

and then outside shocks hit us in the form of a terrorist attack that devastated large segments of the economy that have still not recovered.

Those of us who are so sure that we control this economy, and what it does by virtue of what we pass here, need to have a little more humility and a little more understanding and realize once again that the most important thing the Government can do in order to maximize Government revenues is to create an economic climate in which market forces can produce the greatest beneficial result. But even at those times, when the atmosphere is most conducive, the business cycle is still with us and will humble us if we keep thinking that, like Lucy Van Pelt, we can go through life with nothing but ups, ups, and ups, and never face the reality of the occasional down.

I appreciate the indulgence of my fellow Senators. I will have more to say on this at another time when we have a sufficient amount of morning business. I recognize the time has come to return to the debate of the bill on the floor.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER (Mrs. LINCOLN). Under the previous order, morning business is closed.

HOMELAND SECURITY ACT OF 2002

The PRESIDING OFFICER. Under the previous order, the hour of 2 p.m. having arrived, the Senate will now resume consideration of H.R. 5005, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 5005) to establish the Department of Homeland Security, and for other purposes.

Pending:

Lieberman amendment No. 4471, in the nature of a substitute.

Gramm/Miller amendment No. 4738 (to amendment No. 4471), of a perfecting nature, to prevent terrorist attacks within the United States.

Nelson (NE) amendment No. 4740 (to amendment No. 4738), to modify certain personnel provisions.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. REID. Madam President, I have spoken with Senator THOMPSON and he has indicated that he has a statement to make. There may be others on his side wishing to make statements on the bill. He indicated that there will be no unanimous consent requests related to this bill.

The leaders have announced there will be no votes today. My friend from Tennessee, I am sure, is aware of that. I look forward to his statement and whoever else wants to speak on this most important legislation.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. THOMPSON. Madam President, I thank my friend from Nevada. I concur in his analysis. There will be no unanimous consent request or additional amendments brought up, or anything of that nature. I also agree with him that we should have our colleagues down here discussing this bill, if they desire to do so. I encourage anyone who may be listening, if they have comments on this bill, come to the floor. There will be plenty of time this afternoon for us to continue to engage in this discussion. It is a very important discussion.

I think with regard to the several points of disagreement that we have, we should keep in mind the points of agreement we do have. I think, for example, all concerned agree that we need to bring many of these agencies that have to do with homeland security under one umbrella and that we must do it in a much better and more efficient way than we have carried out the operations of Government in many other respects. So let's build on that.

I hope we can build on that and address the points of disagreement and see if we cannot come together. I am still hopeful that in the waning days in which we have to address this issue, we will be able to come together and agree on not only the principle I just enunciated with regard to the merger, but also with regard to issues concerning the President's proper authority and appropriate flexibility that is going to be needed to manage this gargantuan enterprise we are setting out on. It is really a major endeavor. Nothing has been done like this in several decades in this country, and we are going to need all hands on deck, all the tools, all the resources, and all of the attention that we can bring to bear on this problem in order to make this country safer.

I think most of us realize now that we will probably never again be able to believe we are totally safe and that we can cover every border and every bolt and every automobile and every airplane, all to the extent that we will have a failsafe situation and that we will not need to constantly keep our guard up.

There is a lot we can do. A lot has already been done. The President has taken charge and Tom Ridge in the Office of Homeland Security has taken charge. They have issued Executive orders that have addressed many of the burning issues that we face. I think our border situation is already better. Our transportation situation is better. But there is an awful lot to be done before we get to the point where we can say that we have done all that we can do.

It is a very difficult proposition. I said last week that one of the things that impresses me most about this body, about the Government in general, is how difficult it is to make any really substantive change to anything. If there is any difficulty connected with it at all, if it comes to spending money, or something like that, we can

usually come together because it benefits those of us who are spending the money, benefits our constituents, and we get some short-term benefit from that all the way around. We sometimes pay long-term consequences for it, but spending money seems to be an easy thing to do.

Here, we are actually stepping on some people's toes and we are acknowledging some dysfunctional aspects of our Government and we are saying, let's change that. But there are a lot of vested interests out there who don't want to change. They want the status quo. In the abstract, they want the same end result we do—we want a better system—but they don't want to change things in order to achieve a better system.

We have been looking, listening, watching, and absorbing for many years in this Congress and in this Senate the various negative aspects of many of the agencies of our Government and how they are not working, how they are not doing what they are supposed to be doing, how they are rife with waste, fraud, and abuse, and billions of dollars are being sent out for things—like people who are deceased, for example. We find that we cannot incorporate high-tech information systems that have been incorporated in the private sector for years and years, to good effect. We cannot seem to bring that into the Government. The IRS has wasted billions and billions of dollars trying to get their computers to talk to each other. They are making real progress now, but for a long time they did not. And there are human resources problems, human capital problems.

We are losing people we ought to be keeping in Government, and too often keeping the people we ought to be losing because of old rules and regulations that were set up decades ago. We have seen all of this happen, all of this evolve as Government got bigger and bigger and more complex, with levels and upper levels—every Deputy Assistant Secretary has an assistant to the Deputy Assistant Secretary, and they have two, three, and four, and it keeps growing. It makes us less efficient and less responsive to the people we are supposed to be serving.

