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AMENDMENT NO. _____ Calendar No. _____

Purpose: To prohibit providing funds to the enemy.

IN THE SENATE OF THE UNITED STATES—113th Cong., 1st Sess.

S. 1197

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GPO: 2012 77-320 (mac)

AMENDMENT intended to be proposed by Ms. AYOTTE (for herself, Mr. BLUMENTHAL, Mr. MORAN, and Mr. COBURN)

Viz:

1 Strike sections 861 and 862 and insert the following:
2 **SEC. 843. PROHIBITION ON PROVIDING FUNDS TO THE**
3 **ENEMY.**

4 (a) STATEMENT OF POLICY.—It shall be the policy
5 of the United States that—

6 (1) executive agencies shall not provide funds
7 through a contract, grant, or cooperative agreement
8 with a person or entity that is directly or indirectly
9 supporting a designated terrorist organization or
10 supporting a force against which the United States

1 is actively engaged in hostilities in accordance with
2 the law of armed conflict; and

3 (2) executive agencies shall not provide funds
4 through a contract, grant, or cooperative agreement
5 with a person or entity that fails to exercise due dili-
6 gence to ensure that none of the funds, including
7 goods and services, received under a contract, grant,
8 or cooperative agreement of the United States Gov-
9 ernment are provided directly or indirectly to a per-
10 son or entity that is supporting a designated ter-
11 rorist organization or supporting a force against
12 which the United States is actively engaged in hos-
13 tilities in accordance with the law of armed conflict.

14 (b) IDENTIFICATION OF PERSONS AND ENTITIES.—
15 The Secretary of Defense shall, in conjunction with the
16 Director of National Intelligence, designate in each geo-
17 graphic combatant command an element to carry out intel-
18 ligence missions within the area of responsibility of such
19 combatant command outside the United States to identify
20 persons and entities that—

21 (1) provide funds, including goods and services,
22 received under a contract, grant, or cooperative
23 agreement of an executive agency directly or indi-
24 rectly to a person or entity that is supporting a des-
25 ignated terrorist organization or supporting a force

1 against which the United States is actively engaged
2 in hostilities in accordance with the law of armed
3 conflict; or

4 (2) fail to exercise due diligence to ensure that
5 none of the funds, including goods and services, re-
6 ceived under a contract, grant, or cooperative agree-
7 ment of an executive agency are provided directly or
8 indirectly to a person or entity that is supporting a
9 designated terrorist organization or supporting a
10 force against which the United States is actively en-
11 gaged in hostilities in accordance with the law of
12 armed conflict.

13 (c) AGENCY ACTIONS ON IDENTIFICATION OF PER-
14 SONS OR ENTITIES.—

15 (1) IDENTIFICATION.—Not later than 270 days
16 after the date of the enactment of this Act, the head
17 of each executive agency shall carry out a program
18 to use available intelligence (including information
19 made available pursuant to subsections (b) and
20 (i)(1)) to—

21 (A) review persons and entities who receive
22 United States funds, including goods and serv-
23 ices, through contracts, grants, and cooperative
24 agreements performed for such executive agen-
25 cy; and

1 (B) identify any such persons and entities
2 who are providing funds, including goods and
3 services, received under a contract, grant, or co-
4 operative agreement of such executive agency
5 directly or indirectly to a person or entity that
6 is supporting a designated terrorist organiza-
7 tion or supporting a force against which the
8 United States is actively engaged in hostilities
9 in accordance with the law of armed conflict.

10 (2) DISCHARGE BY DOD THROUGH COM-
11 MANDERS OF COMBATANT COMMANDS.—The Sec-
12 retary of Defense shall carry out the program re-
13 quired by paragraph (1) through the commanders of
14 the geographic combatant commands.

