COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010—Resumed

The PRESIDING OFFICER. Under the previous order, the motion to proceed to the motion to reconsider the vote by which cloture was not invoked on the committee-reported substitute to H.R. 2847 is agreed to, and the motion to reconsider that vote is agreed to.

Under the previous order, there will be 40 minutes of debate equally divided and controlled as follows: 20 minutes under the control of the Senator from Louisiana and 20 minutes total under the control of the Senator from Maryland, Ms. MIKULSKI, and the Senator from Alabama, Mr. SHELBY.

Ms. MIKULSKI. Mr. President, very shortly, we will vote on cloture on the CJS bill. As the chairperson of the committee, I wish to say that we want to finish this today so we can move forward with the blessing and the business of funding—Mr. President, I have to yield the floor a moment. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Ms. MIKULSKI. Mr. President, reclaiming my time as the manager of the bill, I wish to bring to my colleagues' attention that at 12:25 p.m. today, we are going to vote on cloture of the Commerce-Justice-Science appropriations bill. We wish to finish this bill today. When I say ''we,'' I mean Senator SHELBY, my ranking member, and myself.

This bill is the result of a rigorous bipartisan effort to fund the Department of Justice, including the FBI and DEA, the Commerce Department, and major science agencies that propel our country in the area of innovation and technology development, such as the National Science Foundation and the National Space Agency.

We want the Senate to be able to deal with this and then move on to other business.

After the cloture vote, it is our intention to dispose of any pending amendments that are germane to the bill. This bill has been public since June. It has been on the floor already for 4 days and over 20 hours. Senators have had ample time to draft and call up their amendments. Senator SHELBY and I hope to be able to move through the amendments in a well-paced but brisk fashion.

We hope our colleagues will cooperate and have any decisions relating to the funding of these important agencies be decided on robust debate and the merits of the argument rather than delay and dither, delay and dither, delay-and-dither tactics of the other side. We don't want to delay. We don't want to dither. We want to proceed, debate germane amendments, and bring our bill to a prompt closure.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I ask unanimous consent that when the Senate resumes consideration of H.R. 2847, that it be in order for me to offer amendment No. 2676, which is filed at the desk.

The PRESIDING OFFICER. Is there objection?

Ms. MIKULSKI. I object, Mr. President. The intention is to vote on cloture and dispose of pending germane amendments. The Senator's amendment is not pending, so I do object, with all courtesy because of my respect for the Senator.

The PRESIDING OFFICER. Objection is heard.

Mr. CHAMBLISS. Mr. President, I obviously am very disappointed to see my colleagues on the other side of the aisle object to my amendment. It is a pretty simple, straightforward amendment.

We have voted several different times when appropriations bills have been on the Senate floor over the last couple of weeks, wherein the folks on the other side of the aisle insist on allowing the transfer of prisoners from Guantanamo Bay to the United States for trial. My amendment prohibits that. I simply think it is not appropriate to bring battlefield combatants into article III trials inside the United States for any number of procedural reasons relative to the treatment of Guantanamo Bay prisoners within our Federal courts. But even beyond that, the potential for the release of those enemy combatants, once they arrive on U.S. soil, certainly is increased.

This is not the way we need to be treating enemy combatants. Those men who are at Gitmo are the meanest, nastiest killers in the world. Every single one of them wakes up every day thinking of ways they can kill and harm Americans, both our soldiers as well as individuals. Some of them were involved in the planning and the carrying out of the September 11 attacks. Others were arrested on the battlefield in Iraq and are at Guantanamo. We are not equipped nor have we ever in our history dealt with trials in article III courts of any enemy combatant arrested on the battlefield. The FBI has not investigated cases prior to arrest. These folks were not given Miranda warnings because our soldiers captured these individuals with AK–47s in their hands with which they were shooting at our men. These are not the types of individuals that our criminal courts are designed to handle or can feasibly handle.

I am disappointed we are not going to get a vote on this amendment. I will continue to raise this issue as long as we possibly can between now and the time that Guantanamo Bay is scheduled to be closed and, from a practical standpoint, until it is closed, if that ever does happen. We have the courts at Guantanamo Bay equipped to handle and try these individuals before military tribunals. Those tribunals have been established, just reauthorized. We are capable of handling the trials at Guantanamo Bay, and that is where they should take place.

I want to make sure the time I utilized is charged against Senator VITTER, which has been agreed to by the Senator.

The PRESIDING OFFICER. It will be so charged.

The Senator from South Carolina.

Mr. DEMINT. Mr. President, I appreciate the Senator from Georgia attempting to get a very important amendment on the floor. I wish to also propound a unanimous-consent request for a related amendment, related to the terrorists in Guantanamo Bay.

This week, I was advised by the officials at the Air Force and Navy base in Charleston——

Ms. MIKULSKI. Will the Senator yield for a question?

Mr. DEMINT. I will in a second.

Yes, I will yield.

Ms. MIKULSKI. Is the Senator offering an amendment or giving a speech about the desire to offer an amendment?

Mr. DEMINT. Mr. President, I desire to offer an amendment, and I will propound a unanimous-consent request to allow my amendment to be considered postcloture. I have a request. I will get to the request in a moment. I wish to give a few seconds of background.

We know this is not an idle threat because inquiries have been made in Charleston for moving detainees from Guantanamo Bay to minimum security brigs in Charleston.

I ask unanimous consent that when the Senate resumes consideration of H.R. 2847, it be in order for me to offer an amendment preventing the transfer of known terrorists at Guantanamo to U.S. soil.

The PRESIDING OFFICER. Is there objection?

Ms. MIKULSKI. Mr. President, I object to the amendment. The intention is to vote on cloture and dispose of pending germane amendments. The Senator's amendment is not pending, so I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DEMINT. Mr. President, this amendment has been filed as a second degree. It makes no sense at this point for us to not have a short debate about moving the most dangerous people in the world to American soil. It is appropriate for us to allow at least a small amount of time, as we rush these bills through, to talk about the issues that are important to Americans.

I am obviously disappointed that we will not allow the discussion of my amendment or the amendment of the Senator from Georgia or others who are trying to get this issue in front of

this body for discussion. It does not mean you cannot vote it down. But not to allow a debate is certainly discouraging at this point.

I appreciate Senator VITTER giving us a few minutes.

I yield the floor.

The PRESIDING OFFICER (Mr. BURRIS). The Senator from Louisiana.

AMENDMENT NO. 2644

Mr. VITTER. Mr. President, I rise again in strong support of my amendment No. 2644 to the Commerce-Justice-Science appropriations bill. It is coauthored by the distinguished Senator BENNETT from Utah, and it is strongly supported by many other Members.

There has been a lot said about this amendment, most of it inaccurate, so let me step back and start with what the amendment says. It is pretty simple, pretty straightforward when you actually read it.

The amendment simply requires the census that we are set to take next year to ask whether the respondent is a citizen. The amendment does not do anything but that. It simply says: The census should ask folks if they are citizens. It is very straightforward.

We should count every person in the United States. The census should include everyone, but in so doing, I am encouraging, and my amendment would require, that the census ask if an individual is a citizen.

Compared to that statement of policy, that simple goal, it is absolutely mind-boggling to me some of the statements that have been made about it. First, the distinguished majority leader Senator REID admitted in several conference calls and statements to the press that he is trying to invoke cloture on this bill specifically to block out any vote, any discussion of the Vitter amendment.

Secondly, in saying that, the majority leader called my amendment ''anti-immigrant.'' I honestly don't see how any reasonable person can say that when we take a census and we simply ask whether the respondent is a citizen or a noncitizen—and plenty of noncitizens are here legally—that is anti-immigrant.

Third, and perhaps most outrageously, Senator REID said my effort is akin to the activities in the 1950s and 1960s to intimidate Black citizens and try to get them to stay away from voting in the voting booth. I take personal offense to that. I think there is no reasonable comparison, and I ask Senator REID to apologize to me for that outrageous statement on the Senate floor.

As I said, what the amendment does is simple. It says that the census should ask whether a respondent is a citizen or not. Why is that important? Well, for at least two reasons. First of all, the census is an enormously important tool we in Congress are supposed to use—information and statistics—as we tackle any number of significant issues and Federal programs. Certainly it is a very significant and important issue that we deal with the immigration problem and the issue of illegal immigration. And certainly it is useful to know, if we are going to spend $14 billion to do a census, who within that number are citizens and who within that number are noncitizens.

Secondly, and even more important, the top thing the census is used for, the first thing the census is used for is to reapportion the U.S. House of Representatives, to determine after each census is done how many U.S. House Members each State gets. The current plan is to count everybody and not ask whether a person is a citizen or a noncitizen. So the current plan is to reapportion House seats using that overall number—using both citizens and noncitizens in the mix. I think that is wrong. I think that is contrary to the whole intent of the Constitution and the establishment of Congress as a democratic institution to represent citizens. I believe only citizens should be in that particular calculation for the reapportionment of the U.S. House of Representatives.

This is a significant issue for many States, including my State of Louisiana. It has a very big and direct and concrete impact on Louisiana and certain other States. It comes down to this: If the census is done next year and reapportionment happens using everybody—citizens and noncitizens—Louisiana is going to lose a seat in the U.S. House of Representatives. We will lose one-seventh of our standing there, our representation there, our clout. If the census was done and only the number of citizens was used to determine reapportionment, Louisiana would not lose that House seat. We would retain seven seats. So that has a very big and direct impact on my State of Louisiana.

I would also point out that it will have the same impact in seven other States: North Carolina, South Carolina, Oregon, Pennsylvania, Mississippi, Michigan, Iowa, and Indiana—excuse me, eight other States. So a total of nine States are in this position, Louisiana being one of them. So it is a very significant issue that directly impacts many citizens and many States.

So I urge all of my colleagues to support getting a vote on the Vitter amendment by denying cloture on the Commerce-Justice-Science appropriations bill. However you may vote, this is an important issue, and however you may vote, we need a full debate and a vote. In particular, I would urge my colleagues from North Carolina, South Carolina, Oregon, Pennsylvania, Mississippi, Michigan, Iowa, Indiana, and, of course, Louisiana to vote no on cloture so we can examine this very significant issue and so we can have a vote on the Vitter-Bennett amendment.

There has been discussion in at least two areas that I wish to quickly address. One is some discussion in the press, including from my distinguished colleague from Louisiana, Senator LANDRIEU, who has indicated that what I just laid out in terms of the impact on reapportionment isn't true. Well, I think every expert who has looked at this, every demographer who has looked at this agrees with what I just said, that this factor is the difference between Louisiana losing a House seat or not and these other States losing a House seat or not.

I would point out three experts, but there are many others. Dr. Elliott Stonecipher, demographer from Louisiana, has been leading the charge on this issue. I compliment him for his tenacity and his hard work. But there are others as well. In an October 27, 2009, New York Times article, my numbers were again confirmed by Andrew Beverage, professor of sociology at Queens College, New York. He did an independent analysis and said exactly the same thing, that, yes, this issue of whether we use citizens and noncitizens in reapportionment does make that huge difference for those States. And last week, my analysis and my numbers were confirmed yet again by an independent and well-respected demographic expert—again in my State of Louisiana—Greg Rigamer with GCR and Associates. And that is very significant.

Secondly, I wish to briefly address this cost issue. It is interesting that in this debate, the other side has been flailing around for an argument against my amendment, though nobody has argued—or nobody whom I have heard—that reapportionment should be done counting citizens and noncitizens, and that is more consistent with the notion of Congress being the representative body of citizens of the United States. So folks on the other side are wildly flailing around for some argument, and the one they have come across is cost: Oh my goodness, the census would have to incur additional cost to add this to the form.

Well, it is certainly true that it would cost some more. I can't give you a precise dollar figure, but it would cost something more. It is certainly true it would have been better for this to have been caught and debated earlier rather than later. Unfortunately, the committee of jurisdiction, the Committee on Homeland Security and Governmental Affairs, which reviews the census forms, did not bring this issue up in a significant way. I agree with that. I don't agree with this wild figure that it would cost $1 billion.

Let me point out a couple of things. First of all, the cost of the census has ballooned from the last census. The last census was $3.4 billion; this census is going to be $14 billion. So the first thing I would say, quite honestly, is that it is pretty ironic for an agency that has had a budget balloon from $3.4 billion in the last census to $14 billion this census to say they can't squeeze in that question, that they can't do it right for $14 billion.

Secondly, quite frankly, the Census Bureau has a horrendous record in terms of cost estimates. When they threw out this very large, very round figure of it costing an additional $1 billion, I called them and said: OK, can you give us the rationale for that, the background on that cost estimate? After 3 weeks of asking for the data behind that $1 billion claim, they sent us one piece of paper with 10 bullet points on it, all very general statements and suggestions, with a final bottom line being a nice even round figure of $1 billion—very unimpressive, in my opinion, in terms of any precise accounting for $1 billion.

I would also draw everyone's attention to an October 7, 2009, GAO report delivered to the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security. It was about the census. In that report, the GAO said:

> Given the Bureau's past difficulties in developing credible and accurate cost estimates, we are concerned about the reliability of the figures that were used to support the 2010 budget.

In another example, the Office of the Inspector General filed a report in 2008 about the census. In that report, the office inspected a particular cost estimate from the Census Bureau that came up to $494 million for a certain portion of their activity, and they said: We think this is a wildly inflated figure, and we can immediately identify cost savings that bring it down to $348 million—a significant savings of almost $150 million. When the Census Bureau was confronted with that, they had to agree and they had to adopt the lower figure.

So, Mr. President, the bottom line is simple: We do a census every 10 years. It is a very important event. We need to do it right, and to do it right, we need a full debate and a vote on this central question embodied by the Vitter-Bennett amendment. So I urge all of my colleagues to vote no on cloture of the Commerce-Justice-Science appropriations bill to demand a reasonable debate and vote on the Vitter-Bennett amendment. This is an important question, and we simply shouldn't forge ahead. Americans have a fundamental problem with not even asking the citizenship question and therefore forging ahead with a plan to reapportion the entire U.S. House of Representatives by putting noncitizens in the mix, when the whole notion of our representative democracy and of Congress is to represent the citizens of the country.

I urge my colleagues to support that position, and I thank my colleagues who have done so thus so far. In particular, I urge my colleagues from North Carolina, South Carolina, Oregon, Pennsylvania, Mississippi, Michigan, Iowa, Indiana, and certainly Louisiana to stand up for their States, to stand up for their interests, to stand up for their clout and their representation in the U.S. House of Representatives.

With that, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I object to the Senator's amendment, and I object to the arguments he has made.

First of all, we adopt cloture so that we can proceed on amendments that are germane. Second, in terms of the inaccurate accusation that we are plowing ahead and forging forward, we were on this bill for 4 days, with over 20 hours of debate. There was plenty of time to talk about this amendment, and I was here and ready to engage.

The other thing is that there have been other times—since my bill was pulled from the floor—called morning business, when a Senator could talk for any length of time on any topic he or she wants. Yet silence, silence, silence. So don't use the cloture vote as a way to say there wasn't enough time.

Now let's go to being asleep at the switch. Two accusations were made—the ballooning of the census cost. Well, one of the reasons and the main reason the cost is exploding is that the party in power prior to 2008 was asleep at the switch with the census. They completely dropped the ball on the new technology for being able to go door to door to get a count. It turned into a big techno-boondoggle. It finally took the Secretary of Commerce to uncover that under that rock was another rock, and under that rock were a lot of buckets of malfunctioning microchips. So we had to bail out Secretary Gutierrez and the census because of the techno-boondoggle because the other party was asleep at the switch in maintaining strict quality controls.

Now let's go to the asking of another question. The Senator from Louisiana says he wants to stand up for his State. I agree, we have to stand up for the States, but the time to stand up was in April of 2007. Did you know that the Census is mandated by law to submit the questionnaires to Congress—and they did? So for 1 year, from April 1, 2007, to the close of the review by Congress 1 year later, April 2008, there was plenty of time to say: We don't like the questionnaire; we want to add a citizenship question. That was the time and the place. When you are going to stand up for your State, stand up at the right time to make a difference and not try to amend the law in a way that is going to create administrative havoc.

We can debate the merits of the question, but I am here as an appropriator on the process. The Census Bureau did meet its statutory responsibility. It submitted the questionnaire to the Congress on April 1, 2007. It did not come by stealth in the night, it was not written in invisible ink, it was written in English here for all to see—and also in other languages we could test and use—to say: Do you, Congress, like this questionnaire? Do you have any comments? For all those who want to stand up, that was the time to do it and the time to make a change.

Let's talk about the consequences. It will delay the census so we could essentially not meet our constitutional mandate of having the census done in a timely way. No. 2, it will cost, if we did not do it, another $1 billion and wreak, again, administrative havoc.

Let's go into this whole claim about citizens and noncitizens. The census already tracks the number of citizens and noncitzens through a separate survey. We could talk about what this will mean in reapportionment and so on. Those questions are for debates that lie with the Judiciary Committee.

We are not going to vote up or down on the Vitter amendment, we are going to vote on cloture. Why is cloture important? So we do not have distracting amendments that are better offered on the appropriate substance of the bill. We have to fund the State, Commerce, Justice, Science agencies. The FBI needs us to fund this agency. The Marshals Service needs us to fund this agency. Federal law enforcement, our Federal prisons—you might not like whom the Obama administration puts in Federal prisons, but we need Federal prisons. So we need to pass cloture so we can dispose of germane amendments and move democracy forward.

Mr. President, how much time do I have?

The PRESIDING OFFICER. The Senator from Maryland has 7½ minutes remaining.

Ms. MIKULSKI. I wish to reserve my time. Did the Senator from Kansas have a question?

Mr. ROBERTS. I would be delighted to respond to my good friend from Maryland. I am in a position to yield back all the minority's time. We have no more speakers.

Ms. MIKULSKI. Mr. President, we are not prepared to yield back any time. I reserve the remainder of my time.

Mr. ROBERTS. Will the distinguished Senator yield?

Ms. MIKULSKI. Certainly.

Mr. ROBERTS. Today, the U.S. Marine Corps is celebrating its birthday. As I speak, the Commandant of the Marine Corps, the Drum and Bugle Corps and various and assorted marines are over in the Russell Building. I am to cut the cake, and I am getting into deeper and deeper trouble if we delay the ceremonies to the degree they could be delayed. If somebody wants to talk, obviously, you have 7 minutes, but I appreciate any consideration you might be able to give us.

Ms. MIKULSKI. That is one heck of an argument, I respond to the Senator from Kansas. I have great admiration for the Marine Corps. If the Semper Fi guys call and you need to cut the cake, I will certainly be willing to cooperate.

Seriously, our congratulations to the U.S. Marine Corps on their birthday. We value them for what they have done in their most recent conflicts and their incredible history. They are truly Semper Fi. In the spirit of what I hope will be the comity of the day, the civility of

the day, we yield back our time in order to permit the vote.

Mr. ROBERTS. I tell the Senator Semper Fi, and on behalf of the minority, I yield back all our time.

CLOTURE MOTION

The PRESIDING OFFICER. All time has expired. Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the committee-reported substitute amendment to H.R. 2847, the Departments of Commerce, Justice and Science and Related Agencies Appropriations Act of Fiscal Year 2010.

Harry Reid, Barbara A. Mikulski, Barbara Boxer, Robert Menendez, Charles E. Schumer, Patty Murray, Tom Harkin, Patrick J. Leahy, Roland W. Burris, Mark Begich, Ben Nelson, Daniel K. Inouye, Debbie Stabenow, Bernard Sanders, Dianne Feinstein, John F. Kerry, Edward E. Kaufman.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call is waived.

The question is, Is it the sense of the Senate that debate on the committee-reported substitute amendment to H.R. 2847, the Departments of Commerce, Justice, and Science, and Related Agencies Appropriations Act of 2010 shall be brought to a close?

The yeas are mandatory under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Arizona (Mr. MCCAIN).

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

The yeas and nays resulted—yeas 60, nays 39, as follows:

[Rollcall Vote No. 335 Leg.]

YEAS—60

Akaka	Franken	Mikulski
Baucus	Gillibrand	Murray
Bayh	Hagan	Nelson (NE)
Begich	Harkin	Nelson (FL)
Bennet	Inouye	Pryor
Bingaman	Johnson	Reed
Boxer	Kaufman	Reid
Brown	Kerry	Rockefeller
Burris	Kirk	Sanders
Byrd	Klobuchar	Schumer
Cantwell	Kohl	Shaheen
Cardin	Landrieu	Specter
Carper	Lautenberg	Stabenow
Casey	Leahy	Tester
Conrad	Levin	Udall (CO)
Dodd	Lieberman	Udall (NM)
Dorgan	Lincoln	Warner
Durbin	McCaskill	Webb
Feingold	Menendez	Whitehouse
Feinstein	Merkley	Wyden

NAYS—39

Alexander	Collins	Hatch
Barrasso	Corker	Hutchison
Bennett	Cornyn	Inhofe
Bond	Crapo	Isakson
Brownback	DeMint	Johanns
Bunning	Ensign	Kyl
Burr	Enzi	LeMieux
Chambliss	Graham	Lugar
Coburn	Grassley	McConnell
Cochran	Gregg	Murkowski
Risch	Shelby	Vitter
Roberts	Snowe	Voinovich
Sessions	Thune	Wicker

NOT VOTING—1

McCain

The PRESIDING OFFICER. On this vote, the yeas are 60, the nays are 39. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The clerk will report.

The legislative clerk read as follows:

A bill (H.R. 2847) making appropriations for the Departments of Commerce, Justice, and Science, and Related Agencies for the fiscal year ending September 30, 2010, and for other purposes.

Pending:

Vitter/Bennett amendment No. 2644, to provide that none of the funds made available in this act may be used for collection of census data that does not include a question regarding status of United States citizenship.

Johanns amendment No. 2393, prohibiting the use of funds to fund the Association of Community Organizations for Reform Now (ACORN).