Now, we understand it is not just money and inefficiency and lack of service we have to be concerned about. We have to be concerned about our very safety—the No. 1 job of Government, self-protection.

Yet there are those who want to incorporate that system, this bureaucratic mess that has evolved into the new Homeland Security Department because they do not want to make any changes.

Unfortunately, a part of what has to be addressed. Governmentwide is our civil service system. No one wants to deal with that because it is politically difficult, politically volatile, and you are going to be stepping on some people's toes. Yet there is unanimity

among Democratic and Republican experts who have looked at this problem and have experienced this problem.

In the homeland security bill, we are trying to solve a Governmentwide problem. It is much too big. It is much too politically difficult. There are too many entrenched interests to successfully address that situation. We are trying to say, with regard to homeland security, with the issue most important to our country: Let's have a little flexibility in these civil service rules that we have not had in times past.

When President Carter asked for civil service reforms in the spring of 1978, he said the system "had become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red-tape, delay, and confusion."

That was President Carter. Accordingly, Congress delivered the requested reforms in the Civil Service Reform Act of 1978. But a lot has happened since 1978 to prove that we still have a long ways to go.

The Brookings Institution report of 2002 quoted earlier now says:

The civil service personnel system underwhelms at virtually every task it is asked to do. It is slow at hiring, interminable at firing, permissive at promoting, useless at disciplining, and penurious at rewarding.

That is the Brookings Institution's analysis of our civil service system.

This is not news to anybody. President Carter knew about it, spoke on it, and the Brookings Institution and others have spoken about it. We heard testimony in the Governmental Affairs Committee over the years about this issue. Something has to be done about it, and everybody wrings their hands and acknowledges it is not right that it takes 5 or 6 months to hire somebody. It is not right that it takes 18 months to fire a poor performer. But that is the way it is, and that is the way we have been doing business. We rock along tolerating that kind of a system because it is only Government and we really do not expect much out of Government anyway, do we?

Now we are in a different world, and we understand that what is at stake is not just aggravation or waiting in a longer line or putting some civil service employees out who are trying to get a job or trying to get promotion inside a system that only let's them move lockstep or waste a few billion dollars—it is not just that anymore. It is our very safety and survival as a nation because, if we adopt this kind of system into the Department of Homeland Security, we will get the same results as other agencies.

We will see not only waste, fraud, abuse, and mismanagement, overlap and duplication, but we will see the border not protected the way it should be, airline safety not being what it should be, cargoes will not be examined the way they should be, the information technology we need to tie all this

together so we can keep up with the bad guys will not be what it should be because we have seen it has not worked in any other aspect of Government.

What makes us think that just by creating this new Department under the same old rules it will work any better in this new Department of Government? If anything, there will be new problems that will be created from this new Department of Government because we are talking about bringing together over 170,000 Federal employees. It will require the coordination of 17 different unions, 77 existing collective bargaining agreements, 7 different payroll systems, 80 different personnel management systems—80—an overwhelming task by any stretch of the imagination.

Again, with this more complex, more difficult, and more-important-than-ever task that we have on our plate now, do we really want to bring the old way of doing business into our Government that has produced these bad results? The answer is no.

We have to do business a little differently. We have to give the President authority that other Presidents have had—not take away his authority as the opposition to this bill would do, or diminish his authority, or set up new requirements for the President to prove. It means that we have to give the people who are going to be running this new Department some flexibility with regard to hiring, firing, promoting, rewarding, holding employees accountable—all those issues we should have done Governmentwide years ago and we do not have the political will to do.

At long last, with regard to the Department of Homeland Security, at least we ought to acknowledge that we have to look at these issues differently. We have done so with regard to several Departments. That is the irony. When the Transportation Security Administration came to us and said, We need a little additional flexibility in hiring, firing, promoting, rewarding, and disciplining, we gave it to them. When the GAO came to us and asked for the same flexibility, we gave it to them. When the IRS came to us and asked for the same flexibility, we gave it to them. When the FAA came to us and asked the same flexibility, we gave it to them. When the President comes today and asks for the same flexibility, we say no. At a time when it is needed the most and is being asked for by the person who needs it the most on behalf of his new Department, we say no. I think it defies logic.

It is not as if we are taking a step back from merit system principles or that we want to engage in prohibited personnel practices and we are going to abrogate civil service for Federal employees. That is not it at all.

The President has made it clear that the merit system principles that have been there for years will still be there. I am talking about principles such as veterans' preference; the requirement

to recruit qualified individuals from all segments of society; select in advance employees on the basis of merit after fair and open competition. We keep that, of course. I am talking about treating employees and applicants fairly and equitably without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping conditions; we keep those principles.

Provide equal pay for equal work and reward excellent performance—of course, we keep those principles; maintain the high standards of integrity, conduct, concern, public interest, we keep that; manage the employees efficiently and effectively, we keep that. The requirement that we retain and separate employees on the basis of their performance and their performance alone, we keep that. Educate and train employees when it will result in individual performance, we keep that; protect employees from improper political influence, we keep that; protect employees against reprisal for lawful disclosure of information in whistleblower situations, that is, protect people who report things such as illegal or wasteful activities, we most certainly keep that. We want that. We value that as much as anyone.