15 (3) NOTIFICATION OF CONTRACTING ACTIVI-
16 TIES.—If the head of an executive agency (or the
17 designee of such head) or the commander of a geo-
18 graphic combatant command identifies a person or
19 entity that is supporting a designated terrorist orga-
20 nization or supporting a force against which the
21 United States is actively engaged in hostilities in ac-
22 cordance with the law of armed conflict, the head of
23 such executive agency (or designee) or commander,
24 as the case may be, shall notify the heads of con-
25 tracting activities, or other appropriate officials, of

1 the executive agencies in writing of such identifica-
2 tion. Any written notification pursuant to this para-
3 graph shall be made in accordance with procedures
4 established to implement the revisions of regulations
5 required by this section.

6 (d) AUTHORITY TO TERMINATE OR VOID CON-
7 TRACTS, GRANTS, AND COOPERATIVE AGREEMENTS AND
8 TO RESTRICT FUTURE AWARD.—

9 (1) IN GENERAL.—Not later than 270 days
10 after the date of the enactment of this Act, applica-
11 ble regulations shall be revised to provide that, upon
12 notice from the head of an executive agency (or the
13 designee of such head) or the commander of a geo-
14 graphic combatant command under subsection
15 (c)(3), the head of contracting activity, or other ap-
16 propriate official, of an executive agency may do the
17 following:

18 (A) If the notice is that a person or entity
19 has been identified as providing funds, includ-
20 ing goods and services, received under a con-
21 tract, grant, or cooperative agreement of the ex-
22 ecutive agency directly or indirectly to a person
23 or entity that is supporting a designated ter-
24 rorist organization or supporting a force
25 against which the United States is actively en-

1 gaged in hostilities in accordance with the law
2 of armed conflict—

3 (i) either—

4 (I) terminate for default the con-
5 tract, grant, or cooperative agreement;
6 or

7 (II) void the contract, grant, or
8 cooperative agreement in whole or in
9 part; and

10 (ii) restrict the future award of con-
11 tracts, grants, or cooperative agreements
12 of the executive agency to the person or
13 entity so identified.

14 (B) If the notice is that the person or enti-
15 ty has failed to exercise due diligence to ensure
16 that none of the funds, including goods and
17 services, received under a contract, grant, or co-
18 operative agreement of the executive agency are
19 provided directly or indirectly to a person or en-
20 tity that is supporting a designated terrorist or-
21 ganization or supporting a force against which
22 the United States is actively engaged in hos-
23 tilities in accordance with the law of armed con-
24 flict, terminate for default, in whole or in part,
25 the contract, grant, or cooperative agreement.

1 (2) TREATMENT AS VOID.—For purposes of
2 this section:

3 (A) A contract, grant, or cooperative
4 agreement that is void is unenforceable as con-
5 trary to public policy.

6 (B) A contract, grant, or cooperative
7 agreement that is void in part is unenforceable
8 as contrary to public policy with regard to a
9 segregable task or effort under the contract,
10 grant, or cooperative agreement.

11 (e) CLAUSE.—

12 (1) IN GENERAL.—Not later than 270 days
13 after the date of the enactment of this Act, applica-
14 ble regulations shall be revised to require that—

15 (A) the clause described in paragraph (2)
16 shall be included in each covered contract,
17 grant, and cooperative agreement of an execu-
18 tive agency that is awarded on or after the date
19 of the enactment of this Act; and

20 (B) to the maximum extent practicable,
21 each covered contract, grant, and cooperative
22 agreement of an executive agency that is award-
23 ed before the date of the enactment of this Act
24 shall be modified to include the clause described
25 in paragraph (2), other than the matter pro-

1 vided for in subparagraph (A) of that para-
2 graph.