Levin/Coburn amendment No. 2627, to ensure adequate resources for resolving thousands of offshore tax cases involving hidden accounts at offshore financial institutions.

Durbin modified amendment No. 2647, to require the Comptroller General to review and audit Federal funds received by ACORN.

Begich/Murkowski amendment No. 2646, to allow tribes located inside certain boroughs in Alaska to receive Federal funds for their activities.

Ensign modified amendment No. 2648, to provide additional funds for the State Criminal Alien Assistance Program by reducing corporate welfare programs.

Shelby/Feinstein amendment No. 2625, to provide danger pay to Federal agents stationed in dangerous foreign field offices.

Leahy amendment No. 2642, to include nonprofit and volunteer ground and air ambulance crew members and first responders for certain benefits.

Graham amendment No. 2669, to prohibit the use of funds for the prosecution in article III courts of the United States of individuals involved in the September 11, 2001, terrorist attacks.

Coburn amendment No. 2631, to redirect funding of the National Science Foundation toward practical scientific research.

Coburn amendment No. 2632, to require public disclosure of certain reports.

Coburn amendment No. 2667, to reduce waste and abuse at the Department of Commerce.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. I ask for the regular order.

Mr. NELSON of Florida. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. NELSON of Florida. I ask unanimous consent that the order for the quorum be rescinded.

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

Mr. NELSON of Florida. Mr. President, the Food and Drug Administration is proposing a rule that will basically eliminate raw oysters from the Gulf of Mexico. There have been 15 people in the past year who have died from a bacterial infection that comes out of raw oysters. But what has been discovered is that the people had a preexisting condition prior to eating the oysters that made their immune system wear down so they were much more susceptible. In a sweeping administrative executive branch decision trying to correct a problem, they are suddenly proposing that they are going to stop the rest of America eating raw oysters from the Gulf of Mexico. This is like saying: If you have a food allergy to peanuts, we are going to ban you eating peanuts unless you cook them.

There is a thriving industry along the coast of America, particularly the gulf coast, that has a delicacy known as raw oysters that people enjoy. Apalachicola oysters, the creme de la creme, are shipped all over the world. And in some of the fanciest restaurants you get Apalachicola oysters on the half shell. The Food and Drug Administration is about to basically ban raw oysters from the Gulf of Mexico. Some of us in the Senate are going to try not to let it happen.

Senator LANDRIEU and I, who both have some interest in this because it affects our States, are filing a bill today that would utilize the appropriations means of not letting an appropriation be enacted or used for the purpose of the FDA implementing such a rule that would basically ban raw oysters from the Gulf of Mexico. This is trying to kill a gnat with a sledgehammer. If people were, because of a preexisting condition, already subject to coming down with an illness, there is simply no sense. This is government run amok. This is government out of control. This is government trying to kill a gnat with a sledgehammer. We are not going to let it happen.

I inform the Senate today that we are filing this legislation.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FRANKEN. I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. FRANKEN. I ask unanimous consent to speak as in morning business for up to 5 minutes and that the time be charged postcloture.

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

(The remarks of Mr. FRANKEN pertaining to the introduction of S. 2734 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. FRANKEN. Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. UDALL of New Mexico). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. NELSON of Florida. Mr. President, I wish to be recognized as in morning business.

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

Mr. NELSON of Florida. Mr. President, it goes without saying that NASA, the National Aeronautics and Space Administration, is at a crossroads. It is an agency that has been starved of funds, so it finds itself in the position that its human-rated capable vehicle, the space shuttle, will be ceasing to fly after six more flights that will continue to build the space station and equip it.

This last flight will probably not be until the first quarter of 2011. But the crossroads NASA is facing is because it has been starved of funds over the course of the last half a dozen years, it will not have a new human-rated vehicle to take our crews to the International Space Station. As a matter of fact, there is a great deal of consternation and conflict within NASA itself as to what that vehicle should be. So the President, recognizing this earlier when he appointed the new NASA Administrator, GEN Charlie Bolden, set up a blue ribbon panel headed by Norman Augustine.

They have now reported, and the strong inference of their extensive and detailed report is that the vehicle that was planned to fly but was obviously going to be delayed because it hadn't been developed quickly enough, the Ares I—by the way, the same vehicle that had a very successful test flight a week ago—the strong inference of the Augustine Commission Report is that the Ares I would not even be ready to fly astronauts until the year 2017. Its sole purpose would be, according to the Augustine Commission Report, to get astronauts to and from the space station, and that would be, in the Augustine report's inference, too late. So they are recommending, or at least the strong inference of the recommendation in the Augustine report, is that commercial vehicles be developed to take cargo and crew to the International Space Station. The Augustine Commission Report is suggesting the space station certainly should be kept alive until the year 2020, but to now start to reap some of the science from the experiments that just now the space station is getting equipped to be able to do, in the nodule that is now designated as a national laboratory on the International Space Station.

If what I have said sounds confusing, indeed it is. That is why NASA is at a crossroads. NASA is even more at a crossroads because NASA can't do anything unless it gets some serious new additional money, and that is the strong recommendation of the Augustine Commission Report. What they are saying is that NASA should have $1 billion extra over the President's request in this fiscal year, the fiscal year that started October 1 known as fiscal year 2010, and that the next fiscal year it should have an additional $2 billion over the President's baseline recommendation in the budget, and that thereafter, for the decade, it should have an additional $3 billion per year to fill out the decade so that NASA can do what it does best.

What does it do best? It explores the unknown. It explores the heavens. What should that architecture be? I don't think our Senate committee can decide that. I don't think the White House can decide that, but the White House can give direction and our committee can give direction to NASA to go figure it out: Figure out what that architecture is to do what NASA does best, which is explore the heavens. That direction is certainly recommended in the Augustine Commission Report as: Get out of low Earth orbit. Expand out into the cosmos, with humans, to explore.

So what I am hoping the President of the United States, Barack Obama, is going to do, now that he has received the Augustine Commission Report—it is my hope, it is my plea to the President that he will take their recommendations seriously and that he will do three things. First, even in the midst of an economic recession, when the budgets are very constrained and tight, he will say that a part of America we are not going to give up is our role as explorers and that he will commit to recommend in his budgets the additional money as recommended by the Augustine Commission, and in this first year, this fiscal year we are in now, fiscal year 2010, that is a lot easier because you can get that additional $1 billion out of the unused money in the stimulus bill. But it gets tougher as we get on down the line. That is the first thing.

The second thing the President should say to his administrator of NASA, General Bolden, is convene the guys and determine the architecture of how we should go about and what is the mission we are going to explore. I can tell my colleagues that this Senator thinks the goal should be to go to Mars. It may not be to the surface of Mars; it may be first to Phobos, one of the moons of Mars; we would have to spend so much less energy in getting down to the surface of that moon because of the gravitational pull instead of going all the way to the surface of Mars. The science that we could gain from that would be extraordinary.

Therefore, the President's direction, I would hope, to NASA would be: Figure out the architecture. Does that mean we are going to take the Ares I and make it into an Ares V?

Is that going to be the heavy lift vehicle to get the hardware up to expand out into the cosmos, be it to Phobos, be it to an astroid, be it to the Moon? My hope is that the President would give that direction: Figure out that architecture and what are the steps along to the goal of getting to Mars. That would be the second thing.

The third thing I hope the President would do is give direction to NASA that since NASA is at this crossroads and since there is going to be disruption in the workforce because there is not another human-rated rocket ready after the space shuttle is shut down, then you have to help the workforce. You have to move work around among the NASA centers. You have to bring in new kinds of research and development, of which NASA is a good example of an R&D agency.

It is through the direction of those three things that I think we can get NASA out of this fix it finds itself in at this crossroads point. Give the direction, No. 1, for the additional funding that NASA needs; No. 2, direct NASA to produce that architecture for exploring the heavens; and No. 3, take care of the workforce in the meantime.

Mr. President, I yield the floor and 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. KAUFMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. KAUFMAN. Mr. President, I ask unanimous consent to speak as in morning business for up to 20 minutes.

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

Mr. KAUFMAN. Mr. President, I rise today because I am deeply concerned that just over 1 year since the collapse of Lehman Brothers, a failure that helped send us to the brink of depression, Wall Street is essentially unchanged. Congress and the SEC have not enacted any reform, and the American people remain at risk of another financial debacle—not just because the same practices that led to the crisis 14 months ago are continuing but from new practices that are leading to new problems and new systemic risks.

Last year, the financial world almost came to an end. Yet most of Wall Street then believed that no government review or additional regulation was necessary—right up until the moment government had to step in and save it.

We had been assured that the system was sound. We were assured that a host of checks and balances were in place that would suffice. We were assured that companies have to report their financial holdings with full disclosure and transparency. We were assured that accountants have to verify those assets. We were assured that due diligence is conducted on every deal and transaction. We were assured that boards of directors have a fiduciary duty to undertake prudent risk management. We were sure that management wanted their companies to thrive

over the long term. Most important, we were assured that regulatory bodies and law enforcement agencies are in place to police the system. But those safeguards did not prevent the disaster.

In the past 10 years or more, one of the most important safeguards—the regulators—had simply given up on the importance of regulation. We believed and they believed that markets could police themselves, they would self-regulate, and so in effect we pulled the regulators off the field.

We now know the confluence of events that led to the disaster, and there is blame enough to go around. We failed to regulate the derivatives market. Government-backed agencies, such as Fannie Mae and Freddie Mac, pushed to make housing available for greater numbers of people; unscrupulous mortgage brokers pushed subprime mortgages at every opportunity; and investment bankers pooled and securitized those subprime mortgages by the trillions of dollars and sold them like hotcakes. Rating agencies, left unmonitored by the SEC, incredibly stamped these pools with AAA ratings.

The SEC, which changed the capital-to-leverage ratio level for investment banks from 30-and-50-to-1, allowed these banks to buy huge pools of these soon-to-be toxic assets, and investment banks wrote credit default swaps and then hedged those risks without any central clearinghouse, without any understanding of who was writing how much or what it all meant—all of this, incredible to believe, without any regulation or oversight.

This chart conveys that banks were involved in high-risk return investments that were largely unregulated. Then, crash—the housing bubble burst and a disaster of truly monumental proportions struck. Americans lost $20 trillion in housing and equity value during the ensuing financial meltdown. The economy lurched into free fall, and the GDP shrunk by a staggering percentage not seen since the 1950s.

What happened next? The American taxpayer, the deep-pocket lender of last resort, had to ride to the rescue. We can barely even count the trillions of dollars in taxpayer money that have gone into bailing out the banks, AIG, and a number of other financial institutions. That is not including the billions of taxpayer dollars we had to spend to stimulate the economy.

We must never let this happen again. Yet here we are 1 year later, with no immediate crisis at hand, and we are falling back into complacency. The credit default swap market remains unregulated. The credit rating agencies have not yet been reformed. The banks are back to their old habits—paying out billions of dollars in bonuses for employees who are still engaged in high-risk, high-reward practices.

What is the great lesson we should have learned from the financial disaster of 2008? When markets develop rapidly and change dramatically, when they are not regulated, and when they are not fully transparent, it can lead to financial disaster. That is what happened in the credit default swap market—rapid and dramatic change in the market, no regulation, and opaqueness, which equaled disaster. This must never happen again.

I look forward to working with my colleagues to regulate the derivatives markets, to ensure that credit default swaps are traded on an exchange or at least cleared through a central clearinghouse with appropriate safeguards enforced, and to enact meaningful financial regulatory reforms.

At the same time, we need to be looking carefully to see if these three deadly ingredients—rapid technological development, lack of transparency, and a lack of regulation—are appearing again in other markets. There is no question in my mind that in today's stock markets, those three disastrous ingredients do exist.

Due to rapid technological advances in computerized trading, stock markets have changed dramatically in recent years. They have become so highly fragmented that they are opaque—beyond the scope of effective surveillance—and our regulators have failed to keep pace.

The facts speak for themselves. We have gone from an era dominated by a duopoly of the New York Stock Exchange and Nasdaq to a highly fragmented market of more than 60 trading centers.

Dark pools, which allow confidential trading away from the public eye, have flourished, growing from 1.5 percent to 12 percent of market trades in under 5 years.

Competition for orders is intense and increasingly problematic. Flash orders, liquidity rebates, direct access granted to hedge funds by the exchanges, dark pools, indications of interest, and payment for order flow are each a consequence of these 60 centers all competing for market share.

Moreover, in just a few short years, high-frequency trading, which feeds everywhere on small price differences in the many fragmented trading venues, has skyrocketed from 30 percent to 70 percent of the daily volume.

Indeed, the chief executive of one of the country's biggest block trading dark pools was quoted 2 weeks ago as saying that the amount of money devoted to high-frequency trading could "quintuple between this year and next."

Let's put the last chart back up for a second. Again, we have learned that if you have rapid and dramatic change, opaqueness, and no effective regulation, which is exactly what exists in the high frequency trading markets, we have a disaster. We should look at this in terms of high-frequency trading. We have no effective regulation in these markets.

Last week, Rick Ketchum, the chairman and CEO of the Financial Industry Regulatory Authority—the self-regulatory body governing broker-dealers—gave a very thoughtful and candid speech, which I applaud. In it, Mr. Ketchum admitted that we have inadequate regulatory market surveillance.

His candor was refreshing but also ominous:

> There is much more to be done in the areas of front-running, manipulation, abusive short selling, and just having a better understanding of who is moving the markets and why.

Mr. Ketchum went on to say:

> [T]here are impediments to regulatory effectiveness that are not terribly well understood and potentially damaging to the integrity of the markets . . . The decline of the primary market concept, where there was a single price discovery market whose on-site regulator saw 90-plus percent of the trading activity, has obviously become a reality. In its place are now two or three or maybe four regulators all looking at an incomplete picture of the market—

And this is important—

> and knowing full well that this fractured approach does not work.

At the same time that we have no effective regulatory surveillance, we have also learned about potential manipulation by high-frequency traders.

Last week, the Senate Banking Subcommittee for Securities, Insurance, and Investment held a hearing on a wide range of important market structure issues. At the hearing, Mr. James Brigagliano, co-acting director of the Division of Trading and Markets, testified that the Commission intends to do a "deep dive" into high-frequency trading issues due to concerns that some high-frequency programs may enable possible front-running and manipulation.

Mr. Brigagliano's testimony about his concerns was troubling:

> . . . if there are traders taking position and then generating momentum through high frequency trading that would benefit those positions, that could be manipulation which would concern us. If there was momentum trading designed—or that actually exacerbated intra-day volatility—that might concern us because it could cause investors to get a worse price. And the other item I mentioned was if there were liquidity detection strategies that enabled high frequency traders to front-run pension funds and mutual funds, that also would concern us.

Reinforcing the case for quick action, several panelists acknowledged that it is a daily occurrence for dark pools to exclude certain possible high-frequency manipulators. For example, Robert Gasser, president and CEO of Investment Technology Group, asserted that surveillance is a "big challenge" and that improving market surveillance must be a regulatory priority.

He said:

> I can tell you that there are some frictional trades going on out there that clearly look as if they are testing the boundaries of liquidity provision versus market manipulation.

But none of the panelists, when asked, felt responsible to report any of their suspicions of manipulative activity to the SEC. That is up to the regulators and their surveillance to stop, they believe.

Finally, at the end of the hearing, Subcommittee Chairman REED asked about the reported arrest of a Goldman Sachs employee who allegedly had stolen code from Goldman used for their high-frequency trading programs.

A Federal prosecutor, arguing that the judge should set a high bail, said he had been told that with this software, there was the danger that a knowledgeable person could manipulate the markets in unfair ways.

The SEC has said it intends to issue a concept release to launch a study of high-frequency trading. According to news reports, this will happen next year. I do not believe next year is soon enough. We need the SEC to begin its study immediately. Where is the sense of urgency?

Our stock markets are also opaque. Again, I refer to Chairman Ketchum's speech:

> There are impediments to regulatory effectiveness that are not terribly well understood and potentially damaging to the integrity of the markets.

He went on to say:

> We need more information on the entities that move markets—the high frequency traders and hedge funds that are not registered. Right now, we are looking through a translucent veil, and only seeing the registered firms, and that gives us an incomplete—if not inaccurate—picture of the markets.

Senator SCHUMER echoed this theme at last week's hearing. He said:

> Market surveillance should be consolidated across all trading venues to eliminate the information gaps and coordination problems that make surveillance across all the markets virtually impossible today.

Let me repeat: '' . . . market surveillance across all the markets virtually impossible today.'' I totally agree with that, and none of the industry witnesses disagreed with Senator SCHUMER. That is why the SEC must not let months go by without taking meaningful action. We need the Commission to report now on what it should be doing sooner to discover and stop any such high-frequency manipulation.

Where is the sense of urgency?

We must also act urgently because high-frequency trading poses a systemic risk. Both industry experts and SEC Commissioners have recognized this threat. One industry expert has warned about high-frequency malfunctions:

> The next LongTerm Capital meltdown would happen—

And get this—

> in a five-minute time period . . .

''The next LongTerm Capital meltdown would happen in a five-minute time period.''

> At 1,000 shares per order and an average price of $20 per share, $2.4 billion of improper trades could be executed in [a] short timeframe.

This is a real problem. We have unregulated entities—hedge funds—using high-frequency trading programs, interacting directly with the exchanges.

As Chairman REED said at last week's hearing, nothing requires that these people even be located within the United States. Known as ''sponsored access,'' hedge funds use the name of a broker-dealer to gain direct trading access to the exchange but do not have to comply with any of the broker-dealer rules or risk checks.

SEC Commissioner Elisse Walter has recognized this threat:

> [Sponsored access] presents a variety of unique risks and concerns, particularly when trading firms have unfiltered access to the markets. These risks could affect several market participants and potentially threaten the stability of the markets.

Let me repeat that:

> These risks could affect several marketing participants and potentially threaten the stability of the markets.

This is from a member of the SEC. Even those on Wall Street responsible for overseeing their firms' high-frequency programs are not up to speed on the risks involved, according to a recent study conducted by 7city Learning. In a survey of quantitative analysts who design and implement high-frequency trading algorithms, two-thirds asserted their supervisors ''do not understand the work they do.''

And though the quants and risk managers played a central role exacerbating last year's financial crisis, 86 percent of those surveyed indicated their supervisor's ''level of understanding of the job of a quant is the same or worse than it was a year ago,'' and 70 percent said the same thing about their institutions as a whole.

I agree with the market expert and 7city director Paul Wilmott who said:

> These numbers are alarming. They indicate that even with the events of the past year, financial institutions are still not taking the importance of financial education seriously.

Let me repeat that.

> . . . They indicate that even with the events of the past year, financial institutions are still not taking the importance of financial education seriously.

Where is the urgency? Time is of the essence. We must act now.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. I thank the Chair.

(The remarks of Mr. SPECTER pertaining to the submission of S. Res. 339 are printed in today's RECORD under ''Submission of Concurrent and Senate Resolutions.'')

Mr. SPECTER. I thank the Chair, and I yield the floor.

Ms. MIKULSKI. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BROWN). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Ms. MIKULSKI. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

Ms. MIKULSKI. Mr. President, our colleague from Pennsylvania, Senator SPECTER, just gave an eloquent speech on why the Supreme Court should be televised and how it would provide greater openness and transparency were decisions being made in the public's eye. I think that argument was very interesting. But there is one institution that is absolutely on television already, and that is the Congress of the United States. Through C–SPAN, what goes on in this Chamber and often in the committee rooms goes out all over America. We get phone calls, in many instances, from the C–SPAN watchers. I think it is an outstanding tool.

Someone watching what is going on all day would wonder: What are they doing? We have kind of lost sight, given some of the amendments that were offered, of just what is the pending business on the floor of the Senate today. As the person who chairs the Appropriations Subcommittee on Commerce, Justice and Science, I would like to remind the American people watching, and my colleagues, what is the pending business.

The pending business is how should we best fund those important agencies at the Commerce Department that promote trade and scientific innovation; also the Justice Department, rendering impartial justice, enforcing the laws that are on the books; to important science agencies, such as the American space program. What the appropriations bill does is it determines what goes in the Federal checkbook to fund these programs.

I am very proud of the way we, in our subcommittee, have worked on a bipartisan basis to bring a bill to the Senate floor that we believe reflects national priorities. I have worked hand in hand with my ranking member, the Republican Senator from Alabama, Mr. SHELBY, and we wrote good legislation.

What do we like about it? First of all, what we like about it is that we want to promote innovation and competition in our society. We are in a terrible economic mess. Our economy is rocking and rolling. The fact is, we still do not have jobs. What about these jobs? What do we do? I want to talk about the role of the Commerce Department in coming up with new ideas, making sure we have innovation from the government. Innovation is important because it is the new ideas that create the new products that create the new jobs.

I note the Presiding Officer is from the State of Ohio. There, as in my State, manufacturing has been very hard hit. Many of the traditional ways of life are not there. We have to look ahead to what is promoting innovation-friendly government. Right there in the Commerce Department is the Bureau of Industry and Security, which makes sure we are able to provide exports of our technology. We have the Patent and Trademark Office, which is guardian of our intellectual property around the world. It protects ideas and those who come up with inventions as private property, the hallmark of capitalism—the ability to own private

property and benefit from the fruits of your labor in an open and competitive marketplace. We would fund that.

When you come up with new products, you also have to have standards so a yardstick is the same in the United States as in any other country—or the metric system. What the National Institute of Standards does is it sets standards for products that will enable the private sector to compete among themselves and around the world. I am proud of them. They are located in Maryland, but even if they were located in Utah or Wyoming I would be proud of them because it is there that they set the standards which help set the pace for America to compete.

Much is said about our arms race, but one of the races we have been in is the race for America's future. One of the agencies that is the greatest inventor of technology has been the National Space Agency. We have all been thrilled to watch our astronauts go into space. Many of us, particularly this summer, were excited about the bold and courageous astronauts because they were able to retrofit Hubble with new batteries and a new camera so we could do the scientific work needed to send Hubble on its final journey. It is at the National Space Agency, though, that so much invention of new technology occurs.