All of those merit system principles we retain. We do nothing with regard to keeping those. Those are principles on which we all agree, and those who imply we are somehow, in the name of national security, eviscerating the rights of employees, is simply not true.

We can maintain the rights of employees but we are not wedded to 50-year-old operating principles. We can make some changes that make some sense in the light of current circumstances.

Well, they ask, what about prohibited personnel practices? In title V of the United States Code, as we all know, there are several prohibited personnel practices in which the managers of these agencies and the heads of these Departments cannot engage. They say employees who have the authority to take, direct others to take or approve personnel actions shall not discriminate on the basis of race, color, religion, national origin, age, handicap condition, marital status, and political affiliation. We retain that prohibition, for sure. May not solicit or consider employment recommendations based on factors other than personal knowledge or jobs or related activities or characteristics, we keep that; may not coerce an employee's political activity, we keep that; shall not deceive or willfully obstruct a person's right to compete for employment; shall not influence any person to withdraw from competition for any position or improve or injure the employment prospects of any other person; shall not give unauthorized preference or advantage to any person or improve or injure the employment prospects of any particular employee or applicant; shall not engage in nepotism; shall not retaliate against a whistleblower; shall

not retaliate against employees or applicants who exercise their appeal rights; shall not discriminate based on personal conduct which is not adverse to on-the-job performance; shall not violate any law, rule, or regulation which implements or directly concerns the merit principles; shall not knowingly take or fail to take a personnel action if that action or failure to act would violate a statutory or regulatory veterans preference requirement.

All of those prohibitions stay. We retain every one of them. They are principles on which we all agree, and they are meaningful. They are protections that employees should have. They are protections we insist these employees retain.

Again, does that mean one cannot make any changes from a system that was created 50 years ago, in light of current circumstances? It does not. When you find somebody not doing their job, does that mean it should take years to do anything about it? Does that mean it should take months in order to hire someone because of rigorous steps and certain pools from which you have to draw and all of that kind of foolishness at a time when we are really in need of people with technology capability that we have not necessarily needed in times past? Of course not.

Does it mean we should not have a system whereby good performers can jump ahead and get paid more and not have to go in a one-step process all the way up where people who are doing their job, people who are doing an excellent job, people who are doing a mediocre job, and people who are doing a terrible job are all lockstep, just same old thing?

That system was created 50 years ago, with 15 different pay grades, 10 steps within each pay grade, when people would go in as a young person and lockstep their way all the way up through the process and retire after 20 years. That is not the world we live in anymore. Young people can do a lot better than that. We need to be able to pay them more. We need to be able to reward them more. We need for them to be able to jump grades, for example. Under less than very exceptional circumstances, it ought to be the rule for extraordinary performance.

By the same token, there needs to be accountability. These are not inconsistent with the merit principles I have enunciated. There is just a little bit of common sense. It does not mean we have to have collective bargaining agreements that go on for months and sometimes years over such issues as whether or not the annual picnic was rightfully called off.

There is a case at an Army base in St. Louis which lasted 6 years over that momentous issue.

The administrative process is rife with cases such as disputes over whether or not the smoking area should be lit. Sometimes it takes years in order to resolve issues that way. At a time of

war, can't we bring a little common sense with regard to the Department of Homeland Security when there are such high stakes? Surely, we can. That is what the issues before us today on this homeland security have to do with. They are in regard to maintaining a rigorous status quo regime or giving the people in this new Department—we will have this Department for the rest of our lives and probably for generations to come. There will be Democrat Presidents and Republican Presidents. There will be Democrat and Republican Secretaries of the Department of Homeland Security. This is not a partisan Democratic or Republican issue; it is a commonsense issue.

Doesn't the new Secretary need to be able to break through some of these old rules and procedures that have gotten us down into waste, fraud, abuse, inefficiency, overlap, duplication, and inability to function and have at least a shot at managing people under the 21st century rules in which we live, instead of rules of another time and another era? I think so. That is what this is all about. That is all we are asking.

I mentioned the various aspects with which the manager of this new Department—whoever that unfortunate soul turns out to be—will need some tools with which to manage. A good employee will welcome that with open arms. In fact, I think all of this would be welcome by employees, the overwhelming majority of whom are doing their job on a day-to-day basis. They are the unsung heroes throughout our Government. If those folks are offered an opportunity to say, look, we are going to make it easier for you to get hired, you are not going to have to be flailing around for 5 months and going through all these various steps, we are going to try to pay you more, once you get in and you do a good job, we are going to make it so you are rewarded commensurate with that, if you do not like what is happening and you file an appeal, or your union does on behalf of you, you are going to have, let's say, two steps instead of four in the appellate process, I think most employees would overwhelmingly embrace that tradeoff.

Ninety-nine percent of the employees are not afraid of bringing a little common sense to the appeals process or the ability to respond to poor performance. If one looks at surveys, they will quickly see the overwhelming number of good Government employees realize there are some poor performers, and nothing can be done with them. They have to be transferred from Department to Department. The political appointees are in there for a short period of time. They are not going to spend all of their time bogged down in administrative hearings and worried about trying to get rid of somebody who has been there—you know the old saying, we will be there when you come and we will be there when you go, and it is true. They are and they will be there. They transfer them around and these

other employees see that. They are making the same pay sometimes that the good employees are making, and that is not right.

