# SENATE—*Thursday, February 4, 1982*

*(Legislative day of Monday, January 25, 1982)*

The Senate met at 10 a.m., on the expiration of the recess, and was called to order by the Honorable THAD COCHRAN, a Senator from the State of Mississippi.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, LL.D., D.D., offered the following prayer:

Let us pray.

*Blessed are the peacemakers, for they shall be called sons of God.*—Matthew 5: 9.

Father in Heaven, our world languishes for peace. Human hearts long for the day when men shall "beat their swords into plowshares and their spears into pruning hooks * * * when they shall study war no more." What contradiction, dear God, in a world which universally desires peace, that there are those who prepare for war. Help us to see the profound wisdom with which Jesus spoke.

Dear Lord, help the Senators as they struggle with monumental issues which determine literally the destiny of every person on Earth. Help them hear what the Bible teaches; to contemplate its precepts, its values, its admonitions, its instruction. Help them to seek Thy wisdom and be directed by its light and truth. Somehow, dear God, give us the will for peace. Grant to the whole Nation the will for peace; for we remember that "peace on Earth" depends upon "good will among men." We pray this in the name of the Prince of Peace. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. THURMOND).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, D.C., February 4, 1982.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable THAD COCHRAN, a Senator from the State of Mississippi, to perform the duties of the Chair.

STROM THURMOND,
*President pro tempore.*

Mr. COCHRAN thereupon assumed the chair as Acting President pro tempore.

## RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Texas is recognized.

## THE JOURNAL

Mr. TOWER. Mr. President, I ask unanimous consent that the Journal of the proceedings be approved to date.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. TOWER. Mr. President, I ask unanimous consent that, following the recognition of the two leaders under the standing order and following the special orders for Senators BENTSEN and BUMPERS, the Senate turn to a period of routine morning business not to extend beyond the hour of 11 o'clock and that the time therein allotted to each Senator not exceed 5 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The minority leader is recognized.

## PROBLEMS AFFECTING OUR AILING STEEL INDUSTRY

Mr. ROBERT C. BYRD. Mr. President, yesterday I had the opportunity to appear before a public conference of the International Trade Commission here in Washington to make a statement on the problems affecting our ailing steel industry.

My State, in particular has been badly hit by the slump in the steel indusdty, which is one of the largest direct employers in West Virginia. Not only are those directly employed by the steel industry impacted, but also thousands of coal miners who produce metallurgical coal are hurt by the near-depression market levels of the American steel industry.

I ask unanimous consent that my statement be inserted in the RECORD at this point.

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

STATEMENT OF SENATOR ROBERT C. BYRD, BEFORE PUBLIC CONFERENCE OF THE INTERNATIONAL TRADE COMMISSION

I am glad to have this chance to speak out on behalf of the steelworkers of West Virginia and against the subsidized but illegal importing of foreign steel into the United States. The steel industry is vital to West Virginia. That industry is one of the largest direct employers in our State. The West Virginia steel industry also indirectly employs thousands of coal miners who produce metallurgical coal.

What hurts steel hurts West Virginia. And whatever hurts West Virginia upsets me and the rest of West Virginia's elected officials.

That is why I am here. Last Friday, the Department of Commerce stated that total European steel mill imports of products involved in this investigation increased 27.4 percent in 1981 over 1980. At the same time, American steel mill shipments increased by only 2.5 percent. Contrary to general opinion, foreign steel mills do not produce steel more efficiently than do our own steel mills.

Such a rampant increase in foreign steel imports can best be explained by the large subsidies enjoyed by many foreign steel producers. Those subsidies give foreign steel producers an unfair price advantage that distorts our domestic free market.

Currently, several different steel cases are before the Commission and the Department of Commerce. But I understand that foreign government subsidies in those cases range from as low as $120 per ton in Germany to as high as an astonishing $533 per ton or more in the United Kingdom.

In fact, one West German steel association has estimated that such subsidies in that country alone would total about $30 billion between 1978 and 1983. Likewise, the state-owned steel mills in Belgium, Italy, and France are especially heavily subsidized.

No American industry—regardless of its product mix, its proximity to market, its efficiency, or its productivity—can compete with such flagrant and unfair government subsidies.

Let me put the American steel industry's problems into clearer focus. Business Week recently reported that the American steel industry was entering 1982 at a near-depression market level.

Let me underscore what I just said. Business Week did not say that our steel industry was suffering from a recession—like everybody else in this country. The state of health of our domestic steel industry is being likened to that of a depression.

Moreover, this week's issue of Fortune magazine reported that steel-industry operating rates had fallen from above 80 percent of capacity to 55 percent of capacity just since spring of 1981. Nevertheless, Fortune went on, foreign steel imports, led by increases in shipments from Europe, have surged, just since last spring, from below 15 percent of our steel market to above 20 percent. Since that time, some 76,000 American steelworkers have been laid off, and industry earnings have virtually disappeared.

In effect, then, our domestic steel industry is in a major crisis. As a result, when the Commerce Department figures for 1981

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

were released last Friday, I requested time to appear before you. As I understand it, the Commission's responsibility is to determine whether injury has occurred to the domestic steel industry as a result of the importation of dumped or subsidized steel into the U.S. market.

According to Public Law 96-39, "the term material injury means harm which is not inconsequential, immaterial, or unimportant."

To decide whether such injury has occurred, the members of the Commission must consider a variety of factors prescribed by law and Federal regulation. But as an elected official, I must decide whether injury is occurring to the people whom I am elected to represent.

For that reason, last Saturday, I visited a major West Virginia steel town. In the proud steel town of Weirton, W. Va., almost 3,000 people are now out of work—nearly 25 percent of the employees of Weirton Steel.

Labor and management alike live in constant fear of becoming the next Youngstown. I met with the people of Weirton—people who share the same fears about paying the mortgage, about keeping their children in college, and, in some cases, about feeding their families in the months ahead.

Everybody wanted to know why you and I—their elected and appointed officials—had let this happen to them. Why do we allow Americans to suffer so that foreign, subsidized steelworkers can keep their jobs?

Recently, I went to some metallurgical coal-producing areas of my State. I saw closed coal mines. I saw jobless coal miners—men who lost their jobs because of reduced operations in America's steel plants. And those jobless coal miners asked the same questions that the jobless steelworkers asked.

I saw injury. Maybe not in the same way that this Commission must judge injury—but injury nevertheless. I saw injury in their eyes, and I read the injury in their hearts. Because of what I have seen in West Virginia, the Commission could hold its deliberations in Weirton, in Follansbee, in Wheeling, or in Steubenville, Johnstown, Gary, Pittsburgh, Detroit, Cleveland, or other steel towns—not just in an unaffected city like Washington. In this room you can listen to lawyers, economists, and trade experts and—yes—even politicians.

But in Weirton or other steel towns, you could hear the voices of those who bear the real injuries that subsidized foreign steel imports are causing.

But injury to America's domestic steel industry goes beyond injuries to our steelworkers and their families alone. That injury also becomes a permanent injury to our national security.

If we irretrievably abdicate a significant portion of our domestic market to foreign steel suppliers, we might never retrieve that lost tonnage in time to meet a national emergency.

Although that kind of injury may seem far fetched, such an injury cannot be ignored. Already the U.S. is the only major country in the world that cannot produce enough steel to meet its maximum annual steel demands. We first proved that in 1974, and we have less capacity to produce steel in 1982 than we did in 1974. Steel self-sufficiency is vital to any major world power.

Therefore, as you make your decision, I hope that you will remember the injuries that I have mentioned—injuries to the American people and injuries to our national defense. Time is long overdue to give our domestic steel industry a chance to compete fairly and equally with its foreign rivals.

Let us give American steel a chance to get back on its feet. Let us give our steelworkers and coal miners a chance to show the kind of job that they can do in a fair market. Once and for all, let us stop helping foreign steel companies and foreign steelworkers. Let us give American steel a fair break.

Mr. ROBERT C. BYRD. Mr. President, I yield as much of my remaining time as the Senator from Wisconsin may require.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin is recognized.

## THE GENOCIDE CONVENTION: A RESPONSE TO SENATOR THURMOND

Mr. PROXMIRE. Mr. President, every Member of the Senate recently received a copy of Senator THURMOND's column on the Genocide Convention. So that my colleagues have an opportunity to hear both sides of the issues he raised, I would like to respond today to the major points of that article.

### GENOCIDE CONVENTION IS PROPER USE OF TREATY POWER

First, he argues that ratification of the Genocide Convention is an inappropriate use of the treatymaking power of the Congress and that in the final analysis genocide is essentially a matter of domestic jurisdiction.

The facts simply do not support either assertion.

The Supreme Court has repeatedly held that the treatymaking power is virtually unlimited. In Geofrey against Riggs (1890), the Court held that except for—

> A change in Character of government, or in that of one of the States, or a cession of the portion of the latter, without its consent . . . but these exceptions, it is not perceived that there is any limit to the questions which can be adjusted.

That decision was reaffirmed in the landmark case, Missouri against Holland in 1920, and is recognized by constitutional scholars as having resolved the question of Congress treatymaking authority.

And the U.S. Senate has a long history of using that treatymaking power for issues which are of international as well as domestic interest. Examples include the Slavery Convention and its Supplementary Protocol, the Protocol Relating to the Treatment of Refugees, the Treaties on the Political Rights of Women—which were adopted by this Senate without a dissenting vote in 1976—and the 1968 amendments to the Charter of the Organization of American States.

That brings me to the second part of his argument: Is genocide essentially a domestic matter?

Mr. President, was the massacre of a million Cambodians a domestic matter for Communist Cambodia? Was the murder of the Acholi and Langi tribes by Idi Amin a domestic matter for Uganda? Was the murder of millions of Jews a domestic matter for the expanding Nazi state?

I think not. And I am confident that my colleagues would agree.

### GENOCIDE CONVENTION CONSISTENT WITH FIRST AMENDMENT

Second, Senator THURMOND argues that the treaty's definition of genocide could have a chilling effect on our first amendment freedom of speech.

The Genocide Convention has only two provisions which might relate to freedom of speech. The first is a prohibition of incitement to commit genocide; the second prohibits causing serious bodily or mental harm. Let me take them in order.

The Supreme Court in Brandenburg against Ohio (1969) made a clear distinction between advocacy, which is free speech protected by the Constitution, and incitement which goes beyond the constitutional protections of the first amendment, thereby producing imminent lawless action. Incitement could be prohibited, according to the Court, and incitement is what the Genocide Convention forbids; it does not affect advocacy whatsoever. It is worth noting that the American Civil Liberties Union, which has never been lax in opposing any action they perceive to threaten civil liberties, has found no threat to the first amendment in this language and endorses the treaty.

The drafters of the Genocide Convention added the section on mental harm to the convention based on incidents during World War II in which drugs were forcibly applied to prisoners of war as part of brainwashing efforts. It does not apply to racial slurs or name calling—as appalling as those may be—and it certainly does not interfere in any way with the right of religious missionaries to preach the Gospel. As the Senate Foreign Relations Committee understanding notes, the mental harm clause refers only to "permanent impairment of mental faculties," for a substantial portion of an ethnic, racial, religious or national group.

### AMERICA RESERVES THE RIGHT TO TRY ITS CITIZENS IN AMERICAN COURTS

Third, Senator THURMOND raises the specter that Americans will be extradited abroad, tried in a foreign land without American safeguards, and punished by hostile courts.

The answer to this allegation is a clear and resounding: "No way."

There is no obligation—and I mean none—for the United States to extradite Americans abroad under this convention. The report of the committee which drafted the Genocide Convention states that nothing in this treaty precludes the right of any nation to try its own citizens at home. That passage is reprinted on page 10 of the Foreign Relations Committee's 1976

report to the Senate. In addition, an understnding recommended by the Senate Foreign Relations Committee as part of the resolution of ratification restates that point to assure its clarity. And, finally, the proposed implementing legislation reprinted in the Foreign Relations Committee's report mandates in section 3 that the Secretary of State, in negotiating extradition treaties on this subject, must secure for the United States the right to try its own citizens here at home.

DEFENSE DEPARTMENT ENDORSES GENOCIDE CONVENTION

Finally, Senator THURMOND restates Sam Ervin's agrument that the North Vietnamese could have tried captured American servicemen for genocide, if we had ratified the Genocide Convention.

I find this a curious argument.

Is Senator THURMOND arguing that the Communist North Vietnamese have such respect for international law that they felt they could not try our prisoners of war for genocide because the U.S. Senate had failed to ratify this treaty? That assumes that they have more respect for internationa law than the facts would warrant.

In time of war, there is no law or treaty or the lack of any law or treaty, which will be the perfect guarantee of the rights of our prisoners of war and Senator THURMOND knows it.

But what is clear is that in 1976, when each branch of our armed services was contacted by the American Bar Association, every branch of our services responded that the Genocide Convention deserved our support and did not pose any threat to our fighting men.

CONCLUSION

In conclusion, Mr. President, the propriety of the Genocide Convention is clear. Genocide is indeed a matter of international concern as well as domestic concern and the precedents are clear that, time and again, the Senate has adopted treaties with such dual concern.

This convention does not impinge upon our first amendment rights in any way and it will not affect the right of Americans to a trial in an American court with our constitutional safeguards.

Finally, the Genocide Convention will not expose our servicemen to any dangers that they do not now face.

Mr. President, the Genocide Convention is not a panacea for the world's ills. It is an international treaty to punish criminals; criminals who commit the most heinous crime known to man.

It is a treaty whose origins are found in America's most fundamental principles and deserves our wholehearted support. Mr. President, I appreciate this opportunity to set the record straight.

Mr. President, I thank the minority leader. I yield the floor.

## QUORUM CALL

Mr. ROBERT C. BYRD. Mr. President, I have no further need for my time. I shall be glad to yield it back.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. TOWER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## RECOGNITION OF SENATOR BENTSEN

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Texas (Mr. BENTSEN) is recognized for not to exceed 15 minutes.

Mr. BENTSEN. I thank the Chair very much.

## WORLD AGRICULTURAL TRADE

Mr. BENTSEN. Mr. President, I should like to continue the series of addresses that I have been making for the last several days concerning the problem that we find the American farmer in today. That is probably the most efficient part of our entire economy, yet farmers are facing the worst days they have faced since 1933—not of their making, but from things beyond their control.

III. THE INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN AGRICULTURE

Faced with the obvious unfairness of policies such as EC subsidization of agricultural exports that are taking away U.S. markets and reducing commodity prices dangerously—matters I have outlined previously—it would seem reasonable to ask why our international trade agreements have not long ago outlawed such practices. This, in fact, will be the main question we will ask at the hearings scheduled by Chairman DANFORTH for February 11. If I may, Mr. President, let me sketch out the current international legal situation and U.S. statutory policies.

GATT

The main purpose of the international trading system represented by the General Agreement on Tariffs and Trade (GATT), Mr. President, is to produce some degree of stability in world trade by providing a backdrop of trading rules that all the parties to the GATT can depend upon. In the important area of agriculture, these rules tend to be ambiguous and frequently go unenforced.

As the world leader of the free trade system, I believe the United States must try to find ways of working within the existing system to provide fairness and greater opportunity for all. We must resist easy, angry solutions such as withdrawing from the subsidies code or even the GATT itself. The long-term consequences of such an action would adversely effect our nonagricultural as well as our agricultural industries. It would have an incalculable and certainly detrimental effect on world trade and Western security.

We must instead use the system of international agreements and U.S. laws in every possible way to enforce principles of open trade, particularly where other countries' practices deny us export markets in areas such as agriculture.

SUBSIDIES CODE

During the multilateral trade negotiations that led to the Trade Agreements Act of 1979, the United States negotiated an agricultural export subsidies agreement providing that, in addition to the preexisting GATT rules, parties may not grant export subsidies on agricultural products in a way that either displaces exports of another party (bearing in mind developments in world markets) or brings prices for subsidized exports materially below those of other suppliers to a particular market. The full text of article 10 of the subsidies code is set out here for the consideration of the Senate.

Article 10—Export Subsidies on Certain Primary Products.

1. In accordance with the provisions of article XVI:3 of the general agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.

2. For purposes of article XVI:3 of the general agreement and paragraph 1 above:

(a) "More than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

(b) With regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade";

(c) "A previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed.

3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market.

Other provisions of the Subsidies Code and the GATT apply to this problem, such as the obligation of countries not to threaten serious prejudice to U.S. interests.

U.S. POLICY

As we try to determine whether the United States can use these agreements to defend itself against CAP exports we must take a close look at current U.S. policy as expressed in our trade laws.

The trade policy of the United States is not to freeze international market shares in agricultural products at some past, present, or future level. Nor is it our objective to attack any common policy of a united Europe. But we do have laws to attack unreasonable and unjustifiable practices of our trading partners, especially where those countries—by actions inconsistent with their international trade obligations—impair our own access to foreign markets.

We have laws to protect our own domestic markets from unfair competition. For example, under our countervailing duty law we would impose special duties on European sugar exports to the United States to cancel the effect of the EC sugar subsidy.

When it comes to securing market access for third country export markets (the EC long ago excluded many of our agricultural exports to Europe itself by CAP variable import levies), we also have a law designed to help enforce international trade agreements.

This law, section 301 of the Trade Act of 1974, has not been rigorously employed in the past. Under its provisions, the President has broad discretion to bring trade agreement violations to the attention of foreign governments and to take retaliatory actions.

Until recently, however, Presidents have hardly acted at all under section 301. Even today, they do not seek out such unfairness on their own under this section, but act only on petition of those adversely affected U.S. industries that have the time and resources to file a complaint. Many industries never file 301 complaints because of fear of retaliation and because it takes forever to get final action.

When the executive branch does act on its own, it does not subject itself to section 301 time limits. This can result in years of meaningless informal consultations.

I am informed that the administration has been studying the agricultural export trade problem since the middle of last year. Late in 1981, the administration took increased interest in the subject and began proceedings in the GATT under the Subsidies Code on several complaints brought to its attention by U.S. exporters in wheat flour and poultry.

The administration has also instituted cases involving the effect of CAP subsidies on pasta sales in the United States and on sugar prices in the United States under section 301, which do not directly relate to agricultural exports, and on citrus exports, a case that involves EC import preferences.

THE EUROPEAN REACTION

During the entire period of the CAP, the Congress and its representatives in the administration, especially the U.S. Trade Representative, have brought to the attention of the Commission of the European Communities the problems presented by the CAP. Even as we speak, these problems are again being brought to the attention of the Commission.

The initial reaction from the Commission is unfavorable. Without revealing the content of confidential international negotiations, I can say, Mr. President, that European representatives have tried to sidestep the issues. They strongly suggest that the 1979 Subsidies Code added nothing to the discipline of the international agricultural marketplace. Apparently, they feel that all CAP subsidies were in some sense validated by the U.S. signature on the Subsidies Code.

As a member of the U.S. delegation to the multilateral trade negotiations, I am not aware of any U.S. concession to hold the CAP harmless.

I can understand to a certain extent the concern of the European Commission. Europe, like the United States, is in a recession. Unemployment is high and reducing farm programs might drive European farmers off the farm and into the sagging industrial economy. I am told about 8 percent of the EC work force is still on the farm, compared to only 3.6 percent in this country.

But real unemployment is about as high in this country as in Europe, and the United States is cutting back its farm programs. The EC, in stark contrast, will be spending over $14 billion on agricultural programs in the current fiscal year, compared to about $3 billion in U.S. agricultural price supports. Additionally, EC member states spend on agricultural programs about twice as much as does the EC itself.

Worse yet, the Commission's announced objectives are to increase EC support of agriculture, and specifically to increase its agricultural exports. The Commission is proposing the establishment of nonsubsidy measures to boost exports, including long-term contracts with countries that are not members of the EC for the supply of agricultural products.

The Commission also wants to provide means for assuring that processed agricultural commodities win a growing share of agricultural exports as part of the effort to create jobs. Modest suggestions from the EC Commission to modify the CAP as a cost-saving measure—which might have also reduced slightly EC subsidies—have not been accepted by the EC council.

Thus, the attitude of the EC has been that present international agreements do not apply to their export subsidies despite compelling evidence to the contrary. But that is not the whole story. The EC is committed to increasing and extending both the size and effect of these subsidies.

Tomorrow I shall suggest areas we might explore at our February 11 hearing to improve the current situation.

Mr. TOWER. Mr. President, will the Senator yield for a question?

Mr. BENTSEN. I am delighted to yield to my distinguished colleague.

Mr. TOWER. Mr. President, I commend the Senator from Texas for his description of what is going on in the European Economic Community.

Their subsidization of agriculture there has had the effect of not only discriminating against the sale of American agricultural produce but it has also generated the production of surpluses, as the Senator has indicated, which they in turn dump in the world marketplace and therefore drive the prices down.

We are, I think, now strongly aware of the inherent protectionism in the whole device of the European Economic Community.

I wonder if the Senator from Texas would also comment on the situation in Japan. If indeed we are to provide a marketplace here for automobiles and electronic products, which the Japanese perhaps produce more efficiently and cheaper than we, is it not reasonable for us to expect that the Japanese should open the doors to American agricultural products in Japan because that is one area in which we produce far more efficiently and cheaper than they, particularly when we consider the fact we are providing Japan with the major part of defense expenditures against potential adversaries?

Mr. BENTSEN. The Senator is absolutely right.

What Japan has done is to put quotas on the importation of agricultural products. They did that to us on beef. In negotiations over there we found that they said, "Look, we will take an additional 10,000 tons of U.S. beef; that is a lot of beef."

I figured it up and that was equivalent to about one hamburger per Japanese per year. I did not think that impressive.

We really did not have the kind of breakthrough we should have had.

The same thing is true on citrus. The Japanese fight us on importation of oranges and importation of grapefruit. They put severe restrictions on that. And we have had to fight hard to keep them from flooding our rice markets with their subsidized rice.

When we talk about automobiles, they say, "Look, we have the same percentage virtually on tariffs that you have on automobiles, why should you compain about that?" The difference is that when they import American cars into Japan, when it comes to the safety standards and the EPA standards they require an inspection on every single one of those cars. But when we bring them into this country we inspect only one out of many. Take a Toyota that sells for $8,500 in this country. It sells for $8,500 in Japan. But take a Chevrolet Citation similar to what I drive, it sells for $8,500 in this country but it sells for $15,000 in that country.

So it is all of these nontariff barriers that they add on that escalate the costs and keep our products out.

Look at what happened to us in electronics and what happened to us on televisions. One can see the whole theme of it where they established their market share in this country but put limitations on the imports into Japan until they had developed a strong domestic industry.

I will tell you how they negotiate. The Japanese negotiate by talk and talk and ship and ship and talk and talk and ship and ship.

The concessions they are talking about now are minimal. And why are they talking about these additional concessions? Because they see how concerned we are in Congress, they are talking about some concessions that do not amount to anything.

There still is no significant breakthrough.

The ACTING PRESIDENT pro tempore. The Chair advises the Senator that his time under the special order has expired.

Mr. BENTSEN. I thank my colleague.

## RECOGNITION OF SENATOR BUMPERS

The ACTING PRESIDENT pro tempore. Under the previous order the Senator from Arkansas (Mr. BUMPERS) is recognized for not to exceed 15 minutes.

Mr. BUMPERS. Mr. President, I thank the Chair very much.

## S. 2062—TENNESSEE VALLEY AUTHORITY ACT AMENDMENT

Mr. BUMPERS. Mr. President, the bill I am introducing today is a reintroduction of the bill that I introduced in 1979, and it is designed to cover an oversight which occurred 20 years ago.

As a matter of fact, I think the distinguished Senator who sits in the Chair and represents the great State of Mississippi (Mr. COCHRAN) is aware of this.

In 1959 the Tennessee Valley Authority Act was amended to allow the Tennessee Valley Authority to issue its own bonds. Because there was a feeling at the time that such authority would enable TVA to freely expand its service area to the detriment of private utilities, the act was amended to restrict TVA's service area. The restrictions were left somewhat flexible, however, in order to allow TVA to make adjustments to serve areas contiguous with its service area as it stood when the restriction was imposed. The single rigid restriction is that TVA is not allowed to sell power in a State which it was not serving on July 1, 1957. Apparently to avoid unduly harsh results to certain cities in Kentucky, Georgia, and Tennessee, those cities were specifically exempted from the restriction.

This bill merely adds the city of West Memphis, Ark., to the list of exempted cities, and it does so without violating the purposes and principles of the overall restriction. West Memphis is contiguous with Memphis, which is within TVA's service area. Statistically, West Memphis is considered a part of Memphis, as defined by the Bureau of Census' standard metropolitan statistical area, and, as such, West Memphis is counted as part of Memphis for purposes of receiving some Federal aid. Moreover, electricity generated by TVA may well be sold in West Memphis at this time, as a result of power exchange agreements with other suppliers, because of exchange agreements between Arkansas Power & Light which does serve West Memphis, and TVA.

I want to emphasize the limited definitive nature of this amendment, because it does not reopen the debate over public power versus private power, and the citizens of West Memphis should not become hostage to the argument. The amendment does not require TVA to sell power to West Memphis; nor does it require West Memphis to buy TVA's power. It gives each party freedom of choice rather than imposing a barrier, which in this particular case is purely artificial and, for that matter, contrary to the purpose of the territorial restriction which was intended to allow extensions of TVA service to contiguous areas, such as West Memphis. Indeed, West Memphis would qualify for TVA service, even under the present restrictions, except for the statute's use of State boundaries as a barrier to the flow of TVA power, which is the Mississippi River which separates Tennessee and Arkansas, and is absolutely arbitrary and demonstrates, since it is united economically with Memphis by the very boundary between the two States, that it simply bars West Memphis from sharing in TVA power. It is especially ironic that this arbitrary barrier should exist under Federal law when it would most likely be unconstitutional if Tennessee had imposed it upon a private utility. I am not proposing to eliminate that barrier in toto, even though it would be justified. I only propose that it be removed to the extent that it artificially walls off West Memphis from participation in TVA's power. Thus, the amendment merely puts West Memphis within the wall.

The 31,000 people in West Memphis are victims of a rank injustice, because the disparity between their electricity rates and those across the Mississippi precludes them from competing with their neighbors for industry. West Memphis is a lovely city. It has great people. It has good leadership. It has worked so hard to build its economy, and it simply will never be able to make the strides it is entitled to make as long as this barrier and this injustice exist. In 1979, an industrial user in West Memphis was paying $3,413 for 100,000 kilowatt--hours, while an industrial user 3 miles away in Memphis was paying $2,830. That is a 20-percent difference. Similarly, commercial users in West Memphis were paying $167 for 3,000 kilowatt-hours, while commercial users in Memphis were paying $111, a difference of 50 percent. Finally, residential users in West Memphis were paying $37 for 1,000 kilowatt-hours, but residential users in Memphis were paying $29, a difference of 28 percent.

If it were not for the river, there would just be a street or a line dividing those two cities, and everybody would say, "Well, this is just insane." But simply because the river is there it has been excepted.

These differentials have widened in recent months as the rates of the Arkansas Power & Light Co. have risen. The city of West Memphis is completely dependent upon A.P. & L. for its power, and it has recently imposed a further large increase upon its customers. West Memphis had no choice but to acquiesce in that increase, because it has no other source of supply. My bill would merely allow it the opportunity to negotiate with the A.P. & L. grid. Thus we are not talking about a construction project. We are not talking about any cost to the Federal Government. We are talking about simple justice. We are talking about this law and the pushing of a button to rectify that injustice.

We are all acutely aware of the necessity for minimizing the cost of energy, not only by conserving but by seeking less expensive sources of energy. This bill would simply allow West Memphis a fully justified opportunity to undertake that search.

Now, Mr. President, this is an idea whose time has come. We do it now or we can do it later, but it has to be done, and I ask all of my colleagues to think very seriously about this. I am not trying to open up TVA and force it to sell power to everybody that wants

it. There is not another case in the country that comes even close to the injustice that is presented here.

Mr. President, I ask unanimous consent that editorials from the Memphis Commercial Appeal dated September 1, 1979, and from the Memphis Press-Scimitar dated September 12, 1979, be inserted in the RECORD. These editorials by these two papers in Memphis strongly support this legislation.

I ask unanimous consent that a resolution adopted by the Arkansas General Assembly and a resolution by the West Memphis City Council be printed in the RECORD.

I ask unanimous consent that the bill amending the TVA Act be printed in the RECORD.

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

[From the Commercial Appeal, Sept. 1, 1979]

FRIENDS IN NEED

The business of Memphis and Memphians does not begin or end at the corporate limits of this city. Rather, it reaches across the municipal boundaries, county lines and state borders that touch Memphis on all sides. This is not several contiguous communities but one community, though we don't always realize it. There are current cases in point.

For example, the City of Memphis and the Tennessee Valley Authority should move to help the power needs of the people of West Memphis and Crittenden County, Ark. This community and TVA should actively support a bill pending in Congress to extend TVA power across the river and make our neighbors there full partners in the future of this metropolitan area.

That's what we are, and that's how we must learn to act.

Recent actions by the Arkansas Power & Light Co. deepened energy problems in West Memphis and strengthened the city's arguments for TVA service.

West Memphis Utilities had been offered 2-percent interests in each of AP&L's new generating plants at White Bluff and Independence. The city had begun the process of selling some $30 million in bonds to purchase its shares. But then AP&L cut the deal in half. Crittenden County's industrial and economic development hopes have long been disadvantaged by the cheaper TVA power on this side of the Mississippi. When the county's wholesale supplier chopped its future power sources, even at higher costs, it left the area with no place to turn except the valley authority.

It is no longer enough for TVA to say, as board Chairman David Freeman did in February, "West Memphis would not be big enough to make us or break us." That sort of left-handed acknowledgement that TVA has the power to sell if Congress says it should, isn't going to get this job done. The time has come for the authority to look upon this case as an opportunity for one of its primary service areas.

Of course, Freeman's lack of enthusiasm has been rooted in the laws which prohibit TVA from being "the principal source of power supply" for areas outside its statutory boundaries, and in what he has seen as practical limits to TVA capacities. He also said last winter, "We have our hands full with Memphis. Our current planning is geared to meet the needs of the people currently within the valley. . . ." But that's just the point. The people of West Memphis are "currently within the valley" economically and spiritually, if not geographically.

Indeed, the geographic definition of the valley was made in an arbitrary political act to include Memphis. New political adjustments to the map now would be entirely in keeping with that tradition.

If the growth fortunes of TVA are tied to those of its biggest and best customers, and they are, then it now behooves TVA officials to lend their full weight to the bill introduced by Sen. Dale Bumpers (D-Ark.) which has been languishing at a sub-level of the Senate Environment and Public Works Committee.

The same goes for the business and political leaders of Memphis. West Memphians aren't our distant relations. They are members of our urban family. We've heard the arguments that what's good for us is good for them, and it is. But the reverse of that is equally true. If TVA power locates business and jobs over the bridges only the most parochial among us could count it as a loss to Memphis. In fact, all of us would have gained on the goal of building a single progressive metropolitan community of national importance.

The route there is not one-way, however. And as the need to assist West Memphis in its search for adequate power argues against Memphis holding to its own provincial interests, the business about building a $12-million private hospital in DeSoto County, Miss., makes the same point about our regional neighbors. Proponents of the project, facing a comprehensive state health plan which recognizes the medical services available to DeSoto countians in Memphis and a surplus of beds in the area, have fallen back on that old bromide, "Keep the money in Mississippi." Are they willing to keep all their indigent patients, too?

We doubt it.

When the Mississippi Health Care Commission approved a requested certificate of need for this facility, it held that the normal rules shouldn't apply because DeSoto County's circumstances were "unique." They are. DeSoto County is a part of metropolitan Memphis. The DeSoto County growth rate cited as the need for the hospital project is evidence of that fact. Does anyone believe DeSoto County would be growing at any significant rate were it not for Memphis? Would there be a Southaven without a Memphis?

The unique circumstances do not suggest that DeSoto County be encouraged to go it alone. Instead, they indicate that the county should be made a part of the Memphis health service area, as suggested by Dr. Alton Cobb, Mississippi's health officer. That is not because we want to "keep all the money in Memphis," but because the many parts of this single community are interdependent.

If men aren't islands unto themselves, neither are the urban communities they have built.

---

[From the Memphis Press-Scimitar, Sept. 12, 1979]

TVA FOR WEST MEMPHIS

Undaunted by Tennessee Valley Authority board opposition to their latest bid for electric power, West Memphians vow to continue their fight. And well they should.

It would be a logical move to extend TVA service to Memphis' sister city to the west. It is, after all, part of the Memphis metropolitan area, and the cheaper power would provide a much needed economic boost.

At present, West Memphis is struggling under the handicap of higher-priced power supplied by the Arkansas Power & Light Co. Industrial growth has been stymied as a result. And lest any Memphians think this is strictly a West Memphis problem, industrial progress across the river invariably benefits the entire Memphis area.

TVA officials almost as a matter of routine resist efforts to bring additional territory within the utility's boundaries. It has repeatedly opposed suggested expansion across the Mississippi River, and reaffirmed that position this week.

At any rate, decisions on whether to change the utility's boundaries are made in Congress. And Arkansans are pushing hard on that front.

A bill by Sen. Dale Bumpers that would amend the TVA act to include West Memphis is in the Senate Environment and Public Works Committee. Meanwhile, Rep. Bill Alexander has a measure in the House Public Works and Transportation Committee that would provide TVA power to all of Crittenden County.

Support of those worthy measures by Memphis area leaders could help sway the needed votes.

An interesting aspect is that very little actually would be involved in adding West Memphis to the system. "It's just a matter of throwing a switch," said P. G. Para, manager of the West Memphis Utility Department. "Right this minute I may be using TVA current. It's already available in West Memphis. Arkansas Power & Light and TVA swap out all the time when one or the other needs energy. But we always pay AP&L rates."

David Freeman, TVA board chairman, was quoted recently as saying that West Memphis (which Para says has about 8,000 residential electricity customers compared to Memphis' 265,000, and used just 61,000 kilowatts of power in July compared to Memphis' 13 million kilowatts) would neither make nor break TVA.

"But TVA could make West Memphis." Para correctly points out.

It's an opportunity the Arkansas city should not be denied.

---

HOUSE CONCURRENT RESOLUTION URGING CONGRESS TO ENACT LEGISLATION AUTHORIZING THE TENNESSEE VALLEY AUTHORITY TO SELL ELECTRICITY TO THE CITY OF WEST MEMPHIS

Whereas, it appears that the Tennessee Valley Authority has the capacity for generating a substantial amount of surplus electricity; and

Whereas, the City of West Memphis is a part of the standard metropolitan statistical area of Memphis, Tennessee; and

Whereas, Memphis, Tennessee is served by the Tennessee Valley Authority but federal law now prohibits the TVA from selling electricity to the City of West Memphis; and

Whereas, since the City of West Memphis owns its own electric utility and is the only such city within a standard metropolitan statistical area served by TVA which is not allowed to purchase electricity from TVA; and

Whereas, it would not result in increased cost to the TVA to sell electricity to the City of West Memphis; and

Whereas, this prohibition in current federal law is blatantly discriminatory against

the City of West Memphis and should be eliminated so that the residents of West Memphis may enjoy the same treatment as the other residents of the Memphis standard metropolitan statistical area with regard to the consumption of electricity: Now, therefore, be it

*Resolved by the House of Representatives of the first extraordinary session of the seventy-third General Assembly of the State of Arkansas, (the Senate concurring therein),* That the United States Congress is hereby urged to enact legislation authorizing the Tennessee Valley Authority to sell electricity to the City of West Memphis, Arkansas.

*Be it further resolved,* That upon the adoption of this Resolution an appropriate copy hereof be transmitted by the Chief Clerk of the House to each member of the Arkansas Congressional Delegation.

RESOLUTION No. 861

Whereas, the City of West Memphis, Arkansas, passed Resolution No. 834, April 16, 1981, at which time Notice was given to Arkansas Power and Light Company that within sixty (60) months from the date of the Notice the City of West Memphis, Arkansas, would seek additional electrical power; and,

Whereas, the Power Coordination Interchange and Transmission Agreement requires that this Notice be given; and,

Whereas, the City of West Memphis desires to seek additional power in an effort to sell electricity cheaper to the Citizens of West Memphis; and,

Whereas, legislation has been entered in the Congress of the United States at Washington, D.C., for the City of West Memphis to buy some of its power from the Tennessee Valley Authority; and,

Whereas, it is in the utmost interest of the Citizens of West Memphis, Arkansas, that this legislation be passed and the present law of the Tennessee Valley Authority which prohibits selling electricity out of its boundaries be expanded to include the City of West Memphis, Arkansas: Therefore, be it

*Resolved* by the City Council of the City of West Memphis, Arkansas:

1. That our Senators and Congressmen in Washington, D.C., renew their efforts to secure legislation allowing the Tennessee Valley Authority to sell electricity to the City of West Memphis in the future.

2. That copies of this Resolution be sent to: The Honorable Dale Bumpers; the Honorable David Pryor; and, the Honorable Bill Alexander.

S. 2062

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That Section 15d(a) of the Tennessee Valley Authority Act is amended by inserting the words "West Memphis, Arkansas," following the words "South Fulton, Tennessee."

## ROUTINE MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of routine morning business with statements limited therein to 5 minutes each.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## RADIO AND TELEVISION COVERAGE OF SENATE DEBATE

Mr. HEFLIN. Mr. President, I have long been on record as being in favor of permitting radio and television coverage of Senate proceedings. I stand firm in the belief that allowing the electronic media to cover Senate debate would be in the best interests of the American people—and, yes, in the long term best interests of the U.S. Senate as well.

In fact, I sponsored a similar resolution myself more than 2 years ago which called for opening the Senate debate on the Strategic Arms Limitation Treaty to radio and television coverage as an experiment for eventual full-time coverage of Senate floor action.

Mr. President, television is a reality. The Senate simply can not continue to ignore this important medium that is so widely used by the American people as a primary source of news and information. The American people are interested in what goes on inside the Senate Chamber and they deserve to have the opportunity to see firsthand how their lawmakers conduct the business of the Nation.

In 1979, the House of Representatives opened its doors and began to provide television signals to the broadcast media. The experience in the House has been widely considered a success.

Here in the Senate, committee hearings have been broadcast and Panama Canal Treaty debate was covered live on radio—both have been done with great success. I have seen little, if any, evidence during these episodes of the "showboating" or playing to the cameras that some argue will occur if we allow television coverage of the floor debate.

Due to the success of all these experiments, I believe the next logical step is to allow full radio and television broadcast coverage of Senate proceedings.

Mr. President, as I said earlier, I have long been in favor of permitting radio and television coverage of legislatures, courts, and other forums where the public's business is conducted. During my term as chief justice of the Alabama Supreme Court, we opened the doors of my State's courts to television cameras.

Our allowing television coverage of both trials and appellate court proceedings generated a movement which has led to broadcast coverage of many trials and hearings in other State courts.

Televising court proceedings can bring into conflict two constitutional guarantees; namely, the first amendment which guarantees the freedom of the press, and the sixth amendment which guarantees the defendant a fair and impartial trial. Conversely, if photojournalism is allowed in the Senate Chamber, I can foresee no conflict between provisions in our Constitution.

Perhaps a review of the consideration given the issue of radio and photojournalism from a judicial system basis will be helpful to the Senate in considering this issue.

In hearings before the Supreme Court of Alabama, the media made a strong case when it pointed out that photographing and broadcasting by television and radio of a church service did not affect the dignity of the service. It also pointed out that when sophisticated and advanced technology is employed, participants in the church service are not distracted, and the solemnity of the worship service remains unharmed.

Experts testified that the media can now use noiseless long range cameras, overhead lighting, still photography without flashbulbs, and other advanced equipment.

The Supreme Court of Alabama approached the issue as to whether, in the majority of the cases, the use of camera, radio, and television instruments would interfere with a fair and impartial trial and with the effective administration of justice. It first considered radio. The court had, for some time prior thereto, been recording oral arguments. It concluded that noiseless and effective broadcasting devices could be placed at designated locations which would record the proceedings accurately and clearly for later radio broadcasting without disturbing court proceedings in any way.

It was apparent to the court that, in the vast majority of cases, radio recording devices would not detract from the dignity of the proceedings or cause prejudice to the parties any more than its own recording system.

Next, the court considered photojournalism. There was no doubt in the minds of the justices that problems could arise. They saw the constant popping of flashbulbs, spotlighting of television lights in the eyes of witnesses, lawyers, jurists, and jurors and wires getting tangled in the chairs and knocking over water pitchers as serious impediments to the effective administration of justice.

However, if the media used advanced camera technology, employed only overhead lighting, and restricted camera movement to designated areas, these problems could be minimized.

The justices also considered that if cameramen and other reporters con-

ducted themselves in the same manner that was expected of spectators, then the resulting harm would be eliminated.

The court further realized that if photographers used silent cameras without flashbulbs and took their pictures from inconspicuous locations, then there would be little danger that the use of such cameras would detract from the dignity of the proceedings.

Adequate overhead lighting can be provided in a manner that would be almost unnoticeable. Areas of movement for camera personnel can be restricted, and orderly conduct required. If desired, a dress code can be enforced for members of the camera crews.

Pooling by television networks has been used effectively by the White House. The number of cameras in the balconies of the Senate Chamber can also be limited. The experience of the television coverage in the House of Representatives can be beneficial to the Senate in formulating rules and guidelines for the media coverage.

Drawing from my experience of participating and observing electronic journalism in courtrooms, and relating this to the facilities of the Senate, I foresee no real problems relative to the dignity of the proceedings, such as distractions.

I have mentioned still photography, as well as radio and television in my remarks about the considerations to be given to this area of media in courtrooms. The issue of still photography may be irrelevant to the resolution currently at hand, but I think that, sooner or later, the issue of comprehensive media journalism will confront the Senate.

The U.S. Supreme Court has established that freedom of the press is not confined to newspaper or printed periodicals, but is a right of wide import and "* * * in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *City of Griffin,* 303 U.S. 444.

Personally, I am a strong believer in first amendment rights, and feel that all forms of reporting journalism should be allowed in the Senate Chamber. However, I fully realize that there are some who will disagree with my position and I respect their right to do so.

Mr. President, I must admit I have some reservations concerning Senate Resolution 20 as it is now written. It is my understanding that if the Senate approves Senate Resolution 20, the Rules Committee will be given total and final authority to set guidelines concerning the placement of cameras, distribution of audio and video tapes, and other rules and regulations. All this without any further consideration or vote by the full Senate.

Mr. President, I would be forced to oppose Senate Resolution 20 if it were being voted on today. However, we are not voting on Senate Resolution 20 but on a motion to proceed with consideration of that resolution. I believe the problems with Senate Resolution 20 can be worked out during the deliberations over the merits of the resolution. I indeed hope so.

It is time to open the Senate to the American people—those voters who sent us to Washington to do the public's work. Therefore, I shall vote for proceeding with consideration of this resolution with the profound and sincere hope that any reservations that I hold concerning its implementation will be corrected by amendment.

