I understand. Therefore, I would like to speak on

behalf of the amendment.

This amendment would strike section 1502 from the underlying bill. I

am pleased to be joined by Senators Inhofe, Warner, Hutchison, Enzi,

Craig, and Coburn in offering the amendment.

Section 1502 would allow State and local governments to trump the

Federal Government in matters of national security involving privately

owned chemical plants. Concerns have been raised by many about the

security of chemical facilities since the tragic events of 9/11. After

5 years of negotiation and several unsuccessful attempts to pass

meaningful legislation, a carefully crafted compromise was included in

the fiscal year 2007 Department of Homeland Security Appropriations

Act.

This act authorized the Department of Homeland Security for the first

time to establish and implement risk-based performance standards at our

Nation's high-risk chemical facilities. In order to meet its statutory

deadline, the Department of Homeland Security has begun the process of

implementing that language and will publish its final interim

regulation within the next 2 weeks. Effectively changing recently

passed legislation giving DHS the long-sought authority to regulate

chemical facilities is premature at best.

In other words, what this amendment would do is strike some language

that is going to try to amend this piece of legislation which we passed

less than 6 months ago and which was signed by the President 6 months

ago. It hasn't even really been implemented thus far. My colleagues do

not want to further delay the process of securing our Nation's chemical

facilities from future attack.

The legislation we passed less than 6 months ago to protect our

chemical facilities from attack anticipated the need for flexibility in

setting standards to protect our chemical facilities. The law

specifically states that the Secretary ``may approve alternative

security programs established by private sector entities, Federal,

State, or local authorities, or other applicable laws if the Secretary

determines that the requirements of such programs meet the requirements

of this section and the interim regulations.''

Basically what that means is that if a State or other local

jurisdiction would come to the Department of Homeland Security and ask

that they be able to enforce other rules and regulations, this

legislation says they have an entree to the Department of Homeland

Security, at which time they would be able to discuss what they would

like to do.

Along those lines, the draft regulations issued by the Department of

Homeland Security in December 2006 invite Federal consultation with any

States or localities that want to enact their own chemical facility

requirements. For example, the State of New Jersey has some very robust

chemical security regulations. I heard the woman that runs that

department talk about them. I would suspect that under those

circumstances, the Department of Homeland Security would grant the

State of New Jersey the right to regulate what they have been

regulating for the last couple of years. Specifically, the regulations

state that it would ``permit State or local governments and/or covered

facilities to seek opinions on preemption from the Department.'' This

process fosters collaboration among parties and prevents unnecessary or

unforeseen Federal preemption from occurring. I would argue that this

flexibility alleviates the concerns expressed--I repeat--by the Senator

from New Jersey on this issue.

I believe Federal preemption is necessary to give the chemical

industry a single set of comprehensive national standards that are

uniformly applied. Without the Department determining the applicability

of Federal preemption, we would end up with a confusing situation.

Somebody has to decide whether--if this legislation is passed in the

respective States, if they do it--it fits in and is consistent so we do

not end up with an inconsistent patchwork of security regulations.

I understand the National Governors Association has sent a letter

arguing against preemption. I think many of my colleagues know that as

a former mayor and Governor, I do not advocate lightly Federal

preemption of State and local action. I usually am a staunch advocate

of States rights and have opposed legislation, such as No Child Left

Behind, because I believed it was an intrusion by the Federal

Government in policy areas that have been traditionally left to the

States.

But the security of our Nation from foreign attack is not an arena

traditionally left to the States. Article I, section 8 of the

Constitution clearly states that Congress is delegated the power to

provide for the common defense. We in the Congress have the duty to

provide for the security of our States and our people. If there were

ever a case for the Federal Government determining the applicability of

preemption under the Constitution, the defense of the homeland

certainly is the best example of that.