As someone who has spoken out so much for women's health, and also the desire to prevent breast cancer, one of the things I am proud of is out of NASA's x-ray technology we have been able to develop other products for the civilian population, such as digital mammography.

A few months ago I broke my ankle and then wore a boot that looked like a space boot. It looked like a space boot because it maybe was—well, not mine. I would love to wear a space boot worn by Sally Ride or one of the great women astronauts. But the fact is, it is because of the technology that was developed to protect our astronauts that we now know how to protect us on Earth. This is what we are talking about.

Should we fund these agencies? Should we be able to make public investments that lead to private sector jobs? While we are fighting over should we have this prisoner over at Gitmo or other kinds of provocative social questions, we have a duty to promote those agencies that promote private sector jobs.

The other area I am very proud of in this bill is our support of law enforcement. Yes, we support Federal law enforcement, our FBI, our Marshal Service, as well as our Bureau of Alcohol, Tobacco, Firearms and Explosives. But I am also proud that we support that thin blue line of local law enforcement. For many of our communities, mayors and county executives are stretched to the limit. Sometimes people who commit crimes are better armed and have the latest technology, more than our cops on the beat. Through a program called the Byrne grants they are able to apply for Federal funds to be able to modernize themselves.

We don't want to hold up the funding. We want this bill to go ahead. We want things to happen. That is what this bill is. We have worked hard. Senator SHELBY and I held hearings, we held meetings, we met with local law enforcement.

We took the time to meet with people who have been victims, battered women. We fund the Violence Against Women Act. Do you know, since JOE BIDEN created that program, over 1 million people have called on the hotline; that we have protected over 1 million women from being abused and maybe even facing violence of such a degree that it threatened their lives?

This is not only about spending. These are about public investments that protect our communities and protect American jobs. I hope my colleagues will come and agree to complete discussion on their amendments so we can complete votes and bring this to a close so we can go to a conference with the House.

I note the Senator from Louisiana is on the Senate floor. I want to single her out, as they say in the colloquial: Do a shout-out. The Senator is well known for her work on adoption, and I salute her for that. Also, international adoption, making sure the laws are made and making sure, as people seek international adoption, there is not the exploitation of those children. We work with that in our bill. We also make sure we protect missing and exploited children in their own country.

You know, we see horrific, ghoulish, and grisly things done to young people who have been picked up. But thanks to the Adam Walsh Act, the Missing Children and Exploitation Act, we are stopping that. We have tough laws now against sexual predators and a way to keep them off the streets and to keep them registered. We have the money in the Federal checkbook to do that.

I really like this subcommittee because it does protect American jobs. It does protect American communities. It does protect the American people. I hope that today we can conclude our debate on the five pending amendments, move to a vote and try to get our country and our economy back again.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. I ask unanimous consent that the Senator from Louisiana be recognized for 3 minutes and then I follow with the 30 minutes I had allotted.

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

Ms. LANDRIEU. Mr. President, I appreciate the comments from our leader, Senator MIKULSKI from Maryland, who does a magnificent job as a member of the Appropriations Committee, and particularly in this area she feels passionate about. I look forward to continuing to work with her in all sorts of criminal justice areas, particularly as it relates to the protection of children. I thank her for those comments.

I thank the Senator for giving me a chance to speak very briefly, to do two things: one, to give a statement on an amendment that was proposed on this bill by Senator VITTER, that related to adding a question to the Census. I have submitted a letter on this to him personally.

Senator VITTER contends that the founding fathers only believed that citizens should be counted by Census officials for the purposes of congressional apportionment.

He argues that the inclusion of noncitizens in the census will result in Louisiana losing a congressional seat since the population of States like California and Texas could be inflated by millions of illegal immigrants, making their population growth relatively greater than ours.

Should noncitizens be included in the calculation that determines the allocation of seats in the House of Representatives? I believe that the answer is no.

But merely adding a question to the Census will not fix that. That change requires an amendment to the Constitution, which states: ''Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State''.

I think that the Constitution is clear. But my staff has checked with the Nation's foremost constitutional scholars at Yale, Stanford, and UCLA to name a few. They have checked with scholars from the political right and scholars from the political left. So far, every single scholar agrees: If you want to exclude noncitizens you must amend the Constitution.

Professor Eugene Volokh, a well-regarded constitutional law scholar at UCLA, and a staunch conservative, has written publicly that the notion would be unconstitutional.

Were the founders wrong to create the formula for congressional apportionment in that way? That is a very serious question for all 50 States, but it is far from the most important challenge confronting Louisiana today.

The fact is that if Louisiana does not bolster law enforcement, our communities will not be safe enough to attract new residents. If we do not improve our failing public schools, families will not want to call Louisiana home, and businesses would not have the employment base that will grow our economy.

The truth is that our State has seen more outward migration than any other in the Union. Only Louisiana and North Dakota lost population this decade, and Louisiana's population was reduced by a much higher degree.

Illegal immigration is a very serious problem. but it is not responsible for Louisiana's loss of representation. Andrew Beveridge, a sociologist at Queens

College and the Graduate Center of the City University of New york, has shown that even if all illegal immigrants were excluded, Louisiana would still lose a seat.

Here is our real problem: Decades of stagnant economic growth drove many Louisianians elsewhere, and that was before Hurricanes Katrina, Rita, Gustav and Ike severely impacted our populous coastal communities.

Demonstrating that Louisiana means business when it comes to reforming our schools and our police departments and our basic infrastructure takes serious work. That is the work that I engage in every day.

Blaming immigrants for our problems does not take much effort, but it will not make our State a better place to live either.

Secondly, quickly, since Puerto Rico does not have a Senator, as it is still a territory and not a State, I wanted to take the opportunity to express to the people of Puerto Rico our sadness about a terrible explosion that happened recently, on October 24. It occurred at one of their major refineries.

This came to my attention for two reasons. One, we also have a lot of refineries in Louisiana, so we are sensitive that accidents such as this can happen, but also as the Chair of the Subcommittee on Disaster Response, I wanted to talk a minute about this. The fire burned for 24 hours. It destroyed 22 of the 40 storage tanks. Thankfully and amazingly, no one was killed.

I come to the floor to congratulate the local officials, the Governor, the FEMA representatives, the law enforcement that responded to this horrific disaster. Some 1,500 people were evacuated, 596 people were sheltered outside of the impacted area. There were 130 firefighters and National Guard troops who worked to bring the inferno under control. The good news is that they did.

The purpose of this comment for the RECORD is to say that training and preparedness help. The Members of this body, both Democrats and Republicans, supported additional funding in last year's bill for FEMA for local training. Congress recognized the importance of training. Since 2007 we have appropriated over $250 million each year in grants. The post-Katrina emergency management reform gave FEMA regional administrators specific responsibility for coordinating that training.

I am encouraged that FEMA seems to have learned some of the lessons from Hurricane Katrina and also from September 11, which is now several years behind us, but nonetheless still on our minds. So I wanted to say that training, the appropriate amount of investment in training, works. Again, no one was killed.

I want to give credit to FEMA and the Governor of Puerto Rico, Luis Fortuño, for their quick action in keeping people safe, in responding to this situation. Hopefully we will continue to refine our processes, make our disaster response even better for disasters such as this. For hurricanes, for earthquakes, or for anything else that comes our way, we will be ready and able to respond.

I yield the floor and I thank the Senator from Oklahoma for being gracious with his time.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I am going to spend about 20 minutes talking about amendments I have that are germane and we will be voting on. But they are small amendments. There is nothing big here. They are amendments that are designed to make a point.

We ran, by a factor of two, the largest deficit in the history of this country. Of the money we spent in the 2009 fiscal year, we borrowed 43 percent of it: 43 cents out of every dollar we expended, 43 cents we borrowed from our children and our grandchildren.

We have before us a bill, the Commerce-Justice-Science bill, that will go up almost 13 percent, 12.6 percent this year, on the back of a 15.5-percent increase last year. The latest inflation numbers are deflation, a minus four-tenths of 1 percent.

The question America has to ask itself, after we pass $800 billion of stimulus spending for which this agency got billions which are not reflected in any of these increases, is how is it that when we can spend $1.4 trillion we do not have, we can come to the floor and continue to have double-digit increases in almost everything we pass?

It does not take a lot of math to figure out that if we keep doing what we are doing, in 4½ years the size of the Federal Government doubles. If you do this for another 4 years, we will double the size of the Federal Government. So there is absolutely no fiscal restraint within the appropriations bills that are going through this body with the exception of one, and that is the Defense Department, probably the one that is most important to us in terms of our national security, in terms of where there is no question we have waste but where we need to make sure that we are prepared for the challenges that face us.

If you look at what we passed through the body, and you look at 2008, 2009, you go 10, 9.9, 9.4, 13.0, 13.3, 14.1, 15.7—that was last year—and now we are going to go 5.7, 7.2, 1.4, 12.6, 22.5, 16.2, and 12.6.

Not only are we on an unsustainable course as far as mandatory programs such as Social Security and Medicare—by the way, we have now borrowed from Social Security, stolen from Social Security, $2.4 trillion which we do not even recognize we owe. We do not put it on our balance sheet. We have stolen $758 billion from the Medicare trust fund, which we do not even recognize. So we borrowed $3 trillion from funds that were supposed to be there for our seniors and our retirees which our children—not us; our children and our grandchildren—will have to repay.

I saw this the other day on the Internet. It speaks a million words to me. Here is a little girl, a toddler with a pacifier in her mouth. She has got a sign hanging around her neck. She says: I am already $38,375 in debt and I only own a doll house.

The problem with that is that she way understates what she is in debt for. That is just the recognized external debt. That does not count what we borrowed internally from our grandchildren. It does not count the unfunded liabilities she through her lifetime will never get any benefit from but will pay because we have stolen the benefit for us, without being good stewards of the money that has been given to us.

If you go through this and you look at it, by the time she is 40, she will be responsible for the $1,119,000 worth of debt we have accumulated for payments for Medicare, Social Security, and Medicaid that she got absolutely zero benefit from.

Then if you think about a $1 million debt for a little girl like this and what it costs, what the interest is to fund that debt, if you just said 6 percent, she has got to make $60,000 first to pay the interest on that debt before she pays any taxes, her share of the taxes, and before she has the capability to have a home and have children and have a college education, own a car. We are absolutely, with bills such as this, strangling her. We are strangling her.

I am reminded what one of our Founders said, and it is so important. I love the Senator from Maryland. She said we had plenty of money in the checkbook to do this. We do not have plenty of money in the checkbook to do this. What we have is an unlimited credit card that we keep putting into the machine and saying, we will take the money and our kids will pay later. That is what we are doing.

Thomas Jefferson said, ''I predict future happiness for Americans if they can prevent the government from wasting the labors of the people under the pretense of taking care of them.''

When we are seeing 12.6 and 15 percent increases in the nonmandatory side, the non-Social Security, the non-Medicare, the non-Medicaid side of the budget, we have fallen into the trap Thomas Jefferson was worried about.

I know my colleagues are sick of me talking about this. But you know what, the American people are not sick of us talking about it. They get it. They realize that we refuse to make hard choices. Every one of them is making hard choices today with their families about their future based on their income. Yet we have the gall to bring to the floor double-digit spending at a time when people, 10 percent of Americans, are out of work, seeking work, another 5 percent have given up, and we are saying, that is fine if we have a 12-percent increase. It is fine. No problem. There is plenty of money in the checking account.

There is no money in the checking account. We are perilously close to having our foreign policy dictated to us by those who own our bonds, people outside of this country. The time to start changing that is now.

I have two little amendments, and one is very instructive. The political science community is hot and bothered because I would dare to say that maybe in a time of $1.4 trillion deficits, maybe at a time when we have 10 percent unemployment, maybe at a time when we are at the worst financial condition we have ever been in our country's history, maybe we ought not spend money asking the questions why politicians give vague answers, or how we can do tele-townhall meetings and raise our numbers. Maybe we ought not to spend this money on those kinds of things right now.

You see, it is instructive because those who are getting from the Federal Government now do not care about their grandchildren. What they want is what they are getting now. Give me now; it doesn't matter what happens to the rest of the generations that follow us.

So we have the political science community all in an uproar, not because I am against the study of political science but because I think now is not the time to spend money on that. Now is the time to spend money we absolutely have to spend, on things which are absolute necessities, as every family in America is making those decisions today. We do not have the courage to do it because it offends individual interest groups that are getting money from the Federal Government for a priority that is much less than the defense of this country, protecting people, securing the future, taking care of their health care, and making sure we have law and order.

You see, Alexander Tyler warned of this as he studied why republics fail. He said, ''All republics fail.'' They fail because when people learn they can vote themselves money from the public treasury, all of the other priorities go out the window. They become totally self-focused, self-centered on what is in it for them, with no long-range vision, only parochial vision, no vision for the country as a whole, but only what is good for them. It is called self-centeredness. It is called selfishness. And we perpetuate it in this body by bringing bills to the floor that are resistant to amendments that say: Maybe this is not a priority right now.

I would bet if you polled the American public and said, we are going to run another $1.4 trillion deficit this year, we probably would not want to spend $12 million telling politicians how to stay elected. We probably would not.

The fact is, it is major universities that get this small amount of money are in debt in excess of $50 billion.

They have plenty of money to fund this if they wanted, but they don't do it because they are getting from the person who is out of work. They are getting from the person who didn't get that job because the economy is on its back, because we are borrowing $1.4 trillion and competing with the capital that is required to create a job. It is just a small amount of money. It by itself won't make any difference. But supporting this amendment will build on confidence with the American people that says, he is right, we ought to be about priorities.

We ought to be about doing what is most important first and cutting out what is least important because the times call for discipline so we don't further hamstring the generation of children to which this young lady belongs. If you take $5 or $6 million and do it once, pretty soon, if you have done it 10 times, you have $60 million. You do it another 10 times, you have $600 million. Pretty soon, we have billions of dollars we are not spending because it is low priority and we are not borrowing it against our children. All of a sudden, the value of the dollar starts to rise. Confidence around the world in the dollar starts increasing. Competition for capital by the Federal Government competing in the private sector for the capital goes down. The cost of capital goes down. Credit flows and job opportunities are created. We don't connect that because we have always done it that way. We have a budget allocation. As long as we are under that budget allocation, everything is fine.

Where is the leadership in our country today that says we are going to model a leadership that we know the American people expect of us—make hard choices, take the heat to eliminate things that are lower priority so that we can preserve the priority of this child and those of her generation? The fact is, that leadership is nonexistent. There is no reason for anyone to doubt why confidence in the Congress is at alltime lows. We are not realists. We are not listening.

The message out there, the No. 1 concern with fear isn't health care; it is economic. Am I going to have a job tomorrow? Am I going to be able to pay my bills? Will I be able to pay my mortgage? There are thousands of items in every appropriations bill just like this one, just like that amendment that we could eliminate tomorrow. It might create some small hardship but nothing compared to the hardship we are transferring to the following generation.

I have no doubt of the outcome of the votes on my amendments. I understand we are a resistant, recalcitrant body that refuses to recognize the will and direction of the American people in terms of commonsense priorities. I understand that. But what we must understand is, they are awake now, they are listening, and they are watching. It is time to respond to the desires of the American people and stop responding to the special interests of those who are getting money from the Federal Government that are low priority in terms of what really counts and really matters for our future.

I have one other amendment we will be voting on that transfers money to increase the money at the inspector general. It will not slow down the conversion of the Hoover Building at all. We have been told that. But it will help to make good government.

Part of our problem in government is about 10 percent of everything we do is pure waste, pure fraud, or pure duplication. If we are going to invest dollars in something, we ought to invest in the transparency and accountability mechanisms we have already set up.

I find myself encouraged by the attitude of the American people, yet discouraged by the attitude of my colleagues. Nobody wants to take and make the hard choices, the hard choices that say we are going to get heat if we start prioritizing. The easiest is to do nothing. The easiest is to continue to let the programs run whether they are high priority or not. That is easy. But America is having a rumble right now. The ground is shaking. The American people are paying attention. They are going to watch votes just like this one. Then we are going to be called to account as to, why won't you make priority choices, why won't you take the heat.

If there ought to be any political science study done, it is, why are Members of Congress such cowards? That is the thing we ought to study. We ought to study why we refuse to do the right thing because it puts our job at risk. We ought to be doing the right thing when it does put our job at risk and when it doesn't.

I will finish up by reminding us of what our oath is. Our oath never mentions our State. Our oath never mentions our special interest. Our oath never mentions our campaign contributors. What our oath mentions is that we are Senators of the United States—not from Oklahoma, not from Delaware, not from Maryland, not from Ohio. We are Senators of the United States; we just happen to be from those places. Our oath is to the long-term best interest of the country, never a parochial interest.

As you go through these bills, what you see are parochial interests trumping the long-term best interests of the country. That is not to demean the fine job the Senator from Maryland has done. She came in with the number that was given her. There is no question that she probably made some tough choices as she did that. But we haven't made enough. This kind of increase in this kind of bill is absurd. It is obscene. It is obscene at a time when the average family's income is declining, their ability to have the freedom to make choices, relaxed choices about what they do versus very stern choices about what is a necessity. We have not gotten the message.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

AMENDMENT NO. 2669

Mr. LIEBERMAN. I thank the Chair.

Mr. President, I rise to speak on behalf of amendment No. 2669 that has been offered by Senator GRAHAM, with Senators WEBB, MCCAIN, and myself as cosponsors. It is a pending amendment.

The purpose of this amendment is quite straightforward. It would prevent the use of any funds made available to the Department of Justice by this appropriations bill from being used to prosecute any individual suspected of involvement in the 9/11/01 attacks against the United States in an article III court—that means essentially a regular Federal court created pursuant to article III of our Constitution.

Why would we feel we need to do such a thing? It is because the current protocol governing the disposition of cases referred for possible prosecution of detainees currently held at Guantanamo Bay, Cuba, the current protocol of the U.S. Department of Justice governing the referral of these detainees from Guantanamo Bay, says as follows:

No. 2, Factors for Determination of Prosecution. There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court in keeping with traditional principles of federal prosecution.

It is because we who are sponsoring this amendment think there is a fundamental error of judgment—in fact, in its way, an act of injustice—that these individuals, suspected terrorists being held at Guantanamo Bay, Cuba, suspected in this case, according to our amendment, of having been involved in the attacks of 9/11 on the United States which resulted in the deaths of almost 3,000 people, that these individuals would be tried in a regular U.S. Federal court as if they were accused of violating our criminal laws. They are not common criminals or uncommon criminals; they are suspected of being war criminals. As such, they should not be brought to prosecution in a traditional Federal court along with other accused criminals.

Citizens of the United States have all the right to the protections of our Constitution in the Federal courts, article III courts of the United States. These are suspected terrorist war criminals who are not entitled to all the protections of our Constitution and whose prosecution should not be confused with a normal criminal law prosecution. They are war criminals. They ought to be tried according to all the rules that prevail for war criminals, including, of course, the Geneva Conventions.

This Congress has established a tradition and improved in recent times a system of military commissions, a system adopted by both Houses of Congress, signed into law by the President, which provides standards of due process and fairness in the trial of suspected war criminals, not just in compliance with the Geneva Conventions and the Supreme Court of the United States but well above the standards that have been required by both the Supreme Court and the Geneva Conventions.

Those who are accused of committing the heinous, cowardly acts of intentionally targeting unsuspecting, defenseless civilians in an act of war as part of a larger declared war of Islamic extremists against, frankly, anybody who is not like them—the most numerous victims of these Islamic terrorists around the world are fellow Muslims who don't agree with their extremism. They have killed many people of other religions. When they struck us in the United States on 9/11, they killed an extraordinary classically American diverse group of people. The only reason they were targeted was that they were in the United States. The terrorists, these people who are suspected of being terrorists participating in and aiding the attacks of 9/11, are war criminals, not common criminals. They should, therefore, be tried by a military commission system, which goes back as long as the Revolutionary War in the United States. There is a proud and fair tradition. We have upgraded and strengthened all the due process and legal protections of them after 9/11. So why would we take these war criminals, suspected war criminals, and bring them into the criminal courts of the United States and give them the rights of the Constitution. I don't understand.

Every Member of the Senate received a letter today from quite a large number of families of the victims of 9/11, 140-plus at last writing. I want to read briefly from the letter. The letter is in support of the amendment Senators GRAHAM, WEBB, MCCAIN, and I have offered.

The American people were rightly outraged by this act of war. Whether the cause was retribution or simple recognition of our common humanity, the words ''Never Forget'' were invoked in tearful or angry rectitude, defiantly written in the dust of Ground Zero or humbly penned on makeshift memorials all across this land.

The country was united in its determination that these acts should not go unmarked and unpunished.

Eight long years have passed since that dark and terrible day.

Remember, Mr. President, this is written by people who lost dear ones on 9/11.

They continue:

Sadly, some have forgotten the promises we made to those whose lives were taken in such a cruel and vicious manner.

We have not forgotten. We are the husbands and wives, mothers and fathers, sons, daughters, sisters, brothers and other family members of the victims of these depraved and barbaric attacks, and we feel a profound obligation to ensure that justice is done on their behalf.

They continue:

It is incomprehensible to us that Members of the United States Congress would propose that the same men who today refer to the murder of our loved ones as a ''blessed day'' and who targeted the United States Capitol for the same kind of destruction that was wrought in New York, Virginia and Pennsylvania, should be the beneficiaries of a social compact of which they are not a part, do not recognize, and which they seek to destroy: the United States Constitution.

So they say:

We adamantly oppose prosecuting the 9/11 conspirators in Article III courts, which would provide them with the very rights that may make it possible for them to escape the justice which they so richly deserve. We believe that military commissions . . . are the appropriate legal forum for the individuals who declared war on America.

