actions to be taken against U.S. citizens abroad who have clearly taken up arms against this Nation, I am concerned about the slow but steady creep of the military into areas that traditionally have been reserved for civilian law enforcement. Testifying yesterday before the Judiciary Committee, FBI Director Robert Mueller said he has serious concerns about the potential future ramifications of introducing military forces into the criminal justice process.

At the local level, it is often difficult to distinguish whether an individual in possession of bomb-making components is a hardened terrorist coordinating with al-Qaeda; is a troubled, dangerous, but affiliated teenager; or is completely innocent of any crime at all. In the rush to ''repel borders'' at the early stages of investigations, mistakes will be made. We need to make sure that these mistakes do not overrun the constitutional protections we all enjoy as Americans.

It is true, as supporters of these provisions have argued, that Section 1021 contains a limitation that the authorization of force does not include the right to hold citizens in violations of their constitutional rights. That is some comfort, but not enough. As I sat in the presiding chair during debate over this bill, I heard my colleagues argue that we are in a time of war and that, during times of war, U.S. citizens have no constitutional protections against being treated as a prisoner of war. Even if there was broad agreement about the constitutional protections citizens enjoy against extrajudicial killing or indefinite detention, who will enforce them? Under this bill, that task would seem to be left to the President and to the military. Were my life or liberty at stake, I would want the benefit of an independent judiciary. So, too, I think would the vast majority of my fellow citizens.

Mr. President, we are in conflict against terrorists. I do not doubt or dispute that. But this is not the first time that has been the case. During the beginning part of the last century, anarchists committed a string of bombings, usually targeting police officers or civilians. In 1901, an anarchist assassinated President McKinley. In the First Red Scare during the early part of the century, a plot was uncovered to bomb 36 leaders of government and industry. During the 1960s and 70s, the Weather Underground declared as its mission to overthrow the U.S. government. Members planted bombs in the Capitol, the Department of State and the Pentagon.

Each of these threats, and others, has before placed an existential fear in the minds of Americans. We have not always acted well. The Sedition Act of 1918, the internment of Japanese Americans during the Second World War, and the House Un-American Activities Committee and Hollywood blacklisting following the war are three notable examples of action, taken in the face of severe threat, which now the vast majority of Americans look back upon with deep regret.

As technology has advanced, so has the ability of the government to reach into our lives, whether through unseen drones and hidden electronic surveillance, omnipresent cameras and advanced facial recognition programs, or unfettered access to our telephone and Internet records.

The advance of technology, however, is not justification for the retreat of liberty, especially not when we have at our disposal a criminal justice system that is up to the task of keeping us safe.

I plan to vote for the Conference Report of the National Defense Authorization Act because I agree with much of what is within it. During a time of war, we cannot allow our military to go unauthorized. We cannot allow our troops to go unpaid. The NDAA provides oversight of and spending limitations for the military. It elevates the head of the National Guard to the Joint Chiefs level, which is necessary to ensure that military leadership adequately considers the unique reserve capacity role now filled by the Guard. The bill will also begin to address the inability of Customs and Border Patrol agents to share information necessary to identify military and other counterfeits at our borders.

Though we were not able to remove the dangerous and counterproductive provisions contained in Sections 1021, 1022 and 1023 from the NDAA today, we are not done trying. I will continue to work with my colleagues to ensure that we maintain the balance between security and liberty.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I ask unanimous consent that the time for debate on the conference report to accompany H.R. 1540 be extended until 4 p.m., with all other provisions of the previous order remaining in effect; further, that at 4 p.m., the Senate proceed to a vote on the adoption of the conference report; that upon the disposition of the conference report and H.

Con. Res. 92, the Senate resume executive session and the consideration of the Christen nomination, as provided under the previous order.

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

Mr. DURBIN. Mr. President, with this agreement, there will be two votes at 4 p.m. The first will be on the adoption of the Defense authorization conference report and the second vote on the confirmation of the nomination of Morgan Christen to be U.S. Circuit Judge for the Ninth Circuit.

Mr. President, I rise today to discuss the National Defense Authorization Act conference report now pending before the Senate.

I thank my colleague from Colorado, Senator UDALL, as well as my colleague from California, Senator FEINSTEIN, for engaging in a spirited and important—perhaps historic—debate during the consideration of this authorization bill on the floor of the Senate. I especially thank Senator FEINSTEIN. It was a pleasure to work with her to insert language which I think moved us closer to a position she and I both share concerning the language in this important bill.

I have the highest respect for the chairman and the ranking member of this committee, Senators LEVIN and MCCAIN, who have worked diligently and hard on a bill which has become a hallmark of congressional activity each and every year, particularly in the Senate. It takes a special effort for them to produce an authorization bill of this complexity and challenge. They do it without fail and they do it in a bipartisan fashion.

For those critics of Congress—and there are many—who look at this bill, you can see the best of the Senate in terms of the effort and the professionalism these two gentlemen apply, along with the entire committee, in bringing this bill to the floor.

This bill does a number of good things for our troops and for my home State of Illinois, and I am thankful to the chairman and the ranking member for those provisions. There is important language about public-private partnerships regarding the U.S. Army that will have special value at the Rock Island Arsenal, where some of the most dedicated and competent civilian individuals continue to serve this country's national security, meeting the highest levels of standards and conduct and performance. They will have a chance to continue to do that work, and it is important they continue to have that chance in this weak economy when so many people are struggling to find jobs.

The legislation provides the Chief of the National Guard with an equal seat at the table with the Joint Chiefs of Staff to ensure the needs of our brave Army and Air National Guard personnel are heard at the highest levels. It makes it easier for reserve units to access mental health services by providing that access during drill weekends. It also provides our men and women in uniform with a much deserved pay increase, which is imperative in light of their heroic service and the state of our economy today.

I must say, though, there are provisions within this bill which still concern me relative to the treatment and detention of terrorism suspects.

First, we need to agree on the starting point, and the starting point should be clear on both sides of the aisle. There are those who threaten the United States, those who would use terrorist tactics to kill innocent people, as they did on 9/11. We are fortunate, through the good leadership of President George W. Bush and President Obama, that we have been spared another attack since 9/11, but vigilance is required if we are to continue to keep this country safe. That is a bipartisan mission. It is shared by every Member of Congress, regardless of their political affiliation.

We salute the men and women in uniform, first, for all the work and bravery they have put into that effort, but quickly behind them we will add so many others in our law enforcement community; for example, those individuals at every level—Federal, State and local—who are engaged in keeping America safe. We salute the executive branch in its entirety, including the Department of Homeland Security, the White House, the National Security Advisors, and all of those who have made this a successful effort.

The obvious question we have to ask ourselves is this: If for 10 years we have been safe as a nation, why is this bill changing the way we detain and treat terrorism suspects?

I will tell you there has been an ongoing effort by several members of this committee and Senate to change the basic approach to dealing with terrorism, to create a presumption that terrorist suspects would be treated first subject to military detention and their cases then considered before military tribunals.

This, in and of itself, is not a bad idea. It could be right, under certain circumstances, but it does raise a question: If to this point in time we have been able to keep America safe using the Department of Justice, law enforcement, and the courts of our land, together with military tribunals, why are we changing?

The record is pretty clear. Since 9/11, more than 400 terrorism suspects have been successfully prosecuted in the courts of America. These are individuals who have been subjected to FBI investigation, they have been read their Miranda rights, they have been tried in our courts in the same manner as those accused of crimes are tried every single day, and they have been found guilty—400 of them—during the same interval that 6—6—have been tried by military tribunals.

Overwhelmingly, our criminal court system has been successful in keeping America safe, but that is not good enough for many Members of the Senate. They are still bound and determined to push more of them into the military tribunal system for no good reason. These people who have been tried successfully when accused of terrorism have been safely incarcerated in the Federal penitentiaries across America, including in my home State of Illinois at the Marion Federal Prison. Not one suggestion has been made that the communities surrounding these prisons nor the prisoners themselves are under any threat. What we have instead is this presumption that isn't borne by the facts or by our experience.

I voted for the Senate version of this bill with the hope that the Members of the Senate and House who were negotiating the final bill would remove some of the detainee provisions that concern me. I want to acknowledge that the conference committee did make some positive changes. But I continue to have serious concerns because provisions in the bill would limit the flexibility of any President in combatting terrorism, create uncertainty for law enforcement, intelligence, and defense officials regarding how they handle suspected terrorists, and raise serious constitutional concerns.