There is ample precedent for Federal preemption in regulatory matters

dealing with security of industry. I think some of my colleagues are

not aware of this. When Congress developed the Nuclear Regulatory

Commission in the interest of national security, it gave the Federal

Government exclusive regulatory authority. The Hazardous Materials

Transportation Act explicitly preempts State action and authorizes a

waiver only if the State regulation is ``not an unreasonable burden on

commerce.'' The preamble to the final rule implementing the Maritime

Transportation Security Act of 2002--another act we put in place to

protect our ports--explicitly states that it preempts State regulations

relating to the security of facilities if such regulations would

``conflict or would frustrate an overriding federal need for

uniformity.''

I would say to my colleagues, the chemical security legislation

provides the Secretary with greater flexibility than the three examples

I have just discussed. In other words, the ability to grant preemption

is a lot more liberal in the Department's regulations dealing with the

issue of chemical security in this country than in the cases that dealt

with the Nuclear Regulatory Commission, the Maritime Transportation

Security Act, and the Hazardous Materials Transportation Act, where one

of them specifically preempts only if the State regulation is ``not an

unreasonable burden on commerce.''

So the fact is, granting State and local governments authority to

supplant Federal chemical manufacturing law is not just a minor carve-

out. This preemption language in the bill before us overhauls 30 years

of settled law regarding the Federal-State relationship on industrial

chemical manufacturing laws as established under section 18 of the

Toxic Substances Control Act. The Toxic Substances Control Act gives

EPA the ability to track the 75,000 industrial chemicals currently

produced or imported into the United States.

I want to ask my colleagues: Does it make sense to undermine the

critical work of Congress last fall to enhance

our Nation's security by eliminating our ability to set and enforce a

single national standard for chemical security? Really, fundamentally,

what this is about is to give the Department of Homeland Security the

option of determining whether a State or locality that comes in and

says: We want to regulate chemical security--it gives them the final

say as to whether preemption will occur.

As to the language that is inserted in the supplemental, what it does

is leaves it in the hands of the court to determine. For goodness'

sake, the last thing we want right now--after 5 years of negotiation

and several unsuccessful attempts to pass legislation, is to hinder the

implementation of the regulations governing chemical security in the

country. Why would we want to throw it up in the air and cause a lot of

controversy and court action?

I want to read the words of Section 1502, which was put in the

supplemental bill, in regards to the Chemical Security language that

was included in the Fiscal 2007 Department of Homeland Security

Appropriations Act, which came out of the conference committee less

than 6 months ago. It says:

Now, the issue is, who determines whether it is more stringent? Let's

say I am the Governor of a State and I come in and say: My State laws

are more stringent than Federal laws. Then Homeland Security comes back

and says: We don't agree with you. Who decides? The Federal court.

Section 1502 goes on to say:

Again, it just throws the issue about who determines whether a State

is going to be allowed to do what they want to do into a court's hands

rather than letting the director of Homeland Security make that

determination.

I think what we are arguing for today is sensible. I would also like

to quote from Section 550 of the Homeland Security Appropriations Act,

which gives direction to the Department of Homeland Security on how the

regulations are to be implemented. The law says:

That basically talks about how they go about developing the

regulations. Then the law goes on to say:

Very important: ``The Secretary may approve''--

In other words, there is room for the Department to sit down with

other people and say: Let's hear what you want to do, and if we think

it makes sense, go ahead and do it.

They make reference to other sections of the code:

So I think the Department, through the regulations, is carrying out

the legislation that was passed last October. We should let the law go

into effect and not tinker with it today, particularly in the

supplemental bill, which, quite frankly, has not a single thing to do

with chemical security. It does not make sense to have this into the

supplemental bill because Congress has already acted on chemical

security.

I suspect that this discussion may become moot because we are going

to pass this bill, it will go to conference, the conference will do

their thing, they will send it back here, it will be voted on in both

Houses, it will go to the President, he will veto it, and then--in

basketball parlance--it will be a jump ball in determining what we are

going to do at that stage of the game.

I wanted to come to the floor and share my concern about the language

which was inserted in the supplemental. Again, it should not have been

put in the supplemental. I have spent hours of my time in the Senate on

chemical security in the United States. We worked this through the

committee and thought we had it taken care of it, and here we are

again.

I yield the floor.