Mr. President, I know there will be further debate on this amendment, but I ask my colleagues to join in this. We are doing it not just because of the protocol I cited at the beginning but because of stories that are emanating that perhaps as early as next week, the Department of Justice will announce they are going to bring Khalid Shaikh Mohammed, the man who planned the 9/11 attacks, who is in our custody, to trial in a Federal court. This man is, from all that I know, one of the devils of history, an evil man who wrought terrible destruction and suffering on our country, and he ought to be given due process, but he ought to be given due process in a forum reserved for suspected war criminals, and that is the military commissions.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The senior Senator from Arizona is recognized.

Mr. MCCAIN. Mr. President, I thank my friend and colleague, Senator LIEBERMAN. Along with Senator GRAHAM and Senator WEBB, we are strongly supporting this amendment.

Senator LIEBERMAN made reference to a letter that has currently been signed by 214 9/11 family members. Mr. President, I ask unanimous consent that this letter be printed in the RECORD, along with an article from the Wall Street Journal dated October 19, 2009, entitled ''Civilian Courts Are No Place To Try Terrorists'' by Michael B. Mukasey, the former Attorney General of the United States of America.

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

NOVEMBER 5, 2009.

U.S. SENATE,
The U.S. Capitol,
Washington, DC.

DEAR SENATORS: On September 11, 2001, the entire world watched as 19 men hijacked four commercial airliners, attacking passengers and killing crew members, and then turned the fully-fueled planes into missiles, flying them into the World Trade Center twin towers, the Pentagon and a field in Shanksville, Pennsylvania. 3,000 of our fellow human beings died in two hours. The nation's commercial aviation system ground to a halt. Lower Manhattan was turned into a war zone, shutting down the New York Stock Exchange for days and causing tens of thousands of residents and workers to be displaced. In nine months, an estimated 50,000 rescue and recovery workers willingly exposed themselves to toxic conditions to dig out the ravaged remains of their fellow citizens buried in 1.8 million tons of twisted steel and concrete.

The American people were rightly outraged by this act of war. Whether the cause was retribution or simple recognition of our

common humanity, the words ''Never Forget'' were invoked in tearful or angry rectitude, defiantly written in the dust of Ground Zero or humbly penned on makeshift memorials erected all across the land. The country was united in its determination that these acts should not go unmarked and unpunished.

Eight long years have passed since that dark and terrible day. Sadly, some have forgotten the promises we made to those whose lives were taken in such a cruel and vicious manner.

We have not forgotten. We are the husbands and wives, mothers and fathers, sons, daughters, sisters, brothers and other family members of the victims of these depraved and barbaric attacks, and we feel a profound obligation to ensure that justice is done on their behalf. It is incomprehensible to us that members of the United States Congress would propose that the same men who today refer to the murder of our loved ones as a ''blessed day'' and who targeted the United States Capitol for the same kind of destruction that was wrought in New York, Virginia and Pennsylvania, should be the beneficiaries of a social compact of which they are not a part, do not recognize, and which they seek to destroy: the United States Constitution.

We adamantly oppose prosecuting the 9/11 conspirators in Article III courts, which would provide them with the very rights that may make it possible for them to escape the justice which they so richly deserve. We believe that military commissions, which have a long and honorable history in this country dating back to the Revolutionary War, are the appropriate legal forum for the individuals who declared war on America. With utter disdain for all norms of decency and humanity, and in defiance of the laws of warfare accepted by all civilized nations, these individuals targeted tens of thousands of civilian non-combatants, brutally killing 3,000 men, women and children, injuring thousands more, and terrorizing millions.

We support Senate Amendment 2669 (pursuant to H.R. 2847, the Commerce, Justice, Science Appropriations Act of 2010), ''prohibiting the use of funds for the prosecution in Article III courts of the United States of individuals involved in the September 11, 2001 terrorist attacks.'' We urge its passage by all those members of the United States Senate who stood on the senate floor eight years ago and declared that the perpetrators of these attacks would answer to the American people. The American people will not understand why those same senators now vote to allow our cherished federal courts to be manipulated and used as a stage by the ''mastermind of 9/11'' and his co-conspirators to condemn this nation and rally their fellow terrorists the world over. As one New York City police detective, who lost 60 fellow officers on 9/11, told members of the Department of Justice's Detainee Policy Task Force at a meeting last June, ''You people are out of touch. You need to hear the locker room conversations of the people who patrol your streets and fight your wars.''

The President of the United States has stated that military commissions, promulgated by congressional legislation and recently reformed with even greater protections for defendants, are a legal and appropriate forum to try individuals captured pursuant the 2001 Authorization for the Use of Military Force Act, passed by Congress in response to the attack on America. Nevertheless, on May 21, 2009, President Obama announced a new policy that Al-Qaeda terrorists should be tried in Article III courts ''whenever feasible.''

We strongly object to the President creating a two-tier system of justice for terrorists in which those responsible for the death of thousands on 9/11 will be treated as common criminals and afforded the kind of platinum due process accorded American citizens, yet members of Al Qaeda who aspire to kill Americans but who do not yet have blood on their hands, will be treated as war criminals. The President offers no explanation or justification for this contradiction, even as he readily acknowledges that the 9/11 conspirators, now designated ''unprivileged enemy belligerents,'' are appropriately accused of war crimes. We believe that this two-tier system, in which war criminals receive more due process protections than would-be war criminals, will be mocked and rejected in the court of world opinion as an ill-conceived contrivance aimed, not at justice, but at the appearance of moral authority.

The public has a right to know that prosecuting the 9/11 conspirators in federal courts will result in a plethora of legal and procedural problems that will severely limit or even jeopardize the successful prosecution of their cases. Ordinary criminal trials do not allow for the exigencies associated with combatants captured in war, in which evidence is not collected with CSI-type chain-of-custody standards. None of the 9/11 conspirators were given the Miranda warnings mandated in Article III courts. Prosecutors contend that the lengthy, self-incriminating tutorials Khalid Sheikh Mohammed and others gave to CIA interrogators about 9/11 and other terrorist operations—called ''pivotal for the war against Al-Qaeda'' in a recently released, declassified 2005 CIA report—may be excluded in federal trials. Further, unlike military commissions, all of the 9/11 cases will be vulnerable in federal court to defense motions that their prosecutions violate the Speedy Trial Act. Indeed, the judge presiding in the case of Ahmed Ghailani, accused of participating in the 1998 bombing of the American Embassy in Kenya, killing 212 people, has asked for that issue to be briefed by the defense. Ghailani was indicted in 1998, captured in Pakistan in 2004, and held at Guantanamo Bay until 2009.

Additionally, federal rules risk that classified evidence protected in military commissions would be exposed in criminal trials, revealing intelligence sources and methods and compromising foreign partners, who will be unwilling to join with the United States in future secret or covert operations if doing so will risk exposure in the dangerous and hostile communities where they operate. This poses a clear and present danger to the public. The safety and security of the American people is the President's and Congress's highest duty.

Former Attorney General Michael Mukasey recently wrote in the Wall Street Journal that ''the challenges of terrorism trials are overwhelming.'' Mr. Mukasey, formerly a federal judge in the Southern District of New York, presided over the multi-defendant terrorism prosecution of Sheikh Omar Abel Rahman, the cell that attacked the World Trade Center in 1993 and conspired to attack other New York landmarks. In addition to the evidentiary problems cited above, he expressed concern about courthouse and jail facility security, the need for anonymous jurors to be escorted under armed guard, the enormous costs associated with the use of U.S. marshals necessarily deployed from other jurisdictions, and the danger to the community which, he says, will become a target for homegrown terrorist sympathizers or embedded Al Qaeda cells.

Finally, there is the sickening prospect of men like Khalid Sheikh Mohammed being brought to the federal courthouse in Lower Manhattan, or the courthouse in Alexandria, Virginia, just a few blocks away from the scene of carnage eight years ago, being given a Constitutionally mandated platform upon which he can mock his victims, exult in the suffering of their families, condemn the judge and his own lawyers, and rally his followers to continue jihad against the men and women of the U.S. military, fighting and dying in the sands of Iraq and the mountains of Afghanistan on behalf of us all.

There is no guarantee that Mr. Mohammed and his co-conspirators will plead guilty, as in the case of Zacarias Moussaoui, whose prosecution nevertheless took four years, and who is currently attempting to recant that plea. Their attorneys will be given wide latitude to mount a defense that turns the trial into a shameful circus aimed at vilifying agents of the CIA for alleged acts of ''torture,'' casting the American government and our valiant military as a force of evil instead of a force for good in places of the Muslim World where Al Qaeda and the Taliban are waging a brutal war against them and the local populations. For the families of those who died on September 11, the most obscene aspect of giving Constitutional protections to those who planned the attacks with the intent of inflicting maximum terror on their victims in the last moments of their lives will be the opportunities this affords defense lawyers to cast their clients as victims.

Khalid Sheikh Mohammed and his co-conspirators are asking to plead guilty, now, before a duly-constituted military commission. We respectfully ask members of Congress, why don't we let them?

Respectfully submitted,

(214 Family Members).

[From the Wall Street Journal, Oct. 19, 2009]

CIVILIAN COURTS ARE NO PLACE TO TRY TERRORISTS

(By Michael B. Mukasey)

The Obama administration has said it intends to try several of the prisoners now detained at Guantanamo Bay in civilian courts in this country. This would include Khalid Sheikh Mohammed, the mastermind of the Sept. 11, 2001 terrorist attacks, and other detainees allegedly involved. The Justice Department claims that our courts are well suited to the task.

Based on my experience trying such cases, and what I saw as attorney general, they aren't. That is not to say that civilian courts cannot ever handle terrorist prosecutions, but rather that their role in a war on terror—to use an unfashionably harsh phrase—should be, as the term ''war'' would suggest, a supporting and not a principal role.

The challenges of a terrorism trial are overwhelming. To maintain the security of the courthouse and the jail facilities where defendants are housed, deputy U.S. marshals must be recruited from other jurisdictions; jurors must be selected anonymously and escorted to and from the courthouse under armed guard; and judges who preside over such cases often need protection as well. All such measures burden an already overloaded justice system and interfere with the handling of other cases, both criminal and civil.

Moreover, there is every reason to believe that the places of both trial and confinement for such defendants would become attractive targets for others intent on creating mayhem, whether it be terrorists intent on inflicting casualties on the local population, or lawyers intent on filing waves of lawsuits over issues as diverse as whether those captured in combat must be charged with crimes or released, or the conditions of confinement for all prisoners, whether convicted or not.

Even after conviction, the issue is not whether a maximum-security prison can hold these defendants; of course it can. But

their presence even inside the walls, as proselytizers if nothing else, is itself a danger. The recent arrest of U.S. citizen Michael Finton, a convert to Islam proselytized in prison and charged with planning to blow up a building in Springfield, Ill., is only the latest example of that problem.

Moreover, the rules for conducting criminal trials in federal courts have been fashioned to prosecute conventional crimes by conventional criminals. Defendants are granted access to information relating to their case that might be useful in meeting the charges and shaping a defense, without regard to the wider impact such information might have. That can provide a cornucopia of valuable information to terrorists, both those in custody and those at large.

Thus, in the multidefendant terrorism prosecution of Sheik Omar Abdel Rahman and others that I presided over in 1995 in federal district court in Manhattan, the government was required to disclose, as it is routinely in conspiracy cases, the identity of all known co-conspirators, regardless of whether they are charged as defendants. One of those coconspirators, relatively obscure in 1995, was Osama bin Laden. It was later learned that soon after the government's disclosure the list of unindicted co-conspirators had made its way to bin Laden in Khartoum, Sudan, where he then resided. He was able to learn not only that the government was aware of him, but also who else the government was aware of.

It is not simply the disclosure of information under discovery rules that can be useful to terrorists. The testimony in a public trial, particularly under the probing of appropriately diligent defense counsel, can elicit evidence about means and methods of evidence collection that have nothing to do with the underlying issues in the case, but which can be used to press government witnesses to either disclose information they would prefer to keep confidential or make it appear that they are concealing facts. The alternative is to lengthen criminal trials beyond what is tolerable by vetting topics in closed sessions before they can be presented in open ones.

In June, Attorney General Eric Holder announced the transfer of Ahmed Ghailani to this country from Guantanamo. Mr. Ghailani was indicted in connection with the 1998 bombing of U.S. Embassies in Kenya and Tanzania. He was captured in 2004, after others had already been tried here for that bombing.

Mr. Ghailani was to be tried before a military commission for that and other war crimes committed afterward, but when the Obama administration elected to close Guantanamo, the existing indictment against Mr. Ghailani in New York apparently seemed to offer an attractive alternative. It may be as well that prosecuting Mr. Ghailani in an already pending case in New York was seen as an opportunity to illustrate how readily those at Guantanamo might be prosecuted in civilian courts. After all, as Mr. Holder said in his June announcement, four defendants were ''successfully prosecuted'' in that case.

It is certainly true that four defendants already were tried and sentenced in that case. But the proceedings were far from exemplary. The jury declined to impose the death penalty, which requires unanimity, when one juror disclosed at the end of the trial that he could not impose the death penalty—even though he had sworn previously that he could. Despite his disclosure, the juror was permitted to serve and render a verdict.

Mr. Holder failed to mention it, but there was also a fifth defendant in the case, Mamdouh Mahmud Salim. He never participated in the trial. Why? Because, before it began, in a foiled attempt to escape a maximum security prison, he sharpened a plastic comb into a weapon and drove it through the eye and into the brain of Louis Pepe, a 42-year-old Bureau of Prisons guard. Mr. Pepe was blinded in one eye and rendered nearly unable to speak.

Salim was prosecuted separately for that crime and found guilty of attempted murder. There are many words one might use to describe how these events unfolded; ''successfully'' is not among them.

The very length of Mr. Ghailani's detention prior to being brought here for prosecution presents difficult issues. The Speedy Trial Act requires that those charged be tried within a relatively short time after they are charged or captured, whichever comes last. Even if the pending charge against Mr. Ghailani is not dismissed for violation of that statute, he may well seek access to what the government knows of his activities after the embassy bombings, even if those activities are not charged in the pending indictment. Such disclosures could seriously compromise sources and methods of intelligence gathering.

Finally, the government (for undisclosed reasons) has chosen not to seek the death penalty against Mr. Ghailani, even though that penalty was sought, albeit unsuccessfully, against those who stood trial earlier. The embassy bombings killed more than 200 people.

Although the jury in the earlier case declined to sentence the defendants to death, that determination does not bind a future jury. However, when the government determines not to seek the death penalty against a defendant charged with complicity in the murder of hundreds, that potentially distorts every future capital case the government prosecutes. Put simply, once the government decides not to seek the death penalty against a defendant charged with mass murder, how can it justify seeking the death penalty against anyone charged with murder—however atrocious—on a smaller scale?

Even a successful prosecution of Mr. Ghailani, with none of the possible obstacles described earlier, would offer no example of how the cases against other Guantanamo detainees can be handled. The embassy bombing case was investigated for prosecution in a court, with all of the safeguards in handling evidence and securing witnesses that attend such a prosecution. By contrast, the charges against other detainees have not been so investigated.

It was anticipated that if those detainees were to be tried at all, it would be before a military commission where the touchstone for admissibility of evidence was simply relevance and apparent reliability. Thus, the circumstances of their capture on the battlefield could be described by affidavit if necessary, without bringing to court the particular soldier or unit that effected the capture, so long as the affidavit and surrounding circumstances appeared reliable. No such procedure would be permitted in an ordinary civilian court.

Moreover, it appears likely that certain charges could not be presented in a civilian court because the proof that would have to be offered could, if publicly disclosed, compromise sources and methods of intelligence gathering. The military commissions regimen established for use at Guantanamo was designed with such considerations in mind. It provided a way of handling classified information so as to make it available to a defendant's counsel while preserving confidentiality. The courtroom facility at Guantanamo was constructed, at a cost of millions of dollars, specifically to accommodate the handling of classified information and the heightened security needs of a trial of such defendants.

Nevertheless, critics of Guantanamo seem to believe that if we put our vaunted civilian justice system on display in these cases, then we will reap benefits in the coin of world opinion, and perhaps even in that part of the world that wishes us ill. Of course, we did just that after the first World Trade Center bombing, after the plot to blow up airliners over the Pacific, and after the embassy bombings in Kenya and Tanzania.

In return, we got the 9/11 attacks and the murder of nearly 3,000 innocents. True, this won us a great deal of goodwill abroad—people around the globe lined up for blocks outside our embassies to sign the condolence books. That is the kind of goodwill we can do without.

Mr. McCAIN. Mr. President, I urge my colleagues, who will be made aware of a letter from Mr. Holder and Secretary Gates, who are urging defeat of this amendment, to look at the views of the previous Attorney General of the United States, which are diametrically opposed.

The 9/11 families say—and I am sure they represent all of the 9/11 families—

> We adamantly oppose prosecuting the 9/11 conspirators in Article III courts, which would provide them with the very rights that may make it possible for them to escape the justice which they so richly deserve. We believe that military commissions, which have a long and honorable history in this country dating back to the Revolutionary War, are the appropriate legal forum for the individuals who declared war on America. With utter disdain for all norms of decency and humanity, and in defiance of the laws of warfare accepted by all civilized nations, these individuals targeted tens of thousands of civilian non-combatants, brutally killing 3,000 men, women and children, injuring thousands more, and terrorizing millions.

I would be glad to respond to a question from the Senator from Illinois.

Mr. DURBIN. Mr. President, I thank the Senator from Arizona. I would ask the Senator if he would be kind enough to ask unanimous consent that I could follow him, speaking after his remarks.

Mr. McCAIN. Mr. President, I ask unanimous consent that the Senator from Illinois follow me.

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

Mr. McCAIN. Mr. President, these are the 9/11 families. All Americans were impacted by 9/11, the 9/11 families in the most tragic fashion. This is a very strong letter from them concerning the strong desire that these 9/11 conspirators not be tried in article III courts but be tried according to the military commissions.

The 9/11 victims experienced an act of war against the United States, carried out not on some distant shore but in our communities on the very symbols of our national power. Because it involved attacks on innocent civilians and innocent civilian targets, it is a war crime. It is a war crime that was committed by the 9/11 terrorists. It is important that we call things what they are and not gloss over the essence of these events, even though they occurred 8 years ago.

In response to the attacks, the Congress quickly and overwhelmingly passed the Authorization for Use of

Military Force giving the President the authority to ''use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . . .'' The Senate passed this legislation unanimously.

The Authorization for Use of Military Force recognized the true nature of these attacks and committed the entire resources of the United States to our self-defense in light of the grave threat to our national security and foreign policy. The United States does not go to war over a domestic criminal act, nor should it. It was clearly understood at that time that far more was at stake. We sent our sons and daughters off to war, where they have been bravely risking their lives and futures on our behalf for the last 8 years.

Given the facts and history of the 9/11 attacks, we should not deal with the treachery and barbarism of the slaughter of thousands of innocent civilians as a matter of law enforcement in the ordinary sense. To do so would belittle the events that transpired, the symbolism and purpose of the attacks, the huge number of lives that were lost, and the threat posed to the United States—which continues in the caves and sanctuaries of al-Qaida to this day.

During my life, I have been a warrior, although that seems a long time ago now. I have some experience in the reality of combat and the suffering it brings. I know something of the law of war, having fought constrained by it and having lived through it, with the help of my comrades and my faith, times when my former enemy felt unconstrained by it.

No, the attacks of 9/11 were not a crime; they were a war crime. Together with my colleagues in Congress, I have worked closely with the President to provide a means to address war crimes committed against this country in a war crimes tribunal—the Military Commissions Act of 2009. It was designed specifically for this purpose. It should be used not to mete out a guilty verdict and sentence that could not be achieved in Federal criminal court but to call things what they are, to be unshakable in our resolve to respond to the unprecedented attacks of 9/11 consistent with the Authorization for Use of Military Force and to tell this and any future enemy that when they attack our innocent civilians at home, we will not be sending the police after them to make an arrest.

By denying funds to the Department of Justice to prosecute these horrendous crimes in article III courts, I do not mean these outrages against our country and its citizens should go unpunished. In fact, I have long argued that justice in these cases was long overdue and that prosecutions should be pursued as expeditiously as possible. Rather, my support for this amendment is based on my unshakable view that these events were acts of war and war crimes and that the proper forum for bringing the war criminals to justice is a military tribunal consistent with longstanding traditions in this country that date back to George Washington's Continental Army during the founding of the Republic.

For that reason, I urge my colleagues to support this amendment so that the prosecution of war crimes will take place in the traditional and long-accepted forum of a military tribunal, as the Congress overwhelmingly enacted in 2006 and which the National Defense Authorization Act for 2010 amended and improved in a statute that was enacted into law by President Obama just days ago.

Again, I hope we will, as we have in the past, listen to the families of 9/11. From the trauma and sorrow of the tragedy they experienced in the loss of their families, they became a force. They became a force that without them we would have never had the 9/11 Commission, we would have never been able to make the reforms that arguably have made our Nation much safer.

Now, today, the families are standing up and saying: Try these war criminals according to war crimes which they committed—the heinous acts of 9/11, which I know Americans will never forget.

Mr. President, I hope we will vote in favor of the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I have great respect for my colleagues from Arizona and Connecticut, but I respectfully disagree with them on this amendment.

If this amendment passes, it will say that the only people in the world who cannot be tried in the courts of America for crimes of terrorism are those who are accused of terrorism on 9/11. Think about that for a moment. The argument is being made that we should say to the President and Attorney General that when they plot their strategy to go after the men and women responsible for 9/11, we will prohibit them, by the language of this amendment, from considering the prosecution of these terrorists in the courts of America.