3 (2) CLAUSE DESCRIBED.—The clause described
4 in this paragraph is a clause that—

5 (A) requires the contractor, or the recipi-
6 ent of the grant or cooperative agreement, to
7 certify in connection with entry into the con-
8 tract, grant, or cooperative agreement that the
9 contractor or recipient, as the case may be, has
10 never knowingly provided funds, including
11 goods and services, directly or indirectly to a
12 person or entity that is supporting a designated
13 terrorist organization or supporting a force
14 against which the United States is actively en-
15 gaged in hostilities in accordance with the law
16 of armed conflict;

17 (B) requires the contractor, or the recipi-
18 ent of the grant or cooperative agreement, to
19 exercise due diligence to ensure that none of the
20 funds, including goods and services, received
21 under the contract, grant, or cooperative agree-
22 ment are provided directly or indirectly to a
23 person or entity that is supporting a designated
24 terrorist organization or supporting a force
25 against which the United States is actively en-

1 gaged in hostilities in accordance with the law
2 of armed conflict; and

3 (C) notifies the contractor, or the recipient
4 of the grant or cooperative agreement, of the
5 authority of the head of the contracting activ-
6 ity, or other appropriate official, to terminate or
7 void the contract, grant, or cooperative agree-
8 ment, in whole or in part, as provided in sub-
9 section (d).

10 (3) COVERED CONTRACT, GRANT, OR COOPERA-
11 TIVE AGREEMENT DEFINED.—In this subsection, the
12 term “covered contract, grant, or cooperative agree-
13 ment” means a contract, grant, or cooperative
14 agreement with an estimated value in excess of
15 \$20,000.

16 (f) REQUIREMENTS FOLLOWING CONTRACT AC-
17 TIONS.—Not later than 270 days after the date of the en-
18 actment of this Act, applicable regulations shall be revised
19 as follows:

20 (1) To require that any head of contracting ac-
21 tivity, or other appropriate official, taking an action
22 under subsection (d) to terminate, void, or restrict
23 a contract, grant, or cooperative agreement notify in
24 writing the contractor or recipient of the grant or
25 cooperative agreement, as applicable, of the action.

1 (2) To permit, in such manner as such regula-
2 tions, as so revised, shall provide, the contractor or
3 recipient of a grant or cooperative agreement subject
4 to an action taken under subsection (d) to terminate
5 or void the contract, grant, or cooperative agree-
6 ment, as the case may be, an opportunity to contest
7 the action within 30 days of receipt of notice of the
8 action.

9 (g) ANNUAL REVIEW; PROTECTION OF CLASSIFIED
10 INFORMATION.—

11 (1) ANNUAL REVIEW.—The heads of executive
12 agencies (or the designees of such heads) and the
13 commanders of the geographic combatant commands
14 shall, on an annual basis, review the lists of persons
15 and entities previously covered by a notice under
16 subsection (c)(3) as having been identified pursuant
17 to subsection (c)(1)(B) in order to determine wheth-
18 er or not such persons and entities continue to war-
19 rant identification pursuant to subsection (c)(1)(B).
20 If the head of an executive agency (or designee) or
21 commander determines pursuant to such a review
22 that a person or entity no longer warrants identifica-
23 tion pursuant to subsection (c)(1)(B), the head of
24 the executive agency (or designee) or commander, as
25 the case may be, shall notify the heads of con-

1 tracting activities, or other appropriate officials, of
2 the executive agencies in writing of such determina-
3 tion.

4 (2) PROTECTION OF CLASSIFIED INFORMA-
5 TION.—Classified information relied upon to make
6 an identification in accordance with subsection (b)
7 or (c) may not be disclosed to a contractor or a re-
8 cipient of a grant or cooperative agreement with re-
9 spect to which an action is taken pursuant to the
10 authority provided in subsection (d), or to their rep-
11 resentatives, in the absence of a protective order
12 issued by a court of competent jurisdiction estab-
13 lished under Article I or Article III of the Constitu-
14 tion of the United States that specifically addresses
15 the conditions upon which such classified informa-
16 tion may be so disclosed.