Mr. President, I do not wish to wage that battle today, but I sincerely believe Senate Resolution 20 is flawed because it does not allow for a final review by each Member of this body before the Rules Committee's guidelines go into effect.

Thank you.

## S. 1956—AUTHORIZATION FOR REIMBURSEMENT OF CHIROPRACTIC SERVICES PROVIDED TO VETERANS

Mr. HEFLIN. Mr. President, I rise today to offer my support for S. 1956, legislation which was introduced by my colleague, Mr. THURMOND of South Carolina, on December 15, 1981. This bill would insure chiropractic care when necessary to eligible veterans under the Veterans' Administration medical care program.

Mr. President, this legislation would not establish any new policy within the Veterans' Administration. Indeed, the VA already has the authority to refer eligible veterans to a chiropractor for necessary treatment. Unfortunately, for our veterans, this authority is infrequently used. Veterans in need of chiropractic care should be allowed to seek and obtain the services of a chiropractic doctor at VA expense. Other Federal and State health care programs already allow reimbursement for chiropractic services.

In the United States, the present number of chiropractic patients is an estimated 10 to 20 million. There are more than 30 million living veterans in the United States who risked their lives to defend our Nation in time of war. Of this great number, I believe there are many veterans who should be but are not receiving needed chiropractic treatment.

To insure the proper medical treatment our veterans so justly deserve, this bill will establish a pilot program which would compel much needed chiropractic referral and care within the VA. It limits expenditures for chiropractic services to $4 million in any fiscal year and also limits the veterans who are eligible for such benefits.

In conclusion, Mr. President, I am pleased to be a cosponsor of this bill to authorize reimbursement for the reasonable charge for chiropractic services provided to certain veterans. This important piece of legislation would reaffirm benefits offered to those veterans who sacrificed for this Nation in its hour of need.

I commend my friend and colleague from South Carolina, Mr. THURMOND, for his leadership on this crucial matter and I urge the full Senate to give this legislation its favorable consideration.

Thank you, Mr. President.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## BIOMEDICAL AND CANCER RESEARCH

Mr. HEFLIN. Mr. President, in President Reagan's recent State of the Union address he proposed an increase of over $100 million in funding for research at the National Institutes of Health. I was very pleased to hear the President make such a proposal.

It was just a few weeks ago that I learned from various reports that David Stockman, Director of the Office of Management and Budget, was preparing to propose a reduction in funding for health programs in the 1983 fiscal year which would have gone far beyond previous spending cuts. On January 8, I wrote President Reagan, urging that he give his full support to the important health research efforts at the National Institutes of Health, particularly in the field of cancer research, and carefully consider any proposed further reductions in their funding. I am glad that the President did oppose further budget reductions and, in fact, decided to support an increase in funding.

It was a little more than a decade ago that our Nation declared war on the horrible disease of cancer. Just before last Christmas, the National Cancer Act, the landmark legislation that greatly expanded and intensified our effort to conquer cancer, was 10 years old.

Although the war has not yet been won, and although the ultimate goal of totally wiping out cancer has not yet been reached, unbelievable progress has been made. It is most important that we work to see that this progress shall continue.

The progress that has been made has largely been because of the National Institutes of Health and its Na-

tional Cancer Institute. The mission of the NIH is to improve the health of the American people. To carry out this mission, the NIH conducts and supports biomedical research into the causes, prevention, and cure of diseases.

A major component of the National Institutes of Health is the National Cancer Institute, which has developed a national cancer program to expand existing scientific knowledge on cancer cause and prevention, as well as on the diagnosis, treatment, and rehabilitation of cancer patients.

Research facilities are supported by grants from the National Cancer Institute, and other institutes of the NIH, and are often provided through university-based programs. In the State of Alabama alone, the work done under these research grants has been staggering. In 1980 and 1981, more than $60 million in health research support grants were awarded to 13 universities and hospitals in Alabama. Of this, some $4.5 million was awarded to the University of South Alabama in Mobile, and more than $5 million went to Southern Research Institute in Birmingham. Both institutions are known across the country for the outstanding work done there under the auspices of the National Institutes of Health. Southern Research is particularly known for the work done there in cancer research.

However, the flagship of biomedical and cancer research in Alabama is the medical complex at the University of Alabama in Birmingham. That university, in 1980 and 1981, received a total of more than $47 million in research grants from NIH, and has built what is truly one of the greatest records in biomedical research in the Nation, if not the world. In 1981, more than $6 million in research grants were awarded to the UAB Comprehensive Cancer Center there in Birmingham. That center is regarded as one of the top two or three such centers for cancer treatment and research in the country.

Through research institutions such as these, the talents of the entire Nation are brought together under the National Institutes of Health, to find new ways of insuring better health for every sector of America, and for every American.

It is because of the priority of these research efforts that I was completely shocked and appalled when I learned of the possibility of OMB proposing a further reduction in their funding for the 1983 fiscal year.

Such reductions would strike a great blow against our war on cancer, for it would require the cutting of these fine research projects and programs at the National Institutes of Health, and the National Cancer Institute.

Under the leadership of these health research agencies, we have come too far in our fight against cancer and other health problems to abandon the efforts now. Indeed, to a great extent, the health research of today will determine the health of the American people tomorrow, for even though it has been written that money cannot buy health, money can fund research programs which find ways to restore health to those unfortunate enough to lose it.

One of the highest priority areas in this research has been our fight against cancer. As a result of decades of work, great progress has been made. It is not possible to describe every advance that has been made toward the prevention and cure of cancer. A look at the broad gains shows the achievement of cures for some forms of cancer, gains in survival for many forms, greatly enhanced knowledge of prevention, and sweeping advances in fundamental areas that will serve as the basis for further improvements in prevention, diagnosis, and treatment. Expanded training programs have increased the number of doctors who are cancer specialists—from about 100 in the late 1960's to almost 3,000 today.

As a result of all this progress, many patients with some types of cancer can be cured, but, regrettably, much more still remains to be done.

Cancer is still a disease that knows no class, income level, lifestyle, race, or sex. It is still a disease that can strike anyone, at any time. The National Cancer Institute estimates that 805,000 Americans will develop cancer this year. Approximately one of three will survive 5 years or more after treatment. Not long ago, that rate was only one out of five.

If you exclude cancer victims who die of other causes—old age, accidents, heart disease—the survival rate today reaches above 40 percent. The death rate from cancer for Americans under the age of 55, where cancer is the single largest cause of death from disease, is decreasing. The decrease is even greater for those patients under 30.

We can now expect to cure half of all children with cancer through the use of modern treatment methods. Gains have been made in the fight against breast cancer—the major cancer killer of women.

Still, despite all these advances, cancer remains a major killer. It is estimated that almost one-half a million people died of cancer in 1981; the estimated annual cost of cancer in financial terms is $30 billion.

Yes, a great deal has been done, but much still remains to be done, too much for us to forsake our tasks now.

This is why it is imperative that we continue to support the important work being done in cancer research. I do not for one moment urge that we abandon all the other health and biomedical research being carried out by the National Institutes of Health. However, I do urge that the increase in funding proposed by the President go toward making further progress in our fight against cancer.

When I learned of the anticipated budget cuts in programs of the NIH and NCI, I spoke out because I could not stand as an idle witness to the disruptive effects that any such reductions would have on our continued progress in biomedical and cancer research.

Now that such a total disruption has been averted, I cannot support a retreat from our long battle against cancer, particularly when we have come so far. I hope that each of you will join with me in urging that the additional research money be used to intensify our attack.

Only through our united, continued support of the crucial work at the National Cancer Institute, and its research programs at universities and hospitals across the United States can we finally succeed. Only through such support can we reach the final goal of our long struggle, and give a great gift to mankind by finding a cure for this killer called cancer.

I ask unanimous consent that the letter I recently wrote to the President, urging his full support for the important research at these institutes, be printed in the RECORD. I ask unanimous consent that a transcript of remarks made by Dr. Vincent Devida, Jr., Director of the National Cancer Institute, at the dedication of Southern Research Institute's Howard E. Skipper Chemotherapy Laboratory, in Birmingham, Ala., be printed in the RECORD.

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

U.S. SENATE,
COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION,
*Washington, D.C., January 8, 1982.*

The PRESIDENT,
*The White House,*
*1600 Pennsylvania Avenue,*
*Washington, D.C.*

DEAR MR. PRESIDENT: It has come to my attention through recent press reports that additional budget cuts are anticipated for the National Institutes of Health programs for fiscal year 1983.

I am concerned over the disruptive effects that any further cuts would have on the continued progress in biomedical research; particularly in the area of cancer research.

As you of course know, during the past decade, tremendous strides have been made in the diagnosis and treatment of cancer. In addition, unprecedented advances have provided limitless opportunities to find the cure for cancer. In fact, I am advised that as a result of these achievements, many patients with cancer can be cured. However, the ultimate goal of cancer research is to find a cure for all types of this horrible disease.

The Comprehensive Training and Education programs at the National Institutes of Health have been a tremendous help by dis-

seminating information to the public, hospitals, clinics, and physicians in private practice. Therefore, I urge you to give your full support to the important health research efforts at the National Institutes of Health and carefully evaluate further reductions in their budget.

With kindest regards, I am

Sincerely yours,

HOWELL HEFLIN.

---

OPEN LETTER TO HOWARD SKIPPER

(By Dr. Vincent T. DeVita, Jr.)

It is always a pleasure to come to Southern Research Institute and it's a greater pleasure to come to this institute on this occasion—the 10th anniversary of the National Cancer Program and the dedication of a building in the name of one of our favorite persons, particularly in the cancer treatment field.

On this occasion of the 10th anniversary of the National Cancer Program I am often asked to make some statement about what kind of progress has been made. I will not burden you with a long list of these things, except to say that when one looks at the contrasts in the field of cancer research in 1970 and in 1981, those contrasts are striking. It's very interesting to let that gap of 10 years go by and reflect on these changes. Some of the things we can do now in cancer research, and some of the promise that we have in cancer research, were things that dreams were made of in 1970. In fact, had I, as director of the National Cancer Institute, mentioned some of these things from a podium like this 10 years ago, people would have thought I had taken leave of my senses.

Nowhere is the contrast more striking than in the field of cancer treatment with drugs, and no institution in the country—probably in the world—has a more distinguished place in the history of cancer chemotherapy than Southern Research. And this is largely due to the man we are here to honor today, Dr. Howard Skipper.

I entered the field of cancer research in 1963. This was a very critical time period for cancer chemotherapy. The impact of Dr. Skipper's work reverberated across the field like a whipcrack and changed the field practically overnight, in medical terms, from one that relied almost totally on empiricism to a field that was heavily laced with inductive reasoning. He had a very strong influence in my career, personally. As a matter of fact, as I look around the room, I think he's had a very strong impact on the career of everybody whose face I recognize, and I am sure that's probably true for many of the other people here whose faces I don't recognize.

I want to tell you it's not really easy to talk about Howard Skipper. As a matter of fact, as I sat down, Dr. Skipper leaned over and said to me, "Now Vince, stick to the facts. Don't embellish it!" I told him I did not want to step out of character but, on this occasion, I will stick to the facts, Howard. He resists all attempts at flattery. I think he's probably the most humble scientist I have ever met, in a field that is not always noted for its overabundance of humility.

I want to express my feelings about Dr. Skipper in a little bit more personal way. I received my instructions from Howard Skipper over a period of 15 years, in a series of booklets that is now threatening to bring my bookshelf to the ground. I want to tell Howard a little bit about how I feel about him and about, I think, how many of my colleagues feel about him. So I have chosen to write a letter to you, Dr. Skipper, which you'll receive shortly. And I'd like to read it to the audience. It could be a lot longer than it is, because there are many, many things we could say about you, but for your sake, Howard, I have made it mercifully short. So if the audience will bear with me, I would like to read this letter:

DEAR HOWARD: I feel somewhat presumptuous making a speech at a dedication ceremony in your honor. There are many of your colleagues who deserve the honor more than I, and it is indeed an honor. I chose a letter because some of the things I have to say can be expressed less formally this way. Also, nowadays I'm never sure I'm going to make it but a letter will (or should).

There are several things I've always wanted to say about you and now is a good time:

First, you can't imagine the influence you have had on the field of cancer chemotherapy in the last 20 years. I came to the Cancer Institute 17 years ago out of a good residency training program in internal medicine. I was proud of what I knew. I had assembled the facts, and the facts were you couldn't cure cancer with drugs. Knowing this made using drugs easy. Since we knew they couldn't do much good, we were careful to train ourselves to use drugs in such a way as to assure no harm. This usually meant low doses of both drugs and optimism and convenient schedules. Cancers, especially hematologic malignancies, were interesting though and we busied ourselves describing phenomena related to the diseases themselves. If you stop to think about it, you might think it peculiar that one so young and new in the field could already be so fixed in his ways, but that's the way it was and still is in medicine. New people are a product of their environment and their teachers. Lacking experience, we defend ourselves with facts or what we perceive to be the facts.

I found something strange happening at the Cancer Institute. No one seemed to be obeying the rules. You had come along and spoke of cure of L1210 leukemia. You even had the audacity to suggest that the same thing might be possible in leukemia of humans, if we would go about doing what we did somewhat differently.

It's hard now to recreate for you the atmosphere your work generated. Probably it's even harder for you since you never seem to think anything you do is important. But what you and Schabel and all the other workers here at Southern Research did was give the minds of eager young clinical researchers, which were not yet entirely rigidly impaled on the facts they assembled, something more palatable to work with—hypotheses, good hypotheses. We still had to dodge the folks who scorned the concept of curing cancer with drugs. Right or wrong, these people never seem to be in doubt or in short supply, but the Clinical Center at NCI was a good place to hide under the protection of your good friends, Gordon Zubrod and Tom Frei. We had some good drugs and some concepts to test, and a whole bunch of us took off running at trying to cure leukemias and lymphomas.

Well, you know the results. These cancers are now curable with drugs. You were right. It really didn't even prove that difficult once we adjusted to the differences between mice and humans.

I'm sure these things are old hat to you and the people at this ceremony. You, undoubtedly, have heard them many times before.

There are, however, two other points I would like to make that you perhaps haven't heard, or if you have heard them, you can't have heard them often enough:

First, I'm a doctor, I always have been and when push comes to shove, I always will be a doctor. I go to clinics and I take care of patients. Howard, you can't imagine the feeling we doctors get when we treat patients successfully, especially with "the new boy on the block," chemotherapy. Working with those mice is convenient and must be satisfying to you, but it can't provide as much satisfaction as we get saving human lives. The thrill of seeing a patient with Hodgkin's disease I treated successfully 15 years ago is really beyond my power of description and makes any struggle I have had to go through worthwhile. There is now a whole generation of medical oncologists who experience these feelings daily. Howard, we doctors owe you a lot. You gave us this thrill. On behalf of all these doctors, I want to thank you.

The second point is this: As I said, I go to clinics still, although less often than I'd like to these days. When I do, I am well received. The patients recognize me as a doctor who had something to do with developing a treatment for their cancer. You can't imagine how it is to see the fear and despair of these patients turn to hope for a normal life. I know all those patients and their families would be saying these things to you personally if they knew how important you were to their lives. Sadly, Howard, we get all of the credit. They don't know who you are. I imagine that those smelly mice are not at all grateful to you either. So, on behalf of the thousands of patients (almost 40,000 a year now cured by chemotherapy), on behalf of their fathers and mothers, husbands and wives and children, I thank you, Howard. I thank you very much.

Finally, having a building named in your honor at Southern Research is perhaps the nicest honor you will ever receive. It isn't the first and it won't be the last, but it is, undoubtedly, the nicest. The folks at Southern Research Institute have a great deal of good sense. They had the good sense to bring you here and to keep you here and provide you with excellent staff and excellent resources. Now that you've retired, they've had the good sense to name a building in your honor. But I want you to know, Howard, none of us are taking your retirement seriously; after all, what would we do without your booklets?

I remain,

Your grateful student,

VINCE DEVITA.

---

## TELEVISION AND RADIO COVERAGE OF SENATE PROCEEDINGS

Mr. DECONCINI. Mr. President, I support Senate Resolution 20, a resolution submitted by the very distinguished majority leader. I am happy to report that I am a cosponsor.

I am perfectly well aware of the arguments that have been marshaled against this measure—it will cost too much, it will cause Senators to perform for the cameras, it will tend to harden positions because of the glare of publicity. Indeed, we are all familiar with those arguments because they have been used repeatedly to oppose change, especially change that would

open up the legislative process to public view.

Woodrow Wilson convinced an entire world that democracy was premised on openness—"open covenants openly arrived at." But our own Government has been excruciatingly slow in implementing the most basic changes that would assure the people of openness and forthrightness.

I fear that our reluctance to open our debate to public view will be interpreted by some that we have things to hide. Quite frankly, Mr. President, there are times when this body acts in a manner that might well be restrained by the presence of television cameras. Under the full glare of public inspection, I wonder how easily we would pass legislation to effectively exempt us from paying Federal taxes, a decision I hope this body will quickly reconsider. I also wonder if we would as easily have raised the ceiling on the honoraria a Senator can receive—payments which, unfortunately, create a sense of obligation, and which may subtly affect legislation. Finally, I wonder whether the hundreds of millions of taxpayers' money that will ultimately be spent on a new Senate office building would have been authorized so easily. In short, I wonder whether the presence of television cameras would not be a positive benefit, not only to the public we represent but also to ourselves.

Each and every step we have taken toward openness in government has had positive, not negative, effects. Opponents of Senate Resolution 20 should be reassured that the consequences of allowing television and radio coverage of the House have been less than catastrophic. After a few weeks of initiation, the cameras were no longer an obstruction but were an unobtrusive part of the daily routine. Surely, it will not be said that Senators are less able to cope with the presence of television cameras than our counterparts in the House.

The Senate has long prided itself on a tradition of debate, a forum in which there was virtually unlimited discussion of the weighty matters of state. Surely, we have an obligation to open these debates to the people whose lives will be affected. There was a time when, through the visitors' galleries and the CONGRESSIONAL RECORD, the Senate was able to reach that segment of the public truly interested in national affairs. Today, a much broader segment is interested and cannot journey to Washington or trek to a library to read the CONGRESSIONAL RECORD. By allowing for television and radio coverage, we rip away the artificial barriers which prevent too many citizens from looking over our shoulders.

I believe, Mr. President, that we have an obligation to agree to this resolution and that we have an obligation to insure that the American people have ample opportunity to watch the inner workings of the greatest democratic nation on Earth.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

## DEPARTMENT OF JUSTICE AUTHORIZATIONS, 1982

Mr. STEVENS. Mr. President, is it in order at this time to proceed to the consideration of S. 951?

The ACTING PRESIDENT pro tempore. The Senator is correct.

Under the previous order, the hour of 11 a.m. having arrived, the Senate will now resume consideration of S. 951, which the clerk will state by title.

The legislative clerk read as follows:

A bill (S. 951) to authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1982, and for other purposes.

The Senate resumed the consideration of the bill.

AMENDMENT NO. 69, AS AMENDED

The ACTING PRESIDENT pro tempore. The question is amendment No. 69, as amended, by the Senator from North Carolina (Mr. HELMS), on which there shall be 90 minutes, with 30 minutes each to the Senator from Connecticut (Mr. WEICKER), the Senator from Louisiana (Mr. JOHNSTON), and the Senator from Michigan (Mr. LEVIN).

The text of the amendment, as amended, follows:

At the end of the material proposed by the committee to be stricken out in its first amendment to the bill on page 2, line 14, add the following:

"minus $37,653,000;

"(C) financial assistance to joint State and local law enforcement agencies engaged in cooperative enforcement efforts with respect to drug-related offenses, organized criminal activity and all related support activities, not to exceed $12,576,000, and to remain available until expended: $50,229,100;

"(D) no part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.".

"SEC. 2.5 (a) This section may be cited as the 'Neighborhood School Act of 1981'.

"(b) The Congress finds that—

"(1) court orders requiring transportation of students to or attendance at public schools other than the one closest to their residences for the purpose of achieving racial balance or racial desegregation have proven an ineffective remedy and have not achieved unitary public school systems and that such orders frequently result in the exodus from public school systems of children which causes even greater racial imbalance and diminished support for public school systems;

"(2) assignment and transportation of students to public schools other than the one closest to their residences is expensive and wasteful of scarce supplies of petroleum fuels;

"(3) the assignment of students to public schools or busing of students to achieve recial balance or to attempt to eliminate predominantly one race schools is without social or educational justification and has proven to be educationally unsound and to cause separation of students by race to a greater degree than would have otherwise occurred;

"(4) there is an absence of social science evidence to suggest that the costs of school busing outweigh the disruptiveness of busing; and

"(5) assignment of students to public schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States.

"(c) The Congress is hereby exercising its power under article III, section I, and under section 5 of the fourteenth amendment.

"Limitation Of Injunctive Relief

"(d) Section 1651 of title 28, United States Code, is amended by adding the following new subsection (c):

" '(c)(1) No court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless—

" '(i) such assignment or transportation is provided incident to the voluntary attendance of a student at a public school, including a magnet, vocational, technical, or other school of specialized or individualized instruction; or

" '(ii) the requirement of such transportation is reasonable.

" '(2) The assignment or transportation of students shall not be reasonable if—

" '(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

" '(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

" '(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

" '(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or

" '(v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the stu-

dent's residence with a grade level identical to that of the student.

"'Definition

"'(e) The school closest to the student's residence with a grade level identical to that of the student shall, for purpose of calculating the time and distance limitations of this act, be deemed to be that school containing the appropriate grade level which existed immediately prior to any court order or writ resulting in the reassignment by whatever means, direct or indirect including rezoning, reassignment, pairing, clustering, school closings, magnet schools or other methods of school assignment and whether or not such court order or writ predated the effective date of this legislation.

"'Suits by the Attorney General

"'(f) Section 407(a) of title IV of the Civil Rights Act of 1964 (Public Law 88-352, section 407(a); 78 Stat. 241, section 407(a); 42 U.S.C. 2000c-6(a)), is amended by inserting after the last sentence the following new subparagraph:

"'Whenever the Attorney General receives a complaint in writing signed by an individual, or his parent, to the effect that he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act and the Attorney General believes that the complaint is meritorious and certifies that the signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.'

"(g) For the purpose of this Act, 'transportation to a public school in violation of the Neighborhood School Act' shall be deemed to have occurred whether or not the order requiring directly or indirectly such transportation or assignment was entered prior to or subsequent to the effective date of this Act.

"(h) If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"(i) It is the sense of the Senate that the Senate Committee on the Judiciary report out, before the August recess of the Senate, legislation to establish permanent limitations upon the ability of the Federal courts to issue orders or writs directly or indirectly requiring the transportation of public school students.".

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. STEVENS. Mr. President, who controls the time on each side under the order?

The ACTING PRESIDENT pro tempore. The three Senators: Mr. WEICKER, Mr. JOHNSTON, and Mr. LEVIN.

Mr. STEVENS. Mr. President, none of those Senators is present. I suggest the absence of a quorum and ask unanimous consent that the time for the quorum call be charged proportionately to each Senator allocated time under the order.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEVIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. ANDREWS). Without objection, it is so ordered.

CLOTURE MOTION

Mr. JOHNSTON. Mr. President, will the Senator yield so I may send a cloture motion on S. 951 to the desk?

Mr. LEVIN. I am happy to yield.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the standing rules of the Senate, hereby move to bring to a close debate on S. 951, the Department of Justice authorization bill.

J. Bennett Johnston, David L. Boren, Russell Long, Jennings Randolph, J. James Exon, Steven Symms, Don Nickles, Edward Zorinsky, Walter D. Huddleston, James Abdnor, John C. Stennis, Lloyd Bentsen, Chuck Grassley, William Proxmire, Mack Mattingly, and Roger W. Jepsen.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. I thank the Chair.

Mr. President, I rise in opposition to the pending amendment even though I share with my friend from Louisiana the general dislike of busing children away from their neighborhood schools. As a matter of fact, I would concur in and fully support the provision of the amendment—at least one provision of the amendment—which indicates that busing is not the preferred method and should not be used unless constitutionally required. I am deeply troubled by this amendment, however, and its implications in terms of Federal court jurisdiction.

I am also deeply troubled by the fact that it sets out to make findings of fact which I do not believe we can rationally make as a Senate. I might say first, however, that as a local elected official in Detroit when busing was ordered, I saw that negative consequences can sometimes result when children are ordered to attend schools outside of their neighborhood. Busing is no longer viewed by the courts, and rightly so, as the preferred method of righting the evils of segregation. Busing orders can no longer be entered to correct de facto as opposed to de jure segregation, and courts have shown an increased willingness to find alternatives to busing where possible, even in the case of de jure segregation. In Detroit, for example, after years of busing, the court and the community are actively exploring alternatives.

As I indicated, I concur with subsection 5 of this amendment, which says that the assignment of students to public schools closest to their residence, neighborhood public schools, is the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States.

Despite my feelings about busing and its limitations and its failure in many instances, I am, nonetheless, troubled by an amendment which would remove from the Federal courts the power to enforce the Constitution. It is a pernicious approach to a difficult problem and I hope that the U.S. Senate will avoid it.

Mr. President, I am wondering if my friend from Louisiana might help me understand what some of these findings of fact purport to find. For instance, in section 2.5(b) of the Senator's amendment, he would have Congress find that court orders requiring busing of students have proven an ineffective remedy and have not achieved unitary public school systems.

My question is whether or not it is the meaning of this amendment and this proposed finding that court-ordered busing has in every case proven to be an ineffective remedy.

Mr. JOHNSTON. I say to my friend that the finding of fact does not say so in every case but in the overwhelming number of cases. If I may, for example, quote from David J. Armour's article, "Unwilling to School." That is a 1981 article in the fall issue of Foreign Policy Review.

Mr. Armour, by the way, is the one who conducted that extensive Rand Study. He says this:

> At this point, however, there is overwhelming social science evidence that mandatory busing has failed as a feasible remedy for school segregation. It has done so, first, because public opposition and white flight have been so extensive as to increase, rather than to decrease, racial isolation in many cities.

He goes on at some length. But the point is, to use his words—and these are the words of the social scientists—that there is overwhelming social science evidence that it has failed as a feasible remedy and has increased racial isolation. He does not say in every single case. There are probably some cases in which it has worked well, I suppose, but we know that it has failed across America.

Mr. LEVIN. Do I correctly understand, then, my friend's answer to mean that the amendment does not purport to say that in all cases the court-ordered busing has proven to be an ineffective remedy?

Mr. JOHNSTON. No, the amendment does not so state.

Mr. LEVIN. That is helpful.

I am wondering, also, if this David J. Armour, whom the Senator quotes, is the same David J. Armour who testified before the Senate Judiciary Committee on May 14 of 1981 that "I do not mean to imply that social scientists are in agreement about the lack of educational and social benefits from desegregation"?

Mr. JOHNSTON. There is no question that there is not unanimity of opinion. So distinguished an intellect as the Senator from Pennsylvania disagrees with me on this particular remedy. So, of course, there is not a unanimity of opinion. I simply say that there is an overwhelming weight and quality of that opinion against busing.

Mr. LEVIN. I thank the Senator.

Will the Senator then be able to clarify another aspect of the findings in the amendment? Section 4 of the findings states that there is an absence of social science evidence to suggest that the cost of school busing outweighs the disruptiveness of busing.

I am not sure I understand what that means. It seems to have a double negative in it. I think it means that the values of busing outweigh the disruptiveness of busing; and, to be a little fuller on that, I think what the Senator is trying to say is that there is an absence of evidence which suggests that the values of school busing outweigh the disruptiveness of school busing. Assuming that that is the Senator's meaning—although those are not the words; in fact, the words are quite different—will the Senator, then, be willing to agree, along with what he just said and along with what David Armour has said, that there are social scientists who do believe that the value of school busing to the schools and to education outweighs the disruptiveness of busing?

Mr. JOHNSTON. First of all, let me say that I hit upon a double negative which was unintended. I hope what we meant to say comes through more clearly than the words portray. But in any event, what we meant to say was that there is no evidence to support the proposition that school busing is worth the cost in disruptiveness.

For example, again to quote Armour from the same 1981 article, and I use him because he is the latest thing in print:

> Desegregation has not produced the educational and social benefits that were promised. Not only does it fail to truly desegregate, it also fails to remedy the presumed effects of segregation.

So I say this: Initially, at the time busing was first discovered by the Supreme Court as a remedy—I suppose that was in the *Swann* case back in 1968, Swann or Green or that group of cases back in the late 1960's—it was perceived by most social scientists that busing would work.

Indeed, James J. Coleman, the distinguished Harvard professor, had a rather extensive study on the effects of past segregation and suggested that busing was the only feasible remedy. It was upon his very findings that the Court based much of its opinion in the *Green* case and the *Swann* case and the other cases.

Mr. LEVIN. I am familiar with that background. My question is slightly different, though. Perhaps it was not very clear.

The amendment would have us find that there is an absence of social science evidence to suggest the conclusion that the amendment states.

My question to the Senator is this: Are not social scientists in disagreement on that conclusion; and, therefore, would the Senator agree that there is some evidence that he believes is outweighed by other evidence?

Mr. JOHNSTON. There is certainly opinion. I guess I used "evidence" in the sense of credible evidence. I think it would be better stated that there is no credible evidence. Clearly, the Senator's point is correct. There is opinion to the contrary, although a diminishing amount of opinion, and certainly in terms of its weight, in the social science community. In my opinion, the weight in the social science community—not just in my mind but in the social science community—is greatly on the side of those who state that busing has failed.

Mr. LEVIN. I thank the Senator for that clarification. I have another inquiry.

In section 2.5(b) of the amendment, the Senator would have Congress find that court orders requiring busing of students have not achieved unitary public school systems. Is it the Senator's intent to say that the court-ordered busing has never achieved unitary public school systems?

Mr. JOHNSTON. No. I think we meant to say just what we said. I am not aware of a school system in the country, certainly not a large one, where it has achieved a unitary school system. I am not aware of even one, particularly not a large one. It may have happened. If it does, we do not intend to preclude it. We do not purport to say "never." We say "not." I think "not" is the correct way to say it. It has not achieved unitary school systems.

Mr. LEVIN. Will the Senator agree that there are instances where it has achieved unitary school systems?

Mr. JOHNSTON. If the Senator will tell me that there are such instances, I am sure he is correct. I am not aware of those.

Mr. LEVIN. I just wondered whether or not we had been given any materials which indicate approximately how many districts have court-ordered busing.

Does the Senator know whether or not there have been any printed materials provided by the committees looking into this telling us the number of school districts which have court-ordered busing?

Mr. JOHNSTON. There are, of course, many studies on it. There is the James J. Coleman study.

Mr. LEVIN. I mean any current studies telling us how many districts currently have court-ordered busing. Do we have any information before us? Does the Senator know of any?

Mr. JOHNSTON. We have put into the RECORD both in the Judiciary Committee and here in the Chamber the various studies. Obviously it is a moving target because more systems are brought in and in the question of what is a busing order we have to define what that is because when districts are redrawn they do not order schoolchildren bused. They order that the districts be redrawn and then they leave it to the school system to do the busing.

Mr. LEVIN. Can the Senator give any idea, approximately, as to the number of districts in which court-ordered busing is now ineffective?

Mr. JOHNSTON. I cannot tell the Senator. I am sure that it is information that is available in the RECORD. I do not recall.

Mr. LEVIN. The Judiciary Committee has not even printed a report, as I understand it. Is that correct?

Mr. JOHNSTON. To my knowledge the committee has not printed a report.

Mr. LEVIN. We have taken the time to go look at those records and there was not a printed report available to the Senate. We are being asked to vote on findings of fact of a critical nature based on reports we have not even printed. We have gone and looked at those transcripts and cannot find that figure. Yet we are being asked to vote on findings which are based on certain information which is not even available. It is the very basic question about how many school districts presently have court-ordered busing and in how many would the Senator estimate it is ineffective? If there are 800 districts which have court-ordered busing, would someone estimate for us, if not the Senator from Louisiana—I do not want to put him on the spot because he cannot have all the figures on the top of his head—but would some one estimate for us in how many of those 800 districts which have court-ordered busing it is a failure?

Mr. JOHNSTON. I suggest to the Senator that the appropriate question is not how many school districts are subject to court-ordered busing but the proper question is how many school districts where it has been ordered has it been successful and how many has it been unsuccessful.

Mr. LEVIN. I agree with that.

Mr. JOHNSTON. And let me say that these rather long studies have been put in the RECORD and have been printed in the RECORD. I do not know whether the Senator has had a chance to read the James J. Coleman report. It is 78 pages long. It is entitled "Trends in School Segregation." That goes into rather painful detail with more mathematical formula than I can understand, and it takes each school district and it finds what happened before and after and where the children went and where they would have gone but for the court order and the demography of it and the trends, and all of those things. As I say it is in rather painful detail. It is interesting to those who are really interested in the social science of it. I think somewhere tucked in all that mass of figures is the judgment of how many school districts have been ordered to bus. If I tell the Senator that there are 9,000 school districts that have been ordered to bus, that does not really tell him anything. The important thing is how it has worked, and I think there is ample evidence printed in the RECORD and made available to Senators.

If I may just say one additional thing, and I do not mean to speak too long in answering these questions, but this is very critically important. Each Congress for the last three or four Congresses, at least, has considered this question in depth and has printed records. I have in my office stacks of printed records, bound records where people testify and figures have been promulgated. It is not a new question. I mean we did not wake up this morning to the world and finally find that busing has not worked. That has been going on for a long time, for a decade, and during that time Congress has considered and reconsidered and simply has not gotten this far in the process yet.

Mr. LEVIN. This is important. This morning we are being asked to make findings of fact.

I think the statement of the Senator from Louisiana that the statement that court-ordered busing has proven to be an ineffective remedy does not mean in every single case. It is an important statement. The Senator acknowledged that in some cases it may be an effective remedy. As a matter of fact, in Jefferson County, according to the information we have, it has been described as a good plan which is working out well. Since 1975 in Hillsboro County, Fla., it has been described as a plan which has drawn citizen support and only minor difficulties according to a Time magazine article and other articles.

I do think it is useful that the Senator has acknowledged that there are or may be instances where court-ordered busing has proven to be an effective remedy.

I take it that the Senator is not willing to offer a percentage as to what percentage of the cases where it has been ordered where it has worked out OK or perhaps the Senator is. If we can get figures as to in how many cases it has been ordered, would the Senator be willing to guess as to what percentage has been ineffective?

Mr. JOHNSTON. I would not want to put a percentage on it. I think Armor is right where it is stated there is "overwhelming social science evidence that mandatory busing has failed as a feasible remedy." So I think the evidence is overwhelming.

No. 2, this amendment does not prohibit all busing. It severely limits it.

No. 3, let me just ask the Senator from Michigan. As he began his statement he said that he happens to agree with me that busing does not work; he does not like the remedy.

Mr. LEVIN. That is not quite what I said. I said busing frequently has not worked.

Mr. JOHNSTON. In the opinion of the Senator from Michigan why has it not worked in those cases where he thinks it has failed?

Mr. LEVIN. I am only familiar with my own situation in Detroit where it has not worked because the school district was about 75 percent black to begin with and it increased the outflow of citizens predominantly white but not exclusively white who were willing to become citizens in the suburbs.

I opposed busing in Detroit. By the way, I opposed it along with our mayor, may I say, Mayor Young. In Detroit we had a case of de jure segregation.

So I am not someone who believes that busing is always the answer, but I am someone who believes in the Constitution, and I do not believe in removing from the Federal court in every case that fits the Senator's description of distance and time the right to order busing to remedy a constitutional violation because busing makes no sense in some cases. I am not willing to take that risk with the Constitution because we set a precedent. If we say the Federal court cannot enforce the Constitution in the earlier busing, tomorrow we will say that it cannot enforce the Constitution in the area of free speech or some other area.

So my difference with the Senator from Louisiana is not so much that I think we should avoid busing except where it is constitutionally permitted as subsection 5 of the Senator's amendment says, a subsection I agree with. Where I disagree with the Senator is that the Senator would have us vote today on findings of fact which sound all inclusive—I am glad they are not—but if they are not all inclusive and if there could be cases and are cases where busing is an effective remedy why then would we foreclose it in all cases as this amendment would do? I do not think that the amendment's logic is consistent with the explanation in the Chamber that there may, indeed, be areas and cases where it has proven to be an effective remedy.

I am not familiar personally with Hillsboro County, Fla., or with Jefferson County, Ky., or with Clark County, Nev., or with Racine, Wis., or with dozens of other districts where apparently this is working.

I do not know, I do not have firsthand knowledge, but we are being asked to find that it is not working in those cases and that retroactively we ought to undo busing orders in communities which have now settled in with those orders. I think such an amendment can be extremely disruptive. I understand its purpose and, frankly, I would like to see busing limited to situations where it clearly is going to have a positive effect and where there is no alternative. But I am not willing to do that by removing Federal court jurisdiction in all cases if it fits your distance and time standards because I think it is a pernicious precedent and that the Federal courts are going to be hobbled by this kind of approach in enforcing the Constitution.

Much as I dislike busing in many instances, I like the Constitution even more, but I do thank my friend from Louisiana. I do think the amendment has been clarified. I do not think it is logical any more because again it prohibits busing in all cases that fit the standards, even though I believe it is clear from this colloquy that busing has not been ineffective in every case or that busing has never produced a unitary school system.

Mr. JOHNSTON. Mr. President, will the Senator yield?

Mr. LEVIN. I would be happy to yield.

Mr. JOHNSTON. I, like my friend from Michigan, strongly agree with passionately believe in, the Constitution. But I happen to believe in all of the Constitution, including section 5 of the 14th amendment which gives to Congress the right to implement the amendment by appropriate legislation.

The Senator also recognizes that section 5 is a part of that Constitution just as surely, indeed more surely, than some newly discovered decisions of the Supreme Court, which did not even exist prior to the late 1960's and, indeed, which decisions do not explicitly require busing.

Mr. LEVIN. I would agree. I want to ask my friend this question: Would you suggest we could eliminate from the Federal court the power to use the remedy of injunction to enforce the first amendment, leaving to the per-

sons who are injured a damage remedy? Would you call that enforcing an amendment?

Mr. JOHNSTON. You can clearly not do that under section 5 of the 14th amendment because that does not relate to 14th amendment rights.

Mr. LEVIN. I would apply it to rights that are enforced against the States through the 14th amendment.

Is my friend suggesting that we could eliminate for all those rights which apply to the States through the 14th amendment the injunctive remedy, leaving to claimants the right to damages? Is that the position you would take?

Mr. JOHNSTON. I would say that the Supreme Court of the United States in the litigation over the Norris-LaGuardia Act, which took away the right to get injunctions in labor disputes of an act passed by Congress, was upheld by the Supreme Court under article III of the Constitution. That is not under section 5.

Mr. LEVIN. That was different from a constitutional violation or a constitutional amendment or right which was enforced against the States under the 14th amendment.

Mr. JOHNSTON. In Ex parte McCardle, an old case in 1868, they took away the right of habeas corpus which is about as basic a constitutional right as you can get.

I am not suggesting that the power of Congress is or should be unlimited under section 5 of the 14th amendment or, indeed, under article III relating to jurisdiction. In all of the instances which the Senator has stated, I believed it would be unwise, even if legal, for Congress to exercise that power. I simply want to get the record clear that we are in a rather unclear or at least in a complicated area when you are talking about what is the power of Congress under the 14th amendment and section 5.

Mr. LEVIN. I would agree. Despite all that, the approach of the pending amendment is flawed both logically and legally.

First, as to the logical weaknesses of the amendment. It rests upon several findings of fact which are, in reality, little more than expressions of opinion. The debate on this amendment has not centered on the findings of fact which are broad and sweeping conclusions regarding the effects of school busing. These findings purport to demonstrate that busing is, in all cases, a failure. The universal failure of busing is critical to the internal logic of the Johnston amendment because the universality of busing's failure is the only justification for a universal ban beyond certain limits.

Senator JOHNSTON himself believes that if the Congress approves his amendment, it will have given its sanction to these facts and, in turn, the courts will have to give deference to them as well. He relies chiefly upon the opinion of Justices Brennan, White, and Marshall in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), which states:

> The nature of the judicial process makes it an inappropriate forum for determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary", "irrational," or "unreasonable".

While it is true that busing has sometimes been unsuccessful and has sometimes produced the kind of negative results identified in the findings contained in the Johnston amendment, it is impossible to rationally determine the reasonableness of the sweeping conclusions in this amendment on the record which has been established during only 1 day of hearings on S. 528, the bill introduced by Senator JOHNSTON which is the predecessor of this amendment. The hearing record and the Senate debate on this amendment have failed to produce any record upon which the Senate could find that—

> (1) court orders requiring transportation of students to or attendance at public schools other than the one closest to their residences for the purpose of achieving racial balance or racial desegregation have proven an ineffective remedy and have not achieved unitary public school systems and that such orders frequently result in the exodus from public school systems of children which causes even greater imbalance and diminished support for public school systems; or that
>
> (3) the assignment of students to public schools or busing of students to achieve racial balance or to attempt to eliminate predominately one race schools is without social or educational justification and has proven to be educationally unsound and to cause separation of students to a greater degree than would have otherwise occurred.

At best, it seems to me that our experience with busing is sufficient to conclude that there are problems with its application in a number of situations. As a result, I agree that busing should be imposed only where constitutionally required and in the absence of a better alternative. But Senator JOHNSTON'S amendment goes way beyond that by prohibiting any busing beyond 5 miles from a student's home in all circumstances.

Senator JOHNSTON relies upon studies on the effects of schoolbusing which have been conducted by David J. Armor, a senior social scientist at the Rand Corp., and James S. Coleman, a professor of sociology at the University of Chicago and the well-known author of the 1965 Coleman report.

David J. Armor testified before the Senate Subcommittee on the Constitution of the Senate Judiciary Committee on May 14, 1981. He told the subcommittee that "mandatory busing has failed as a reasonable remedy for school segregation," but he emphasized that there is still disagreement among social scientists as to the effects of school busing. He stated:

> I do not mean to imply that social scientists are in agreement about the lack of educational and social benefits from desegregation, the possible harmful effects of desegregation on race relations, or the causes of housing segregation. These issues are controversial and are still being debated.

Furthermore, Armor's specific recommendations to the subcommittee differ dramatically from the approach taken in the Johnston amendment. He recommended: First, that the Congress commission studies to consolidate evidence showing the feasibility of various types of remedies for school segregation; second, that any new legislation should represent an affirmative step to acknowledge the existence of constitutional violations and to address the need for feasible remedies, rather than legislation that simply opposes mandatory busing; and third, that the courts should be required to use remedies approved by the Congress.

