

away an individual's rights to equal protection under the 14th amendment to the U.S. Constitution, nor do they take away one's due process rights afforded under the 5th or 14th. If this bill did such a thing, I would strongly oppose it.

I want to thank everyone for reaching out to the office to voice their concerns on this bill. I want to assure them that I always have, and always will, listen to their concerns and address them in a timely fashion. I know this bill is not perfect. In fact, I proposed two amendments to prevent the President from transferring foreign terrorists to the U.S. to be prosecuted in the Federal court system, and I joined with Senators DEMINT, COBURN, and LEE to vote against cloture. However, in regard to the assertions that this bill allows the U.S. military to supplant our local police departments or that it allows the Federal Government to detain otherwise law-abiding citizens for simply carrying on in their daily lives, those assertions are entirely unfounded. As always, if anyone has any other questions, please feel free to contact me.

#### MORNING BUSINESS

The PRESIDING OFFICER. The Senate will now proceed to a period of morning business for the duration of 1 hour.

Mr. LIEBERMAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. GRAHAM. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. GRAHAM. I would ask to be notified when 10 minutes is up.

The PRESIDING OFFICER. The Chair will let the Senator know when 10 minutes is up.

#### DEFENSE AUTHORIZATION

Mr. GRAHAM. I would like to do a colloquy with my good friend from Connecticut.

Senator LIEBERMAN said something that I think we need to sort of absorb. As the chairman of the Homeland Security Committee, does the Senator believe the likelihood of American citizens being recruited, enlisted, and radicalized on behalf of al-Qaida is going up? Is that what the Senator is trying to tell us?

Mr. LIEBERMAN. Mr. President, I say to my friend from South Carolina, I not only believe it, but it is shown by the facts.

I wish I had the numbers exactly in front of me. But if we chart attempts at terrorist attacks on the United States—and here I am limiting it to people who are affiliated with the global Islamist extremist movement—there

were a few after 9/11, but in the last 2 or 3 years, the numbers have gone up dramatically.

I hasten to say these represent a very small percentage of the Muslim-American community. But of course it doesn't take too many people to cause great havoc. We have been effective at law enforcement and, frankly, we have been lucky that all but two of these attempts have been stopped. But I think we would find law enforcement officials, Homeland Security officials saying the toughest and most dangerous threat right now to the homeland security of the American people comes from homegrown terrorists who have been self-radicalized or radicalized by somebody else.

Mr. GRAHAM. I think that is important for us to understand. Does the Senator agree with me that when we look at the war on terror, the United States is part of the battlefield?

Mr. LIEBERMAN. Well, there is no question our enemies have declared it part of the battlefield. The very official commencement of the war against Islamist terrorism, 9/11, was an attack on America's homeland, on civilians.

Mr. GRAHAM. So let's just go with that thought for a moment.

Let's say our intelligence community, our law enforcement community, and our military/Department of Defense are all monitoring al-Qaida threats at home and abroad; does the Senator agree with that?

Mr. LIEBERMAN. Absolutely true. Al-Qaida and like Islamist terrorist groups.

Mr. GRAHAM. Under the Posse Comitatus Act, the military cannot be used for domestic law enforcement functions. Does the Senator agree with me that tracking al-Qaida operatives—citizen or not—within the United States is not a law enforcement function; it is a military function?

Mr. LIEBERMAN. It is a combination, truthfully.

Mr. GRAHAM. But our military has the ability to defend us against al-Qaida attacks at home, such as they do abroad.

Mr. LIEBERMAN. Right.

Mr. GRAHAM. So if the Department of Defense somehow intercepted information about an al-Qaida cell, let's say in Connecticut or South Carolina, could they be involved in suppressing that cell?

Mr. LIEBERMAN. I would say what has happened here since 9/11, and what we needed to have happen, is that the old stovepipes have dissolved and we have military, civilian, CIA, FBI, each with a focus, working together.

For instance, the Army doctor who killed 13 people at Fort Hood, our committee did an investigation in that case. He was actually communicating with the radical cleric Awlaki in Yemen over the Internet. That was picked up by international intelligence operatives. Part of the story is it wasn't transferred effectively to the Army so they could grab him before he

committed the mass murder at Fort Hood.

But I have to say for the record, the primary responsibility for counterterrorism now in the United States is with the FBI that has developed an extraordinary capability since 9/11. But it works very closely with the CIA, gathering international intelligence, NSA, homeland security, and the military.

Mr. GRAHAM. As a team effort.

Mr. LIEBERMAN. Right.

Mr. GRAHAM. Let's imagine a scenario next week where we find an al-Qaida cell exists that is planning a series of attacks against the United States, and within that cell we have some American citizens and we have people who have come here who are noncitizens.