17 (h) DELEGATION OF CERTAIN RESPONSIBILITIES.—

18 (1) COMBATANT COMMAND RESPONSIBILITY TO
19 IDENTIFY AND PROVIDE NOTICE.—The commander
20 of a geographic combatant command may delegate
21 the responsibilities in paragraphs (1) through(3) of
22 subsection (c) to the deputy commander of that com-
23 batant command. Any delegation of responsibilities
24 under this paragraph shall be made in writing.

1 (2) NONDELEGATION OF RESPONSIBILITY FOR
2 CERTAIN ACTIONS.—The authority provided by sub-
3 section (d) to terminate, void, or restrict contracts,
4 grants, and cooperative agreements, in whole or in
5 part, may not be delegated below the level of head
6 of contracting activity or equivalent official for pur-
7 poses of grants or cooperative agreements.

8 (i) ADDITIONAL RESPONSIBILITIES OF EXECUTIVE
9 AGENCIES.—

10 (1) SHARING OF INFORMATION ON SUPPORTERS
11 OF THE ENEMY.—The Secretary of Defense shall, in
12 consultation with the Director of the Office of Man-
13 agement and Budget, carry out a program through
14 which agency components may provide information
15 to heads of executive agencies (or the designees of
16 such heads) and the commanders of the geographic
17 combatant commands relating to persons or entities
18 who may be providing funds, including goods and
19 services, received under contracts, grants, or cooper-
20 ative agreements of the executive agencies directly or
21 indirectly to a person or entity that is supporting a
22 designated terrorist organization or supporting a
23 force against which the United States is actively en-
24 gaged in hostilities in accordance with the law of
25 armed conflict. The program shall be designed to fa-

1 cilitate and encourage the sharing of risk and threat
2 information between executive agencies and the geo-
3 graphic combatant commands.

4 (2) INCLUSION OF INFORMATION ON CONTRACT
5 ACTIONS IN FAPIIS AND OTHER SYSTEMS.—Upon
6 the termination, voiding, or restriction of a contract,
7 grant, or cooperative agreement of an executive
8 agency under subsection (c), the head of contracting
9 activity, or other appropriate official, of the execu-
10 tive agency shall provide for the inclusion in the
11 Federal Awardee Performance and Integrity Infor-
12 mation System (FAPIIS), or other formal system of
13 records on contractors or entities, of appropriate in-
14 formation on the termination, voiding, or restriction,
15 as the case may be, of the contract, grant, or coop-
16 erative agreement.

17 (3) REPORTS.—The head of contracting activ-
18 ity, or other appropriate official, that receives a no-
19 tice pursuant to subsection (c)(3) shall submit to the
20 head of the executive agency (or designee) concerned
21 or the appropriate geographic combatant command,
22 as the case may be, a report on the action, if any,
23 taken by the head of contracting activity pursuant to
24 subsection (d), including a determination not to ter-
25 minate, void, or restrict the contract, grant, or coop-

1 erative agreement as otherwise authorized by sub-
2 section (d). This paragraph shall expire on the date
3 that is three years after the date of the enactment
4 of this Act.

5 (j) REPORTS.—

6 (1) IN GENERAL.—Not later than March 1 of
7 2015, 2016, and 2017, the Director of the Office of
8 Management and Budget shall submit to the appro-
9 priate committees of Congress a report on the use
10 of the authorities in this section in the preceding
11 calendar year, including the following:

12 (A) For each instance in which an execu-
13 tive agency exercised the authority to terminate,
14 void, or restrict a contract, grant, and coopera-
15 tive agreement pursuant to subsection (d),
16 based on a notification under subsection (c)(3),
17 the following:

18 (i) The executive agency taking such
19 action.

20 (ii) An explanation of the basis for the
21 action taken.

22 (iii) The value of the contract, grant,
23 or cooperative agreement voided or termi-
24 nated.

1 (iv) The value of all contracts, grants,
2 or cooperative agreements of the executive
3 agency in force with the person or entity
4 concerned at the time the contract, grant,
5 or cooperative agreement was terminated
6 or voided.

