

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006—Continued

Mr. WARNER. Mr. President, my understanding is that the Senate now returns to the Defense authorization bill. Is that the pending business?

The PRESIDING OFFICER. The Senator is correct.

The Senator from Texas.

AMENDMENT NO. 1477

Mrs. HUTCHISON. Mr. President, I call up amendment No. 1477 and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, the pending amendment is laid aside. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Texas [Mrs. HUTCHISON] proposes an amendment numbered 1477.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To make oral and maxillofacial surgeons eligible for special pay for Reserve health professionals in critically short wartime specialties)

At the end of subtitle B of title VI, add the following:

**SEC. 624. ELIGIBILITY OF ORAL AND MAXILLOFACIAL SURGEONS FOR SPECIAL PAY FOR RESERVE HEALTH PROFESSIONALS IN CRITICALLY SHORT WARTIME SPECIALTIES.**

(a) IN GENERAL.—Section 302g(b) of title 37, United States Code, is amended by inserting “, including oral and maxillofacial surgery,” after “in a health profession”.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on October 1, 2005.

Mrs. HUTCHISON. Mr. President, this is a very simple amendment, and it is going to add one more category to those who will be able to receive special incentive pay for signing up to come in to serve our military in the medical field. This field is oral surgery. Those who are deployed in Iraq and Afghanistan and other military theaters have critical needs for oral surgery. Complex facial trauma comes with battlefield injuries.

In addition to being on the ground in mobile surgical hospital units, oral surgeons are serving on every aircraft carrier to provide essential facial reconstruction and trauma care. These surgeons are indispensable military personnel who provide a unique and necessary role in caring for our troops. Unfortunately, this valuable role is being threatened by an ever-widening compensation gap between military and civilian pay and the unlimited practice opportunities that oral surgeons have in the civilian market. With a historical retention rate of 85 percent, a loss of 15 percent, recent statistics predict the current retention rate for oral surgeons is closer to only 75 percent. Even more concerning, many of our military's oral surgeons are senior officers who could retire at any time. In fact, if all oral surgeons

eligible for retirement were to retire next year, we could have a 50-percent reduction in this force.

As a means to recruit and retain essential specialties vital to maintaining the military's readiness, the military offers a variety of special pay programs to supplement a specialist's base pay and to help close the military-civilian pay gap. One such special pay program is known as incentive special pay. Available to medical personnel, incentive special pay is a yearly bonus that is designed to bring the salaries of military specialists into closer line with civilian specialists. Although it doesn't get there, it does help. Applied at different levels based on medical specialties, wartime role, and retention, incentive special pay ranges from now between \$12,000 for pediatrics to \$36,000 for trauma surgery specialists. Ear, nose, and throat specialists, the most comparable medical personnel to oral surgeons, are eligible for incentive special pay around \$30,000.

Although oral surgeons stand the same facial trauma watches as ear, nose, and throat specialists and provide the same critical head and neck trauma care as ENTs, they are not eligible for incentive special pay. Often serving as the only head and neck specialist on aircraft carriers and smaller hospitals, our oral and maxillofacial surgeons are providing essential services for our troops in combat, services we cannot afford to lose.

Today, I ask my colleagues to join me in recognizing the important and necessary role that oral surgeons are providing our military by making these surgeons eligible for incentive special pay. We can't allow the pay disparity between military and civilian oral surgeons to become so substantial that these necessary specialists retire from the service or resign their commissions to be in private practice. I urge my colleagues to join me in allowing oral surgeons in uniform who are providing critical trauma services for our troops in the war on terror to be eligible for incentive special pay just as many other medical specialties are.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. I know the Senator from Wyoming desires to address the Senate.

I yield the floor.

AMENDMENT NO. 1342

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Mr. President, I rise in support of amendment No. 1342, the Support Our Scouts Act offered by my distinguished colleague from Tennessee, Senator FRIST. The amendment was intended to be simple and straightforward in its purpose to ensure the Department of Defense can continue to support youth organizations, including the Boy Scouts of America, without fear of frivolous lawsuits. The dollars that are being spent on litigation ought to be spent on programs for

youth. Every time we see a group such as the Boy Scouts that will teach character and take care of community, we ought to do everything we can to promote it.

Last Saturday, over 40,000 Boy Scouts from around the Nation and the world met at Fort A.P. Hill in Virginia for the National Boy Scout Jamboree. This event provides a unique opportunity for the military and civilian communities to help our young men gain a greater understanding of patriotism, comradeship, and confidence.

Since the first jamboree was held at the base of the Washington Monument in 1937, more than 600,000 Scouts and leaders have participated in the national event. I attended the Jamboree at Valley Forge in 1957. Boy Scouts has been a part of my education. I am an Eagle Scout. I am pleased to say my son was in Scouts. He is an Eagle Scout. Boy Scouts is an education. It is an education of possibilities for careers. I can think of no substitution for the 6 million boys in Scouts and the millions who have preceded them. There are dozens on both sides of the aisle who have been Boy Scouts. I say it is part of my education because each of the merit badges that is earned is an education. I tell school kids, as I go across my State and the country, that even though at times I took courses or merit badges or programs that I didn't see where I would have any use for them, I later wished I had paid more attention at the time I was doing it.

I always liked the merit badge pamphlet on my desk called entrepreneurship. It is the hardest merit badge in Boy Scouts. It is also one of the most important ones. I do believe that small business is the future of our country. Scouts promote small business through the entrepreneurship merit badge. Why would it be the toughest to get? Not only do you have to figure out a product or a service, not only do you have to do a business plan, not only do you have to find financing, the toughest requirement is the final requirement, and that is that you actually have to start the business.

I could go on and on through the list of merit badges required in order to get an eagle badge. There are millions of boys in this country who are doing that and will be doing that. They do need places to meet. They are being discriminated against. They are being told they cannot use military facilities even for their national jamboree. That is a tradition. These jamborees become a great American tradition for our young people, and Fort A.P. Hill has been made the permanent site of the gatherings. But now the courts are trying to say that this is unconstitutional. It isn't just military facilities, it is Federal facilities.

A couple of years ago, we had an opportunity to debate this on the Senate floor. It had to do with the Smithsonian. Some Boy Scouts requested that they be able to get their Eagle Scout Court of Honor at the National Zoo.

They were denied. Why? The determination by the legal staff of the Smithsonian that Scouts discriminate because of their support for and encouragement for the spiritual life of their members. Specifically, they embrace the concept that the universe was created by a supreme being, although we surely point out Scouts do not endorse or require a single belief or any particular faith's God. The mere fact they ask you to believe in and try to foster a relationship with a supreme being who created the universe was enough to disqualify them.

I read that portion of the letter twice. I had just visited the National Archives and read the original document signed by our Founding Fathers. It is a good thing they weren't asked to sign the Declaration of Independence at the National Zoo.

This happens in schools across the country. Other requests have been denied. They were also told they were not relevant to the National Zoo. That is a kind of fascinating experiment in words. I did look to see what other sorts of things have been done there and found that they had a Washington Singers musical concert and the Washington premiers for both the Lion King and Batman. Clearly, relevance was not a determining factor in those decisions, but it was in the Boy Scouts decision.

The Boy Scouts of America has done some particular things in conservation that are important, in conservation tied in with the zoo. In fact, the founder of the National Zoo was Dr. William Hornaday. He is one of the people who was involved in some of the special conservation movements and has one of the conservation badges of Scouts named for him.

If the situations did not arise, this amendment would not come up. But they do. In 2001, I worked with Senator Helms to pass a similar amendment requiring that the Boy Scouts be treated fairly, as any other organization, in their efforts to hold meetings on public school grounds. This amendment clarified the difference between support and discrimination. It has been successful in preventing future unnecessary lawsuits. The Frist amendment is similar to the Helms amendment and will help prevent future confusion.

Again and again, the Scouts have had to use the courts to assure they were not discriminated against. I am pretty sure everyone in America recognizes that if you have to use the courts to get your rights to use school buildings, military bases, or other facilities, it costs money. It costs time. This amendment eliminates that cost and eliminates that time to allow all nationally recognized youth organizations to have the same rights.

The legal system is very important, but it has some interesting repercussions. Our system of lawsuits, which sometimes is called the legal lottery of the country, allows people who think they have been harmed to try to point

out who harmed them and get money for doing that. It has had some difficulties through the Boy Scouts. I remember when my son was in Scouts, their annual fundraiser was selling Christmas trees. One of the requirements when we were selling Christmas trees was that the boys selling the trees at the lot had to be accompanied by two adults not from the same family. I didn't understand why we needed all of this adult supervision. It seemed as if one adult helping out on the lot would be sufficient. The answer was, they have been sued because if there is only one adult there and that adult is accused of abusing boys, they get sued.

So two adults provides some assurance that they won't get sued. The interesting thing is, it was just me and my son. We still had to have another adult in order to keep the Boy Scouts from being sued. They run into some other difficulties with car caravans.

So the legal system of this country has put them in the position where they are doing some of the things that they are doing. The legal system of this country has caused some of the discrimination that is done. It is something we need to correct.

This discussion of the Frist amendment is timely. U.S. District Judge Blanche Manning recently ruled that the Pentagon could no longer spend Government money to ready Fort A.P. Hill for the National Boy Scouts Jamboree. The Frist amendment would ensure that our free speech protections would also apply to the Boy Scouts of America.

The Boy Scouts of America is one of the oldest and largest youth organizations in the United States and the world today. The organization teaches its members to do their duty to God, to love their country, and to serve their fellow citizens. The Boy Scouts of America has formed the minds and hearts of millions of Americans and prepared these boys and young men for the challenges they are sure to face the rest of their lives. It is an essential part of America.

I urge my colleagues to join me in defending the Boy Scouts from constitutional discrimination by supporting the Frist amendment.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, before my distinguished colleague leaves the floor, I regret to say that I just got a call from the Department of Defense in which I was advised that at the jamboree being held just a short distance down 95 in Virginia, a power line collapsed, and at the moment there is one deceased and five critically injured and an assortment of other problems associated with this.

So I am delighted that you gave that speech. I am a cosponsor of the bill. I support it. I was a Scout myself, and I got a lot out of it. I think we ought to close this set of remarks out by offering our prayers and hearts and minds to this tragic accident that occurred an hour or so ago. I thank my colleague.

Mr. ENZI. I thank the Senator.

Mr. WARNER. Mr. President, we are still on the bill and speakers are coming to the Senate floor.

At this time, 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. LOTT. 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. LOTT. Mr. President, parliamentary inquiry: What is the pending business? Are we now on an amendment?

The PRESIDING OFFICER. We are on amendment No. 1477.

Mr. LOTT. Further parliamentary inquiry: Are we in a position where we can discuss any amendment that has been offered and has been set aside? For instance, amendment No. 1389 by Senator THUNE?

The PRESIDING OFFICER. It is in order to discuss any amendment at this time.

Mr. WARNER. Mr. President, the Senator is free to go. He spoke with me. It is an important element before the Senate. The general subject is BRAC.

#### AMENDMENT NO. 1389

Mr. LOTT. Mr. President, I thank the chairman, Mr. WARNER, the Senator from Virginia. I wanted to begin by congratulating him and Senator LEVIN for the bill they have produced from the Senate Armed Services Committee. I, frankly, had my doubts that we were going to be able to get the bill up at this time in a way that would have momentum and would get through to passage. I think they have succeeded in doing that. The atmosphere is such that I believe we will pass the Defense authorization bill.

As the Senator from Virginia knows, I always made a window for him, when I had the opportunity to make that call. Sometimes it took 2 weeks. Sometimes we put it up against a recess. Sometimes we put it together with Defense appropriations. But it is of a high priority, and I would be delighted if I could see us pass this bill in an orderly fashion this week.

Mr. WARNER. Mr. President, I thank the distinguished leader. The Senator forgot the one time it was 5 weeks, but we got there.

Mr. LOTT. We did. I think the atmosphere is different now. The Senator understands and the American people understand that we are at war, and terrorism is a very serious threat. We cannot expect homeland security and our law enforcement agencies to do the job alone. This is broader than that. We have to have a defense that is prepared to do the job at home and overseas. Certainly, we have called on our National Guard and Reserve to fill in, and they are doing a wonderful job. We have to provide the additional authorization necessary to get the funds so

our men and women can continue to do the fine job they have done.

I thank the Senator for his cooperation on amendments that have been accepted and the language in the bill. I served on the Armed Services Committee for a few years—I believe 6½ years. I enjoyed it very much. I always had a real interest in this area. I am happy to be on the Intelligence Committee now. I am obviously interested in shipbuilding because of what it means to not only my hometown and my State but to our country, the Navy, and a lot of other issues you have addressed for our military.

I am worried about what we are having to expend and how we are having to expend things now because we have certain demands in Afghanistan and Iraq for the Army and the Marines. I am concerned that in 5 or 10 years, we will need to have a military that can address new and emerging threats. I think that is part of what this bill is about—to try to begin to address some of those issues. I look forward to working with the Senator.

I rise in support of Senator THUNE's amendment No. 1389, which would defer Congress's consideration of closure and realignment recommendations that the President will forward to the Congress this coming fall. This is not a new position for me. I have always been opposed to the Base Realignment and Closure Commission process. I generally don't like commissions. I have spoken against them on a number of subjects on the Senate floor. I probably will again before the week is out. I think that is what we were hired to do. That is our job.

I get nervous sometimes that from Social Security, to tax policy, to detainees policy, to intelligence, we basically say: Well, we cannot do the job, so let a commission give us advice here. A commission can do it for us. Our attitude is see no evil, hear no evil, speak no evil, save us. But doing that difficult work is our job.