Would the Senator agree with me, since Congress has designated cooperating or collaborating with al-Qaida to be an act of war, that entire cell could be held as enemy combatants and questioned by our intelligence community as to what they know about the attack and questioned on future attacks?

Mr. LIEBERMAN. That certainly should be the case, and we have had this circumstance in reality. They are all part of the same enemy. In the case the Senator posits, they have all been part of the same plot to attack the American people.

Mr. GRAHAM. So would the Senator agree with me that the current law is very clear that anytime an American citizen joins the enemy force, they can be held as an enemy combatant; that is the law?

Mr. LIEBERMAN. That is the law. As the Senator has said and Chairman LEVIN has said several times in the debate, there may be some in the Chamber who don't like it, but that is what the U.S. Supreme Court has said very clearly.

Mr. GRAHAM. If we capture an American citizen as part of this cell and we can't hold them as an enemy combatant for intelligence-gathering purposes, does domestic criminal law allow us to hold someone for an indefinite period of time to gather military intelligence?

Mr. LIEBERMAN. No.

Mr. GRAHAM. Does domestic criminal law focus on the wrongdoing of the actor, based on a specific event, when we are trying to resolve a dispute between the wrongdoer and the victim?

Mr. LIEBERMAN. Yes, it does. The Senator is making a very important point. It goes back to the colloquy the Senator from New Hampshire and I had, which is, when we capture an enemy combatant, we do so for two reasons: One is to get that enemy off the battlefield, the second is to gather intelligence. Sometimes the second purpose is more important than the first because it can lead us to other plots against the American people.

Mr. GRAHAM. Does the Senator agree with me the reason the Supreme Court has recognized that an American citizen could be held as an enemy combatant if they collaborate with an

enemy is that the Court views that as an act of war; and under the powers of the Commander in Chief, he can suppress all the enemies, foreign and domestic, that are at war with us?

Mr. LIEBERMAN. I do. There has been a lot of talk about the Constitution. The Constitution makes very clear that the primary responsibility we have in the Federal Government is to provide for the common defense, to protect the security of the American people.

Mr. GRAHAM. So our courts have recognized that during a time of hostilities, the executive branch has the authority to detain an American citizen who is helping the enemies of the Nation. The question is, Does the Congress want to change that for the first time ever?

I would like to add something that my good friend from Rhode Island got me thinking about. I have always tried to explain indefinite detention, what are we trying to do here? Clearly, in war, there is no requirement to let the enemy prisoner go back to the fight after the passage of time. We don't want to let any enemy prisoner go back to the fight because that makes no good sense. The problem with this war is, there is no definable end. That is the reason we have a habeas review, because we will never know when hostilities are over. So an enemy combatant determination could be a de facto life sentence, and that is why our Supreme Court said we want a judicial check on the executive branch.

So every enemy combatant will have their day in Federal court, and the government has to prove, by a preponderance of the evidence to an independent judge, that the decision to hold this person is warranted under the law. That was what the Hamdi case was about. I think that makes sense because it will not be the traditional war; it will be a war without a definable end.

The idea of continuing to hold them, if the judge says to the government: You are right, there is compelling evidence this person was involved with al-Qaida, tried to get involved with a hostile act; you are right, they are part of the enemy, you can hold them forever. But we have come up with an annual review process to make sure they will have a chance every year to have their case looked at.

Senator WHITEHOUSE got me thinking. In our own law, under the civil justice system—such as Hinckley, the man who shot President Reagan, he was acquitted in court, by reason of insanity, of shooting President Reagan. He has been in a psychiatric hospital ever since, and he can be held away from the community because he is a danger to himself or others.

I think what Senator WHITEHOUSE is saying is, the idea that we can hold someone—the Court has agreed with the government—as part of the enemy force as a continuing threat is not an unknown concept. We just have to have a review.

The PRESIDING OFFICER. The Senator asked to be notified at 10 minutes.

Mr. GRAHAM. I thank the President.

I would suggest to our colleagues, let's think this thing through. Let's realize that if the enemy is coming to our homeland, the enemy is recruiting American citizens; and if we find an American citizen who has, in fact, joined forces with al-Qaida, our No. 1 goal should be to gather intelligence to prevent future attacks and to find out what that person knows about what the enemy is up to. Our secondary concern should be prosecution. When we interrogate somebody as the enemy combatant, the best thing we have on our side is time. I don't want to waterboard anyone, but I want to keep them in a controlled environment where time is on our side, and I will argue that the best information we have from Guantanamo Bay detainees did not come from waterboarding, it came from the fact that we could hold them for an indeterminate period of time, and through time, they began to cooperate and tell us valuable information.

Does the Senator agree that is the concept we need to hold onto in this war?

Mr. LIEBERMAN. I thank my friend. I absolutely agree. I talked to professionals in this business of interrogation, and they say some of the most effective interrogation takes time. I have had people describe to me detainees who were totally uncooperative, and they were asked over and over for days and weeks and months, and then finally broke and began to give information that was critically important for the protection of our country. So I do agree.