7 (B) For each instance in which an execu-
8 tive agency did not exercise the authority to ter-
9 minate, void, or restrict a contract, grant, and
10 cooperative agreement pursuant to subsection
11 (d), based on a notification under subsection
12 (c)(3), the following:

13 (i) The executive agency concerned.

14 (ii) An explanation why the action was
15 not taken.

16 (2) FORM.—Any report under this subsection
17 may be submitted in classified form.

18 (k) OTHER DEFINITIONS.—In this section:

19 (1) The term “appropriate committees of Con-
20 gress” means—

21 (A) the Committee on Armed Services, the
22 Committee on Homeland Security and Govern-
23 mental Affairs, the Committee on Foreign Rela-
24 tions, and the Committee on Appropriations of
25 the Senate; and

1 (B) the Committee on Armed Services, the
2 Committee on Oversight and Government Re-
3 form, the Committee on Foreign Affairs, and
4 the Committee on Appropriations of the House
5 of Representatives.

6 (2) The term “combatant command” means a
7 command established pursuant to chapter 6 of title
8 10, United States Code.

9 (3) The term “contract” includes a contract for
10 commercial items but is not limited to a contract for
11 commercial items.

12 (4) The term “designated terrorist organiza-
13 tion” means any organization designated as a ter-
14 rorist organization under section 219(a) of the Im-
15 migration and Nationality Act (8 U.S.C. 1189(a)).

16 (5) The term “executive agency” has the mean-
17 ing given that term in section 133 of title 41, United
18 States Code.

19 (6) The term “head of contracting activity” has
20 the meaning given that term in subpart 601 of part
21 1 of the Federal Acquisition Regulation.

22 (I) COORDINATION WITH CURRENT AUTHORITIES
23 APPLICABLE TO CENTCOM.—

24 (1) REPEAL OF SUPERSEDED AUTHORITY.—Ef-
25 fective 270 days after the date of the enactment of

1 this Act, section 841 of the National Defense Au-
2 thorization Act for Fiscal Year 2012 (Public Law
3 112–81; 125 Stat. 1510; 10 U.S.C. 2302 note) is re-
4 pealed.

5 (2) USE OF SUPERSEDED AUTHORITIES IN DIS-
6 CHARGE OF REQUIREMENTS.—In providing for the
7 discharge of the requirements of this section by the
8 Department of Defense, the Secretary of Defense
9 may use and modify for that purpose requirements
10 and procedures established by the Secretary for pur-
11 poses of the discharge of the requirements of section
12 841 of the National Defense Authorization Act for
13 Fiscal Year 2012.

14 **SEC. 844. ADDITIONAL ACCESS TO RECORDS.**

15 (a) CONTRACTS, GRANTS, AND COOPERATIVE
16 AGREEMENTS.—

17 (1) IN GENERAL.—Not later than 270 days
18 after the date of the enactment of this Act, applica-
19 ble regulations shall be revised to require that the
20 clause described in paragraph (2) shall be included
21 in each covered contract, grant, and cooperative
22 agreement of an executive agency that is awarded on
23 or after the date of the enactment of this Act.

24 (2) CLAUSE.—The clause described in this
25 paragraph is a clause authorizing the head of the ex-

1 ecutive agency concerned, upon a written determina-
2 tion pursuant to paragraph (3), to examine any
3 records of the contractor, the recipient of a grant or
4 cooperative agreement, or any subcontractor or sub-
5 grantee under such contract, grant, or cooperative
6 agreement to the extent necessary to ensure that
7 funds, including goods and services, available under
8 the contract, grant, or cooperative agreement are not
9 provided directly or indirectly to a person or entity
10 that is supporting a designated terrorist organiza-
11 tion or supporting a force against which the United
12 States is actively engaged in hostilities in accordance
13 with the law of armed conflict.