Senator JOHNSTON also relies on a study conducted by James S. Coleman entitled, "Trends in School Segregation, 1968-1973." This highly controversial study identifying the phenomenon of "white flight" has been harshly criticized by a number of prominent social scientists. Dr. Coleman himself has conceded that the conclusions he reached in the paper go beyond the statistical data he gathered. I would like to insert in the RECORD at this point, a July 11, 1975, New York Times article which points to some of the deficiences of the Coleman study. The article states in part:

> Dr. Coleman's contentions were based on a purely statistical study of trends in the 20 largest central city school districts from 1968 to 1973. The crux of his argument is that integration in the first two years, 1968-1970, led directly to a substantial exodus of white families in the following three years, 1970-1973, over and above the normal movement to the suburbs.
>
> However, a thorough check of all 20 cities—in which key officials in each were questioned by telephone—could find no court-ordered busing, rezoning or other kind of coerced integration in any of the cities during 1969-1970 period. Court suits were pending in many, but desegregation was limited to a few modest open enrollment plans, used mostly by blacks. If there was "massive and rapid" desegregation, as Dr. Coleman said, it could not have been due to court-imposed remedies.

For every study purporting to demonstrate that busing has been unsuccessful, there are those which claim it is beneficial to students who have been the target of purposeful discrimination in the schools. How then can we be expected to find an absence of social science evidence?

The Congress has only once addressed the question of whether

schoolbusing is effective, in a comprehensive and responsible fashion. In 1972, the Select Committee on Equal Educational Opportunity found that "our survey of the evidence that is available demonstrates a definitive positive relationship between racial socioeconomic integration and academic achievement of educationally disadvantaged children." It is unfortunate that the Congress has not chosen to update the findings of the select committee, because in a debate of such import there should be current and accurate information. Indeed, I question whether there should even be a vote on this amendment without first having updated the report of the select committee.

However, since we are debating the issue, we should at least weigh all the available evidence. There are, for example, studies which suggest that the white-flight phenomenon studied by David Armor and James Coleman is often attributable to a variety of sociological and economic conditions other than busing. In his appendix to testimony before the Senate Subcommittee on the Constitution regarding the effects of schoolbusing, William Taylor, Director for the Center for National Policy Review, stated:

> The claim that desegregation leads to white flight is limited to school desegregation that occurs in large cities with high proportions of minorities that are surrounded by virtually all white suburbs. White suburbanization preceded school desegregation by several decades. It stems from many causes, including record levels of suburban housing construction; the movement of urban jobs to suburban facilities; and discriminatory housing practices limiting minority access to suburban housing.

Senator JOHNSTON'S amendment is logically deficient as there is no proof before us that busing is a universal failure. Absent such proof, the absolute ban on busing beyond a certain distance, which the amendment proscribes, is not logical.

I am also deeply troubled by the approach of prohibiting the Federal courts from ordering busing where it is constitutionally required. As I read the Constitution, such an attempt to restrict the power of the courts to order a specific remedy is unconstitutional. Consequently, the amendment is also legally flawed.

The amendment purports to be rooted in part in section 5 of the 14th amendment which grants the Congress the "power to enforce, by appropriate legislation, the provisions of this article." But the Supreme Court, in its limited examination of the meaning of the phrase "power to enforce," has indicated that the Congress was given a "positive grant" to adopt legislation which is "plainly adopted to the end" of enforcing equal protection and which is "consistent with the letter and spirit of the Constitution," *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

In Katzenbach, the Supreme Court held that section 4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Puerto Rican residents educated in American-flag schools, was appropriate legislation under section 5 of the 14th amendment. In a footnote to the majority's opinion in that case, the Court stated:

> Section 5 does not grant Congress the power to exercise discretion in the other direction and to enact statutes so as in effect to dilute the equal protection and due process decisions of this Court. We emphasize that Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; Section 5 grants to Congress no power to restrict, abrogate, or dilute those guarantees. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be—as required by Section 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state law.

That this amendment attempts to restrict the equal protection guarantees insured by a long line of school desegregation cases is plain and apparent. The direct and rigid limit on the equitable power of the Federal courts it contains circumscribes a specific remedy which has been construed by the Supreme Court as being essential, in many cases, to the effective elimination of the remnants of State-sanctioned school segregation.

Senator JOHNSTON argues that this amendment restricts only one possible remedy for de jure school segregation and therefore cannot be said to tie the hands of the Federal courts in fashioning alternative remedies for denial of constitutional rights. But Chief Justice Burger wrote in *North Carolina Board of Education* v. *Swann*, 402 U.S. 42 (1971), that "bus transportation has long been an integral part of all public school systems, and it is unlikely that a remedy could be devised without continued reliance on it." On the basis of this premise, the Federal courts have found busing to be constitutionally required in some cases.

This amendment is inconsistent with section 5's requirement that the Congress adopt legislation which is designed, in a positive sense, to extend the rights guaranteed under the 14th amendment. The amendment attempts to restrict what the courts have deemed a sometimes necessary remedy. As a result, it is a violation of the limitations placed on the power of the Congress under section 5 of the 14th amendment, in my view.

A second legal problem, Mr. President, also springs from attempts made in this amendment to exercise the power granted to Congress in article III of the Constitution. If the pending amendment is adopted by the Congress, it will signal a new open hunting season on the Constitution. There are over 30 bills pending in the Congress which would limit the jurisdiction of the Federal courts over constitutional claims relating to school prayer, abortion, busing, and differentiations between men and women in the armed services. If we allow the Congress to curtail Federal court jurisdiction in any of these areas, we will set the stage for an extremely dangerous policy whereby anytime the Congress finds the Court protecting rights which we want to see abrogated, we would simply restrict their power in that particular area.

The effect of such a policy would be twofold. First, we would totally eliminate the Federal nature of our Government. As the Court indicated in *Ableman* v. *Booth*, 62 U.S. (21 Howard) 506 (1958), such actions would have the effect of nullifying the supremacy clause of article VI of the Constitution. The Court reasoned that where there is not a single supreme tribunal with the authority to interpret and pronounce the meaning of the Constitution and of Federal law, "the Constitution and the laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States and the United States would soon become one thing in one State and one thing in another."

Equally damaging would be the erosion of the judicial branch as a check on the other branches of the Federal Government or the States. Today a majority of the Congress takes issue with Federal court's decisions regarding school segregation. Tomorrow the Congress might differ with the Court on its decisions upholding the Bill of Rights. The system of checks and balances which the Johnston amendment threatens is the cornerstone of our Government. Surely we do not want to erode it in this manner, regardless of our individual views on the effectiveness of busing.

Mr. President, Supreme Court decisions requiring social change are often unpopular. This is not the first time that attempts will have been made to restrict the power of the Federal courts which make these controversial decisions. Over the years, however, the Congress itself has recognized the danger of such attacks on the judiciary. For example, in 1957, Senator Jenner introduced a bill to eliminate the Supreme Court's appellate jurisdiction over State rules regarding the admission of applicants to the bar, State actions to control subversive activities, regulations by educational institutions regarding subversive activities by teachers, Federal executions of security programs, and congressional contempt actions against witnesses. The Senate Judiciary Committee struck the latter four limitations,

added several nonjurisdictional amendments to the bill, and reported it to the Senate with the limitation regarding State bar admissions intact. The Senate voted to table the bill, rather than limit the Court's jurisdiction.

In 1964, Senator THURMOND offered an amendment in response to the Supreme Court's Reynolds against Sims decision, which required reapportionment of each House of the State legislatures solely on the basis of population. The amendment would have eliminated both the Supreme Court's appellate jurisdiction and the lower Federal court's original jurisdiction over cases involving questions of reapportionment of State legislatures. The amendment was rejected 21 to 56.

In the 1930's this Nation properly rejected attempts by President Roosevelt to pack the Supreme Court in an effort to implement a mechanism which would give him control over it. As much as many believed in the products he wanted, the process was highly objectionable. To dismantle the integrity of the Court would have been to dismantle the very basis of our system of checks and balances and to jeopardize enforcement of the guarantees of the Constitution. This amendment is the modern version of Court packing.

Mr. President, I ask unanimous consent that a letter addressed to Senator BAKER from the president of the American Bar Association, Mr. Robert Hoffman, be printed in the RECORD. Part of that letter states:

The issue is not busing. The issue is whether as a matter of policy and of Constitutional permissibility, this nation is going to adopt a device whereby each time a decision of the Supreme Court or a lower Federal court offends a majority of both Houses of Congress the jurisdiction of the Federal courts to hear that issue will be stripped away. We do not believe that is a system the framers intended or one that we should strive to institute.

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

DEAR SENATOR BAKER: I am writing to urge our opposition to the Johnston-Helms amendment to the Justice Department authorization bill. This amendment would drastically restrict the jurisdiction of the Federal courts to issue remedies in school desegregation cases, even when such remedies are the only available means of vindicating Constitutional rights against a deliberate and intentional violation of the equal protection clause of the Fourteenth Amendment.

The American Bar Association opposes this amendment because of one overriding conviction: the necessity to protect the integrity of the courts of this nation from misdirected legislative efforts to achieve something that can be done only through Constitutional amendment. The issue is not busing. The issue is whether as a matter of policy and of Constitutional permissibility, this nation is going to adopt a device whereby each time a decision of the Supreme Court or a lower Federal court offends a majority of both Houses of Congress the jurisdiction of the Federal courts to hear that issue will be stripped away. We do not believe that is a system the framers intended or one that we should strive to institute.

The American Bar Association has long opposed efforts from whatever spectrum of the political scene, to alter constitutional interpretation through means other than constitutional amendment. We stood in opposition to the "Court-packing" plan of the late 1930's, which would have altered prevailing law by stacking the Court's membership. More than thirty years ago we called for the adoption of assurance that jurisdictional manipulation would not and could not be used to work substantive changes in the Constitution. In 1958, the Association opposed bills pending in Congress that would have denied the Supreme Court review of decisions involving alleged subversives in various fields. That policy is Association policy today.

Because the policy considerations are so substantial and because the constitutional propriety of these bills is open to such serious reservations, we urge the Senate to oppose the curtailment of the jurisdiction of the Federal courts for the purpose of effecting constitutional change that is properly the province only of the amending process. Irrespective of the subject involved and regardless of our individual beliefs with respect to any of them, the overriding consideration is that we support the integrity and independence of Federal courts, whether we agree with particular decisions or not, and that we support the integrity and inviolability of the amending process.

In view of the above, I urge you and your colleagues to reject the Johnston-Helms Amendment.

Sincerely,

HERBERT E. HOFFMAN.

Mr. LEVIN. I also ask unanimous consent that the resolution of the 50 State supreme court chief justices, who make up the Conference of Chief Justices, be printed in the RECORD. Part of that resolution reads:

the Conference of Chief Justices, without regard to the merits of constitutional issues involved, expresses its concern about the impact of these bills on state courts and views them as a hazardous experiment with the vulnerable fabric of the Nation's judicial systems,

The bills being referred to are the approximately 20 bills pending.

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

RESOLUTION I—RESOLUTION RELATING TO PROPOSED LEGISLATION TO RESTRICT THE JURISDICTION OF THE FEDERAL COURTS

Whereas, there are presently pending in the United States Congress approximately twenty bills that would strip the federal courts, including the United States Supreme Court, of substantive jurisdiction in certain areas involving prayer in public schools and buildings, abortion, school desegregation and busing, and sex discrimination in the armed services; and

Whereas, the Conference of Chief Justices, without regard to the merits of constitutional issues involved, expresses its concern about the impact of these bills on state courts and views them as a hazardous experiment with the vulnerable fabric of the nation's judicial systems, arriving at this position for the following reasons, among others:

A. These proposed statutes give the appearance of proceeding from the premise that state court judges will not honor their oath to obey the United States Constitution, nor their obligations to give full force to controlling Supreme Court precedents;

B. If those proposed statutes are enacted, the current holdings of those Supreme Court decisions targeted by this legislation will remain the unchangeable law of the land, absent constitutional amendments, beyond the reach of the United States Supreme Court or state supreme courts to alter or overrule;

C. State court litigation constantly presents new situations testing the boundaries of federal constitutional rights. Without the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and thus the United States Constitution could mean something different in each of the fifty states;

D. Confusion will exist as to whether and how federal acts will be enforced in state courts and, if enforced, how states may properly act against federal officers;

E. The proposed statutes would render uncertain how the state courts could declare a federal law violative of the federal Constitution and whether Congress would need to wait for a majority of the state courts to so rule before conceding an act was unconstitutional;

F. The added burden of litigation engendered by the proposed acts would seriously add to the already heavy caseload in state courts: Now, therefore, be it

*Resolved*, That the Conference of Chief Justices expresses its serious concerns relating to the above legislation, approves the report of the Conference's Subcommittee of the Committee on State-Federal Relations, and directs its officers to transmit that report, together with this resolution, to appropriate members of Congress.

Adopted at the Midyear Meeting in Williamsburg, Virginia on January 30, 1982.

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

Mr. LEVIN. I thank the Chair. I ask the Senator from Connecticut if he will yield 1 minute.

The PRESIDING OFFICER. Will the Senator from Connecticut yield 1 minute?

Mr. WEICKER. Mr. President, I yield 2 minutes to the distinguished Senator from Michigan.

Mr. LEVIN. I thank my friend.

The bills being referred to in that resolution from the conference of the chief justices are 20 bills which would strip the Federal courts, including the U.S. Supreme Court, of substantive jurisdiction in certain areas involving prayer in the public schools, abortion, school desegregation, busing, and sex discrimination in the armed services.

Mr. President, I ask unanimous consent that a Harris poll recently issued, indicating that the majority of the parents whose children are bused so far as desegregation orders, both white and black, find such orders are working satisfactorily, be printed in the RECORD.

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

MAJORITY OF PARENTS REPORT SCHOOL BUSING HAS BEEN SATISFACTORY EXPERIENCE

(By Louis Harris)

Among the 19 percent of American families whose children have been bused to school as part of the effort to achieve racial balance, 54 percent of the parents say the experience has been very satisfactory, 33 percent say it has been partly satisfactory, and only 11 percent feel it has not been satisfactory. These latest findings are diametrically opposed to the general impression that such busing has been a disaster where it has been tried.

Among the 17 percent of white families who have experienced busing, 48 percent report that it has been very satisfactory, 37 percent partly satisfactory, and only 13 percent unsatisfactory. Among the 40 percent of black families, 74 percent feel that busing has been very satisfactory, 21 percent partly so, and only 5 percent report it has not worked well.

Among the public as a whole, there are signs that the longstanding opposition to busing as a means of remedying segregation in the schools is beginning to diminish:

A 53 percent majority of Americans, blacks and whites, believe that black children would do better "if they all went to school with white children." Only 16 percent feel that black children would do worse, while 18 percent think they would do about the same. Among whites, 51 percent think that black children would do better, 18 percent worse, and 19 percent the same. Among blacks, 67 percent feel their offspring would do better under integrated conditions.

75-22 percent, Americans simply do not believe the claim that "if black children all went to school with white children, the education of white children would suffer, because black children would hold back the white children." Among whites, a 72-24 percent majority discounts this; among blacks a nearly unanimous 92-4 percent disagrees that black children would hold back white children.

Nationwide, 52 percent think that "five years from now, most black and white children will be going to school together." There is a sense that increasing integration is inevitable. Another 27 percent feel that "some but not a lot" of black and white students will be attending schools together, while 16 percent feel "only a few" will be going to school together. There is little difference in how blacks and whites estimate the future of integration. Among whites, 52 percent foresee that most white and black children will attend the same schools, 28 percent think it will be "some but not a lot," while 15 percent say only a few. Among blacks, 53 percent estimate that most children will be attending fully integrated schools five years from now, 24 percent "some but not a lot," and 19 percent "only a few."

These results from the latest Harris Survey of 1,254 adults nationwide suggest that school busing for racial purposes has worked well in most cases and that it will result in increased school integration. There is also a rather deep sense that blacks get a better education when they attend integrated schools and that white children will not be held back educationally if they go to school with blacks.

Yet, when asked whether they would like to see their own children "picked up in buses every day so they could go to another part of town to go to school with children of all races," a 74-21 percent majority of Americans feels such busing would be "too hard on the children." Whites and blacks sharply disagree on this question: by 79-16 percent, whites feel that busing is too hard, while blacks favor it by 61-31 percent.

It seems that the idea of busing to achieve racial balance is unpopular. And yet, those whose children have experienced busing report that it was a satisfactory process that worked out well in the end.

TABLES

Between February 19th and 22nd, the Harris Survey asked a cross section of 1,254 adults nationwide by telephone:

"Do you feel that black children would do better or worse if they all went to school with white children today?"

BLACK CHILDREN DO BETTER IF GOING TO SCHOOL WITH WHITE CHILDREN?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Better | 53 | 51 | 67 |
| Worse | 16 | 18 | 3 |
| About the same (vol.) | 18 | 19 | 20 |
| Not sure | 13 | 12 | 10 |

"It's been said that if black children all went to school with white children, the education of white children would suffer. The reason given is that the black children would hold back the white children. Do you believe that or not?"

EDUCATION OF WHITE CHILDREN SUFFER IF GOING TO SCHOOL WITH BLACK CHILDREN?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Believe | 22 | 24 | 4 |
| Do not believe | 75 | 72 | 92 |
| Not sure | 3 | 4 | 4 |

"Five years from now, do you think right around here most black and white children will be going to school together, some but not a lot, or only a few will be going to school together?"

MOST BLACK AND WHITE CHILDREN GOING TO SCHOOL TOGETHER 5 YEARS FROM NOW?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Most | 52 | 52 | 53 |
| Some but not a lot | 27 | 28 | 24 |
| Only a few | 16 | 15 | 19 |
| Not sure | 5 | 5 | 4 |

"Of course, because of where they live today, many black children go to all-black schools and whites go to all-white schools. Would you like to see children in your family be picked up in buses every day so they could go to another part of town to go to school with children of all races or would that be too hard on the children?"

BUSING TOO HARD ON CHILDREN?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Picked up by buses | 21 | 16 | 61 |
| Too hard on children | 74 | 79 | 31 |
| Not sure | 5 | 5 | 8 |

"Have any of the children in your family been picked up by bus to go to a school with children of other races, or hasn't that happened?"

CHILDREN IN YOUR FAMILY BEEN BUSED?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Been picked up by bus | 19 | 17 | 40 |
| Not happened | 70 | 72 | 53 |
| No children in school (vol.) | 10 | 10 | 6 |
| Go to private schools (vol.) | (1) | 1 | 1 |
| Not sure | 1 | (1) | (2) |

[1] Less than 0.5 percent.
[2] No response.

"How did the busing of children in your family to go to school with children of other races work out—was it very satisfactory, partly satisfactory, or not satisfactory?" (Base: "been picked up by bus.")

BUSING OF YOUR CHILDREN SATISFACTORY?

[In percent]

| | Total | White | Black |
|---|---|---|---|
| Very satisfactory | 54 | 48 | 74 |
| Partly satisfactory | 33 | 37 | 21 |
| Not satisfactory | 11 | 13 | 5 |
| Not sure | 2 | 2 | |

Mr. LEVIN. I very much thank my friend from Louisiana for his patience both with my questions and with my voice.

Mr. JOHNSTON. Mr. President, will the Senator yield for a question?

Mr. LEVIN. I yield.

Mr. JOHNSTON. When his time runs out then on my time.

Will the Senator yield? First of all, I would observe that the letter from the American Bar Association really had reference to article III jurisdictional cases or legislation and not to section 5 of the 14th amendment cases.

Second, I would observe that the Harris poll is not inconsistent with polls which over a period of a decade have by margins of at least 3 to 1 of the American public soundly disapproved of busing; am I correct on those two points?

Mr. LEVIN. I must admit that I was surprised by the size of the results of the Harris poll myself. I do not know what other polls show. I think it would show that busing is unpopular with most Americans. But the point is it does not always fail, and sometimes it does work. This amendment is retroactive, and we would have, unduly have, instances under this amendment where it has worked as well as those cases where it has not, and I think that is a much broader sweep than the Congress should be engaged in.

I also, in terms of the first question. believe that the amendment is offered to the Congress not just under section 5 but also under article III. I believe both are cited in the amendment that is before us.

Mr. JOHNSTON. The Senator is correct.

Let me ask one final question: The Senator stated he opposed busing in Detroit, even went to court to oppose it. The circumstances cited were a black-white ratio of 75 to 25, and the Senator feared that there would be white flight if the order was entered. I believe the order was entered, and I believe that white flight did occur. I believe the Senator would now be convinced that he would be vindicated in his judgment that the order was improvidently entered and should not have been entered; am I correct on that?

Mr. LEVIN. The Senator's statement is generally correct.

Let me say that I opposed the order being entered. I opposed the order being entered because I believed in that instance it would not achieve the goal of limiting segregation but would promote resegregation. That is why I opposed the order.

But there are other orders by other Federal courts where busing is used which will not have the effect of promoting segregation. This amendment touches those orders as well.

Mr. JOHNSTON. That is in somebody else's State.

Mr. LEVIN. Also in my State, may I say. We have busing orders in Michigan, so I am not just talking about other States. What I am talking about are other situations about which I have read where the orders have been effective, where the communities feel they have benefited, and where the orders would be undone.

Mr. JOHNSTON. I understand the Senator's point on that. But my question now is, Did not the court in that case obviously feel that it was bound by Supreme Court decisions to enter that order that the Senator thinks was improvidently entered?

Mr. LEVIN. I think the court wrongfully felt that and was corrected by the court of appeals, as I remember it. I hope my memory is correct on it. The order of the lower court was returned to the lower court by the court of appeals for further consideration in light of Supreme Court opinions, I believe. I hope my memory is correct. I should know that by heart. I may be wrong, but I think that is what happened.

Mr. JOHNSTON. Mr. President, I ask the Senator, finally, what would be his remedy? What should we do if courts do enter these orders? And let me tell you that all across Alabama they enter these orders. In Baton Rouge, this morning 6-year-old children are being bused 1½ hours in one direction. That is improvident. I would go so far as to say that is virtually idiotic. Any policy of any country that requires that ought to be reversed. How would the Senator reverse that kind of nonsense?

Mr. LEVIN. I would adopt the Senator's subsection 5, which says that the assignment of students to public schools closest to their residence, neighborhood public schools, is the preferred method of public school attendance and should be employed to the maximum extent, consistent with the Constitution of the United States.

I buy that wholeheartedly, either that or I would amend the Constitution, but I would not try to amend the Constitution by legislation because that is not the proper way to do it.

Mr. JOHNSTON. The Senator does feel that there is a place and a power of the Congress under section 5 relating to busing. The Senator's disagreement is as to the reach of this bill. It overreaches what the Senator thinks is "appropriate legislation" as that term is used in section 5 of the 14th amendment?

Mr. LEVIN. I think we can enforce section 5 through legislation. I do not think we can hobble it, reduce it, diminish it, and I think that is clearly the effect when you remove one extension for enforcing. There is no way I could see logically that removing the injunction sanction is a way of enforcing the Constitution. That, to me, violates all logic and I believe also violates the Supreme Court decision in the Katzenbach against Morgan case.

Mr. JOHNSTON. I thank the Senator.

Mr. LEVIN. I thank my friend. I also thank my friend from Connecticut for yielding me additional time. I hope that this latter colloquy comes off the time of the Senator from Louisiana: I expect that it does.

Mr. JOHNSTON. Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Louisiana reserves the remainder of his time.

The Senator from Connecticut.

Mr. WEICKER. Mr. President, first, I compliment the distinguished Senator from Michigan for bringing into question that section of the amendment which sets forth congressional findings of fact which indeed are neither findings nor facts. Nobody that I know of in the U.S. Senate has done the necessary investigative work to arrive at any conclusions, much less these conclusions. And of course when it comes to those school districts that, again, by virtue of their history, in fact, defy the conclusions therein, there are many across the United States where the remedies of the court have succeeded.

In any event, I choose to debate this matter on another aspect and only want to compliment the work done and the comments made by the distinguished Senator from Michigan as to the section of the bill that relates to findings of fact.

Now, Mr. President, this issue commenced on June 16, 1981. And I would expect that this exercise in unconstitutionality by the distinguished Senator from Louisiana and the distinguished Senator from North Carolina will end up in their favor before the afternoon is up. But I think anybody makes a serious mistake if they look upon it as any more than one more stop along the way to the eventual disposition of the bill.

I remember on June 16, it was reported in the media that this matter would be resolved in a matter of 24 to 48 hours. It is now February 4, 1982, and the matter has not been resolved and the matter will not be resolved either today or this week or this month, and it should not be.

I am surprised, during this conservative era, at the concern exhibited on behalf of lawbreakers by Members on the floor of this Chamber. And that is what we are talking about—lawbreakers. This remedy does not even come into play unless somebody has been found guilty of breaking the laws of the United States of America; in this particular instance, found guilty of discrimination.

Now, maybe that does not have the flair to it that murder does or rape does or bank robbery does, but we are still talking about breaking the law.

This is supposed to be the law-and-order Congress, the law-and-order administration, and yet all this time is being spent on an overweening concern for lawbreakers.

We are told of the importance to this Congress of the social issues—the social issues defined as busing, the social issues defined as abortion, the social issues defined as prayers in school. I would suggest to my colleagues that a true definition of the social issues to the rest of the country, if not to the Members of this Chamber, are unemployment—that is a social issue; interest rates—that is a social issue; bankruptcy of small businesses—that is a social issue. These are the social issues that are impacting on the lives of millions of Americans and in a devastating way. And yet what is this Congress up to? Spending its time trying to unearth the bitternesses of decades past, to exhume the corpse and to revel in it. There is not one Member on this floor—with the possible exception of the two principal sponsors, and even maybe they have doubts—that would not recognize that what we are spending time on, what we will pass, will eventually be termed unconstitutional.

Every impartial, outside individual or entity with knowledge in the area

of the law clearly marks it as being unconstitutional.

The American Bar Association, both as an association and through its leadership, has consistently decried this type of effort ever since it was proposed in June.

I noticed the following in an article in the Washington Post of January 24, 1982, entitled, "ABA Head Sees Crisis for Courts."

American Bar Association President David R. Brink warned today that legislation before Congress to strip the federal courts of jurisdiction over controversial social issues could "lead to the most serious constitutional crisis" since the Civil War.

He called on attorneys, because of their "special responsibility as guardians of the rule of law" to declare battle against these proposals, which he said were "almost unbelievably" making unexpected headway in Congress.

Conservatives have introduced at least 32 proposals in Congress to remove federal court authority in such controversies as abortion, school busing and school prayer in retaliation for Supreme Court rulings they consider objectionable. Such bills generally would leave these matters to the state courts, where conservatives say they think they will have better luck.

I ask unanimous consent, Mr. President, that the article already quoted a similar article in the New York Times, and others to be quoted in the next several minutes be printed in their entirety in the RECORD.

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

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

ABA HEAD SEES CRISIS FOR COURTS

(By Fred Barbash)

CHICAGO, January 23.—American Bar Association President David R. Brink warned today that legislation before Congress to strip the federal courts of jurisdiction over controversial social issues could "lead to the most serious constitutional crisis" since the Civil War.

He called on attorneys, because of their "special responsibility as guardians of the rule of law" to declare battle against these proposals, which he said were "almost unbelievably" making unexpected headway in Congress.

Brink made his remarks in a speech to the National Conference of Bar Presidents, meeting here along with the American Bar Association.

Conservatives have introduced at least 32 proposals in Congress to remove federal court authority in such controversies as abortion, school busing and school prayer in retaliation for Supreme Court rulings they consider objectionable. Such bills generally would leave these matters to the state courts, where conservatives say they think they will have better luck.

Brink's statement was unusually strong for the head of an organization that prides itself on moderation on political issues. The ABA is run largely by lawyers with large commercial law firms. But the growth in power of conservatives, often on the strength of issues involving the law and the courts, has placed the ABA increasingly in the role of protester.

The organization has waged a massive effort against President Reagan's efforts to eliminate federally financed legal services.

Brink said the fight against the court-stripping bills would be the second "great fight" of this period. "We must join as partners and companions in arms," he said.

These proposals, Brink said, "threaten elimination of the third branch of federal government, the judicial branch." He said they also threaten "the Constitution as the supreme law of this land. And if we lose that, we lose our system of government."

Giving each state court system exclusive jurisdiction over the issues, he said, would "convert America into a kind of league of independent states instead of one nation."

Brink asked each state and local bar association to follow the lead of the ABA and adopt resolutions against such legislation. He also asked that lawyers engage in "a massive letter-writing campaign and personal visits to members of Congress."

The bars, he said, should also fight similar proposals now circulating in state legislatures to take jurisdiction away from state courts over these matters.

---

[From the New York Times, Jan. 25, 1982]

LEADING LAWYERS DEFEND THE COURTS

(By Stuart Taylor, Jr.)

CHICAGO, January 24.—The American Bar Association, characteristically gray, pinstriped, businesslike, and traditionalist as its mid-year convention plods through a frigid weekend here, is uncharacteristically worried about the future the legal system.

David R. Brink, the association's president, is a careful man who rose to senior partner of the largest law firm in Minneapolis by helping affluent clients plan their estates. Yet he has been warning in speeches, news conferences and interviews here that "we are confronted at this very moment with a legislative threat to our nation that may lead to the most serious constitutional crisis since our great Civil War."

It is not the radicals of the left, the bugaboos of past A.B.A. presidents, about whom Mr. Brink and other dignitaries of the legal establishment have been sounding alarms.

NEW RIGHT WORRIES LAWYERS

They are worried about the "new right," led by Senator Jesse Helms, Republican of North Carolina, and the fundamentalist Moral Majority. These groups are pushing more than 30 proposals in Congress that leaders of the bar association say may damage or destroy the power of the Federal courts to safeguard Constitutional rights.

And sometimes they worry about the Reagan Administration, with which the 290,000-member association has a correct but cool relationship. The coolness came from a bitter fight in Congress over Administration efforts to abolish direct Federal financing of legal services for poor people.

The bar association has not been known for advocacy of liberal social causes. Thus it may indicate how far the balance of power in Washington has shifted that the nonpartisan bar association finds itself allied on many major issues with liberatarians and civil rights groups. These unlikely allies are fighting the proposals of Congressional conservatives, and, in some cases, of the Administration.

The foremost threat to "the rule of law," according to Mr. Brink and other lawyers, comes from a strong push by Senator Helms and other Congressional conservatives to strip the Supreme Court and the lower Federal courts of the power to decide cases involving such "social issues" as busing, abortion and school prayer.

"These proposals challenge our Constitution, our separation of powers, our system of American government and our identity as one nation," Mr. Brink said here in a speech.

"They threaten the elimination of the third branch of Federal Government, the judicial," Mr. Brink said. If enacted, he continued, they could lead to "a terrible confrontation" between Congress and the Supreme Court, and especially if the Court agreed with Mr. Brink's view that the proposals were unconstitutional.

Mr. Brink said in an interview that he had asked Attorney General William French Smith to oppose the legislative attacks on the Federal courts.

REAGAN CRITICAL OF JUDGES

Mr. Smith, who is to give a speech here tomorrow, and President Reagan have joined with the conservatives in assailing judicial activism. In particular, they have criticized the Supreme Court's decisions establishing constitutional rights to abortion and requiring school desegregation through busing. But the Administration has taken no position on proposals to strip the courts of jurisdiction over these issues.

Other issues on which the bar association does not see eye-to-eye with the position of some conservatives in Congress and the Administration include these:

The battle over legal aid, with the association leading opposition to the Reagan Administration's proposal to eliminate direct Federal financing.

An Administration proposal to allow unconstitutionally seized evidence to be used against criminal defendants, if a search was conducted in "reasonable, good-faith belief" that it was legal. An association group has opposed this as a dilution of the rights of defendants.

The proposed Federal equal rights amendment. The association supports it; the Administration opposes it, on the ground that it would give courts too much power to strike down laws making distinctions between men and women.

In an interview, Mr Brink was quick to reject a suggestion that the bar was becoming politically liberal.

"We're an apolitical organization," he said. "We're not liberal or conservative or anything else. We're interested in the Constitution and the rights it creates, and the role of the courts as protectors of those rights."

Mr. WEICKER. On February 2, 1982, an article in the Washington Post entitled "State Justices Reject Sole Power Over Social Issues," states as follows, in part:

The chief justices of the state supreme courts, in an unusually strong and unanimous resolution, have condemned the many bills before Congress which would strip the federal courts of power to rule on controversial social issues such as abortion, busing and school prayer.

They also served notice on conservatives that turning these issues over to the state courts, as these bills would do, will not produce the intended result of overturning Supreme Court rulings on busing, legalizing abortion or banning prayer in public schools but will, instead, probably cast them in concrete.

The bills "give the appearance of proceeding from the premise that state court judges

will not honor their oaths to obey the U.S. Constitution," the Conference of Chief Justices said, "nor their obligations to give full force to controlling Supreme Court precedents.

"If the proposed statutes are enacted," the resolution said, those rulings "will remain the unchangeable law of the land . . . beyond the reach of the U.S. Supreme Court or state supreme courts to alter or overrule."

I ask unanimous consent that the article be printed in the RECORD at this point.

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

STATE JUSTICES REJECT SOLE POWER OVER SOCIAL ISSUES

(By Fred Barbash)

The chief justices of the state supreme courts, in an unusually strong and unanimous resolution, have condemned the many bills before Congress which would strip the federal courts of power to rule on controversial social issues such as abortion, busing and school prayer.

They also served notice on conservatives that turning these issues over to the state courts, as these bills would do, will not produce the intended result of overturning Supreme Court rulings on busing, legalizing abortion or banning prayer in public schools but will, instead, probably cast them in concrete.

The bills "give the appearance of proceeding from the premise that state court judges will not honor their oaths to obey the U.S. Constitution," the Conference of Chief Justices said, "nor their obligations to give full force to controlling Supreme Court precedents.

"If the proposed statutes are enacted," the resolution said, those rulings "will remain the unchangeable law of the land . . . beyond the reach of the U.S. Supreme Court or state supreme courts to alter or overrule."

The resolution is expected to carry significant weight because under the bills, the state courts headed by these judges would have sole authority to rule on busing, abortion and other volatile subjects. The judges' resolution said they do not want that authority and regard the legislation as "a hazardous-experiment with the vulnerable fabric" of the nation's judicial system.

The Conference of Chief Justices passed the resolution at a meeting at the National Center of State Courts in Williamsburg, Va., last weekend.

Lawrence H. Cooke, chief judge of New York State and chairman-elect of the conference, said every state was represented and there was no dissent when the vote was taken Saturday.

There are at least 30 court-stripping bills before Congress, some due for floor debate within the next few weeks. Congressional conservatives, led by Sen. Jesse Helms (R-N.C.), are pressing the bills as alternatives to the more difficult process of overruling Supreme Court decisions by amending the U.S. Constitution. Most scholars say the effect would be to throw all the issues into the state courts for resolution where conservatives hope they will have better luck.

The resolution said, such a situation, besides clogging the state courts with new cases, would make the Constitution "mean something different in each of the 50 states" and cause "confusion" throughout the judicial system about the balance of state-federal judicial power.

Mr. WEICKER. There may be a political end to all of this, and I am sure that is why we are here spending the time. It is not popular for anybody to stand up here and defend the proposition called busing. But I think we do have a great obligation, as stated by the State supreme court justices, in the sense of our oath of office to uphold the Constitution of the United States. That is the issue before the U.S. Senate.

I gathered in the dialog between the distinguished Senator from Michigan and the distinguished Senator from Louisiana (Mr. JOHNSTON), that the Senator asked what should we do. We have always had it in our power as a Senate to do anything at all in terms of righting the wrongs brought about by discrimination.

What are we going to do? We make the laws. We control the money. We set the policy. The fact remains that we have not done any of these things so the matter goes to the Supreme Court, the Supreme Court acts, and we do not like what they do. So we want to nullify that. If we nullify that, we will sit right back and continue to do nothing.

But the Constitution, you see, does not allow you to do nothing. It says that there shall be equal opportunity and that we all have equal rights. If those rights are being denied, you just cannot sit back and do nothing.

That is the final upshot of what is being done here, to do nothing. If somebody is murdered on the street, do you do nothing? If somebody is raped, do you do nothing?

What? The destruction of the Constitution because it is a little more sophisticated, a little more difficult to understand? That makes its destruction something less than the destruction of human life? Not at all. What gives value to life are the principles espoused in the Constitution and when they go, you do not sit back and do nothing.

The reason why this has to be fought on the floor of the U.S. Senate is so that we cannot complain when the courts take action in the absence of our action.

It is very easy to pass the buck, to let the President do it. We all know the President is not going to do anything in this area. What appalls me is not that he believes in policies that are different from my own beliefs, but he certainly has an obligation by the powers of his office. He can exercise through the powers of the Executive, or he can create through the powers of the Executive, those policies which tend to back off and make a full commitment to civil rights. That is his privilege. It is the privilege of every Member on the floor.

But I can assure each one of my colleagues that if anybody tries to erode the powers of the U.S. Senate there would be a hue and a cry and we would say, "No."

This President is quite satisfied to let part of his office float out to sea. That should be his bother and concern, not mine.

But it is going to come to pass that there will be other men and women sitting in his chair, in his office. I want to make sure that they have every bit of power that was given to him by his predecessor, because these powers, taken in conjunction with each other, the legislative branch, the executive branch, and the judicial branch, are what give a guarantee, the fullest guarantee, to the rights of all Americans.

We are not safe from all power in any one of those branches, and sometimes two of them fail us. But never have three of them failed us.

That is the issue before us. Yet this amendment attacks two of those branches, both the executive in limiting what it is the Justice Department can do, and the judicial in the sense of what the courts in this Nation can do.

Really, is there any American who wants to leave their entire fate and all of their rights in the hands of the Senate and the House of Representatives of the United States of America? We are very good as to polls and very good as to trying to articulate and manifest the tempers of the times. Really, I think history shows us we are a little short on that area called courage. That, more than anything else, is needed in defense of the Constitution of the United States, because that is the toughest document you can possibly imagine insofar as what it demands of each one of us and the Nation.

No, I do not want my fate left in the hands of the Senate of the United States and the House of Representatives, because I realize they might one day fall short, as they have more often than not. I want to make sure that I have a second arrow in my quiver, the executive branch, and even a third, the judicial branch. Indeed, when it comes to tough decisions, more often than not history shows it has been the judicial branch that has stepped in on behalf of all of us and the rights that are ours under the Constitution of the United States.

To leave the constitutional arguments that I have tried to put forth this afternoon, let us for 1 minute try to bring our judgment of busing back into the framework of the times when it was ordered and the times that have transpired since.

Brown against the Board of Education was a 1954 case. Is there anybody who will deny the dramatic change that has taken place in education in the past 28 years? That is the bottom line.

Do you think that is the same system out there? Do you think the same people are getting educated? Do you think the same people have the opportunity today they had in 1954? No way.

There are thousands of Americans that have opportunities available to them because of our great public education system and the opportunities presented therein and the lack of discrimination therein—thousands, hundreds of thousands, that could look upon their future back in 1954 as consisting of nothing more than the most menial and physical of tasks.

That is the bottom line, Mr. President. Ah, now we have become more affluent. Now there are enough out there in terms of minorities that have succeeded that maybe we can try this little experiment once again to narrow the scope of vision and idealism that resides in each one of us. Let us try it. Maybe it is time we do have a minority. Maybe we have just lopped off the numbers so there is not such a large crowd out there still knocking on the door of opportunity.

That is what this is all about. That is what the mood of the Nation is all about.

Sooner or later, again as was hinted at in the remarks of the distinguished Senator from Michigan, if we follow this precedent, it will be some other portion of our society that has become unpopular, not deserving of the majority opinion or the politicians' efforts or the results of polls. Maybe it will be the elderly or maybe it will be the retarded. Maybe it will be the workingman, the laborer. Maybe it will be the politician. Maybe it will be the news media.

There is no end to this mischief once it starts and for anybody to think that they will be immune flies in the face of all history for all nations.

It was John Bonne's words, "I am mine own executioner." That is what we are talking about here as a nation that has been given everything in terms of our opportunity and our rights. We do this to ourselves when we think we do it to someone else. That is the issue here today. And there will be many more uncomfortable moments if we follow that Constitution. But I sure would rather be uncomfortable than have nothing, and nothing is exactly what is assured to us by the narrowness of how we view our fellow citizens, how we perceive them through the lens of that Constitution.

I hope the amendment will be defeated, Mr. President, but if it is not, there will be ample opportunity in the months ahead to discuss the issue further. It is not going to become law. They can all sit there and drool with their tongues hanging out at the prospect that we are going to engage in a little narrowing of the American dream, but it is not going to happen. It is not going to happen.

Yes, there will be separation of church and State and the first amendment is not going to get whittled down.

Maybe this is all great for getting votes, but it surely is not doing much for the country in its present state. And when we are all through with it, I guarantee one thing: The policies might have changed, the laws might have changed in the sense of what is on the books in the new conservative attitude, and maybe some of the economics will change; but the Constitution will be exactly on December 31 of this year as it was on December 31 of last year and December 31 of the year before. The only thing that I would like to see is that situation brought about by the courage of the men and women on this floor, rather than having the Supreme Court of the United States do it for us.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. JOHNSTON. Mr. President, this bill has rumbled on now for many months. We have had debates and we have been told about political courage, we have been told about the great promises of the Constitution. We have debated everything here on the floor except busing.

Is it not interesting, Mr. President, that in all of these months, the opponents of this amendment, to my judgment, have not once gotten up and tried to defend busing as an institution, as a remedy that works, either as something that achieves educational goals, or indeed, as something that achieves desegregation? Not once have the opponents of this amendment gotten up and said that busing works, that busing is useful, that busing is necessary to bring about and vindicate the promises of the 14th amendment.

Is there a case to be made, Mr. President? Of course, there is not a case to be made. We all know that. The American people know that. That is why, in every public opinion poll, by 3-to-1 margins, they have been against it—because they know it does not work.

The experts know that, Mr. President, I hate to repeat these matters ad nauseum, but listen to what James J. Coleman says. He says:

> It was once assumed that segregation, at least in majority middle-class white schools, would automatically improve the achievement of lower-class black children. I hasten to say that it was research of my doing that in part laid the basis for this assumption. It turns out that school desegregation, as it has been carried out in American schools, does not generally bring achievement benefits to disadvantaged children.

He also says:

> It was once assumed that policies of radical school desegregation could be instituted such as a busing order to create instant racial balance and the resulting school populations would correspond to the assignments of students to the schools, no matter how much busing, no matter how many objections by parents to the school assignments. It is now evident that despite the unwillingness of some to accept the fact, there are extensive losses of white students from large central cities when desegregation occurs.

Mr. President, we could go on and on. Mr. Armor states there is "overwhelming social science evidence that mandatory busing has failed as a feasible remedy for school desegregation." Overwhelming evidence.

Mr. President, just listen to this. I ask my colleagues to listen to a few short paragraphs. I shall quote, then tell who said it.

> In a case involving a school district in Alabama, however, the Court of Appeals for the Fifth Circuit approves a plan "that will probably result in an all-black student body where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited." Even though the court acknowledged that the remedy was self-defeating, it ordered the plan implemented unless the local school board could come forward with a plan equally effective in eliminating one-race schools."