I am especially concerned about section 1022 in the conference report. This provision would, for the first time in American history, require our military to take custody of certain terrorism suspects in the United States. Our most senior defense and intelligence officials have raised serious concerns about this provision. FBI Director Robert Mueller strongly objects to the military custody requirement. For those who need reminding, Robert Mueller served as a Federal judge in California and was appointed to this position as head of the FBI by Republican President George W. Bush. He has been retained in that office by Democratic President Barack Obama. I believe he is a consummate professional who has dedicated his life, at least in the last 10 years-plus, to keeping America safe. I trust his judgment. I respect his integrity.

In a letter to the Senate, Director Mueller says the bill will ''inhibit our ability to convince covered arrestees to cooperate immediately, and provide criminal intelligence.''

He was asked after the conference report whether the changes absolved any of his concerns, and he said he was still concerned. I will go to that in a moment. Director Mueller concluded that the provision I am raising ''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.''

Considering the source of this concern, the Director of the Federal Bureau of Investigation who has been responsible ultimately for the successful prosecution of 400 suspected terrorists, we should take his concerns to heart.

The Justice Department, which then prosecutes terrorism suspects, shares

Director Mueller's concerns. Here is what they said:

Rather than provide new tools and flexibility for FBI operators and our intelligence professionals, this legislation creates new procedures and paperwork for FBI agents, intelligence lawyers and counter-terrorism prosecutors who have conducted hundreds of successful terrorism investigations and prevented numerous attacks inside this country over the past decade.

The supporters of this legislation have responded to these concerns by pointing to the fact that the bill allows the Secretary of Defense to waive the military custody requirement. But the Justice Department says the administrative burdens of obtaining a waiver could hinder ongoing counterterrorism operations. Here is how they explained it:

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

The authors of this legislation say they made changes to the military custody requirement to respond to these concerns raised by Director Mueller and the Department of Justice. But in my view, these changes don't go nearly far enough. They continue to create uncertainty and impose administrative burdens on our counterterrorism professionals whom we depend on to keep us safe.

The changes in the legislation do not change the fundamental premise. They create a presumption that a terrorism suspect arrested in the United States should be transferred to military custody, despite the fact—despite the fact—that the Federal Bureau of Investigation has kept America safe since 9/11.

I am not alone in my feelings. This morning, an editorial in the Washington Post said:

[These provisions]—while less extreme—are still unnecessary and unwise. . . . [L]awmakers have . . . introduced confusion in the form of directives that threaten to bollix up law enforcement and military personnel when they most need to be decisive.

Why in the world would we create uncertainty and bureaucracy when, with every second that ticks away, American lives can be in danger?

Just yesterday in the Senate Judiciary Committee, FBI Director Robert Mueller testified he is still deeply concerned about section 1022, despite the changes made in this conference report. Here is what Director Mueller said:

Given the statute the way it is now, it does not give me a clear path to certainty as to what is going to happen when arrests are made in a particular case. The possibility looms that we will lose opportunities to obtain cooperation from the persons in the past that we've been fairly successful in gaining.

That, in and of itself, should give pause to every member of the Senate. When we consider this objection from the Director of the Federal Bureau of Investigation, the lead official charged with combatting terrorism in the United States, shouldn't we take Director Mueller's concerns to heart? Do we want the FBI to have uncertainty the next time they stop and detain a suspected terrorist in the United States?

I want to address another provision, section 1021. I was very concerned that the original version of the legislation would, for the first time in history, authorize indefinite detention in the United States. But we have agreed, on a bipartisan basis, to include language in the bill offered by Senator FEINSTEIN that makes it clear this bill does not change existing detention authority in any way. What it means is, the Supreme Court will make the decision who can and cannot be detained indefinitely without trial, not the Senate.

I believe the Constitution does not authorize indefinite detention in the United States. Some of my colleagues see it differently. They claim the Hamdi decision upheld indefinite detention. It didn't. Hamdi was captured in Afghanistan, not in the United States. Justice O'Connor, the author of the opinion, carefully stated the Hamdi decision was limited to ''individuals who fought against the United States in Afghanistan as part of the Taliban.''

Some of my colleagues also cited the Padilla case, claiming it is a precedent for the indefinite detention of U.S. citizens captured in the United States. But look at what happened in the Padilla case. Padilla is a U.S. citizen who was placed in U.S. custody. The Fourth Circuit Court of Appeals, one of the most conservative in the land, upheld his military detention. But then, before the Supreme Court had the chance to review the Fourth Circuit's decision, George W. Bush's administration transferred him out of military custody, prosecuting him in an article III criminal court. To this day, the Supreme Court has never ruled on the question of whether it is constitutional to indefinitely detain a U.S. citizen captured in the United States. That decision must be decided by the Supreme Court, not by the Senate, thanks to the Feinstein amendment.

I support the inclusion of the Feinstein amendment in this bill. I continue to believe there is no need for this provision overall and that it should have been removed.

I also continue to oppose provisions in the conference report that limit the administration's ability to close the Guantanamo Bay detention facility. Section 1027 of this legislation provides that no detainee held at Guantanamo can be transferred to the United States even for the purpose of holding him incarcerated for the rest of his life in a Federal supermaximum security facility.

There is absolutely no reason for this prohibition. Section 1026 of this legislation provides clearly that the government may not construct or modify any facility in the United States for the purpose of holding a Guantanamo Bay detainee.

Let me bring this closer to home. We have offered for sale in the State of Illinois a prison built by our State that has not been used or opened in its entirety. The Federal Bureau of Prisons has stated they are interested in purchasing it because of the overcrowded conditions in many Federal prisons. We would, of course, like to see that done—not just for the revenue that would come to the State of Illinois but because it would create jobs in my State.

In the course of deliberating it, controversy arose as to whether Guantanamo detainees would be placed in this prison. Initially, the administration said they would, and I supported them. But ultimately it became clear that there was opposition to going forward with this purchase of the Illinois prison if there was any likelihood Guantanamo detainees would be incarcerated at this prison. We have now made it clear—and I wish to make it clear for the record—that despite my personal views on this issue, I believe the law is clear that the Thomson Prison, once under Federal jurisdiction, will not house Guantanamo detainees. That has been a stated policy. It is now going to be a matter of law in this Defense authorization. Regardless of my personal feelings on the subject, it is the governing law, and I will not try to change the situation of Thomson in any way as long as I serve in the Senate when it comes to this important issue.

Unfortunately, some of my colleagues—whom I disagree with—are determined to keep Guantanamo open at all costs. I disagree. When we consider the expense of detention at Guantanamo and the reputation of that facility, I believe the President was right, initially, when he talked about the fact that we needed to, at some point, bring detention at Guantanamo to a close. My feelings are not only shared by the President but also by GEN Colin Powell; former Republican Secretaries of State James Baker, Henry Kissinger, and Condoleezza Rice; former Defense Secretary Robert Gates; ADM Mike Mullen; and, GEN David Petraeus.

There is great irony here. For 8 long years during the previous Republican administration, Republicans on the floor argued time and again that it was inappropriate—some said even unconstitutional—for Congress to ask basic questions about the Bush administration's policies on issues such as Iraq, torture, waterboarding, and warrantless wiretapping. Time and again, we were told Congress should defer to President Bush, our Commander in Chief. Let me give one example.

My friend Senator LINDSEY GRAHAM of South Carolina, on September 19, 2007, said:

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

With a Democratic President, obviously some of my colleagues have had a change of heart. They think it is not only appropriate but urgent for Congress to limit this President's authority to combat terrorism, despite the success we have had since 9/11 under President Bush and President Obama keeping America safe. This is a clear political double standard. It is unnecessary. Look at the track record.

Since 9/11, our counterterrorism professionals have prevented another attack on the United States, and more than 400 terrorists have successfully been prosecuted and convicted in Federal courts. Here are just a few of them: Umar Faruk Abdulmutallab, the Underwear Bomber; Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing; Omar Abdel-Rahman, the so-called Blind Sheik; the 20th 9/11 hijacker, Zacarias Moussaoui; and Richard Reid, the Shoe Bomber—all prosecuted in the criminal courts of this land successfully and safely incarcerated in our Federal prisons. Something which many on the other side refuse to acknowledge, and argue is impossible, has, in fact, happened over and over again over 400 times.