We do not need to put up with a situation such as that in our Government. (Disturbance in the galleries.)

The PRESIDING OFFICER. The Sergeant at Arms will restore order to the Senate proceedings.

The Senator will continue.

Mr. THOMPSON. Madam President, chapter 43 goes beyond the intent of merit principles which provides employees who cannot or will not improve their performance to meet required standards should be separated. As a result, managers must give employees multiple opportunities to demonstrate their ability to perform the essential aspects of their position at an acceptable level. Such a requirement undermines the managers' willingness and ability to discipline poor performance and results in poor-performing employees remaining on the job for many months and sometimes years.

Section 4302(b)6 authorizes agencies to remove employees whose performance is unacceptable, but only after giving that employee an opportunity to improve performance. It defines unacceptable performance as failure in any single element of an employee's standards. Another section requires any such opportunity to improve must be provided within one year preceding the removal of the employee.

The combined impact of these provisions is poor performers are entitled to fail at each different element of their performance once each year without being subject to removal. If they are deficient in more than one, they have a year to see if they can improve on that, and if they prove to be deficient on another, they have another year on that. So the worse performing you are, the more time you have before anything can be done. What manager is going to spend his time going through that?

An OPM study conducted in the last administration estimated 3.7 percent of Federal civilian employees were poor performers. When applied to the total Federal workforce, that percentage works out to be 64,340 employees.

Last year, 434 individuals were removed for poor performance, so only .67 percent remained removed from service last year. In other words, of 1,000 Federal employees who did not do their job, 7 of them were let go. Let's hope that of that 1,000, they are not checking the bags or checking the cargos or checking the borders when you or I are there and our safety and our loved ones' safety is at stake. Perhaps we can afford that in some departments, but not in the Department of Homeland Security. That is all we are talking about.

The overwhelming number of good Federal employees and Federal performers see this and know who they are and know they are probably going to be making the same thing, and there is nothing that can be done about it.

What does that do to morale? What does that do to workforce morale?

In 1993, a police sergeant with the Department of the Treasury was fired for providing false statements during an investigation. This action was not finally sustained until 5 years later when it was finally decided by the Supreme Court of the United States. During the intervening 5 years, there was a hearing before the MSPB, the administrative judge, a decision by the MSPB, an appeal to the Federal court, and a discussion by the U.S. Supreme Court. This was all regarding a police sergeant who lied during the investigation.

An employee of the Civil Service Administration removed for falsification of travel voucher claims contends the action was unjustified. Under chapter 707, that employee would be entitled to seek investigation and review by the Office of Special Counsel, an average of 4 months; hearing and decision by the regional Office of the Merit System Protection Board, average 4 months; review by the headquarters of the Merit Systems Protection Board, 4 months; review by the Equal Opportunity Commission, 36 months estimated; and review at all 3 levels of the Federal court system—district court, appeals court and Supreme Court—6 months to several years.

It is not that it would be a good idea to deprive people of their administrative rights. It is just a question of how many levels and how many avenues and how many claims and how long should all this take with regard to the Department of Homeland Security.

Are we doing the best we can do? Clearly, we are not. It is showing up Governmentwide. It has to do with much more than just the rather narrow issues we have been talking about in terms of the homeland security. In June of last year, before September 11, we put out a document called Government at the Brink. This was a document I put out as chairman of the Governmental Affairs Committee. It was subtitled Urgent Federal Government Management Problems Facing the Bush Administration. This was as the Bush administration was coming in. We were trying to inform the new administration of the situation they were going to be confronted with, as other presidents have been informed. We tried to summarize the problems the Federal Government was having. This was not an attempt just to bash the Federal Government. It was an attempt to try to make it work better.

We would have hearing after hearing after hearing. We would bring the GAO in. They would give us every year the high-risk list of agencies that were most subject to waste, fraud, abuse and mismanagement, overlap and duplication. The same agencies every year. No one ever got off of it. New ones kept coming on to it. We passed the RESULTS Act, which said every year: Now, you have not done very well at all. Some of you have done awful. You

will have to start showing your results. We will have to start measuring your results.

We have spent years now and we are still in the middle of trying to make that work, and the reports we are getting in many cases from the RESULTS Act show they were producing the right kind of results, but they are incomprehensible themselves. So we are having trouble getting through some of the reports in order to decide whether we are getting any results.

Is Congress just laying on another requirement that will be unfulfilled? It is a very discouraging, long-term problem that has been developing for many years in our Government. It is getting worse and not better. My own view is that until we attach the appropriations process to these problem areas, we will probably never make any progress.

In other words, if these agencies keep coming up with bad performances, not only should people be held accountable, the agencies should be held accountable, and it should be reflected in their funding for the next year. How can you justify continuing to fund failure year after year after year? That would not happen in any other aspect of American society except the Government. Yet what happens if they get bad enough? Usually, we give them more money.

That is the situation. That is the backdrop. That is what we tried to summarize in this little booklet we put out.

We mentioned some of the examples that the new administration was going to have to deal with in term of Government management or mismanagement.