Up until recent years, we did our job and it worked. After World War II and Korea, certainly as the chairman knows, we closed bases in his State and mine. I can take you around Mississippi and show you those bases that were closed. How was it done? The Pentagon assessed their needs, recognized the fact that we were not on war footing, and we had to begin to close some of those airbases in Greenwood, MS, and in Mobile, AL, and make difficult recommendations, and Congress considered it and dealt with it. We did our job. Now we are in the fifth BRAC round, or something like that. I have opposed every one of them.

One day, I was walking up to the floor of the House of Representatives and this young Congressman from Texas named Dick Arme came up to me as a member of the Rules Committee and said, "I got this idea and I want you to talk to me about how I get it through the Rules Committee." He would remember this. I told him, "I

don't agree with what you are trying to do, and I am absolutely going to vote against it. But if I were you, this is how I would do it." He did it, and it led to this BRAC process. Congressman Dick Arme from Texas went on to be majority leader.

I voted against BRAC every time. Some people say: Wait a minute, you are just protecting your own bases; you are troubled because of bases in your own State. Not true. Not a single base has been closed in my State in these rounds. Contrary to popular opinion, we don't have a whole lot of bases. We have been through every round, and we have been fortunate. The commissions have decided not to go forward with closing those bases. So it is not that I have a grudge or that I am angry at anybody. I don't like the process, No. 1.

No. 2, this amendment doesn't kill the process. It allows the Commission to finish their independent and important work and forward the recommendations to the President.

The amendment permits the President to submit a set of recommendations to the Congress. At that point, the Congress would hold the President's recommendations in abeyance, pending completion of several requirements that are critical to achieving a fully informed interagency perspective of our basing requirements.

Here is my problem with BRAC this time. I don't like the process, No. 1. No. 2, I think the timing could not be worse. At a time when we are in war in Iraq and, of course, have been and are still exposed in Afghanistan, a war on terror, with communities all over America having to cope with Reserve and Guard units from all of our States there on extended tours in Iraq, Afghanistan, or in the region, it has had an impact on communities. They are already stressed, and they are asking themselves, What next? Now you are going to come in and close my Air Guard unit or this hospital or you are going to do this or that. The timing could not be worse. That is the second problem.

Next is I think this particular process, the way it is set up by the Pentagon, is a lot less reassuring and messier and more unreliable than the previous BRAC rounds have been. They have made significant mistakes. At a time, also, when we are looking at overseas alignment, talking about reformation, I have serious questions about some of the Pentagon's reformation plans.

So in instance after instance, I think we are making a mistake here. It is going to have huge negative ramifications, and I think we are going to wake up later and find out, wait a minute here, we didn't evaluate the impact of the reduction of military medical services and what it means in the local communities. The local communities may not be able to absorb that additional service. Who is going to serve these military men and women? Or, wait a minute, you mean we are bring-

ing that heavy unit back from Europe? Where are we going to put them? Where are the spouses going to live? What are the quality of life facilities? In some instances, they won't be there. This BRAC, in my opinion, is set up to be worse than all the previous rounds.

Senator THUNE has done a very thoughtful job. He has allowed the process to go forward to a point where he will then put it on hold until some very important things are done.

The conditions that have to be met:

First, complete analysis and implementation of recommendations from the Overseas Basing Commission. We have been talking about this, and we are planning on doing it. We are going to have realignment of where our units are based in Europe. We are going to bring some units home, perhaps some heavy units. We are going to have to bring them somewhere. We need to know what that is and where we are going to put them.

Second, submission of the Quadrennial Defense Review by the DOD to the Congress, and that will be completed before very long—I think this coming winter. Why don't we wait until we see what the needs and the plans are for the future? It would not cause an inordinate delay for that in itself.

The next condition is that we complete deployment and implementation by the Department of Defense and Department of Homeland Security of the national maritime security strategy and the homeland defense and civil support directive. It would have to be held until we get a submission of a report by the DOD to Congress to assess military installation needs in view of the Overseas Basing Commission, returning troops, QDR, national maritime strategy, and the homeland defense and civil support directive.

And return of substantially all troops from Iraq. We need to weigh the impact of what is going on in Iraq, when they will be coming home, and where they are going.

So those are the factors that would have to be considered before the Congress could actually act on the present recommendations.

When the Department of Defense released its BRAC recommendations last May, it was very evident that many of the recommendations were flawed and developed in a vacuum. Their recommendations did not consider the impact on other agencies, such as the Department of Homeland Security or the Veterans' Administration.

The Department of Defense did not even involve the Governors of States that would be affected by recommendations concerning Air National Guard units. The Air Guard is under the Governors. I don't know how they missed that turf. More than one counsel has advised the BRAC Commission that they cannot willy-nilly go in there and say they are shutting down this Air Guard unit. The Governor is going to have some say in that.

I, along with many of my Senate colleagues, was also alarmed that DOD

used transformational options in lieu of military value as the framework for many of the recommendations. Even distinguished Chairman WARNER noted in his testimony before the BRAC Commission, "A number of the Department's recommendations" deviate substantially from the BRAC legislative requirements in three important areas.

First, certain recommendations were justified by factors and priorities other than the selection criteria in violation of section 2914(f) [of the base closure law];

Two, certain recommendations were based on data that was not certified as required by section 2903 [of the BRAC law];

Three, certain recommendations did not contain accurate assessments of the costs and savings to be incurred by the Department of Defense and other Federal agencies as required by section 2913(e) [of the BRAC law].

The experience in my own State of Mississippi in looking at the installations was similar to what the great State of Virginia obviously observed and experienced: that DOD recommendations were not based in fact and analysis was faulty. For example, for Keesler Hospital at Keesler Air Force Base, the cost for admitting patients was underestimated by over \$2,000 per patient. A math error decreased the military value by 20 percent, and the Department of Defense ignored the fact that local VA facilities and community hospitals have no—none—no excess capability.

Where are these military men and women going to go? It is a problem, it is a big problem for the local community and, more importantly, for the military men and women who deserve quality health care.

Let me get even more simply to the statement of what happened. In one military value critical category, for some reason they gave this category almost a zero rating. When they actually went back at our urging, they said that obviously a mistake was made, and that should have been an 11 military value points instead of a zero. It moved that installation up 44 places. Little error? Big error.

There is a lot more embedded in this than we have been able to dig out even yet. Regarding the Navy Personnel Center at Stennis Space Center, DOD mistakenly assumed that the building was a commercially leased property with no security perimeter. It is not. The personnel center is on a secure compound owned and operated by NASA and is the model of interagency cooperation. Just a little detail there. We have this huge buffer zone. It is a totally secure facility, and they missed that little point.

For Pascagoula Naval Station, DOD proposed to abandon a naval presence for 35 percent of our Nation's coastline, leaving unprotected over 30 percent of this Nation's gas and oil reserves, 60 percent of our trade sealanes, and 14 of America's largest 23 ports. But just 3 weeks ago, the Department of Defense issued a new policy stating that defense of the homeland is their new No. 1 priority.

DOD's proposal to the BRAC Commission would mean we would not have a single naval port between the east coast of Florida at Mayport, FL, to San Diego. It is all sitting there, a vast gulf with all kinds of sealanes and potential threats and future dangerous areas. But DoD says no presence at all is ok; that causes me a great deal of concern.

Even if DOD's work had been perfect, we should not be closing bases at home if we are engaged in armed conflict overseas. It is not fair to the families of our service men and women who have to endure the uncertainty of where they will live and where their children will go to school.

Closing bases right now is also detrimental to our war-fighting ability. The Overseas Basing Commission has already noted that "... to launch major realignments of bases and unit configurations at a time when we are in the midst of two major conflicts takes us to the edge of our capabilities."

The Overseas Basing Commission also expressed concern that the domestic BRAC is disconnected from the proposed closure of overseas bases, and DOD's budget is woefully inadequate to implement necessary changes. These are some of the Commission's recommendations:

... adequate strategic sealift, airlift, and prepositioned equipment and stocks do not exist ...

And—  
budgetary plans for mobility assets are inadequate to meet projected lift demand—

When forces return from overseas.

We [intend to] reposition tens of thousands of family members to localities that have not been given adequate time or budget to prepare for their proper reception ...

... DOD estimates the implementation of [global basing changes] to be between \$9 billion and \$12 billion with only about \$4 billion currently budgeted in fiscal years 2006 through 2011.

If it was just up to me, I would vote to kill this process right now. I have never liked it. I must admit, I have fought it three times in the Senate and was almost able to kill it one of those times. It is an abrogation of Congress's responsibility to oversee basing and, if necessary, to close excess bases.

DOD insisted on doing its BRAC assessment in a vacuum. We tried to follow what was going on. We could not get the answers. But we, the Congress, are obligated to the American people to take a larger perspective.

Commissioner Principi and the entire BRAC Commission are doing a good job. They are doing honorable work right now to try to fix some of the fundamental flaws in DOD's set of recommendations. I want to make it clear, it is not that I don't have confidence in the chairman and the Commission. I do. I think they are a good quality group. But even the Commission can only do so much. The Commission is bound by a set of legal constraints that did not anticipate DOD recommendations would deviate from the laws so substantially.

So if we are not willing to stop this flawed process in its tracks, let's do the next best thing. Senator THUNE's amendment is a workable compromise. It gives breathing room to take a larger view to consider our basing requirements in a global fashion and across all affected agencies. The distinguished Senators from Virginia and Michigan have both said that we do need to close unneeded bases. I agree with that. I am not unrealistic. I know different times call for different things. I know we have some duplication and overlapping, and we can have more efficiencies and we can consolidate.

I do know we are trying to change our forces to deal with where the challenges may be, where our forces are more light, more mobile, and prepositioned. The problem is that many of the recommendations of the BRAC undermine the construct of lighter and more mobile and prepositioned. They do not mesh with what we are saying we should do here, and what we are saying we do should do in reformation does not fit with making our troops lighter and more mobile and prepositioned. Let's not ride a flawed process into oblivion. I urge my colleagues to support Senator THUNE's amendment so that we, the Congress, can make an informed decision when we are asked to vote on the merits of closing domestic bases. I think we will feel better about it.

I realize perhaps the die is cast. I tried last year with an amendment to defer it for a couple of years. We got, I think, 44 votes or close to that. A couple votes who were absent, and we got close. In retrospect, that was the key vote. The opposition was effective, and they won the day. And we have moved forward. I don't think we can turn back that clock, but I do think we can take a pause. We can take some time to see if certain things are considered before we actually pull this trigger and make some changes that we may regret.

Mr. WARNER. Mr. President, if my distinguished leader would enter into a little discussion with me, the Thune amendment, to which he has referred in his remarks, apparently has been modified in a way that I wish to advise the Senate on this modification, as I read it. It is extraordinary.

The concept of BRAC only works if the President decides on the block of closures and sends it to the Congress to vote it up or down en bloc.

As I read this and I just read it for the first time a few minutes ago I draw your attention to the page I handed the Senator from Mississippi. It says as follows:

In the heading by striking "congressional disapproval" and inserting "congressional action." In subparagraph A, by striking "the date on which the President transmits such report" and inserting "the date by which the President is required to transmit such report," and subparagraph B, by striking "such report is transmitted" and inserting "such report as required"—all

this gets down to the following: that the Secretary may not carry out any closure or realignment—that is any of the number on the whole list, any of them:

The Secretary may not carry out any closure or realignment recommended by the Commission report transmitted by the President pursuant to section 2903 if a recommendation for such closure or realignment is specified as discussed by Congress in a joint resolution partially disapproving the recommendations of the Commission that is enacted before the earlier of . . .

It seems to me, as I read this, Congress can now go in and cherry-pick base after base and pass a resolution to take it out.

Mr. LOTT. Mr. President, if the Senator would allow me to ask, is this a modification of the Thune amendment? Is this the Thune amendment? This sounds similar to an amendment I heard discussed earlier as maybe one that was being suggested or considered by Senator COLLINS. It is not clear to me.

Mr. WARNER. If I may inquire at the desk, was there not a modification put in by Senator COLLINS this morning, three amendments, and among them

The PRESIDING OFFICER. The Senator from Maine called up three amendments on behalf of the Senator from South Dakota, Mr. THUNE. None of the amendments have been modified.

Mr. LOTT. That is an important point, I say to the Senator from Virginia. That is not my understanding of the Thune amendment. If a modification along these lines were added to the Thune amendment, I would have some reservations about that. I want to take a look at it.

Mr. WARNER. Let me point out, I say to my distinguished former leader, that the original Thune amendment that was offered, I think, Thursday or Friday night and was the subject of a detailed colloquy between myself and the distinguished Senator from South Dakota, is still at the desk, and then this amendment that I read to you is the final paragraph in an amendment which is identical in every way to the one we discussed—Senator THUNE and myself—on Thursday night.

With the exception of the last paragraph in that amendment, it has been changed to read the same as this one.

Mr. LOTT. Mr. President, I say to the distinguished chairman of the committee, I would want to take a good look at the different amendments that might be pending. I want to be sure I understood any modification or change to Senator THUNE's amendment. The Thune amendment, as I understand it and as I described it in my remarks, is an approach which I think is good. I think what the chairman is saying about the idea that Congress would start cherry-picking at this point from this list, I have my sincere reservations about that. That would be a messy thing to do without proper consideration. I would have a lot of reservations about it. I would want to hear what the sponsors have to say. My

predisposition is to be very hesitant about that.

Mr. WARNER. Mr. President, I thank my distinguished leader. I cannot remember how many years he was in the House and how many years he has been in the Senate, but I have only been here 27.