Why do we want to change this system when it is working so well to keep America safe?

The fact that these detainee provisions have caused so many disagreements and such heated debate demonstrates the danger of enacting them into law. We shouldn't impose this kind of uncertainty on law enforcement, defense, and intelligence who are working to protect America. We should not limit the flexibility of the administration to respond to suspected terrorists in the most effective way, and we should not raise serious constitutional questions by requiring the military to detain people in the United States.

I have a letter from the Agents Association of the Federal Bureau of Investigation, dated December 7, 2011, raising many of the same issues which I have raised. I will say we contacted the Agents Association after the conference and asked them their reaction, and they said they still stood behind their statements of December 7, 2011. I ask unanimous consent to have printed in the RECORD this letter.

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

FEDERAL BUREAU OF INVESTIGATION AGENTS ASSOCIATION,
Arlington, VA, December 7, 2011.

Hon. CARL LEVIN,
Chairman, Senate Armed Services Committee, Washington, DC.
Hon. JOHN MCCAIN,
Ranking Member, Senate Armed Services Committee, Washington, DC.
Hon. HOWARD P. MCKEON,
Chairman, House Armed Services Committee, Washington, DC.
Hon. ADAM SMITH,
Ranking Member, House Armed Services Committee, Washington, DC.

DEAR CHAIRMEN AND RANKING MEMBERS: On behalf of the more than 12,000 active duty and retired FBI Agents who are members of the FBI Agents Association (''FBIAA''), I write today to express our concerns about Section 1032 of S. 1867, the National Defense Authorization Act for Fiscal Year 2012. Section 1032 requires that persons detained in connection with incidents of terrorism be held in military custody and leaves critical operational details unresolved. Like many in the federal law enforcement and intelligence communities, the FBIAA is concerned that this language undermines the ability of our counterterrorism experts to conduct effective investigations, Accordingly, we urge the conferees working to reconcile H.R. 1540 and S. 1867 through the conference process to reject Section 1032.

Section 1032 establishes a presumption for military custody for individuals detained in connection with acts of terrorism against the United States. While Section 1032 includes some exceptions and waivers to the military custody requirement, they are limited in scope and could create additional layers of bureaucracy at critical points in our investigations. Injecting this level of uncertainty and delay into terrorism investigations could undermine law enforcement effectiveness. To truly fight terrorism, all of the nation's law enforcement assets should be deployed and enabled to act nimbly. This can only be accomplished if our laws preserve flexibility and prevent unnecessary bureaucracy from hampering law enforcement activities.

As part of the nation's counterterrorism strategy, FBI Agents work in the United States and abroad as an integral part of the intelligence-gathering and interrogation process. These interrogations are often instrumental in obtaining information that is essential to efforts to thwart subsequent acts of terror. The interrogation of detained persons, however, must be adapted to each specific individual and circumstance in order to be effective. Obtaining cooperation or information requires a mix of patience, leverage, and relationship-building that is inconsistent with the language in Section 1032, which under a presumption of military custody would require a waiver early in the process. FBI Agents already work closely with the military and prosecutors to conduct effective investigations, and interjecting a requirement to obtain waivers from the Secretary of Defense, while well-intentioned, risks delays and miscommunications that would not serve the goal of conducting effective investigations,

The FBIAA shares the goal of enacting and adopting policies that protect Americans from terrorism, and we appreciate the difficult task before the conferees working to reconcile H.R. 1540 and S. 1867. To this end, we urge the rejection of any language that risks unnecessarily limiting the flexibility that is essential to adapting our investigations to the circumstances of each investigation. In the interest of national security, please reject Section 1032 in the final National Defense Authorization Act for Fiscal Year 2012. If you have any questions or would like to discuss the FBIAA's views on this issue, please do not hesitate to contact me.

Sincerely,

KONRAD MOTYKA,
President.

Mr. DURBIN. Mr. President, I have a press report that was released today relative to the testimony of Director Robert Mueller of the FBI, which I referenced in my speech. So that his statement will be reported more fully at this point, I ask unanimous consent to have printed in the RECORD the press report from Politico.

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

[From www.politico.com, Dec. 14, 2011]

ON NATIONAL DEFENSE AUTHORIZATION ACT, ROBERT MUELLER NOT SATISFIED

(By Josh Gerstein)

FBI Director Robert Mueller said Wednesday said he remains concerned that a defense bill containing provisions about military custody for terrorism suspects could interfere with the FBI's ability to investigate terrorist incidents and interrogate those believed responsible.

On Monday, a House-Senate conference committee announced a revised version of the National Defense Authorization Act that lawmakers said addressed many of the concerns that led White House officials to threaten a veto. However, at a Senate Judiciary Committee hearing Wednesday morning, Mueller said he remains worried about aspects of the bill.

''The drafters of the statute went some distance to resolving the issue related to our authority but the language did not really fully address my concerns. . . .'' Mueller said during questioning by Sen. Dianne Feinstein (D-Calif.), who opposes the detainee-related language in the bill. ''I was satisfied with part of it with regard to the authority, I still have concerns and uncertainties that are raised by the statute.''

Mueller said he fears that the legislation would muddle the roles of the FBI and the military.

The bill ''talks about not interrupting interrogations, which is good but gaining cooperation is something different than continuing an interrogation,'' Mueller said. ''My concern is that . . . you don't want to have FBI and military showing up at the scene at the same time on a covered person (under the law], or with a covered person there may be some uncovered persons there, with some uncertainty as to who has the role and who's going to do what.''

Mueller said later that he worries confusion caused by the legislation could affect the FBI's ability to build rapport with suspects.

''Given the statute the way it is now, it does not give me a clear path to certainty as to what is going to happen when arrests are made in a particular case. And the facts are gray as they often are at that point,'' the FBI director said under questioning by Sen. Chris Coons (D–Del.) ''The possibility looms that we will lose opportunities to obtain cooperation from the persons in the past that we've been fairly successful in gaining.''

Backers of the defense bill say it will improve intelligence collection by making military custody the default for certain terrorism suspects. President Barack Obama has established civilian custody and courts as the default for terrorism cases, with the option to direct them to military commissions when the Justice and Defense departments deem it appropriate.

Since the conference bill was unveiled Monday, the White House has been mute about whether the changes to the bill are enough to win Obama's signature or whether he plans to carry through with the veto threat.

Mr. DURBIN. I yield the floor.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. President, I thank the Senator from Illinois for his very eloquent remarks; also, the Senator from Colorado, Mr. UDALL, whom I had the pleasure of hearing from my office. I think they have encapsulated the situation we find ourselves in very well.

Mr. President, I wish to follow up on the detention authorities in the Defense Authorization bill and announce that today I am introducing legislation to clearly state that citizens apprehended in the United States shall not be indefinitely detained by the military.

This new legislation is called the Due Process Guarantee Act of 2011. I am joined by Senator LEAHY, the chairman of the Judiciary Committee, to which this bill will go, Senator LEE, a member of that committee, Senator KIRK, Senator MARK UDALL, Senator PAUL, Senator COONS, and Senator GILLIBRAND. I thank them for being original cosponsors of this bipartisan legislation.

In sum, the Due Process Guarantee Act we are introducing will add to another major law called the Non-Detention Act of 1971, which clearly stated:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.

The new legislation we intend to introduce will amend this Non-Detention Act to provide clearly that no military authorization authorizes the indefinite detention without charge or trial of U.S. citizens who are apprehended domestically. It also codifies a ''clear statement rule'' that requires Congress to expressly authorize detention authority when it comes to U.S. citizens and lawful permanent residents for all military authorizations and similar authorities.

We cannot limit the actions of future Congresses, but we can provide that if they intend to limit the fundamental rights of U.S. citizens, they must say so clearly and explicitly.

I am very pleased to add that Senator DURBIN will also cosponsor this legislation.

Lawful permanent residents are included in this bill we will introduce because they have the same due process protections as citizens under the Constitution. In this bill, the protections for citizens and lawful permanent residents is limited to those ''apprehended in the United States,'' excluding citizens who take up arms against the United States on a foreign battlefield.