What are the odds of prosecuting a terrorist successfully in the courts of America, our criminal courts, as opposed to military commissions, commissions that have been created by law, argued before the Supreme Court, debated at great length? What are the odds of a successful prosecution of a terrorist in the courts of our land as opposed to a military commission? I can tell you what the odds are. They are 65 to 1 in favor of prosecution in our courts. Mr. President, 195 terrorists have been prosecuted in our courts since 9/11. Three have been prosecuted by military commissions. But the offerers of this amendment want to tie the hands of our Department of Justice and tell them: You cannot spend a penny, not one cent, to pursue the prosecution of a terrorist in an American court.

Who disagrees with this amendment? It is not just this Senator from Illinois. It would be our Secretary of Defense, Robert Gates, and our Attorney General, Eric Holder. Here is what they said in a letter to all Members of the Senate about this amendment:

> We write to oppose the amendment proposed by Senator Graham (on behalf of himself and Senators McCain and Lieberman). . . . This amendment would prohibit the use of Department of Justice funds ''to commence or continue the prosecution in an Article III court of the United States of an individual suspected of planning, authorizing, organizing, committing, or aiding the attacks on the United States and its citizens that occurred on September 11, 2001.''

They go on to say:

> As you know, both the Department of Justice and the Department of Defense have responsibility for prosecuting alleged terrorists. Pursuant to a joint prosecution protocol, our departments are currently engaged in a careful case-by-case evaluation of the cases of Guantanamo detainees who have been referred for possible prosecution, to determine whether they should be prosecuted in an Article III, court or by military commission. We are confident that the forum selection decisions that are made pursuant to this process will best serve our national security interests.
>
> We believe it would be unwise, and would set a dangerous precedent, for Congress to restrict the discretion of either department to fund particular prosecutions. The exercise of prosecutorial discretion has always been and should remain an Executive Branch function. We must be in a position to use every lawful instrument of national power—including both courts and military commissions—to ensure that terrorists are brought to justice and can no longer threaten American lives.
>
> For these reasons, we respectfully request that you oppose this amendment.

This amendment would hinder President Obama's efforts to combat terrorism. That is why the Secretary of Defense and the Attorney General have written to each one of us urging us to vote no.

The Graham amendment would be an unprecedented intrusion into the authority of the executive branch of our government to combat terrorism.

There is a great argument. For 8 long years, Republicans argued it was inappropriate to interfere in any way with President Bush's Commander in Chief authority. Time and again, we were told by our Republican colleagues that it is inappropriate and even unconstitutional for Congress to ask basic questions about the Bush administration's policies on issues such as Iraq, Guantanamo, torture, or warrantless wiretapping. Time and again, we were told that Congress should defer to the Defense Department's expertise.

Let me give one example. On September 19, 2007, the author of this amendment, Senator GRAHAM, said, and I quote:

> 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.

Just 2 years later, a different President of a different party, and my Republican colleagues have a different view. My colleagues think Congress should not defer to that very same Defense Secretary, Robert Gates, and they think it is not only appropriate but urgent for Congress to tie the hands of this administration, making it more difficult to bring terrorists to justice. Clearly, there is a double standard at work.

Some of my Republican colleagues argue that Federal courts are not well suited to prosecute terrorists, and terrorists should only be prosecuted by military commissions. But look at the facts. Since 9/11, 195 terrorists have been convicted in Federal courts. Three have been convicted by military commissions. Again, the odds are 65 to 1 that if we want to find a terrorist guilty and be incarcerated for endangering or killing Americans, it is better to go to a regular court in America than to a military commission. That is the record since 9/11.

According to the Justice Department, since January 1 of this year, more than 30 terrorists have been successfully prosecuted or sentenced in Federal courts. I would like to ask my colleagues behind this amendment and their inspiration, the Wall Street Journal: Was this a mistake, taking accused terrorists into our courts and successfully prosecuting them under the laws of America?

Clearly, it was not. The Department of Justice made the right decision effectively prosecuting these individuals and, equally important, showing to the world we would take these people accused of terrorism into the very same system of justice that applies to every one of us as American citizens, hold them to the same standards of proof, give them the rights that are accorded to them in our court system, and come to a just verdict.

That is an important message. It is a message which says we can treat these individuals in our judicial system in a fair way and come to a fair conclusion and find justice, and we did—195 times since 9/11, 30 times just this year.

Recently, the administration transferred Ahmed Ghailani to the United States to prosecute him for involvement in the 1998 bombings of our Embassies in Kenya and Tanzania. Those bombings killed 224 people, including 12 Americans. My colleagues on the other side of the aisle have been very critical of this administration's decision to bring this man to justice in the courts of America. One of them, a House Republican Member from Virginia, ERIC CANTOR, said, and I quote:

> We have no judicial precedence for the conviction of someone like this.

That is from Congressman CANTOR. Unfortunately, the Congressman is wrong. There are many precedents for convicting terrorists in U.S. courts. I will name a few: Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing; Omar Abdel Rahman, the so-called Blind Sheikh; Richard Reid, the Shoe Bomber; Zacarias Moussaoui; Ted Kaczynski, the Unabomber; and Terry Nichols, the Oklahoma City coconspirator. They were all accused of terrorism. Some were citizens of the United States, some not. All were tried in the same article III courts which this amendment would prohibit—would prohibit—our President and Attorney General from using.

In fact, there is precedent for convicting terrorists who were involved in the bombing of U.S. Embassies in Tanzania and Kenya, the same attack in which Ahmed Ghailani was allegedly involved. In 2001, four men were sentenced to life without parole at the Federal courthouse in Lower Manhattan, the same court in which Mr. Ghailani will be tried. To argue that we cannot successfully prosecute a terrorist in American courts is to ignore the truth and ignore history.

Susan Hirsch lost her husband in the Kenya Embassy bombing. She testified at the sentencing hearing for the four terrorists who were convicted in 2001. Mrs. Hirsch said she supports the Obama administration's decision to prosecute Ahmed Ghailani for that same bombing that took the life of her husband. She said, and I quote:

> I am relieved we are finally moving forward. It is really, really important to me that anyone we have in custody accused of acts related to the deaths of my husband and others be held accountable for what they have done.

Mrs. Hirsch also said she believes it is safe to try Ahmed Ghailani in a Federal court. I quote her again: ''I have some trust in the New York Police Department'' based on her experience at the 2001 trial.

Listen to what she said about the critics of this administration: ''They're just raising fear and alarm.'' This is from the widow of a terrorist bombing where the terrorists have been brought to justice in the courts of our land.

I agree with Susan Hirsch. I have faith in the New York Police Department. I have faith in our law enforcement agencies, I have faith in our courts, and I have faith in our system of justice.

We know how to prosecute terrorists, and we know how to hold them safely. We have living proof in 195 prosecutions since 9/11 and 350 convicted terrorists being held today in America's jails across the United States.

The Graham amendment is not about whether military commissions are superior to Federal courts. The amendment doesn't just express a preference for one over the other. The amendment expressly prohibits this administration and the Department of Justice from trying a terrorist in a Federal court.

The truth is, President Obama may choose to try the 9/11 terrorists in military commissions. That should be the President's decision. If it is his decision that it is in the interests of the security of the United States or in a successful prosecution to turn to a military commission over a regular Federal court in America, that should be the President's decision, the decision of his Attorney General, the decision of the prosecutors, not the decision of Members of the Senate who do not know the facts of the case and don't know the likelihood of prosecution.

Defense Secretary Gates and Attorney General Holder have developed a joint protocol to determine whether individual cases should be tried in Federal courts or commissions. The President worked closely with Congress to reform the military commissions so he would have another lawful tool to use in the fight against terrorism. The two lead cosponsors of the amendment before us, Senator MCCAIN and Senator GRAHAM, who is on the Senate floor, were very involved in that effort, as was Senator LEVIN of Michigan, the chairman of our Armed Services Committee. They sat down to rewrite the rules for military commissions because, frankly, we haven't had a great deal of success with prosecutions of terrorists with military commissions. Only three cases have gone before the Supreme Court, raising issues about military commissions, the standard of justice, due process, and fairness.

Now there is a new effort by President Obama, with the bipartisan help of Members of the Senate. So I am not standing here in criticism of the use of military commissions, but I am standing here taking exception to the point of view that we should preclude prosecutions in any other forum than military commissions of the terrorists of 9/11. President Obama may very well choose to try Khalid Sheikh Mohammad and other terrorists in military commissions. That should be his choice. Let him choose the forum, the most effective forum to pursue justice and to protect America from future acts of terrorism.

In their letter to Senators REID and MCCONNELL, Secretary Gates and Attorney General Holder said it well, and I quote them again:

> We must be in a position to use every lawful instrument of national power, including both courts and military commissions, to ensure that terrorists are brought to justice and can no longer threaten American lives.

The decision may be reached at some future date by the administration, with the concurrence of the Secretary of Defense and the Attorney General, that it is a better forum to move to military commissions for a variety of reasons. They could be issues of national security. They could be issues of evidence.

But do we want to take away from them with this pending amendment the right to make that decision? Why would Congress choose to take away one of these lawful instruments from the President, our Commander in Chief? Don't we want the President to have the use of every lawful tool to bring these terrorists to justice?

One word in closing. I have the greatest respect for the families of 9/11.

Those who have spoken out on behalf of this amendment, I respect them greatly. They have been a force in America since the untimely and tragic deaths of members of their families. They forced on the previous administration a dramatic investigation of 9/11 and where our government had failed and what we could do to improve things. They have become a voice and a force in so many other respects since that awful day of 9/11. But they don't speak with one voice on this issue. Many support the pending amendment; others see it differently.

Susan Hirsch, whose husband was lost in a terrorism bombing in Africa, clearly sees it differently than these survivors of 9/11. With the greatest respect for those who support this amendment, I would say there are others who see this in a much different light.

I urge my colleagues to reject the Graham amendment. It is an unprecedented effort to interfere with the executive branch's prosecutorial discretion and President Obama's genuine efforts to combat terrorism.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, I appreciate Senator LEVIN allowing me to speak now. I know we are going back and forth. I appreciate that.

To my friend, Senator DURBIN, it is my honest desire that as we move forward with what to do with Guantanamo Bay, we can find some bipartisanship and close the facility. I am one of the few Republicans who expressed that thought, simply because I have listened enough to our commanders to know—General Petreaus, Admiral Mullen, and others—that Guantanamo Bay has become a symbol for recruitment and propaganda usage against American forces in the war on terror.

It is probably the best run jail in the world right now, to those of us who have been down there. To the ground forces, I wish to acknowledge your patriotism and your service. It is a tough place to do duty because there are some pretty tough characters down there.

At the end of the day, I have tried to be helpful where I could, and I will tell you in a little detail why I am offering this amendment. But my hope was that when President Obama was elected, we could find a way to reform Guantanamo Bay policy, detainee policy, because I have been a military lawyer for 25 years. I do understand detainee policy affects the war effort. If we mess it up, if we abuse detainees, we can turn populations against us that will be helpful in winning the war.

One of the great things that happened in World War II is that we had over 400,000 German prisoners, Japanese prisoners housed in the United States. We took 40,000 hard-core Nazis from the British and put them in American military jails in the United States. So this idea that we can't find a place for 200 detainees in America, I don't agree with. We have done that before. These people are not 10 feet tall. They are definitely dangerous, but as a nation I believe we could start over.

By closing Guantanamo Bay in a logical, rational way, we would be improving our ability to effect the outcome of the war in the Mideast because we would be taking a tool away from the enemy.

President Obama and Senator MCCAIN both, when they were candidates, agreed with the idea of closing Guantanamo Bay and reforming interrogation policy.

To most Americans, it is kind of: Why are we worried about what we do with these guys, because they would cut our heads off. You are absolutely right. It is not lost upon me or any other military member out there that the enemy we are dealing with knows no boundaries and they are barbarians and brutal.

The question is not about them but about us. The fact that we are a civilized people is not a liability, it is an asset. So when you capture a member of al-Qaida, I have always believed it becomes about us, not them. We need interrogation techniques that will allow us to get good intelligence and make the country safe. We need to understand we are at war, and the people we are dealing with are some of the hardest, meanest people known since the Nazis.

But if you try to say, in the same breath, that anything goes to get that information, it will come back to haunt you. So some of the interrogation techniques we have used that come from the Inquisition got us some information, but I can assure you it has created a problem. Ask anybody in the Mideast who has to deal with America. They will tell you this has been a problem. You don't need to do that to protect this country. You can have interrogation techniques that get you good information but also adhere to all your laws.

As to the trials, some people wonder: Why do we care about this? They wouldn't give us a trial. You are absolutely right. The fact that our country will give the worst terrorist in the world a trial with a defense attorney, for free; a judge who is going to base his decision on facts and law and not prejudice; a jury, where the press can show up and watch the trial; and the ability to appeal the result, makes us stronger, not weaker. So count me in for starting over with Guantanamo Bay, with a new legal process that recognizes we have had abuses in the past and we are going to chart a new course.

Regarding the Military Commission Act that just passed the Congress, I wish to say publicly that Senator LEVIN was a great partner to work with. The military commission system we have in place today has been reformed. I think it is a model justice system that I will put up against any in the world, including the International Criminal Court at the Hague, in terms of due process rights for detainees. It also recognizes we are at war. This military commission system, while transparent, with the ability to appeal all verdicts to the civilian system, has safeguards built in it to recognize we are at war and how you handle evidence and access the evidence and intelligence sources are built into that military system that are not built into civilian courts.

Since this country was founded, we have historically used military commissions as a venue to try suspected war criminals caught on battlefields. Why have I brought forth this amendment? I have been told by too many people, with reliable access, that the administration is planning on trying Khalid Shaikh Mohammed—the mastermind of 9/11, the perpetrator of the attacks against our country in Washington, Pennsylvania, and New York—in Federal court in the lower district of Manhattan. If that is true, you have lost me as a partner.

Why do I say that? It would be the biggest mistake we could possibly make, in my view, since 9/11. We would be giving constitutional rights to the mastermind of 9/11, as if he were any average, everyday criminal American citizen. We would be basically saying to the mastermind of 9/11, and to the world at large, that 9/11 was a criminal act, not an act of war.

I do believe in prosecutorial discretion and executive branch discretion. I introduced this amendment reluctantly but with all the passion and persuasion I can muster to tell my colleagues: Act now, so we will get this right later. Congress said we are not going to fund the closing of Gitmo. Well, is Congress meddling in the ability of the Commander in Chief to run a military jail? Hell, yes, because we don't know what the plan is. We have an independent duty as Members of Congress to make sure there is balance. This Nation is at war. It is OK for us to speak up. As a matter of fact, it has been too much passing—too many passes during the Bush administration, where Congress sort of sat back and watched things happen. Don't watch this happen. Get on the record now, before it is too late, to tell the President we are not going to sit by as a body and watch the mastermind of 9/11 go into civilian court and criminalize this war. If he goes to Federal court, here is what awaits: a chaos zoo trial.

Yes, we have taken people into Federal court before for acts of terrorism. We took the Blind Sheik—the first guy to try to blow up the World Trade Center—and put him in civilian court. We treated these people as common criminals. What a mistake we made. What if we had treated them as warriors rather than a guy who robbed a liquor store? Where would we have been in 2001 if we had the foresight in the 1990s to recognize that we are at war and these people are not some foreign criminal cartel; they are warriors bent on our destruction who have been planning for

years to attack this country and are planning, as I speak, to attack us again?

We are not fighting crime. We are fighting a war. The war is not over. What happened in the Blind Sheik trial? Because it was a civilian court, built around trying common criminals, the court didn't have the protections military commissions will have to protect this Nation's secrets and classified information. As a result of that trial, the unindicted coconspirator list was provided to the defense as part of discovery in a Federal civilian criminal court. That unindicted coconspirator list was an intelligence coup for the enemy. It went from the defense counsel, to the defendant, to the Mideast. Al-Qaida was able to understand, from that trial, whom we were looking at and whom we had our eye on.

During the 1990s, we tried to treat these terrorist warriors as just some other form of crime. It was a mistake. Don't repeat it. If you take Khalid Shaikh Mohammed, the mastermind of 9/11, and put him in Federal civilian court, you will have learned nothing from the 1990s. You will have sent the wrong signal to the terrorists and to our own people.

Judge Mukasey, who presided over the Blind Sheik trial, wrote an op-ed piece about how big a mistake it would be to put the 9/11 coconspirators into Federal court. He went into great detail about the problems you would have trying these people in a civilian court. He became our Attorney General. So if you don't listen to me, listen to the judge who presided over the trial in the 1990s.

I don't know what they are going to do in the Obama administration. If I believed they were going to do something other than take Khalid Shaikh Mohammed to Federal court in New York, I would not introduce this amendment. I know this is not a cavalier thing to do. I have taken some grief for trying to help the President form new policies with Guantanamo Bay and reject the arguments made by some of my dear friends that these people are too dangerous to bring to the United States. We can find a way to bring them to the United States; we just have to be smart about it.

To our military men and women who will be administering the commission, my biggest fear has always been that the military commission system will become a second-class justice system. Nothing could be further from the truth. The men and women who administer justice in the military commission system are the same judge advocates and jurors who administer justice to our own troops. The Judge Advocate General of the Navy said the new military commission system is such that he would not hesitate to have one of our own tried in it.

We will gain nothing, in terms of improving our image, by sending the mastermind of 9/11 to a New York civilian court, giving him the same constitutional rights as anybody listening to me in America who is a citizen. The military commission system will be transparent. He will have his say in court. He will have the ability to appeal a conviction to our civilian judges. He will be defended by a military lawyer—or private attorney, if he wants to be. He will be presumed innocent until found guilty. It will be required by the ''beyond a reasonable doubt'' standard for him to be found guilty of anything.

For those who are wondering about military commissions, I can tell you the bill we have produced I will put up against any system in the world. To those who think it is no big deal to send Khalid Shaikh Mohammed to Federal court, I could not disagree with you more. What you will have done is set in motion the dynamic that led to criminalizing the war in the 1990s. You will have lost focus, yet again. You will have been lured into the sense that we are not at war, that these are just a bunch of bad people committing crimes. The day we take the mastermind of 9/11 and put him in Federal court, who the hell are you going to try in the military commission? How can you tell that detainee you are an enemy combatant, you are a bad guy? You are at war, but the guy who planned the whole thing is just a common criminal. What a mistake we would make.

It is imperative this Nation have a legal system that recognizes we are at war and that we have rules to protect this country's national security balance against the interests and the rights of the accused detainee. The military commission forum has created that balance. It is a system built around war, a system built around the rules of military law, a system that recognizes the difference between a common criminal and a warrior, a system that understands military intelligence is different than common evidence. If we do not use that system for the guy who planned 9/11, we will all regret it.

My amendment is limited in scope. It is a chance for you, as a Member of the Senate, to speak up about what you would like to see happen as this Nation moves forward and our desire to correct past mistakes and defend this Nation, which is still at war this very day. It is a chance for you to have a say, on behalf of your constituents, as to how they would like to see this Nation defend itself.

I argue that most Americans—not just the 9/11 families—would be very concerned to learn that the man who planned the attacks that killed 3,000 of our fellow citizens—who would do it again tomorrow—is going to be treated the same as any other criminal. No good will come from that. You will have compromised the military commission system beyond repair. You will have adopted the law enforcement model that failed us before, and we will not be a better people.

I, along with Senator LEVIN, was at Guantanamo Bay the day Khalid Shaikh Mohammed appeared before the Combat Status Review Tribunal. We were in the next room. We listened on a monitor. You could see him and could hear the chains rattle next door when he went through great detail about 9/11 and all the other acts of terrorism he planned against our country.

I never will forget when he told the military judge that he was a high-ranking commander in the al-Qaida military organization and he appreciated being referred to as a military commander. Some would say: You don't want to elevate this guy. What I would say is you want to understand who he is. If you think he is a common criminal, no different than any other person who wants to hurt people, you have made a mistake.

Khalid Shaikh Mohammed is bent on our destruction. He did not attack us for financial gain. He attacked us because he hates us. He is every bit as dangerous as the Nazis. These people we are fighting are very dangerous people. I am insistent they get a trial consistent with our values, that they do not get railroaded, that they get a chance to defend themselves. The media will see how the trial unfolds and you can see most of it, if not all of it. But I am also insistent that we not take our eye off the ball. It has been a long time since we have been attacked. For a lot of people—those who were on the front lines of 9/11—they relive it every night. It replays itself over and over every night of their lives.

For the rest of us, please do not lose sight of the fact that this country is engaged in an armed conflict with an enemy that knows no boundaries, has no allegiance to anything beyond their radical religion, and is conspiring to attack us as I speak.

When we try them, we need to understand that the trial itself is part of the war effort. How we do the trial can make us safer or it can make us weaker. If we criminalize this war, it would take the man who planned the attacks of 9/11 and put him in civilian court. It is going to be impossible with a straight face to take somebody under him and put him in a military court. And the day you put him back in civilian court, you are going to create the problems Judge Mukasey warned us against. You are going to have evidence compromised and you are going to regret it.

I hope to continue to work with the administration to find a way to close Guantanamo Bay, to create a transparent legal system that will allow every detainee their day in court, due process rights they deserve based on our law, not based on what they have done but based on who we are as a people.

The 20th hijacker said this in Federal court—the victims were allowed to testify about the impact of 9/11. They had a U.S. Navy officer talking about being at the Pentagon and the impact on her

life and on her friends. During the testimony, the officer started to cry. Here is what the defendant said, Moussaoui, the 20th hijacker:

I think it was disgusting for a military person to pretend that they should not be killed as an act of war. She is military.

It was a Navy female officer.

She should expect that the people who are at war with her will try to kill her.

This is the 20th hijacker in civilian court:

I will never, I will never cry because an American bombed my camp.

If you have any doubt that we are at war, the one thing you ought to be certain of, they have no doubt that they are at war with us.

The one thing the men and women who go off to fight this war should expect of their government and of their Congress is to watch their back the best we can. We would be doing those men and women a great disservice if we put the mastermind of 9/11, who killed the friends of this Navy officer, in a civilian court that could lead to compromising events that would make their job harder. We would be doing them a disservice to act on our end as if we are not at war.