Mr. LOTT. So long my memory has faded to the point I can't remember.

Mr. WARNER. If he had something such as this on the roll, he would have a challenge—

Mr. LOTT. I think, if we should start to cherry-pick from this list or any list at this time, it would not be very wise.

Mr. WARNER. Give them the benefit of the doubt to find out, but this is at the desk right now. This is the moving target on this BRAC. I am strongly in favor of the current BRAC law being implemented as it is written in the law, not deviating in any way. I cannot accept the delay, I say to my distinguished leader, because there are too many communities burdened by all the expenses of lobbyists, and so forth, and the uncertainty that would throw onto the business community not knowing, with the Thune amendment, for maybe another 2 years whether they are going to stay open.

Mr. LOTT. I certainly agree with that argument. I have a problem with why these communities and States have had to spend a lot of money on it. I thought that is what we were for.

Having said that, if you gave a lot of them a choice—have your base closed or delay it for 2 years—I think I know what the answer would be: Give me 2 more years to deal with the demands of this kind of choice.

There have been instances where these closures have taken place and the communities have done pretty well. The old Brookley Air Force Base in Mobile, AL—talking about a State other than my own—recently won a competition to assemble airbus airplanes there. I think they are making pretty good use of it.

Mr. WARNER. Mr. President, I am familiar with that.

These communities could not begin to attract new business, could not get new capital. They would become almost stagnated not knowing which way that decision would go. I thank my distinguished leader for his participation in this debate.

Mr. LOTT. I yield the floor.

The PRESIDING OFFICER (Mr. THUNE). The Senator from Virginia.

Mr. WARNER. Mr. President, if I might advise the Senate, there was a UC in place whereby the Senator from South Carolina was to be recognized for the purpose of bringing an amendment to the attention of the Senate. He has been patiently waiting some period of time. I would like to consult with the distinguished Senator from Michigan. I would like to give the Senator from South Carolina the opportunity to proceed, but I would like to be aware of what the needs of the Senator from Michigan are in regards to his side.

Mr. LEVIN. I thank my good friend from Virginia. I think Senator GRAHAM was actually part of a UC.

Mr. WARNER. It is a part of the RECORD.

Mr. LEVIN. Right. So he has the right to go next.

I would ask, if it is convenient for the Senator from Florida, that after Senator GRAHAM, I will ask unanimous consent that the Senator from Florida be recognized to introduce his amendment at that time. I wonder if we could find out from Senator GRAHAM about how long he expects to be.

Mr. GRAHAM. Less than 10 minutes.

Mr. WARNER. Mr. President, might I suggest that we take 15, and I would like to have 5 of those minutes.

Mr. GRAHAM. Fifteen minutes, and the Senator from Virginia can have 5; yes, sir.

Mr. LEVIN. Then I would make inquiry also from my friend from Virginia. I understand that the Republican TV monitor has already indicated no votes tonight. Is that correct?

Mr. WARNER. I am not aware of that. I have been on the floor. I know that we checked with the Senator's side and there was some doubt as to whether there could be votes.

Mr. LEVIN. If we could work out votes, we were willing to do that, but I think it is becoming clear that is not going to happen.

Mr. WARNER. In fairness to our colleagues, let us clear that up in the course of the debate on the amendment of the Senator from South Carolina.

Might I ask from the Senator from Florida how much time he would like?

Mr. LEVIN. The Senator from Florida would need about how much time?

Mr. NELSON of Florida. At the Senator's great pleasure, 10 minutes.

Mr. LEVIN. Whatever the Senator needs is fine. Then I would be offering two amendments, if that is agreeable with the Senator from Virginia.

Mr. WARNER. Absolutely.

Mr. LEVIN. I will be introducing them immediately following the Senator from Florida.

The PRESIDING OFFICER. The Senator from South Carolina is recognized under the previous order.

Mr. WARNER. Mr. President, I think we had modified the previous order with a new UC whereby the Senator from South Carolina gets 15 minutes, 5 minutes under the control of the Senator from Virginia, and 10 under his control, followed by the Senator from Florida for 10 minutes. Am I not correct?

The PRESIDING OFFICER. The Chair would note that is correct.

Mr. WARNER. I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

AMENDMENT NO. 1505, AS MODIFIED

Mr. GRAHAM. I ask unanimous consent at this time to set aside the pending amendment and call up amendment No. 1505 and send it to the desk with a modification.

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

The clerk will report.

The legislative clerk read as follows:

The Senator from South Carolina [Mr. GRAHAM], for himself, and Mr. MCCAIN, proposes an amendment numbered 1505, as modified.

Mr. GRAHAM. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

At the end of subtitle G of title X, add the following:

**SEC. 1073. AUTHORITY TO UTILIZE COMBATANT STATUS REVIEW TRIBUNALS AND ANNUAL REVIEW BOARD TO DETERMINE STATUS OF DETAINEES AT GUANTANAMO BAY, CUBA.**

(a) AUTHORITY.—The President is authorized to utilize the Combatant Status Review Tribunals and a noticed Annual Review Board, and the procedures thereof as specified in subsection (b), currently in operation at Guantanamo Bay, Cuba, in order to determine the status of the detainees held at Guantanamo Bay, including whether any such detainee is a lawful enemy combatant or an unlawful enemy combatant.

(b) PROCEDURES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the procedures specified in this subsection are those that were in effect in the Department of Defense for the conduct of the Combatant Status Review Tribunal and the Annual Review Board on July 1, 2005.

(2) EXCEPTION.—The exceptions provided in this paragraph for the procedures specified in paragraph (1) are as follows:

(A) To the extent practicable, the Combatant Status Review Tribunal shall determine, by a preponderance of the evidence, whether statements derived from persons held in foreign custody were obtained without undue coercion.

(B) The Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advise and consent of the Senate.

(3) MODIFICATION OF PROCEDURES.—The President may modify the procedures and requirements set forth under paragraphs (1) and (2). Any modification of such procedures or requirements may not go into effect until 30 days after the date on which the President notifies the congressional defense committees of the modification.

(c) DEFINITIONS.—In this section:

(1) The term “lawful enemy combatant” means person engaging in war or other armed conflict against the United States or its allies on behalf of a state party to the Geneva Convention Relative to the Treatment of Prisoners of War, dated August 12, 1949, who meets the criteria of a prisoner of war under Article 4 of that Convention.

(2) The term “unlawful enemy combatant”, with respect to noncitizens of the United States, means a person (other than a person described in paragraph (1)) engaging in war, other armed conflict, or hostile acts against the United States or its allies, or knowingly supporting others so engaged, regardless of location.

Mr. GRAHAM. Very quickly, I appreciate the patience of the Senator from Florida and Chairman WARNER.

Mr. President, this amendment deals with the concept called unlawful enemy combatant, a concept being used to detain about 500 people at Guantanamo Bay who have been captured throughout the world, many of them on battlefields. It is a concept

that goes back to World War II where the Supreme Court, during World War II, coined the phrase “enemy combatant” to deal with some German saboteurs who were caught coming into America in civilian clothes, with a plan to disrupt American life in the war operations.

These individuals—I think there were seven of them—were tried by military tribunals. A couple of them were put to death. Some were given lengthy prison sentences. Then the Court recognized the concept of enemy combatant.

Fast forward 60 years. What do we find? We find ourselves in a war with a group of people who are not part of a state or a nation. They do not wear uniforms. They are terrorists. They hide among civilians. They cheat. They do anything one can imagine to have their way. They do not abide by any international regimes.

When we capture these people, we have made a decision as a nation to house them at Guantanamo Bay, a place run by the military. It has three functions: To interrogate foreign terrorists to get good information to make sure that we are safer as a nation. Senator MCCAIN has an amendment to standardize the interrogation techniques. I think the country would be well served to have everything dealing with unlawful and lawful combatants in separate categories.

We want the Geneva Conventions to apply to people who are under it. We do not want the Geneva Conventions to apply to terrorists. We want to do it right. We want our troops to not be confused. Senator MCCAIN has an amendment that would basically allow the Army Field Manual to be the one source of law to deal with both categories, which would be a great benefit to the military and the country at large, in my opinion.

I have an amendment that gets Congress involved for the first time. In a general way, the Congress authorized the President to go to war after 9/11. A lot has happened since then, some good, some bad. I think it is now time for the Congress to weigh in on the issues that affect this Nation in the war on terror. My amendment allows Congress to define “unlawful enemy combatant” in a very flexible way similar to what is being used at Guantanamo Bay now. It incorporates the procedures that are used to classify and review enemy combatant status.

The way it works now, if the military or appropriate authority sends someone to Guantanamo Bay, the first thing that happens is there is a review process where a determination will be made as to whether that person fits the definition of “unlawful enemy combatant.” We are codifying that procedure. We are accepting most of it. We are tweaking the definition in line with Supreme Court cases that have reviewed this whole subject matter.

That is another point I would like to make. There are about five cases in Federal court now dealing with issues

like enemy combatant status, military commissions to try noncitizen foreign terrorists. The Government has won on most of these cases. But enemy combatant status needs to be defined, in my opinion, by the Congress working in conjunction with the administration because courts will defer to a statute much quicker than it will defer to anything else.

In one of these opinions, Justice Scalia has been telling us that Congress has been AWOL. Congress needs to get involved. So this amendment allows the procedures in place at Guantanamo Bay to make the initial determination, if one is an enemy combatant, to be authorized to be utilized by the President. Every year, a review is made of each person’s case. Every year the Government has to come and show that the enemy combatant status is still justified, that the person who is being detained is not dangerous to us or our allies, or they no longer have any intelligence capability or intelligence value. At that point, they can be released. Two hundred and something have been released. What we are trying to do with this amendment is to get Congress involved in that process so that the courts will understand that Congress agrees with the concept of unlawful enemy combatant and that the review process in place is a good process. I have made two changes.

One, I have addressed the issue of using statements that are derived from foreign interrogations. I do not think anybody in this country wants our Nation to be using evidence that may be tainted by torture or undue coercion. So I have a provision in there that says if a statement or information is used that comes from a foreign detention or a foreign interrogation, we have to simply prove, where practical, that it is reliable, that it is not as a result of coercion. The courts will appreciate that, and I think the American public would appreciate that.

Second, we have a provision that the releasing authority, the person who decides if someone can be released, should be confirmed by the Senate. Under Secretary England performs that function right now, but I think it would be a good relationship to have the Senate involved in picking that person who has the ultimate authority to determine to let these people go because 12 of them have gone back to the fight. Some people who have been released have gone back to the war. Some people who have been picked have probably been misidentified.

We are trying to get a procedure that the courts will accept, that will be good for the country, that will keep terrorists off the battlefield, that would withstand legal scrutiny and live up to the ideals of who we are.

If Congress will get involved and legitimize unlawful enemy combatant status, it will pay great dividends to the operation at Guantanamo Bay because we will have the administration and the Congress on the same sheet of music and the courts will soon follow.

My goal is to strengthen Guantanamo Bay, make sure that abuses in the past never occur again, have standardization of interrogation techniques so our troops will not get in trouble so that we can get good, reliable information. The military commissions are on track to be approved by the Supreme Court. We need a place to try these terrorists for their crimes. If they are not being tried, they need to be kept off the battlefield. Enemy combatant status does that. We need due process rights. We are a nation of laws. This amendment incorporates the due process that already exists with some improvement.

If we will do these things, Guantanamo Bay will be more effective in the future. It will be a forward-looking, reform-type process. We will not be captured by the mistakes of the past, and we will be a safer nation.

I appreciate Senator WARNER's support and leadership on this issue. We are trying in concert to make sure that we are stronger as a nation, not weaker. We learn from our problems. We clean up some of the problems we have had in the past and Congress finally gets involved. I think the courts will appreciate that. I know the American public will.

With that, I will yield to Senator WARNER.

**THE PRESIDING OFFICER.** The Senator from Virginia.

**Mr. WARNER.** Mr. President, this is another very important step forward, drawing on the very profound remarks made earlier today by our distinguished colleague from Arizona. The three of us have worked together.

I want to clarify one aspect because when I looked at the Senator's earlier draft, it appeared to me that a military judge being given to an unlawful combatant appearing before an administrative review board would give that individual more due process than accorded a lawful combatant, a POW. My understanding is the Senator's modification now embraces that concern, and I want to make that clear to our colleagues.

**Mr. GRAHAM.** That is correct.

**Mr. WARNER.** Why does the Senator not state it in his own words?

**Mr. GRAHAM.** That is a very good point. Under the procedure in place now, a military representative is provided to the enemy combatant initially. When the determination is made whether someone is an enemy combatant, our own rules provide a military representative. In an annual review, a military representative is given to the enemy combatant to make their case that they are no longer a danger. What I wanted to do at the annual review is make that person a military lawyer because the potential of keeping these people there for a long period of time is great because unlike other wars dealing with traditional POWs, there is nobody to sign surrender documents.

I can understand the Senator's concerns. We can deal with that issue later. So we will go back to the old way

of doing business. The lawyer requirement will be taken out and we will go back to the procedures that are in place now.

Right now, every unlawful enemy combatant has a military representative to help them make their case about their status. We will not make that person a military judge advocate. I think it would help us in court, but I do not believe it is that important. It will pass muster with the courts in its current form, so that has been changed.

**Mr. WARNER.** Clearly, the unlawful has no advantages over, as we might say, the lawful. They are on equal status, so to speak?

**Mr. GRAHAM.** The Geneva Convention would govern how we treat the lawful combatant. That is something we all understand and have been working with for 60 years. The unlawful enemy combatant can now be detained for an indeterminate period of time, once that determination has been made, with an annual review required to see if they should be kept based on danger to our country that the person presents, and any intelligence data that they present.