It goes on to say:

> The pursuit of racial balance at any cost—the unintended legacy of Green—is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems.

Who was that? Mr. Justice Powell of the U.S. Supreme Court, speaking in the case of Estes against Metropolitan Branches of the Dallas NAACP in a 1979 case.

Mr. President, it is no wonder my colleagues do not defend busing, because it cannot be defended. There is no evidence to support it. The Supreme Court itself says that they do not look at the effect of busing, but they march in lockstep to these sets of decisions, started in the late sixties, which, in turn, were based on studies like Mr. Coleman's study. It has been proven, and the facts show, that what Mr. Coleman said back in the sixties was not so. Mr. Coleman says to himself.

Mr. President, if the American people oppose busing, as they have for 10 years, by margins of more than 3 to 1; if indeed the black community opposes busing, as the NBC poll taken this last year shows, by a margin of 47 to 44; if the margin of those who feel strongly is about 60-40 against busing even in the black community, and if it does not work for education; that is, it hurts education, as Mr. Justice Powell, Mr. Armor, Mr. Coleman, and a whole range of experts say; then are we powerless to do anything about it? Can we simply wring our hands here in the U.S. Senate and say the Constitution requires it?

Mr. President, in the first place, there is no decision of the U.S. Supreme Court that elevates busing to the level of a constitutional right. There are, indeed, many decisions which require it. What is elevated in all the decisions of the U.S. Supreme Court to the level of constitutional rights is the right to be free of discrimination and the need to eliminate segregation and the need to create unitary school systems. That is the constitutional right, not the right to bus.

So, what we are dealing with in this amendment, Mr. President, is a remedy—a remedy.

We are exhorted about the meaning of the Constitution, and those of us who back this amendment are told that the Constitution says only one thing: that it requires busing, and no matter how idiotic, no matter how counterproductive that policy is, there is nothing we can do about it as the elected representatives of the people of the United States.

Mr. President, I say to my colleagues, if they believe that, they are not reading the whole Constitution.

Section 5 of the 14th amendment is also a part of the Constitution. Indeed, it was there more than 100 years before the Green case and the Swann case, which first discovered the remedy of busing. It says that Congress shall have power to enforce this article by appropriate legislation.

Mr. President, there are decisions which, if one reads the language, would seem fully to support the conclusions of this amendment.

I should like to read a couple of short paragraphs from the latest decisions. Katzenbach against Morgan was a 1966 case involving Puerto Rican voting rights in New York. The Court had previously ruled that under the 14th amendment the New York literacy law was perfectly valid and perfectly legal.

Along came the Voting Rights Act of 1965, and Congress, exercising its power under section 5, declared, in effect, that New York's law was illegal. So that Congress went beyond what the Supreme Court had already said did not violate the Constitution, and yet the Supreme Court in Katzenbach against Morgan, a 1966 case, upheld the power of Congress.

What they said was this:

> By including section 5 the draftsmen sought to grant to Congress, by specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Article I, section 8, cl. 18.
>
> Correctly, viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Whether and what legislation is needed."

Four years later, the Court came along and decided the case of Oregon against Mitchell, a 1970 case. Here is what they said there:

> The manner of enforcement involves discretion; but the discretion is largely entrusted to Congress, not to the courts.
>
> The power of Congress in section 5 is to "enforce" the Equal Protection Clause was sufficiently broad, we held, to enable it to abolish voting requirements which might pass muster under the Equal Protection Clause, absent an act of Congress.
>
> But the choice of appropriate remedies is for Congress and the range of available ones is wide.

Mr. President, to read that kind of language, it seems beyond any argument that there is a broad range of discretion to be exercised by Congress, that we are not powerless—that part of the same Constitution we are exhorted to obey gives Congress the right to choose among various remedies.

Mr. President, what we have done in this bill is to try to fashion a remedy that will work. We want to eradicate segregation, root and branch, as the Court often has said. We want to eliminate discrimination. But we also want a remedy that will work to do that.

What good does it do, Mr. President, to prescribe a remedy that does not work? It was with the best of intentions that doctors in medieval times often used the leech to remove what they saw as the cause of the problem; that is, impure blood. So they would put leeches on a person, in spite of the evidence that all it would do was make them weaker. For decades, indeed for centuries, the leech was used, when any observant person could see that leeching hurt the patient rather than helped the patient.

Mr. President, long distance busing is a leech on the educational system in this country. I do not need David J. Armor and James J. Coleman to tell me that. I can go home to my hometown of Shreveport, La., where they defeated a tax election greatly needed by the school system because public support for education is gone with long distance busing.

I do not need an expert to tell me that it is not working in Baton Rouge, La., when the superintendent tells me that 6-year-old kids are bused an hour and a half in one direction. That is 3 hours all together. Just how much attention span and energy and intellectual drive do they think 6-year-old kids have after 3 hours on the school bus?

So, Mr. President, let us do away with this remedy of leeching on our school system. Let Congress find facts and exercise discretion, as the courts say we have the right and the power to do. Let us fashion a remedy that says experience teaches and the evidence teaches that, basically, the neighborhood school system works the best, that it works the best with a limited amount of busing to be authorized, 5 miles or 15 minutes; that you continue to eliminate discrimination in the way you draw your districts.

We endorse that in this bill. We give to every child the remedy they have had under the Constitution for some years now to go to whatever school they wish, regardless of whether it is in their district or not.

We encourage in this legislation the magnet school, the vocational school, the other kinds of special education schools, and endorse busing as a way to get there.

Mr. President, there are many things that can be done more effectively than to use the leech on this patient, than to use the remedy of busing. We are saying let us get appropriate legislation to implement the real goals and the real thrust of the 14th amendment.

With this legislation we can promote integration—or should I say we will really promote desegregation; and we will promote education by bringing back into the school system those tens of thousands, those hundreds of thousands of students who have left the school system because the remedy has not worked. It has resulted in the sickness and in some instances in almost the death of the patient. Let us promote education and adopt this amendment.

I reserve the remainder of my time.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 7 minutes and 43 seconds.

Mr. WEICKER. Mr. President, I shall ask a very brief question of my good friend from Louisiana on the findings of fact. "The Congress finds * * *"—who found? What committee? Is this prospective or has someone actually done something which has been accepted by the Senate?

Mr. JOHNSTON. At about, I think it is 1:30 this afternoon, this Senate will vote, and that is a finding, and that is the only way of which I know that Congress can find facts, which is to pass it on the floor of the Senate and then hopefully pass it on the floor of the House of Representatives. At that point we will make a finding.

Mr. WEICKER. But there has been no committee work or no one has gone down and prepared any report, have they, just our vote?

Mr. JOHNSTON. There has been committee work and there has been so much work on this question and so many studies that I put in a bibliography which came off the computer tape—and it stretched all across the room—on articles on this very subject. I put in the bibliography and put in a stack of studies this thick, and they heard also from the witnesses them-

selves. There is a surfeit of studies and information on the subject.

Mr. WEICKER. There might be a surfeit of opinion, but there certainly is not surfeit of fact as established by the Senate.

Let me say this: If busing is a leech on the body politic, then discrimination and racism are the dracula, if you will, on both the Constitution and the body politic.

Mr. JOHNSTON. I agree with that.

Mr. WEICKER. That is what we are talking about. That is how the American body politic has been weakened, because all of its citizens have not had that same opportunity for education and what lies beyond education.

I think it is clear what has been going on here, if we take a careful look at the record and put it all together in these difficult times. In times past it was very difficult to get the big picture because each individual fact was so spectacular. The same is true right now with the issue that confronts us. It has gone on for about the past year. The Voting Rights Act is being watered down. Leave that off by itself. But then let us hook it up to other things that are happening.

Funding for the Equal Employment Opportunity Commission is cut back.

Arthur Flemming, one of the most articulate and committed individuals to the cause of civil rights, was dismissed. There are tax exemptions for segregated schools.

Now this type of legislation on the floor comes up. Put it all together and what does it spell? It is pretty clear to me. This is not some sort of a strategic withdrawal of the commitment to civil rights and individual rights. It is an absolute rout.

I for one stand here with many of my other colleagues saying that this is what is wrong; indeed, no greatness lies in that particular act.

This is best phrased in more constitutional terms, however, by a report of the Association of the Bar of the City of New York.

I ask unanimous consent to have printed in the RECORD the report of the Association of the Bar of the City of New York in its entirety.

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

[The Association of the Bar of the City of New York]

JURISDICTION-STRIPPING PROPOSALS IN CONGRESS: THE THREAT TO JUDICIAL CONSTITUTIONAL REVIEW

(By The Committee on Federal Legislation)*

INTRODUCTION

Central to our system of government, and to its success, is the principle of separation of powers and the elaborate system of checks and balances that prevents any organ of government from exceeding its authority or infringing the rights of the people. The federal judiciary has long played a central role in that scheme by exercising the power of judicial constitutional review—by which we mean judicial determinations, in cases properly brought by parties having standing, or whether actions by the political branches of the federal government or by the states conform with or contravene our supreme law, the United States Constitution. It is principally through the mechanism of judicial constitutional review that the Constitution's limitations on the political branches of government are enforced. Alexis de Tocqueville observed.

"I am inclined to believe this practice of the American courts to be at once the most favorable to liberty and to public order. . . . [T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."

The barrier against tyranny" praised by de Tocqueville nearly two centuries ago is today under attack by newly powerful forces in Congress. There are pending in both houses of Congress at least 25 bills that, if enacted and upheld as constitutional, would have the effect of scrapping the federal courts' historical role in the system of checks and balances. These bills, listed in the Appendix to this Report, would divest the federal courts of all original and appellate jurisdiction to hear cases relating to (1) the constitutionality of programs of "voluntary" prayer in the public schools or other public places, (2) the constitutionality of laws or regulations affecting abortions, (3) busing as a remedy for school segregation, and (4) the constitutionality of treating men and women differently in connection with the armed forces or the draft. One bill, H.R. 114, may be read to go even further—to eliminate all federal judicial review of state court decisions.

In this Report, we do not address the merits of the various federal court decisions on these subjects that have prompted the proposed legislation, nor do we analyze the individual bills in detail. Rather, we address a question that is raised by all such proposals: Is the elimination of federal court jurisdiction to hear constitutional claims a lawful and appropriate response to judicial decisions of which a current majority in Congress disapproves? That question is fundamental to the structure of our government because, if Congress can legitimately curtail the federal courts' jurisdiction to hear constitutional claims concerning such specific issues as school prayer, abortion, and desegregation, then there is no principled limitation on Congress' power effectively to eliminate the judicial branch as a check on the other branches of the federal government or the states. By enacting any of the present bills, Congress would necessarily be claiming the power, should it so choose, to forbid the federal courts to hear *any* claim asserted under the Bill of Rights or under any other provision of the Constitution.

Although most of the proponents of these bills generally style themselves as "conservatives," our reveiw of the historical record reveals that their proposals are *radical* in the most extreme sense of that word. They would not only cast doubt upon the abortion, school prayer, and busing decisions of the past few years, but two centuries of historical development and constitutional doctrine. For the reasons set forth below, we conclude that this radical departure from the system of checks and balances that has served our nation well for the past two centuries is unwise and probably unconstitutional. There is no precedent of enacted legislation eliminating all federal courts jurisdiction to hear claims of deprivation of constitutional rights. To find any precedent for the present bills, one must look to many bills that have been proposed over the years but *not* enacted. Congress wisely declined these previous invitations to tamper with our constitutional structure of government, and should decline the same invitation presented by the current bills.

Article III of the Constitution does grant Congress power to regulate the jurisdiction of the federal courts (see Part III below). But, as the following analysis shows, this power cannot fairly be construed to permit Congress to deprive the courts of jurisdiction to hear claims arising under the Constitution itself, particularly on an issue-by-issue basis. If Congress' power were so extensive, it would undo the elaborate system of checks and balances that the Framers of the Constitution so carefully crafted. First, it would upset the checks and balances among the three coordinate branches of the federal government, eliminating the judiciary as a check upon unconstitutional actions of the political branches by the simple expedient of removing their jurisdiction to consider challenges to such actions. Second, it would disrupt the allocation of power between the federal government and the states, by eliminating the power of the federal judiciary to restrain acts of the states that violate the Constitution. Third, and perhaps most significant, it would alter the constitutional balance between individual rights and majority will, since the judiciary is the only organ of government that is institutionally suited to protect the rights that our Constitution guarantees to individuals against the wishes of a strong-willed majority.

Another serious objection to legislation of the sort currently proposed is that it is undesirable to deal with complex and controversial social issues, particularly those of constitutional dimension, by eliminating the opportunity for full airing and debate in the federal judiciary. Indeed, one of the ironies of the present bills is that the constitutional interpretations with which the bills' sponsors differ would remain frozen as the supreme law of the land forever, binding upon the state courts under the Supremacy Clause and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel.

We are not alone in voicing our alarm over the present jurisdiction-stripping proposals. In August 1981, the American Bar Association announced its strong opposition to the jurisdiction-stripping device. The New York State Bar Association has issued a report that reaches the same conclusion. The substantial majority of legal scholars and former senior Government lawyers who have testified before committees of Congress—from both sides of the political spectrum—have explained their opposition to the jurisdiction-stripping proposals. And a distinguished jurist, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, has written that the jurisdiction-stripping device "threatens not only a number of individual liberties, but

*Preprinted from THE RECORD of the Association for December 1981. Copies of this Report have been mailed to Congress.

also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years."

We begin this Report with a brief description of the pending bills (Part I). We then examine in detail the role of the federal judiciary in our governmental structure (Part II) and the extent of Congress' control over federal court jurisdiction under Article III of the Constitution (Part III).

*I. Pending bills to restrict Federal court jurisdiction over constitutional claims*

As noted, at least 25 bills are pending in both houses of Congress that would restrict the powers exercised by federal courts in cases involving constitutional questions. While these bills to a large extent invoke the same claims to congressional power over federal court jurisdiction, the nature of the constitutional interests affected by them, and the scope of the restrictions proposed, vary substantially. The bills of which we are aware (listed in the Appendix) fall into five categories: prayer, abortion, school desegregation, sex-based military classification, and federal court review of state court decisions.

A. Prayer

"Voluntary prayer in public schools and public buildings" is the subject of seven virtually identical bills in the House and one bill in the Senate. These bills are a response to court decisions holding that certain religious observances in public schools, whether voluntary or involuntary, violate the First Amendment's prohibition against laws establishing religion. Modeled on the so-called Helms amendment introduced in the 96th Congress, such bills would divest the Supreme Court and the lower federal courts of jurisdiction to hear any case that relates to "voluntary prayer" and that arises out of either "any State statute, ordinance, rule, regulation, or any part thereof" or out of any act of Congress "interpreting, applying, or enforcing" such state acts. Actions currently pending in the federal courts would not be affected by these proposals.

Since each of these proposed bills applies only to the jurisdiction of the federal courts, challenges to the constitutionality of state acts relating to voluntary prayer could still be brought in state courts. State courts, like the federal courts, are bound to give full effect to the provisions of the Federal Constitution and to recognize its supremacy over state laws and regulations. In addition, since the proposed legislation does not and could not purport to alter any prior federal court decisions on the subject of prayer in public schools and public buildings, state courts would still be obligated to apply existing Supreme Court precedent in ruling on future cases.

One of the pending bills would eliminate the Supreme Court's appellate jurisdiction in any case involving a state act that related to voluntary prayer in public schools or buildings, or that relates to "the qualifications imposed by the State as a condition of teaching in the public schools of the State." The latter provision would eliminate all federal appellate jurisdiction where a state law unconstitutionally imposed racial, religious, political, or other invidious qualifications for schoolteachers.

B. Abortion

The Supreme Court has held that certain types of laws restricting or regulating therapeutic abortions infringe women's constitutionally guaranteed rights of privacy. Four bills pending in the House and two in the Senate would restrict the federal courts' power to enforce these constitutional rights.

Two identical bills, H.R. 73 and S. 583, would simply forbid lower federal courts to enjoin the operation of federal or state laws that restrict abortion, pending final review by the Supreme Court. In the event that the Supreme Court does not review a lower court's ruling in an abortion case, the bills would foreclose any injunctive relief. These bills would not affect the Supreme Court's appellate jurisdiction, nor would they foreclose the lower federal courts from ruling on the constitutionality of state or federal laws relating to abortion. However, by prohibiting the lower federal courts from enjoining the operation of federal or state abortion laws, the bills would in most cases remove the only effective means to enforce such rulings. It would be extremely difficult to maneuver a case through a district court, a court of appeals, and then the Supreme Court quickly enough for an abortion to be safely performed at the end of the judicial process; requiring abortion cases to be handled so hastily would place an intolerable burden on the courts.

Three other bills would also divest the lower federal courts of jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in cases involving state or local laws prohibiting or regulating abortion, but would go further, in seeking to undo the Supreme Court's decisions on abortion by declaring that, for constitutional purposes, human life begins at conception. These bills, although not fully impairing the Supreme Court's appellate jurisdiction, also go further than H.R. 73 in proscribing declaratory as well as injunctive relief and in proscribing declaratory or injunctive relief even after review by the Supreme Court.

Although these bills purport to be a limitation on federal court jurisdiction, they actually represent a restriction not on the types of cases the federal courts may hear, but on the relief those courts may grant. The bills thus raise questions as to the extent of Congress' power to restrict the traditional remedies dispensed by duly constituted courts in cases over which they have jurisdiction—questions that are outside the scope of this Report.

H.R. 867 more closely resembles the pending prayer bills. That bill would remove the jurisdiction of both the Supreme Court and the lower federal courts in cases arising out of either any "State statute, ordinance, rule, regulation or any part thereof" which relates to abortion, or any "Act interpreting, applying, or enforcing" any such state act.

C. School desegregation

The Supreme Court has held that in certain circumstances, where public schools have been racially segregated in violation of the Fourteenth Amendment's Equal Protection Clause and where no other remedy will effectively eliminate the pattern of segregation, the Constitution requires that pupils be assigned and transported to schools in a manner that eliminates the unconstitutional pattern of racial segregation. The only limitation upon this constitutional mandate is that "the time or distance of travel" not be "so great as to either risk the health of the children or significantly impinge on the educational process." Six bills proposed in the House and one in the Senate would restrict the federal courts' jurisdiction to award this remedy even where constitutionally required. Although phrased in terms of a limitation on federal court jurisdiction, these bills really limit the power of federal courts to award a particular remedy, not the power of federal courts to hear cases involving certain types of disputes.

H.R. 761 is much broader than the other bills, in that it is not confined to desegregation orders that require busing. Read literally, this bill would forbid any federal court remedy for school segregation, since any desegregation order—even one that did not employ busing—would require that individual students be assigned to a "particular school," even if the assigned school were the one nearest his home.

H.R. 869, which parallels the prayer bills in form, would deny to the federal courts jurisdiction to hear "any case arising out of" any state act (or any act interpreting, applying, or enforcing a state act) "which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex." While the intent of the draftsman was probably to eliminate federal court jurisdiction to assign students to schools on the basis of race, if the bill is read literally it would eliminate all federal court original and appellate jurisdiction to hear *any* segregation case, since even a state statute that blatantly assigned all black students to one school and all whites to another would be a "State statute . . . assigning . . . any . . . student to attend a particular school because of his race" and therefore beyond federal judicial purview under this bill.

Two other bills, H.R. 2047 and S. 528, would not prohibit the federal courts from employing busing as a remedy for school segregation. Rather, these bills would limit the circumstances in which busing may be ordered, limit the length of the bus ride, and require that alternative remedies be explored before ordering busing as a last resort.

D. Armed Forces

H.R. 2365 would eliminate Supreme Court and lower federal court jurisdiction to review equal protection challenges to males-only registration or induction for military service—a constitutional claim rejected by the Supreme Court after the bill was introduced.

Of more concern, therefore, is H.R. 2791, which would deprive the Supreme Court and lower federal courts of jurisdiction to hear constitutional challenges not only to different treatment of the sexes in registration for the draft or induction, but also to sex-based standards for the composition of, or duty assignments in, the armed forces. While courts have generally given the military wide latitude in determining whether sex-based distinctions are appropriate, some sex-based classifications in the military, apart from the draft, have been ruled unconstitutional.

These two bills raise serious constitutional problems beyond those presented by the bills previously discussed, since they foreclose federal court challenges to federal laws and regulations. The other bills primarily address federal judicial review of state acts, and at least leave the state courts as forums for judicial constitutional review. These two bills, however, might eliminate *any* avenue of judicial constitutional review, since state courts may be powerless to afford a remedy for unconstitutional actions by federal officials.

E. Review of State Court Decisions

H.R. 114 would deny to any court "that is established by Act of Congress under Article III of the Constitution . . . jurisdiction to modify, directly or indirectly, any order of a

court of a State if such order is, will be, or was, subject to review by the highest court of such State."

It is not clear whether this bill would affect the Supreme Court's jurisdiction, since the Supreme Court was created directly by Article III of the Constitution, but is organized by congressional act, or whether it refers only to the inferior federal courts. If the bill is intended to apply to the Supreme Court, it would entirely eliminate the Supreme Court's appellate jurisdiction over all state court decisions—constituting a radical curtailment of the Supreme Court's constitutional role (see Part IIB below). If, on the other hand, H.R. 114 is intended to affect only the jurisdiction of the lower federal courts, it is likely to have little impact, since the lower federal courts do not have appellate jurisdiction over state court decisions, and therefore ordinarily have no occasion to modify state court orders (except perhaps indirectly, as in habeas corpus cases).

Having briefly described what the 25 pending bills seek to do, we turn now to our analysis of the wisdom and constitutionality of the basic concept underlying them all. We consider first whether such legislation would profoundly alter the system of checks and balances upon which our constitutional government rests. We then discuss whether, in any event, Congress has the power under the Constitution to enact such laws.

*II. The constitutional role of the Federal judiciary*

Such power as Congress has over federal court jurisdiction derives from two brief phrases in Article III of the Constitution. One of them, following a statement that the Supreme Court shall have appellate jurisdiction, both as to law and fact, in all cases within the broadly defined "judicial power of the United States," adds, "with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2.) The other, providing that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1), is the source of Congress' power over lower court jurisdiction.

To interpret these provisions, it is necessary to examine them in the context of the role of the judicial branch of the federal government in our constitutional system. Central to that system is the principle of separation of powers among the branches of the federal government as it relates to judicial constitutional review. Within that system, judicial constitutional review by the federal judiciary serves four distinct, yet interrelated, functions: (a) the federal judiciary enforces the Constitution's limitations on the power of the political branches of the federal government; (b) the federal judiciary assures the supremacy of the United States Constitution and laws vis-a-vis the states; (c) the federal judiciary protects individual rights guaranteed by the Constitution against encroachments by majority will as expressed in acts of the federal and state governments; and (d) the federal judiciary accommodates the principles of our written Constitution with the changing needs of society. We shall examine in turn each of these aspects of the federal judiciary's role and show why the proposed legislation would undermine them all.

A. Judicial Review and the Separation of Powers

The first three articles of the Constitution set forth the specific, limited powers granted to the three coordinate branches of the federal government: the legislature, the executive, and the judiciary. The Framers conceived of this separation of powers as the essential safeguard of the liberties of American people. Thus, in The Federalist Papers, Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny." The doctrine of separation of powers does not require that the legislative, executive, and judicial departments be wholly unconnected with each other, but rather that they should be "so far connected and blended as to give to each a constitutional control over the other." The Supreme Court has repeatedly reaffirmed these concepts as basic to our federal governmental structure.

The Founding Fathers feared tyranny by a majority of the public and therefore feared tyranny by a legislature elected by that majority. Judicial constitutional review by an independent federal judiciary not beholden to the public or legislature for tenure in office or continued compensation was intended by the Framers as the people's safeguard against the exercise of governmental power in excess of that conferred under the Constitution and against the invasion of the individual's rights of liberty and property.

In our jurisprudence, the federal judiciary can only exercise this essential power of judicial constitutional review by declaring and applying the law in cases and controversies submitted to the courts for decision. That fundamental concept led, in 1803, to the Supreme Court's unanimous decision in *Marbury* v. *Madison*, and Chief Justice Marshall's heretofore unchallenged declaration that: "It is emphatically the province and duty of the judicial department to say what the law is." More than 150 years later, another unanimous Supreme Court, in the Little Rock school desegregation case, said of *Marbury* v. *Madison*:

"This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

The function of constitutional review is allocated to an independent judiciary in order to prevent the accumulation of power in one department of the government. As Hamilton wrote in *The Federalist Papers*, it could not be expected "that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges." Thus, a constitutional system that imposes limitations on the authority of the legislative branch also requires an independent branch to determine whether legislation comports with the constitutional limitations; otherwise, the legislature would have the power both to enact and to judge the law, and there would be no check on its proper exercise of its powers.

Judicial constitutional review does not imply judicial supremacy, but rather rests on the foundation of legislative supremacy. As Hamilton explained, because the adoption of the Constitution expressed the people's ultimate legislative act of ratification, the courts are *obliged* to invalidate legislation that is contrary to the Constitution. The function of constitutional review is safely entrusted to the judiciary not because it is the supreme branch of government, but rather because it is the weakest. As Hamilton observed, "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated." In contrast, the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

The power of judicial constitutional review is not absolute, but is limited by the very nature of the judicial function. Courts may decide constitutional questions only when those questions must be answered to decide justiciable cases submitted to them by litigants with standing to raise such questions. hence, the judiciary does not sit in general review of legislation as it is enacted or executive actions as they are taken. Nor have the courts any power to review legislation or executive actions on their own initiative. Rather, judges must wait for the necessity of constitutional review to be thrust upon them by litigants whose interests are adversely affected by conduct claimed to be unconstitutional. This limitation is expressed in Article III's definition of the judicial power as extending only to "cases" and "controversies."

The Founding Fathers were not unmindful of the possibility that the judiciary, like the other two branches of government, might be tempted to exceed its constitutionally circumscribed role. Hamilton conceded the possibility that judges, in constructing a statute, "may substitute their own pleasure to the constitutional intentions of the legislature." But such action would be improper, for the "courts must declare the sense of the law"; they may not exercise "will" instead of "judgment." Thus, Hamilton acknowledged the need for judicial accountability, but stressed that the "precautions" for the "responsibility" of the federal judiciary were to be found *only* in the Constitution's provision for impeachment. That device, he wrote, was "the only provision on the point which is consistent with the necessary independence of the judicial character.

Hamilton characterized as "a phantom" any feared danger of judicial encroachments on legislative authority. To him, not only was the judiciary a comparatively weak branch of government, but there was also "the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security."

If, as the Framers thus believed, the judicial branch is the only realistic check to prevent the political branches from exceeding their constitutional powers, then it must follow that Congress' power to regulate federal court jurisdiction cannot be so broad as to enable Congress to divest the courts of the function of judicial constitutional review, as the bills currently under consideration would do. In the system explicated by the Framers, Congress could not have the power to make any statute review-proof by the simple expedient of divesting all federal courts of jurisdiction to hear a challenge to it. Even more abhorrent to that scheme is the notion inherent in the current bills, that a simple majority of Congress may eviscerate judicial constitutional decisions with which that majority disagrees merely

by stripping the federal courts of power to consider such cases in the future. To conclude that the Framers viewed the judiciary as the fundamental check upon excesses by Congress, but also gave Congress the power by simple majority to nullify that check, is, in the words of a recent commentary, "to charge them with chasing their tails around a stump."

B. Judicial Review and the Supremacy of Federal Law

Federal judicial review of state laws and acts is as important to our federal system as review of federal laws and acts. Yet most of the bills now under consideration are aimed primarily at restricting this form of judicial review.

The Supremacy Clause provides that the United States Constitution, and all federal laws enacted pursuant thereto, are the "supreme Law of the Land." The federal judiciary, especially the Supreme Court, is the Constitution's mechanism for enforcing the Supremacy Clause vis-a-vis the states.

Many constitutional scholars believe that the Supreme Court's most important role in our constitutional system is assuring that federal law, and particularly the Constitution, is interpreted uniformly throughout the nation. In this view, the notion of a single supreme Constitution would be rendered virtually meaningless if it could be interpreted to mean different things in different states.

Professor Charles Black has written:

"There is nothing in our entire governmental structure which has a more leakproof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality."

And Justice Holmes stated:

"I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states."

These views echo those of the Framers. A major criticism of the Articles of Confederation was the weakness of the national government and the consequent disharmony among the states. Hamilton regarded it as essential that, in a national union, there be a national judiciary to assure uniform interpretation of national laws:

"If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of the uniformity in the intepretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."

Hence, the Framers understood that the supremacy of federal law can only be effected if there is a single tribunal with the ultimate responsibility for deciding what the law is. As Hamilton wrote:

"To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."

Even those at the Constitutional Convention who emphasized the independence of the states in the proposed federal system and wished to minimize the scope of the federal judiciary acknowledged that such independence was limited by the requirements of the Constitution and federal law, and that the federal judicial branch had the authority to interpret the Constitution and the laws. For example, John Rutledge of South Carolina argued at the Constitutional Convention:

"The State Tribunals might and ought to be left in all cases to decide in the first instance, *the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments.*"

Over nearly two centuries, Congress has consistently recognized the necessity of appellate jurisdiction in the Supreme Court over state court decisions as the primary means of enforcing the Supremacy Clause. From the Judiciary Act of 1789 through the present Judicial Code, Congress has always preserved the Supreme Court's appellate jurisdiction to consider whether state acts contravene the Constitution or federal laws enacted pursuant thereto.

The debate over the first Judiciary Act is instructive. Although the First Congress continued the Constitutional Convention's debate over the desirability of creating inferior federal courts, the necessity of the Supreme Court's having appellate jurisdiction to assure national uniformity was not questioned. Even those who "were anxious to give the Federal Courts as little jurisdiction as possible" acknowledged that state court decisions on questions of federal law must be "subject to Federal revision through the appellate power of the United States Supreme Court." The universal acceptance of federal judicial constitutional review over state acts and court decisions sheds light on the intent of the Constitution's Framers, for the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."

Following passage of the Judiciary Act of 1789, leading Supreme Court decisions have consistently expounded the importance to our system of constitutional federalism of federal judicial review over state acts. As one scholar observed:

"From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority."

Justice Story's opinion in *Martin* v. *Hunter's Lessee* reaffirmed the Supreme Court's essential role in securing a uniform system of law throughout the United States by holding that its appellate jurisdiction applied to all cases specified in Article III, whether those cases arose in state or federal courts. That landmark opinion emphasized "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot believed that they could have escaped the enlightened convention which formed the constitution. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."

These principles have never been seriously questioned. In *Cohens* v. *Virginia*, Chief Justice Marshall's opinion, upholding the Supreme Court's authority to review a state court criminal conviction that involved interpretation of a federal statute, stated that "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. . . .

"[The Constitution's Framers] declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction."

In *Ableman v. Booth*, the Supreme Court reiterated that the Supremacy Clause requires a single federal tribunal to make a final determination as to the laws of the United States and the Constitution, "for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the government of the United States would soon become one thing in one State and another thing in another."

In the face of these clear Supreme Court pronouncements, Congress has never disturbed the Supreme Court's appellate jurisdiction to hear federal constitutional challenges to state acts, either broadly or as to specific issues. To do so now, as proposed in the bills here under consideration, would violate the spirit, if not the letter, of the Supremacy Clause by eliminating the only federal means for enforcing it, and would run counter to a consistent line of historical authority affirming the Supreme Court's central role under that clause.

C. Judicial Review and Individual Rights

The pending bills strike most directly at the third basic function of judicial constitutional review: protecting individual rights against abridgement by majority rule as expressed through the political branches of government.

Majority rule is not the *only* rule in the United States. Rather, our Constitution guarantees specific rights to individuals—freedom of speech, free exercise of religion, equal protection of the law, and due process of law, to name a few—against infringement by majority will be expressed as through the political branches of government. As the Supreme Court stated nearly 40 years ago in *West Virginia State Board of Education v. Barnette:*

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

89-059 O-85-56 (Pt. 1)

And as James Madison wrote much earlier:

"[I]n our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Hence, the Founding Fathers recognized that the exercise of fundamental rights, and the individuals who exercise them, would not always win public favor, and that, from time to time, a substantial and vocal majority of the public might clamor to abridge them in certain instances. Were this not so, there would be no reason to enjoin the infringement of these rights in the Constitution.

Institutionally, the federal judiciary is the only organ of government that can be counted upon to protect individual rights when they are pitted against the will of the majority. That was why Article III, Section I, of the Constitution made the judiciary independent of public favor by giving judges lifetime tenure and undiminished compensation throughout their judicial service. It was thus intended that the courts should be free to render unpopular decisions that thwart the current majority's will when the law, as the courts interpret it, so requires.

The central role of the federal courts in protecting individual rights from encroachment by the majoritarian branches of government has been repeatedly acknowledged. Chief Justice Hughes wrote in 1927:

"In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interests or prejudice.

Similarily, Justice Frankfurter, while a professor of law at Harvard, wrote:

"The Supreme Court is indispensable to the effective workings of our federal government. . . . I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment.

And Justice Black observed that our federal courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."

While most commentators have emphasized the courts' role as protectors of personal liberty (freedom of speech, religion, privacy, and the like), equally important is the courts' role as guardians of private property. The courts are the people's only means of enforcing the Fifth and Fourteenth Amendment prohibitions against the taking of private property for public use without just compensation and the deprivation of a person's property without due process of law.

Given the historic swings of the political pendulum, it is not inconceivable that a majority of the people of the United States, or of just one state, might someday elect a socialist government, as has already occurred in Western Europe. Should that government embark on a program that included nationalization of major industries or redistribution of private property, the judiciary would be the only institution sufficiently independent to protect the rights of private property guaranteed by the Constitution in the face of public clamor. But if the 97th Congress can legitmately curtail the federal courts' jurisdiction to adjudge selected constitutional claims, as now proposed, then a future Congress, by simple majority, could as easily eliminate the courts' jurisdiction to hear claims based on government seizures of private property without due process or just compensation.

The federal judiciary's historic role as guardian of the rights of personal liberty and property guaranteed by the Constituion should not be cast aside simply because, as the Framers intended, courts sometimes render opinions that are unpopular. It is no secret that the bills presently under consideration were prompted by controversial judicial decisions—banning prayer from public schools, imposing busing as a means of integrating public schools, and permitting abortions—that are extremely unpopular in many quarters. Whether or not one agrees with the courts' decisions in these cases, it is clear that the courts were acting in their constitutional capacity as the protector of individual rights guaranteed by the Constitution. It would ill serve the long-term stability of our form of government, and would probably be unconstitutional, for Congress now to claim the power to curtail the federal courts' jurisdiction to perform this essential constitutional function.

### D. Judicial Review and Constitutional Development

A final objection to the practice of divesting the federal courts of jurisdiction to hear constitutional claims is that it would stultify the development of constitutional law. Our Constitution is more than the words put on paper some two hundred years ago; rather, it is a living document that grows and adapts with the experience of our people.

The meaning of laws, and particularly the meaning of constitutional provisions, is not always a bright-line truth, especially as it may be applied to factual circumstances never envisioned by the Framers. For example, radio and television did not exist at the time that the First Amendment was drafted, nor indeed for most of the Amendment's history. Yet, although the technological advances raise questions of access and other matters not present in the case of other forms of publication such as newspapers, the courts have applied the principles of the First Amendment to these new means of communication.

The federal judiciary has been the primary instrument for reflecting such growth and adaptation in constitutional doctrine. Thus, one of the ironies in proposals like the present bills is that the very judicial decisions that were so unpopular that they spawned such bills would become frozen in the law forever. If the federal courts are divested of jurisdiction to engage in the normal processes of change through the development of new legal doctrine, shifts in social conditions, or turnover of judges (especially Supreme Court Justices), and if state courts continue to follow federal constitutional law, as they are required to do under the Supremacy Clause, the current state of the law on abortions, school prayer, and busing will be preserved, subject to change only by constitutional amendment.

In cases where a bright-line result is not immediately apparent, the interplay between the courts and Congress and among the different courts throughout the country is an important process in the development of the law. Silencing the federal courts to speak on such issues by withdrawing their jurisdiction would deprive the nation of this important element in the lawmaking process and would be grievously unwise. Not only would the creative interplay between the inferior federal courts and the Supreme Court be lost, but so too would the interplay between the federal courts and the state courts. Three years ago, this Committee, commenting upon proposals to abolish diversity jurisdiction, stated:

"The *Erie* requirement that federal courts apply state substantive law in diversity cases has resulted in a continuous flow between the federal and state systems of both procedural and substantive reforms. . . . Elimination of such cross-fertilization could have significant adverse effects on the general character and competence of the two systems."

This process of cross-fertilization is all the more important in the realm of the basic constitutional issues, which the pending bills propose to remove from the jurisdiction of the federal courts.

### *III. The extent of Congress' authority under article III*

Given the federal judiciary's essential role in our system of checks and balances, its basic function of enforcing the Supremacy Clause, and its task of protecting individual rights, does it stand to reason that Congress has the constitutional power to curtail those functions by limiting the courts' jurisdiction as the proponents of the current bills contend? It is with that question in mind that we now examine the Constitution's provisions granting Congress a measure of control over federal court jurisdiction, which are cited as the constitutional authorization for most of the pending bills.

Congress' power to regulate the jurisdiction of the federal courts is conferred by Article III of the Constitution (emphasis added):

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish.* The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

"Section 2. . . .

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*"

Historically, the federal judiciary has never exercised jurisdiction as broad as the full judicial power defined in Article III. From the Judiciary Act of 1789 onward, statutes defining the jurisdiction of the Supreme Court and lower federal courts have never utilized the entire reach of the "judicial power" defined in Article III, Section 2, and the courts have never claimed jurisdiction to reach the categories of cases outside the statutory definition. To cite two con-

temporary examples: (1) no federal court has original jurisdiction to hear diversity claims that do not meet the statutory jurisdictional amount, even though there is no such limitation on diversity jurisdiction in Article III; (2) the Supreme Court does not have appellate jurisdiction over diversity cases tried in the state courts that do not involve a federal question, even though such jurisdiction would be within the reach of Article III.

On the other hand, since the Judiciary Act of 1789, statutes defining federal court jurisdiction have regularly conferred broad jurisdiction upon the federal judiciary within the definition of "judicial power" contained in Article III of the Constitution. Congress has not sought to use its power over federal court jurisdiction to erode the judiciary's central role in interpreting the Constitution and federal law or in exercising the responsibility of judicial constitutional review. Nor has it previously attempted to define federal court jurisdiction in terms of substantive issues, as opposed to neutral principles such as citizenship of the parties or amount in controversy. Because of this, there has been little occasion for the courts to consider the metes and bounds of Congress' control over federal court jurisdiction. Most of the statements in judicial opinions concerning the extent of Congress' power over federal court jurisdiction are therefore dicta, and cannot be viewed as controlling doctrine.

This much, however, seems clear: There is no support, from the debates surrounding the adoption of Article III or otherwise, for the proposition that the Framers intended Article III to confer upon Congress power to strip the federal courts of jurisdiction to hear constitutional claims or to abrogate the federal courts' essential function of judicial constitutional review in response to unpopular, or even erroneous, judicial decisions. Nor is there authority for the proposition that congress' power to regulate jurisdiction may be used as an indirect means of undermining judicial opinions with which Congress disagrees.

The statements in *The Federalist Papers* that the power of impeachment was intended to be the *only* check on the federal judiciary strongly indicate that the Framers never intended Congress' Article III control over jurisdiction to be so used. Rather, read in context, it appears that Congress' regulation of federal court jurisdiction was intended solely to permit Congress, through policy-neutral criteria, to allocate judicial business among the federal courts, to prevent the federal courts from becoming overburdened by cases that do not involve substantial federal claims, and to provide orderly procedures for the federal judiciary's exercise of its jurisdiction. This view is supported by the manner in which Congress has actually exercised its Article III powers to regulate federal court jurisdiction since the beginning of the Republic; Congress has never curtailed the courts' jurisdiction to adjudicate constitutional claims as proposed in the jurisdiction-stripping bills.

The unprecedented nature of the bills here under consideration poses serious doubts about their constitutionality as well as their wisdom. While the manner in which Congress has historically exercised its jurisdictional power cannot alter the Constitution's grant of that power, it can illuminate the proper meaning of that grant. As Justice Frankfurter explained:

"The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."

We turn now to specific consideration of the constitutional language relied upon as authority for enactment of the pending bills. Since Congress' power over Supreme Court and lower court jurisdiction depends upon different provisions of Article III, those provisions must be analyzed separately.

A. Supreme Court Jurisdiction

The Constitution confers original jurisdiction upon the Supreme Court in a relatively narrow range of cases involving diplomatic personnel or in which a state is a party. Congress can neither add to nor subtract from the original jurisdiction thus conferred.

The Supreme Court's most important role in our system is thus as an appellate court, hearing appeals from both inferior federal courts and state courts on issues of federal constitutional, statutory, administrative law. As discussed above (Part II), the history of the Constitution indicates that the Supreme Court was intended to be the final arbiter of federal law; to review the constitutionality of acts of Congress and federal executive actions; to review the constitutionality of state enactments in light of federal statutory and constitutional law, thereby serving as the primary instrument for enforcing the Supremacy Clause; and to protect individual rights from encroachments by the majoritarian branches of the federal and state governments.

Such power as Congress has over the Supreme Court's appellate jurisdiction is conferred by the Exceptions Clause of Article III, Section 2, which grants such jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." If Congress has authority to restrict the Supreme Court's appellate jurisdiction to hear constitutional claims, as proposed in the pending bills, it must derive from this clause.

Those who advocate such authority for Congress contend that the Exceptions Clause, read literally, gives Congress plenary power over the Supreme Court's appellate jurisdiction. One answer to this contention is that the Constitutional Convention voted down a proposal that would have expressly given Congress such plenary power. In the course of the Constitutional Convention's consideration of Article III, a motion was made to replace a provision that was substantively identical to the Exceptions Clause as enacted with the following language: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." The Convention rejected this proposal, and instead adopted the Exceptions Clause in its present form.

Moreover, while such a literal reading of a single phrase might be acceptable in construing a detailed regulatory statute, it is not appropriate in constitutional interpretation. In the words of Chief Justice Marshall, "we must never forget, that it is a constitution we are expounding." It is thus axiomatic that the Constitution necessarily must be read as a broad outline of our system of government, and its individual provisions must be read in the context of the organic whole. Proper interpretation of the Constitution requires consideration of its spirit, as well as its letter, and the spirit should control over an interpretation that would defeat an essential tenet of the Constitution, such as the doctrine of separation of powers.

Accordingly, the Exceptions Clause must be read in the context of the broad language of Article III establishing the judicial power of the United States. It would be curious drafting, and contrary to established principles of constitutional, statutory, *and* contractual construction, if an "exception" in the third paragraph of the Article were read to grant to Congress the power totally to efface the Supreme Court's appellate jurisdiction granted in the same Article—especially in the absence of any historical evidence that this clause was intended to permit, at Congress' option, a radical diminution of the constitutional role of the Supreme Court.