I strongly believe constitutional due process requires that U.S. citizens apprehended in the United States should never be held in indefinite detention. That is what this legislation would accomplish, so I look forward to working with my colleagues, especially Chairman LEAHY on the Judiciary Committee, to move this bill forward.

I note the Senator from Illinois, Senator KIRK, is on the floor of the Senate to speak about this bill as well.

Our current approach to handling these suspects in Federal criminal courts has produced a strong record of success since the 9/11 attacks. We would be wise to follow the saying, ''If it ain't broke, don't fix it.''

Our system is not broken. We thwarted attempted terrorist acts. We have captured terrorists, interrogated them, retrieved actionable intelligence from them, prosecuted them, and locked them up for lengthy sentences—in most cases for the rest of their lives.

Both Senator UDALL and Senator DURBIN pointed out Director Mueller's testimony before the Judiciary Committee yesterday. This is relevant because it had been said that the Director of the FBI was satisfied with the language of the conference report of the Defense authorization bill. When Director Mueller was asked the question yesterday, Are you satisfied with the language, in so many words, he said, not quite. To quote him, Director Mueller said:

Given the statute the way it is now, it doesn't give me a clear path to certainty as to what is going to happen when arrests are made in a particular case.

He warned:

The possibility looms that we will lose opportunities to obtain cooperation from the persons in the past that we've been fairly successful in gaining.

I am concerned about how these provisions will be implemented once they are enacted into law, so I will be watching carefully to ensure that they do not jeopardize our national security.

Finally, I want to explain, as the sponsor of the Feinstein compromise amendment, No. 1456, that the Defense authorization bill should not be read to authorize indefinite detention of U.S. citizens captured inside the United States or abroad, lawful resident aliens of the United States captured inside our country or abroad, or any other persons who are captured or arrested in the United States.

On page 655 of the conference report, the compromise amendment, No. 1456, that passed the Senate by a vote of 99 to 1, reads this way, and this is in the conference report of the Defense authorization bill:

Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, or lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

What does this mean? This means we have agreed to preserve current law for the three groups specified, as interpreted by our Federal courts, and to leave to the courts the difficult questions of who may be detained by the military, for how long, and under what circumstances.

And the Due Process Guarantee Act will clarify that citizens and lawful permanents cannot be detained without charge or trial if they are apprehended domestically.

I interpret current law to permit the detention of U.S. citizens as ''enemy combatants,'' consistent with the laws of war, only in the very narrow circumstance of a citizen who has taken an active part in hostilities against the United States and is captured outside the United States in an area of ''active combat operations,'' such as the battlefields of Afghanistan. This was the Supreme Court's narrow holding in Hamdi v. Rumsfeld in 2004.

I am sorry to say that Hamdi has been mischaracterized in this body. Whether Congress should grant the President more expansive powers of detention or act to curtail the powers identified by the Supreme Court in Hamdi is a question that Congress will continue to debate in the future. And we introduced the Due Process Guarantee Act to help clarify current law: that citizens and lawful permanents cannot be detained without charge or trial if they are apprehended domestically.

I would like to point out the errors in the legal analysis by those who would interpret current law, or this Defense Authorization Act, to authorize the indefinite detention of U.S. citizens without charge or trial, irrespective of where they are captured or under what circumstances.

Let's turn to the Supreme Court's 2004 opinion in Hamdi v. Rumsfeld, which has been incorrectly cited by others for the proposition that the 2001 AUMF permits indefinite detention of American citizens regardless of where they are captured.

Hamdi involved a U.S. citizen, Yaser Esam Hamdi, who took up arms on behalf of the Taliban and was captured on the battlefield in Afghanistan and turned over to U.S. forces. The Supreme Court's opinion in that case was a muddled decision by a four-vote plurality that recognized the power of the government to detain U.S. citizens captured in such circumstances as ''enemy combatants'' for some period, but otherwise repudiated the government's broad assertions of executive authority to detain citizens without charge or trial.

In particular, the Court limited its holding to citizens captured in an area of ''active combat operations'' and concluded that even in those circumstances, the U.S. Constitution and the due process clause guarantees U.S. citizens certain rights, including the ability to challenge their enemy combatant status before an impartial judge. The plurality's opinion stated:

It [the Government] has made clear, however, for the purposes of this case, the ''enemy combatant'' that it [the Government] is seeking to detain is an individual who, it alleges, was ''part of or supporting forces hostile to the United States or coalition partners'' in Afghanistan, and who ''engaged in an armed conflict against the

United States'' there. Brief for Respondents 3.

That was all a quote from the plurality opinion, and it continues:

We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The opinion goes on to say at page 517:

We conclude that the AUMF is explicit congressional authorization for the detention of individuals—

And here it is—

in the narrow category we describe. . . . And the narrow category they describe is one who is part of forces hostile to the U.S. on the battlefield of Afghanistan. Indeed, the plurality later emphasized that it was discussing a citizen captured on the battlefield. In responding to Justice Scalia's dissenting opinion, the plurality opinion says:

Justice Scalia largely ignores the context of this case: a United States citizen captured in a foreign combat zone.

The plurality italicized and emphasized the word ''foreign'' in that sentence.

Thus, to the extent the Hamdi case permits the government to detain a U.S. citizen until the end of hostilities, it does so only under a very limited set of circumstances; namely, citizens taking an active part in hostilities who are captured in Afghanistan and who are afforded certain due process protections, at a minimum.

It is also worth noting that amid lingering legal uncertainty regarding whether the government had the authority to detain Hamdi, the Government—this was the Bush administration—saw this and released Hamdi to Saudi Arabia on the condition that he relinquish his U.S. citizenship.

As a result, I don't regard the Supreme Court's decision in Hamdi as providing any compelling support for broad assertions of legal authority to detain U.S. citizens without trial. Certainly, the case provides no support for the indefinite detention of citizens captured inside the United States.

Let me go back to something. In 1971, the Congress passed, and Richard Nixon signed into law, a Non-Detention Act to preclude this very possibility. That act was intended in large measure to put the wrongs of Japanese internment during World War right. It provides simply:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.

I very much agree with the Second Circuit Court of Appeals, which held in the case of Padilla v. Rumsfeld that:

[W]e conclude that clear congressional authorization is required for detentions of American citizens on American soil because . . . the Non-Detention Act . . . prohibits such detentions absent specific congressional authorization.

The Second Circuit went on to say that the 2001 AUMF ''is not such an authorization and no exception to [the Non-Detention Act] otherwise exists.''

The Fourth Circuit came to a different conclusion when it took up Padilla's case, but its analysis turned entirely on disputed claims that ''Padilla associated with forces hostile to the U.S. Government in Afghanistan'' and, ''like Hamdi,'' and this is a quote, ''Padilla took up arms against United States forces in that country in the same way and to the same extent as did Hamdi.''

To help resolve this apparent dispute between the circuits, I believe we need to pass the Due Process Guarantee Act that my cosponsors and I are introducing today.

I would like to add Senator BILL NELSON of Florida as a cosponsor.

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

Mrs. FEINSTEIN. This is important. We spent about half a day on this floor discussing this with Senator LEVIN, with Senator MCCAIN, in the cloakroom with Senators LEE and PAUL, as well as with a whole host of staff both from the Armed Services Committee as well as the Intelligence and Judiciary Committees. Here is the conclusion: I, and many of my colleagues and legal scholars, believe neither the AUMF nor the provisions of the National Defense Authorization Act that we are considering today constitute such an express authorization to detain American citizens.

As I previously mentioned, I sponsored compromise amendment No. 1456 to the Defense bill when it passed the Senate and that amendment has now become section 1021(e) of the conference report specifically to prevent misrepresentations from providing Congressional intent to support the detention of Americans.

Ex parte Quirin is a 1942 Supreme Court case that upheld the jurisdiction of a U.S. military tribunal that tried several German saboteurs captured inside the United States during World War II and brought to stand trial before the hastily convened military tribunal.

One of the saboteurs, Herbert Hans Haupt, was a U.S. citizen. However, the question at issue in Quirin was not whether a U.S. citizen captured inside the United States could be held indefinitely under the laws of war without trial, but rather, whether such an individual could be held in detention for a matter of weeks pending trial by military commission.