So this legitimizes what the courts have been telling us to do. The courts have said that an unlawful enemy combatant status determination is an appropriate legal concept as long as the person is given notice and the right to challenge. So what we are doing in this statute is taking the court's directive and we are giving them notice and we are giving them a right to challenge. A lawful combatant already has that under the Geneva Conventions.

**Mr. WARNER.** Mr. President, I thank my colleague. I ask that I now be a cosponsor, with that modification.

**Mr. GRAHAM.** The Senator has made my day.

**THE PRESIDING OFFICER.** Without objection, it is so ordered.

**Mr. WARNER.** Mr. President, the three of us, together with others who have talked with us, I think, have made a very valuable contribution because all eyes are on America as to how we conduct these difficult situations.

Tomorrow we will have an opportunity to further go into this question about the use of the Army manual. My concern over that is that the current manual, in my judgment, does not quite strike the balance between detention and interrogation. I am hopeful that we can draw from the Department of Defense, as best we can, what the modification of the Army manual would be.

If I can be assured that is going to be balanced and take into consideration the need to address this unlawful category of these individuals who are not acting on behalf of a State-sponsored conflict—am I not correct?

**Mr. GRAHAM.** I say to the chairman, he is absolutely correct. It is a very simple concept we are trying to achieve. There are two problems, there

are two groups of people we worry about for two different reasons. One group I worry about is the Americans in charge of these detainees because we have all kinds of laws that we have adopted, for 60 years, directing our people in how to treat folks who are captured—whether they are lawful or unlawful. We have had policy statements and directives that are at best inconsistent, that are all over the board, floating out there in legal cyberspace. We are trying to put into one document, the Army Field Manual, the rules of the road for both groups, lawful combatants and unlawful combatants.

We are not writing the field manual, we are not telling the experts what to put in the manual, how to write it, we are saying, for the sake of our own troops, you have one document you can go to now. And we are saying to the world we are going to standardize our techniques. We are not going to have inconsistent messages. The JAG memos we were talking about a while ago that were 2 years old now are telling us if you get too far afield from what we have been doing for 60 years, you are going to get yourself in trouble. So the Army Field Manual will be one-stop shopping for all those responsible for detainees in both categories, and it will standardize procedures that will allow us to get good information, be aggressive, without losing who we are as a people. That is why we need this, in my opinion.

**Mr. WARNER.** Mr. President, I do need to make certain that this modification will treat the subject of how a person is detained with equal specificity as to how they are to be interrogated.

As you know from your experience of 20 years in the JAG—as a matter of fact, you and I went to Guantanamo a week or so ago. It is important that detention be conducted in a way that it doesn't somehow influence how the interrogation might go. I will not draw the picture here as to what could be done.

**Mr. GRAHAM.** Absolutely.

**Mr. WARNER.** I yield the floor.

**Mr. DURBIN.** Will the Senator yield for a question?

**Mr. GRAHAM.** Absolutely.

**Mr. DURBIN.** I ask the Senator from South Carolina, the amendments which you have offered and were cosponsoring with Senator McCAIN, Senator WARNER, and others, do they make it clear that the policy of the United States is not to engage in cruel, inhuman, and degrading treatment of any prisoner in our control?

**Mr. GRAHAM.** It becomes a statute—

**Mr. WARNER.** Mr. President, I can answer that. If you look at the second McCain amendment, basically that amendment is directed at that question. That is my understanding.

**Mr. GRAHAM.** That is absolutely right. It uses the terms the Senator has just uttered and makes it a statutory

prohibition to engage in that conduct. It takes what the President said, we are going to treat people humanely, gets the Congress involved, and we are putting parameters around what we do with foreign terrorists, noncitizens. We can interrogate them, but we are not going to change who we are as a people, and the interrogators tell us that the Army Field Manual—as we were down there a week ago—gives them all the tools they need to aggressively pursue the interrogations. You really don't get things out of torture. They do not believe it is good practice, to begin with, so you are absolutely right. There will be a prohibition in law as well as rhetoric.

Mr. DURBIN. I ask unanimous consent for 2 additional minutes for the Senator from South Carolina or Virginia—whoever wants the floor.

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

Mr. DURBIN. I thank the Senator from Florida for his patience, too.

If I can ask either Senator—both served in the military, and the Senator from South Carolina in the Judge Advocate General Corps—it strikes me this is an important thing for our troops, to give them clarity, in terms of policy. I would ask the Senator from South Carolina if, in his visits to Guantanamo or visits with other military personnel, he has found that sentiment.

Mr. GRAHAM. This is absolutely giving clarity. What had been confusing will now be clear, and it will be protection for the troops who are having to administer the detainees, in terms of interrogation. That is what Senator WARNER said, in terms of detention.

The Marine Corps Judge Advocate, who was part of a review process 2 years ago, said the one thing he thought policymakers were missing, or misunderstood, was the effect on our own troops. Under the Uniform Code of Military Justice, it is a crime to abuse a detainee. So you are creating a new model for interrogation, and you may be getting your own people in trouble if you don't understand how the law exists already.

We are trying to reconcile those concepts; let the military tell us what they need and not put our own people at jeopardy. This will help GTMO in two regards: Get better, more reliable information that will not give us a black eye and help the troops understand what their duties are.

Mr. DURBIN. I say in closing to the Senator from South Carolina, I thank him for his leadership, along with Senators WARNER and MCCAIN. I know better than most in this Chamber this is a very delicate issue, and I think they have handed it in a positive way, with clarity along the lines we are drawing, so we protect America and protect our troops and give them clear guidance in terms of conduct that is acceptable and up to American's standard of value. I thank the Senator for his leadership.

Mr. LEVIN. Will the Senator yield for an additional question? And I ask

unanimous consent that I be allowed to proceed for 3 minutes with the Senator from South Carolina, if the Senator from Florida will be so gracious.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Michigan.

Mr. LEVIN. I also commend the Senators who are involved in these proposals. These are extremely important proposals. I hope that they would not be nongermane if, indeed, cloture is invoked tomorrow.

By the way, I wonder if I could ask the Chair whether or not the pending amendment would be germane, if cloture is invoked?

The PRESIDING OFFICER. The Chair would note there is not sufficient information at this time to make that determination.

Mr. LEVIN. I thank the Chair.

Mr. WARNER. Will the Senator allow me to address the Senate on a separate matter for 1 minute? On the subject of cloture, my leader, Senator FRIST, and I will confer in the morning and then confer with the Democratic leader himself. At the moment, it is not a matter of absolute certainty, even though it ripens, as to whether the leader will wish to pursue it.

Also, we would like to advise all Senators there will be no more votes tonight, if you concur in that?

Mr. LEVIN. I have no objection.

Mr. WARNER. The assistant Democratic leader is here.

Mr. LEVIN. If I can go back and make inquiry of my good friend from South Carolina, I think he has focused, along with the cosponsors, on something which is critically important, and that is reliance on the Army manual so everybody knows the roadmap, as he puts it.

Is it the Senator's understanding of the Army manual that abusive and degrading treatment would be prohibited?

Mr. GRAHAM. It is not only my understanding, it is also part of the Uniform Code of Military Justice. There is a specific section that makes it a crime to abuse a detainee or a prisoner.

Mr. LEVIN. The reason this comes up is those words have now been utilized by a witness, by somebody who has made investigation. So I want to be as precise as I can, in my question, about whether it would be the belief of the Senator from South Carolina that abusive and degrading treatment would be a violation of the manual?

Mr. GRAHAM. It is my understanding that the Army Field Manual, as written—and it is being revised—rejects that concept in interrogation of abusive and degrading behavior. I am not an expert on the terms of it. But the whole point of these amendments also is to make sure that we have standardized interrogation techniques that get good information without having to be abusive and degrading. But you can be forceful. You can be stressful. You can be psychologically and physically stressful under the Army

Field Manual without crossing the line that we are all concerned about.

That is exactly what we did. We had confusing messages—if I may continue for a second—to our troops. We had a DOJ memo that was a basic departure from the way we have lived as a nation for 60 years. Understandably, after 9/11 we wanted to be aggressive. But the JAGs in question told us: Don't go down this road too far because we have trained people for 60 years to do it one way. It works that way. And you are going to confuse our own troops.

Lo and behold, that's exactly what happened. So we are trying to get it back to where we have been.

We fought World War II, Hitler—a pretty bad guy—using these concepts. We can fight these terrorists using these concepts.

My goal, and I am sure it is your goal, is to kill them if we have to, capture them, interrogate them, detain them and prosecute them and do all that without giving up who we are as a nation.

We can do that. This is a step in that direction.

Mr. LEVIN. Again, I commend my friend from South Carolina. I am glad we have the reassurance that he would consider at least abusive and degrading treatment to be inhumane treatment within the meaning of those words. I thank him, and I yield the floor.

AMENDMENT NO. 762

The PRESIDING OFFICER. Time has expired. The Senator from Florida is recognized.

Mr. NELSON of Florida. Mr. President, I want to talk about widows and orphans. I call up amendment No. 762, which is filed at the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Florida [Mr. NELSON], for himself and Mr. HAGEL, Mr. CORZINE, Mr. NELSON of Nebraska, Mr. SMITH, Ms. CANTWELL, Mr. DAYTON, Mr. KERRY, Ms. LANDRIEU, Ms. MIKULSKI, Mrs. MURRAY, Ms. STABENOW, Mrs. BOXER, Mr. PRYOR, Mr. DURBIN, Mr. JEFFORDS, Mr. JOHNSON and Mr. SALAZAR proposes an amendment numbered 762.

Mr. NELSON of Florida. I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To repeal the requirement for the reduction of certain Survivor Benefit Plan annuities by the amount of dependency and indemnity compensation and to modify the effective date for paid-up coverage under the Survivor Benefit Plan)

At the end of subtitle D of title VI, add the following:

**SEC. 642. REPEAL OF REQUIREMENT OF REDUCTION OF SBP SURVIVOR ANNUITIES BY DEPENDENCY AND INDEMNITY COMPENSATION.**

(a) REPEAL.—Subchapter II of chapter 73 of title 10, United States Code is amended—

(1) in section 1450(c)(1), by inserting after "to whom section 1448 of this title applies" the following: "(except in the case of a death as described in subsection (d) or (f) of such section)"; and

(2) in section 1451(c)—

(A) by striking paragraph (2); and

(B) by redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively.

(4) as paragraphs (2) and (3), respectively.

(b) PROHIBITION ON RETROACTIVE BENEFITS.—No benefits may be paid to any person for any period before the effective date provided under subsection (e) by reason of the amendments made by subsection (a).

(c) PROHIBITION ON RECOUPMENT OF CERTAIN AMOUNTS PREVIOUSLY REFUNDED TO SBP RECIPIENTS.—A surviving spouse who is or has been in receipt of an annuity under the Survivor Benefit Plan under subchapter II of chapter 73 of title 10, United States Code, that is in effect before the effective date provided under subsection (e) and that is adjusted by reason of the amendments made by subsection (a) and who has received a refund of retired pay under section 1450(e) of title 10, United States Code, shall not be required to repay such refund to the United States.

(d) RECONSIDERATION OF OPTIONAL ANNUITY.—Section 1448(d)(2) of title 10, United States Code, is amended by adding at the end the following new sentences: “The surviving spouse, however, may elect to terminate an annuity under this subparagraph in accordance with regulations prescribed by the Secretary concerned. Upon such an election, payment of an annuity to dependent children under this subparagraph shall terminate effective on the first day of the first month that begins after the date on which the Secretary concerned receives notice of the election, and, beginning on that day, an annuity shall be paid to the surviving spouse under paragraph (1) instead.”.

(e) EFFECTIVE DATE.—The amendments made by this section shall take effect on the later of—

(1) the first day of the first month that begins after the date of the enactment of this Act; or

(2) the first day of the fiscal year that begins in the calendar year in which this Act is enacted.

**SEC. 643. EFFECTIVE DATE FOR PAID-UP COVERAGE UNDER SURVIVOR BENEFIT PLAN.**

Section 1452(j) of title 10, United States Code, is amended by striking “October 1, 2008” and inserting “October 1, 2005”.

Mr. NELSON of Florida. Mr. President, it is an honor for me, on behalf of some folks who have not been treated with fairness and equity, to rise on the floor of the Senate to try to obtain it for them. There will be attempts to strip this amendment from the bill. But I offer it tonight, whether or not cloture is invoked on the overall bill, with the hope that we are going to get an up-or-down vote. It is important that widows and orphans in this country, whose husbands and fathers died as a result of their military service, can know where the Senators stand on this important issue. It is an honor for me to offer this amendment, and it is going to correct two important inequities faced by our military widows and our military retirees.

There is an unfair and painful offset of the Defense Department's Survivors Benefits Plan, offset against the Veterans Affairs Dependency and Indemnity Compensation. What is Survivors Benefit Plan? When servicemembers die on active duty, their survivors receive a benefit to recognize their sacrifice. You also have 100-percent disabled military retirees who actually go

out and purchase this survivors benefit so their loved ones will have this when they have passed on. Yet that survivor benefit is today being taken away unfairly from our military widows and orphans. Fixing that is what my amendment is all about.

If you go back into the Good Book, you will find that one of the main things that we are admonished is to look out for the widows and orphans. With our Nation now in a violent struggle with brutal and vicious enemies, and Americans being lost every day, we simply must not forget that the families left behind by those courageous men and women, those families, bear tremendous pain. Their survivors' lives are forever altered. Their future is left unclear. They have made the ultimate sacrifice and our Nation expects us to honor that sacrifice.