Mr. President, I say to my colleagues, they have a chance to speak. They have a chance to be on the record for their constituents to send a signal that needs to be sent before it is too late. Here is what I ask them to say with their vote: I believe we are at war and that the legal system we are going to use to try people who attacked this country and killed 3,000 American citizens should be a military legal system, consistent with us being at war. I will not, with my vote, go back to the law enforcement model that jeopardized our national security back in the nineties. I will insist that these detainees have a full and fair trial and that they be treated appropriately. But I will not, with my vote, take the mastermind of 9/11, the man who planned the attacks, who would do it tomorrow, and give him the same constitutional rights as an average, everyday American in a legal system that is not built around being at war.

If they will say that, we will get a good outcome. If they equivocate, we are slowly but surely going to create a legal hodgepodge that will come back to haunt us.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, the amendment that has been sponsored by Senators GRAHAM, MCCAIN, LIEBERMAN, and WEBB is wrong and it is unnecessary. It would, as Senator GRAHAM said, prohibit the prosecution of any individual suspected of involvement with the September 11 attacks against the United States from being tried in our article III courts.

The idea that we cannot try a terrorist and mass murderer in our courts is beneath the dignity of this great country. Timothy McVeigh was one of the greatest mass murderers this Nation has ever known and we had no difficulty trying him and convicting him and executing him using our laws and our article III courts.

The real intent of this amendment is clear, to ensure that the detainees held at Guantanamo Bay, some who have been held for years without charge, can only be tried by military commissions.

As a former prosecutor, I find it deeply troubling that the Senate would be asked to prohibit the administration from trying even dangerous terrorists in our Federal courts. These Senators should not use an amendment that politicizes decisions about significant prosecutions as a backdoor to require the use of military commissions.

The administration has worked hard to revise the military commissions to make sure that they meet constitutional standards. However, their use has been plagued with problems and repeatedly overturned by a conservative Supreme Court.

In contrast, our Federal courts have a long and distinguished history of successfully prosecuting even the most atrocious violent acts, and they are respected throughout the world. When we use our Federal courts, the rest of the world recognizes that we are following over 200 years of judicial history of the United States of America. We earn respect for doing so.

The administration strongly opposes this amendment. In a letter to the Senate leadership the Secretary of Defense, Robert Gates, and the Attorney General of the United States, Eric Holder, warn that this amendment would ''set a dangerous precedent'' by directing the Executive Branch's prosecutorial determination.

They also point out this amendment would prohibit them from being able to ''use every lawful instrument of national power . . . to ensure that terrorists are brought to justice and can no longer threaten American lives.''

If we really want to stop terrorists, if we really want to make sure they pay for their crime, why would we block off any of the avenues available to us? Two senior administration officials, individuals directly responsible for the disposition of these detainees, are telling us not to tie their hands in the fight against terrorism. This Senator is listening to them, and I believe all Senators should listen to them.

There has been an outpouring of opposition against this amendment including by numerous human rights groups such as Human Rights First, the National Institute of Military Justice, Constitution Project and Amnesty International.

We have also seen a strong public declaration in support of trying terrorism offenses in Federal courts, signed by a bipartisan group of former Members of Congress, high-ranking military officials and judges.

The Senate Judiciary Committee has held several hearings on the issue of how best to handle detainees. Experts and judges across the political spectrum have agreed that our criminal justice system can handle this challenge and indeed has handled it many times already.

We are a nation that fought hard to have a strong, independent judiciary, with a history of excellence. Do we now want to say to the world that in spite of all of our power, our history, our strong judiciary, that we are not up to trying those who struck us in our traditional federal courts? I think we should say just the opposite, that we can and will prosecute these people in a way that will gain the respect of the whole world and protect our nation. Republican luminaries, such as General Colin Powell, have agreed with this idea.

In fact, one of the things we tend to forget is since January of this year alone, over 30 terrorism suspects have been successfully prosecuted or sentenced in Federal courts. Those federal courts have sentenced individuals directly implicated by this amendment, such as Zacarias Moussaoui.

If this amendment were law Moussaoui, the so called ''20th hijacker'' who was directly involved in the planning of September 11, would not have been convicted by our federal courts and sentenced to life in prison. This amendment takes away one of the greatest tools we have to protect our national security—the ability to prosecute suspects in Federal court. Instead, as the Justice Department has said in its opposition to it, the Graham amendment would make it more likely that terrorists will escape justice.

I believe as strongly as all Americans do that we should take all steps possible to prevent terrorism, and we must ensure severe punishment for those who do us harm. As a former prosecutor, I have made certain that perpetrators of violent crime receive serious punishment. I also believe strongly that we can ensure our safety and security, and bring terrorists to justice, in ways that are consistent with the laws and the values that make us a great democracy.

The administration has said where possible they will try individuals in Federal courts. When we unnecessarily preempt that option, we are saying we do not trust the legal system on which we have relied for so long. All that does is give more ammunition to our enemies. It further hurts our standing around the world, a standing which has already suffered so much from the stain of Guantanamo Bay. Worse still it sends the message to other countries that they do not have to use traditional legal regimes with established protections for defendants if they are prosecuting American soldiers or civilians.

Just as partisan Republicans were wrong in trying to hold up the confirmation of Attorney General Holder to extort a pledge from him that he would not exercise independent prosecutorial judgment—something I have never seen done before in 35 years here—it is also wrong to force an amendment politicizing prosecutions in the Commerce-Justice-Science appropriations bill. I opposed the effort by some Republican Senators who wanted the Nation's chief prosecutor to agree in advance to turn a blind eye to possible lawbreaking before even investigating whether it occurred. Republicans asked for such a pledge, a commitment that no prosecutor should give. To his credit, Eric Holder didn't give that pledge.

Passing a far-reaching amendment that takes away a powerful tool from the Justice Department in bringing terrorists to justice and usurps the Attorney General's constitutional responsibilities is not the path forward. All administrations should be able to decide who to prosecute and where they should be prosecuted. This amendment denies us the benefit of using not only our Federal courts, with their successful track record convicting terrorists, but also from using our Federal laws, which are arguably more expansive and better suited for use in terrorism cases than the narrower set of charges that can be brought in a military commission. We should not tie the hands of our law enforcement in their efforts to secure our national security. Any former prosecutor, any lawyer and any citizen should know it is not the decision of or an appropriate role for the United States Senate.

It is time to act on our principles and our constitutional system. Those we believe to be guilty of heinous crimes should be tried, and when convicted, punished severely. Where the administration decides to try them in Federal courts, our courts and our prisons are more than up to the task. I agree with the Justice Department that this amendment ''would ensure that the only individuals in the world who could not be prosecuted under the criminal terrorist offenses Congress has enacted would be those who are responsible for the most devastating terrorist acts in U.S. history.'' That means that the only people in the world who could not be prosecuted under our terrorism laws are the people who committed the most devastating terrorist acts against us. That is Alice in Wonderland justice. It makes no sense to have tough terrorism laws, to have the best judicial system in the world and then, when terrorist acts are committed against us, to simply ignore that system and decide we cannot use it to prosecute those acts. It makes no sense.

Let us put aside heated and distorted rhetoric and support the President in his efforts to truly make our country safe and strong and a republic worthy of the history and values that have always made America great.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mrs. MCCASKILL). The Senator from Michigan.

Mr. LEVIN. Madam President, I very much oppose the Graham amendment, and I want to take a few moments to explain why.

It has been argued that we are at war. Indeed, we are. I can't think of anything clearer, that any of us in this country understands than we are at war. And being at war, it totally mystifies me why we would deny ourselves one of the tools that we could use against people who are attacking us, who have attacked us, who will attack us, who will kill us, who kill innocent people. Why would we deny ourselves one of the tools which are available to try these people, to lock them up, or execute them and throw away the key? Why we would, by law, say this particular group of people can't be tried in a Federal court, that they can only be tried in a military commission, when we have tried so many terrorists in court, convicted them and executed them, is something I do not understand.

I believe we ought to not only throw the book at these people, but I think we ought to throw both books at these people. Why limit ourselves to one book—the book that sets the procedures for military commissions? Why do we deny ourselves the opportunity, if it is more effective—for whatever reasons the Justice Department determines it is more effective—to prosecute in a Federal court? Why would we deny them that?

In fact, under this amendment, they could not even continue the prosecution they had begun. The language of the amendment says either ''to commence or continue the prosecution in an Article III court.'' So the question isn't whether these are the most dangerous people around—they are.

I also went down to Guantanamo. I went with Senator GRAHAM, and we watched the proceeding against Khalid Shaikh Mohammed. I want us to use all of the tools. I want them all to be available. I want the Justice Department to be able to determine which is more effective, and not for us to decide in a political setting, in a legislative setting, that they cannot use one of the tools which has been proven to be effective against dozens of terrorists.

What about the law of war? What about war crimes? The argument is these are war crimes. As far as I am concerned, they are crimes; they are war crimes—both. War crimes can be prosecuted in an article III court. Let me repeat that because the argument is these are war crimes. War crimes can be prosecuted in an article III court under our laws that we adopted about 10 or 15 years ago. So Khalid Shaikh Mohammed needs to be given justice. He needs to be dealt with as strongly as we possibly can and as effectively as we possibly can. I believe he was the mastermind of 9/11. I don't think there is a Member of this body that would not want to see him dealt with as strongly as can possibly be done. But I don't know why we would tell the Justice Department that they only can consider one of the two tools that they could use against him; that they only can consider the military commissions but they can't consider article III courts.

I have been deeply involved in rewriting the military commissions law. That law, when we first wrote it, was defective, and I argued against it because it was defective. This body adopted it. That is the way things work. The majority decided to go with it. It was not usable. So we took a major step in the last few months to revise the military commissions law. I helped to lead that effort, and I know how important it is. But it was never our intent to make that the exclusive remedy for people who would attack us or attack this country. We want that remedy to be available if that is the most effective remedy. But there is nothing in that law that we wrote, or intended, that said this would displace article III courts if the Justice Department decided the most effective place to try an alleged terrorist was an article III court.

Are we actually, on the floor of the Senate, going to decide which terrorists should be tried in article III courts and which ones should be tried in military commission courts? Why would we tie the hands of the Justice Department in that way?

I know Senator GRAHAM feels very strongly these should be tried in front of military commissions, and if he were the Justice Department, or if he were the Attorney General, he may make that decision, assuming he knows all the facts that go into the decision. He may make that decision, and he could strongly recommend it to the Justice Department. But why would we decide to displace the discretion of the Justice Department is a mystery to me. I find it unacceptable.

More importantly, the Attorney General and the Secretary of Defense find it unacceptable. They have urged us not to do this. They have written our leaders—Senator REID and Senator MCCONNELL—opposing the Graham amendment.

They say in their letter that there is a joint prosecution protocol, and the departments are ''currently engaged in a careful case-by-case evaluation of the cases of Guantanamo detainees who have been referred for possible prosecution, to determine whether they should be prosecuted in an Article III court or by military commission. We are confident that the forum selection decisions that are made pursuant to this process will best serve our national security interests.''

That is the Attorney General of the United States and the Secretary of Defense. Can we truly say in the Senate that we are going to displace that process which will determine what is the

most effective way to prosecute these people? Can we and should we do that? I hope not.

They end their letter of October 30 by saying the following:

> The exercise of prosecutorial discretion has always been and should remain an Executive Branch function. We must be in a position to use every lawful instrument of national power—including both courts and military commissions—to ensure that terrorists are brought to justice and can no longer threaten American lives.

If we adopt the Graham amendment, we are saying no; we are only going to use one instrument of national power. We are not going to consider both instruments of national power, and that is truly not only limiting our options but tying one of our hands behind our back in the essential prosecution of these people.

Madam President, Zacarias Moussaoui, the so-called 20th hijacker, was convicted in Federal court in May of 2006 for conspiring to hijack aircraft and crash them into the World Trade Center. He was quoted by Senator GRAHAM as saying that ''we are at war with you people.'' I don't have the slightest doubt that he means it and if he were ever released he would go back to war.

But I also have no doubt about something else. He was saying this in a Federal court, after being convicted in a Federal court of the terrorist acts that he perpetrated. He is now in a supermax facility in Florence, CO. He is serving life imprisonment without parole. If the Graham amendment had been in place at the time that Moussaoui was being prosecuted—indeed, if the Graham amendment had come in the middle of that prosecution—the prosecution would have had to have been suspended.

This amendment, if it is adopted, is going to make it more difficult to bring some of the 9/11 terrorists to justice. Let me share some of the reasons this possibility exists.

A court could decide that one of the 9/11 detainees does not meet the test, under the military commissions law, of being an ''unprivileged enemy belligerent.'' In particular, a court could decide that one of the 9/11 alleged terrorists did not participate in a ''hostility'' and therefore was not subject—a belligerent subject to the laws of war. So we are saying to the Justice Department: If you see the possibility that someone could be let out or somebody could be found not guilty based on that kind of a technicality, we are not going to let you go and try that person in a Federal court. You must try that person where that person could escape justice based on a technicality.

Why would we want to do that? How can we possibly sit here and reach a judgment on all of the possible factual situations which might allow one of these people to escape justice? We cannot do that. That is what prosecutors are for. That is what a Justice Department is for. We should be giving them tools, not denying them tools. We should be handing them every possible tool we can give them to prosecute these people instead of saying you can't use this tool or you can't use that tool.

A court could decide that the crimes committed by one of the 9/11 detainees is not justiciable under the Military Commissions Act. So therefore we are going to say you have to prosecute him there anyway? A court could decide that an offense under the Military Commissions Act cannot be retroactively applied to an offense that took place before the enactment of the act. In our language, they can be tried even though it is a retroactive application. What happens if that occurs and then a court comes along, a court of appeals following a military commission, and says: No, you can't do that. Why would we not want the Justice Department to be able to weigh all of these possible escape loopholes that a defendant could use and decide that they have a better chance of convicting somebody and making that conviction stick if they proceed in an article III court?

Maybe the procedural rights which we have written into our Military Commissions Act, which is now law—maybe a court will determine they are not adequate. Maybe they will throw out the entire process despite our best efforts to correct what we had previously done. We should not presume the outcome of the judicial process and throw away legal tools that may be needed to bring the 9/11 terrorists to justice. We should not be tying the hands of our prosecutors against these people.

Prosecutorial discretion is one of the cornerstones of the American judicial system. It is wrong for us to be limiting that discretion by directing cases to a particular forum. It denies our prosecutors the ability to choose the forum that is best suited to a successful outcome in the case. The mechanism of cutting off funds for a prosecution, which is what this amendment does because Congress believes that a prosecution should take place in one forum or another, would set a terrible precedent. We should not be intervening in that kind of decision through the appropriations act.

The determination of the proper forum for the trial of 9/11 terrorists should be made by the professional prosecutors based on the circumstances of the case and their judgment as to where is the best chance to gain a successful prosecution. We should not decide where these cases are going to be tried. I don't believe we should presume they will be tried in one place or another.

There is a process underway, including both the Defense Department and the Justice Department, to make a determination as to which will be the most effective place to try these terrorists. So that is the appropriate process, and we ought to let it continue without this kind of intervention by the Senate.

Before I yield the floor and suggest the absence of a quorum, I ask unanimous consent to have printed in the RECORD the letter from the Attorney General and the Secretary of Defense to Senators REID and MCCONNELL.

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

OCTOBER 30, 2009.

Hon. HARRY REID,
Majority Leader, U.S. Senate, Washington, DC.
Hon. MITCH MCCONNELL,
Minority Leader, U.S. Senate, Washington, DC.

DEAR SENATORS REID AND MCCONNELL: We write to oppose the amendment proposed by Senator Graham (on behalf of himself and Senators McCain and Lieberman) to H.R. 2847, the Commerce, Justice, Science, and Related Agencies Appropriations Act of 2010. This amendment would prohibit the use of Department of Justice funds ''to commence or continue the prosecution in an Article III court of the United States of an individual suspected of planning, authorizing, organizing, committing, or aiding the attacks on the United States and its citizens that occurred on September 11, 2001.''

As you know, both the Department of Justice (in Article III courts) and the Department of Defense (in military commissions, reformed under the 2010 National Defense Authorization Act) have responsibility for prosecuting alleged terrorists. Pursuant to a joint prosecution protocol, our departments are currently engaged in a careful case-by-case evaluation of the cases of Guantánamo detainees who have been referred for possible prosecution, to determine whether they should be prosecuted in an Article III court or by military commission. We are confident that the forum selection decisions that are made pursuant to this process will best serve our national security interests.

We believe that it would be unwise, and would set a dangerous precedent, for Congress to restrict the discretion of either department to fund particular prosecutions. The exercise of prosecutorial discretion has always been and should remain an Executive Branch function. We must be in a position to use every lawful instrument of national power—including both courts and military commissions—to ensure that terrorists are brought to justice and can no longer threaten American lives.

For these reasons, we respectfully request that you oppose this amendment.

ROBERT M. GATES,
Secretary of Defense.
ERIC H. HOLDER, JR.,
Attorney General.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MCCONNELL. 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. MCCONNELL. Madam President, most Americans recognize that our continued success in preventing another terrorist attack on U.S. soil depends on our ability as a Nation to remain vigilant and clear-eyed about the nature of the threats we face at home and abroad.

Some threats come in the form of terror cells in distant countries. Others

come from people plotting attacks within our own borders.

And still others can come from a failure to recognize the distinction between everyday crimes and war crimes.

This last category of threat is extremely serious but sometimes overlooked—and that is why Senators GRAHAM, LIEBERMAN, and MCCAIN have offered an amendment to the Commerce, Justice and Science appropriations bill that would reassure the American people that the Senate has not taken its eye off the ball.

The amendment is simple and straightforward. It explicitly prohibits any of the terrorists who were involved in the September 11, 2001, attacks from appearing for trial in a civilian U.S. courtroom. Instead, it would require the government to use military commissions; that is, the courts proper to war, for trying these men.

By requiring the government to use military commissions, the supporters of this amendment are reaffirming two things: First, that these men should have a fair trial.

And second, we are reaffirming what American history has always showed; namely, that war crimes and common crimes are to be tried differently—and that military courts are the proper forum for prosecuting terrorists.

Some might argue that terrorists like Zacarias Moussaoui, one of the 9/11 conspirators, are not enemy combatants—that they are somehow on the same level as a convenience store stick-up man. But listen to the words of Moussaoui himself. He disagrees.

Asked if he regretted his part in the September 11 attacks, Moussaoui said: ''I just wish it will happen on the 12th, the 13th, the 14th, the 15th, the 16th, the 17th, and [on and on].'' He went on to explain how happy he was to learn of the deaths of American service men and women in the Pentagon on 9/11. And then he mocked an officer for weeping about the loss of men under her command, saying:

> I think it was disgusting for a military person to pretend that they should not be killed as an act of war. She is military. She should expect that people who are at war with her will try to kill her. I will never cry because an American bombed my camp.

There is no question Moussaoui himself believes he is an enemy combatant engaged in a war against us.

The Senate has also made itself clear on this question. Congress created the military commissions system 3 years ago, on a bipartisan basis, precisely to deal with prosecutions of al-Qaida terrorists consistent with U.S. national security, with the expectation that they would be used for that purpose.

The Senate reaffirmed this view 2 years ago when it voted 94–3 against transferring detainees from Guantanamo stateside, including the 9/11 planners.

We reaffirmed it again earlier this year when we voted 90–6 against using any funds from the war supplemental to transfer any of the Guantanamo detainees to the United States.

And just this summer the Senate reaffirmed that military commissions are the proper forum for bringing enemy combatants to justice when we approved without objection an amendment to that effect as part of the Defense authorization bill.

Further, our past experiences with terror trials in civilian courts have clearly been shown to undermine our national security. During the trial of Ramzi Yousef, the mastermind of the first Trade Center bombing, we saw how a small bit of testimony about a cell phone battery was enough to tip off terrorists that one of their key communication links had been compromised.

We saw how the public prosecution of the Blind Sheikh, Abdel Rahman, inadvertently provided a rich source of intelligence to Osama bin Laden ahead of the 9/11 attacks. And in that case, we remember that Rahman's lawyer was convicted of smuggling orders to his terrorist disciples.

We also saw how the trial of Zacarias Moussaoui resulted in the leak of sensitive information.

And we saw how the trials of the East African Embassy bombers compromised intelligence methods to the benefit of Osama bin Laden.

The administration calls these prosecutions ''successful.'' But given the loss of sensitive information that resulted, former Federal judge and Attorney General Michael Mukasey has noted ''there are many words one might use to describe how these events unfolded; 'successfully' is not among them.''

Trying terror suspects in civilian courts is also a giant headache for communities; just look at the experience of Alexandria, VA, during the Moussaoui trial. As I have pointed out before, parts of Alexandria became a virtual encampment every time Moussaoui was moved to the courthouse. Those were the problems we saw in Northern Virginia when just one terrorist was tried in civilian court. What will happen to Alexandria, New York City, or other cities if several terrorists are tried there? You can imagine.

It is because of dangers and difficulties like these that we established military commissions in the first place. The administration has now rewritten the military commission procedures precisely to its liking. If we can't expect the very people who masterminded the 9/11 attacks and went to war with us to fall within the jurisdiction of these military courts, then who can we expect to fall within the jurisdiction of these military courts?

The American people have made themselves clear on this issue. They do not want Guantanamo terrorists brought to the U.S., and they certainly do not want the men who planned the 9/11 attacks on America to be tried in civilian courts—risking national security and civic disruption in the process.

Congress created military commissions for a reason. But if the administration fails to use military commissions for self-avowed combatants like Khalid Sheikh Mohammed, then it is wasting this time-honored and essential tool in the war on terror.

I would ask the opponents of the Graham amendment the following: what material benefit is derived by bringing avowed foreign combatants like KSM into a civilian court and giving them all the rights and privileges of a U.S. citizen; and why should we further delay justice for the families of the victims of 9/11?