We mentioned the big dig, Boston Central Artery, the most expensive Federal infrastructure project in the Nation's history. Its cost continues to rise and is now estimated at \$13.6 billion, an almost 525-percent increase from the original \$2.6 billion in cost.

We mentioned abusing the trust of the American Indians. The Department of the Interior does not know what happened to more than \$3 billion it holds in trust for American Indians. A judge overseeing this case called it fiscal and governmental irresponsibility in its purest form.

We mentioned the Department of Defense financial management. There is widespread agreement that the Department of Defense finances are a shambles. I hope they are better than when this report was written. It wastes billions of dollars each year, and it cannot account for much of what it spends.

We mentioned NASA, NASA mismanagement; the fact that it causes mission failures. In spectacular example after example, NASA lost billions because of mismanagement at some of its biggest programs. The cause of the Mars Polar Lander failure, for example, was that one team used English measurements—feet, inches, pounds—to design and program the vehicle while another used metric measurements.

We mentioned Medicare waste, fraud, and abuse. Medicare wastes almost \$12 billion every year on improper payments. It misspent that \$12 billion last year from the fee-for-service part of Medicare alone, which was about 7 percent of the total fee-for-service budget. The amounts wasted on improper Medicare payments would go a long way toward funding a prescription drug benefit or other program enhancement.

We mentioned security violations at the Department of Energy. The Department of Energy does not adequately safeguard America's nuclear secrets. In just one case, a party was dead for 11 months before Departmental officials noticed that he still had four secret documents signed out.

We talked about the IRS fiscal mismanagement. The IRS manages its finances worse than most Americans. The agency does not even know how much it collects in Social Security and Medicare taxes. GAO found significant delays, sometimes up to 12 years, in recording payments made by taxpayers.

We mentioned the Veterans Affairs and how they put patients' health at risk. The Department of Veterans Affairs IG found that the hospital food services shares the loading dock with the environmental management services hazardous waste containers. Dirty environmental management services and red biohazard carts were located next to the area where food is transported to the kitchen.

We mentioned the student financial aid program bilking taxpayers in that program. Federal student aid programs are rife with fraud and abuse. A cottage industry of criminals advises people on how to cheat to get Federal Government loans and grants. In one case, scam artists passed off senior citizens taking crafts classes as college students who qualified for Federal Pell grants.

Then we mentioned unemployment insurance fraud. A Las Vegas, NV, man illegally collected at least \$230,000 in fraudulent unemployment insurance benefits from four different States between September of 1996 and November of 1999. He set up 13 fake companies and submitted bogus claims based on falsely reported wages for 36 nonexistent claimants using names and Social Security numbers of dead people, then collected claims by mail from California, Massachusetts, Texas, and Nevada.

These are just 10 examples of things we pointed out last year that were going on in our Government. For the most part, from the Government's standpoint, not counting the people who are out there always willing to take advantage of the Government, stealing from the Government, but for the most part this was not deliberate activity on behalf of people who work for the Government. These were just things that we let happen.

A lot of it had to do with our lack of managing these Departments, the turnover that we had, the inability to keep

good people in developing these information technology programs. That is part of the IRS problem. Who wants to spend their time doing that, at that kind of pay? So we gave them flexibility. They are using it, and they are making some progress now. But this is the tip of the iceberg, and nobody pays any attention to it. We just kind of shake our heads, there is a newspaper story that comes out, and we go on and waste billions of dollars every year in the most egregious circumstances.

Again, I ask: Now we have been attacked. We have lost almost 3,000 people in one attack. We are going to bring some of these agencies together. If we just bring some of these agencies together, what have we accomplished except a bigger mess? We must do so, but we must do so with some ability to reward, punish, promote, demote, and get the right people in, raise some salaries, give some incentives, have some esprit de corps in some of these Departments, and be able to get rid of a poor performer with something less than 6 years in a case before the Supreme Court of the United States.

I mentioned earlier we have already given this kind of ability to manage to several of our Departments: The FAA, GAO, GSA, IRS, several of our agencies. Yet when it comes to the most sensitive area of all, homeland security, we are not willing to give the new Secretary that kind of flexibility and that kind of ability.

Someone might ask us: What about just giving the new Secretary for the Department of Homeland Security the kind of flexibility with regard to its employees that Members of Congress have? What about the same kind of flexibility to hire, fire, promote, set salaries that Members of Congress have?

I can assure anyone listening that Members of Congress have much more flexibility than what is being proposed for this new Department. But more on point, in keeping within the executive branch of Government, what about the flexibilities we have given these other Departments?

With regard to the IRS, there was a provision in there that basically said you must negotiate with the union, and if you do not, you must go to an impasses panel. That is what our friends, who would deny the Secretary this flexibility, suggest we should adopt for the Secretary. So one agency, and one agency alone, is all I can tell. We required them, when we gave them their flexibility—we required them to go through the administrative process that would wind up with some panel making the ultimate decision as to whether or not their actions were justified. We didn't do that with regard to the FAA, we didn't do it with regard to the GAO, we didn't do it with regard to the Transportation Security Agency. I submit that what we are about now, with 170,000 employees and 77 collective bargaining agreements and 80 different personnel management systems—that

flexibility is needed more with regard to homeland security than any of these other agencies.