14 (3) WRITTEN DETERMINATION.—The authority
15 to examine records pursuant to the contract clause
16 described in paragraph (2) may be exercised only
17 upon a written determination by the contracting offi-
18 cer or comparable official responsible for a grant or
19 cooperative agreement, upon a finding by the com-
20 mander of a geographic combatant command or the
21 head of an executive agency (or the designee of such
22 head) that there is reason to believe that funds, in-
23 cluding goods and services, available under the con-
24 tract, grant, or cooperative agreement concerned
25 may have been provided directly or indirectly to a

1 person or entity that is supporting a designated ter-
2 rorist organization or supporting a force against
3 which the United States is actively engaged in hos-
4 tilities in accordance with the law of armed conflict.

5 (4) FLOWDOWN.—A clause described in para-
6 graph (2) shall also be required in any subcontract
7 or subgrant under a covered contract, grant, or co-
8 operative agreement if the subcontract or subgrant
9 has an estimated value in excess of \$20,000.

10 (b) REPORTS.—

11 (1) IN GENERAL.—Not later than March 1 of
12 2015, 2016, and 2017, the Director of the Office of
13 Management and Budget shall submit to the appro-
14 priate committees of Congress a report on the use
15 of the authority provided by this section in the pre-
16 ceding calendar year.

17 (2) ELEMENTS.—Each report under this sub-
18 section shall identify, for the calendar year covered
19 by such report, each instance in which an executive
20 agency exercised the authority provided under this
21 section to examine records, explain the basis for the
22 action taken, and summarize the results of any ex-
23 amination of records so undertaken.

24 (3) FORM.—Any report under this subsection
25 may be submitted in classified form.

1 (c) DEFINITIONS.—In this section:

2 (1) The term “appropriate committees of Con-
3 gress” means—

4 (A) the Committee on Armed Services, the
5 Committee on Homeland Security and Govern-
6 mental Affairs, the Committee on Foreign Rela-
7 tions, and the Committee on Appropriations of
8 the Senate; and

9 (B) the Committee on Armed Services, the
10 Committee on Oversight and Government Re-
11 form, the Committee on Foreign Affairs, and
12 the Committee on Appropriations of the House
13 of Representatives.

14 (2) The term “combatant command” means a
15 command established pursuant to chapter 6 of title
16 10, United States Code.

17 (3) The term “contract” includes a contract for
18 commercial items but is not limited to a contract for
19 commercial items.

20 (4) The term “covered contract, grant, or coop-
21 erative agreement” means a contract, grant, or co-
22 operative agreement with an estimated value in ex-
23 cess of \$20,000.

24 (5) The term “designated terrorist organiza-
25 tion” means any organization designated as a ter-

1 rorist organization under section 219(a) of the Im-
2 migration and Nationality Act (8 U.S.C. 1189(a)).

3 (6) The term “executive agency” has the mean-
4 ing given that term in section 133 of title 41, United
5 States Code.

6 (d) COORDINATION WITH CURRENT AUTHORITIES
7 APPLICABLE TO CENTCOM.—

8 (1) REPEAL OF SUPERSEDED AUTHORITY.—Ef-
9 fective 270 days after the date of the enactment of
10 this Act, section 842 of the National Defense Au-
11 thorization Act for Fiscal Year 2012 (Public Law
12 112–81; 125 Stat. 1513; 10 U.S.C. 2313 note) is re-
13 pealed.

14 (2) USE OF SUPERSEDED AUTHORITIES IN DIS-
15 CHARGE OF REQUIREMENTS.—In providing for the
16 discharge of the requirements of this section by the
17 Department of Defense, the Secretary of Defense
18 may use and modify for that purpose the regulations
19 and procedures established for purposes of the dis-
20 charge of the requirements of section 842 of the Na-
21 tional Defense Authorization Act for Fiscal Year
22 2012.