It reminds me of President Lincoln, who during the midst of the Civil War, said:

As God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan.

The immortal words of President Lincoln.

Since the beginning of this session we have considered and adopted increased death gratuity benefits for the survivors of our troops lost in this present war. But the survivors of those killed in action are entitled to automatic enrollment in the survivors benefit plan. That is a change we made in the law, but it is not complete.

We now see the pain caused. At the same time a widow or a widower is enrolled in the Survivor Benefit Plan, and in many cases paid for it, another set of laws under the Department of Veterans Affairs says they are also entitled to dependency and indemnity compensation. However, under current law one offsets the other—they can't get both.

Widows instantly recognize the injustice of this offset. It deeply wounds their sense of the value of their sacrifice. It is wrong, the way we treat these families. This offset is no less painful for the survivors of our 100-percent disabled military retirees because it is a purchased plan, yet they cannot get what they have purchased because it is offset by Dependency and Indemnity Compensation.

Survivors of service members killed on active duty are entitled, in law, to automatic enrollment in the Survivor Benefit Plan, and 100-percent disabled military retirees can purchase the survivors benefit plan. Survivors stand to lose most or even all of the benefits under that plan because they are offset by a second benefit to which they are also entitled, Dependency and Indemnity Compensation.

That is not right. I have 22 cosponsors of this amendment. They are from both sides of the Senate. This amendment is going to remedy these inequities. It is going to honor our commit-

ments to military retirees and servicemembers who are killed in the line of duty, and their surviving widows and dependent children.

We have sergeants and corporals losing their lives. Their base pay determines the benefits for their surviving spouse. The base pay of a corporal isn't very much, and their survivors are supposed to live off even less; yet, in fact, in another part of the law, they are due something as the widow of a veteran, and we are saying under the current law: You cannot get both benefits you are entitled to.

Is this what we want to do for these young families who lost a loved one in Iraq or elsewhere? Will the Nation not stand tall to support them? This is not what the law intended. We ought to change it.

Mr. DURBIN. Will the Senator yield?

Mr. NELSON of Florida. I yield.

Mr. DURBIN. I ask unanimous consent to be added as a cosponsor to Senator NELSON's amendment.

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

Mr. DURBIN. Mr. President, I ask the Senator from Florida—to make sure I understand exactly what he is saying—here is a person in service to our country who was killed in combat. If that soldier had basically bought an insurance policy on his life, then the amount of money his family would receive from our Government is going to be reduced by the amount he would have received from that insurance policy? Is that, in shorthand, the way to describe the current law?

Mr. NELSON of Florida. Let me tweak it a little bit for the Senator, and I thank the Senator for the compassion coming out of his heart and expressed on his face as he asks this question. This Senator from Illinois is right on.

In the first place, in current law the soldier does not actually have to make an affirmative purchase. Under current law we enroll the survivors of any service member who is killed in the Survivors Benefit Plan. However, for a private, a corporal, a sergeant, that is not a lot because of their base pay.

Mr. DURBIN. I might ask the Senator from Florida, through the Chair, so the benefit the soldier receives depends on rank and salary?

Mr. NELSON of Florida. Under the Survivors Benefit Plan it does. However, there is another part of the law that says survivors shall receive a second benefit, Dependency and Indemnity Compensation, to attempt in one small way to make those survivors whole for all the sacrifice their loved one has given.

But, no, because of a problem with the current law, they cannot get both. One offsets the other, the long and short of which is that a young widow of a private or corporal or sergeant can't make it with what the U.S. Government is going to give her unless we rectify this inequity in the law.

Mr. DURBIN. Does the Senator have remaining time?

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

Mr. DURBIN. I ask unanimous consent the Senator from Florida be recognized for an additional 5 minutes.

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

Mr. DURBIN. I ask the Senator from Florida this specific question. We are about to consider whether we are going to shut down debate on this bill. It is called cloture. It closes down the debate on the bill, limits the amendments to the bill. As to the Senator's amendment, which protects these widows and surviving children of a soldier killed in combat, once we have closed down debate and limited amendments, would we still be able to vote on the Nelson amendment?

Mr. NELSON of Florida. The Senator asked a good question.

I ask the Presiding Officer, would the Nelson amendment, with its 22 cosponsors, be considered germane following a successful cloture motion?

The PRESIDING OFFICER. There is insufficient information at this point to be able to make that determination.

Mr. NELSON of Florida. So the answer, I say to the Senator from Illinois, it could well be knocked off if cloture is brought on this Defense authorization bill.

Mr. DURBIN. I ask through the Chair one last question. How often do we have an opportunity to change the law and to help these soldiers and their families? How many times do we get a chance in the Senate during the course of the year to consider the Department of Defense authorization bill or another bill that might give us a chance to help those families and to rectify this injustice which the Senator from Florida has pointed out and which I think every Member on both sides of the aisle would like to change?

Mr. NELSON of Florida. The Senator from Florida will ask for the yeas and nays.

If the chairman of the committee, the distinguished Senator from Virginia, is persuasive in talking to the Republican majority leader not to bring the motion for cloture to cut off debate so that amendments like this to help widows and orphans might fall, maybe we can get it to a vote. It is the least we can do for Americans who have given their lives, or their best years, in defense of our country. We simply cannot allow this situation to continue. We need to restore fair benefits to these folks. I am going to continue my fight for these people who have given their all to their Nation and especially to the loved ones whom they have left behind.

I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. WARNER. Mr. President, I say to our good friend and colleague, we will take under consideration the Senator's amendment with great care.

Mr. DURBIN. Mr. President, I would like to address to the chairman the following. I have two pending amendments which I would like to call up. I will do this briefly.

Mr. WARNER. Please proceed.

AMENDMENT NO. 1428

Mr. DURBIN. I ask unanimous consent that the pending amendment be set aside for the purpose of calling up amendment No. 1428.

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

The clerk will report.

The legislative clerk read as follows: The Senator from Illinois [Mr. DURBIN] proposes an amendment numbered 1428.

Mr. DURBIN. I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To authorize the Secretary of the Air Force to enter into agreements with St. Clair County, Illinois, for the purpose of constructing joint administrative and operations structures at Scott Air Force Base, Illinois)

On page 371, between lines 8 and 9, insert the following:

**SEC. 2887. ADMINISTRATIVE AND OPERATIONS STRUCTURES, SCOTT AIR FORCE BASE, ILLINOIS.**

(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of the Air Force may enter into agreements with St. Clair County, Illinois, for the joint construction and use of administrative and operations facilities at Scott Air Force Base, Illinois.

(b) LIMITATIONS.—

(1) TOTAL COST.—The total cost of agreements entered into under subsection (a) may not exceed \$60,000,000.

(2) LEASE PAYMENTS.—All payments made by the Air Force under leases entered into under subsection (a) shall be made out of funds available for the Air Force for operation and maintenance.

(3) TERMS OF LEASES.—Any lease agreement entered into under subsection (a)—

(A) shall provide for the lease of such administrative or operations facilities for a period not to exceed 30 years; and

(B) shall provide that, upon termination of the lease, all right, title, and interest in the facilities shall, at the option of the Secretary, be conveyed to the United States.

Mr. DURBIN. Mr. President, and to the chairman and ranking member of the committee, I hope this is an amendment which will be accepted because it is noncontroversial and important to my State and to the protection of our country.

The amendment authorizes the Secretary of the Air Force to enter into agreements with local county officials for the construction and lease of joint administration and operation facilities needed at Scott Air Force Base, currently operating under a joint use agreement with MidAmerica Airport, to accommodate new missions.

The fiscal year 05 Defense Appropriations conference report included \$259 million to procure three C-40C aircraft to be based at Scott Air Force Base and flown by the 932nd Airlift Wing with the 375th Air Wing as an active asso-

ciate, move three C-9C aircraft from Andrews Air Force Base to Scott AFB, and to support these new and expanded missions.

The expanded C-9 mission and new C-40 mission will strain existing TRANSCOM and TACC facilities and require additional administrative and operations space/structures.

Due to the accelerated funding schedule of the C-9 and C-40 missions, immediate administrative and operations space is needed.

St. Clair County, IL, the appropriate local unit of Government, has offered to enter into an agreement with the Air Force to construct the necessary facilities, saving our Department of Defense some money. These structures would be for joint military-civilian use. Currently, Scott AFB and MidAmerica Airport operate on a joint use plan. St. Clair County is a partner in MidAmerica Airport.

The Air Force has estimated the cost of a new facility for TRANSCOM and HQ TACC is about \$60 million.

This general provision is needed in order for the Air Force and St. Clair County to enter into an agreement on joint use facilities. The construction would be at no cost to the Air Force. The county would invite the Air Force to lease space in the buildings, consistent with military lease requirements.

If the chairman has not had a chance to review this amendment, I would like to ask his staff to take a look at it. It is no expense to the Government and it provides a necessary facility at a very important airbase.

Mr. WARNER. Mr. President, we will take the amendment under careful consideration, I assure the Senator.

Mr. DURBIN. I ask for the yeas and nays on that pending amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

AMENDMENT NO. 1571

Mr. DURBIN. Mr. President, I ask that amendment be set aside and we call up amendment No. 1571.

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

The clerk will report.

The legislative clerk read as follows:

The Senator from Illinois [Mr. DURBIN], for himself, Ms. MIKULSKI, Mr. ALLEN, Mr. GRAHAM, Ms. LANDRIEU, Mr. LEAHY, Mr. SARBANES, Mr. LAUTENBERG, Mr. BINGAMAN, Mr. KERRY, Mr. SALAZAR, Mr. CORZINE, Mr. CHAFEE, Mrs. LINCOLN, Mr. BIDEN, Mr. KENNEDY, and Mrs. MURRAY, proposes an amendment numbered 1571.

Mr. DURBIN. I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To ensure that a Federal employee who takes leave without pay in order to perform service as a member of the uniformed services or member of the National Guard shall continue to receive pay in an amount which, when taken together with the pay and allowances such individual is receiving for such service, will be no less than the basic pay such individual would then be receiving if no interruption in employment had occurred)

At the end of title XI, add the following:

**SEC. 1106. NONREDUCTION IN PAY WHILE FEDERAL EMPLOYEE IS PERFORMING ACTIVE SERVICE IN THE UNIFORMED SERVICES OR NATIONAL GUARD.**

(a) **SHORT TITLE.**—This section may be cited as the “Reservists Pay Security Act of 2005”.

(b) **IN GENERAL.**—Subchapter IV of chapter 55 of title 5, United States Code, is amended by adding at the end the following:

**“§ 5538. Nonreduction in pay while serving in the uniformed services or National Guard**

“(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

“(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee’s civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

“(2) the amount of pay and allowances which (as determined under subsection (d))—

“(A) is payable to such employee for that service; and

“(B) is allocable to such pay period.

“(b)(1) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee’s civilian employment had not been interrupted)—

“(A) during which such employee is entitled to reemployment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

“(B) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee’s civilian employment with the Government.

“(2) For purposes of this section, the period during which an employee is entitled to reemployment rights under chapter 43 of title 38—

“(A) shall be determined disregarding the provisions of section 4312(d) of title 38; and

“(B) shall include any period of time specified in section 4312(e) of title 38 within which an employee may report or apply for employment or reemployment following completion of service on active duty to which called or ordered as described in subsection (a).

“(c) Any amount payable under this section to an employee shall be paid—

“(1) by such employee’s employing agency;

“(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

“(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee’s civilian employment had not been interrupted.

“(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to

carry out the preceding provisions of this section.

“(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

“(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

“(f) For purposes of this section—

“(1) the terms ‘employee’, ‘Federal Government’, and ‘uniformed services’ have the same respective meanings as given them in section 4303 of title 38;

“(2) the term ‘employing agency’, as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

“(3) the term ‘basic pay’ includes any amount payable under section 5304.”

(c) **CLERICAL AMENDMENT.**—The table of sections for chapter 55 of title 5, United States Code, is amended by inserting after the item relating to section 5537 the following:

“5538. Nonreduction in pay while serving in the uniformed services or National Guard.”

(d) **EFFECTIVE DATE.**—The amendments made by this section shall apply with respect to pay periods (as described in section 5538(b) of title 5, United States Code, as amended by this section) beginning on or after the date of enactment of this Act.

Mr. DURBIN. Mr. President, this amendment is not new to this Senate. We have considered it several times and passed it. It has not survived conference committees, but I hope this time it will be successful, we will be successful in our effort in passing it. It is the reservist pay amendment.

Here is what is going on in America: All across America members of Guard units and Reserve units are being activated, called into service for our country, risking their lives, spending lengthy periods of time away from their families. We understand these new assignments create a lot of personal hardship and sacrifice on the part of these soldiers and marines, sailors, airmen, members of the Coast Guard, and others. We also understand it creates much financial hardship on some as well.

So we, as a nation, encourage the employers of Guard and Reserve members to try to stand by the men and women who are serving our country, even when they have been activated. It turns out that well over 1,000 employers across America have said: We will do just that. They continue to make up the difference in pay for these activated members of the Guard and Reserve. We salute them. We thank them. They are bringing financial peace of mind to men and women who are serving our country every day, separated from their homes and their families.

Now, the concern I have is the fact that one of the largest employers in America is not doing the same thing, and that is the Federal Government.

The Federal Government is not making up the difference in pay for those members of the Guard and Reserve who are activated. Some of them face quite a setback when they are activated and receive less money and a lot of financial hardship.