So we are not just comparing apples to oranges. We are comparing peanuts to elephants. We give these agencies this additional flexibility to manage with these relatively contained problems they have. But when we magnify the potential problems we know are going to come about with regard to the Department of Homeland Security, we don't want to give that to the new Secretary. I think we must if we want it to work, and if we want it to work differently, and we don't want to incorporate and adopt and inherit so many of the problems we have seen throughout Government—some of them relating to safety, some of them not—and expect we can keep doing the same old things the same old way after switching the boxes around and expect different results.

What do all these billions of dollars of waste, inefficiency, lost items, and inability to balance the books that the Government cannot do—in small part or as a whole cannot balance its own books—translate over into when you are talking about safety issues? I hope we don't have to find out.

We are suggesting the new Secretary have some of the same things these departments have—that we have already given flexibilities to have—in consultation with the Office of Personnel Management. This is a department headed by a Senate-confirmed person who is an expert in personnel rules, title V, and what the Government can and cannot do—the prohibitions I just read earlier, the principles I read earlier that we must adhere to—in consultation with that person to come up with some rules.

I should point out there is nothing in the Gramm-Miller substitute that mandates any changes. It is simply a law that allows those whose job it is and whose responsibility it is to make this a safer country to make those changes, and then come before Congress for appropriations and oversight—and all of the attention and sometimes aggravation and all of that—it will get as it justifies the changes it has made.

The House of Representatives recognized this need and necessity in passing their homeland security bill. There were basically six areas where this bill gives the new Secretary some flexibility.

There are many areas where no flexibility is sought at all. In fact, with regard to most of the personnel areas and flexibilities that are dealt with in title V, only a small percentage of them are being requested by the administration as being ones they need some flexibility in.

Let us talk about what is not being suggested that there be any flexibility in by the administration.

Chapter 21, general provisions; chapter 23, merit system principles; chapter 29, commission reports; chapter 41, au-

thority for employment; chapter 33, examination and placement; chapter 34, part-time career employment opportunities; chapter 35, retention preference, restoration and reemployment; chapter 41, training; chapter 45, incentive awards; and chapter 47, personnel research programs and demonstration projects.

Again, I am just about halfway through here. But these are areas in which the administration says OK, we are not asking for any changes or for the ability to change anything in these areas.

Chapter 55, pay administration; chapter 57, travel, transportation and subsistence; chapter 59, allowances; chapter 61, hours of work; chapter 63, leave; chapter 72, antidiscrimination and right to petition Congress; chapter 73, suitability, security and conduct; chapter 79, services to employees; chapter 81, compensation for work injuries; chapter 83, retirement; chapter 84, Federal Employee Retirement System; chapter 85, unemployment compensation; chapter 87, life insurance; chapter 89, health insurance; chapter 90, long-term care insurance; and chapter 91, access to criminal history records for national security.

There are close to 30 areas here in title V where no flexibility is being asked for at all.

There are six areas where flexibility is being asked for: Chapter 43, performance appraisal; chapter 51, classification; chapter 53, pay rates; chapter 71, labor-management relations; chapter 75, adverse actions; and chapter 77, appeals.

With regard to those six areas, the House says OK, we will give the new Secretary some flexibility in those areas.

The Gramm-Miller amendment adopts those six areas.

The "compromise," so-called, before us—the Nelson-Chafee-Breaux amendment—would say we will give you four of those six areas. In other words, you have to add two more to the 30 or so you don't touch—labor-management and appeals. The new Secretary can do nothing with regard to the entire area of labor-management or appeals.

Unfortunately, labor-management and appeals has to do with the framework system by which you resolve disputes. If you control that process, you control everything else. Everything else has to go through it. So this is our difficulty.

When the Breaux-Chafee-Nelson amendment says we may not give the Secretary the authority to make any changes to labor-management relations or to appeals, it is simply a step too far or a step not far enough.

The President has said without this authority, the new Secretary would come in with his hands tied behind his back; he could not do all of the momentous things that are going to have to be done in terms of organizing and consolidating all these personnel systems without some flexibility in those areas as well.

The Nelson-Chafee-Breaux amendment also says—we were talking about six—we will give you four. But with regard to those four, you have to enter into negotiating agreements with the union. If the union refuses to enter into a negotiated agreement with you, you have to go to the Federal Services Impasses Panel.

I don't think it is as much a fact that we think the Federal Services Impasses Panel—whatever that is—is going to come up with terrible decisions; it is, again, do we really need to go through this kind of process with these kinds of decisions which other departments have the flexibility to go ahead and handle and take action on when we are dealing with homeland security, and we are dealing with the people who are going to be in charge of homeland security?

One of these areas has to do with classifications and pay rates and systems. I would like to think we could pay people better. I would like to think we could promote people more easily. I would like to think we could retain good people.

What if a union decides we are discriminating, we are taking this group of people and we want to give them more money, and we are taking another group of people and we don't want to give them any more money, and they represent all of them? So then we go through the Federal Services Impasses Panel. I cannot stand here and tell you how long it would take to go through this Federal Services Impasses Panel, but I can assure you it would be longer than it should.