I want to stress two things the Senator from South Carolina has said because it is very relevant to the attempt to give special status to Americans deemed to be enemy combatants in the contravention of existing U.S. Supreme Court rulings that say if you are an American and you are found to have joined the enemy, then you can be treated as an enemy combatant, which common sense tells you is what you are.

Here is what I want to say, and this is important to what we are here for. There are two kinds of due process that are put into the bill, the underlying language and the compromise that has been adopted on the treatment of detainees. One, for the first time there is a judicial process to determine the status of the detainee, whether evidence shows that the detainee should, in fact, be treated as an enemy combatant. The second is that while the enemy combatant is subject to indefinite incarceration, that indefinite incarceration is subject to annual review now. So we can determine, according to a stated series of standards, whether that person—

Mr. GRAHAM. Wouldn't the Senator agree that under domestic criminal law, that indefinite ability to question about enemy activity doesn't exist?

Mr. LIEBERMAN. That is absolutely right. The Senator stated earlier—and it is an important point—this is the danger we get into as we start to treat people who are terrorists as common criminals, or even uncommon criminals, which is that the criminal law aims at imposing a penalty, doing justice, incarcerating somebody as a result. The law of war is aimed at making sure that enemy combatants, prisoners of war, are taken off the battlefield—

Mr. GRAHAM. And to my colleagues—

Mr. LIEBERMAN. Until the war is over.

Mr. GRAHAM. I acknowledged in the Christmas Day Bomber case, in the Times Square attempted bombing, that they were put in Federal court. I am okay with that. I do believe in the "all of the above" approach. Our Federal courts can handle cases involving transnational terrorists and al-Qaida members and so can military commissions. The idea of reading somebody their Miranda rights may be the best interrogation technique. I know that we were able to get some good information after reading Miranda rights.

I guess the point I am trying to make is I acknowledge that the people doing the interrogation are better suited to make that decision than I am. I just don't want the Congress by legislation to say for the first time in the history of the country in this war—unlike any other war you no longer have it available to you, the U.S. Government, the ability to hold somebody as an enemy combatant if you believe that is the best way to gather intelligence. I am not saying the other system cannot be used. Let's leave it up to the professionals.

But the Senate is suggesting through the legislation being proposed that the idea of holding an American citizen who is suspected of collaborating with al-Qaida that they can no longer be held as an enemy combatant is not only changing the law, it is taking off the table a tool that I think we need now more than ever. I don't want us to lose sight of the fact of what we are doing here and what it would mean to our country and our ability to defend us. No one in World War II would have tolerated the idea that someone who collaborated with a Nazi trying to kill us on our own soil would have any other disposition than to be considered an enemy of the American people.

My question for this body is: Do you think al-Qaida is an organization that doesn't present that same kind of threat? Is it the Senate's desire to say during these times that an American citizen can collaborate with al-Qaida to kill us on our own soil and that is no longer considered an act of war? I would argue that that would be one of the most irresponsible decisions ever made in a time of war by an elected body. It not only would change the law as we know it, it would create an opportunity and a hole in our defenses at

a time when, as the Senator has indicated, the threat is growing.

I say to Senator LIEBERMAN, thank you for being a steady, stern, consistent voice along the line that since 9/11 our Nation has been in an undeclared state of war. The enemy still roams the globe. They have as their hope and dream hitting us again here at home. And, for God's sake, let's not weaken our defenses in a way that no other Congress has ever chosen to weaken the executive branch in the past. I thank the Senator for his service.

Mr. LIEBERMAN. I thank my friend from South Carolina for his expertise in this area and also his sense of principle. We have colleagues on the floor who want to speak. I want to say a final word. I know the Senator from South Carolina is particularly worried about pending amendments that would alter the way in which the underlying bill now treats enemy combatants who are citizens of the United States.

The underlying provision in the bill on detainee treatment fills a gap in our law that has been harmful and difficult for our military to deal with because there is no law about how to treat detainees. Senator GRAHAM worked very closely with Senator LEVIN and Senator MCCAIN to draft this compromise, and it is a good compromise. As he knows, if I had my preference, there would be no waiver in this because I believe anybody who is an enemy combatant is an enemy combatant and as a matter of principle ought to be held in military custody and tried by a military tribunal according to all the protocols of the Geneva Conventions, according to the Military Code of Justice.

Incidentally, if these tribunals are good enough for American men and women in the military who face charges, they ought to be good enough for enemy combatants who face charges.