Haupt was, in fact, tried, convicted and sentenced to death within weeks after his capture. Moreover, the Quirin opinion predates the Geneva Conventions, a milestone of rather substantial significance in the development of the law of war, and the decision also predates the Non-Detention Act of 1971.

As Justice Scalia said in his dissent in Hamdi: ''[Quirin] was not [the Supreme] Court's finest hour.''

The only recent case of a U.S. citizen captured inside the United States and held as an enemy combatant under the law of war is that of Jose Padilla.

However, amid considerable legal controversy regarding the legality of his detention, Padilla was ultimately transferred out of military custody and tried and convicted in a civilian court.

Padilla, a U.S. citizen, was arrested in Chicago on May 8, 2002 on suspicion of plotting a dirty bomb attack in the United States. He was initially detained pursuant to a material witness warrant based on the 9/11 terrorist attacks.

On June 9, 2002, two days before a Federal judge was to rule on the validity of continuing to hold Padilla under the material witness warrant, President Bush designated him an ''enemy combatant'' and transferred him to a military prison in South Carolina for detention pursuant to the law of war without charge or trial.

Padilla subsequently filed a petition for a writ of habeas corpus in Federal court challenging the legality of his continued detention and an extended series of appeals ensued.

Facing an impending Supreme Court challenge and mounting public criticism for holding a U.S. citizen arrested inside the U.S. as an enemy combatant, President Bush ordered Padilla transferred to civilian custody to face criminal conspiracy and material support for terrorism charges in Federal court. The criminal charges against Padilla were not, however, related to Padilla's alleged involvement in a dirty bomb plot, which had been the basis for his prior detention as an enemy combatant.

Padilla was subsequently convicted and sentenced to 17 years in prison. That 17-year sentence has since been vacated and is under reconsideration. Thus, the Padilla case is at best inconclusive as to the President's authority to detain a citizen captured inside the United States as an ''enemy combatant.'' More likely, it evidences the folly of such overreaching assertions of Executive power.

Despite my longstanding opposition to the detention provisions in this bill, I will be voting yes on this important legislation. The main reason I support the defense authorization bill is because it ensures our troops deployed around the world—especially those in Afghanistan—have the equipment, resources, and training they need to defend this Nation.

I wish to sum up by quoting Justice Sandra Day O'Connor, writing for the plurality in Hamdi. Here is what she wrote:

As critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

This is what Senator KIRK, Senator LEE, Senator PAUL, and those of us on the Democratic side who have worked on this truly believe. What about the person captured on the corner who looks a certain way, who gets picked up and put into detention? Does that

person have the right to a charge and to a trial? Our system of due process and the Constitution of the United States say, simply, yes.

I look forward to working with my colleagues to pass the due process guarantee bill.

I wish to defer to the distinguished Senator from Illinois, Senator KIRK.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. KIRK. Madam President, I wish to rise in support of the Feinstein-Leahy-Lee legislation. We are taking up the Defense authorization bill with the controversial provisions in it, somewhat protected already by the Feinstein language. But this legislation locks in a fundamental truth that I think is important for our country, and that is as a U.S. citizen inside the territory of the United States, you have inalienable rights under our Declaration of Independence. We are protected pursuant to the U.S. Constitution.

Our Constitution says all crimes, and prosecution thereof, shall be pursuant to a grand jury indictment. There is no exception in the Constitution for that. The Constitution grants a U.S. citizen a trial in the State in which the crime was committed, I think clearly envisioning a civilian trial. We, as Americans, have a right to a speedy trial, not indefinite detention.

We as Americans have a right to a jury of our peers, which I would argue is not enlisted or military personnel sitting in a jury. You cannot search our persons or our places of business or homes without probable cause under the Bill of Rights. You cannot be deprived of your freedom or your property without due process of law, and that, I would say, is not indefinite detention. All due process guarantees under law are granted to you by the 14th amendment. I would actually argue that no statute and no Senate and no House can take these rights away from you.

It is very important to pass this legislation to prevent needless litigation against constitutional rights, which I regard already as your birthright as an American citizen. It is very important to talk about what the Feinstein legislation does and does not do. I think it is very narrowly crafted to defend the rights of American citizens and resident aliens inside the United States. We agree that aliens who are engaged or captured on foreign battlefields can be subjected to rough justice, battlefield outcomes, or detention and prosecution by the U.S. military.

We even agree that a U.S. citizen such as Anwar al-Awlaki, who took up arms against the United States from his terrorist base, Yemen, is then the proper subject of U.S. military action, and he received that proper attention. Illegal aliens, even inside the United States—we are not engaging on that subject. If they are part of jihad or other warfare against the United States, they can be subjected to military jurisdiction. But with regard to U.S. citizens and resident aliens on U.S. soil, I would argue that the entire point of the Department of Defense is to defend our constitutional rights and to make sure they are honored. If you read the Constitution—and I would urge all Members in this battle to reread it; it is only 5,000 words long—you will see that the rights provided are without qualification and are part of your birthright.

What is the first thing a U.S. Senator, a Member of Congress, or the President does? They swear an oath to the Constitution of the United States. What is the first act any American or resident alien joining the U.S. military does? They don't swear allegiance to a President or a leader or a territory; they swear allegiance to the U.S. Constitution, and that is the mission which they are undertaking to protect.

We see a number of cases cited—as I noted, Ex parte Quirin, the German spy, or U.S. nationals who landed in Long Island and were summarily executed under U.S. military justice. I would say at least they were part of a foreign military and trained in that mission and trying to carry out that mission when that rough justice was put in place.

With regard to Jose Padilla, he was a U.S. citizen—sometimes when I was at the State Department, people would ask me who our Ambassador to Puerto Rico was. Puerto Rico is part of the United States. He was a full member of the country, with U.S. citizenship. He was arrested at O'Hare Airport, but pursuant to executive action was immediately taken into military custody and held in a brig. I regard all of his constitutional rights were then violated. In the subsequent litigation, I think eventually the Bush administration realized they were about to lose this case, which is why they kicked him back into civilian court.

In the Hamdi case, which is so often cited, even there we at least had a foreign connection, foreign training as part of another battlefield. What we are talking about here is very narrow, to make sure at the very least that you, as a U.S. citizen in U.S. territory, are not going to be subjected to indefinite military detention and military justice, that all of your constitutional rights are adhered to.

I would simply ask this—also as a reserve naval officer—what U.S. military officer wants the duty to roll in, for example, to Peoria, IL, and arrest an American citizen for actions that citizen has only done in the United States, not connected to a foreign military or training, and then to put that person through military detention and justice? I would say for the long-term interest of the U.S. military and to protect the U.S. military, we do not want to give that mission to our Armed Forces. A point of common sense should prevail here as well.

We spend billions of dollars on the Department of Homeland Security, which is fully under the fourth and sixth amendments of our constitutional protection. We have an extraordinarily able FBI, ATF, DEA, et cetera, the whole panoply of Federal law enforcement, which, quite properly, is not under the administration of the Pentagon but is instead under the administration of the Department of Justice. We have a vast array of State and local law enforcement all dedicated to protecting the United States but, most importantly, to uphold the very oaths they also take in their first minute as law enforcement officers to protect the U.S. Constitution.

So on this day that we pass the NDAA, which has a murky provision regarding this—somewhat protected by the Feinstein legislation—it is very important for us then to rally behind the further legislative protections here. I think this is strong, bipartisan legislation. I commend Senator FEINSTEIN, Chairman LEAHY, and Senator LEE for bringing it forward. No. 1, this will help protect the U.S. military from missions that it should not undertake. No. 2, we will make sure there is clear delineation between the Department of Justice, Homeland Security, and its whole panoply of agencies, and our military, which protects our rights from threat overseas. But, most importantly, No. 3, to defend the U.S. Constitution, your birthright as an American citizen to have these rights to make sure we do not subject any U.S. citizen apprehended inside the United States to indefinite detention under U.S. military authority, knowing they have inalienable birthrights that were granted to them by the U.S. Constitution.

With that, I commend the Chair.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER. The Senator from Illinois.

Mr. KIRK. Madam President, we have two other provisions that are in the National Defense Authorization Act that I want to briefly mention.