So basically 17 unions are representing about one-fourth of the workforce of these 170,000 employees. Only 20,000 of them are in a union. Forty thousand of them are represented by unions, but 20,000 of them are in a union. About 25 percent of the workforce becomes the tail that wags the dog.

That is unnecessary. That is unwise. It, again, is placing restraints on this new Department that we have not placed on other Departments with much less serious mandates than we are giving this new Department.

There was one case where the union objected to a number of issues relating to the deployment of the National Guard to help in Customs' antiterrorism responsibilities. The union even demanded to bargain over arming the National Guardsmen. And they objected to Customs employees having any responsibility for storing National Guard weapons needed to fight terrorism.

In another example, the union has challenged Customs decisions to temporarily reassign inspectors to the northern border as the current union contract allows. Despite the continued terrorist threat after 9/11, the union has insisted on a new and time-consuming process that would require Customs to canvas thousands of employees nationwide for volunteers.

I guess most of us know by now that Customs has been sued because they put out a directive, pursuant to the President's direction, with regard to the color-coded warning system we have now: red, yellow, orange, whatever. So Customs was implementing that, and the labor union sued them because they said they should have negotiated that color system before it was put out.

So these are the kinds of things about which we are talking. None of them, in and of themselves, are the end of the world, but in case after case we have become consumed with procedure and process.

We can have due process. We can keep people from getting run over. I have spent most of my professional career trying to make sure that people didn't get run over. But you can do that without tying up the Government when it is trying to protect our borders. You can do it in less than a lifetime.

The Congress cannot do it. We cannot sit here and decide the details of a massive personnel system, and especially all the different personnel systems we are having to bring together. That is an administration job. They got elected. Let them come with a system that has a chance of getting the job done and working out the detail.

We will have oversight in this body. But I submit, we do not have the ability to micromanage a system such as that—which brings us to the President's national security authority. We have had a lot of discussion about that because a lot of people do not understand why, again, when we are creating a new Department that is going to be in charge of homeland security, we would give the President less authority with regard to this new Department not only than what other Presidents have had but than what other Departments have had and will have. So we will be taking the new Department, which needs the President's firm hand the most, and be providing him with less authority than other Departments have.

I think that perhaps it would be good if we considered the history of the President's authority in this regard. As we have been talking about now for several days on the floor, the law basically is that if a primary purpose of a particular agency or subdivision has to do with certain categories of work, such as intelligence, counterintelligence, investigative or national security, then the President can set aside collective bargaining agreements because national security is at stake and we simply do not have the time to go through some of this rigmarole I have been describing on the floor with regard to this limited number of areas.

The Nelson-Chafee-Breaux amendment would amend that and say that, No. 1, the President has to prove this work has to do with terrorism and not the broader definition of national security or he has to determine that; and,

No. 2, the President has to also determine that the new people who are coming into the Department with regard to whom he is exercising this authority have had their jobs changed. In other words, additional requirements are being made upon the President to make additional determinations which could be challenged in court.

The President will have a presumption in his favor, for sure, with regard to the courts, but it will be a rebuttal presumption and it will be a situation where the President's representative has to decide to what extent, in a litigation situation, he wants to lay out these sensitive matters.

But any way you look at it, it is not the same authority that other Presidents have had. We are putting up additional hurdles for this President to overcome, for some reason. We are making additional requirements, additional determinations for this President to make, for some reason. We are not making it easier for him to exercise his national security authority because of September 11, we are making it more difficult.

There was an Executive order that President Kennedy signed, and it contained an exception for agencies and offices engaged in national security. But the exception did not even need to be invoked by the President. It could be invoked by a head of an agency.

Executive Order 109-88 said:

This order shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency or other office, bureau, or entity within an agency primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations when he deems it necessary in the national interest. And subject to such conditions as he may prescribe, the head of any agency may suspend any provision of this order with respect to any agency, installation, or activity which is located outside the United States.

President Kennedy's Executive order was based on the recommendations of a distinguished six-member task force chaired by then-Secretary of Labor Arthur Goldberg. It was known as the Goldberg Commission. The statement from the Goldberg Commission is the best rationale for the national security exception we have found. The felt need for such an exemption seems to have been so widely acknowledged that no extended argument was even necessary. The general point has been made by many others, however.

For example, President Franklin D. Roosevelt said:

All government employees should realize that the process of collective bargaining has its distinct and insurmountable limitations when applied to public personnel management because the obligation to serve the whole people is paramount.

President Kennedy, President Roosevelt. In 1969, President Nixon repealed the Kennedy order but recodified and expanded the rules of procedure for labor-management relations in

Federal service. That order also contained an exemption for agencies and offices doing national security work and allowed the head of the agency to invoke the exception. Not the President, but the head of an agency could do it.

The current statute then was signed by President Carter. He concurred with the language the House and Senate presented to him. But his own bill which he sent to Congress earlier in 1978 also contained an exemption for the work of national security.

This is a well-established need that all Presidents have seen fit to exercise; to the extent, evidently, that extended debate back then was hardly even necessary. I don't know that there has ever been extended debate on the authority the President should have with regard to setting aside collective bargaining agreements in situations pertaining to national security and these other categories until now.