There was no discussion in the Constitutional Convention of any such far-reaching effect to be attributed to the Exceptions Clause. Nor was there any suggestion of any such significance in the preparation of earlier drafts of the Constitution. Although the clause was debated at the Constitutional Convention, the point at issue was the scope of the Supreme Court's appellate jurisdiction with respect to matter of fact, which some considered to be an infringement of the cherished right to a trial by jury. As Hamilton observed, "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact." As one constitutional scholar has noted, the debate ended in a compromise that left the First Congress to struggle with the scope of the Supreme Court's appellate jurisdiction over factual determinations under the Exceptions Clause:

"So complicated were the varying practices [of review of facts] that it was concluded to leave the problem for handling by the Congress through the medium of the 'exceptions' clause, fashioned to meet the 'principal criticism' of the appellate jurisdiction, its inclusion of matters of 'fact' "

In his well-known "Dialogue," Professor Hart rejected as "preposterous" the notion that the Exceptions Clause might be read "as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether." According to Hart, the measure of Congress power over the Supreme Court's appellate jurisdiction under the Exceptions Clause "is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." As Professor Ratner pointed out, this interpretation of the limits of the Exceptions Clause is buttressed by legal usage known to the Framers when the Constitution was drafted, by which an "exception" cannot be construed to nullify the rule that it limits or to negate an essential part of what was granted.

Judicial precedent on the scope of Congress' power under the Exceptions Clause is not illuminating. As noted above, because Congress has never challenged the Supreme Court's jurisdiction to hear constitutional claims, there are no definitive rulings on the extent or limits of Congress' power. While some cases contain extravagantly broad statements concerning Congress power over the Supreme Court's jurisdiction, the state-

ments are dicta, for the cases did not involve any attempt by Congress to limit the Court's jurisdiction to hear constitutional claims. Only two Reconstruction-era cases, *Ex parte McCardle* and *United States v. Klein*, actually addressed the scope of Congress power under the Exceptions Clause, and they point in opposite directions.

Those who urge that the Exceptions Clause gives Congress plenary power to divest the Supreme Court of appellate jurisdiction most often cite *Ex parte McCardle* as the leading authority for this view. In 1867, William H. McCardle, a newspaper editor in Mississippi, had been arrested by the army pursuant to the Military Reconstruction Act passed earlier the same year, which subjected the South to federal military command. Based upon anti-reconstructionist editorials McCardle had published, he was charged with libel, disturbing the peace, inciting insurrection, and impeding reconstruction. He petitioned the federal circuit court for a writ of habeas corpus, challenging the constitutionality of the Military Reconstruction Act, under a Habeas Corpus Act passed by the same Reconstruction Congress in 1867. There was some irony in this: the 1867 Habeas Corpus Act was passed for the purpose of advancing reconstruction by expanding the federal courts' powers to release former slaves and others who were being unlawfully held prisoner by the southern states. But the terms of the statute were not confined to prisoners in state custody, and McCardle, an anti-reconstructionist, was using it as a device to challenge the very reconstruction that the act was intended to promote.

The circuit court denied McCardle's petition, and he appealed to the Supreme Court under a provision of the 1867 Act. The Government moved to dismiss the appeal, and the Supreme Court denied the motion. The Government then faced the prospect that the Supreme Court, on reaching the merits, might declare one of the cornerstones of reconstruction policy to be unconstitutional. To avert this threat, while McCardle's appeal was still pending, Congress repealed the provision of the 1867 Habeas Corpus Act that allowed a direct appeal to the Supreme Court. In light of that repeal, the Supreme Court dismissed the appeal in a terse opinion, containing the following language relied upon by proponents of the current bills:

". . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the courts is that of announcing the fact and dismissing the cause."

In reading *Ex parte McCardle*, it must be borne in mind that the opinion was written under the most intense imaginable pressure at the peak of radical Reconstruction. As one commentary has noted, "With troops in the streets of the capital and the President of the United States on trial before the Senate, a less ideal setting for dispassionate judicial inquiry could hardly be imagined." And as Justice Douglas once observed, "There is a serious question whether the *McCardle* case could command a majority view today."

Moreover, the full *McCardle* opinion shows that it does not support so broad a view of Congress' power over the Supreme Court's jurisdiction as the above-quoted excerpt might suggest. While the opinion terms the 1868 repealer act an "exception" to the Court's appellate jurisdiction, in fact the repealer merely withdrew a *procedure* for appealing to the Supreme Court under the 1867 Habeas Corpus Act enacted the preceding year. The repealer did not narrow the Supreme Court's *subject matter* jurisdiction—that is, it did not limit the kinds of claims that the Supreme Court could hear, assuming they came to it by an available route. The *McCardle* opinion made this very point:

"Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. *It does not affect the jurisdiction which was previously exercised.*"

The Supreme Court made the distinction even plainer later the same year in *Ex parte Yerger*. There, the Court considered another appeal by another anti-reconstructionist newspaper editor held in military custody under the Military Reconstruction Act. Like McCardle, Yerger was charged with impeding reconstruction. Like McCardle, he petitioned a circuit court for a writ of habeas corpus under the Habeas Corpus Act of 1867. The circuit court denied Yerger's petition, and Yerger sought review by the Supreme Court. But unlike McCardle, Yerger invoked the Supreme Court's appellate jurisdiction under the procedures provide by the Judiciary Act of 1789, not the repealed provision for direct appeals of the Habeas Corpus Act of 1867. The Supreme Court held, over objection by the Government, that it had appellate jurisdiction under the prior law to hear appeals in habeas corpus cases brought under the 1867 Act, and that this jurisdiction was not affected by the 1868 repealer act. Significantly, the Court intimated that any attempt through legislation to remove entirely the Supreme Court's appellate jurisdiction in habeas corpus cases would strike at one of the Court's essential constitutional functions and raise serious constitutional questions.

*United States v. Klein*, the second case to address directly Congress' authority to legislate exceptions to the Supreme Court's appellate jurisdiction, was decided three years after *Ex parte McCardle*. That opinion disposed of any remaining impression that the Exceptions Clause gave Congress plenary power to deprive the Supreme Court of appellate jurisdiction. A Civil War statute authorized suits in the Court of Claims to recover captured property by owners who were loyal to the Union or had been pardoned by the President. Klein had received a pardon that recited his previous disloyalty. Based upon his pardon, Klein brought an action in the Court of Claims and recovered judgment under the statute. While an appeal to the Supreme Court was pending, Congress passed a statute purporting to deprive the Court of Claims and the Supreme Court of jurisdiction in any case where a presidential pardon recited disloyalty and to direct that any such case be dismissed. The Supreme Court held that this was an attempt to prescribe a rule of decision in cases before the judiciary, violated the principle of separation of powers, and was not a permissible use of Congress' Article III powers over jurisdiction. The Court opined:

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

"It is of vital importance that these powers be kept distinct."

The power claimed in the present bills to divest the Supreme Court of appellate jurisdiction to hear constitutional claims goes well beyond anything Congress has done in the exercise of its Article III powers at least since the turbulent Reconstruction era. Since the pending bills erode the Supreme Court's essential role in our constitutional system of government, they cannot be found to be within Congress' power under the Exceptions Clause of Article III in the absence of compelling authority. But that authority is not to be found in the history of Article III, judicial decisions under that Article, or the weight of scholarly authority concerning the Article's intent.

B. Lower Court Jurisdiction

The foregoing analysis shows that Congress' power to regulate the Supreme Court's jurisdiction under Article III does not give Congress power to withdraw the Supreme Court's jurisdiction to hear constitutional claims. The issue of Congress' power under Article III to divest the lower federal courts of jurisdiction to hear constitutional claims presents a closer question. However, taking into account other provisions of the Constitution and considerations of sound policy toward the judiciary, the case against the jurisdiction-stripping proposals as applied to the lower federal courts is no less compelling.

1. Article III

Congress' control over lower court jurisdiction derives not from the Exceptions Clause, but from its power under Article III, Section 1, to "ordain and establish" courts inferior to the Supreme Court. One early view, expressed by Justice Story, was that Article III *required* Congress to establish lower federal courts to exercise original jurisdiction in all cases within the constitutionally defined judicial power, other than those in which the Supreme Court had original jurisdiction. Under this view, Congress' discretion was limited to deciding where, what number, and what character of lower federal courts to establish, and how jurisdiction should be allocated among them.

The premise underlying this view—that the entire judicial power defined by Article III must be vested in the federal judiciary—has since been rejected. Indeed, Justice Story's position ignored the historical evidence that the Framers were divided as to the desirability of establishing any lower federal courts and intended to leave that decision to Congress.

The prevailing view has been that the Constitution gives Congress absolute discretion as to whether to establish any lower federal courts. From this it is said to follow that Congress has plenary control over the jurisdiction of such lower courts as it chooses to create. Some modern scholars have questioned the premise underlying this view, arguing that federal courts of original

jurisdiction are now necessary to carry out the Constitution's plan for the federal judiciary. Professor Eisenberg argues that, because of the proliferation of federal law and federal court caseloads since the Framers' era, lower federal courts have become a constitutional necessity to administer federal justice; he argues that, if the federal courts were abolished and their cases turned over to the state courts, the burden of harmonizing conflicting interpretations of federal law by the 50 state court systems and vindicating federal rights would be more than the Supreme Court, exercising its appellate jurisdiction, could bear. Professors Redish and Woods argue that lower federal courts are constitutionally necessary to restrain unconstitutional acts by federal officials, since state courts are generally without power to award relief in such cases.

Whether or not it was constitutionally required to do so, the first Congress did establish a system of lower federal courts in the Judiciary Act of 1789, and Congress has since then consistently endowed those courts with a broad measure of the judicial power defined in Article III. The lower federal courts have long had original jurisdiction over diversity cases and cases arising under the Constitution and federal laws. Exercising that subject matter jurisdiction, the lower federal courts have been important instruments of judicial constitutional review, although their role in enforcing the Supremacy Clause vis-a-vis the states is not so central as that of the Supreme Court. Congress has never before enacted legislation to deprive the lower federal courts of jurisdiction to hear cases arising under the Constitution generally, nor on an issue-by-issue basis, as proposed in the pending bills.

The lower federal courts play a vital role as courts of first instance in which federal rights can be vindicated. In *Mitchum* v. *Foster*, the Supreme Court reaffirmed this role in tracing the history of 28 U.S.C. § 1983 to its origin in the Civil Rights Act of 1871. The Court noted that this provision "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." The Court continued:

"The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' . . . And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U.S. 123; cf. *Truax* v. *Raich*, 239 U.S. 33; *Dombrowski* v. *Pfister*, 380 U.S. 479."

For individuals seeking to enforce federal rights, the ability to bring suit in a federal forum rather than a state court is significant. As a leading study by the American Law Institute concluded, "federal courts are more likely to apply federal law sympathetically and understandingly than are state courts."

An important advantage of the lower federal courts over most state courts in protecting constitutional rights is the independence of federal judges from political influence, based upon their appointment for lifetime terms and their guarantee of undiminished compensation. Judge McGowan of the D.C. Circuit saw the lower federal courts' role in desegregating the public schools as a prime example of that advantage:

"[I]s it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges. . . . Certainly it would have been hard to ask them to risk such an exposure with so few shields."

Another important role of the lower federal courts is to develop a body of empirical evidence that the Supreme Court can later use in formulating constitutional doctrine. The Supreme Court will often permit a difficult issue to germinate among the lower courts before it accepts a case to resolve the issue. From that process of grappling with a thorny issue through several different cases in different courts, a more judicious final resolution may result—or, at least, the areas of uncertainty and disagreement may be crystallized. Then, when the Supreme Court announces doctrine, it often does so in broad terms, leaving to the lower federal courts the task of fashioning from that doctrine decisions in concrete cases. As Judge Craven of the Fourth Circuit explained, the Supreme Court

"quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals, while others are allowed to orbit indefinitely."

In sum, the lower federal courts have historically played a vital role in vindicating constitutional rights and in promoting national uniformity in the interpretation of the Constitution and the federal laws. The federal courts have successfully functioned side-by-side with the state courts. As a practical matter, the proposed limitations on the lower federal courts (even assuming that an avenue of review by the Supreme Court were left open) would so inundate the Supreme Court as the sole federal arbiter of such issues that the effectiveness of the federal judicial branch would be impaired. We see no compelling interest to justify this kind of radical tampering with the present judicial system and the form in which it has functioned for so many years. Indeed, given the lower federal courts' present-day role in that system, such tampering may now be unconstitutional, whatever Congress could have done in 1789.

2. Other constitutional provisions

Aside from the limitations inherent in Article III of the Constitution and the historic role of the judiciary in our system of government, other constitutional provisions and considerations should constrain Congress from enacting any of the pending bills. Whatever the scope of Congress' authority over federal court jurisdiction under Article III, Congress may not exercise that authority in a manner that contravenes any other provision of the Constitution. While Congress is acknowledged to have plenary power to regulate interstate commerce, for example, no one would suggest that Congress constitutionally could use that power to prohibit interstate transport of political pamphlets in violation of First Amendment guarantees, or to seize property moving in interstate commerce without due process of law in disregard of the Fifth Amendment. Congress' exercise of its authority over federal court jurisdiction, like the exercise of all of its other powers, is "entirely subject to all of the other provisions of the Constitution that constrain government power."

As the Supreme Court observed:

"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."

By the same token, Congress' authority over jurisdiction may not constitutionally be used to shield government actions from judicial constitutional review.

(a) The due process clause

The Fifth Amendment prohibits the Government from depriving any person of life, liberty, or property without due process of law. Judicial constitutional review of government actions is an essential element of due process. While Congress has never before put the issue to the test by impairing federal court jurisdiction to exercise such review, several cases have intimated that a law eliminating any opportunity for federal judicial review in any class of cases would violate the Due Process Clause.

Hence, Congress' authority over federal court jurisdiction under Article III is limited by the requirements of the Fifth Amendment's Due Process Clause. And due process requires that there be a judicial remedy for someone claiming to be aggrieved by a government's violation of the Constitution.

Applying these due process principles, the Supreme Court disregarded a section of the Military Selective Service Act that purported to prohibit any judicial review of selective service classifications except in a criminal prosecution for violation of the Act and upheld a registrant's right to bring an action to enjoin an unlawful classification practice. And the Court of Appeals for the District of Columbia Circuit refused to give effect to a provision of the Federal Deposit Insurance Act that purported to deprive the courts of jurisdiction to review certain administrative actions taken pursuant to it. Other cases have carefully scrutinized jurisdiction-limiting statutes according to these due process principles.

In light of these precedents, it is extremely doubtful that the bills withdrawing jurisdiction in draft and military classification cases would withstand constitutional scrutiny. The Due Process Clause would not tolerate subjecting a citizen to loss of liberty by being inducted into the military without an opportunity for some form of judicial review of the law ordering that loss of liberty. It is equally doubtful that Congress could constitutionally require the federal courts to enforce federal legislation—for example, by trying individuals for the crime of refusing induction into the military—but deny those courts jurisdiction, as two of the pending bills would do, to consider a challenge to the law's constitutionality by a person against whom enforcement is sought.

Another due process principle limiting Congress' power over judicial jurisdiction is the requirement that all persons receive equal treatment under the law. Statutes

that would eliminate jurisdiction to hear narrow categories of constitutional claims violate this principle by invidiously discriminating against those who assert the particular claims thus singled out. All of the bills presently under consideration save one (H.R. 114) suffer this infirmity. They each single out narrow categories of constitutional claims for jurisdictional oblivion—those involving public prayer, abortion, school desegregation, and sex discrimination in the military.

Since closing off federal judicial redress to persons claiming violations of specific constitutional rights impinges upon fandamental liberties, such jurisdictional limitations should be subjected to strict scrutiny by the courts and can satisfy the equal protection component of the Due Process Clause only where they are "shown to be *necessary* to promote a *compelling* governmental interest." Yet it is doubtful that these jurisdictional limitations would satisfy even the lower standard applicable where fundamental rights are not involved: a statutory classification must bear a reasonable relationship to a permissible governmental purpose. No legitimate, let alone compelling, governmental interest is served by curtailing federal court jurisdiction to hear specified constitutional claims. No serious argument can be made that jurisdictional limitations are intended to promote judicial efficiency or any similar interest legitimately within Congress' purview under Article III. And a desire to alter some judicial interpretations of the Constitution with which a majority of the Congress may disagree is not a licit governmental purpose that will satisfy the constitutional standard.

(b) Specific constitutional rights

Statutes that would eliminate federal court jurisdiction to hear specified constitutional claims, as proposed in the present bills, may well be held to be impermissible abridgements of the constitutional rights underlying the claims as to which jurisdiction is denied. For example, the bills that would eliminate any federal judicial remedy against govenmental violations of the First Amendment through school prayer programs would themselves be an abridgement of the First Amendment rights.

It is established that, where the purpose and effect of a law is to obstruct judicial protection of constitutional rights, the law is unconstitutional unless it is necessitated by compelling and legitimate governmental interests. As shown above, no such showing of justification can be made for bills like those here considered. Indeed, the present bills appear to have no purpose other than limiting constitutional rights as those rights have been enforced by the courts.

In *Faulkner v. Clifford*, a district court invalidated a statutory provision that purported to deprive all federal courts of jurisdiction to review selective service classifications except in criminal prosecutions of registrants for violation of the Military Selective Service Act. There, a registrant was punitively classified 1-A for returning his registration card as a protest against the draft. The registrant commenced a civil action to challenge the punitive classification, arguing that his First Amendment right to protest the draft had been infringed. The Government moved to dismiss for lack of jurisdiction based on the statutory prohibition against judicial review. The court held that denying the registrant a judicial forum for his constitutional claim impermissibly chilled his exercise of First Amendment rights, and ruled the jurisdictional limitation to be unconstitutional as so applied.

(c) Structural provisions

As discussed above (Part II), depriving the federal judiciary of jurisdiction to hear constitutional claims threatens the basic structure of our government and particularly the principle of separation of powers. As Chief Justice Burger wrote in 1976,

"Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. . . .

"Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, [the statute in question] can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles."

We have already discussed how jurisdictional limitations of the sort proposed would offend one important structural provision of the Constitution, the Supremacy Clause (Part IIB above). Such jurisdictional limitations, by seeking indirectly to alter authoritative judicial interpretations of the Constitution, may also be regarded as an impermissible attempt to circumvent the process of constitutional amendment.

We do not take issue with those who point out that, ultimately, legislative supremacy is at the heart of our democratic system. But the established constitutional mechanism for resolving a profound and lasting disagreement between the judicial branch and Congress, as the elected will of the people, as to the meaning of a constitutional provision, is amendment of the Constitution, not tampering with the jurisdiction of the courts. Under Article V, an amendment to the Constitution can be proposed by two-thirds of both houses of Congress or the application of legislatures of two-thirds of the states, and such amendment becomes effective when ratified by three-fourths of the states. The process of amending the Constitution was not intended to be a simple matter, but rather one that required great deliberation. Much more was required than the simple majority vote necessary for ordinary legislation.

The proposed jurisdictional limitations also implicate another important structural provision of the Constitution, the one governing impeachment. As noted above, the Framers intended impeachment to be the *sole* check on the judiciary. Impeachment was intended to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.

Were Congress able to act by simple majority upon every disagreement with the judiciary's constitutional interpretations by divesting the courts of jurisdiction, both of these carefully constructed safeguards—constitutional amendment and impeachment—requiring supermajority action by Congress and the people would be wholly avoided. Such a result would impair the tripartite balance of power in our constitutional system and would be inconsistent with the intentions of the draftsmen of the Constitution.

CONCLUSION

For the reasons here discussed, the Committee concludes that legislation to divest the federal courts of jurisdiction to hear constitutional claims, such as proposed in the pending bills, is probably unconstitutional and certainly unwise. The basic constitutional plan of separation of powers, and judicial constitutional review as an essential part of this plan, have served the nation well for two centuries. The plan should not be tampered with because some Supreme Court constitutional decisions are perceived to be out of step with public favor or even wrong.

We believe that, when faced with proposals to divest the federal courts of jurisdiction or to undermine their independence, Congress should be guided by the example of self-restraint exhibited by the 75th Congress when it rejected President Roosevelt's court-packing proposal. As the Senate Judiciary Committee put it in 1937:

"Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system?

". . . Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

". . . Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."

Mr. WEICKER. I shall just read an excerpt, and this will be the conclusion of my remarks:

We believe that, when faced with proposals to divest the federal courts of jurisdiction or to undermine their independence, Congress should be guided by the example of self-restraint exhibited by the 75th Congress when it rejected President Roosevelt's court-packing proposal. As the Senate Judiciary Committee put it in 1937:

"Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? . . .

". . . Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

". . . Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."

The PRESIDING OFFICER. The time of the Senator from Connecticut has expired.

Mr. JOHNSTON. Mr. President, we seem to get lumped in with a lot of other anticivil rights movements when we talk about this bill.

I quite agree with the Senator from Connecticut in what he says about the restoration of the tax exemption for segregated schools. I think that was all the bad things he says it was. I think many of these other things are. But let us not mix that up with busing.

Let us remember that busing, according to the latest NBC poll, is opposed in the black community as well as in the white community.

There was an interesting article by the distinguished black journalist, William Raspberry, not too long ago, September 4, 1981, in the Washington Post. He described what happened over in Prince Georges County. He says:

They drew up bus routes and pupil-assignment plans that, at least at the beginning, had the effect of ending official segregation.

A couple of things have happened since the plan was implemented in 1972. First, a large number of whites have left the public schools while a large number of black families have moved into the county, most of them in areas near the District of Columbia. Second, housing patterns in 1981 are not what they were in 1972. Whites have been moving farther out into the county, in many cases selling their homes to black newcomers.

He goes on to say that:

The school system that was 13 percent black a decade ago is some 40 percent black today. One result of all this is the busing patterns that enhanced integration when they were established now often involve the absurd phenomenon of black children traveling great distances from their neighborhood only to wind up in schools that are overwhelmingly black.

Mr. President, we could go on and on.

Listen to what the Urban League says in "The State of Black America In 1980." It says:

Many urban school desegregation decrees involve little more than the shifting of bodies from one location to another with little regard for the consequences and the effects on the quality of education and human relationships . . . increasing numbers of black parents, after years of seeing the burdens of desegregation placed disproportionately on black children, are questioning the benefits of desegregation. Many black parents, instead, argue for improving the quality of education their children receive wherever the children attend school.

Mr. President, we are not going to be able to improve that quality of education if wholesale numbers of white children, indeed black children, usually the more affluent, leave the system, and that is just what is happening. They are leaving the school system. In my hometown, they are either going across the river to Bossier Parish, or they go to a whole group of new private schools that they have started, and we can rant and rail how terrible it is and how we wish they would stay in the school system, but we cannot make them stay. It is still a free country.

When that happens—erosion of that public school system and its support is happening at an increasingly rapid rate—there is something we can do, and that is to pass this amendment. It will improve education. Indeed, it will be a more effective remedy to get our schools desegregated.

As Mr. Justice Powell stated "In the rush to try to accomplish one thing, that is desegregation, we have created another evil or," as he says, "out of a zeal to remedy one evil courts may encourage or set the stage for other evils.

"By attempting to get rid of one-race schools you may get one-race school systems," says Mr. Justice Powell.

We have the right, we have the power, indeed we have the mandate from the American public to act and to act now, Mr. President, and I urge my colleagues to act affirmatively on this amendment.

Mr. RIEGLE. Mr. President, I am strongly opposed to forced school busing. I am voting against this amendment because I believe it is unconstitutional.

The PRESIDING OFFICER. All time has expired.

Under the previous order, the Senate will now recess until——

Mr. WEICKER addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut has no time.

Mr. WEICKER. Mr. President, I ask unanimous consent that it be in order to suggest the absence of a quorum at this time.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order of the quorum call be rescinded.

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

Mr. STEVENS. Mr. President, it is my understanding that all time has expired under the previous order?

The PRESIDING OFFICER. The Senator is correct.

RECESS UNTIL 1:25 P.M.

Mr. STEVENS. Mr. President, I ask unanimous consent that the Senate stand in recess until 1:25 p.m.

There being no objection, the Senate, at 12:34 p.m., recessed until 1:25 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. GRASSLEY).

The PRESIDING OFFICER. The Chair recognizes the Senator from Alaska.

Mr. STEVENS. Mr. President, it is my understanding that at 1:30 p.m. there will be a rollcall vote on the pending amendment.

Have the yeas and nays been ordered on that amendment yet?

The PRESIDING OFFICER. The Senator is correct.

Mr. STEVENS. Immediately following the vote on that amendment, it is my further understanding that there will be a rollcall vote on the distinguished majority leader's motion to proceed with the consideration of Senate Resolution 20; is that correct?

The PRESIDING OFFICER. The Senator is not correct. That has not been ordered. The yeas and nays have not been ordered.

Mr. STEVENS. The yeas and nays have not been ordered but there is an order that there will be a vote immediately following the vote on the amendment to S. 951; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. STEVENS. As soon as there is a sufficient second I will ask for the yeas and nays and will alert the Members of the Senate that there will be a rollcall vote on the majority leader's motion to proceed with consideration of Senate Resolution 20.

Mr. President, I will ask that there be a quorum call and I intend to call it off at 1:30 p.m.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Under the previous order, the hour of 1:30 p.m. having arrived, the question is on agreeing to the amendment, as amended, of the Senator from North Carolina. The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. STEVENS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from Arizona (Mr. GOLDWATER), and the Senator from Florida (Mrs. HAWKINS), are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mrs. HAWKINS) would vote "yea."

Mr. CRANSTON. I announce that the Senator from New Jersey (Mr. WILLIAMS) is absent because of illness.

The PRESIDING OFFICER. Are there any other Senators desiring to vote?

The result was announced—yeas 58, nays 38, as follows:

[Rollcall Vote No. 2 Leg.]

YEAS—58

| | | |
|---|---|---|
| Abdnor | Ford | Nickles |
| Andrews | Garn | Nunn |
| Armstrong | Gorton | Pressler |
| Bentsen | Grassley | Proxmire |
| Biden | Hatch | Pryor |
| Boren | Hayakawa | Quayle |
| Byrd, Harry F., Jr. | Helms | Randolph |
| | Hollings | Roth |
| Byrd, Robert C. | Huddleston | Sasser |
| Cannon | Jepsen | Schmitt |
| Chiles | Johnston | Simpson |
| Cochran | Kassebaum | Stennis |
| D'Amato | Kasten | Stevens |
| Danforth | Laxalt | Symms |
| DeConcini | Long | Thurmond |
| Denton | Lugar | Tower |
| Dole | Mattingly | Wallop |
| Domenici | McClure | Warner |
| East | Melcher | Zorinsky |
| Exon | Murkowski | |

NAYS—38

| | | |
|---|---|---|
| Baucus | Hart | Mitchell |
| Boschwitz | Hatfield | Moynihan |
| Bradley | Heflin | Packwood |
| Bumpers | Heinz | Pell |
| Burdick | Humphrey | Percy |
| Chafee | Inouye | Riegle |
| Cohen | Jackson | Rudman |
| Cranston | Kennedy | Sarbanes |
| Dixon | Leahy | Specter |
| Dodd | Levin | Stafford |
| Durenberger | Mathias | Tsongas |
| Eagleton | Matsunaga | Weicker |
| Glenn | Metzenbaum | |

NOT VOTING—4

| | | |
|---|---|---|
| Baker | Hawkins | Williams |
| Goldwater | | |

So Mr. HELMS' amendment (No. 69) as amended was agreed to.

Mr. JOHNSTON. Mr. President, I move to reconsider the vote by which the amendment, as amended, was agreed to.

Mr. STEVENS. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## TELEVISION AND RADIO COVERAGE OF SENATE PROCEEDINGS

Mr. STEVENS. Mr. President, it is my understanding that we will now have a rollcall vote on the motion to proceed to the consideration of Senate Resolution 20. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. STEVENS. Mr President, before that rollcall commences, the distinguished majority leader is absent today. He is not feeling well. It is my intention, following the rollcall vote on this motion to proceed to the consideration of Senate Resolution 20, to recess the Senate, unless there is some Senator who has pressing business he wishes to discuss following the rollcall vote.

The PRESIDING OFFICER. The question is on agreeing to the motion to proceed to the consideration of Senate Resolution 20. The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. TOWER. Mr. President, on this vote, I have a live pair with the distinguished Senator from Tennessee (Mr. BAKER). If he were present and voting, he would vote "aye." If I were permitted to vote, I would vote "nay." Therefore, I withhold my vote.

Mr. STEVENS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from Arizona (Mr. GOLDWATER), and the Senator from Florida (Mrs. HAWKINS), are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mrs. HAWKINS) would vote "yea."

Mr. CRANSTON. I announce that the Senator from New Jersey (Mr. WILLIAMS) is absent because of illness.

The PRESIDING OFFICER (Mr. DANFORTH). Are there any other Senators in the Chamber wishing to vote?

The result was announced—yeas 92, nays 3, as follows:

[Rollcall Vote No. 3 Leg.]

YEAS—92

| | | |
|---|---|---|
| Abdnor | Exon | Melcher |
| Andrews | Ford | Metzenbaum |
| Armstrong | Garn | Mitchell |
| Baucus | Glenn | Moynihan |
| Bentsen | Gorton | Murkowski |
| Biden | Grassley | Nickles |
| Boren | Hart | Nunn |
| Boschwitz | Hatch | Packwood |
| Bradley | Hatfield | Pell |
| Bumpers | Hayakawa | Percy |
| Burdick | Heflin | Pressler |
| Byrd, Harry F., Jr. | Heinz | Pryor |
| | Helms | Quayle |
| Byrd, Robert C. | Hollings | Riegle |
| Cannon | Humphrey | Roth |
| Chafee | Inouye | Rudman |
| Chiles | Jackson | Sarbanes |
| Cochran | Jepsen | Sasser |
| Cohen | Johnston | Schmitt |
| Cranston | Kassebaum | Simpson |
| D'Amato | Kasten | Specter |
| Danforth | Kennedy | Stafford |
| DeConcini | Laxalt | Stennis |
| Denton | Leahy | Stevens |
| Dixon | Levin | Symms |
| Dodd | Long | Thurmond |
| Dole | Lugar | Tsongas |
| Domenici | Mathias | Wallop |
| Durenberger | Matsunaga | Warner |
| Eagleton | Mattingly | Weicker |
| East | McClure | Zorinsky |

NAYS—3

| | | |
|---|---|---|
| Huddleston | Proxmire | Randolph |

PRESENT AND GIVING A LIVE PAIR—1

Tower, against.

NOT VOTING—4

| | | |
|---|---|---|
| Baker | Hawkins | Williams |
| Goldwater | | |

So the motion to proceed to the consideration of Senate Resolution 20 was agreed to.

Mr. STEVENS. I move to reconsider the vote, Mr. President.

Mr. PACKWOOD. I move to lay it on the table.

The motion to lay on the table was agreed to.

Mr. LONG. Mr. President, a parliamentary inquiry.

Mr. STEVENS. I yield to the distinguished Senator from Louisiana for the purpose of making a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. LONG. Will the Chair please repeat that vote?

The PRESIDING OFFICER. Ninety-two yeas, three nays.

Mr. LONG. I thank the Chair.

## ROUTINE MORNING BUSINESS

Mr. STEVENS. Mr. President, there has been a request for a period for routine morning business. I do ask unanimous consent that there now be a period for routine morning business for the next 15 minutes, during which Senators may speak for not to exceed 2 minutes each.

Mr. CHILES. Mr. President, I wish to make some remarks that are going to take a little longer than 2 minutes. I can do it in this period or on the bill.

Mr. STEVENS. How long does the Senator wish, Mr. President?

Mr. CHILES. Ten minutes.

Mr. STEVENS. Under the circumstances, Mr. President, I amend that request and ask unanimous consent that there be a period for routine morning business to expire at 2:45 p.m., during which Senators may speak for not to exceed 10 minutes.

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

## FIDEL CASTRO; A CONTINUING PROBLEM

Mr. CHILES. Mr. President, in affairs of state as in human affairs, we tend with the passage of time to learn to live with a situation no matter how abhorrent and dangerous that situation may be. We can become complacent and even tolerant of the status quo. At times the American public and the American Government have seemed to fall into that trap with respect to the Castro dictatorship in Cuba.

It has been 23 years since Castro imposed his rule on Cuba. During that time, Castro, hand-in-glove with the Soviet Union, has worked consistently and with some success in steadfast opposition to the policies and efforts of the United States. The Castro government, overtly or covertly, has remained in the forefront of the world's troublemakers and has indeed caused a great deal of trouble. Not only has he enslaved the people of Cuba and wreaked economic ruin on that nation but the Castro regime has played a

leading role around the world in fomenting armed conflict and terrorism.

Yet, because Castro and his activities have been going on for some time, it is all somehow old news. Some people are simply no longer interested in the fact of a lawless regime 90 miles from our shores. Others see Castro as merely an irritant; a thorn in our side not worthy of a great deal of consideration. Still others would even maintain that Castro has moderated over the years and that the United States should seek to normalize relations with Cuba.

These viewpoints are, at best, naive and fail to recognize the present reality of Cuba and the threat it represents.

It is important to remember that Cuba, while a relatively small nation, is a significant military power. Supplied and bankrolled by the Soviets, Cuba is well-armed and disposed to use those arms. Cuban armed forces are the largest in Latin America, except for Brazil, which has 12 times the population. Cuba has 225,000 people in the armed forces, plus several hundred thousand in paramilitary organizations. The Soviet Union's military transfers have given them mobility and the capacity to project armed forces beyond Cuba's shores. It has the potential to mount and sustain military operations throughout the Caribbean and the northern tip of Latin America. In short, Cuba represents a serious problem for the United States of growing magnitude.

I am convinced that Castro is not moderating or curtailing his violent, destructive actions in any way. Rather, the evidence becomes clearer and clearer that Castro is intensifying his efforts and enlarging his role as the stalking horse of the Soviet Union.

Mr. President, the disturbing and—I can think of no other word—evil nature of the Castro threat is vividly illustrated by new revelations indicating the active participation of the Cuban Government in organized drug-smuggling activities. The complete story is not yet known and I hope that the Senate Permanent Subcommittee on Investigation will soon be undertaking an effort to bring the entire story to light. But enough is now known and confirmed to show that the Cuban Government itself is now in a partnership with the worst criminal element to facilitate the smuggling of illegal drugs into the United States.

This Nation has faced and continues to face an overwhelming crisis with respect to the flow of illicit narcotics into our country. These drugs poison our population and have spurred a resurgence of criminal activity so widescale it is difficult to fully comprehend. My State of Florida is experiencing a crime wave that threatens the social structure, the economy, and every individual who lives there. The key element in this surge of crime and corruption has been the drug trade with its billions in profits and ruthless violence.

I, and other Members of this body, have been searching for ways to combat the narcotics trade; looking for every resource of the Federal Government that might contribute to a more effective drug law enforcement effort. Now we come to find that another government, if one can use that term for the Castro regime, is aiding and abetting the drug traffickers. We find that Cuba has entered into a cynical bargain with the drug merchants.

The State Department has confirmed that Cuba is giving sanctuary to drug-smuggling ships for refueling and maintenance. It is allowing mother ships, laden with illegal drugs from Latin America, to operate within Cuban waters while unloading onto smaller vessels for drug runs into Florida. In return, the drug dealers are transporting Cuban arms and money to aid guerrilla operations.

We are faced with a situation that is nothing short of diabolical. In the thrust of one operation, Castro is able to strike viciously at U.S. society by aiding the drug traffickers to spread their poison and, in turn, use the smugglers to help arm and fund insurrection and terrorism. The sheer effrontery and total disregard for the dictates of international law would be shocking if it were not so consistent with the Castro pattern of behavior.

As profoundly disturbing as these revelations are, they merely build on the record of international crimes by this outlaw regime. For over 20 years, Castro has sought to promote violence and destabilize other nations. Cuba has been the armed surrogate and the agent of terrorism for the Soviet Union throughout the world.

Over the past several years, these activities have reached a new level of intensity. The investment of time, manpower, energy, and Soviet money is staggering. In the mid-1970's, Cuba turned to direct intervention in Africa. To this day, Cuba's military and political activities in Africa are major and range throughout the continent. Cuba still maintains large armed contingents in Angola and Ethiopia to do the Soviets' bidding.

The African adventures have been followed by a renewed and full-scale assault on the Caribbean and Central and Latin America. Since 1978, Cuba has embarked on a well-organized and well-financed campaign to incite violence and armed conflict throughout the region. It has supplied arms, training, and other forms of assistance to aid armed insurgencies in country after country. The State Department has documented the range and scope of Cuban involvement, not only in Nicaragua and El Salvador and Guatemala, but also in Costa Rica, the Dominican Republic, Colombia, and Chile. The extreme gravity of these activities and the potential consequences for U.S. policy are evident in Nicaragua, Grenada, and in the ongoing struggle in El Salvador. The Cuban interference is having a devastating impact.

All indications are that the impact will grow as the militarization of Cuba continues to escalate at an alarming rate; 1981 witnessed the largest volume of Soviet military deliveries to Cuba since 1962, twice that of 1980. This Tuesday, Secretary Haig indicated that Cuba recently received a second squadron of Soviet Mig-23 warplanes. Unclear is whether these are models that can carry nuclear weapons. Other reports disclose that Cuban airfields now operate as a base for Soviet TU-95 bombers, the primary Soviet heavy bomber, which has a nuclear capability.

Some reports have indicated, Mr. President, that the Bear is being used as a reconnaissance plane. We know that it is overflying our ships. We know that it is flying very close to our coastline. However, to say the Soviet bomber, the Bear, is a reconnaissance plane is to say that the B-52 would be primarily a reconnaissance plane.

These reports raise disturbing questions about the potential use of these armaments and aircraft. Clearly at issue is whether Cuba is building an offensive capability in violation of the United States-Soviet agreement following the Cuban missile crisis. It appears to me that the agreements are being violated. Do not the Mig-23's and the Soviet Bears constitute violations? The Senate must be informed as to the complete contents of the 1962 agreements and whether violations are occurring.

Mr. President, in addition to the prohibition against having weapons that have an offensive capability, that being a part of the 1962 agreements after the missile crisis, there was another provision that was widely discussed. It was that Cuba would not be used to foment revolution and armed conflicts in other countries. Nothing could be further from a breach than what Cuba has been doing in regard to insurgent actitivies, the fomenting of revolution, the furnishing of arms and supplies, and the training of terrorists.

Mr. President, Cuba's reckless and provacative behavior, which appears to know no limit, mandates that the Cuba problem be brought to the forefront of our foreign policy agenda. Its illegal activities cannot be allowed to continue unchecked. As past experience dictates, there are no easy answers with Cuba. For over 20 years, we have struggled with this dilemma and the administration faces an extremely difficult challenge. But past experience also shows that only a position of

strength and firmness of purposes will work to curtail Cuba. Somehow, we must make Cuba understand that we will extract a heavy price if it continues on its present course. Cuba must understand that we will not tolerate its participation in criminal activitiy directed at our very social fabric. I am glad the administration is sounding the alarm about Cuba. I hope we will see realistic and effective action to back up those words of alarm.

Mr. President, another thing that must be noted is the situation with the refugees who were sent out from Mariel. We know some were criminals. Some were mentally ill and some were emptied out of institutions. Others were simply poor people, people who were unemployed.

But we also know that some of them were provocative agents; and as they have come to our country, they have been trying to stir up discord. They have been trying to foment strife in our country.

This is one more evidence of what Castro has been trying to do and what he continues to do and this is something that we cannot tolerate any longer.

Mr. RANDOLPH. Mr. President, will my knowledgeable colleague from Florida yield?

Mr. CHILES. I yield.

Mr. RANDOLPH. Mr. President, I wish more Senators were present. I am in no wise critical of the absence of Senators from this Chamber. They are at work elsewhere. The Senator who has been speaking, and the Senator from West Virginia who is now commending his colleague, for what he has spoken understand that. I hope and believe that the Members of the Senate will give not only a careful reading, but also a factual understanding, of the reality of the words that our colleague has addressed not only to the Members of Congress, but also to the people of the United States of America.

I have known of the Senator's commitment in this critical problem for a long period of time. I have recognized his efforts in bringing to the attention of his constituents within the State of Florida and to men and women in other States, of the appalling situation which we continue to tolerate, if that is the word, in reference to Cuba in relationship to the United States of America.

I well remember that day when Castro came into this Chamber and was in the Capitol of the United States and, with wide-spreading hands, he declared: "We come as your friends. We are your friends."

Twenty years come and go, and that promised friendship between the Cuban regime of Castro and the Soviets who work with him, has never been exhibited insofar as I know even in one iota. The conditions worsen. There is a tragic relationship that is festering between Cuba as it relates to the United States of America and the well-being not only of our own people but freedom-loving people throughout the world.

I hope that through the media, the Senator's words will be carried to the public, to men and women who are not only intensely interested in the validity of the truth that the Senator speaks, but of the need now to have affirmative action programs of many types to cause Castro if possible, and those who join with him, to realize that we no longer will take a passive position in reference to these violations. We will stand together. We will move together. We will do what is necessary for the United States of America, the well being of our own people and the free world.

Mr. CHILES. I thank the distinguished Senator from West Virginia for his kind remarks and also for the cogent observations that he had made.

I well remember that he has been one that has been following this situation over a number of years and has attempted to raise his voice many times to warn this country and to warn the Senate of the potential dangers.

I also wish not to let this opportunity to go by without saying that the Senator from West Virginia has also been tremendously sympathetic to the problems that have been visited on my State by the refugees who have fled from Cuba seeking freedom. Florida is the closest point to their homeland. It has a similar climate. It also became an area where they can find a cultural heritage and family connections. And, of course, they have worked very hard in my State and in the main have assimilated themselves very well.

Up until the Mariel boatlift we were reducing the number of refugees added. The Senator from West Virginia has always been helpful and understanding of the problems of my State. The problems are not of our making. We did not develop the policy. It was the national policy or absence of national policy that caused this to come about. Yet continually Florida and the local government of south Florida have had to carry a very severe burden in trying to help these people get their feet on the ground, and then after the Mariel boatlift it has all started over again.

One of the great difficulties that the Senator from Florida and the whole delegation from Florida have is that every day further away from the Mariel experience the tendency is to say: "Well that is your problem down there. You all handle it."

But the Senator from West Virginia has always recognized that it was a national problem and he has been very sympathetic in that regard. I thank him for it.

Mr. RANDOLPH. I thank the Senator.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## CONFERENCE ON ADMINISTRATION OF JUSTICE

Mr. SPECTER. Mr. President, this past weekend there was a conference on the administration of justice in Williamsburg, Va., attended by the Committee on the Judiciary of the U.S. Senate, the Committee on the Judiciary of the U.S. House of Representatives, and the Chief Justice of the U.S. Supreme Court at which time a number of useful subjects were discussed.