First, we have a modified Brooks amendment in the conference report that says if there is any plan to deliver classified missile defense data to the Russians, the administration has to have a 60-day clock expire and then certify to the Congress that none of this data could end up in the hands of third parties, particularly the Iranians or Syrians. I wish to put the administration on notice that that certification probably cannot be made. Dmitry Rogozin, the lead negotiator on the missile defense for their government, has a close and continuing relationship with Iran. He is going to Iran next month. When we see the intelligence sharing and cooperation on

missiles and on other weaponry, but especially discussions about a second nuclear reactor in Iran, I think we should all realize that any classified data on U.S. missile defense going to the Russians would be given to the Iranians.

Remember, in missile combat between enemies of the United States and ourselves, everything would be over potentially in a matter of hours. If the Russians accomplish by diplomacy what they have failed to do by espionage, which is getting critical details of U.S. missile defense, and especially missile defenses of Poland and other key allies, we give only a few minutes to a few hours to the U.S. commander to be able to diagnose the problem, understand how he has been penetrated or fooled, and to correct that. I think that weakens the defenses of the United States significantly.

I had a hold on the nominee for the U.S. Ambassador to Moscow, Michael McFaul. Because of the passage of the modified Brooks amendment and a written letter of assurances given to me by the administration, I have now lifted that hold. I will be supporting his nomination also because he will be good in working with the opposition and human rights communities in Russia.

But I think everyone is now on notice that we should not move forward with any plan to provide classified missile defense data to Russia because it will be shared with the Islamic Republic of Iran, and that is one of the principal threats for which the U.S. and NATO missile defenses are arrayed against.

A second provision which is in the National Defense Authorization Act concerns Iran itself. Senator MENENDEZ and I teamed up on an amendment that also says: If you do business with the Central Bank of Iran, you may not do business with the United States. But we provided critical flexibility to the administration. The amendment is not imposed for weeks, if not months, and two critical waivers are put in the amendment which say, No. 1, if we find a critical shortage in oil markets because of Iran's leading role, sanctions could be delayed if not suspended. Also, there is a general national security waiver put in if something unexpected happens. But, in general, the rule goes forward that we are moving forward on a comprehensive plan to collapse the Central Bank of Iran.

Despite Secretary Geithner opposing the Menendez-Kirk amendment, this body voted 100 to 0 to support that amendment because we know of the International Atomic Energy Agency's report that they may be getting close to having enough fissile material for a nuclear weapon. We know of Iran's support for Hezbollah and Hamas. We know of their oppression of minorities, especially 330,000 Baha'is, who have been prohibited from contracting with the Iranian Government. Kids are not allowed to be in university. We even know of one poor Iranian actress who was sentenced to 90 lashes, later suspended, for simply appearing in an Australian film without a head dress.

The time for action on Iran is now. With the passage of the National Defense Authorization Act and the signature that we now expect from the President, a set of clocks begins, 60- and 180-day clocks. I will be teaming with Senator MENENDEZ and others—in fact, with the entire U.S. Senate that supported this—to make sure we have the toughest action possible to collapse the Central Bank of Iran, which the Treasury Department noted is the central money launderer for that government to support terror and nuclear proliferation.

With that, I yield the floor. Actually, I yield to my colleague from New Hampshire.

The PRESIDING OFFICER. The Senator from New Hampshire.

Ms. AYOTTE. Madam President, I rise today in support of the National Defense Authorization Act. In particular, I wish to speak briefly about the detainee provisions contained in the conference report.

I have spoken many times over the last few months about this issue, but due to the importance of these issues—and I think because of some of the unfortunate mischaracterizations we have heard about the bipartisan compromise that passed this body already overwhelmingly and came out of the Armed Services Committee overwhelmingly—I wanted to come to the floor to make some closing points on this.

I would like to start with this proposition: No member of al-Qaida, no terrorist, should ever hear the words ''you have the right to remain silent.'' That fundamental principle is at the heart of the issue we confronted in the Armed Services Committee in addressing the detainee provisions that are contained within the Defense authorization report. The central issue is, how do we best gather intelligence to protect our country from future attacks?

It is common sense that if we tell a terrorist they have the right to remain silent, they may exercise that right. What if they do so and they have additional information about future attacks on our country or, as in the case of the so-called Underwear Bomber—which, unfortunately, in my view, has been cited by some of my colleagues as a success—if that event had been part of a series of events such as the events that occurred on 9/11 where we were attacked on our own soil, what would we have lost? After 50 minutes, the so-called Christmas Bomber was told he had the right to remain silent and he exercised that right and we did not get to question him again until 5 weeks later, after law enforcement officials tracked down his parents in another country and convinced him to cooperate. That is not a good policy to gather intelligence to protect our country, and that is at the heart of what we are trying to address on a bipartisan basis in the Defense authorization bill.

We have to ask ourselves: The events of 9/11, were they acts of war or were they a crime against our country? I firmly believe we are at war with members of al-Qaida; that what happened on September 11 was an attack against the United States of America. Innocent Americans were killed not because of what they did but because of what we believe in and what we stand for as a country.

So when I hear some of my colleagues suggest there are problems with the detainee compromise that was achieved on a bipartisan basis in this body—because we have basically said, if a foreign member of al-Qaida comes to the United States of America, seeks to commit another 9/11 against us, seeks to attack our country or its citizens, that the presumption will be military custody. That those provisions are misguided in some way deeply troubles me. If this wasn't an act of war, then I don't know what is. We need to make sure we treat enemies of our country for who they are and make sure they are not read their Miranda rights.

So in this bipartisan compromise we said there is a category of individuals—members of al-Qaida or associated groups—who want to come to America to attack us or our allies and for whom, yes, there is a presumption of military custody. That way they don't have to be read their Miranda rights or be provided the rights of our civilian system.

We also address the administration's concerns by giving them a national security waiver, by allowing our law enforcement officials the flexibility to come up with the procedures on how to implement the provisions of this bill.

I wish to address what I heard from FBI Director Mueller yesterday, just to be clear on the record, because yesterday FBI Director Mueller raised concerns about these detention provisions saying there is a possibility that looms that we will lose opportunities to obtain cooperation from individuals we have been able to obtain cooperation from in the past.

Well, I am concerned because when FBI Director Mueller came to a group of us, including the chairman of the Armed Services Committee and Ranking Member MCCAIN, he raised operational concerns about this provision, and we said we want to address those concerns. So in the final conference report there is language that was given to us by the FBI to address their operational concerns. It was included in this bill without a comma changed.

So it makes me concerned when we put their language in to address their concerns, saying nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with respect to a covered person regardless of whether such covered person is held in military custody.

So I say to Director Mueller: We put your language in directly, and it makes

me concerned when I hear, in my view, what are political viewpoints rather than what is the reality of what is in this bill, which will allow the FBI to continue its work and will allow for us to hold in military custody those who are seeking to attack our country and will ensure that Miranda rights do not have to be given if that is the best investigative way to go forward to protect our country.

I see my colleague, the Senator from South Carolina, on the floor. I wish to ask him a question about the bill and the detainee provisions, particularly about the authorization for the use of military force. I have heard some people on the floor of the Senate—including the Senator from Colorado, the Senator from Illinois, and the Senator from California—express concerns about the fact that this bill reaffirms the authority of the President of the United States to detain an American citizen who has joined with al-Qaida and who has, as a member of al-Qaida or an associated force, joined arms against our country and sought to kill Americans.

I wish to ask the Senator from South Carolina about this provision and why it is important for our country.

Mr. GRAHAM. I thank the Senator from New Hampshire who has been a great leader on this issue.

Let me just tell my colleagues what drives my thinking. I think we are at war—I don't think it, I believe it. I hope my colleagues believe it too, and I know America is part of the battlefield because the enemy would like to destroy our country.

If we capture an al-Qaida operative overseas, does anybody in this body suggest that we should give them a lawyer or read them their rights? In World War II, if we had captured a Nazi soldier overseas and started saying they had the right to remain silent and we would give them a lawyer, even though Miranda didn't exist at the time, people would have run us out of town.

So if we believe we can kill an American citizen who has joined al-Qaida—the Awlaki case, where the President of the United States made an executive decision under the rule of the law, not through a court decision, to target an American citizen who had aligned themselves with the enemy—then if we can kill them, which is pretty indefinite, why can't we capture and hold them?