Last year, when we debated this amendment, the Government Accountability Office told us that about 40 percent of Guardsmen and Reservists lose some amount of income when mobilized. Well, I want to report to the Senate that figure has now been updated. The new figure is 51 percent. More than half of the men and women activated in the Guard and Reserve lose income because of that activation, causing financial hardship and economic difficulties for some. Over 11 percent of those activated lose more than \$2,500.

We also find that income loss is one of the top reasons given by Guardsmen and Reservists as to why they stop serving in Reserve components. We need to actively recruit and retain the very best to serve in America’s military. And when you ask those currently serving why they are not reupping, why they are not reenlisting, many of them give as a major reason—one of the top reasons—the loss of income when they are activated to serve from Reserve units.

We want to make certain that we salute the employers across America who are dealing with these troops and helping them. But I think we have an obligation, those of us who work here in Washington, to make sure our Government does the same.

Roughly 1 out of every 10 Guardsmen and Reservists in service to our country is also a Federal employee. How can we on the one hand say to private employers, and even State governments, “We salute you for your foresight and compassion in helping our troops” and not do the same? I think we ought to be standing by those Federal employees who are activated in the service to our country as well. We should not be lagging behind those who have made real contributions and have shown this leadership. We should be setting an example.

This measure does not bust the budget. It results in some expenditures, but the money to make up any lost income by mobilized Federal workers is drawn from funds already previously appropriated. Secondly, it is not additional pay for military service. Reservists continue to receive the same military pay for the same military job. Any differential pay they receive is separate and apart, simply intended to keep such employees financially whole while serving our country.

I do not believe our service men and women sit down and ask those serving with them, “Do you have a supplement in pay coming in here?” and resent it if some do and some do not. Why, then, would we put Federal employees in this unfortunate situation? The wisdom of this amendment is it is readily understandable by the entire force, whether

Active Duty or Reserve. They know that private-sector companies are making whole these employees' pay, and they can certainly understand it if the Federal Government did the same.

I think we ought to be sensitive to the fact that if we do not make up the difference in regular civilian income, it could create great hardship, concern, worry, stress, and anxiety on troops that we want in the field with a positive attitude doing their job and coming home safely.

The reason to support this measure is simple: The Federal Government cannot continue to do less for its employees than other major employers. It is time for the Government to be as generous, as caring, as compassionate as Sears, Roebuck, IBM, Home Depot, General Motors, and 24 State governments that stand behind their soldiers once they are activated to serve our country.

How can we commend everyone else and not do our part? We can adopt this amendment. I invite all of my colleagues to come together once more to adopt the Reservist Pay Security Act.

Mr. President, I ask for the yeas and nays on the pending amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

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

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I ask unanimous consent to set aside the pending amendment.

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

AMENDMENT NO. 1496

Mr. LEVIN. Mr. President, I call up amendment No. 1496.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Michigan [Mr. LEVIN] proposes an amendment numbered 1496.

Mr. LEVIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To prohibit the use of funds for normalizing relations with Libya pending resolution with Libya of certain claims relating to the bombing of the LaBelle Discotheque in Berlin, Germany)

At the end of title XII, add the following:

**SEC. 1205. LIMITATION ON AVAILABILITY OF FUNDS FOR NORMALIZATION OF RELATIONS WITH GOVERNMENT OF LIBYA.**

None of the funds authorized to be appropriated by this Act or any other Act may be obligated or expended for purposes of negotiations towards normalizing relations with the Government of Libya until the Attorney General, in consultation with the Secretary of State and the Secretary of Defense, certifies to Congress that the Government of Libya has made a good faith offer in the negotiations on the claims of members of the

Armed Forces of the United States who were injured in the bombing of the LaBelle Discotheque in Berlin, Germany, and the claims of family members of members of the Armed Forces of the United States who were killed in that bombing.

Mr. LEVIN. Mr. President, on April 5, 1986, Libya directed its agents to execute a terrorist attack in West Berlin for the sole purpose of killing and maiming as many American military personnel as possible. So they selected a discotheque that military personnel frequented in Berlin. They placed a bomb in the discotheque when 260 people, including U.S. personnel, were present. When that bomb detonated, two U.S. soldiers were killed and over 90 soldiers were severely injured. They have not been compensated.

The German civilians who were in that discotheque were compensated, but the American military personnel and their families have not been, despite promises of the Libyan Government to do so.

So this amendment simply says that we will not normalize, in any further way, relations with Libya until the Attorney General, after consulting with the Secretary of State and the Secretary of Defense, certifies to Congress that Libya has made a good-faith effort and a good-faith offer in negotiating with U.S. service members who were injured in that discotheque bombing and with the family members of U.S. service members who were killed in that bombing.

It is a very straightforward amendment that is so essential if we are going to do justice for U.S. military personnel who were killed in a terrorist attack by Libya the way justice has been done for the German civilians who were killed in that attack at that discotheque that was perpetrated by Libya and its agents.

So we provide a very carefully worded assessment by the Secretary of State and the Attorney General. They will decide if the good-faith offer has been made the way it has been promised. We do not make that decision in this amendment. We leave that up to the Attorney General, after consulting with the Secretary of State and the Secretary of Defense.

AMENDMENT NO. 1497

Mr. President, I now ask unanimous consent that the pending amendment be laid aside, and I call up amendment No. 1497.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Michigan [Mr. LEVIN] proposes an amendment numbered 1497.

Mr. LEVIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To establish limitations on excess charges under time-and-materials contracts and labor-hour contracts of the Department of Defense)

At the end of subtitle A of title VIII, add the following:

**SEC. 807. LIMITATION ON EXCESS CHARGES UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS.**

(a) REGULATIONS REQUIRED.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall prescribe regulations governing the terms and conditions of time-and-materials contracts and labor-hour contracts entered into for or on behalf of the Department of Defense.

(b) LIMITATION ON EXCESS CHARGES.—

(1) IN GENERAL.—The regulations prescribed pursuant to subsection (a) shall authorize the use of a time-and-materials contract or a labor-hour contract for or on behalf of the Department of Defense only if the contract provides for acquiring supplies or services on the basis of—

(A) direct labor hours provided by the prime contractor at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and

(B) the reimbursement of the prime contractor for the reasonable costs (including overhead, general and administrative expenses, and profit, to the extent permitted under the regulations) of subcontracts for supplies and subcontracts for services, except as provided in paragraph (2).

(2) SUBCONTRACTOR LABOR HOURS.—Direct labor hours provided by a subcontractor may be provided on the basis of specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit only if such hourly rates are set forth in the contract for that specific subcontractor.

(c) DEPARTMENT OF DEFENSE PURCHASES THROUGH CONTRACTS ENTERED BY NON-DEFENSE AGENCIES.—The regulations prescribed pursuant to subsection (a) shall include appropriate measures to ensure compliance with the requirements of this section in all Department of Defense purchases through non-defense agencies.

(d) EFFECTIVE DATE.—The regulations prescribed pursuant to subsection (a) shall take effect on the date that is 90 days after the date of the enactment of this Act, and shall apply to—

(1) all contracts awarded for or on behalf of the Department of Defense on or after such date; and

(2) all task or delivery orders issued for or on behalf of the Department of Defense on or after such date, regardless whether the contracts under which such task or delivery orders are issued were awarded before, on, or after such date.

Mr. LEVIN. Mr. President, we read the other day in the Washington Post about a procedure that is used by a number of contractors that reimburses those contractors for services rendered by subcontractors and where the contractor is charging the Government significantly more for that service than the subcontractor is paid. We are talking about labor rates.

Here is what the Post told us and reminded us:

Security guards in Virgin Islands paid \$15 and \$20 an hour were billed to the government at [twice that rate]. Office workers provided by [a subcontractor] at \$20 an hour were billed to the government [by the prime contractor] at \$48.07 an hour.

This is not just to have a profit put in there for the prime contractor. That

is legitimate. This is a theory that prime contractors are using known as "mapping," where instead of basing their charge to the Government on the cost of labor, they are basing the charge to the Government on a theoretical cost of labor—not on the subcontractor's cost but on what the prime would have paid for the same service. So we are billed as a Government for labor performed, and the cost of that labor, although it is not the true cost of the labor, is a theoretical cost.

That kind of practice should end. This amendment would fix the problem by requiring that prime contractors charge the Government their actual subcontract costs, unless the subcontract rates are specifically set forth in the prime contract. The General Services Administration has been balking at this change, although the Department of Defense itself says they have recognized the problem and are working to fix it. So we are going to come down with the effort to correct this problem that the DOD recognizes and override the obstinacy of the GSA to correct a very obvious inequity in terms of the American taxpayer.

So that is the sum and substance of this amendment. We would ask that this amendment be considered in the usual course, assuming, again, that cloture is not invoked.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, we are a nation at war. I can think of no other legislation deserving of this body's complete attention than the Defense Authorization bill. What could be more profound than debating critically important amendments on the very issues of war and peace? What could honor our men and women in uniform fighting in the sands of Iraq and Afghanistan than a full and complete discussion of amendments that will promote the safety and well-being of our troops, their families, our veterans, and our national security. Unfortunately, there are those who wish to shut down this critically important debate. And so I rise today to urge my colleagues to consider the consequences of terminating such discourse. When the time comes tomorrow, I ask my colleagues to vote against cloture to end debate on this important piece of legislation.

I am not a member of this committee. And I commend the distinguished chairman from Virginia and the ranking member from Michigan and the other members of this committee who have worked tirelessly to bring this bill to the floor.

In my more than 20 years as a Member of this body, I can tell you, historically, the Defense authorization bill has come up at about this time, and has generally been subject to between five and ten days of unlimited debate over its amendments. From the time that John Stennis was the chairman of the Armed Services Committee to the

tenure of its current Chairman, Senator WARNER, I have observed the great care that this body has taken to ensure adequate consideration of amendments that would serve the national security interests of our nation. And we in this body have done so because of the importance of this legislation—particularly at times, such as now, when the Nation faced down grave threats around the globe.

As a matter of tradition as well as law, the Armed Services Committee has always produced an authorization bill. Unlike any other government agencies, the Defense Department has always been subject to both an authorization and appropriations bill.

Other than some expenditures that occur as a result of our demands under Medicaid, Medicare, and the like, nothing consumes as much of our Treasury as does the Defense appropriations bill. Therefore, Mr. President, I rise because of my concern that we are about to vote tomorrow after little more than a day and a half of debate on this Defense authorization bill. Here we are bringing up one of the most critically important pieces of legislation we ever consider here, and we are going to potentially truncate this debate down to a few hours.

Here we are, a nation at war, with literally thousands of our fellow citizens in uniform serving in Afghanistan and Iraq. We are facing major questions about the conduct of a war and considerable strain is being placed on our military personnel—with active duty, reserve, and national guard members. Are constituents are asking How well protected are our troops? How much do we provide for them when they come back?

We have listened to my colleague from Florida, my colleague from Illinois, and my colleague from Michigan, who raise serious issues about whether we are going to provide additional benefits for our veterans. I am told by many who have analyzed these amendments that there is a very good likelihood that those amendments would not survive a post-cloture environment. If we do invoke cloture tomorrow, at 10 or 10:30 tomorrow morning, I am told that those amendments would require a supermajority to consider them, and there is little or no likelihood they would ever have any chance of being even considered by this body.

I do not understand that. I do not quite understand the logic that would suggest somehow we ought to so truncate this debate that these very important amendments would not be considered or at least potentially not be considered. There are a number of amendments being offered on the Base Realignment and Closure Commission that has been formed.

I know the Presiding Officer, like this Senator, has more than a passing interest in what happens with the Base Closure commission. Facilities in both of our States are listed for closure. There are those of us who have deep

concerns about how this process is working. If, in fact, cloture is invoked tomorrow, I suspect, based on what I have been told, that any effort by the Presiding Officer or this Senator or others to bring up these amendments, to talk about those issues, to at least debate them here and ask our colleagues whether they are sympathetic to our proposals would fail. We would not be allowed to consider those amendments.

Again, I am not suggesting that every idea we have ought to be adopted by this body. But the fact that we wouldn't even be allowed to debate these matters strikes me as a breach of our obligations to our constituents back home as well as American troops fighting on the frontlines in Iraq and Afghanistan.

I realize you have to close the debate at some point. You can't go on endlessly. We are getting near the end of this session before we take the August break. So clearly over the next several days, we have to conclude these debates. But there ought to be ample enough time, short of 10:30 tomorrow morning, for us to conclude our deliberations, going through amendments, dropping those which may be redundant. At least there ought to be a fair consideration of those matters before we just cut off the debate, slam the door shut on matters as important as the safety and well-being of our troops, American veterans, the BRAC process, the future of new nuclear weapons programs and a whole host of issues that would no longer be viable under a postcloture environment.

For example, Senator STABENOW would like to offer a critically important amendment to guarantee adequate funding levels for veterans health benefits; Senator MURRAY would like to offer an amendment on childcare for troops based overseas; Senator KERRY has an amendment on the GI bill. And Senators MCCAIN and GRAHAM have a number of issues related to the treatment of detainees held in U.S. military facilities.

For those who care about BRAC amendments, those who care about the Geneva Convention, those who care about whether we can have a good debate regarding our veterans, the base-closing commission, all of that discussion would be precluded from having a final consideration if, in fact, cloture is to be invoked.

The Presiding Officer, when queried whether these amendments would fall, properly responded that you would have to see the amendment before you could make a categorical statement. But for those who have been through these amendments and examined whether they would survive postcloture, the conclusion has been that this list of amendments, including many more that I have in front of me, would not survive a postcloture environment.