Ironically, while the opponents of the Gramm-Miller substitute and the President's preferred course of action want the status quo with regard to all other aspects of this bill except the organizational part, but the status quo with regard to the managerial part, they do not want the status quo when it comes to giving the President the authorities that Presidents have traditionally received.

The President can't accept that. He has said so. I hope it is not presented to him like that because we know what the fate of this bill would be. That would not be good for the country. We all know that.

I am hopeful that in these waning days we will be able to, with regard to these two issues, which opponents of Gramm-Miller say are not very significant but which the President says are extremely significant, which you would think would cause a basis for some compromise right there, but I would hope we would be able to address this issue of some flexibility that we have given other departments that we must give the new Secretary on the one hand and, secondly, maintaining the President's traditional position with regard to his national security responsibilities having to do with collective bargaining agreements.

I yield the floor.

The PRESIDING OFFICER (Mr. WYDEN). The Senator from Nevada.

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent the Senate now proceed to a period of morning business with Senators allowed to speak therein for a period of up to 10 minutes each and that this time extend until 5:15 today.

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

HOMELAND SECURITY ACT OF 2002—Continued

Mr. REID. Mr. President, the Senator from Pennsylvania is here and he wish-

es to speak on the bill. I ask unanimous consent we return to the homeland security bill and that there would be a period for debate only, and the Senator be recognized for whatever period of time he wishes to speak, and that when the Senator from Pennsylvania finishes his statement, we go back into morning business under the previous request.

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

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, it is my hope that the Senate will complete action on the pending homeland security legislation, that we will go to conference with the House of Representatives, and that this bill will be passed, signed into law by the President, before we adjourn because, in my judgment, the most important business the Congress has is to legislate is on homeland security and to do our utmost to prevent a recurrence of 9/11.

The intelligence communities have advised that there will be another terrorist attack. It is not a matter of whether or if, but it is a matter of when. I am not prepared to accept that. I believe another terrorist attack can be prevented. I believe had all of the so-called dots been put together before September 11, 2001, that there was a good chance that terrorist attack could have been prevented.

I say that because there were very important leads which were never coalesced, analyzed, or brought together. I refer to the FBI report out of Phoenix, in July of 2000, about a man taking flight training, had a big picture of Osama bin Laden, very suspicious. That report never got to the upper echelons of the FBI. We had the CIA tracking two members of al-Qaida in Kuala Lumpur. They turned out to be hijackers, two of the pilots involved in September 11. But the CIA never told the FBI or never told INS, and they gained admittance to the country and were part of the suicide bombers.

Then there is the famous, or perhaps infamous, national security agency report on September 10 that something dire was about to happen the very next day. It wasn't translated until September 12. Further, the very important effort by the Minneapolis branch of the FBI to get a warrant under the Foreign Intelligence Surveillance Act for Zacarias Moussaoui, who was supposed to have been the 20th member of the hijackers and suicide bombers, was never pursued properly because the FBI used the wrong standard.

We know from the 13-page single-spaced letter written by Special Agent Colleen Rowley that the U.S. Attorney's office in Minneapolis was applying the wrong standard—a 75 to 80 percent probability—and that Agent Colleen Rowley thought it was a standard of more probable than not, which would have been 51 percent. The appropriate legal standard, as defined by the Supreme Court of the United States in *Gates v. Illinois*, in an opinion by then

Justice Rehnquist, was that probable cause is established on the totality of the circumstances based on suspicion. Had the Zacarias Moussaoui matter been integrated, there was a great deal of information available in Moussaoui's computer which was not acquired. The Intelligence Committee hearings have disclosed that in the past two weeks. All of these dots were on the screen, and even more. Had they been brought together, then there is a possibility that 9-11 may have been prevented. At least they would have been on inquiry.

I believe this was a veritable blueprint. I believe we have a very heavy duty to see that this legislation is enacted and all of the intelligence agencies are brought under one umbrella. I tried to do that in 1996 when I chaired the Senate Intelligence Committee. I wanted to bring them all under the CIA. I think it is not really critical under which umbrella, but under one umbrella. Now we have the chance to accomplish that with homeland security.

We have two provisions under the Labor-Management Act that are, so far, providing a controversy that has held the measure from going further. It is my suggestion these two provisions are not too far apart. The law, as set forth in 5 United States Code 7103 says:

The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter [which is collective bargaining] if the President determines that (a) the agency or subdivision has a primary function, intelligence, counterintelligence, investigative, or national security work, and the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

That is the existing law which the President does not want changed, and there has been an effort by labor to what is called "shore up" those provisions of collective bargaining by this language in the Nelson-Chafee-Breaux amendment:

The President could not use his authority without showing that (1) the mission and responsibilities of the agency or subdivision materially change, and (2) a majority of such employees within such agency or subdivision have as their primary duty, intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

Now, there was a question on my mind as to whether the language of the Nelson amendment was in addition to or in substitution for the existing language on collective bargaining. We had an extensive discussion among Senator LIEBERMAN, Senator THOMPSON, Senator BREAU, myself, and Senator NELSON was on the floor. At that time, the drafters of the amendment said it was not in substitution for, but in addition to.

Well, the main concern the President has expressed is he is concerned his authority under the provisions relating