Now, that would be the dumbest thing in the history of the world for a nation to say: We all acknowledge the executive branch's power to target an American citizen who has aligned themselves with the enemy. We can kill them overseas, we can capture them overseas, we can interrogate them about what they know about future attacks, but when they get here we have to treat them as a common criminal.

I think what we share, I say to the Senator from New Hampshire, is that we think al-Qaida operatives, citizens or not, are not common criminals. We think they are crazy people, warriors, bent on our destruction, who would blow themselves up just as quickly as they would blow you up, and they don't care if they blow themselves up. The only reason the Christmas Day Bomber didn't kill a bunch of people is because his shoe didn't go off. The only reason the Times Square Bomber didn't kill a bunch of people is because the bomb didn't go off.

If you are an American citizen and you want to help al-Qaida kill Americans and destroy your own country, here is what is coming your way. If you happen to be listening to this debate, please understand the law as it is today and as it is going to be after this bill is passed: We are at war. The authorization to use military force passed by the Congress right after the attacks against this Nation designates al-Qaida as a military threat, not a common criminal threat, so we apply the law of war. There are two legal systems at play: domestic criminal law that well serves us as a nation to deal with crime—even the worst person, the worst child abuser gets a lawyer and is presumed innocent. Believe it or not, war criminals get lawyers and are presumed innocent.

I am proud of both systems, but the law enforcement model doesn't allow us to hold someone for a period of time to gather intelligence. Under the law enforcement model, once we capture someone, we have to start reading them their rights and providing them with a lawyer. Under the law of war model, we can hold someone who is part of the enemy force and gather intelligence.

This is not the first war where American citizens have sided with the enemy. In the In re Quirin case, a World War II case where American citizens aided Nazi saboteurs, here is what the Court said: There is no bar to the Nation holding one of its own citizens as an enemy combatant. That has been the law for decades.

So if it made sense to hold an American citizen who was helping the Nazis under military authority because they were helping a military enemy of the Nation to gather intelligence, why in the world wouldn't it make sense to hold somebody who has joined with al-Qaida to gather intelligence about the next attack?

Let me give an example of what we may face. Homegrown terrorism is on the rise. The Internet is out there. It is a good thing and a bad thing. But the idea of people getting radicalized and turning against their own country is a growing threat.

So the likelihood in the future of someone getting radicalized—an American citizen here at home going to Pakistan, getting educated in one of these extremist madrassas, coming back home, getting off the plane at Dulles Airport, coming down to the Mall and starting to shoot American citizens and tourists alike—is very real.

What this legislation does is it says from the Congress's point of view we recognize the person who is aligned with al-Qaida is not a common criminal, that we expressly authorize the indefinite detention of someone who has joined al-Qaida operations.

Why is that important? Don't you think most Americans, I say to the Senator, would be offended if after the person who went on a rampage in the Capital to kill American citizens, to kill people in America, was captured, we could not question them about: Is there somebody else coming? We would have to say: You have the right to remain silent. Here is your lawyer.

What we should do with that person who went to Pakistan and got radicalized and wants to come back and kill us all is hold them in military custody, as we have done in every other war, and find out all we can about future attacks and what they know. Because we are not fighting a crime; we are fighting a war. That has been the law, according to the Supreme Court, for decades, and all we are doing in Congress is saying, statutorily: We recognize the authority of this President and every other President to hold an enemy combatant for intelligence-gathering purposes indefinitely, whether they are captured at home or abroad, because that only makes logical sense. The idea of criminalizing the war and not being able to gather intelligence will put our country at risk.

Let me say this about the system: No one can be held as an enemy combatant under the law we have constructed without having their day in Federal court. So do not worry about going to a tea party or a moveon.org rally or an Occupy Wall Street rally and somebody holding you as a political prisoner under this law. The only people who can be held under military custody for an indefinite period are ones who have been found to have associated with al-Qaida in an overt way, and the government has to prove that to a Federal judge. If the Federal judge does not believe the government has made their case, the person is released. If the Federal judge says to the U.S. Government: You have convinced me that the person in front of me is cooperating and has joined al-Qaida and is overtly engaged in hostilities against the United States. I hereby authorize to you to hold that person to gather intelligence, how long can you hold them? As long as it takes to make us safe.

Here is what the law does. Every year, the person being held as an enemy combatant has an annual review process where the experts in our government look at the threat this person possesses, whether we have more intelligence to be attained, and there is a legal process to review ongoing detention.

Here is what some of my colleagues would say: Wait a minute. You cannot

do that. We are going to say, as a Member of Congress, that at an artificial date you have to let that person go or try them? A lot of these cases will be based on intelligence that may not go to an article III court. We may have to compromise our national security. We can prove to a judge they are a member of al-Qaida, but we are not going to take them to the criminal court because that is not in our national security interest.

The key fact is, no one is held as an enemy combatant without judicial review. Once you are determined to be an enemy combatant, then we are going to apply the law of war, as we have for 200 years. The law of war says: No nation has to let an enemy prisoner go or prosecute them—because we are not fighting a crime; we are fighting a war.

If you are an al-Qaida operative, you could get killed, even if you are an American citizen, by assisting the enemy at home or abroad. So do not join al-Qaida because you could lose your life. If you do get captured, you can be held indefinitely under the law of war because you have committed an act of war.

Ms. AYOTTE. Would the Senator from South Carolina yield for a question?

Mr. GRAHAM. I am pleased to.

Ms. AYOTTE. Isn't it true that included within the Defense authorization language in the detainee provisions is that:

> Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

In other words, what is the law today—as you just described it—we are reaffirming in this bill. But we are not adding or subtracting from the President's authority that he has, as the Commander-in-Chief of our country, to protect our country against members of al-Qaida.

Mr. GRAHAM. The Senator is correct.

But here is what we are doing. Here is what LINDSEY GRAHAM is doing, and CARL LEVIN, and an overwhelming number of the Members of this body are about to do. We are about to pass a defense authorization bill that increases military pay, that has a lot of great things. But we are about to say as a Congress: We believe we are at war, and we reject the idea—the Libertarian idea; who are great Americans—that if you get to America somehow, it is no longer a war.

I think the Libertarians agree that if you catch an al-Qaida operative, including an American citizen, overseas, we do not have to read them their rights, and we do not have to give them a lawyer. But somehow, the perverse logic is, if they make it to America to attack us, whether they are a citizen or not, somehow they get a special deal.

All of us who are voting for this bill say that is crazy; we are at war. For no other war has that been the case. If you would have suggested in 1942 that the American citizen helping the Nazis commit sabotage against the United States had a special status and could not be treated in the fashion of a military threat to the country, they would have run you out of town.

So we are 10 years out from the attacks of 9/11, and here is what we are rejecting: We are rejecting the criminalization of the war, but we are doing it in a smart way. We are not telling the executive branch they have to go into a law-of-war detention system. We are just saying that is available to them. We are not telling the executive branch they have to try people in military commissions. We are just saying to them that is available for noncitizens. What we are telling the executive branch is that we believe we are at war, and that narrow group of people—thank God it is a narrow group—who join al-Qaida do not have special privileges when it comes to destroying our homeland; that if they make it to America, the closer they get to us, the more tools we should have available to protect ourselves.

So we are on record—at least I am and I think the body as a whole. Senator LEVIN has been terrific. The administration has been great to work with. Finally, after 10 years, the Congress of the United States, through this legislation, is going to make the simple statement, simple proposition that under the law of war, you can be held as an enemy combatant indefinitely to protect this Nation. Because when you join al-Qaida—the enemy of us all—we are not worried about whether we are going to prosecute you right away. We are worried about what you know about the next attack coming.

Let me tell you why we need this flexibility. The Christmas Day Bomber—the bomb did not go off, thank God; it was just luck—was read his Miranda rights within 45 minutes. Five weeks later, his parents convinced him to cooperate. What we are suggesting is there is another way that has been used in other wars, that the U.S. intelligence community, law enforcement community, and military have an option available to them.

We could grab this person who has just tried to blow up an airplane over Detroit—American citizen or not—and we can hold them without telling them they have a right to a lawyer and reading them their Miranda rights. Because we are trying to find out is another airplane coming and what do they know about the enemy and what were they up to and where did they train.