But here is my point: The Levin-McCain-Graham provision in this bill on detainees is a compromise. It is a reasonable, effective, bipartisan compromise. It is the kind of compromise that doesn't happen here enough, and so I support it because even though I might have wished it would have gone further, so to speak, it is a lot better than the status quo. And I say that at this moment because I urge our colleagues who now want to come in with other amendments, to essentially undo this bipartisan compromise can do great damage. I am saying myself, yes, I wish it had not given the President the power to waive that he has under the bill and take somebody who is an enemy combatant to a normal article III Federal court, but this provision is a real step forward from the status quo, and I think if we can say that, then we ought to support it. So I hope our colleagues will think twice before trying to undo the compromise, and that if they do go forward with it, that our colleagues on the floor will defeat those amendments.

Mr. GRAHAM. Mr. President, I will wrap this up. I know we have colleagues who want to speak. Let me reiterate what Senator LIEBERMAN said. There is a stream of thought that every member of al-Qaida, American citizen or not, is an enemy of the people of the United States in a military sense, not a criminal sense, and they should be in a military tribunal. That is the way we have handled most cases in the past.

Here is what I believe: I believe that the choice of venue should lie with the executive branch, and I think there is a very robust role for article III courts. So I don't want to say from a congressional point of view that every member of al-Qaida has to be tried by a military commission all the time, because, quite frankly, sometimes article III courts could be the better venue. When it comes to telling the executive branch that you have to put a noncitizen in military custody inside the United States, I think that is the right way to do it, but I don't know enough, so if there is a reason to waive that provision, the experts can waive it.

I have been very cautious about micromanaging the executive branch because they are the ones fighting the war. We have a role to play, we have a voice to be heard, and here is what I am urging some my colleagues. This compromise is not what some of our friends wanted, such as Senator LIEBERMAN and, quite frankly, it is not what the ACLU wants, because they don't buy into the idea that al-Qaida operatives are anything other than common criminals. So you have two poles here. I believe an al-Qaida operative is not a common criminal, and if an American citizen joins al-Qaida they should be treated as an enemy combatant as one possibility. But if you want to go down the other road, you can go down that road. I just don't want us to take off the table, for the first time in the history of America, that an American citizen trying to help the enemy kill us here at home somehow can no longer be talked to by our military to gather intelligence. That is a crazy outcome.

I think we have a good bill that gives maximum flexibility to the executive branch but preserves the tools we are going to need now and into the future. And to my colleagues, please ask yourself: If in World War II we could hold an American citizen who tried to help the Nazis blow up America as an enemy combatant, why wouldn't you want to help hold an American citizen who is helping al-Qaida—which did more damage to the homeland than the Nazis—as an enemy combatant? Why would you want to take off the table the ability to hold that person, humanely interrogate them to find out why they joined, who they talked to and what they know? Because what they know and who they talked to may save thousands of lives. For us to say you cannot do that for the first time in the history of the country would be a colossal mistake.

I yield the floor.

The PRESIDING OFFICER (Mr. BENNET). The Senator from Kansas.

#### COMMUNITIES FIRST ACT

Mr. MORAN. Mr. President, I am here to speak on another topic, but it has been my privilege to hear the discussion between the Senator from South Carolina, Mr. GRAHAM, and the Senator from Connecticut, Mr. LIEBERMAN, about what I think is a very serious debate; that is, the juxtaposition of our constitutional rights as U.S. citizens in light of our desire to make sure Americans' lives are protected. I have always struggled with trying to find that right balance, and I found tonight's conversation on the Senate floor very valuable.

I wish to turn my attention and bring to the attention of my colleagues in the Senate a pending piece of legislation, a bill I have introduced dealing with our country's economy and particularly as it relates to financial institutions and particularly our community banks.

There are, as we know, so many Americans who are looking for work. I would say our government's first priority is to defend our country, and we have been having a debate about how we do that, but we also have a significant responsibility to create an environment where businesses can grow and put people to work. I want to point out tonight a piece of legislation I have introduced that I believe is part of the solution. It is called the Communities First Act, and it is a compilation of what I would say are commonsense tax and regulatory relief ideas for our Nation's smallest financial institutions.

We constantly hear about Wall Street. I want to worry tonight about Main Street. These banks in communities across Kansas and in States across our country were not the cause of the financial crisis from which we are still struggling to emerge, but unfortunately they have become the victims. They have become casualties of the crisis on Wall Street. Hundreds of community banks have been allowed to fail, and the survivors are left waiting for the next burdensome regulation to come from Washington, DC.

Until banks are willing and able to make prudent loans to creditworthy hometown customers, job creation will remain stifled and our economic recovery will continue to lag.

The evidence seems clear to me that the current regulatory requirements impose a disproportionate burden on community banks because they do not operate on the scale to spread the legal and compliance costs. When a bank with, say, just 40 employees requires 4 compliance experts, I believe something is terribly wrong.

This expensive overregulation diminishes the ability of a community bank to attract capital and to support the credit needs of customers. What that means is that someone who wants to be