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WEBB. Madam President, I rise with some regret because I am in a contradiction with our President and with many members of my own caucus. I am a cosponsor of the Graham amendment. I have no regrets about cosponsoring the amendment. I do regret that I am in contradiction with a number of my colleagues on this side.

I believe this is an appropriate amendment. I believe it is the best way for us to move forward and bring a solution with respect to those who are detained in Guantanamo.

I would start by saying I have consistently argued that the appropriate venue for trying perpetrators of international terrorism who are, in fact, enemy combatants is a military tribunal. One of my primary focuses in my time in the Senate has been to work toward a fairer and more efficient criminal justice system in the United States.

As all my colleagues know, we have an enormous backlog in many court systems right now. Prisons are overcrowded. We have 2.3 million people in prison right now, 7 million people inside the criminal justice system. The process of trying enemy combatants in our already overburdened domestic courts, on the one hand, is not necessary and, on the other, would introduce major logjams and work against our goals of improving our criminal justice system.

As someone who served in the military, has spent 5 years in the Pentagon, and is privileged to serve in this body, I would like to say, in my view, the Guantanamo Bay detainee situation is challenging, it is complicated, it involves balancing an entire host of considerations, including national security, constitutional due process requirements, international law, procedural and practical considerations, and the responsibilities and authority of all three branches of government.

Given the complicated nature of this situation, I believe it is very important for us to move forward with a careful and considered approach. These are among the considerations we should be looking at: First, the Supreme Court has reviewed this issue a number of times and, in several cases, has given clear guidance on due process requirements.

Second, taking into consideration these Supreme Court's decisions, Congress enacted new procedures for military tribunals. These new pressures, which were included in the recently passed Defense authorization bill, contain safeguards that protect detainees' due process and habeas rights.

President Obama, as a Senator, took part in the creation of these new procedures. President Obama signed these new procedures into law. Additionally, the facilities for properly holding and trying dangerous detainees who are, in fact in many cases, enemy combatants, exist at the cost of approximately millions of dollars in Guantanamo.

The Guantanamo debate has, in my view, improperly focused on place versus process over the past couple of years. The most important factor has been to improve the process as we consider these different cases, not simply whether this was Guantanamo or anywhere else.

Removing our detainees from Guantanamo to the United States is not going to solve the problem. The improved processes we have put in place is one of the key factors in addressing the problem.

The people we are seeking to prosecute—I think it needs to be said again and again—are enemy combatants. They were apprehended during a time of war, while hostilities are still ongoing. Prosecuting these individuals in domestic courts gives rise to a host of problematic issues which are basically unnecessary because of the availability now of properly constituted military tribunals.

The problems with trying alleged detainees in domestic courts include: procedural, constitutional, and evidentiary rules in place to protect civilian criminal defendants in our country. These protections would require the production of classified materials. It could require military and intelligence officers to be called from other duties, in some cases from the battlefield, to testify.

This could lead to the exposure of sensitive material or, alternatively, to acquittal of enemy combatants who are guilty of these crimes. In the U.S. legal system, when a defendant is acquitted he goes free. In this complex scenario, it is unclear what will happen in our domestic judicial system if one of those enemy combatants is actually acquitted.

This mixing of the legal and military paradigms, I believe, would confuse our criminal justice system without a real upside. The burden of trying enemy combatants in a domestic court is overwhelming. Other people have mentioned this. There is an issue, of course, of maintaining security for the courtroom and for the jail facilities: the additional security burdens to the U.S. Marshals Service and to local police services, the security and procedural complexities would tie up our court system at a time when we need to move criminal cases forward.

I think it is very important for the understanding of this body, that while this amendment only applies to six detainees at Guantanamo Bay, it is long past time that we work to reach a consensus on how and where all these detainees are going to be tried and/or held. The administration has consistently talked about three different categories of detainees: Those who have been found not to be a threat to the United States and can be released and a number of them have; those who are a threat and can be prosecuted, which takes up most of our discussion, but, importantly, a third group is those who we have reason to believe will continue to be a threat to the United States, but we may not have sufficient admissible evidence to bring them to trial. That is the category that is the most troubling when we start talking about moving these detainees from Guantanamo Bay to the United States.

Every Member of this body should be concerned with the implications of confining such individuals indefinitely inside the United States without due process. I took the time, after a number of discussions, including a long discussion with the President about this, to read the Hamdi case, the Supreme Court case that deals with indefinite detention of detainees.

There is a conundrum here, if you think about the reality of what we are doing. If you bring these people into the United States and do not try them, you are going to put them in a civilian prison. There are only two possibilities here: either as legally here in the United States they have to be given a speedy trial or, as enemy combatants, we do not have to give them a speedy trial until the end of hostilities. How do we define the end of hostilities? We are simply going to be importing a problem, affecting about 50 people at Guantanamo, from Guantanamo into the United States.

Again, it is not the place, it is the process. Ten years from now, fifteen years from now we don't want to find ourselves saying: There is an individual in a super-max prison somewhere in Illinois who has never been charged with a crime.

Why do we need to bring that into our system? Why do we need to bring that into our country? We have to commit ourselves to examining that issue in detail and figure out a way to move forward. I am committed to working with the administration. I have said this to the President in the past and to Members of this body, we need to move forward and develop a final trial and detention plan.

But the bottom line is, we are a nation at war. The Supreme Court has outlined due process rights for detainees. Guantanamo Bay is the appropriate facility for holding the enemy belligerents, particularly since we just passed these improvements in the Military Commissions Act. I hope this body will think seriously about the implications of bringing large numbers of Guantanamo Bay detainees into the United States.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. DEMINT. I see the Senator from Rhode Island.

Mr. WHITEHOUSE. Madam President, I will be speaking for only 4 or 5 minutes. I see Senator DEMINT. I ask unanimous consent that I follow him. But I will be considerably briefer than Senator WEBB.

Mr. DEMINT. I would be happy to let the Senator from Rhode Island go first, as long as I can follow him.

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

The Senator from Rhode Island is recognized.

Mr. WHITEHOUSE. I appreciate the Senator's courtesy. I wish to take a different view than our distinguished colleague from Virginia. He comes from a military background and he views this from that lens. I come from a prosecutor's and lawyer's background. I see it through a different lens.

I take exception to a number of the concerns the distinguished Senator from Virginia elucidated. My concern is, the balancing of those concerns and the determination as to on which side, military commissions or traditional law enforcement prosecution, the government should come down on is one that should not be a legislative determination.

We have executive officials who are very capable of making this determination. It is at the soul of prosecutorial discretion to decide whom to charge, what to charge, and in what forum to bring the charge. I think we are in the wrong location, trying to inject ourselves as the legislative branch of government into the executive determination as to where a case should be brought.

It may very well be that a great number of these cases should indeed be brought in military commissions. But I do not think it is up to us as Members of the Senate to force the executive branch's hands.

A second point is, we have had very bad luck with these military commissions so far. Many believe the procedures for those commissions did not afford adequate process to the accused, and, as a result, the perceived legitimacy of the commissions was undermined. That is the finding of the Detention Policy Task Force.

Some of those shortcomings have been improved upon recently. But we are in a stage, at this point, in which article III courts—the Federal American courts—have handled 119 terrorism cases with 289 defendants. Of those, 75 cases are still pending in our courts, but 195 defendants have been convicted. Our conviction rate has been 91 percent.

Our Bureau of Prisons currently holds 355 terrorists in its facilities, by it is own estimation, 216 international

terrorists, and 139 domestic terrorists. So regular, traditional American law enforcement, prosecution by the Department of Justice, is a tried-and-true vehicle for prosecuting and punishing terrorists.

By contrast, the Gitmo military tribunals have convicted three detainees. After all those years of trouble and effort, 289 defendants convicted in our criminal courts, three in our military commissions.

So I submit there may be very good logic for those military commissions, but it is not a wise decision and not properly our decision to force the hand of the executive branch of government and close down the side of the war on terrorism that has been most effective at incarcerating and punishing our terrorist enemies.

I yield the floor and, again, thank the Senator for his courtesy.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. DEMINT. I thank the Chair.

Madam President, I wish to associate myself with Leader MCCONNELL and thank him for his leadership on the Guantanamo Bay issue. I know as the President looks to close this facility which costs the American taxpayers $275 million, people around the country, including in my own State of South Carolina, are concerned that we will now move some of the world's most dangerous people into a civilian area that is not designed for this type of security threat. I appreciate the leadership of Senator MCCONNELL in trying to bring some rational thinking.

HONDURAS

I wish to take a break from the discussion of Guantanamo Bay and the appropriations bills to discuss briefly the situation in Honduras. Honduras is one of America's best allies in this hemisphere. For the last 4 months they have been involved in a constitutional crisis. I have been very critical of the administration's handling of the Honduras situation. In fact, I have held two nominees, one to Latin America and one to Brazil, in order to shine a spotlight on the situation and get this administration and this Congress to focus on what I consider very bad policy toward a very close friend of the United States.

While I have been critical, it is important, when the administration changes its view and puts things on the right course, to thank Secretary Clinton, Secretary Tom Shannon for their work in Honduras. I also wish to talk a little bit about the situation.

As part of my talk, I want Senator REID to know it is my intent to release my holds on the nominees so they can move forward, now that I believe the administration has set a good course for our allies in Honduras.

Let me take a few minutes to go through the background of the situation. Not many people have paid much attention to it. Over 4 months ago, I believe our administration rushed to judgment in declaring the removal of President Zelaya from office as a military coup. All branches of the Honduran Government agreed that he should have been removed. The congress, the electoral tribunal, the attorney general, the supreme court, all institutions of democracy in Honduras, agreed the president had violated the constitution and the law and needed to be removed from office. For weeks leading up to his arrest, President Manuel Zelaya defied his nation's laws and attempted to illegally rewrite the Honduran constitution so he could remain in office past his term. That probably sounds familiar because that is the same course Hugo Chavez has taken in Venezuela and Ortega in Nicaragua. We know about the Castros, of course. It is a pandemic in Latin America that democracies elect leaders who change the constitution and become dictators. Zelaya was on the same course until the democratic institutions in Honduras stopped him short.

He attempted to force a national vote to allow himself to stay in office. He went so far as to lead a violent mob to try to retrieve ballots printed in Venezuela that had been confiscated by the Honduran authorities so he could not have the national referendum he wanted. As I mentioned before, every Honduran institution supported his removal because of his open defiance of the laws and the constitution. The people of Honduras have struggled too long to have their hard-won democracy stolen from them by a would-be dictator. The Honduran Government had little choice but to act in accordance with the Honduran constitution and their own rule of law. They had to remove Zelaya from office to protect their democracy.

Since June, the Law Library of Congress made public a thorough report defending the actions undertaken by the Honduran institutions in contradicting the claims made by the Obama administration. Our own State Department said they have secret legal memos of their own supporting their actions, but they have refused our request to release them and have kept them hidden from the public. Instead of siding with the Honduran people, the administration decided to put their full support behind Mr. Zelaya, who is a close ally of Hugo Chavez and who the State Department even said had undertaken provocative actions that led to his removal. Despite this admission, the Obama administration has waged a war directly against the Honduran people by denying visas, terminating aid, and refusing to acknowledge that free and fair elections would solve the problems in Honduras.

The Presidential election is on schedule for November 29. It has been scheduled that way since 1982, when their constitution was put in place. Under Honduras's one-term-limit requirement, Zelaya could not have sought reelection anyway. The current president, Roberto Micheletti, whom I just got off the phone with, was installed after Zelaya's removal per the constitution. He is not on the ballot either. He is not seeking power in Honduras. The Presidential candidates were nominated in primaries over a year ago, and all of them, including Zelaya's former vice president, expect these elections to be free and fair and transparent, as has every other Honduran election for almost a generation. I have been terribly disappointed with the administration's policies on Honduras and have consistently argued that the upcoming November 29 elections are the only way out of this mess. We as a nation have to send a signal that we will recognize these elections.

I personally visited Honduras last month and was satisfied as to the legitimacy of the interim government of Micheletti and as to the legitimacy of the long-scheduled Presidential elections that will be held later this month. I am happy to report that after many months, Secretary Clinton and Assistant Secretary Shannon have led the Obama administration back in the right direction. I met yesterday with Assistant Secretary of State of Latin America Tom Shannon and spoke today with Secretary Clinton. I can report that we now appear to be on the right track. Both Assistant Secretary Shannon and Secretary Clinton assured me that notwithstanding any previous statements by administration officials, the United States will recognize the November 29 Honduran election, regardless of whether the Honduras Government votes to reinstate Zelaya. They have made it clear the administration will recognize the elections, regardless of whether the Honduran Congress votes on the Zelaya reinstatement before or after the November 29 election.

The independence, transparency, and fairness of those elections has never been in doubt. Thanks to the reversal of the Obama administration, the new government sworn into office next January can expect the full support of the United States and, I hope, the entire international community.

I applaud the administration. I am thankful they have ended their focus on whom I consider a would-be dictator and are now standing firmly with the Honduran people and for a Honduran solution to the problem. Today starts a major step forward for the cause of freedom and democracy for the western hemisphere, for the United States, and especially for the brave people of Honduras. They are proving that despite crushing hardships and impossible odds, freedom and democracy can succeed anywhere people are willing to fight for it. The condemnation heaped on the free people of Honduras these last several months never had to happen. The Obama administration erred in its assessment of the situation in Honduras because of a rush to judgment based on bad information. We have all learned a lesson about distinguishing friends from foes and the

paramount importance of constitutional democracy to international stability.

For months I have made it clear I would continue to object to two State Department nominations until the United States reversed its flawed Honduras policy. My goal has been to get this administration to recognize the November 29 elections. Now that this has happened, I will keep my part of the bargain and release these holds. I will notify Senator REID that these nominations can move ahead on his schedule. It is no secret that I have been critical of the administration on their handling of these issues. But I take this opportunity today to thank Secretary Clinton and Assistant Secretary Shannon for reengaging the Honduran Government and working out a solution that President Micheletti and the government in Honduras, as well as the Honduran people, feel is fair.

There are still a number of concerns. As I talked to President Micheletti moments ago, he is concerned that the Organization of American States continues to support deposed President Zelaya and is organizing, along with Zelaya, a lot of mischief related to the upcoming elections, encouraging people to take to the streets and violence. I hope the State Department and the Obama administration, along with Congress, will continue to support the Honduran people and make sure the Organization of American States and any other country will support the agreement that has been signed by the people in Honduras and that we have agreed to.

I am thankful for the opportunity to speak on this issue, to bring it to the attention of this Congress and the American people. I look forward to releasing the holds on these nominations and continue to follow the situation closely, particularly the November 29 elections, as Honduras continues as a free and democratic nation.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. WHITEHOUSE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Ms. MIKULSKI. I ask unanimous consent that the order for the quorum call be rescinded.

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

Ms. MIKULSKI. Mr. President, as the chairman of the Commerce, Justice, Science Committee, I ask unanimous consent that all postcloture time be yielded back, except the 10 minutes specified for debate as noted in this agreement; that the Senate now resume the Coburn amendments Nos. 2631 and 2667, and that prior to the votes in relation to each amendment in the order listed, there be 2 minutes of debate, equally divided and controlled in the usual form; that upon the use or yielding back of time, the Senate proceed to vote in relation to the amendments; that upon the disposition of the Coburn amendments, the Senate resume consideration of the Graham amendment No. 2669, and that prior to a vote in relation to the amendment, there be 4 minutes of debate, equally divided and controlled between Senators GRAHAM and LEAHY or their designees; that upon the use or yielding back of time, the Senate proceed to vote in relation to the amendment; that upon disposition of the Graham amendment, the Senate then resume the Ensign amendment No. 2648, as modified; that there be 2 minutes of debate, equally divided and controlled in the usual form, prior to a vote in relation to the amendment; that upon disposition of the Ensign amendment, the Senate resume the Johanns amendment No. 2393; that the amendment be agreed to and the motion to reconsider be laid upon the table, with no amendments in order to the aforementioned amendments; that no further amendments be in order; that the substitute amendment, as amended, be agreed to, the bill, as amended, be read a third time, and the Senate then proceed to vote on passage of the bill; that upon passage, the Senate insist on its amendment, request a conference with the House on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees, with the subcommittee plus Senators BYRD and COCHRAN appointed as conferees; that if a point of order is raised and sustained against the substitute amendment, then it be in order for a new substitute to be offered, minus the offending provisions but including any amendments previously agreed to; that the new substitute be considered and agreed to, no further amendments be in order, the bill, as amended, be read a third time, with the provisions of this agreement after adoption of the original substitute amendment remaining in effect; and that the cloture motion on the bill be withdrawn; and that the order commence after the remarks of Senator CHAMBLISS.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

UNANIMOUS-CONSENT AGREEMENT—EXECUTIVE CALENDAR

Ms. MIKULSKI. Mr. President, as in executive session, I ask unanimous consent that upon disposition of H.R. 2847, the Senate proceed to executive session and immediately proceed to vote on confirmation of the nomination of Calendar No. 462, and that upon confirmation, the motion to reconsider be considered made and laid upon the table; that no further motions be in order, the President be immediately notified of the Senate's action, and the Senate then resume legislative session.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from Alabama.

AMENDMENT NO. 2669

Mr. SESSIONS. Mr. President, I would like to speak, briefly, in support of Senator GRAHAM's amendment dealing with the trial of 9/11 terrorists in Federal court. It, in effect, would prohibit the administration from doing that by denying funding for any such trials.

This is a very important matter. One of the things we learned when 9/11 occurred was that this country had made a mistake in treating people who are at war with the United States, who attempt to destroy the United States, as normal criminals and that they should be tried in court.

We learned the only effective way to deal with persons such as that is to treat them as prisoners of war or unlawful combatants, who are people who violate the rules of war—and all these individuals do, basically, with the way they conduct themselves. So we would try them according to military commissions. The Constitution makes reference to military commissions. They can be tried fairly in that method without all the rules and procedures we cherish so highly in Federal courts for the trials of normal crimes that people are accused of in this country.

I spoke about al-Marri just last week, who came to the United States on September 10. He had met bin Laden. He had been to a training camp in Afghanistan. He had a goal, pretty clearly, to participate in an attack on the United States. He seemed to be a part of that entire effort. He came 1 day before 9/11. He was tried by a Federal judge who apparently gave a conviction but sentenced him to, in effect, 7 years. He had training in bomb making and that kind of thing. He had done other acts that indicated an intent to kill American people, innocent civilians, in a surreptitious way, contrary to the laws of war. So as a result of that, I think he should have been tried by a military commission, and he was not.

As one of the professors said in commenting on this case, it raises questions about the ability of our normal Federal court system to try these people who may be subject to having the courthouse attacked in an attempt to free them. Jurors may feel threatened because they are willing to kill to promote their agenda—or their allies are. Courthouses have to be armed with guards all around and with people on top of the courthouse to protect the courthouse throughout the trial.

They can be tried effectively by military commissions. So Senator GRAHAM is serving the national interest in raising this issue. It is not a little bitty matter. It is correct. He has a good idea about it. He has focused it narrowly on the 9/11 issue and on those who participated in that attack. I think that is at least what we should do today.

We need to have a sincere analysis of the determination by this administration to try more and more cases in Federal court when they have been

captured by the military. In fact, they say there is a presumption in their commission report to date that they would be tried in Federal courts rather than military commissions. I think that is very dangerous because military people do not give them Miranda warnings when they are arrested. They do not do the kinds of things that are necessary to maintain change of custody or to admit evidence into trials in a way we would normally do. These kinds of procedures could cause a trial to be extremely difficult. They could bring witnesses from the battlefield and the like.

It is not the way, I am aware, any country tries people who are at war with them—any country. All countries provide for military commissions against unlawful combatants.

I see my friend, Senator CHAMBLISS, in the Chamber. I know he wants to speak on this issue.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise in strong support of the Graham amendment, and I wish to echo the sentiments expressed by my friend from Alabama, who, like me, has had extensive experience in trying cases for many years.

In this country, over our 225-plus years, we have been involved in many different military conflicts. In each of those conflicts, dating back to the early years, there have always been prisoners captured, and we have always had a procedure whereby we incarcerated and ultimately tried those individuals who were captured on the battlefield.

The process of how we operate from an article III criminal standpoint relative to criminals in America who commit offenses against the United States of America is one thing. The process we have always used to deal with those individuals whom we capture on the battlefield has been entirely different and all for the right reasons.

I know there are those who have gotten up here over the past several weeks and months as we have talked about this issue from time to time, and I have had any number of amendments on this issue and have spoken on the floor numerous times about it. It is important for the protection and security of the American people to keep all these individuals whom we capture on the battlefield, who are incarcerated at Guantanamo, outside America. We have the mechanics set up to try them. We have a very safe place for them to be incarcerated. That is, frankly, where they ought to stay until some method can be worked out to deal with them, to have them housed somewhere outside the United States.

Unfortunately, the President has made a commitment to close Guantanamo by January 22, without ever having a plan in place as to how he was going to deal with them. What we are talking about doing is making sure, because folks on the other side of the aisle have already said: We want to bring the prisoners from Guantanamo to American soil, we try them there. Ultimately, I guess they are saying: We want to house them in American prisons. I think that is wrong.

This amendment, though, is even narrower than that. That is why it is so important. This amendment says: We are going to take the meanest of these individuals, who get up every day thinking of ways to kill and harm Americans, and make sure they never come to American soil for trial and are never subjected to the process that is developed in article III courts for average, ordinary criminals who are tried every single day in America.

Khalid Shaikh Mohammed is the admitted mastermind of September 11. He is one of the individuals who today is housed at Guantanamo Bay. He is one of the individuals who is going to be directly affected by this amendment. Does Khalid Shaikh Mohammed want justice? No. Khalid Shaikh Mohammed wants a platform. He wants a platform on which to exude his arrogance and his hatred of America and his hatred of Americans, as exhibited by the plan he put in place to fly airplanes into the Pentagon, the World Trade Center, and another entity that was probably the U.S. Capitol. That airplane, ultimately, crashed in Pennsylvania.