If we take that option off the table, we will have diminished our national security. We will have overturned what every other time of war has been about. We would be the first Congress in the history of the country to reject the idea that we can hold someone who is collaborating with the enemy under the law of war. Let's reverse this. This is the first time in history people have said on the floor of the Senate: We reject the Supreme Court holdings that allow the American Government to hold someone as an enemy combatant when they have joined the enemy forces at home or abroad.

So those of us who are voting for this, we are saying we accept the proposition that if you join al-Qaida, you can be killed, you can be captured, you can be interrogated. I am willing to accept the heat for making that decision. Because if we cannot kill them and we cannot capture them and we cannot interrogate them, we have made a huge mistake because these people hate us. They hate who we are. They hate what we stand for. They would kill us all if they could. They are out there, and some of them are among us who have the title of ''American citizen.''

But let me tell you about that title. Not only does it have rights, it has responsibilities. Our courts have said there is nothing in our law or our Constitution that prevents us from holding one of our own when they join the enemy. Because when they join the enemy, they have not committed a crime; they have turned on the rest of us, and they should accept the consequences of being at war with America. Being at war with America is something they should fear, and if they do not fear being at war with America, we have made a huge mistake.

I believe in due process. No one is going to prison without a Federal judge's oversight. No one stays in prison indefinitely without an annual review. But, my God, we are not going to arbitrarily say: You have to go. You have to be let go because of the passage of time and we are not going to criminalize this war—because it is a war.

As sure as I am standing here talking today, we are going to be wrong once. We have to be right every time, I say to the Senator. We have been lucky, and our men and women in uniform and our intelligence community and our FBI agents are doing a wonderful job. They are working night and day to protect us. The threats are growing. They are not lessening. There will come a day, I am sad to say, when we are going to get hit again. But when that day comes, we are going to make sure we have the tools to deal with it in terms of what it is: an act of war. We are going to have the tools available to this country to rein in the consequences because we are going to have the tools available to find out where is the next attack coming from.

We are not going to criminalize the war. We are going to fight it within our values. We are going to provide robust due process. But we are going to acknowledge as a body in Congress that our Chief Executive and those men and women in uniform, law enforcement agents, CIA agents—that they have our blessing to do their job, and we are going to acknowledge that they have the tools available in this war that were available to other like people in other wars.

Ladies and gentlemen, if there was ever a war where it was important to know what the enemy was up to and hit them before they hit us, it is this war. They could care less about losing their lives. The only way we will be safe is to gather intelligence, and we cannot gather intelligence, in my view, by locking down America to ''Dragnet'' standards. This is not a TV show. This is a real-world event that changes as I speak.

To Senator LEVIN, to Senator AYOTTE, and to all those who have tried to create a compromise to enjoy bipartisan support—to the administration—thank you all. To the critics, some of your criticism has been unfounded. But you have the right to be a critic. You live in the State called ''Live Free or Die.''

Let me remind everybody, being a critic and being able to speak your mind sometimes means people have to die.

What I am——

The PRESIDING OFFICER. The time for the Senator from New Hampshire has expired.

Mr. GRAHAM. Madam President, could I ask for 30 seconds?

The PRESIDING OFFICER. Is there any objection?

Mr. LEVIN. Madam President, reserving the right to object—and I, of course, will not—how much time is left before our vote?

The PRESIDING OFFICER. One minute.

Mr. GRAHAM. I will do this in 15 seconds.

Mr. LEVIN. If the Senator will save me 30 seconds, I would appreciate it.

Mr. GRAHAM. Absolutely.

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

Mr. GRAHAM. This idea of civil liberties and the American way of life—if we do not fight for it, we are going to lose it. We are under siege and we are under attack. So let's fight back within our values. This bill allows us to fight back, and I am very proud of the product.

I thank Senator LEVIN for being such a good leader for the Nation at a time when we need good leaders.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Madam President, let me first thank Senators GRAHAM and AYOTTE for their contributions this afternoon and long before this afternoon on this subject.

The best answer to some of the criticism we have heard this afternoon—the FBI has been successful. Why change it?—read the law, read the conference report.

Nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation. . . .

It is flatout explicit in the law.

Something else we have heard: We are doing something for the first time—long-term custody for American citizens. Read the conference report:

Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens. . . .

I urge people to read our conference reports read the Senate bill, before they accept some of the arguments which have been made against this conference report.

Madam President, I ask unanimous consent that the statement of the Press Secretary for the President that was issued yesterday on behalf of the President be printed in the RECORD, including this line:

[W]e have concluded that the language does not—

The language in the conference report—

challenge or constrain the President's ability to collect telling intelligence, incapacitate dangerous terrorists, and protect the American people—

And the key words for many people—

and the President's senior advisors will not recommend a veto.

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

STATEMENT FROM THE PRESS SECRETARY ON THE NDAA BILL

We have been clear that ''any bill that challenges or contrains 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.'' After intensive engagement by senior administration officials and the President himself, the Administration has succeeded in prompting the authors of the detainee provisions to make several important changes, including the removal of problematic provisions. While we remain concerned about the uncertainty that this law will create for our counterterrorism professionals, the most recent changes give the President additional discretion in determining how the law will be implemented, consistent with our values and the rule of law, which are at the heart of our country's strength. This legislation authorizes critical funding for military personnel overseas, and its passage sends an important signal that Congress supports our efforts as we end the war in Iraq and transition to Afghan lead while ensuring that our military can meet the challenges of the 21st century.

As a result of these changes, we have concluded that the language does not challenge or constrain the President's ability to collect intelligence, incapacitate dangerous terrorists, and protect the American people, and the President's senior advisors will not recommend a veto. However, if in the process of implementing this law we determine that it will negatively impact our counterterrorism professionals and undercut our commitment to the rule of law, we expect that the authors of these provisions will work quickly and tirelessly to correct these problems.

Mr. LEVIN. Again, I want to thank all of my colleagues who participated in this debate.

I yield the floor.

The PRESIDING OFFICER (Ms. KLOBUCHAR.) The question is on agreeing to the conference report.

Mr. LEVIN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. MORAN).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 86, nays 13, as follows:

[Rollcall Vote No. 230 Leg.]

YEAS—86

Akaka	Graham	Mikulski
Alexander	Grassley	Murkowski
Ayotte	Hagan	Murray
Barrasso	Hatch	Nelson (NE)
Baucus	Heller	Nelson (FL)
Begich	Hoeven	Portman
Bennet	Hutchison	Pryor
Bingaman	Inhofe	Reed
Blumenthal	Inouye	Reid
Blunt	Isakson	Roberts
Boozman	Johanns	Rockefeller
Boxer	Johnson (SD)	Rubio
Brown (MA)	Johnson (WI)	Schumer
Brown (OH)	Kerry	Sessions
Burr	Kirk	Shaheen
Cantwell	Klobuchar	Shelby
Carper	Kohl	Snowe
Casey	Kyl	Stabenow
Chambliss	Landrieu	Tester
Coats	Lautenberg	Thune
Cochran	Leahy	Toomey
Collins	Levin	Udall (CO)
Conrad	Lieberman	Udall (NM)
Coons	Lugar	Vitter
Corker	Manchin	Warner
Cornyn	McCain	Webb
Enzi	McCaskill	Whitehouse
Feinstein	McConnell	Wicker
Gillibrand	Menendez	

NAYS—13

Cardin	Franken	Risch
Coburn	Harkin	Sanders
Crapo	Lee	Wyden
DeMint	Merkley	
Durbin	Paul	

NOT VOTING—1

Moran

The conference report was agreed to.

MR. LEVIN. Madam President, I move to reconsider the vote by which the conference report was agreed to.

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

The motion to lay on the table was agreed to.

CORRECTING THE ENROLLMENT OF H.R. 1540

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of H. Con. Res. 92, which the clerk will report.

The legislative clerk read as follows:

A concurrent resolution (H. Con. Res. 92) directing the Clerk of the House of Representatives to correct the enrollment of the bill H.R. 1540.

The PRESIDING OFFICER. Under the previous order, the concurrent resolution is agreed to, and the motion to reconsider is considered made and laid upon the table.

EXECUTIVE SESSION

NOMINATION OF MORGAN CHRISTEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT—Continued

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to resume