One of the highlights of the conference in my opinion was the speech made by the president of the Pennsylvania Bar Association, Robert M. Landis who, coincidentally, was my partner when I was in the practice of law with Dechert Price & Rhoads in Philadelphia. Mr. Landis made a speech on a subject which is especially timely today and that involves the effort to limit the jurisdiction of the Federal courts on a variety of issues including busing, a subject upon which this body voted a few moments ago.

At this time I ask unanimous consent to have printed in the RECORD the remarks of Mr. Landis.

There being no objection, the remarks were ordered to be printed in the RECORD, as follows:

REMARKS OF ROBERT M. LANDIS

The 97th Congress now has before it more than thirty bills designed to curtail the jurisdiction and remedial powers of the federal courts in federal constitutional cases. The bills focus on substantive issues that are politically sensitive: prayer in public buildings; methods of achieving school desegregation; abortion; and sex discrimination in the armed forces. Their purpose, as their sponsors bluntly proclaim, is to "be a healthful corrective to further excesses by the Supreme Court," to teach the Court "a salutary lesson so that future excursions by the Court beyond its proper bounds would be avoided."

All of the bills would place restrictions on the lower federal courts; most would affect the appellate jurisdiction of the Supreme Court; some would completely remove federal court jurisdiction over particular subjects; and some of the bills dealing only with remedy are so broad they would effectively preclude all federal court review of the substantive areas involved.

This array of legislation, generated, as Senator Hatch claims, by "substantial constituencies" who oppose particular constitutional rulings is a nearly unprecedented at-

tempt to circumvent the constitutional safeguards provided by the amendment procedures. Those procedures, with the participation of state legislatures, and subject to requirements of concurrence by extraordinary majorities, would be bypassed through ordinary statutes purporting to limit federal court jurisdiction enacted by a mere majority of the House and Senate.

This is an alarming challenge: to the fundamental principle of separation of powers; to the application of the supremacy clause; and to the precious historical tradition in the United States of elaborating and enforcing constitutional provisions through an independent judiciary, a practice sanctioned since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). This legislative incursion of the federal judiciary may be the gravest threat to its independence and to the principle of separation of powers since the court packing plan in 1937.

On this venerated 100th anniversary, listen to the overtones of President Franklin D. Roosevelt's court-packing Fireside chat:

"I am in favor of action through legislation:

"First, because I believe that it can be passed at this session of the Congress.

"Second, because it will provide a reinvigorated . . . Judiciary necessary to furnish quicker and cheaper justice from bottom to top.

"Third, because it will provide a series of Federal Courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political . . . policies.

". . . The balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance."

These words were spoken on March 9, 1937. They will surely echo in the Senate Chamber next Tuesday in the executive session of the Judiciary Committee.

This is not a time for scholarly debate. The peril of abstract debate on questions of constitutional power is that it leads nowhere. We heard the parade of constitutional scholars last summer in the Senate hearings. Some of them upheld Professor Hart's famous structural hypothesis of the essential role of the Supreme Court in the constitutional plan; others questioned its historical assumptions. Some of them, like my friend, Professor Charles Rice, advocated facile experimentation with statutory jurisdictional withdrawal; others found this abhorrent. Some of them thought Congress can do almost anything it wants to the jurisdiction of the lower federal courts or even to the appellate jurisdiction of the Supreme Court; others found such power bound by external and internal limits of the Constitution.

If there was any consensus at all, it was on these two points: that so long as federal courts have federal question jurisdiction, they always have the power to decide the constitutionality of any congressional jurisdiction limitation; and that the senators and representatives were treading on treacherous grounds of social policy as they ventured over this constitutional terrain.

It is time now to look hard at the principles that are at risk in this elemental struggle.

The policy reasons for resisting this legislation are compelling: First, the proposals seek to circumvent the established amendment procedures with their extraordinary safeguards for changing the provisions of the Constitution. Second, the premise of the legislation is pernicious, that state courts and state judges will be less hospitable to existing constitutional precedent and more likely to respond to popular notions of constitutional rights because they are more accountable to citizens who elect them. Third, transient and vagrant interpretations of constitutional law would spread among the fifty states without the unifying values of one Supreme Court exercising the traditional powers under Article III, undergirded by the Supremacy clause of Article VI. Fourth, and most alarming, once let loose upon unpopular interpretations of constitutional rights, this process of jurisdictional gerrymandering may not be contained.

It was this portent that prompted Fred W. Friendly in Chicago last week to sound an alarm of the peril to the press in these words: "The public and the media," he said, "must be made aware that once the floodgates are opened, all of our liberties and rights can be placed in jeopardy. Pressure will grow to withdraw jurisdiction every time a lobby group receives what it perceives to be an adverse ruling [from the federal courts]. For the media, this means that the First Amendment is also subject to congressional mutation."

Friendly sketched a plausible scenario, tracking the history of *Near* v. *Minnesota*, in which a state enacts a Public Nuisance Law, decreeing that a newspaper or broadcaster which twice suffers a final judgment for libel, published with knowledge or with reckless disregard that it was false, is guilty of a public nuisance and may be enjoined from publication within the state. A newspaper loses two cases in the statutory period and is enjoined. The appellate courts of the state uphold the injunction, declaring the Public Nuisance Law constitutional. The United States Supreme Court grants certiorari and strikes down the state Public Nuisance Law as unconstitutional, as it did in the historic *Near* case.

The majority whip of the Senate, who cames from that state and voted for judicial preclusion statutes like these, introduces a bill "to teach the court a lesson," a bill which delcares that neither the Supreme Court nor any other federal court shall have jurisdiction over any such case. The bill passes; the state re-enacts the Public Nuisance Law; the newspaper is enjoined from publication and the newspaper carries the case to the Supreme Court.

In a landmark decision the Supreme Court holds that the act precluding the high court from jurisdiction is unconstitutional. Friendly foresees such a constitutional crisis as "a national tragedy of the most radical implications . . . a constitutional gridlock," as he calls it.

If this scenario sounds fanciful, who could have foreseen the deluge of legislation poured into the Congress last year with these draconian measures to carve up to jurisdiction of the federal courts?

But if it is said that all Congress is doing here is legislating on remedies, not jurisdiction, let us look more closely at what some of this remedial legislation really does.

The beguiling notion inherent in Congressional freedom of choice in fashioning remedies for violations of federal law has its own constitutional infirmities. The right to a judicial hearing in a school desegregation case is meaningless unless the court is empowered to grant reasonably effective relief. Denying to the federal judiciary all reasonably effective remedies is as fatal to litigant in vindicating his constitutional rights as is denying the litigant a judicial forum at all.

While the present proposals might leave state courts nominally free to fashion relief for constitutional wrongs, any defendant in a state court action can thwart the state court remedy by removal to the federal court. Armed with the power of removal, defendants will expliot the federal judicial impotence. This is what happened to the Norris-LaGuardia Act's ban on federal antistrike injunctions and promoted the Supreme Court to shut off that route to evasion. When the Congress fatally inhibits the federal court's power to grant a crucial remedy, it denies that remedy effectively.

Beyond this, the selective deprivation of effective remedies, as in school desegregation cases, or public prayer cases or abortion cases, besides creating a political climate hostile to those constitutional rights, runs athwart of the constitutional objection that Congress cannot proclaim outcome determination: giving the federal courts jurisdiction to adjudicate cases while directing them to reach a particular result. That is what *United States v. Klein*, was all about. "What is this," said the Supreme Court of the law it held unconstitutional in that case, "but to prescribe a rule for the decisions of a cause in a particular way?

This is not an issue that should divide conservatives and liberals or Democrats and Republicans. It should not divide those who support or disagree with one or another constitutional decision of the Supreme Court. The issue at stake is our fundamental constitutional plan, the basic allocation of powers in our political system.

From its earliest decisions the Supreme Court has explicitly recognized that its indispensable function under the Constitution is to resolve conflicting interpretations of federal law and legislative power under the Constitution and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority.

Tampering with this fundamental responsibility as a political expedient to satisfy popular opposition to Supreme Court decisions is a treacherous legislative experiment. It challenges the spirit of the Constitution. Its legitimacy is suspect. Its invitation to vagrant, disparate constitutional interpretations among the high courts of the fifty states could fragment the integrity of the Constitution that has bound this nation for nearly two hundred years into a coherent legal establishment.

Responsible lawyers and concerned citizens should not stand silent while Congress fashions constitutional rights and remedies in the transient image of what an imagined popular majority would like them to be or reduces the Constitution to what those in power would like it to mean.

I am presenting to this seminar today the formal statement of position of the American College of Trial Lawyers declaring its opposition to this legislation. Hardly a band of hot-eyed zealots, these leading trial lawyers of the country have expressed the concerns of responsible lawyers and citizens everywhere when we said:

"Curtailment of federal judicial authority in federal cases would undermine the consistency, predictability, and supremacy of federal constitutional law. . .

"The doors of the federal courts must remain open to litigants whose claims arise out of the federal Constitution. . . The issue at stake is our fundamental constitutional plan, the basic allocation of powers in our

political system. Preservation of the independence of the federal judiciary is essential to the principle of separation of executive, legislative and judicial powers."

Congressional forbearance in the past, supported by a Department of Justice with allegiance to the established processes of the federal judicial system, has avoided a constitutional confrontation between the federal courts and the Congress over legislative efforts to gut the capacity of the Supreme Court and the lower federal courts to preserve the unity and supremacy of federal law.

Let us here work together to accomplish such forbearance.

If there is one thing worse than being wise after the event, it is being courageous after the danger is past.

Mr. SPECTER. There was at the same time presented at the conference the statement of the American College of Trial Lawyers on pending legislation affecting the jurisdiction of the Supreme Court of the United States and the lower Federal courts. I similarly ask unanimous consent to have printed in the RECORD this material.

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

STATEMENT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

The 97th Congress now has before it more than thirty bills designed to curtail the jurisdiction and remedial powers of the federal courts in federal constitutional cases. The bills focus on substantive issues that are politically sensitive: prayer in public buildings; methods of achieving school desegregation; abortion; and sex discrimination in the armed forces. Their purpose, as their sponsors acknowledge, is to "be a healthful corrective to further excesses by the Supreme Court," to teach the Court "a salutary lesson so that future excursions by the Court beyond its proper bounds would be avoided."

All of the bills would place restrictions on the lower federal courts; most would affect the appellate jurisdiction of the Supreme Court; some would completely remove federal court jurisdiction over particular subjects; and some of the bills dealing only with remedy are so broad they would effectively preclude all federal court review of the substantive areas involved.

The bills attempting to limit federal court rulings on questions of prayer in public schools and public buildings generally provide that neither the Supreme Court nor the District Courts would have jurisdiction to hear any case arising out of a state law or regulation relating to voluntary prayer in public schools or buildings. They would simply withdraw jurisdiction of this subject matter from the lower federal courts and the Supreme Court.

The bills relating to school desegregation generally seek to limit remedies available to the federal courts rather than to remove them from the courts' jurisdiction entirely. Although dealing with remedy, some of them have such broad prohibitions that they are essentially denials of the courts' jurisdiction.

The abortion bills are largely like the school desegregation bills, purporting to limit remedies rather than jurisdiction, although one of them withdraws jurisdiction from both the Supreme Court and the District Courts over any case arising out of a state law relating to abortion. Some abortion bills invoke the power given to Congress by the Fourteenth Amendment to prevent deprivation of life without due process of law: they purport to redefine when human life exists, declaring that it begins at conception.

Although the various bills do not present identical constitutional and policy problems, they share a common purpose. All attempt, by ordinary legislation, to control or influence the substantive interpretation of Federal constitutional provisions. The consequences are clear and disturbing. The bills would permit constitutional changes without following the amendment procedures detailed in the Constitution. They would fundamentally alter the checks and balances in the 178-year-old American doctrine of judicial review. And they would have far reaching and disruptive effects on the American political system.

Article V of the Constitution embodies what may well be the most distinctive aspect of the American political system. It reflects the Framers' view that ordinary legislation should never be used to change the substance of the Constitution. It permits Congress to initiate constitutional changes only by two-thirds votes of both Houses, and even then requires ratification by three-fourths of the States. This process is deliberately intended to take substantive interpretation of the Constitution beyond the reach of a mere legislative enactment—to protect against transitory simple-majority excesses. A great strength of the American political system, in comparison with the parliamentary democracies of Europe, has been precisely in the gradual and deliberative character of constitutional changes.

It is the function of the federal courts "to decide on the [federal] rights of individuals," and "It is emphatically the province and duty of the judicial department to say what the law is". *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803). That is nowhere more true than with respect to the Constitution. The federal judiciary is the "living voice of the Constitution."[1] Once a federal court has interpreted the Constitution in a particular case, the rights and duties declared may thereafter be altered only if the decision is judicially overruled or by a pertinent constitutional amendment.

The bills in question would establish as a governing principle of our political system that the final word on constitutional interpretation is the word of a bare majority of Congress. If that principle were to prevail, the judiciary would have no ultimate role in constitutional interpretation and thus no check on the other branches of government. That is not what the Framers intended.

Curtailment of federal judicial authority in federal cases would undermine the consistency, predictability and supremacy of federal constitutional law. Leaving the matter to the state courts for final decision can only lead to national chaos. There are few easy cases in constitutional interpretation, and perhaps even fewer that can be decided unanimously. Inevitably diverging interpretations of federal constitutional rights by fifty different jurisdictions would threaten the integrity of the Constitution itself. If there are to be different classes of constitutional rights and a corresponding division of authority between federal and state courts, those differences are matters of constitutional interpretation that should be declared by constitutional amendment.

The doors of the federal courts must remain open to litigants whose claims arise out of the federal Constitution. This issue should not divide conservatives and liberals or Democrats and Republicans. Nor should it divide those who support or disagree with one or another constitutional decision of the Supreme Court. The issue at stake is our fundamental constitutional plan, the basic allocation of powers in our political system. Preservation of the independence of the federal judiciary is essential to the principle of separation of executive, legislative and judicial powers.

Accordingly, the American College of Trial Lawyers declares its opposition to legislative curtailment of the jurisdiction of the Supreme Court of the United States and the lower federal courts for the purpose of effecting changes in constitutional law.

ALSTON JENNINGS,
*President, American College of Trial Lawyers.*

[1] 1 Bryce, *The American Commonwealth* 272 (1905), quoted in Abraham, "A Self-Inflicted Wound," 65 *Judicature* 179, 182 (1981).

Mr. SPECTER. The conference also received a resolution relating to proposed legislation to restrict the jurisdiction of the Federal courts which was passed by the Conference of Chief Justices which were assembled coincidentally at the same time in Williamsburg. I understand a copy of that resolution has already been inserted in the RECORD by the distinguished Senator from Michigan (Mr. LEVIN).

I thank the Chair.

I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## VETERANS BURIAL BENEFITS

Mr. MITCHELL. Mr. President, I am pleased to join my colleagues, Senators CRANSTON, DECONCINI, MATSUNAGA, and RANDOLPH in cosponsoring S. 2048, a bill to store the $300 burial benefit to destitute wartime veterans.

Last year the Senate Veterans' Affairs Committee, of which I am a member, worked diligently to report savings of $110 million in the Veterans' Administration budget for fiscal year 1982. In deciding where to recommend savings, the committee placed a high priority on maintaining benefits for living veterans with service-connected disabilities.

As such, one of the recommendations the committee made was to save $75 million by eliminating the $300 burial benefit for those wartime veterans not in need. Prior to this time, any wartime veteran, regardless of need, was eligible to receive the benefit. To insure that indigent veterans remained eligible, the committee recommended, and the Senate approved, a

provision requiring the VA to conduct an "income-eligible" test in determining eligibility. Under this test, a wartime veteran who was either in receipt of, or eligible to be in receipt of, a VA pension would still be eligible to receive the burial benefit.

This provision was dropped in conference with the House, however, when it became apparent that the administrative costs involved in determining the income eligibility of each veteran on a case-by-case basis would far exceed the total amount of benefits paid. As a result, current law limits the burial benefit to those wartime veterans who, at the time of death, were in receipt of either VA service-connected disability compensation or a VA pension.

Since this provision went into effect on September 30, 1981, there have been numerous reports of indigent wartime veterans not being able to receive a proper funeral, simply because they were not in receipt of a VA pension when they passed away. Clearly, this was not the intent of either the committee or the Senate when it passed the Omnibus Reconciliation Act last summer.

Mr. President, we can never fully repay those wartime veterans who risked their lives to defend the ideals of this great country. I believe, the very least we can do, is insure that these veterans receive a decent burial.

This bill would insure that indigent veterans receive a proper burial and would avoid the problem of the "income-eligible" test mentioned earlier by providing that a wartime veteran be deemed to be in receipt of a VA pension at the time of death provided that: no next of kin claims the body; a State or political subdivision assumes responsibility for the burial of the veteran; and, sufficient funds do not exist, other than from the State, to cover the cost of the burial. In such cases, the lesser of $300 or the actual expense incurred will be paid to the State or political subdivision which assumed responsibility. In addition, the bill would be retroactive to September 30, 1981.

Although no comprehensive cost estimates have been developed, S. 2048 would address this problem for substantially less than the $75 million needed to completely restore the benefit.

Mr. President, I believe this bill would address a gross injustice in a fair and equitable manner—and at a minimum cost. I urge my colleagues to join me in cosponsoring this important bill and to work to insure its swift passage.

## JOB SERVICES

Mr. MITCHELL. Mr. President, one of the harshest, and most unwise, of the recent budget cuts was the crippling blow dealt by the December continuing resolution to Job Services offices nationwide. At a time when more than 9 million Americans are unemployed—and millions more are so discouraged that they are no longer seeking work—the forced closures of 1,000 Job Services offices nationwide is unconscionable.

The primary function of Job Services offices is job placement. Cutbacks impact on both job applicants and employers. In Maine more than 50 of the State's largest employers use Job Services as their exclusive recruiting agent. Many smaller businesses that cannot afford extensive personnel departments rely heavily on Job Services to find qualified employees. Maine Job Services placed 24,000 job applicants in productive employment last year.

Of these 24,000 many were receiving unemployment benefits. Placing these individuals in jobs reduced the cost of unemployment insurance far in excess of the operational cost of Job Services. Is the layoff of 64 more Maine Job Services employees cost-efficient government? Of course not. People put back to work are not only not drawing unemployment insurance but they are paying income tax dollars back to the Government.

And what about job seekers in our rural areas? Many of the 14 Job Services offices that may be forced to close in Maine are located in our rural areas where unemployment is often the highest. Job seekers in these areas will be even more hard pressed to find productive employment if we allow these closings to occur.

Revenues coming into the Federal Treasury decline as unemployment rises. President Reagan has explained his record budget deficits by noting that a 1-percent increase in unemployment puts the Government $25 billion further in the red. As we face record deficits, can we really afford to abandon one of the few methods we have to put people back to work?

Apparently, President Reagan thought so. His proposed funding level, contained in the December 15 continuing resolution, cut $264 million from the administrative expense account for both employment and unemployment insurance activities. Eighty percent of that cut—$210 million—was earmarked for employment services. During the debate on the continuing resolution assurances were given that layoffs would not result from these reduced spending levels. The administration promised a supplemental budget request if their calculations proved incorrect and layoffs became necessary.

And what happened? The funding level for Job Services proved woefully inadequate. Job Services employees were laid off and Job Services offices were closed all across the Nation. The administration sat idly by.

Mr. President, it is imperative that we restore that $210 million immediately. We must remove the dark cloud from over the head of the dedicated Job Services employees whose jobs are threatened. We must offer the unemployed our assistance in getting them back to work. We must assist the beleaguered small businessman, struggling to survive in a hostile economy, in finding qualified employees to fill his open positions.

I was prepared to offer an amendment to the first suitable appropriations bill to restore funding for Job Services. It now appears that House Joint Resolution 391 will accomplish my objectives. This funding measure is now before the House Appropriations Committee with belated administration support.

I urge the leadership to insure prompt consideration of this bill and I implore my colleagues to offer their full support in its passage.

## MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Saunders, one of his secretaries.

## EXECUTIVE MESSAGES REFERRED

As in executive session, the Acting President pro tempore laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

## TENTH ANNUAL REPORT ON THE ADMINISTRATION OF THE FEDERAL RAILROAD SAFETY ACT—MESSAGE FROM THE PRESIDENT—PM 108

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report, which was referred to the Committee on Commerce, Science, and Transportation:

*To the Congress of the United States:*

I transmit herewith the Tenth Annual Report on the Administration of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421 et seq.) as required by that Act. This report was prepared in accordance with Section 211 of the Act and covers calendar year 1980, preceding my term of office.

RONALD REAGAN.

THE WHITE HOUSE, *February 4, 1982.*

BILL HELD AT DESK—H.R. 5379

Mr. STEVENS. Mr. President, I ask unanimous consent that the bill (H.R. 5379) to amend Public Law 97-76 to extend the period during which authorities provided under the Department of Justice Appropriation Authorization Act, fiscal year 1980, are continued in effect, be held at the desk pending further disposition.

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

## EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-2584. A communication from the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), transmitting a draft of proposed legislation to amend title 10, United States Code, to authorize ordering reserve commissioned officers of the Army on active duty (other than for training) to serve on active duty in a grade to which promoted; to the Committee on Armed Services.

EC-2585. A communication from the Assistant Secretary of the Army (Installations, Logistics, and Financial Management), transmitting, pursuant to law, a report on a study with respect to converting the office equipment repair activity at Fort Richardson, Alaska, and the decision that performance under contract is the most cost-effective method of accomplishment; to the Committee on Armed Services.

EC-2586. A communication from the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), transmitting a draft of proposed legislation to amend title 10, United States Code to revise and standardize the provisions of law relating to the authority of the Secretaries of the Military Departments to order certain retired and other similarly situated members of the Armed Forces to active duty; to the Committee on Armed Services.

EC-2587. A communication from the Assistant Secretary of the Army (Installations, Logistics, and Financial Management), transmitting, pursuant to law, a report with respect to converting the guard services function at Fort Greely, Alaska, and the decision that performance under contract is the most cost-effective method of accomplishment; to the Committee on Armed Services.

EC-2588. A communication from the Assistant Secretary of the Army (Installations, Logistics, and Financial Management), transmitting, pursuant to law, a report with respect to converting the refuse collection and disposal function at Fort Bragg, N.C., and the decision that performance under contract is the most cost-effective method of accomplishment; to the Committee on Armed Services.

EC-2589. A communication from the Assistant Secretary of the Army (Installations, Logistics, and Financial Management), transmitting, pursuant to law, a report with respect to converting the furniture repair activity at Fort Bragg, North Carolina, and the decision that performance under contract is the most cost-effective method of accomplishment; to the Committee on Armed Services.

EC-2590. A communication from the Deputy Assistant Secretary of Defense (Facilities, Environment, and Economic Adjustment), transmitting, pursuant to law, a report on eight construction projects to be undertaken by the Army Reserve; to the Committee on Armed Services.

EC-2591. A communication from the Assistant Secretary of the Air Force (Research, Development, and Logistics), transmitting, pursuant to law, a report with respect to converting the publishing distribution office function at Tinker Air Force Base, Okla., and the decision that performance under contract is the most cost-effective method of accomplishment; to the Committee on Armed Services.

EC-2592. A communication from the Deputy Assistant Secretary of Defense (Facilities, Environment, and Economic Adjustment), transmitting, pursuant to law, a report on 26 construction projects to be undertaken by the Army National Guard; to the Committee on Armed Services.

EC-2593. A communication from the Acting Director of the Defense Security Assistance Agency, transmitting, pursuant to law, a report on the Department of the Army's proposed letter of offer to Turkey for defense articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-2594. A communication from the Acting Director of the Defense Security Assistance Agency, transmitting, pursuant to law, a report concerning the Department of the Navy's proposed letter of offer to Saudi Arabia for defense articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-2595. A communication from the Acting Director of the Defense Security Assistance Agency, transmitting, pursuant to law, a report concerning the Department of the Army's proposed letter of offer to the Philippines for defense articles estimated to cost in excess of $25 million; to the Committee on Armed Services.

EC-2596. A communication from the Administrator of the Panama Canal Commission, transmitting, pursuant to law, a report, including financial statements, covering the operation of the Panama Canal for fiscal year 1981; to the Committee on Armed Services.

EC-2597. A communication from the Chairman of the Board of Governors of the Federal Reserve System, transmitting, pursuant to law, the sixth annual report of the Board on the Equal Credit Opportunity Act covering 1981; to the Committee on Banking, Housing, and Urban Affairs.

EC-2598. A communication from the Assistant Attorney General (Civil Rights Division), transmitting, pursuant to law, the annual report on the administration of the Equal Credit Opportunity Act for calendar year 1981; to the Committee on Banking, Housing, and Urban Affairs.

EC-2599. A communication from the Secretary of the Interstate Commerce Commission, transmitting, pursuant to law, notice of a 3-month extension of the statutory time period in Docket No. 9256, Joint Line Route Cancellation on Soda Ash by the Union Pacific Railroad; to the Committee on Commerce, Science, and Transportation.

EC-2600. A communication from the vice president for Government Affairs, National Railroad Passenger Corp., transmitting, pursuant to law, a report on the average number of passengers on board and the on-time performance of each train operated by the corporation for the month of September 1981; to the Committee on Commerce, Science, and Transportation.

EC-2601. A communication from the Secretary of Commerce, transmitting, pursuant to law, the tenth annual report of the National Advisory Committee on Oceans and Atmosphere; to the Committee on Commerce, Science, and Transportation.

EC-2602. A communication from the chairman of the Marine Mammal Commission, transmitting, pursuant to law, the ninth annual report of the Commission covering calendar year 1981; to the Committee on Commerce, Science, and Transportation.

EC-2603. A communication from the Secretary of Energy, transmitting, pursuant to law, the fifth quarterly report on Biomass Energy and Alcohol Fuels covering the period July through September 1981; to the Committee on Energy and Natural Resources.

EC-2604. A communication from the Deputy Secretary of Energy, transmitting, pursuant to law, notice that there will be a delay in the submission of the report concerning the development of building energy conservation standards; to the Committee on Energy and Natural Resources.

EC-2605. A communication from the Under Secretary of the Interior, transmitting, pursuant to law, an annual report on the evaluation of oil and gas development, wilderness characteristics, and wildlife resources on Federal lands in the Central Arctic Area of Alaska; to the Committee on Energy and Natural Resources.

EC-2606. A communication from the Under Secretary of the Interior, transmitting, pursuant to law, notice of a 1-year deferment of the 1981 construction repayment installments of certain reclamation loans; to the Committee on Energy and Natural Resources.

EC-2607. A communication from the Secretary of Energy transmitting, pursuant to law, an assessment of the sufficiency of efforts to provide trained professionals to operate nuclear powerplants and fuel cycle facilities on the feasibility of creating a Federal Corps of nuclear operators; to the Committee on Energy and Natural Resources.

EC-2608. A communication from the Secretary of Transportation transmitting, pursuant to law, a report on Inland Waterway User Charges; to the Committee on Environment and Public Works.

EC-2609. A communication from the Administrator of the National Aeronautics and Space Administration transmitting, pursuant to law, a report on the Administration's progress on its Upper Atmospheric Research Program; to the Committee on Environment and Public Works.

EC-2610. A communication from the Acting Secretary of State transmitting, pursuant to law, the report on the extent and disposition of United States contributions to international organizations for fiscal year 1980; to the Committee on Foreign Relations.

EC-2611. A communication from the Director of the Office of Legislative Affairs of the Agency for International Development transmitting, pursuant to law, its fiscal year 1982 report on program allocations; to the Committee on Foreign Relations.

EC-2612. A communication from the Chairman of the Board for International Broadcasting transmitting, pursuant to law, the eighth annual report of the Board for International Broadcasting; to the Committee on Foreign Relations.

EC-2613. A communication from the Assistant Secretary of State for Congressional

Relations transmitting, pursuant to law, a proces-verbal of rectification of the French text of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Exec. E, 96-1); to the Committee on Foreign Relations.

EC-2614. A communication from the Assistant Secretary of the Treasury for Legislative Affairs transmitting, pursuant to law, additional project performance audit reports by the International Bank for Reconstruction and Development, the Inter-American Development Bank, and the Asian Development Bank; to the Committee on Foreign Relations.

EC-2615. A communication from the executive vice president of the Potomac Electric Power Co. transmitting, pursuant to law, a copy of the balance sheet of Potomac Electric Power Co. as of December 31, 1981; to the Committee on Governmental Affairs.

EC-2616. A communication from the comptroller of Washington Gas Light Co. transmitting, pursuant to law, the balance sheet of the company as of December 31, 1981; to the Committee on Governmental Affairs.

EC-2617. A communication from the Administrator of the National Aeronautics and Space Administration transmitting, pursuant to law, positions established under 5 U.S.C. 3104 during the calendar year 1981 in NSSA; to the Committee on Governmental Affairs.

EC-2618. A communication from the Chairman of the Commission on Intergovernmental Relations transmitting, pursuant to law, the 23rd annual report of the Commission; to the Committee on Governmental Affairs.

EC-2619. A communication from the Secretary of Agriculture transmitting, pursuant to law, notice of a new Privacy Act System of records; to the Committee on Governmental Affairs.

EC-2620. A communication from the Secretary of the American Battle Monuments Commission transmitting, pursuant to law, its report for calendar year 1981 under the Freedom of Information Act; to the Committee on the Judiciary.

EC-2621. A communication from the Executive Director of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research transmitting, pursuant to law, its biennial report on Protecting Human Subjects; to the Committee on Labor and Human Resources.

EC-2622. A communication from the Public Printer, United States Government Printing Office transmitting, pursuant to law, the fiscal year 1981 annual report of the GPO; to the Committee on Rules and Administration.

EC-2623. A communication from the Chairman of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Chairman of the Federal Deposit Insurance Corporation transmitting, pursuant to law, a report on small business finance; to the Committee on Small Business.

EC-2624. A communication from the Assistant Secretary of the Army for Installations, Logistics, and Financial Management transmitting, pursuant to law, notice of conversion of the transportation motor pool and maintenance operations at Military Ocean Terminal, Bayonne, N.J. to performance under contract; to the Committee on Armed Services.

## EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. HATCH, from the Committee on Labor and Human Resources:

William J. Bennett, of North Carolina, to be Chairman of the National Endowment for the Humanities for a term of 4 years.

## INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. BUMPERS:

S. 2062. A bill to amend the Tennessee Valley Authority Act; to the Committee on Environment and Public Works.

By Mr. MURKOWSKI (for himself and Mr. STEVENS):

S. 2063. A bill to amend the Naval Petroleum Reserves Production Act of 1976 to authorize the Secretary of the Interior to permit local entities to extract and use coal from lands within the National Petroleum Reserve in Alaska for heat and generation of electricity.

By Mr. MATHIAS:

S. 2064. A bill to amend title 5, United States Code, to provide that retired administrative law judges may be reappointed under regulations prescribed by the Office of Personnel Management; to the Committee on Governmental Affairs.

By Mr. McCLURE:

S. 2065. A bill for the relief of Joseph Antonio Francis; to the Committee on the Judiciary.

By Mr. MATSUNAGA:

S. 2066. A bill for the relief of Micaela Agno Rasay; to the Committee on the Judiciary.

By Mr. SYMMS:

S. 2067. A bill to amend the Trade Act of 1974 in order to authorize the President to respond to foreign practices which unfairly discriminate against United States investment abroad; to the Committee on Finance.

By Mr. DODD:

S. 2068. A bill to amend the National Housing Act to authorize the insurance of certain shared appreciation mortgages; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. HART:

S. 2069. A bill to amend the Congressional Budget Act of 1974 to require that each congressional budget resolution fix the level of tax expenditures for the fiscal year involved as well as the recommended aggregate level of Federal revenues; to the Committee on the Budget and the Committee on Governmental Affairs, jointly, pursuant to the order of August 4, 1977, with instructions that if one committee reports, the other committee has 30 days of continuous session to report or be discharged.

By Mr. BENTSEN:

S. 2070. A bill for the relief of Dr. Ferit Acar; to the Committee on the Judiciary.

By Mr. HEINZ (for himself, Mr. DOLE, Mr. SYMMS, Mr. SPECTER, and Mr. MOYNIHAN):

S. 2071. A bill to amend the Trade Act of 1974 with respect to reciprocal market access; to the Committee on Finance.

## SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. HEFLIN (for himself, Mr. BENTSEN, Mr. BOREN, Mr. ROBERT C. BYRD, Mr. CHILES, Mr. DECONCINI, Mr. EXON, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. JOHNSTON, Mr. LONG, Mr. NUNN, Mr. PRYOR, Mr. STENNIS, and Mr. ZORINSKY):

S. Res. 313. A resolution expressing the sense of the Senate that the Congress should expeditiously consider making an urgent supplemental appropriation for the Department of Labor for the fiscal year ending September 30, 1982; submitted and read.

By Mr. ROTH (for himself, Mr. LEVIN, Mr. HEFLIN, Mr. RIEGLE, Mr. WEICKER, Mr. WILLIAMS, Mr. SPECTER, and Mr. SARBANES):

S. Con. Res. 63. A concurrent resolution entitled "The All Taxpayers Assistance Resolution."; to the Committee on Appropriations.

## STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BUMPERS:

S. 2062. A bill to amend the Tennessee Valley Authority Act; to the Committee on Environmental and Public Works.

(The remarks of Mr. BUMPERS on this legislation appear earlier in today's RECORD.)

By Mr. MURKOWSKI (for himself and Mr. STEVENS):

S. 2063. A bill to amend the Naval Petroleum Reserves Production Act of 1976 to authorize the Secretary of the Interior to permit local entities to extract and use coal from lands within the National Petroleum Reserve in Alaska for heat and generation of electricity; to the Committee on Energy and Natural Resources.

NORTH SLOPE COAL

● Mr. MURKOWSKI. Mr. President, I am today introducing legislation to grant to the Secretary of the Interior the authority to permit local governmental entities on the North Slope of Alaska to extract coal from the National Petroleum Reserve in Alaska ("NPR-A") to use as a fuel within the North Slope area for heating or for the generation of electricity.

The cost of transporting refined petroleum products by airplane and by barge to the remote villages in the North Slope area is extremely expensive. In the village of Wainwright, for example, fuel oil sells for $2.06 per gallon and gasoline is selling for $2.60 per gallon.

The North Slope Borough is currently assessing the feasibility of using local deposits of coal for space heating and for the generation of electricity in some of the villages on the North Slope. The economics of operating a

small-scale, coal-fired project in a Native village will make it necessary to obtain the coal at the cost of mining and transporting the coal to the site of use.

The Department of the Interior has in the past interpreted its responsibilities to Alaska Natives living in and near the NPR-A to include granting the right to extract coal from the NPR-A in quantities sufficient for single-household use. The Department believes, however, that it does not have authority to permit an Alaska Native village to extract sufficient quantities of coal from the NPR-A to fill the heating needs of the village or fuel an electrical generation station. I am attaching to my statement a copy of a letter which sets forth the position of the Interior Department.

If the fuel needs of the Natives for heating and electric generation could be supplied by coal rather than oil, the economic burden now being borne by the Native villagers could be significantly lessened. In addition, use by the villages of coal rather than oil would be a contribution toward reduction of the country's dependence on foreign oil.

The measure I am introducing today would amend section 102 of the Naval Petroleum Reserves Production Act of 1976 to grant to the Secretary of the Interior clear authority to issue whatever permits, licenses, leases, easements, or rights-of-way are needed to permit the extraction of coal from lands within the NPR-A for local use. The authority would permit coal to be taken by the North Slope Borough, any other local governmental entity, or any Native organization within the North Slope Borough, without the payment of any royalty. The purposes for which the coal could be utilized would be limited: to provide fuel for heating or for the generation of electric power within the North Slope Borough.

The NPR-A was created in 1923 as a source of oil for the ships of the Navy in time of war. Jurisdiction over the reserve was transferred to the Department of the Interior in 1977 by the Naval Petroleum Reserves Production Act of 1976—Public Law 94-258. The known reserves of coal within the NPR-A are very significant, and the speculative reserves are estimated to equal a significant portion of the entire Earth's reserves. Identified coal reserves within NPR-A are estimated to be 44 billion tons, while total reserves are probably several times this figure.

The feasibility study prepared for the North Slope Borough estimates a requirement of approximately 3,000 tons per year for this project. At present, however, and for the immediately foreseeable future, there is not a commercial market for the coal which could be mined within the NPR-A. The primary reason for this is the lack of a transportation system which could economically move commercial quantities of coal from the North Slope to potential export markets.

The North Slope Borough had a feasibility study prepared to examine the feasibility of constructing a coal-fired generating plant for the village of Wainwright. The recommended site for coal development is only one-half mile from the village of Wainwright. The coal at this site is approximately 6 feet thick, comprised of subbituminous and lignite coal with an approximate Btu content of 12,000 Btu's per pound, a sulphur content of approximately 0.4 percent, and an ash content of between 10 and 12 percent.

As required by the Surface Mining Control and Reclamation Act of 1977, the National Academy of Sciences completed an in-depth study of surface mining conditions in Alaska in the fall of last year. This study concluded that only small-scale operations should be allowed on the North Slope until more is known about the effect of mining on the fragile Arctic environment, but recognized that mines of a limited size might not be economical. The bill I am introducing today would permit the development of small-scale mines, as recommended by the National Academy of Sciences. The development of limited-size mines would serve the dual purposes of providing the residents of the North Slope with energy from a local resource and providing a site, as recommended by the National Academy, for the testing and developing of mining and reclamation techniques which can be used on the North Slope.

The Congress, as well as the executive branch, have approved numerous actions over the last several years so that the energy resources of Alaska could more expeditiously be explored and developed in order to contribute to the energy needs of the rest of the country. However, none of those developmental activities has or will serve to assist the Native people of Alaska in reducing their dependence on expensive petroleum products. The energy resources of Alaska which are being tapped are being transported to the lower 48 States for the heating of homes and fueling of the Nation's industry. While use of those resources in the rest of the country is desirable and beneficial, it seems that it would be a small step to make available to the Alaska Natives an energy source which exists, literally, in their backyard and which is present in far greater quantities than will ever be commercially developed.

I am hopeful this bill will receive rapid consideration so that planning for the village generating stations can proceed expeditiously and the isolated citizens of the North Slope of Alaska can thus begin to recognize a measure of energy independence.●

---

By Mr. MATHIAS:

S. 2064. A bill to amend title 5, United States Code, to provide that retired administrative law judges may be reappointed under regulations prescribed by the Office of Personnel Management; to the Committee on Governmental Affairs.

REEMPLOYMENT OF RETIRED ADMINISTRATIVE LAW JUDGES

● Mr. MATHIAS. Mr. President, today I am introducing legislation which would amend the statute governing reemployment of retired Federal employees to permit temporary reemployment of retired administrative law judges in certain situations.

Under present law, as found at section 3323(b) of title 5, United States Code, a reemployed annuitant serves at the will of the appointing officer or agency. Believing such service to be inconsistent with the intent of Congress in enacting the administrative law judge provisions of the Administrative Procedures Act, the Office of Personnel Management, and previously the Civil Service Commission, have barred reemployment of administrative law judges. This determination applies to reemployment even on an occasional or temporary basis, except in strictly limited or emergency situations such as the need for a retiring judge to complete cases assigned to him before retirement. The Office of Personnel Management's position is based on the clear intent of Congress to maintain the independence of administrative law judges from the administrative management of their employing agency.

The effect of the Office of Personnel Management's ruling has been to deprive our Government of the special skills and unique experience of its most senior administrative law judges, many of whom are able and willing to continue Government service. Authorizing the temporary recall of these judges will relieve shortages of judges in active service and greatly ease delay in disposition of cases by agencies with large caseloads.

This legislation, identical to that which has already been introduced in the House, gives the Office of Personnel Management authority to prescribe rules under which reemployed administrative law judges may be appointed and serve, thereby insulating such judges from agency control and pressure. The Office of Personnel Management would be permitted to determine the rehired annuitant's pay within the limitations of law, provide for temporary utilization of retired administrative law judges without regard to the regular supergrade manpower ceilings, and establish other necessary regulations.

Mr. President, I believe enactment of this legislation will promote more efficient operation of the Federal regulatory process within which administrative law judges play so vital a role, and result in substantial savings of both funds and manpower. Accordingly, I urge my colleagues to consider this matter promptly.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

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

S. 2064

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 3323(b) of title 5, United States Code, relating to reappointment of retired Federal employees, is amended by striking out the period at the end thereof and inserting in lieu thereof the following: "; except that a former administrative law judge appointed under section 3105 of this title may be reappointed under section 3105 and shall serve pursuant to regulations prescribed by the Office of Personnel Management.".●

By Mr. SYMMS:

S. 2067. A bill to amend the Trade Act of 1974 in order to authorize the President to respond to foreign practices which unfairly discriminate against U.S. investment abroad; to the Committee on Finance.

FAIR TREATMENT FOR U.S. OVERSEAS INVESTMENT

● Mr. SYMMS. Mr. President, I am today introducing a bill to amend section 301 of the Trade Act of 1974.

Section 301, which Congress last amended in the Trade Agreements Act of 1979, allows the President to retaliate against foreign nations which engage in unfair practices that discriminate against or that otherwise harm U.S. trade. My amendment would insure that such practices which injure U.S. investments are covered as well. That is, the President will be empowered to take retalitory investment-related measures when other countries discriminate against American investments.

Mr. President, my bill gives the President a power that he will be able to use in his discretion. It does not require that he use it. My bill is not a weapon to be used in a trade war. It is an instrument to be used with care in trade negotiations.

We live in a world in which unfair treatment of U.S. investment capital is proliferating. Canada's energy policies, which effectively deprive American oil companies of their investments at fire sale prices, are one clear example. The increasingly frequent performance requirements insisted upon by developing countries are another.

An especially troubling—although still prospective—instance is the legislative program of the European Communities. The seventh and ninth company law directives, and the so-called Vredeling proposal, would impose unreasonable and extremely burdensome requirements upon U.S. companies of information disclosure, consultation with trade unions, and even personal liability of U.S. directors.

I believe this program is unfair and unreasonable. Mr. President, my bill would provide a mechanism whereby American companies can protest such programs as this, and can enlist the aid of our Government in making those protests effective. I urge my colleagues to join with me in cosponsoring this measure.

I ask unanimous consent that the bill be printed in the RECORD at the conclusion of these remarks.

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

S. 2067

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 301 of the Trade Act of 1974 (19 U.S.C. 2411) is amended as follows:

(1) Subsection (b) is amended—

(A) by striking out "and" at the end of paragraph (1);

(B) by striking out the period at the end of paragraph (2) and inserting in lieu thereof "; and"; and

(C) by adding at the end thereof the following new paragraph:

"(3) restrict, through such means as he deems appropriate (including, but not limited to, the suspension of investment agreements), direct investment within the United States by such foreign country or instrumentality or by persons who are citizens or nationals of, or are organized or existing under the laws, of such foreign country or instrumentality.".