There were over 3,000 victims on September 11. It is my understanding family members of those victims have written letters and made phone calls urging the passage of this amendment. They are an indication of the strong feeling that prevails all across America relative to how we deal with these individuals who, particularly—particularly—intended and did, in fact, carry out an attack against America, an atrocious attack that took the lives of over 3,000 people.

I commend Senator GRAHAM for even thinking of the idea of narrowing this amendment to include just those individuals who participated in the September 11 attack. I would rather broaden it to include all those who are housed at Guantanamo. I defy anyone to stand and say that trying any of those individuals who are housed at Guantanamo, who were captured on the battlefield, in an article III court in the United States would be similar to some other terrorists we have tried in this country. That is wrong. We have never tried anybody who was arrested on the battlefield in an article III court in the United States.

So Senator GRAHAM's amendment is very appropriate. It ought to be passed. It ought to be passed with a large margin. A vote against this amendment is simply a vote to give Khalid Shaikh Mohammed that platform he wants to have to talk about why he hates America and about everything that is wrong with America. That is not what we ought to be doing in this body today or at any other time.

I urge a positive and affirmative vote on the Graham amendment.

I yield back, Mr. President.

AMENDMENT NO. 2631

Ms. MIKULSKI. Mr. President, what is the pending amendment?

The PRESIDING OFFICER. Coburn amendment No. 2631 is the pending amendment.

Ms. MIKULSKI. Mr. President, I vigorously and unabashedly oppose the Coburn amendment. It eliminates not only the dollars from the science program at the National Science Foundation, it specifically targets the $9 million cut in the area of funding for research by political scientists.

The very first American woman to win the Nobel Prize for economics ever has received 28 awards from the National Science Foundation, the science program offered to political science professors. It shows what groundbreaking work can be done.

This amendment is an attack on science. It is an attack on academia. We need full funding to keep America innovative, and I urge my colleagues to vote no on this amendment.

Mr. President, I yield back the remainder of our time, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays are ordered.

The PRESIDING OFFICER. Who yields time in favor of the amendment?

Is there objection to yielding back all time?

Without objection, all time is yielded back.

The question is on agreeing to the amendment.

The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) and the Senator from Louisiana (Ms. LANDRIEU) are necessarily absent.

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

The result was announced—yeas 36, nays 62, as follows:

[Rollcall Vote No. 336 Leg.]

YEAS—36

Barrasso	Enzi	McConnell
Baucus	Graham	Murkowski
Bayh	Grassley	Nelson (NE)
Bennett	Hatch	Risch
Brownback	Hutchison	Roberts
Bunning	Inhofe	Sessions
Chambliss	Isakson	Shelby
Coburn	Kyl	Thune
Corker	LeMieux	Vitter
Crapo	Lugar	Voinovich
DeMint	McCain	Webb
Ensign	McCaskill	Wicker

NAYS—62

Akaka	Burr	Conrad
Alexander	Burris	Cornyn
Begich	Cantwell	Dodd
Bennet	Cardin	Dorgan
Bingaman	Carper	Durbin
Bond	Casey	Feingold
Boxer	Cochran	Feinstein
Brown	Collins	Franken

Gillibrand	Leahy	Sanders
Gregg	Levin	Schumer
Hagan	Lieberman	Shaheen
Harkin	Lincoln	Snowe
Inouye	Menendez	Specter
Johanns	Merkley	Stabenow
Johnson	Mikulski	Tester
Kaufman	Murray	Udall (CO)
Kerry	Nelson (FL)	Udall (NM)
Kirk	Pryor	Warner
Klobuchar	Reed	Whitehouse
Kohl	Reid	Wyden
Lautenberg	Rockefeller	

NOT VOTING—2

Byrd Landrieu

The amendment (No. 2631) was rejected.

Mr. REID. Mr. President, I ask unanimous consent that all succeeding votes in the tranche of votes—and I think there are five—be 10 minutes in duration.

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

Mr. REID. Mr. President, people are anxious to finish tonight. If everybody will try to stay close and not wander around, we can wrap these up.

I yield at this time to the Senator from Texas, KAY BAILEY HUTCHISON.

MOMENT OF SILENCE

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that this body have a moment of silence in memory of 11 great soldiers at Fort Hood, TX, who have been shot down this afternoon at the base at a processing center where they were being prepared to be deployed to Iraq and Afghanistan. In addition, the person who was the main shooter has also been killed. Over 30 of our great personnel are also injured and being treated as we speak.

When I spoke to the general a few minutes ago, the base, Fort Hood, was still in lockdown to make sure they have checked every possibility that there would be no more shootings. I know all of us love our military and appreciate everything they do. For them to have to suffer even more tragedy like this, as they are on their way to protect our freedom, is unthinkable.

I ask unanimous consent that all of us show how deeply we care about them right now on the floor of the Senate.

The PRESIDING OFFICER. Without objection, a moment of silence will commence.

[Moment of Silence.]

Mrs. HUTCHISON. Mr. President, I thank Senators very much.

AMENDMENT NO. 2667

The PRESIDING OFFICER. There will now be 2 minutes of debate equally divided in relation to the Coburn amendment No. 2667. Who yields time?

The Senator from Oklahoma.

Mr. COBURN. Mr. President, this is a straightforward amendment that actually increases the funding for the IG. One of our weaknesses is waste, fraud, and abuse. According to GSA, this will not affect the renovations whatsoever at the Hoover Building. We are simply transferring funds.

I understand a point of order is going to be made against this amendment. But if my colleagues want control and have accurate work done by our IGs, we need to fund them appropriately, and this amendment is intended to do that.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I share the concerns of the Senator from Oklahoma about oversight at the Department of Commerce. That is why the bill already funds the inspector general at $25.8 million, the same as the President's request. There is an additional $6 million furnished through the stimulus.

This amendment does cut the Hoover Building and it would only delay the renovations to meet basic health and safety standards. I oppose the amendment. The amendment would cause the CJS bill to exceed its allocation. Therefore, I make a point of order that the amendment violates section 302(f) of the Congressional Budget Act of 1974.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I move to waive the applicable section of the Budget Act with respect to my amendment, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

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

The result was announced—yeas 42, nays 57, as follows:

[Rollcall Vote No. 337 Leg.]

YEAS—42

Alexander	Crapo	LeMieux
Barrasso	DeMint	Lincoln
Baucus	Ensign	Lugar
Bayh	Enzi	McCain
Bennett	Feingold	McCaskill
Brownback	Graham	McConnell
Bunning	Grassley	Risch
Burr	Gregg	Roberts
Chambliss	Hatch	Sessions
Coburn	Hutchison	Shelby
Cochran	Inhofe	Snowe
Collins	Isakson	Thune
Corker	Johanns	Vitter
Cornyn	Kyl	Wicker

NAYS—57

Akaka	Hagan	Nelson (NE)
Begich	Harkin	Nelson (FL)
Bennet	Inouye	Pryor
Bingaman	Johnson	Reed
Bond	Kaufman	Reid
Boxer	Kerry	Rockefeller
Brown	Kirk	Sanders
Burris	Klobuchar	Schumer
Cantwell	Kohl	Shaheen
Cardin	Landrieu	Specter
Carper	Lautenberg	Stabenow
Casey	Leahy	Tester
Conrad	Levin	Udall (CO)
Dodd	Lieberman	Udall (NM)
Dorgan	Menendez	Voinovich
Durbin	Merkley	Warner
Feinstein	Mikulski	Webb
Franken	Murkowski	Whitehouse
Gillibrand	Murray	Wyden

NOT VOTING—1

Byrd

The PRESIDING OFFICER. On this vote, the yeas are 42, the nays are 57. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to. The point of order is sustained, and the amendment fails.

Mrs. BOXER. Mr. President, I move to reconsider the vote.

Mrs. MURRAY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 2669

The PRESIDING OFFICER. There is now 4 minutes equally divided before the vote on the Graham amendment, No. 2669.

The Senator from South Carolina.

Mr. GRAHAM. Colleagues, we are about to take a vote. It is a tough vote, and I regret we are having to do this, but at the end of the day, I have a view that this country is at war. I think most of you share it. Our civilian court system serves us well, but we have had a long history of having military commission trials when the Nation is at war. The military commission bill which this Congress wrote is reformed. It is new, it is transparent, and it is something I am proud of.

This amendment says that the six coconspirators who planned 9/11—Khalid Shaikh Mohammed at the top of the list—will not be tried in Federal court because the day you do that, you will criminalize this war.

In the first attack on the World Trade Center, the Blind Sheik was tried in Federal court, and the unindicted coconspirators list wound up in the hands of al-Qaida.

Military commissions are designed to administer justice in a fair and transparent way, but they know and understand we are at war. Our civilian courts are not designed to deal with war criminals; the military system is.

Khalid Shaikh Mohammed, the mastermind of 9/11, didn't rob a liquor store; he didn't commit a crime under domestic criminal law; he took this Nation to war and he killed 3,000 of our citizens. He needs to have justice rendered in the system that recognizes we are at war.

Please support this idea of not criminalizing the war the second time around.

The PRESIDING OFFICER. Who yields time?

Mr. REED. Mr. President, we all recognize the severity of this issue and the passion the Senator from South Carolina brings to the issue. But since 9/11, we have tried 195 terrorists in article III courts; we have tried 3 in military commissions. I think we have recognized that our courts are durable enough to stand up to the issues of the culpability of these individuals and the magnitude of their actions. Secretary Gates and Attorney General Holder have asked for the option to use article

III courts or military commissions. We are preserving that if we reject the Graham amendment.

Let me say something else. Our enemies see themselves as jihadists—holy warriors. They don't object to being tried in military commissions because they see themselves as combatant warriors. They are criminals. They committed murder. The sooner we can convince the world that these aren't holy warriors, that they are criminals, the sooner we will take an advantage in this battle of ideas between those people and the system of laws and justice that we represent and try to protect and defend.

So I recognize the sincerity and the passion of the Senator, but I would urge a vote against this amendment, and I move to table the amendment.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. To my dear friend, this is the biggest issue of the day: Are they criminals? Are they warriors? Does it matter? These people are not criminals, they are warriors, and they need to be dealt with in a legal system that recognizes that.

And to the 214 9/11 families who support my amendment, I understand that the people who killed your family members are at war with us. I hope the Senate will understand that so we don't have another.

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

The Senator from Rhode Island.

Mr. REED. Mr. President, do I have time remaining?

The PRESIDING OFFICER. Twenty-five seconds.

Mr. REED. Mr. President, this present statute that is on the books gives the Secretary of Defense the opportunity to recommend and the Attorney General the opportunity to prosecute in either an article III court or a military tribunal. I think that choice should be maintained.

I would urge that we defeat this amendment.

I move to table the amendment.

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

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

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the motion.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

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

The result was announced—yeas 54, nays 45, as follows:

[Rollcall Vote No. 338 Leg.]

YEAS—54

Akaka	Franken	Mikulski
Baucus	Gillibrand	Murray
Bayh	Hagan	Nelson (NE)
Begich	Harkin	Nelson (FL)
Bennet	Inouye	Reed
Bingaman	Johnson	Reid
Boxer	Kaufman	Rockefeller
Brown	Kerry	Sanders
Burris	Kirk	Schumer
Cardin	Klobuchar	Shaheen
Carper	Kohl	Specter
Casey	Landrieu	Stabenow
Conrad	Lautenberg	Tester
Dodd	Leahy	Udall (CO)
Dorgan	Levin	Udall (NM)
Durbin	McCaskill	Warner
Feingold	Menendez	Whitehouse
Feinstein	Merkley	Wyden

NAYS—45

Alexander	DeMint	Lugar
Barrasso	Ensign	McCain
Bennett	Enzi	McConnell
Bond	Graham	Murkowski
Brownback	Grassley	Pryor
Bunning	Gregg	Risch
Burr	Hatch	Roberts
Cantwell	Hutchison	Sessions
Chambliss	Inhofe	Shelby
Coburn	Isakson	Snowe
Cochran	Johanns	Thune
Collins	Kyl	Vitter
Corker	LeMieux	Voinovich
Cornyn	Lieberman	Webb
Crapo	Lincoln	Wicker

NOT VOTING—1

Byrd

The motion was agreed to.

Mrs. MURRAY. Mr. President, I move to reconsider the vote.

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

The motion to lay on the table was agreed to.

AMENDMENT NO. 2648, AS MODIFIED

The PRESIDING OFFICER. There is now 2 minutes equally divided with respect to the Ensign amendment, No. 2648. The Senator from Nevada is recognized.

Mr. ENSIGN. Mr. President, my amendment is very simple. It would add $172 million to the State Criminal Alien Assistance Program. This program provides payment to States that incur correctional officer salary costs for incarcerating undocumented criminal aliens for at least one felony or two misdemeanor convictions. This amendment is offset by simply an across-the-board decrease in spending, so it is budget neutral.

I believe this is an important amendment. It is especially important if you are in one of the Southwestern States or border States. Local law enforcement in those states incur a lot of expenses; those associated with illegal immigrants, especially those who are criminals. I urge my colleagues to support this amendment and match what the House of Representatives did when they passed this amendment by a vote of 405 to 1. Let's go along with the House of Representatives and make sure our local law enforcement has the resources they need to fight those who are here illegally and committing serious crimes.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SHELBY. Mr. President, I rise in opposition to the Ensign amendment. The State Criminal Alien Assistance Program, a program that was not requested by this nor the previous administration, is currently overfunded in this bill at $228 million. With the Ensign amendment, we are being asked to add $172 million to a program that barely touches most of our States. Since 2004, five States have received 71 percent of the $2.1 billion in funding for this program.

Let me say that again, 71 percent, or $1.5 billion of the amount for this program since 2004, has gone to five States. This can hardly be called a national program.

In 2008, during the CJS Senate floor debate a year ago, this amendment was tabled and rejected by a vote of 68 to 25. I strongly oppose this amendment and urge my colleagues to vote against this amendment.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, I support every comment made by my ranking member. I believe this amendment will cause the CJS bill to exceed its allocation, therefore I make a point of order the amendment violates section 302(f) of the Congressional Budget Act of 1974.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. ENSIGN. To clear up a couple of facts, first of all, not every State has the same problem with illegal immigrants that other States do.

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

Mr. ENSIGN. I move to waive the applicable sections of the Budget Act with respect to my amendment and ask for the yeas and nays.

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

The question is on agreeing to the motion. The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

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

The yeas and nays resulted—yeas 32, nays 67, as follows:

[Rollcall Vote No. 339 Leg.]

YEAS—32

Barrasso	Ensign	LeMieux
Baucus	Enzi	McCain
Bingaman	Feinstein	McConnell
Boxer	Graham	Nelson (NE)
Brownback	Grassley	Reid
Burr	Hagan	Risch
Chambliss	Hatch	Roberts
Coburn	Hutchison	Tester
Cornyn	Isakson	Thune
Crapo	Johanns	Wicker
DeMint	Kyl	

NAYS—67

Akaka	Bunning	Conrad
Alexander	Burris	Corker
Bayh	Cantwell	Dodd
Begich	Cardin	Dorgan
Bennet	Carper	Durbin
Bennett	Casey	Feingold
Bond	Cochran	Franken
Brown	Collins	Gillibrand

Gregg
Harkin
Inhofe
Inouye
Johnson
Kaufman
Kerry
Kirk
Klobuchar
Kohl
Landrieu
Lautenberg
Leahy
Levin
Lieberman
Lincoln
Lugar
McCaskill
Menendez
Merkley
Mikulski
Murkowski
Murray
Nelson (FL)
Pryor
Reed
Rockefeller
Sanders
Schumer
Sessions
Shaheen
Shelby
Snowe
Specter
Stabenow
Udall (CO)
Udall (NM)
Vitter
Voinovich
Warner
Webb
Whitehouse
Wyden

NOT VOTING—1

Byrd

The PRESIDING OFFICER. On this vote, the yeas are 32, the nays are 67. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to, the point of order is sustained, and the amendment falls.

AMENDMENT NO. 2393

The question is on agreeing to amendment No. 2393.

The amendment (No. 2393) was agreed to.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, I ask unanimous consent that it be in order to make a point of order against the remaining amendments.

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

Ms. MIKULSKI. I make a point of order en bloc that amendments Nos. 2644, 2627, 2646, 2625, 2642, and 2632 are either not germane postcloture or violate rule XVI.

The PRESIDING OFFICER. The points of order are well taken. The amendments fall.

AMENDMENT NO. 2647, AS MODIFIED

Ms. MIKULSKI. Mr. President, notwithstanding the order regarding the passage of H.R. 2847, I now ask unanimous consent that amendment No. 2647, as modified, be agreed to and the motion to reconsider be laid upon the table.

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

The amendment (No. 2647), as modified, was agreed to.

EFFECTS OF RESEARCH AND DEVELOPMENT AND ENERGY ON THE GDP

Mr. BINGAMAN. Speaking through the Chair to the manager of the Commerce-Justice-Science bill, I would like to ask if she is aware that the President's fiscal year 2010 budget for the Bureau of Economic Analysis contained two important initiatives to measure the impact that research and development as well as energy has on the gross domestic product?

Ms. MIKULSKI. Yes, I am aware of these two important initiatives I know from the COMPETES Act, which I was integrally involved in with the Senator, that one of the more important policy questions is what effect research and development has on gross domestic product. There are many estimates that it is substantial and it is an important question for Congress to consider.

Mr. BINGAMAN. As chairman of the Energy and Natural Resources Committee, I would also like to point out another initiative by the Bureau in the fiscal year 2010 budget on the effect of energy consumption on the gross domestic product. I believe that such macroeconomic information will be critical as we develop a comprehensive energy policy that is currently before the Congress.

Ms. MIKULSKI. Yes, I am aware of the initiative and it is important we understand how the recent prices increases for the energy we use affects the overall gross domestic product.

Mr. BINGAMAN. I would like to ask the manager if during conference with the House consideration can be given to help start these two initiatives so that we in Congress can begin to understand how these two important parameters affect our gross domestic product.

Ms. MIKULSKI. I thank Senator BINGAMAN. I will work with the House and Senate conferees to give these two important initiatives the consideration they deserve.

COPS HIRING PROGRAM FUNDING

Mr. BENNET. Mr. President, I congratulate the senior Senators from Maryland and Alabama for their excellent work putting together a Commerce, Justice, Science—CJS—appropriations bill that invests in critical national priorities. At this moment, I would like to invite Chairwoman MIKULSKI to enter into a colloquy about how important that the Community-Oriented Policing Services, COPS, Hiring Program is for our local law enforcement personnel. Given the budget shortfalls faced by states and local governments, federal resources through the COPS program are absolutely essential to ensure that work we are doing locally to prevent domestic violence and drug trafficking, for example, do not go neglected during this recession. I know Senator MIKULSKI has championed the COPS program, and. I would love to hear more of her thoughts.

Ms. MIKULSKI. Certainly, I thank the Senator for his kind words. As the Senator noted, I am a strong supporter of the COPS Hiring Program. This year in particular, we faced difficult funding decisions and had to juggle a number of priorities because we were trying to make up for years of underinvestment in Justice Department programs. That is why our fiscal year 2010 CJS spending bill provides $100 million for the COPS Hiring Program to put an additional 500 cops on the beat, patrolling our streets and protecting our families. As we move forward to conference with the House, I expect to hear from Democratic members about the need to increase those funds. I intend to do my part in conference to see that this program remains a high priority in the conference report.

Mr. BENNET. I agree with the Senator that we need to ensure that our law enforcement ranks remain stable. In February, this body took significant steps to ensure that our law enforcement maintained its ranks through investments made in the American Recovery and Reinvestment Act. The stimulus provided $1 billion for the COPS Hiring Recovery Program, CHRP, which was intended to help communities hire and rehire police officers during the recession. Nearly 7,300 CHRP applications requesting over 39,000 officers and $8.3 billion in funds were submitted to the COPS Office. Because of limited funds available, COPS was able to fund only 1,046—14 percent of the 7,272 CHRP requests received during the 2009 solicitation.

Some local law enforcement in my state are in need of assistance, though, and have not been able to get it. In July, the Montrose Police Department tragically lost Sgt. David Kinterknecht in a shooting. His sacrifice in the line of fire is a testament to the commitment of law enforcement in Colorado. Unfortunately, Montrose and some other departments in my state were rejected when they applied for the COPS Hiring Recovery Program. After the loss of Sergeant Kinterknecht, they were not only unable to add to their force, but also could not refill their ranks after this tragic death. The Montrose Police Department remains an officer short.

The story of the Montrose Police Department is just one of the many challenges faced by law enforcement as they try to protect our communities. Denver had to forego pay increases for 2010 and 2011 due to shortfalls in the city budget, for example. The city faced layoffs and our law enforcement made hard concessions in order to protect crucial jobs. Now in addition to making sacrifices in the line of duty, law enforcement is making financial sacrifices as our communities struggle to stay above water.

An increase in funding for the COPS Hiring Program would go a long way toward helping communities brace with the challenges of the current economic crisis.

Ms. MIKULSKI. I agree that we need to do all we can to help our police officers to ensure they are not walking a thin blue line. Our cops need a full team to combat violence, protect families, and fight the crime that's destroying neighborhoods. The funding provided in the stimulus went a long way toward helping put cops back on the beat. It is clear that the demand and needs of local communities are high. The Senators tireless advocacy for his State's law enforcement is much appreciated. The Senator has made his point loud and clear, and I know we will continue to hear from him on the importance of the COPS Hiring Program as we move into conference.

Mr. BENNET. I thank the Senator.

Mr. CARDIN. Mr. President, I rise today to express my support for the Senate amendment to H.R. 3288 and to thank my colleagues on the Commerce,