I urge my colleagues, regardless of how you may feel about these amendments, give this body a chance to do its

job. Otherwise, by closing off the debate, we deprive our members and the American people of critically important discourse at a time when our nation is at war.

Throughout my tenure here, I do not ever recall a debate that would last about a day and a half on a Defense authorization bill, particularly when our troops were engaged in combat overseas. Some of the best debates I have ever witnessed as a Member of this body have occurred on the Defense authorization bill because the chairs of this committee, Republicans and Democrats, have insisted that authorization bill be considered by this body in its entirety. We made better decisions because we had those debates about the direction in which our country ought to go.

Arguing over the wisdom of certain weapons systems, arguing over whether we ought to be involved in certain military conflicts, it has been educational for the country.

And in the end, no other issue was more important than those impacting our troops deployed in harm's way. We have lost somewhere between 1,700 and 2,000 of our men and women in uniform, battling in Iraq and Afghanistan. It is for them and their families that we ought to continue to take into serious consideration the various amendments proposed to support their operations at home and abroad.

What matter could possibly trump the importance of having a full debate about the national security needs of our country? I can't think of another subject matter that is more important than this one. Allowing this body to be heard on these issues is the patriotic thing to do. It would be unpatriotic to cut off debate prematurely. There should be a time certain on final passage and not to delay going on endlessly in this discussion. But these are important amendments my colleagues have drafted.

I have no amendment on this list. I am a cosponsor of a couple of them. But I have no matter that I am insisting be brought up here. But there are others here who do have amendments that ought to be heard. But I would hope that the leadership would ask to vitiate the cloture vote, work out the arrangements we traditionally do here so that amendments could be brought up and debated and discussed in a reasonable amount of time, and try to limit the number of amendments so we don't have duplication.

I hope this evening as the leadership considers its game plan for tomorrow and the coming days, they will decide that the Defense authorization bill ought to be the business of the day, of every day this week to finish this debate and to do so in the kind of spirit that I think is warranted, when Members of both bodies get a chance to fully debate and discuss the importance of these issues.

We ought to have a debate about the Base Closure Commission. There are

important issues. Is it wise for us to be shutting down major military facilities at a time of war? Would it not be wiser maybe to delay those decisions a few months to determine whether we truly are going to need these facilities in the coming months? That is a legitimate debate to occur. When else is it going to occur if not on this bill? When can it come up? After September 8, when the decisions are made, when we are already just coming back from an August break and people look back and say, Why didn't you raise it then, why didn't you debate it on the floor of Senate to let the American public know what the choices ought to be?

If we cut off this debate, I am told that those amendments that would deal with the Base Closure Commission would not be allowed under a postcloture environment.

I think that is an important debate. Our colleagues may decide to vote against those amendments, may decide they are all wrong, but at least give us a chance to be heard and to vote up or down on whether you think it is the right time to close these facilities.

Certainly, when it comes to veterans' benefits and some of the other issues that my colleagues are offering—Senator DORGAN from North Dakota wants to form a special committee dealing with contracting. Lord knows, given the amount of waste and abuse that there have been reports of that have occurred, that certainly is a good amendment, in my view. I think we probably ought to have such a committee to determine whether taxpayer money is being wasted. That amendment, I am told, would fall.

Senator KENNEDY and Senator FEINSTEIN want to offer an amendment on dealing with the robust nuclear earth penetrator. We have had a good debate here. I listened intently to both sides as they argued the wisdom of having that system or not. I am told that amendment would fall as well. That is an important debate to have, regardless of your view. We ought to be debating the wisdom of that weapons system. If that debate does not occur here, where does it occur, if not on the Defense authorization bill? Is it unpatriotic to have a debate about a weapons system that will cost millions and millions of dollars when there are strong feelings on both sides? If we cut off that debate, we will never have an opportunity to understand the wisdom of having a system or not having that system.

It is not my intention to go down and list every single one of these amendments that I am told would fall. My colleague from Connecticut, would like to propose an amendment increasing Army end strength, he is offering that amendment with several of our colleagues. That is a very important amendment. That is a very important debate, for it gets to the core of the readiness of the American Armed Forces. What is the appropriate personnel level for our forces to both fight

wars on two fronts while staying prepared to mobilize against threats that have not yet emerged? If you don't have that debate on this bill, when do you have it? If you don't authorize it, you can't appropriate it. If you can't appropriate it, then we never can decide whether that end strength ought to be increased. Again, there may be those who will offer very strong arguments against the Lieberman amendment about why we don't need to increase the end strength, but let's have the debate and let's have the vote, if you think it is important. I believe it is.

I feel strongly about this and many other issues. Some have suggested that there will be those who will be accused of being not patriotic if they appear to be having an extended debate on the Defense authorization bill. I think just the opposite. It is unpatriotic not to have the debate. Not unlimited debate, not debate that goes on forever, but is it unlimited debated to go on for the next 2 or 3 days to discuss this issue which is in the headlines every day we pick up the paper? Terrorists attacking the transit system in London, hotels in Egypt. We find soldiers dying from suicide bombers every day. What could be more important than this subject matter, to be discussing how best to prepare our troops and our country for what needs to be done to support our veterans when they come back from these conflicts?

It is unpatriotic to cut off the debate. The patriotic thing to do is to have a good discussion, a good civil debate over the important issues that confront our country when it comes to the Defense authorization. I commend the chairman of the committee for insisting that there be a debate on the Defense authorization bill. That is the great tradition of this committee. It is one of the few committees that is an authorizing committee that insists every year that there be a Defense authorization bill. I commend every member of that committee for insisting that we take the time to do it. I wish other authorizing committees were insistent as well so that we would have these debates about policy before deciding on the appropriations levels. That is the way it ought to proceed. My commendations to Senators WARNER and LEVIN and other members of the committee. I thank them for giving us the opportunity to at least discuss these matters tonight.

Every year we have had a good debate on Defense authorization. Armed Services is one of the few committees that insist upon it. I wish others did as well. It is the way we are supposed to proceed.

It is the tradition of this great body to have good discussions, educate our constituents about the difficult choices with not unlimited resources. Where do we go? What do we invest in? How far do we go in helping veterans and in the support structures we need? That debate occurs because there has been a

tradition in the committee of insisting that we have that discussion. I hope, as I said in the absence of the chairman, we have a reasonable amount of time this week—call for a time certain on Thursday or Friday, whenever it would occur, to end debate and come to final passage.

Why don't we stay in tomorrow night and Wednesday night later than we normally retire here, and we can come in a bit earlier. Say you have an hour or half an hour for debate on amendment. Let's have that good discussion.

The country would be better for it, and our men and women in uniform deserve it. They want to know where we are and where we are going. There is no vehicle other than the Defense authorization bill for us to have that kind of discussion and to consider these important amendments. It has been the history of this great body, and I hope it will continue to be after tomorrow. And I would suggest, that at a time when this Nation is engaged in a war on terrorism, it is important that we take as much care as possible to consider these critically important matters.

I thank the Chair.

Mr. WARNER. Mr. President, may I assure our colleague and others who have expressed an interest, Senator LEVIN and I are working toward those ends. I take full responsibility for the concept of the cloture. It has achieved, a significant result thus far. We have up to 240 amendments. Another 18 amendments are pending at the desk with rollcalls requested. So the Senate is actively participating. I assure you I am going to meet with my leader—and I respect his judgment—first thing in the morning. I will explore the options that are available with him. I thank my colleague.

Mr. DODD. Mr. President, I thank the chairman.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. While Senators DODD and WARNER are on the floor, let me first thank Senator DODD for the passion he brought to this issue. This sounds like a process issue. It is not a process issue. These are life-and-death issues we are debating. These are war issues and how do we support our troops and their families issues. These are issues of whether there will be benefits for families who have lost loved ones in war. These are issues of whether bases will be closed, issues of nuclear weapons, and issues of whether we are going to go down the road of new nuclear weapons use at the same time we are trying to persuade the world not to go down that road.

These are the most vital issues we can possibly face as a people. I commend the chairman. He is, in good faith, going to attempt to see if we cannot find a way we can have a reasonable few days of debate before this debate is closed off, so we can consider the important amendments that have been filed.

The chairman is very much aware of the tradition of this committee because he has been part of it and supportive of it for so long. The tradition the Senator from Connecticut talks about is tradition which is plenty deep, but it is also law. I think we are the only committee which, by law, must pass an authorization bill. So that tradition is embodied in the law itself.

There is one little statistic, and this is something the Senator from Connecticut feels in his bones is true. But I want to give a statistic to support that passion and feeling that has been so beautifully expressed by the Senator from Connecticut. Last year, the first cloture motion was filed on the 11th day of debate. This year, it was the beginning of the second day. The second cloture motion, because the first wasn't adopted last year, was filed after 15 days of debate and after 148 amendments were considered. That is how important this bill is. So look at a longer period of time—a 10-year average. The average length of time for the first filing of cloture on a Defense authorization bill during that 10-year period is the fifth day of debate, and the second filing is on the ninth day of debate. So we have always historically, and by law, taken a reasonable period of time—a week or 2 weeks—to debate this bill because of its importance to the country.

As I was saying a moment ago, the chairman is very much aware of this tradition. He embodies it. He has fought for it. The Defense authorization bill should have due consideration, and I know he will do what he can in the next 24 hours to see if we cannot work out something that would allow some critically important amendments to be considered.

I thank the chairman for that and I thank the Senator from Connecticut.

Mr. WARNER. Mr. President, we have labored together these 27 years. This, too, shall be overcome in one way or another. I thank my friend from Connecticut. I am impressed with the enthusiasm he expressed at this hour of the night.

Mr. DODD. I thank my friend. Enthusiasm at any hour of the night is appreciated.

Mr. WARNER. Mr. President, I rise to express concerns about the Levin amendment related to Federal time and material contracts.

The proposed amendment would direct that when prime contractor engages a subcontractor to augment the delivery of hours under a time and materials contract, the prime should be entitled to be reimbursed only at the price the subcontractor is billing the prime.

I want to bring to the attention of the Senate the rationale for the pricing of these time and materials contracts. The prime contractor must locate, negotiate and obtain the subcontractors with whom he performs the contract and assume the risk associated with his and the subcontractors perform-

ance. If a subcontractor does not perform or is substandard in its performance, the prime is responsible. If a subcontractor quits or is dismissed, the prime must find a substitute. Assuming this management role, and more importantly, the risk, is one of the reasons for the time and management contract and the blended payment arrangement.

Of particular concern to me about the Levin amendment is its potential impact on small business. The proposed amendment would be counter to the President's mandate to promote small business participation in government acquisitions by de-incentivizing prime contractors from engaging subcontractors—most of whom are small businesses—in the fulfillment of their contracts.

Finally, Mr. President, I am told that the administration is about to initiate a rule making to revise how time and materials contracts are managed. Federal contracting is a very complex process which is best resolved through a thorough review among all the parties and through the regulatory process. If there are abuses, I am the first to stand and say that they should be stopped. But it is very difficult for the Senate today to understand fully the implications of the Levin amendment and whether it will even resolve any alleged abuses in contracting.

I would like to work with Senator LEVIN and others to encourage the administration to issue its proposed rule promptly, put it out for comment so that all the impacted parties would have the opportunity to comment. If the Senate continues to have concerns once the rule making is completed, that is the appropriate time for us to act.

I ask unanimous consent that several letters I received on this subject be printed in the RECORD.

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

PROFESSIONAL SERVICES COUNCIL,  
JULY 25, 2005.

Hon. JOHN WARNER,  
*Chairman, Committee on Armed Services, Senate, Washington, DC.*

DEAR MR. CHAIRMAN: As the Senate continues with its debate on S. 1042, the fiscal year 2006 National Defense Authorization Act, we understand that Senator LEVIN may offer an amendment to dictate the method for pricing time and materials and labor-hour (T&M) contracts and subcontracts on Defense Department contracts and purchases through non-defense agencies. On behalf of the Professional Services Council (PSC), I am writing to urge you to oppose the amendment in its current form.

PSC is the leading national trade association that represents more than 185 companies of all business sizes providing professional and technical services to virtually every agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific environmental and social sciences.

We strongly disagree with the characterization contained in the amendment's title that it is necessary to limit "excess

charges." Nothing in the DCAA work or in the contract negotiation process supports the allegation that there are "excess charges" on these T&M contracts. Furthermore, if the Levin amendment was adopted, we believe it would significantly restrict defense agencies' flexibilities to select the best contract type to meet its mission needs. The amendment will also directly affect prime contractor-subcontractor relationships, particularly where the agency's procurement needs are addressed through a task order under an existing multiple-award contract or through purchases from the GSA schedules. It could also particularly affect small business subcontractors and the ability of prime contractors to manage those subcontracts, as well as a contractor's ability to meet existing small business subcontracting requirements.

Finally, because the amendment applies to new task orders under already awarded contracts, all of the government's approved pricing agreements would have to be renegotiated to adopt the regulatory changes that would flow from the legislative prescription. This is a significant administrative task for the department and would significantly slow up new work under these task orders until these actions can be completed.

Over a year ago, the Defense Contract Audit Agency (DCAA) identified a potential ambiguity between provisions in the Federal Acquisition Regulation and the terms and conditions of T&M type contracts, particularly under the GSA Schedules program. Since then, both DCAA and GSA have been meeting to resolve the matter. This discussion should be allowed to continue to timely resolution. In addition, the Federal Acquisition Regulation (FAR) Council is reviewing proposed clarifications to the FAR and that process would, importantly and appropriately, provide an opportunity for public comment on any changes. We strongly encourage the Senate to not preclude the regulatory process from considering the full implications of this important contracting matter.