(2) Subsection (d)(1) is amended—

(A) by inserting "(A)" immediately before "services associated"; and

(B) by inserting ", and (B) investment" immediately before the period.●

By Mr. DODD:

S. 2068. A bill to amend the National Housing Act to authorize the insurance of certain shared appreciation mortgages; to the Committee on Banking, Housing, and Urban Affairs.

SHARED APPRECIATION MORTGAGES

● Mr. DODD. Mr. President, I am introducing legislation today to authorize the Federal Housing Administration to insure shared appreciation mortgages for the purpose of assisting first-time homebuyers, with a priority for residents of rental housing facing involuntary displacement as a result of the conversion of their units to either condominium or cooperative ownership. A shared appreciation mortgage involves a reduced, below-market interest rate for the borrower in return for the lender receiving a commensurate share of the net appreciated value of the property.

I am concerned particularly with the urgency of developing tools to mitigate involuntary displacement resulting from conversions. While already a significant problem in certain markets, the conversion phenomenon will intensify so long as the supply of rental housing is constrained. My State of Connecticut witnessed a 400-percent increase in conversions from 1977 to 1979. Even if the net loss of rental units resulting from this process is relatively low as some national data suggest, the pace of conversions in combination with rental vacancy rates in many larger cities of close to 1 percent paints a very dismal picture for those of limited means or on fixed incomes, such as senior citizens and the disabled. We must find ways to keep monthly housing costs in line with our citizens' ability to pay and we should not foreclose the benefits of homeownership for our people.

The measure I am offering today is not a panacea for either the problems of potential conversion displacees or unsuccessful first-time buyers. It is merely one tool that could ease the problems of housing affordability confronting these groups. In my opinion, our prior efforts at fashioning solutions to housing problems have been hampered by a desire to structure single, grand solutions to multifaceted conditions and needs. Inevitably, programs have been judged to fail because the accomplishments never measure up to the goals or the assistance was not sufficiently focused so as to have a concerted impact. I have attempted to learn from experience in developing this bill which is highly targeted both in terms of purpose and intended beneficiaries.

The FHA must continue to encourage innovation in addressing the housing needs of our lower and moderate income citizens. While I believe that the FHA should continue, without credit restraints, to emphasize the long-term, fixed-rate mortgage, we must recognize that other means must be found to allow the FHA to continue to reach its traditional share of the potential homebuying population. In addition, the FHA historically has provided a leading influence in the housing finance industry. In short, by designing alternative mortgage instruments which are sensitive to consumer needs, the FHA can and should spur a broader acceptance of these instruments throughout the private sector.

In reviewing the testimony from the September 19 hearing by the Subcommittee on Housing and Urban Affairs on this general subject, I find myself in agreement with the testimony of the consumer representatives who argued both for continuation of the basic FHA mortgage instrument and cautioned against certain alternative instruments with unpredictable terms. It is my belief that the limited proposal I am offering responds to these concerns as well as the legitimate need to allow the FHA to continue to perform

89-059 O-85-57 (Pt. 1)

its historic mission. In order to succeed, these new instruments will require broad-based consumer acceptance which can only be accomplished with an approprate equating of risk and benefit and strong consumer protections and disclosures.

Mr. President, certain elements of this bill are drawn from a demonstration which is ongoing in California. I want to extend my appreciation to Donald Terner, director of the California Department of Housing and Community Development for his assistance in the development of this proposal. By all reports the demand for assistance under this demonstration has been overwhelming and the mortgage form has been well received by participants. I want to emphasize the following elements of the bill I am proposing:

To assure that there is a balanced risk sharing between the lender and the consumer, the reduction in the effective interest rate must be at least one-half of the lenders' share of the net appreciated value of the property.

Mortgages will be amortized over 30 years with a term of at least 10 years. The mortgagee must offer to refinance or arrange financing under FHA programs or other sources based on the credit worthiness of the borrower.

With respect to conversion displacees, this insurance will be limited to families or individuals with incomes which do not exceed 120 percent of local area median. While the Secretary is given some discretion to exceed this level, it is imperative that this assistance be utilized in conformance with the antidisplacement objectives of this proposal and not lead to any increase in conversions.

Mortgages are limited to owner-occupants and other FHA requirements on downpayments and mortgage amounts are made applicable.

Most importantly, the Secretary must establish adequate consumer protections and disclosures with respect to these mortgages. While not spelled out in statute, it is my intent that these should closely parallel the notices and disclosures contained in recent California law.

In conclusion, I believe that we must give our immediate attention to this and other potentially promising ideas for addressing the various aspects of our Nation's housing problems. It is possible to fashion creative, alternative solutions which contribute to a national housing policy without spending enormous sums or putting the Federal Government in an area best reserved for other governmental entities or the private sector. The situation is growing increasingly desperate in both human and economic terms and the responsibility to respond expediently is ours.

I ask unanimous consent that the bill be printed in the RECORD following my remarks.

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

S. 2068

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That title II of the National Housing Act is amended by adding at the end thereof the following:

"SHARED APPRECIATION MORTGAGES

"SEC. 247. (a) The Secretary is authorized to insure a shared appreciation mortgage which is secured by a first lien on real property. In carrying out the provisions of this section, the Secretary shall give a priority to tenants who may be involuntarily displaced by the conversion of rental housing to condominium or cooperative ownership.

"(b) For the purpose of this section—

"(1) the term 'shared appreciation mortgage' means a loan or mortgage made upon the security of an owner-occupied one-to-four family dwelling, including a condominium unit or the stock allocated to a dwelling unit in a residential cooperative housing corporation, in connection with which the lender has a right to receive a share of the appreciation in the value of the security property upon sale, refinancing, or acceleration upon default, whichever occurs first, and as a condition of which the lender agrees to a reduction in the interest rate from the prevailing market rate by a percentage which is not less than one-half of the percentage share acquired by the lender in the net appreciated value of the property;

"(2) the lender's share in the net appreciated value of the property may not exceed 50 per centum; and

"(3) in calculating the amount of net appreciated value, the Secretary shall make provision for sales costs, closing costs, and the cost of capital improvements made by the unit owner.

"(c) To be eligible for insurance under this section, a mortgage shall—

"(1) be amortized over a period of not to exceed 30 years, but the actual term of the mortgage (excluding any refinancing) shall be not less than 10 nor more than 30 years, and the commitment for the mortgage shall include an offer by the lender or mortgagee to refinance or arrange for refinancing of the principal balance of the mortgage and any contingent deferred interest at an interest rate generally available in the market under any other section of this title or privately prior to the conclusion of the actual term, subject to qualification of the borrower;

"(2) be executed by a purchaser who has not owned a home during the three years preceding the date of application for insurance;

"(3) in the case of insurance provided pursuant to the second sentence of subsection (a), be executed by a borrower whose income at the time of application for insurance does not exceed 120 per centum of the median income for the area, except that the Secretary may in his or her discretion, increase such percentage of median income limitation where necessary to minimize housing displacement, where appropriate in high-cost areas, or in the case of families with two wage earners;

"(4) have a principal amount which does not exceed the maximum amount of a mortgage which is secured by the same type of property and which may be insured under any other section of this title; and

"(5) be executed by a borrower who shall have paid on account of the property the same percentage of the value of the security property which the borrower would be required to pay under such other section of this title.

"(d) The Secretary shall prescribe adequate consumer protections and disclosure requirements with respect to mortgages insured under this section, and may prescribe such other terms and conditions as may be appropriate to carry out the provisions of this section.".●

---

By Mr. HART:

S. 2069. A bill to amend the Congressional Budget Act of 1974 to require that each congressional budget resolution fix the level of tax expenditures for the fiscal year involved as well as the recommended aggregate level of Federal Government; jointly, to the Committee on the Budget and the Committee on Governmental Affairs, pursuant to the order of August 4, 1977.

TAX EXPENDITURE BILL

● Mr. HART. Mr. President, today I am introducing legislation to significantly improve congressional control over the Federal budget. This legislation will amend the Congressional Budget Act of 1974 to require the establishment of ceilings on tax expenditures in congressional budget resolutions. This legislation was originally drafted and introduced by Representative DAVID BONIOR, in the House last year.

Under current law, the 1974 Budget Act prevents anything more than a perfunctory review of tax expenditures. The Finance and Budget Committees draft revenue floors and spending targets respectively. However, neither of the two adequately consider the total revenue forgone due to tax expenditures. This legislation, will require the incorportion of tax expenditure ceilings in the first and second budget resolutions and the reconciliation process each year.

Tax expenditures, as defined by the Budget Act are those "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential tax rate, or a deferral of tax liability." They are designed to encourage particular economic behavior, such as productive investments, for a targeted segment of the population.

In practice tax expenditures are another form—an uncontrolled form—of Federal spending. They are realized in the form of tax deductions for the elderly and the blind as well as the expensing of exploration and development costs for oil companies. They include the deductibility of interest on home mortgages and the preferential tax treatment of capital gains.

Mr. President, this indirect Federal spending is growing at an alarming rate. The Congressional Budget Office reports that in 1967, when the Treasury Department first began keeping track of expenditures, there were a total of 50 expenditures amounting to roughly $37 billion in uncollected Federal revenues. In 1968, that amounted to just over 20 percent of the entire Federal budget. Today, the CBO indicates there are 110 expenditures totaling nearly $266 billion in forgone revenue or just over one-third of the entire Federal budget. And, for the most part, this Federal spending is uncontrolled Federal spending. At this rate we can expect to see tax expenditures become among the biggest slices of the Federal budget pie—second only to the interest paid on the Federal debt—by the early 1990's.

Mr. President, we have barely completed one of the most arduous budget processes ever undertaken by Congress. In doing so, we battled over the direction and depth of nearly $130 billion in funding cuts to both foreign and domestic Federal programs. Ironically, while we were battling over this $130 billion in cuts, we were also indirectly spending over $80 billion in tax expenditures.

Some may argue that the budget process adequately controls tax expenditures through the revenue floors established each year. However, it is worth pointing out that the required revenue floors take into account primarily revenue from general tax policy and make only general assumptions about the amount of revenue lost to tax expenditures. Beyond this general assumption, nothing is done to quantify or control this aspect of Federal spending. The legislation will highlight the two very distinct parts of the revenue floor process and mandate equal consideration of both the revenue from general tax policy and revenue forgone due to tax expenditures.

This legislation does not in any way limit the amount of money spent through tax expenditures. Rather, it requires Congress pay due attention to the amount of money spent indirectly through Federal subsidies, preferential tax rates, tax deferral, and special credits. We cannot merely assume the amount of money spent through these channels each year and expect to maintain adequate control over the budget process—a significant element in the Nation's economy.

Congress must take every step possible to insure the fiscal integrity of the budget process. This legislation will help do that finally bringing tax expenditures into account in the budget.

I request that the fact sheet prepared by Congressman BONIOR's office on the Bonior/Hart bill as well as the text of this legislation be printed in the CONGRESSIONAL RECORD.

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

S. 2069

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) section 301(a)(4) of the Congressional Budget Act of 1974 is amended to read as follows:

"(4) the recommended level of Federal revenues; the recommended level of tax expenditures; and the amount (if any) by which the aggregate level of Federal revenues, and the level of tax expenditures, should be increased or decreased by bills and resolutions to be reported by the appropriate committees;".

(b) Section 303(a)(2) of such Act is amended by inserting ", or in tax expenditures," after "revenues".

(c) Section 310(a)(2) of such Act is amended—

(1) by striking out "the total amount by which revenues are to be changed" and inserting in lieu thereof "the total amount by which revenues or tax expenditures (or both) are to be changed"; and

(2) by striking out "the revenue laws" and inserting in lieu thereof "the applicable laws".

(d) Section 311(a) of such Act is amended—

(1) by striking out "or reducing revenues" in the matter preceding paragraph (1) and inserting in lieu thereof "providing additional tax expenditures for such fiscal year, or otherwise reducing revenues"; and

(2) by striking out "or would cause revenues to be less" in the matter following paragraph (3) and inserting in lieu thereof "would cause the recommended level of tax expenditures so set forth to be exceeded, or would otherwise cause revenues to be less".

SEC. 2. The amendments made by the first section of this Act shall apply with respect to fiscal years beginning after September 30, 1982.

---

FACT SHEET—TAX EXPENDITURES AND THE BUDGET PROCESS

Tax expenditures, which are defined in the Budget Act of 1974, are special exceptions to the generally prevailing tax schedule. Already a major share of total federal spending, they are growing at an alarming rate with important implications for both budget and tax policy.

Despite their growing importance, tax expenditures are not directly subject to the budget process. No ceiling is established for tax expenditures in the budget resolutions, and tax expenditures are not directly controllable through reconciliation. The Bonior/Hart measure would amend the Budget Act to include tax expenditures.

THE GROWTH OF TAX EXPENDITURES AND THE FEDERAL BUDGET

Tax expenditures already constitute one-fourth (25 percent) of all expenditures and they are growing faster than direct spending. Tax expenditures will constitute an increasing, not decreasing share of all expenditures:

Before the 1981 Tax Act, tax expenditures were projected to cost $266 billion in fiscal year 1982.

Since 1975, tax expenditures have increased at an average annual rate of 14 percent in contrast to 11 percent for direct spending. (Tax Expenditures: Current issues and five year budget projections for fiscal years 1981-1985, CBO, April, 1980)

Failure to subject tax expenditures to the budget process allows them to expand even during periods of otherwise tight fiscal constraints. The result is that the growth of tax expenditures is not only high, but accelerating:

Tax expenditures increased 69 percent from fiscal year 1978 to fiscal year 1980 alone. (CRS, Growth in Tax Expenditures, fiscal year 1978 to fiscal year 1980, November 3, 1981).

The 1981 Tax Act added eight (8) new tax expenditures and expanded twenty-two (22) more at a cost of $227 billion through fiscal year 1986, according to a provisional CBO estimate.

THE IMPACT OF TAX EXPENDITURES AND TAX EQUITY

The normal deducting procedures concentrate the benefits of tax expenditures for individuals among those in the highest marginal income tax brackets. Over one-fifth of all tax expenditures go to corporations at a cost equal to 72 percent of the total tax actually paid by corporations in fiscal year 1981.

A CRS study (Tax Expenditures: The Link Between Economic Intent and the Distribution of Benefits Among High, Middle and Low Income Groups, May 22, 1980, CRS Report No. 80-99E) has demonstrated the impact:

For those making over $50,000, 22.3 percent of their total adjusted gross income is shielded in tax loopholes, compared to only 6.1 percent for those making $20,000 to $30,000.

"For the highest income group, over $50,000," the study concluded, "tax expenditures appear deeply regressive." (Page 32).

THE BONIOR/HART BILL IS A RESPONSIBLE SOLUTION CONSISTENT WITH EARLIER CONGRESSIONAL REFORMS

Under the present budget procedures, each budget resolution sets a limit for total spending and a floor on revenues. While the aggregate spending is broken down by function, no limit is set for tax expenditures even though the total cost of tax expenditures now exceeds $266 billion. Similarly, reconciliation bills do not provide direct instructions to decrease tax expenditures.

The Bonior/Hart bill will prompt regular review of tax expenditures and will bring tax expenditures under the overall constraints of budget policy:

It will require Congress to set and live with a yearly ceiling for tax expenditures.

It will subject tax expenditures directly to reconciliation.

In achieving these results, the Bonior/Hart bill refrains from setting a permanent absolute ceiling on tax expenditures either as a percentage of GNP, revenues or direct spending. It also does not disrupt traditional committee jurisdiction by mandating coreferral of tax expenditures.●

---

By Mr. HEINZ (for himself, Mr. DOLE, Mr. SYMMS, Mr. SPECTER, and Mr. MOYNIHAN):

S. 2071. A bill to amend the Trade Act of 1974 with respect to reciprocal market access; to the Committee on Finance.

RECIPROCAL TRADE

Mr. HEINZ. Mr. President, today I am introducing, together with Senators DOLE, MOYNIHAN, SPECTER, and SYMMS, the Reciprocity in Trade Services and Investment Act of 1982. At

the same time, Congressman BROD-HEAD is introducing an identical counterpart in the House of Representatives.

This bill is the result of several years of intensive experience with our existing trade laws and many months of consultation and legislative drafting with interested Members of Congress and other experts in the field. Before describing the purpose and details of our legislation, I would like to clarify the context in which this or any other trade proposals must be considered.

Mr. President, the multilateral trade negotiations were a watershed in the development of recent trade policy. The culmination of years of negotiations in the Tokyo round, the MTN produced hundreds of tariff reductions and numerous separate agreements on a wide range of codes of behavior for conducting international trade. Some of these codes broke new ground—as in government procurement and standards. Others, subsidies and antidumping, revised old concepts and, theoretically, at least tightened old loopholes.

Subsequently, the Congress passed the Trade Agreements Act of 1979 to implement these new agreements. I supported that bill. In fact, I cosponsored it, after considerable work on it, because I believe it and the MTN represented a major step forward in our efforts to establish a common set of international trading rules and to bring U.S. law in compliance with them. And I believe that still.

Our goal in setting up those trade rules has been and must continue to be establishment and preservation of the free market system. That is usually abbreviated as free trade. But in using that term I think we have to be very clear about what we mean. Free trade means the operation of the system according to free market principles and the law of comparative advantage. It implies a rejection of tariffs, quotas, and other restrictions on market access. It also implies a rejection of subsidies and artificial incentives that give one nation's industries an advantage over others, even though they might be less efficient or productive. Such subsidies distort the law of comparative advantage and divert scarce resources into relatively unproductive industries at the expense of their more efficient competitors elsewhere in the world.

Unfortunately, some analysts choose to ignore this second half of the equation and define free trade only in terms of the United States removing its barriers. The result of that position is a world in which our doors are open and everyone else's are closed; where we struggle to export while other nations dump their less efficiently produced goods here, and along with them, their economic problems. This is not free trade. It is a policy which guarantees the survival of the unfit at the expense of the efficient.

The MTN and the Trade Agreements Act made substantial progress in setting up more uniform rules based on free trade principles. But they neither solved nor anticipated all the problems.

Historically, the most well-known means of deterring imports was the use of a tariff to raise the price of imports as high or higher than that of the domestic competition. However, more than 20 years of negotiations have reduced tariffs to relatively low levels and focused attention on other kinds of barriers. Some of these have existed for years and went unnoticed in the concentration on tariffs. Some are newer and are intended essentially to replace other barriers no longer permitted.

Regardless of type, these nontariff barriers on goods, services, and investment are proliferating in number and variety. In the largest sense they are intended to restrict market access, either by effectively preventing it, such as through discriminatory health or inspection standards, or by deterring it through the imposition of unpalatable performance requirements like mandatory investment in production facilities and required export levels for such plants. The fact that these restrictions apply to both goods and services as well as investment is particularly important to a service-oriented economy like ours.

Considerable research has been done and much has been printed recently about this growing problem. Only last week, the Wall Street Journal, in a front page story, went into considerable detail on Japanese trade barriers. Equally important in that article is the fact that, despite endless negotiations and discussions with Japan, nothing ever changes. Agreements may be reached, meetings are held, changes are announced, but when all is said and done, everything stays the same. As of the weekend, we have a new announcement from Japan. Only time will tell if it will produce significant change. Few of us in the Senate, however, are holding our breath.

Mr. President, I ask unanimous consent that the text of that article appear at this point in the RECORD.

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

[From the Wall Street Journal, Jan. 26, 1982]

AT A CROSSROADS: JAPAN NEARS A CHOICE OF EASING TRADE CURBS OR FACING WEST'S IRE

PROTECTIONIST PRESSURE RISES, BUT THE JAPANESE CRITICIZE FAILINGS OF UNITED STATES, EUROPE—APOSTROPHE DELAYS AN IMPORT

(By Art Pine)

TOKYO.—When a blue-ribbon Japanese trade mission made the rounds of West European capitals last October, its leaders came home jolted by the anti-Japanese feeling they found.

In London, British Chancellor of the Exchequer Geoffrey Howe read a list of complaints about Japanese Trade practices and then disclosed bitterly that it was the same paper the British had presented in the early 1970s. In Paris, French trade Minister Michel Jobert told the delegation acidly that if push came to shove, "there's nothing we really need" to import from Japan.

Complaints from the U.S. have been less rancorous, but frustration with Japan's import barriers is increasing, and so is the chance that the U.S. may move to close its doors to some Japanese goods. Congress is aflutter with draft bills to retaliate against Japan's import restrictions, and the Reagan administration is fast losing patience with the Japanese. "We got to this point a lot sooner than most administrations do," a U.S. policy maker says.

AT A CROSSROADS

The pressure from Japan's major trading partners has become so heated that Japan may be approaching a crossroads—where it must reduce the remaining trade barriers that shelter its industry or face mounting protectionism from the West.

Prime Minister Zenko Suzuki has promised that Japan will act to ease some of its import restrictions; he has ordered a series of top-level councils to produce recommendations by Thursday. (The prime minister has just renewed his pledge to ease trade frictions. See story on page 39.) But most analysts say any progress will probably be slow and painful by Western standards. And they see a substantial risk that trade frictions will intensify before the major trading blocs reach any accommodations, as powerful elements in Japanese government and business remain opposed to significant change.

Predicts Leslie Fielding, the European Common Market's senior representative in Tokyo: "You can be well certain that by spring a package will have been evolved which will be judged in the U.S. and Western Europe as inadequate."

The U.S. and European complaints center on Japan's reluctance to alter its post-World War II trade policies—an aggressive worldwide export drive along with a web of complex restrictions on imports. Businessmen say these policies make it far more difficult for Westerners to crack the lucrative Japanese market than it is for the Japanese to sell in the West.

U.S. LISTS COMPLAINTS

The U.S. has compiled a list of 51 separate tariffs and "nontariff barriers," which include import quotas on 24 agricultural products ranging from citrus fruits to beef. They also include restrictive standards and inspection requirements that effectively shut out such American exports as cosmetics, food additives, autos, tobacco, medical supplies, semiconductors and high-technology products.

Among these restrictions: Japanese refusal to accept U.S. certification that American pharmaceutical exports are safe; insistence on different-from-U.S. standards for electrical appliances and pressurized containers; requirements that importer-distributors of foreign autos submit each car shipped for painstaking emissions-testing rather than, say, one out of every 10.

American businessmen also want Japan to improve Westerners' access to its closely controlled distribution system and to encourage more local companies to abandon

their traditional buy-Japan mentality. And the Reagan administration wants Tokyo to make it easier for U.S. corporations to buy Japanese companies and to enter still-restricted fields such as banking, financial services and insurance.

CONGRESSIONAL PRESSURES

If the Japanese don't open their markets further, the administration has warned, it may go along with congressional pressures for "reciprocity" legislation—laws denying access to some U.S. markets to countries that don't open their own markets to American businesses. Sen. John Danforth, the chairman of the Senate subcommittee on international trade, has indicated that he is considering such legislation. Congressional aides say the pressures now are so intense that some sort of protectionist legislation is likely this year. "It's a damage-control operation," one says.

The West Europeans have submitted their own set of demands. These call for a reduction in Japan's import barriers to products including confectionery, whisky and leather goods. European Common Market officials also want the Japanese to restrain their shipments of high-priced, politically sensitive exports such as autos and machine tools. And they are prodding Japan to sanction more direct investment abroad and more joint ventures in Europe between Japanese and European companies.

But both the American and the European demands face heavy opposition here—from the government's conservative finance and transportation ministries, from the well-entrenched and influential bureaucracy, from some business and farm groups and from the Japanese public. All tend to see U.S. and European complaints as exaggerated and the West's trade troubles as largely its own fault.

"We aren't totally convinced of our wrongdoing, or our evils," says Tadashi Yamamoto, the director of the Japan Center for International Exchange. Adds Yukihiko Ikeda, Prime Minister Suzuki's deputy chief cabinet secretary: "We aren't the only ones to be blamed; Europe and the U.S., too, have something to do."

Indeed, Japan's spectacular economic success has spawned a self-confidence that makes many Japanese openly scornful of American and European society—and quick to blame the West's economic troubles on sloth and decay instead of unfair competition from Japan. They contend that rather than ask Japan to restrain its exports or open its markets wider, Western governments should strive to increase productivity.

"The responsibility lies partly in Europe and the U.S.," says Saeki Kiichi, the director of the prestigious Tokyo-based Nomura Research Center. "If their competitiveness hadn't declined, there would be no problem now." Scoffs Hyogo Fukazawa, a Tokyo importer, in an oft-proffered view that inevitably raises Western hackles: "Mr. America is partly in the hospital. Europe is sick. The Europeans are trying to bring the healthy Japanese into their bed."

Many Japanese argue that the frictions with Japan actually stem from the West's current problems of recession and high U.S. interest rates, along with Westerners' failure to work hard and put aside their preoccupation with short-term profits. They contend that Western discontent will abate as the recession ends and as the Japanese yen rises in value—making imports more attractive here and Japan's exports more costly abroad. Akio Kohno, the chief economist for Daiwa Securities Co., predicts that the yen will appreciate by year-end from its current 229-to-the-dollar rate to a more realistic 180 to the dollar.

Few Japanese accept the widely held Western view that their markets are closed to foreign goods. Mr. Fukazawa charges, "Your businesses aren't finding any trouble selling here; they're just not working enough." He says Japanese businessmen wanting to compete in the U.S. start out by learning English and slowly courting potential customers. "Here, the Americans say, 'We can't sell, we can't sell. But how many of them have really tried?"

THE JAPANESE WAY

Moreover, Japanese tend to look at such barriers as their distribution system and company-takeover restrictions as simply Japan's peculiar way of doing business—something that foreigners ought to accept. "Here, to buy a company is almost considered immoral," explains Saburo Okita, the chairman of the Tokyo-based Institute for Domestic and International Policy Studies. "It's related to the notion that companies should guarantee their workers lifetime employment."

American businessmen with long experience in Japan concede that some of the Japanese contentions are valid, but they argue that Japan still is a closed market by most Western standards. "If you're willing to make the commitment in terms of people, money and time, this is a profitable investment," says retired Gen. Lawrence F. Snowden, the president of the American Chamber of Commerce in Japan. "But there are a lot of barriers that U.S. firms just shouldn't have to meet. There's no doubt that some change is in order."

Admittedly, Japan has come a long way in liberalizing its trade practices from the "Japan Inc." days of the 1960s. Partly as a result of international negotiations in 1978, Tokyo has sharply reduced or eliminated many of its tariffs and some import quotas. But many nontariff barriers remain.

A MISSING APOSTROPHE

For example, Givenchy Japon complained recently that its application to import l'Interdit perfume was held up by the welfare ministry—because the company left out an apostrophe between the L and I. Golfclub parts made in America and assembled in Taiwan can't come in unless the manufacturers gouge out the "Made in U.S.A." stamp engraved in the shafts. Korean-made electric fans that have passed rigorous U.S. tests can't be sold here unless their cords are replaced with Japanese substitutes. Grain accepted in one Japanese port is rejected in another—even though it is in the same shipload.

Western demands that Japan alter its trading practices may well have a familiar ring. Twice during the 1970s the U.S. and Western Europe raised a similar clamor—and got some satisfaction. Says Ryutaro Komia, a Tokyo University professor of international trade: "Now we have experienced the third wave."

This time, all sides agree, the pressures are stronger: Western complaints now involve the whole spectrum of Japanese products and services, not just one or two categories, such as textiles or autos; all of Western Europe, even usually free-trade-minded West Germany, is joining in; Western countries are suffering from high unemployment—and so more likely to turn protectionist—and the anti-Japanese feeling is visibly more strident than it has been before. The feeling in Europe is "approaching the 'yellow-peril' stage," says one U.S. official there.

SORE POINT FOR UNITED STATES

The basic sore point for the U.S. is America's burgeoning foreign-trade deficit with Japan, which hit $18 billion in 1981 and is expected to top $25 billion this year—with little relief in sight. Ironically, all sides agree that even if Japan did everything the U.S. is asking, the trade deficit wouldn't disappear; rather, it would be pared only by a scant $800 million. But, U.S. Ambassador Mike Mansfield told a Tokyo audience this month, "At least the political problems would disappear."

Precisely what steps the Suzuki government will take still isn't clear. But top Japanese leaders obviously recognize that they have a problem. "To the external world, we are in the position that we cannot make excuses any more," says Masumi Esaki, the elder statesman assigned by Mr. Suzuki to coordinate development of a package of trade changes.

As a result, Japan probably will come up with some serious measures to deal with specific U.S. and European complaints, though most observers doubt that Tokyo will make the kind of sweeping "reforms" sought by the U.S.

Mr. Esaki hints broadly that of the 51 specific complaints that the U.S. has lodged about Japanese trade practices, 31 will be resolved "as the U.S. wants." The Japanese think that another 10 practices either are fair or involve easily correctible misunderstandings. The remaining 10, Mr. Esaki says, "still need discussion."

SOME EXAMPLES

Included among the 31 steps to ease existing standards, inspection requirements and import procedures now routinely inhibiting Western sales of products such as cosmetics, pharmaceuticals and auto parts. Officials say U.S. demands for elimination of the remaining import quotas—including two dozen on agricultural products—are apt to receive only token relief.

The remaining items, such as overhaul of Japan's complex and difficult-to-penetrate distribution system, "are touchy, and I don't think we can get early answers," says Yukihiki Ikeda, Prime Minister Suzuki's deputy chief cabinet secretary, who holds a position similar to that of Edwin Meese, counselor in the Reagan White House. Adds Tomio Tsutsumi, a trade-ministry official: "That kind of thing is difficult for the government to handle. If it's easy, we already did it."

The policy makers here are planning other moves, in any case. As a concession to the European Common Market, Japan is expected to slow its exports to Western Europe. Prime Minister Suzuki has indicated that he may install a top-level ombudsman—with broad powers to penetrate the Japanese bureaucracy—to run down specific complaints by U.S. companies. Mr. Esaki says Japan also will "make procedures easier to understand."

PLAN DUE SOON

Mr. Suzuki's strategists say their trade package will be put in final form in early February and timed to hit the U.S. just before members of Congress go home for the Lincoln's Birthday recess; the hope is to have maximum effect on protectionist lawmakers.

Whether the Japanese concessions will be enough to satisfy either U.S. or European officials remains to be seen. During a visit to Japan earlier this month, a group of U.S.

lawmakers headed by Sen. Danforth seemed unlikely to be assuaged. And the administration continued to step up the pressure during a visit by Japanese Trade Minister Shintaro Abe to Washington last week.

All sides are apparently trying to resolve their differences in time to avert a new round of protectionism. But, says Saburo Okita, the chairman of the Tokyo-based Institute for Domestic and International Policy Studies, "Things are getting emotional—and not well-grounded in facts."

Mr. HEINZ. Mr. President, this article also points out the Japanese view that Americans and Europeans do not approach their market properly and that the root of the problem lies in our practices rather than theirs. There is an element of truth in this, and the record no doubt contains examples of American and European failure for the reasons cited; but it is also replete with standards, barriers, and informal practices which make success virtually impossible. Following are some examples of such barriers, taken from practices in a number of different countries:

Restrictive standards and/or inspection requirements on goods like cosmetics, food additives, autos, tobacco, medical supplies;

Refusal to accept U.S. certifications on the safety of pharmaceutical exports;

Emissions testing—or other testing—of each imported auto—or other product—rather than testing a sample;

Prohibitions or restrictions on U.S. entry into key service fields like banking, financial services, and insurance;

Linking market access to a requirement to build production facilities in the country;

Requiring such production facilities to maintain a specified level of exports;

"Unexpected" or unannounced delays in unloading freight, including perishable products;

Limitations on the showing of U.S. films;

Discriminatory airport user charges or less advantageous airport locations for foreign airlines;

Exclusion from airline travel agency reservation systems;

Licensing requirements; and

Local content rules.

There are, of course, numerous others, but the above should serve as an illustrative list.

To better judge the frequency with which such restrictions are imposed, it is useful to look at "The Use of Investment Incentives and Performance Requirements by Foreign Governments," published by the Commerce Department last October. Its conclusions are based on data gathered by the Bureau of Economic Analysis for its Benchmark Survey of U.S. Direct Investment Abroad in 1977. The information is a bit old, but comprehensive, since the 1977 survey covered 3,540 U.S. companies and their 24,666 affiliates. With respect to performance requirements, the study showed that on the average 14 percent of U.S. affiliates were subject to them, although this varied widely by country and region. In South America, for example, every country but Argentina imposed one or more performance requirements on at least one-third of U.S. affiliates. India's rate was the world's highest—60 percent. The sectors most often affected were mining and manufacturing, particularly transportation equipment. Significantly, the use of performance requirements was greater among developing nations, an area where we will be increasingly concentrating in the future.

There is no question, of course, about the growing importance of U.S. investment abroad. U.S. direct investment outflows from 1948 to 1980 were $81.5 billion. Comparing that to the $231.1 billion in earnings suggests a net balance-of-payments gain of nearly $150 billion. The same benchmark survey I referred to shows that 34 percent of U.S. exports go to U.S. nonbanking affiliates abroad, illustrating clearly how the flow of exports is related to foreign investment. Performance requirements or other restrictions that impinge on investment have an immediate and obvious impact on our exports.

Mr. President, I could go on, as ample additional material is available. One particularly useful document I would commend to Senators' attention is the Ways and Means Committee Trade Subcommittee's recent report on its trade mission to the Far East—December 21, 1981—which discusses Japanese practices in some detail.

Clearly, it is past time we gave the President the tools he needs to act against these barriers. If we believe in the free market system as I have described it above, then it is our responsibility to promote such a system on a worldwide basis. Such an effort will not be easy, and it cannot be pursued in an arbitrary manner. While in some cases the practices in question have been deliberately developed to deter foreign access and to promote domestic industries, in others they are the product of long-standing cultural or social traditions and ways of doing business which are integral parts of the society. Belief in the free market does not mean recasting other economies in our image, even if it were possible. It does mean working together with other countries to establish mutually acceptable rules for trade and then insuring that those rules are enforced. Sometimes, it must be recognized, some countries will need encouragement to get to the bargaining table, and we should not shrink from providing that kind of incentive in the form of verbal encouragement or, if necessary, substantive retaliation. But our goal, nevertheless, must remain the reaching of agreement on trade rules and not simply the creation of matching trade barriers on our part.

In attempting to reach that objective, we should give some consideration to the principles of reciprocity and national treatment, the ideas, simply put, that we should expect from others the same treatment we provide them and that U.S. entities operating in a foreign country should be treated the same as comparable domestic entities in that country. Obviously such concepts, clear in broad principle, can be difficult to work with in specific circumstances, and allowance must be made for that. But the concepts themselves are sound.

Accordingly, I am today introducing legislation designed to give the President additional authority to achieve these objectives. This authority is in essence discretionary. It does not depend exclusively on a mechanical process outside the administration's control. It is largely discretionary because I believe that this is the method which will be most likely to produce the fastest, most tangible, and beneficial results.

My bill amends section 301 of the Trade Act of 1974, which is the section providing for U.S. use of the international dispute settlement process centered in the GATT. Under current law the President on his own initiative or via the acceptance of a petition from the private sector can initiate an investigation into another country's unfair trade practice, begin the GATT consultation and dispute settlement process, and ultimately take retaliatory action after the conclusion of the GATT process. My bill would clarify this section to permit the President to use this process to establish or further the principles of reciprocal market access or national treatment for U.S. goods, including agricultural goods, services, or investment. Further, the 301 process could be initiated by resolution of the Finance or Ways and Means Committees, in addition to the private petition or Presidential initiative routes in current law.

Once an investigation was underway under my bill, it would proceed according to current law, with the following differences:

First, the President would be permitted, but not required, to utilize GATT process, which would give him additional latitude for emergency action or action emphasizing the gravity of the situation, if needed;

Second, roughly midway through the GATT process, if it is utilized, the U.S. Trade Representative would have to publish a list of legislative alternatives being considered in the case, in order to make public what options are available to the Government if negotiations fail;

Third, in these cases involving reciprocity or national treatment, the President would have additional retaliatory authority beyond what is in the present statute, including:

(a) Entering into bilateral or multilateral negotiations;

(b) Adjusting Government procurement policies;

(c) Instructing the U.S. directors to the IMF and World Bank to vote against loans to countries against whom a complaint is pending;

(d) Requesting Federal regulatory agencies, such as the FCC or ICC, to consider another country's adherence to reciprocity or national treatment principles in acting on applications from that Government or its nationals;

(e) Proposing mirror image legislation, to be handled under special fast track rules, that would match the nonreciprocal practice.

These additional actions are discretionary and subject to the procedures established in current law.

In my view, Mr. President, this is a responsible way to proceed. Ample opportunity is provided for the administration to consider each case as it is presented by the private sector, and the opportunity remains for presidential self-initiation, should that be appropriate. Equally ample opportunity exists to utilize existing international dispute settlement procedures to bring the matter to a successful conclusion. But in order to help that process along the bill clarifies and specifies existing authority and provides additional authority for the President—and thereby additional negotiating leverage—to retaliate if necessary.

Senators should be aware, Mr. President, that my bill is not the only one on this issue under consideration. I understand that the distinguished Chairman of the International Trade Subcommittee, the Senator from Missouri (Mr. DANFORTH), will shortly be introducing his own bill. Senator DANFORTH has been a leader on this issue for some time, particularly with respect to our longstanding problems with Japan, and I anticipate this bill will reflect his long study of the reciprocity problem, including insights gained from his recent trip to Japan.

While I believe our bills will be materially different, I anticipate they will be in many respects complementary, and I look forward to working with Chairman DANFORTH in developing a comprehensive approach to this problem.

It is my view that we need legislation that will strengthen our own laws, strengthen the GATT process, focus world and national attention on the reciprocity problem, and help develop trading rules more consistent with free market principles. I look forward to the Finance Committee's rapid consideration of this bill, and I ask that it be printed in the RECORD, along with a fact sheet detailing the bill's provisions.

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

S. 2071

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. FINDINGS; STATEMENT OF PURPOSE.

(a) FINDINGS.—

(1) TRADE IN SERVICES.—The Congress finds that—

(A) trade in services (including banking and other financial services, insurance, information and data processing, communications, transportation, advertising, shipping, construction and engineering, and entertainment) is becoming an increasingly important part of the United States economy;

(B) many nations, for various reasons, are increasingly erecting nontariff barriers to the import of United States and other foreign goods and services;

(C) such barriers include, but are not limited to, national monopolies, personnel restrictions, discriminatory restrictions on licensing and foreign exchange, local content requirements, local investment requirements, minimum export requirements, local equity participation requirements, discriminatory health, safety, or environmental standards, restrictions on the flow of information, restrictions on the repatriation of funds or profits, discriminatory tax policies, and other discriminatory restrictions on, or requirements of, foreign entities operating in the host country;

(D) the effect of such barriers has been to discriminate against imported goods and services and to provide for trade on a nonreciprocal basis; and

(E) such discrimination—

(i) results in a less open trading system and a distortion of the market system, and

(ii) works to the disadvantage of all countries, particularly countries (including the United States) which adhere to a free market system.

(2) INTERNATIONAL INVESTMENT.—The Congress further finds that—

(A) international investment flows should not be restricted or impaired by uneconomic or artificial barriers or restrictions which exist in many developed and developing countries;

(B) uneconomic and artificial barriers to direct investments, or restrictions on such investments, cause inefficiencies in the international production and distribution process which result in increased costs of production of goods and services to the consumers of the world;

(C) such barriers and restrictions should be removed to enhance the benefit to both investors and consumers of the limited resources available for international direct investment;

(D) arbitrary and nontransparent investment review procedures (other than with respect to certain industries critical to a nation's security interests), and unreasonable or otherwise arbitrary limitations on foreign currency exchange by non-nationals, adversely affect foreign direct investment by nationals or citizens of the United States;

(E) the consumers and producers of the world would benefit by the development of an effective multilateral agreement (under the auspices of the General Agreement on Tariffs and Trade) which limits unreasonable, discriminatory or burdensome restrictions on foreign direct investments;

(F) multilateral negotiations on such a multilateral agreement, under the authority vested in the President by section 102 of the Trade Act of 1974, should be concluded as soon as practicable; and

(G) such an agreement should, to the extent possible, guarantee reciprocal direct investment access among the developed countries of the world and in no event provide less than national treatment for foreign direct investors in developed or developing countries.

(b) PURPOSE.—It is the purpose of this Act to encourage—

(1) adherence to the principles of the existing international trading system, and

(2) the operation and development of a free and open international trading and investment system,

by promoting the principles of reciprocity and national treatment through multilateral and unilateral means.

SEC. 2. AMENDMENT TO THE TRADE ACT OF 1974.

(a) AMENDMENTS TO SECTION 301.—

(1) DETERMINATIONS REQUIRING ACTION.—Section 301 (a) of the Trade Act of 1974 (19 U.S.C. 2411 (a)) is amended—

(A) by striking out "or" at the end of paragraph (1);

(B) by inserting before the semicolon at the end of paragraph (2) (B) thereof the following: ", including restrictions on direct investments by citizens or nationals of the United States";

(C) by inserting "or" at the end of paragraph (2);

(D) by inserting immediately after paragraph (2) the following new paragraph:

"(3) to establish or further the principles of national treatment or reciprocal market access with respect to United States goods (including agricultural products), services, and foreign direct investment by nationals or citizens of the United States;"; and

(E) by striking out "or services" in the last sentence thereof and inserting in lieu thereof the following: ", services, or direct investments".

(2) OTHER ACTION.—Section 301 (b) of the Trade Act of 1974 (19 U.S.C. 2411 (b)) is amended—

(A) by striking out "and" at the end of paragraph (1);

(B) by inserting "or direct investment in the United States by nationals" after the word "services" in paragraph (2);

(C) by striking out the period at the end of paragraph (2) and inserting a semicolon; and

(D) by inserting at the end thereof the following:

"(3) with respect to subsection (a) (3), also—

"(A) enter into bilateral or multilateral negotiations to further such principles;

"(B) adjust government procurement policies and practices to provide for procurement from nations which provide reciprocal market access to comparable United States producers, but only if such procurement is consistent with the provisions of the Code on Government Procurement or similar bilateral arrangements;

"(C) instruct the United States directors of the International Bank for Reconstruction and Development and the International Monetary Fund to vote against loans or other assistance from their respective institutions to countries which do not adhere generally to principles of national treatment and market access;

"(D) request Federal regulatory agencies (including the Civil Aeronautics Board, Office of the Comptroller of the Currencies, Federal Communications Commission, Federal Reserve Board, Interstate Commerce Commission, Federal Maritime Commission, and Federal Energy Regulatory Commission) to consider (if such consideration would not violate any multilateral agreement) a country's adherence to principles of national treatment and reciprocal market access in making any decision or taking any action with respect to an application or request from such country or nationals of such country; or

"(E) propose legislation which would impose equivalent restrictions or requirements within the United States on goods or services from countries that do not adhere to the principles of national treatment or reciprocal market access, such legislation to be treated as an implementing bill pursuant to the provisions of section 151 of the Trade Act of 1974 (19 U.S.C. 2191); and

"(4) take any other action which the President determines appropriate, including action to obtain the elimination of such unjustifiable, unreasonable, or discriminatory barriers or restrictions on foreign direct investment by citizens or nationals of the United States.".