We appreciate the importance of transparency in the contracting process and believe it can be accomplished through appropriate administrative policies and contract negotiations. The Levin amendment would be a step in the wrong direction.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to call Alan Chvotkin, PSC's senior vice president and counsel, or me. We can be reached at (703) 875-8059.

Sincerely,

STAN SOLOWAY,  
*President.*

ITAA,  
July 25, 2005.

U.S. Senate,  
Washington, DC.

ATTENTION: VOTE TODAY ON LEVIN AMENDMENT TO S. 1042, DOD AUTHORIZATION BILL

DEAR SENATOR: possible as early as this afternoon, Senator CARL LEVIN, (D-MI) will offer an amendment to S. 1042, the Defense Authorization Bill, which will be detrimental to federal contractors pursuing Time & Material contracts, especially small and mid-sized businesses working as subcontractors.

The government uses Time & Material contracts when outcomes are open ended and therefore difficult to price accurately. The Levin amendment requires prime contractors to "pass through" subcontractor rates to the government, with no allowance for risk or overhead.

ITAA believes that this amendment is very harmful in that it undermines the concept of

prime contractors offering total solutions to the government. No prime will accept the work of subcontractors if they cannot properly price risk and yet still be held accountable for total performance. The losers will probably be the small- to mid-size businesses that are now flourishing, since the integrators will do the work themselves at possibly higher rates. The government will have to take on the additional role of the systems integrator and then contract separately with these smaller firms.

While the Levin amendment allows initial subcontractor rates to be included with some overhead and profit considerations, additional future subcontractors could only be added at their labor rates, thus not allowing the prime to price for risk and overhead. The prime contractors, however, would still be held responsible for their performance. Since many of these contracts run 3 to 5 years or more, this would be very disruptive for federal contractors. Also, the amendment seems to go into effect immediately, so that contracts already in place could be affected. The IT industry is very dynamic with new businesses entering the market. The Levin Amendment would freeze the contract to the original participants and take away the flexibility of adding new technology to government contracts.

To summarize the situation, the prime contractor serves the same role as the general contractor when building a new house. It is the company's role to guarantee that a total solution is provided by managing the subcontractors, overseeing the delivery of supplies, and thus presenting the homeowner with a completed building. This amendment singles out future subcontractors and applies different pricing rules to them while still holding the prime contractor responsible for the total project.

We urge your opposition to the Levin Amendment.

Sincerely,

HARRIS N. MILLER,  
*President.*

#### COMMENTS ON TIME AND MATERIALS CONTRACT AMENDMENT

##### RISK AND SMALL BUSINESS IMPACTS

This is a problem more for the small to medium size service firms that have to use significant subcontract labor to obtain the appropriate expertise. Larger firms will opt to self-perform rather than subcontract for labor, which will serve to reduce subcontract opportunities. In the final analysis, it is the SB/SDB that will be impacted.

The proposed amendment would not allow prime contractor risk to be added to the subcontractor rate. This likely will militate against using T&M subcontracts in favor of cost type contracts. This may be a problem for subcontractors that do not have CAS compliant systems that would be required under cost reimbursable contracts. This would probably impact commercial sources and small businesses the most.

##### ADMINISTRATIVE BURDEN

Most large services contracts over the last few years have included large teams of subcontractors (20 + companies). There will be a large administrative burden to the Government (and the contractor) if each subcontractor labor category must be billed out at a separate rate. This will require extensive invoice reconciliation. Also, as subcontractors are added to the team over time for specific requirements a new set of rates will be required to be negotiated and added to the contract. Since the Government is likely to be reluctant to negotiate and administer multiple sets of rates, primes will retain more work in house and small business participation will be reduced.

The use of a single rate per category, eases administration, increases contractor risk and opportunity, and provides labor at commercially competitive rates. If the Government truly believes that the use of subcontractor specific rates is necessary, the solution is already available through the use of a cost type contract.

If enacted, this amendment would slow proposal preparation and submission to a crawl, as no competent prime contractor will conclude a T&M contract containing subcontractor costs until the subcontractor is selected and costs are fully-priced.

The amendment would limit contractor flexibility to cope promptly with changed circumstances without processing a contract modification. Changed circumstances include unanticipated surges in requirements to react to an emergent situation necessitating the hiring of subcontract personnel, the need to substitute for a poor performing subcontractor listed in the contract, and the need to add a subcontractor to meet small business goals.

The legislation is silent on how a contractor would be reimbursed if it reacted to an emergent situation by using subcontracted effort, to the benefit of the Government, when the subcontractor's rates are not listed in the contract. Some labor hour contracts extend over multiple years and have goals for the utilization of small and small disadvantaged businesses, all of which may not be known at the time of contract award.

This requirement would inhibit changing from one subcontractor to another subcontractor for underperformance. The contractor would potentially have to propose the new subcontractor to the contracting officer and have the appropriate rate included in the contract before the change could be made. This would be particularly problematic for contractors working in a deployed situation where completion/delivery may directly impact mission success and the safety/welfare of military personnel.

##### IMPACT ON COMMERCIAL PRACTICES

The proposed legislation fails to exclude "commercial" T&M purchases. Commercial pricing is not cost-based but is market driven. The legislation would require that certain elements of cost plus profit be included in the specified rates. Commercial contractors will be reluctant or refuse not propose elements of cost which would seem to be required by the proposed legislation.

This revision would preclude the use of commercial T&M contracts which was specifically authorized by legislation just last year.

##### OTHER CONCERNS

Section (d)(2), which applies the requirement retroactively to task or delivery orders under existing contracts, may be unconstitutional under *Winstar*. (Supreme Court case that ruled that Congress cannot change laws that will affect contracts retroactively.)

##### AMENDMENT NO. 1425

Mr. LEVIN. Mr. President, there is one more matter. I was handed this. On behalf of Senator HARKIN, I ask unanimous consent that the pending amendment be laid aside so an amendment of his relating to the Armed Forces network could be introduced at this time.

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

The clerk will report.

The legislative clerk read as follows:

The Senator from Michigan [Mr. LEVIN], for Mr. HARKIN and Mr. DORGAN, proposes an amendment numbered 1425.

The amendment is as follows:

At the end of subtitle A of title IX, add the following:

**SEC. 903. AMERICAN FORCES NETWORK.**

(a) **MISSION.**—The American Forces Network (AFN) shall provide members of the Armed Forces, civilian employees of the Department of Defense, and their families stationed outside the continental United States and at sea with the same type and quality of American radio and television news, information, sports, and entertainment as is available in the continental United States.

(b) **POLITICAL PROGRAMMING.**—

(1) **FAIRNESS AND BALANCE.**—All political programming of the American Forces Network shall be characterized by its fairness and balance.

(2) **FREE FLOW OF PROGRAMMING.**—The American Forces Network shall provide in its programming a free flow of political programming from United States commercial and public radio and television stations.

(c) **OMBUDESMAN OF THE AMERICAN FORCES NETWORK.**—

(1) **ESTABLISHMENT.**—There is hereby established the Office of the Ombudsman of the American Forces Network.

(2) **HEAD OF OFFICE.**—

(A) **OMBUDESMAN.**—The head of the Office of the Ombudsman of the American Forces Network shall be the Ombudsman of the American Forces Network (in this subsection referred to as the “Ombudsman”), who shall be appointed by the Secretary of Defense.

(B) **QUALIFICATIONS.**—Any individual nominated for appointment to the position of Ombudsman shall have recognized expertise in the field of mass communications, print media, or broadcast media.

(C) **PART-TIME STATUS.**—The position of Ombudsman shall be a part-time position.

(D) **TERM.**—The term of office of the Ombudsman shall be five years.

(E) **REMOVAL.**—The Ombudsman may be removed from office by the Secretary only for malfeasance.

(3) **DUTIES.**—

(A) **IN GENERAL.**—The Ombudsman shall ensure that the American Forces Network adheres to the standards and practices of the Network in its programming.

(B) **PARTICULAR DUTIES.**—In carrying out the duties of the Ombudsman under this paragraph, the Ombudsman shall—

(i) initiate and conduct, with such frequency as the Ombudsman considers appropriate, reviews of the integrity, fairness, and balance of the programming of the American Forces Network;

(ii) initiate and conduct, upon the request of Congress or members of the audience of the American Forces Network, reviews of the programming of the Network;

(iii) identify, pursuant to reviews under clause (i) or (ii) or otherwise, circumstances in which the American Forces Network has not adhered to the standards and practices of the Network in its programming, including circumstances in which the programming of the Network lacked integrity, fairness, or balance; and

(iv) make recommendations to the American Forces Network on means of correcting the lack of adherence identified pursuant to clause (iii).

(C) **LIMITATION.**—In carrying out the duties of the Ombudsman under this paragraph, the Ombudsman may not engage in any pre-broadcast censorship or pre-broadcast review of the programming of the American Forces Network.

(4) **RESOURCES.**—The Secretary of Defense shall provide the Office of the Ombudsman of the American Forces Network such personnel and other resources as the Secretary and the Ombudsman jointly determine appropriate to permit the Ombudsman to carry

out the duties of the Ombudsman under paragraph (3).

(5) **INDEPENDENCE.**—The Secretary shall take appropriate actions to ensure the complete independence of the Ombudsman and the Office of the Ombudsman of the American Forces Network within the Department of Defense.

(6) **ANNUAL REPORTS.**—

(A) **IN GENERAL.**—The Ombudsman shall submit to the Secretary of Defense and the congressional defense committees each year a report on the activities of the Office of the Ombudsman of the American Forces Network during the preceding year.

(B) **AVAILABILITY TO PUBLIC.**—The Ombudsman shall make available to the public each report submitted under subparagraph (A) through the Internet website of the Office of the Ombudsman of the American Forces Network and by such other means as the Ombudsman considers appropriate.

Mr. LEVIN. Mr. President, this amendment relates to the Armed Forces network. It is provided in this amendment that the Armed Forces network would provide members of the Armed Forces, civilian employees of the Defense Department, and their families stationed outside of the continental U.S. and at sea with the same type and quality of American radio and television news, information, sports, and entertainment that is available in the continental U.S. There are other provisions about fairness, balance, free flow of programming, et cetera. I am not familiar with the details.

I yield the floor.

**MORNING BUSINESS**

Mr. WARNER. Mr. President, I ask unanimous consent that there now be a period of morning business with Senators permitted to speak therein for up to 10 minutes each.

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

**HONORING OUR ARMED FORCES**

CHIEF PETTY OFFICER DANIEL R. HEALY

Mr. GREGG. Mr. President, I rise today to remember and honor Senior Chief Petty Officer Daniel Healy of Exeter, NH for his service and supreme sacrifice for his country.

Daniel exhibited a willingness and enthusiasm to serve and defend his country by joining the United States Navy. He was dedicated to a cause much greater than himself, demonstrated by his decision to join the U.S. Navy SEALs, one of the most challenging, rigorous, and elite fighting organizations in the history of the world. Navy SEALs are named after the environment in which they operate, the Sea, Air, and Land, and are the foundation of Naval Special Warfare combat forces. They are organized, trained and equipped to conduct a variety of Special Operations missions in all operational environments. SEAL training is extremely demanding, both mentally and physically, and produces the world's best maritime warriors that live by the motto of “the only easy day was yesterday.” Daniel knew

that he would be continually challenged and surely would face dangerous assignments when he signed up for this premier fighting organization. He was a stellar example of today's elite warriors that are upholding the values of freedom and democracy around the world.

Daniel graduated from Exeter High School in 1986, and answered the call to serve our great Nation when he enlisted in the Navy on June 5, 1990. He attended Basic Underwater Demolition/SEAL School and Basic Airborne School from 1991–1992, and then was assigned to SEAL Delivery Vehicle Team ONE for four years. After attending a year of extensive language training in California, Daniel was assigned to SEAL Delivery Team TWO in 1998 and was most recently stationed in Pearl Harbor, HI, again with SEAL Delivery Team ONE. Daniel dutifully and confidently led a training platoon in submerged delivery vehicles. He was deployed to the Middle East in March of 2005, for what should have been a six-month tour. Tragically, on June 28, 2005, Daniel made the ultimate sacrifice for this great Nation. Daniel and 16 other service members were killed while conducting combat operations when the MH-47 helicopter that they were aboard crashed in the vicinity of Asadabad, Afghanistan in Kumar Province.

Throughout his career, Daniel earned a series of awards which testify to the dedication and devotion he held for his fellow SEALs, the Navy, and his country. Daniel's hard work and perseverance contributed greatly to his unit's successes and placed him among many of the great heroes and citizens that have paid the ultimate price for their country. Daniel was recognized throughout his distinguished career by receiving the Navy/Marine Corps Achievement Medal, Joint Meritorious Unit Award, Meritorious Unit Commendation, three Good Conduct Medals, and three National Defense Service Medals. He also attended the Basic Airborne School and was a graduate of language training at the Defense Language Institute, Monterey, CA.

Daniel was truly an exceptional special operations warrior with more than 15 years of service and an unparalleled dedication to serve his county and fellow Navy SEALs. Daniel was also a noble and selfless family man, being a compassionate husband and father of four. He leaves behind a family proud of all that he had accomplished throughout his distinguished life and career in the military. His valor and service cost him his life, but his sacrifice will live on forever among the many dedicated heroes this Nation has sent abroad to defend freedom.

My condolences and prayers go out to Daniel's family, and I offer them my deepest sympathies and most heartfelt thanks for the service, sacrifice, and example of their Navy SEAL, Senior Chief Petty Officer Daniel Healy. He was respected and admired by all those