(3) PRESIDENTIAL PROCEDURES.—Section 301 (c) of the Trade Act of 1974 (19 U.S.C. 2411 (c)) is amended by inserting "resolution or" before "petition" in the first sentence of paragraph (1) thereof.

(4) DEFINITIONS.—Section 301 (d) of the Trade Act of 1974 (19 U.S.C. 2411 (d)) is amended—

(A) by inserting before the period at the end of paragraph (1) thereof the following: "and foreign direct investment by citizens or nationals of the United States"; and

(B) by adding at the end thereof the following new paragraph:

"(3) DEFINITION OF NATIONAL TREATMENT.—For purposes of this section, the term 'national treatment' means the treatment by a government of foreign investment or foreign establishments operating within its borders in the same manner as domestic investment or comparable domestic establishments are treated.".

(b) AMENDMENTS TO SECTION 302.—

(1) FILING OF RESOLUTIONS BY COMMITTEES OF CONGRESS.—Section 302(a) of the Trade Act of 1974 (19 U.S.C. 2412 (a)) is amended by inserting ", or the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate may file with the Trade Representative a resolution,".

(2) CONFORMING AMENDMENTS.—

(A) Section 302 of the Trade Act of 1974 (19 U.S.C. 2412) is amended—

(i) by inserting "or resolution" after "petition" each place it appears in the last sentence of subsection (a), subsection (b), and the heading for subsection (a),

(ii) by inserting "or Committee" after "petitioner" each place it appears, and

(iii) by inserting "or resolutions" after "petitions" in the section heading and the heading for subsection (b).

(B) The table of sections for chapter 1 of the table of contents of the Trade Act of 1974 is amended by inserting "or resolutions" after "Petitions" in the item relating to section 302.

(c) AMENDMENTS TO SECTION 303.—

(1) NO CONSULTATION, ETC. IN CERTAIN CASES.—Section 303 of the Trade Act of 1974 (19 U.S.C. 2413) is amended by adding at the end thereof the following new sentence: "This section shall not apply to an affirmative determination described in section 301 (a) (3).".

(2) RESOLUTIONS.—Section 303 of the Trade Act of 1974 (19 U.S.C. 2413) is amended—

(A) by inserting "or resolution" after "petition" each place it appears; and

(B) by inserting ", the appropriate committee of Congress," after "petitioner".

(d) AMENDMENTS TO SECTION 304.—

(1) RECOMMENDATIONS.—Section 304 of the Trade Act of 1974 (19 U.S.C. 2414) is amended—

(A) by striking out "or" at the end of subparagraph (C); and

(B) by striking out subparagraph (D) and inserting in lieu thereof the following new subparagraphs:

"(D) one month in the case of a petition involving allegations which relate to section 301 (a) (3) in which the President has not requested consultations or initiated proceedings; or

"(E) 12 months after the date of the investigation initiation in any case not described in subparagraph (A), (B), (C), or (D).".

(2) RESOLUTIONS AND RECOMMENDATIONS OF THE PRESIDENT.—Section 304 of the Trade Act of 1974 (19 U.S.C. 2414) is amended—

(A) by inserting "or resolution" after "petition" the first place it appears in subsection (a)(1) thereof; and

(B) by adding at the end of subsection (a) the following new paragraph:

"(4) LEGISLATIVE RECOMMENDATIONS OF PRESIDENT.—Notwithstanding any other provision of this chapter, the President shall within 120 days after an affirmative determination is made under section 302(b) with respect to a petition or resolution or a decision by the President to take action under section 301(c), make preliminary recommendations to the House of Representatives and to the Senate with respect to what alternative actions the President is considering under this chapter to the extent that any consultation or dispute settlement procedure provided under this chapter does not result, in his judgment, in the enforcement of such rights as the United States may have under any trade agreement or the elimination of any unjustifiable, unreasonable, or discriminatory burden or restriction on the commerce of the United States. Notice of such alternatives shall be published in the Federal Register."

(C) by striking out "or service" each place it appears in subsection (b) and inserting in lieu thereof the following: ", service, or direct investment".

SEC. 3. MULTILATERAL NEGOTIATIONS ON RESTRICTIONS ON FOREIGN DIRECT INVESTMENT.

Section 102(b) of the Trade Act of 1974 (19 U.S.C. 2112(b)) is amended by inserting "(including any restrictions on foreign direct investment)" after "United States" the first place it appears.

---

SENATOR HEINZ' RECIPROCAL MARKET ACCESS LEGISLATION

This legislation clarifies the President's current authority and gives him new authority to deal with problems of reciprocal market access or discriminatory treatment of U.S. goods, services, or investment abroad. It is an amendment to section 301 of the Trade Act of 1974.

HOW IT WORKS

*Present Law:* Section 301 creates a process whereby private parties, or the President on his own initiative, can make a complaint about other nations' violations of the General Agreement on Tariffs and Trade (GATT) rules or the GATT's various codes, or other discriminatory actions, and seek redress, first through the GATT consultation/dispute settlement process and ultimately through direct retaliation.

Under the law an interested private party could file a petition (or the President could directly initiate a case), which the U.S. Trade Representative (USTR) would then have 45 days to consider and either accept or reject.

If accepted, an investigation into the allegations is begun, and GATT consultations are requested simultaneously. If the consultations do not resolve the matter and a GATT issue is involved, then USTR would initiate GATT dispute settlement proceedings, which could last from 6 months to more than one year, depending on the nature of the case.

At the conclusion of the proceedings, the USTR makes a recommendation to the President, who then has three weeks to decide what action to take. While a recommendation and a Presidential decision are mandatory, there is no requirement that either be positive, and there is no Congressional override.

Permissible actions include suspending or withdrawing existing trade agreement concessions or imposing duties, fees, or restrictions on the goods or services of the country in question.

*Proposed bill:* The legislation would make the following changes in the present procedures:

(1) In addition to GATT and code violations and "discriminatory" actions, the bill clarifies that non-reciprocal market access or non-national treatment are grounds for a complaint and Presidential action, whether they involve a GATT violation or not. (National treatment means treating foreign entities operating in one's country in a manner equivalent to the way comparable domestic entities are treated).

(2) In addition to initiation of a case through petition or Presidential request, the bill would also permit it by resolution of the Ways and Means or Finance Committee.

(3) With respect to cases involving reciprocity or national treatment, the President is given specific additional authority in addition to the general retaliatory authority in present law. The new authority includes:

(a) specific authorization to engage in bilateral or multilateral negotiations to resolve the problems;

(b) adjusting government procurement policies;

(c) instructing the U.S. directors, the World Bank and the IMF to oppose loans or other assistance from countries not providing reciprocal market access or national treatment;

(d) requesting specific federal regulatory agencies, including bank regulators, to take reciprocity issues into account when considering applications from foreign entities;

(e) proposing "mirror image" legislation to impose equivalent restrictions, which would be considered by Congress under "fast track" procedures;

(f) specific authorization to take any other action he determines appropriate.

(4) In these cases the President is also given the option of not using the GATT consultation/dispute settlement process, though it would be open to him. If he chose not to go to the GATT, the USTR recommendation to the President would be due one month after the case was initiated.

(5) Midway through the GATT process (no later than 120 days after the initiation of the case) the President would be required to make public a list of actions he is considering in the event the GATT process fails.

(6) Specific authorization is also provided to negotiating an international agreement on direct investment.

REASONS FOR CHANGE

This bill is intended to clarify, focus, and in some respects expand existing law, without removing either its discretionary base or its centralization in the Executive Office of the President.

The practices that could be subject to complaint, while sometimes blatant cases of discrimination, are also sometimes simply representative of the development of different cultural or economic practices than cannot be easily removed. As a matter of policy, the President should be encouraged to negotiate our differences on these matters rather than be required simply to retaliate. He should be given maximum flexibility to conduct such negotiations along with adequate leverage to obtain results; and control of this process, because of its delicacy, should be centralized in his office rather than throughout the various agencies.

This bill meets that standard by:

(1) clarifying present law to include specific references to reciprocal market access and national treatment as principles the President can act to maintain or promote;

(2) clarifying present law to insure that it applies to goods, services, and investment;

(3) focusing attention on reciprocity/national treatment issues through specific references to them in the statute and through the special procedures and authorities created for them;

(4) providing new retaliatory authority in the form of provisions on federal procurement policies, "mirror image" legislation using expedited procedures, and Presidential requests to regulatory agencies;

(5) increasing our negotiating leverage through the requirement that retaliatory actions under consideration be made public midway through the GATT process;

(6) broadening the base of the law by permitting Congress, by committee resolution, to file a complaint.

NEED FOR THE BILL

The bill is necessary because:

(1) It is not sufficiently clear in existing law that non-GATT violations involving reciprocity or national treatment are proper subjects for a 301 inquiry. Examples of probable non-GATT issues are the Canadian energy policy, the Canadian foreign investment review process (FIRA), and investment-related performance requirements generally, including equity ownership limits, and forced licensing or research and development transfers. The GATT process, of course, would also not be applicable, even in the case of a violation, to cases involving countries that do not belong to the GATT, like Mexico.

(2) Barriers to investment are not adequately reachable under current law, nor does the President have authority to retaliate against investment in this country.

(3) The President lacks explicit negotiating authority to deal with these matters on a bilateral basis.

(4) Presidential retaliatory authority in present law is not sufficiently clear, and there are few precedents to provide guidelines.

(5) Present law contains no authorization to begin negotiations on an International Investment Code.

## ADDITIONAL COSPONSORS

S. 649

At the request of Mr. BAUCUS, the Senator from Arizona (Mr. DECONCINI) was added as a cosponsor of S. 649, a bill to amend the Internal Revenue Code of 1954 to provide that the executor may elect, for estate tax purposes, to value certain items at an amount equal to the adjusted basis of the decedent in such items and to remove certain limitations on charitable contributions of certain items.

S. 1444

At the request of Mr. THURMOND, the Senator from North Dakota (Mr. BURDICK) was added as a cosponsor of S. 1444, a bill to authorize the Administrator of General Services to donate to State and local governments certain Federal personal property loaned to them for civil defense use, and for other purposes.

S. 1782

At the request of Mr. WEICKER, the Senator from Georgia (Mr. NUNN) was added as a cosponsor of S. 1782, a bill to amend section 305 of the Federal Property and Administrative Services Act of 1949 pertaining to contract progress payments made by agencies of the Federal Government, providing for the elimination of retainage in certain instances, and for other purposes.

S. 1844

At the request of Mr. JOHNSTON, the Senator from New Hampshire (Mr. HUMPHREY) was added as a cosponsor of S. 1844, a bill to facilitate the national distribution and utilization of coal.

S. 1907

At the request of Mr. ROTH, the Senator from Texas (Mr. BENTSEN) was added as a cosponsor of S. 1907, a bill to amend the Currency and Foreign Transactions Reporting Act and section 1961 (1) of title 18, United States Code, to improve enforcement, and for other purposes.

S. 2000

At the request of Mr. DOLE, the Senator from Indiana (Mr. LUGAR) was added as a cosponsor of S. 2000, a bill to amend title 11, United States Code, to establish an improved basis for providing relief under chapter 7, and for other purposes.

S. 2016

At the request of Mr. LUGAR, the Senator from Iowa (Mr. JEPSEN) was added as a cosponsor of S. 2016, a bill to amend title II of the Social Security Act to provide generally that benefits thereunder may be paid to aliens only after they have been lawfully admitted to the United States for permanent residence, and to impose further restrictions on the right of any alien in a foreign country to receive such benefits.

S. 2027

At the request of Mr. RANDOLPH, his name was added as a cosponsor of S. 2027, a bill to provide for an accelerated study of the causes and effects of acid precipitation, to provide for an examination of certain acid precursor control technologies, and for other purposes.

SENATE JOINT RESOLUTION 140

At the request of Mr. MATHIAS, the Senator from North Carolina (Mr. EAST), the Senator from South Carolina (Mr. THURMOND), and the Senator from Montana (Mr. BAUCUS) were added as cosponsors of Senate Joint Resolution 140, a joint resolution designating February 11, 1982, "National Inventors' Day."

## SENATE CONCURRENT RESOLUTION 63—THE ALL TAXPAYERS ASSISTANCE RESOLUTION

Mr. ROTH (for himself, Mr. LEVIN, Mr. HEFLIN, Mr. RIEGLE, Mr. WEICKER, Mr. WILLIAMS, Mr. SPECTER, and Mr. SARBANES) submitted the following concurrent resolution, which was referred to the Committee on Appropriations:

S. CON. RES. 63

Whereas the Internal Revenue Code is becoming increasingly complex and difficult to understand for the average American taxpayer:

Whereas the Internal Revenue Code has become so complex that the Internal Revenue Service currently provides a free program, known as the "taxpayer's assistance program", to aid taxpayers in preparing their annual federal income tax returns;

Whereas the taxpayer's assistance program provided service to over 43 million American taxpayers in preparing their federal income tax returns in fiscal year 1980;

Whereas, in fiscal year 1980, the equivalent of 5,591 staff years was devoted to assisting taxpayers in preparing their federal income tax returns;

Whereas the program served 100 percent of all taxpayers requesting tax assistance in fiscal year 1980;

Whereas it is currently estimated that the number of taxpayers requesting tax assistance in fiscal year 1982 will increase by 7 percent over fiscal year 1980 levels, from 43 million to 46 million taxpayers;

Whereas the proposed appropriations for the taxpayer's assistance program for fiscal year 1982 will substantially reduce both the number of staff and the amount of time that will be available for the IRS to assist taxpayers;

Whereas the Internal Revenue Service will only be able to assist some 76 percent of all taxpayers requesting tax advice because of the proposed reduction in fiscal year 1982 appropriations;

Whereas the taxpayer's assistance program is the basic and only means of tax advice available to the majority of American taxpayers who simply cannot afford to retain private tax consultants;

Whereas the proposed reductions in appropriations for the taxpayer's assistance program would explicitly minimize taxpayer

services and revenue collection efforts: Now, therefore, be it

*Resolved by the Senate (the House of Representatives concurring),* That the budget and appropriations for fiscal year 1982 of the Internal Revenue Service's taxpayer's assistance program shall not be reduced below the level required to permit a full 100 percent response and service by the Internal Revenue Service to all taxpayers requesting assistance and service in fiscal year 1982.

● Mr. ROTH. Mr. President, I am submitting today a concurrent resolution of Congress which will insure that American taxpayers continue to receive free tax advice and service from the Internal Revenue Service.

Mr. President, our current tax law has become so complex and difficult for the average American taxpayer to understand that the Internal Revenue Service provides a free program known as the taxpayer's assistance program. This program aids taxpayers in preparing their annual Federal income tax returns and also serves as the basic source of tax advice for most of working America.

In fiscal year 1980 this program provided assistance to over 43 million American taxpayers in preparing their tax returns. In that year the equivalent of 5,591 IRS staff-years was devoted to assisting taxpayers in preparing their returns. The IRS responded fully to 100 percent of all taxpayers requesting aid in 1980.

This year the number of taxpayers requesting tax assistance is expected to increase by 7 percent over the 1980 level from 43 to 46 million taxpayers.

It is therefore important that the taxpayer assistance program be maintained at its current level. It is there to serve the vast majority of low- and middle-income citizens who make up over 75 percent of the taxpaying public. The program is quite possibly the only positive perception of the Internal Revenue Service these citizens have.

However, the Treasury, Postal Service, and general appropriations bill for fiscal year 1982, as revised by the administration, would significantly reduce the funding for this invaluable program. Moreover, it appears likely that unless Congress acts to prevent it, the entire program will be discontinued by the end of fiscal year 1983.

At a time when our Tax Code is becoming increasingly complex, we should provide greater, not fewer, services to our Nation's taxpayers. Indeed, how can the Government expect the average working man or woman to comply with the system and pay his or her taxes when it takes an expert in the field of taxation to first decipher what is expected.

On December 14, 1981, the Finance Committee unanimously approved a sense of the Senate resolution to preserve the taxpayer's assistance program.

Today, I am introducing an identical concurrent resolution, the all taxpayers assistance resolution, which will maintain the program at a level that will permit the IRS to fully respond and provide assistance to all taxpayers requesting advice in fiscal year 1982.●

## SENATE RESOLUTION 313—RESOLUTION RELATING TO EMPLOYMENT SERVICES

Mr. HEFLIN (for himself, Mr. BENTSEN, Mr. BOREN, Mr. ROBERT C. BYRD, Mr. CHILES, Mr. DECONCINI, Mr. EXON, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. JOHNSTON, Mr. LONG, Mr. NUNN, Mr. PRYOR, Mr. STENNIS, and Mr. ZORINSKY) submitted the following resolution; which was ordered held at the desk until the close of business on February 9, 1982:

S. RES. 313

Whereas, unemployment in the United States has risen to 8.9 percent with over 9 million Americans out of work; and

Whereas, Employment Service offices throughout the United States have been closed or are scheduled to be closed in the near future because of appropriation reductions in the area of employment services; and

Whereas, it is essential that employment services be used to help people find jobs; and

Whereas, the President has recognized the need to restore adequate funding to this vitally needed service and has therefore requested a $2.3 billion supplemental appropriation for the Department of Labor for the fiscal year ending September 30, 1982: Therefore, be it

*Resolved by the Senate of the United States of America in Congress assembled,* That it is the sense of the Senate that the Congress should expeditiously consider making an urgent supplemental appropriation to the Department of Labor for the restoration of employment services for the fiscal year ending September 30, 1982.

THE CRITICAL NEED FOR EMPLOYMENT SERVICES

Mr. HEFLIN. Mr. President, I am today submitting a resolution expressing the sense of the Senate that the Congress should expeditiously consider making an urgent supplemental appropriation for the Department of Labor for the fiscal year ending September 30, 1982. One of the major purposes of this appropriation would be to restore adequate funding for employment services, which was drastically reduced by the continuing resolution this Congress passed during the final hours of the last session. The reduction in funding for employment services contained in the continuing resolution, has brought employment services to a standstill in every State. This is certainly unwise at a time when nearly 9 million Americans are unemployed.

The drastic rise in unemployment in our country has become a problem of the highest priority. Our Nation's unemployment reached 8.9 percent in December, which is one of the highest monthly levels our country has experienced in recent decades. Even more alarming is the fact that a drastic reduction in this rate is not foreseeable in the immediate future. The administration yesterday revealed that it is projecting 8.9-percent unemployment to become commonplace and be the average monthly rate for 1982.

My home State of Alabama has been hit very hard by high unemployment which has resulted from the economic decline of several key industries. The northern part of Alabama has suffered the consequences of massive layoffs as a result of slumping automobile sales which has caused manufacturing facilities to close their doors. The automobile industry decline has also resulted in higher unemployment among related industries, such as the tire industry in Gadsden, Ala., where unemployment rates have recently exceeded 17 percent. In addition, the depressive decline in new construction starts has resulted in a higher jobless rate within the construction industry throughout the State of Alabama. Another major factor in the high unemployment in Alabama has been the decline in the steel industry which has played an integral role in the economy of Alabama. These are but a few examples of the decline in economic prosperity in Alabama which has reulted in such a high rate of unemployment for the State. In one town, as many as 1 out of every 6 employees was unemployed at the end of 1981. That is an unemployment rate in excess of 17 percent. The overall unemployment rate for Alabama in December was an alarming 12.1 percent.

The effects of an unemployment rate of this magnitude are devastating. In the State of Alabama alone, the reduction in funding for employment services has resulted in staff reductions of 441 persons. In terms of employment service personnel alone, this represents a 47.6-percent reduction in staff since midsummer of 1981 and the closing of some 25 employment service offices throughout the State. Budget reductions in this vital area have clearly gone beyond the intended purpose of eliminating waste and fraud in the Federal bureaucracy, but rather have encroached upon the soundness of a valid program which renders a worthy service for those Americans who are unemployed. It is unwise to reduce funding for a program which is needed now more than it has been in recent years to address one of the greatest ills facing America today.

High unemployment has a tremendous impact on the stability of our economy and therefore affects us all. Accordingly, we must do all that we possibly can to see that the spiraling unemployment we are experiencing today is halted. One way to address this problem is through a sound employment service program.

The recent reduction in employment services will not serve to provide relief for the unemployed; rather it will result in the virtual elimination of a valuable service to the unemployed of this country. The employment service program provides valuable State assistance to the unemployed through job placement activities, counseling, testing, and other services which are direly needed during times of high unemployment.

In the coming days, the House of Representatives is expected to enact legislation restoring adequate funding to employment services. The President has called for a supplemental appropriation to take care of this situation. By custom, appropriation bills originate in the House of Representatives and pass there first. The purpose of my sense of the Senate resolution is that when it does reach the Senate we can give expeditious action to the proposed supplemental appropriation to restore employment services to the Department of Labor.

At a time when nearly 9 million Americans are unemployed, I wholeheartedly pledge my support to this effort to restore the backbone to one of the few programs we have which serves the function of placing people in jobs and removing them from the increasing ranks of the unemployed.

I trust that this legislation will receive prompt action in the House of Representatives and I urge my colleagues to place their undivided support behind this legislation when it comes before the Senate.

I ask unanimous consent that this resolution stay at the desk until the close of business on Tuesday of next week while exploration is undertaken to see whether or not we can agree to this sense of the Senate resolution without going through the regular committee process.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

● Mr. CHILES. Mr. President, I am sponsoring this resolution with Senator HEFLIN to express the crucial need for this urgent supplemental of $2.3 billion for employment services and unemployment extended benefits. Like many of my colleagues, I have been alarmingly aware of effects on employment services in Florida due to the substantial cutbacks in funds for unemployment programs in 1982. In my State, there was a good possibility that all of our branch employment service offices could have been closed. This comes at a time when unemployment in Florida has risen over 2 percent in a year and is as high as 14 and 12 percent in the Lakeland and Panama City areas.

During this trying recession, Florida has had a continually growing number of skilled and lesser skilled workers in the unemployment ranks. It is true that the general trends of growth in industry and the labor market will open up jobs in the workforce for some of the more skilled workers. However, the lesser skilled workers are more likely to remain unemployed and, therefore, an increasing burden on the unemployment insurance program and public assistance. These lesser skilled workers are not going to find jobs in the classifieds. Many of them need the special training and placement provided by the employment service programs. Florida's employment service offices have been successful in providing training, counseling and placement for many lesser skilled workers, disadvantaged workers and veterans. In fact, Florida has ranked first among the southern region States and second in the Nation in placement productivity. These efforts would be at least cut in half if the present budget cuts continue. We cannot afford this significant regression.

Mr. President, the recession hits Florida a little later than it hits the rest of the country, but we are not immune to its problems. It hits us hard especially when coupled with our special problems with staggering numbers of refugees, the citrus freeze, and declines in tourism. Like most States, our chief industries have been shocked by the skyrocketing interest rates and economic growth has been crippled. The slack in these industries has been the catalyst for our high unemployment.

That is why it is absurd for budget cuts to be directed at efforts designed to curb unemployment. We must continue to provide the necessary programs to assist with training, retraining and placement of the unemployed. We must utilize every economic defense we can muster to combat unemployment while we also strive to bring down the deficits and inflation. The employment service programs have been helping the unemployed. We must continue to help them. This is the worst of times to abandon any efforts to fight unemployment.

I urge my colleagues to support this urgent supplemental so that the funds can be expedited to the States. Many employment offices are scheduled to close this week and this must be avoided.●

● Mr. BENTSEN. Mr. President, statistics to be released tomorrow will reveal that almost 10 million Americans are unemployed. Economists suggest that we are in a recession, but for each of those 10 million people who are out of work, our economic situation is an intense personal disaster.

I believe one of our highest national priorities must be to put our people back to work in productive, private sector jobs. That is why I am pleased to join Senator HEFLIN in cosponsoring Senate Resolution 313 which expresses the sense of the Senate that necessary Federal funds should be restored to State employment service programs. At a time of record unemployment our efforts to assist people to return to productive participation in our Nation's work force makes eminent good sense. It is a sound investment in our future.

So, Mr. President, even at a time of tight fiscal discipline, I am fully prepared to support the President's request for additional Federal funding to help respond to the unemployment crisis.

I want to make it clear, however, that my support for this initiative includes the expectation that the Secretary of Labor will exercise his discretionary authority to allow each State maximum flexibility and discretion in allocating its share of these funds between the administration of unemployment benefits and placement services.

In the State of Texas, for instance, the employment commission has a proven record of successful performance in finding jobs. The Texas Employment Commission is one of the 10 largest State employment agencies nationwide. It ranks first in the number of individuals served and second in job placements made. In carrying out its responsibilities the TEC makes a special effort to assist small businesses and those unemployed workers for whom job placement can be especially difficult.

During 1981, for example, TEC found employment for some 47,000 veterans, more than 100,000 youth, close to 29,000 older workers, more than 12,000 food stamp recipients, and some 14,000 disabled or handicapped individuals. Equally significant, TEC records indicate that Texans drawing unemployment benefits remain on the rolls an average of 12.7 weeks, as compared to a nationwide average of 14.6 weeks. In short, the Texas Employment Commission has demonstrated that it can reduce the drain on our unemployment trust fund by putting people back to work. That is a goal I know we all share, and I want to be sure that we do not place restrictions on these funds that will inhibit the TEC and other such agencies in doing their jobs.

Mr. President, the administration is to be commended for its commitment to increasing State and local control over Government programs and tax resources. Permittting local employment commissions to exercise their best judgment in allocating these additional funds will insure that agencies such as ours in Texas will make the most efficient and effective use of available resources.

I urge my colleagues to cast their votes in favor of the pending resolution.●

## NOTICES OF HEARINGS

SUBCOMMITTEE ON LABOR

Mr. NICKLES. Mr. President, the Labor Subcommittee of the Labor and Human Resources Committee had scheduled a hearing on February 10, 1982, on S. 1748, the Multiemployer Pension Plan Stabilization Act of 1981. It is necessary to change the date for the hearing to March 11 and 17, 1982. The hearings will begin at 9:30 a.m. in room 4232 of the Dirksen Senate Office Building. Members of the public wishing to testify should submit a written request as soon as possible.

COMMITTEE ON THE BUDGET

Mr. DOMENICI. Mr. President, the Senate Committee on the Budget will hold a hearing on the credit task force on Wednesday, February 10, at 2 p.m. in 6202 Dirksen Senate Office Building. Alan Greenspan, Clifford Hardin, Center for Study of American Business; Miner Warner, Solomon Brothers; and Jim Fralick, Morgan Guaranty are scheduled to testify.

For further information, contact Nancy Moore at 224-4129 of the Senate Budget Committee staff.

SUBCOMMITTEE ON AGRICULTURAL RESEARCH AND GENERAL LEGISLATION

Mr. LUGAR. Mr. President, I wish to announce that the Senate Agriculture Subcommittee on Agricultural Research and General Legislation has scheduled a series of hearings in February and March to consider legislation authorizing the Commodity Futures Trading Commission. A number of witnesses have been invited including representatives of the CFTC, various segments of the commodities industry and other interested parties.

The hearings schedule will be from 9:30 a.m. to 12:30 p.m. on February 26, March 1, 2, 10, and 11 in room 324 Russell Senate Office Building.

Anyone wishing further information should contact Denise Alexander or John Cozart at 224-2035.

SUBCOMMITTEE ON FOREIGN AGRICULTURAL POLICY

Mr. BOSCHWITZ. Mr. President, I wish to announce that an additional hearing date has been scheduled for the Senate Agriculture Subcommittee on Foreign Agricultural Policy's hearing on the economic impact of agricultural embargoes. In addition to the hearing today, the subcommittee will meet on Friday, February 5, to hear Secretary of Agriculture, John Block, discuss USDA's estimate of the costs of the 1980-81 grain embargo for both the United States and the Soviet Union. The Friday hearing will begin at 9 a.m. in room 324 Russell Building.

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

Mr. WARNER. Mr. President, I would like to announce for the information of the Senate and the public that the subcommittee hearing to review the capacity, distribution and status of the strategic petroleum reserve previously scheduled for Monday, February 8 at 10 a.m. has been postponed and will be rescheduled at a later date.

## AMENDMENTS SUBMITTED FOR PRINTING

### CRIMINAL CODE REFORM ACT OF 1982

AMENDMENT NO. 1248

(Ordered to be printed and to lie on the table.)

Mr. JEPSEN submitted an amendment intended to be proposed by him to the bill (S. 1630) to codify, revise, and reform title 18 of the United States Code, and for other purposes.

### SENATE RADIO AND TV BROADCAST RESOLUTION

AMENDMENT NO. 1249

(Ordered to be printed and to lie on the table.)

Mr. PRESSLER submitted an amendment intended to be proposed by him to the bill (S. Res. 20) to permit public and private broadcasting of Senate proceedings.

## ADDITIONAL STATEMENTS

### S. 2027—ACID PRECIPITATION ACCELERATED REVIEW AND REPORTING ACT

● Mr. RANDOLPH. Mr. President, on January 28, my colleague from West Virginia, the able minority leader, ROBERT C. BYRD, introduced the Acid Precipitation Accelerated Review and Reporting Act (S. 2027). This proposal is similar to one previously introduced in the House of Representatives by our concerned colleague from West Virginia, Representative NICK J. RAHALL.

This measure by Senator ROBERT C. BYRD gives to the Senate another approach to the questions raised by the intense interest in acid precipitation in many parts of our country and in Canada. I am today asking to be included as a cosponsor of S. 2027 to emphasize another approach to a complex legislative and environmental problem. I do not necessarily agree with every detail.

The Committee on Environment and Public Works is considering possible amendments to the Clean Air Act and will review proposals relating to acid precipitation in this context. At this time I do not support any specific approach, but I will continue to work with other Members to examine various recommendations, including that of Senator ROBERT C. BYRD. Out of this process I hope that we can develop amendments that realistically address this problem in a way that is soundly based scientifically and do not unnecessarily affect our ability to increase the production and use of coal. Such a balanced response to environmental and economic questions has long been a guiding principle of my work in these areas.

I commend Senator ROBERT C. BYRD and Representative RAHALL for their sensitivity to the need for more information on acid precipitation and to their concerns for the interests of our State. I am eager to cosponsor S. 2027 and to be actively involved with him, and other Senators, in the successful resolution of this difficult issue.●

### THE DESTRUCTION OF EPA

● Mr. STAFFORD. Mr. President, on Tuesday an article on the plight of the Environmental Protection Agency was printed in the Washington Post. With the increasing amount of attention being focused on the Agency's state of affairs, the appearance of such an article is not particularly remarkable.

This statement, however, is remarkable in one significant way: It was written by Russell Train, former Administrator of the Environmental Protection Agency and former Chairman of the Council on Environmental Quality under Presidents Ford and Nixon. I personally found his article to be extremely thoughtful and well written and ask that it be printed in the RECORD at this point.

The article follows:

THE DESTRUCTION OF EPA

The Environmental Protection Agency is rapidly being destroyed as an effective institution in the federal government. Current and planned budget and personnel cuts, if continued, will inevitably reduce the agency to a state of ineffectualness and demoralization from which it is unlikely to recover for at least 10 years, if ever. While some may greet this situation with enthusiasm, I am convinced that the business community, among others, has very little to gain and a great deal to lose.

I see EPA's mission as a critically important one. I am convinced that, in the long run, our free enterprise system can only prosper and grow within the context of adequately protected public health and environment. I am also convinced that responsible business leadership knows this and asks only that regulatory requirements be reasonable, cost-effective, have an adequate scientific basis, and be fairly and uniformly enforced.

Corrected for inflation since 1981, President Reagan's expected 1983 budget request for EPA will represent a reduction of approximately 45 percent. Administrator Anne Gorsuch has reportedly been working on 1984 numbers of $700 million, or a cut of 61 percent. EPA's research branch would be cut by two-thirds, far more than any other basic research program.

In the personnel area, the cuts are equally drastic. If Gorsuch is allowed to carry out plans that have been circulating within the agency for some time, by this coming June—one year and four months after the Reagan

administration took office—80 percent of EPA's headquarters staff will have quit or been fired, demoted or downgraded.

It is hard to imagine any business manager consciously undertaking such a personnel policy unless its purpose was to destroy the enterprise. Predictably, the result at EPA has been and will continue to be demoralization and institutional paralysis. Attrition within the agency is running at an extraordinary 2.7 percent per month or 32 percent a year.

From an administration that quite rightly emphasizes the need for good management, what we are seeing at EPA is its very antithesis. Permits that businesses need do not get issued. Required rules and regulations do not get promulgated. Enforcement has ground practically to a halt. The most competent, technically proficient, professional staff have either already left or are looking for jobs. If one believes that effective environmental protection is essential it is tragic. If one is not necessarily an environmentalist but believes that our environmental programs need to be managed efficiently, scientifically and less burdensomely, the current situation is equally disastrous.

Congress and the courts will effectively impede the ability of the administrator to bring about substantial change by administrative action alone. But they will provoke an upsurge in lawsuits and more decisionmaking by confrontation. While adversarial approaches to conflict resolution seem to be deeply ingrained in American society, there have been encouraging signs lately of growing appreciation of economic realities within the environmental community and a greater environmental sensitivity on the part of the business community. A return to the early days of polarization benefits no one.

Many of EPA's difficulties over the years can be traced to the fact that Congress loaded the agency with far more statutory responsibilities within a brief period of time than perhaps any agency could effectively perform. Surely, those problems can only be compounded by drastically reducing its resources while its responsibilities remain the same or grow. When EPA came into being in 1970, it took over the air pollution, water pollution; solid waste, pesticide and radiation programs scattered around the federal government. Since then those programs have been broadened and improved, and Congress has added major new responsibilities—including the Toxic Substances Act, the Safe Drinking Water Act, the Noise Control Act, the hazardous waste control program, and Superfund. These are not hangovers from the concerns of prior generations. EPA has been on the frontier of today's concerns, and there is every indication in the polls that environmental protection remains high on the public agenda.

Environmental protection needs are not going to lessen if EPA becomes ineffectual. The kepone problems and the Love Canals will continue to crop up from time to time. Unless the public institutions charged with responsibility for handling such problems, there is real danger of a backlash developing against business. The pendulum will swing once more and in even more violent oscillations. EPA will be forced to react and will do so without adequate staffing and with a reduced research base. Business needs greater stability and predictability of policy, and for that it needs a credible EPA. The tendency of our political system to ignore the need for reasonable continuity in institutions and policies is one of it most serious failings.

As one who served two Republican administrations from 1969 to 1977 and who voted for President Reagan, I must record my profound concern over what is happening at EPA today. The budget and personnel cuts, unless reversed, will destroy the agency as an effective institution for many years to come. Environmental protection statutes may remain in full force on the books, but the agency charged with their implementation will be a paper tiger.●

## THE "NEW FEDERALISM"

● Mr. BAUCUS. Mr. President, in President Reagan's state of the Union address, we heard his proposals for a "New Federalism." The President has proposed that we "swap" certain programs and responsibilities between the States and the Federal Government.

Hon. Ted Schwinden, Governor of the State of Montana, discussed these, "New Federalism" proposals in his state of the State message last month.

If the administration truly intends to forge a new partnership with the States, it is essential that we listen to what State leaders have to say about these proposals and work with them to find the best solutions. Governor Schwinden points out that "in fact, the New Federalism has yet to provide to the States either the flexibility, or the resources, essential to responsible decisionmaking."

These issues cannot be addressed piecemeal simply to help us cut the Federal budget deficit. Rather, we must work with State and local leaders and address difficult issues like the management and disposal of federally owned land, State energy severance taxes, the protection of our environment and our remaining wilderness and park lands, and providing for our national networks of roads, highways, and railroads.

I urge my colleagues to consider Governor Schwinden's remarks and to listen to other State and local leaders across the country. If we are to forge a New Federalism, we must go beyond cosmetic program-swapping.

I ask that Governor Schwinden's address be printed in the RECORD.

The address follows:

1982 STATE OF THE STATE MESSAGE

(By Governor Ted Schwinden)

1982—is it a crossroads in Montana history, or a year of business as usual? Today, I hope to identify the major issues that will affect us in Montana—this year and in the future. Tomorrow, and throughout the months and years ahead, Montanans will determine our response to those issues. That is the way it should be.

This Nation is experiencing a remarkable political transformation—a dramatic change in the relationship between State and Federal Governments. And we cannot ignore the long-term impacts of that change. America's Great Depression produced a political "solution" that, for nearly a half century, increasingly centralized decisionmaking in Washington, D.C. That process, and the public reaction to it, has produced a new "solution."

In a reform effort now labeled the "New Federalism," the Federal Government is returning decisionmaking and administrative authority to the 50 States. The initial transfer of program responsibilities has been accompanied by some relaxation of Federal control, and significantly lower levels of Federal funding.

The jury is still out on the long-term significance of the "New Federalism"—after all, who would have dared project the ultimate implications of the "Hundred Days" of Congressional activity in 1933! But "New Federalism" is real enough in 1982 to make it the single most important factor in Montana's future.

Federalism may be novel rhetoric, but as a philosophy, it's as old as Alexander Hamilton. For years, State and local officials have advocated a more equal relationship between State and Federal Governments. A major goal of the National Governors' Association since 1978 has been the restoration of a genuine federalist partnership. In theory, federalism—new or old—should offer Montanans the potential to design our own future, to tailor government programs to fit Montana needs, to set priorities consistent with Montana aspirations. In fact, the New Federalism has yet to provide to the States either the flexibility, or the resources, essential to reponsible decisionmaking. And it is increasingly apparent that Washington is much more anxious to transfer program responsibilities than to provide funding. Through direct cutbacks or by the preemption of revenue sources traditionally used by the States, the Federal Government can, and is, creating fiscal distress in many States. Last year, 30 State legislatures met in special sessions; at least 20 of the sessions were held specifically to deal with the impacts of Federal budget actions. And the reluctance on the Potomac to loosen Federal strings has denied the States the necessary flexibility to structure programs to meet State needs.

Montana has already experienced a few of the consequences of the New Federalism. They dramatically underscore the link between national political change and the State's economy. Between October 1, 1981, and January 1, 1982, 1,875 Montana families were taken off the rolls of the Aid to Families with Dependent Children (AFDC) program. The December 1981 unemployment rate is projected at 7.2 percent—the highest December level since 1975. Thirty-five new car dealerships closed last year in Montana. Federal highway dollars adjusted for inflation show that, in real dollars, we received only half as much Federal highway aid in fiscal year 1982 as we did in 1971.

What will the New Federalism mean for Montanans in 1982? First, proposed additional Federal funding cutbacks, combined with a depressed national economy, will mean more tough times ahead for all of us. Tough times and tough choices. Our managerial skills will be tested as we seek to maintain essential programs in the face of shrinking budgets and fewer public employees. Already, State agencies have taken steps to further trim budgets and payrolls in anticipation of further budget cuts. Last year, we eliminated nearly 400 positions in State government; not a pleasant task, but a necessary one. We have taken cost-cutting initiatives ranging from such major actions as the administrative reorganization of the Department of Social and Rehabilitation Services, which saved the State $1.6 million over the biennium, to my minor personal decision to remove the telephone from the

Governor's car at a cost-savings of $1,855 a year. In short, we are proving to the skeptics that State government can identify waste, reduce fraud and minimize the inefficiencies that have too often characterized the public sector. A year ago, I pledged this administration to "cost-conscious, people-sensitive" government. I intend to keep that pledge.

Second, the New Federalism should provide us the philosophic foundation and the political opportunity to successfully assert Montana's right to participate in all decisions within our own borders, including those associated with the nearly one-third of this State under Federal jurisdiction. Federal decisions on wilderness designation, coal leasing goals, grazing regulations or timber harvest must reflect Montana's concerns, as well as national policy. And as the U.S. Supreme Court verified last year, Montana's battle to preserve the coal tax is firmly rooted in the State's protection of its sovereign rights.

Finally, a fully implemented federalism would provide the opportunity for leadership that I, and 49 other Governors, are anxious to accept on behalf of our States. Some doubting Thomases question the ability of States to meet the needs of their people. Those critics do not believe that the States can handle additional responsibilities. They are wrong, and the States ought to be given the chance to prove it. After all, if the Federal Government had done the job right, the public frustration that mandated an end to Federal arrogance and Federal domination would not have occurred.

A recent survey in the Helena Independent Record found, not surprisingly, that the average Montanan has little respect for government. Montanans believe that "people in Washington are out of touch with the rest of the country;" that "what you think doesn't count for much anymore;" and that "most people with power try to take advantage of people like yourself." While most mistrust is still aimed at Washington, State governments also suffer from a lack of credibility with the people. A well-run, responsive State government is needed, not only to minimize the tax burden on the public, but also to restore public confidence in government itself.

We made management of State government a top priority in 1981, and significant efforts were taken to increase the efficiency of program administration. In 1982, we plan to expand those efforts by enlisting the support and the expertise of the private sector to help us identify additional program inefficiencies and other opportunities for improvement in the executive branch. By working closely with the private sector to improve government operations, the State will also strengthen public/private relationships—an accomplishment that will be essential in realizing the other major goal of this administration in 1982—encouraging economic development in Montana.

Montana is a good place to do business, and last year we took steps to make it better. The new Department of Commerce has begun to improve Montana's business image. We have established a better working relationship with Montana's business community. In the process, we are easing the long-standing animosity and friction between public and private sectors. This administration is sending a clear signal to entrepreneurs, in- and out-of-state, that Montana State government is aggressively pursuing economic growth and job creation.

Let me make it clear—we expect no miracles. Economic growth is elusive in good times; during these uncertain economic times the problem is compounded. The expansion of existing business, or the attraction of new ones, is not an overnight accomplishment, but the pay-offs are well worth the wait. The pay-offs are jobs—jobs that will provide Montanans a decent wage—jobs that will allow them to stay in the State they prefer to call "home"—jobs that will permit our graduating students an alternative to leaving this State. The commitment of this administration to promote economic development is firm, and it is coupled to our determination to protect those values that make Montana a good place to live. Among this State's most valuable attributes in attracting new business are the relative absence of traffic jams and street crime, the abundance of breathable air and recreational opportunities. We can have progress, and retain our pride.

The Montana of 1981 was a Montana in flux. The Montana of 1982 must rise to the challenge of national political reform. We must accept the new responsibilities and, together with the other States, insist on partnership, not paternalism, in our dealings with Washington. The opportunity lies ahead to make the 1980s "the best of times" for Montana. The alternative is to abdicate our responsibilities and invite "the worst of times."

Those choices are ours, choices long sought as the inherent right of States. The choices we make will measure the sincerity of our past rhetoric, and establish the standards for our future generations.●

## UKRAINIAN INDEPENDENCE DAY

● Mr. ZORINSKY. Mr. President, the great American essayist and poet, Ralph Waldo Emerson, wrote that:

The sun will be taken out of the skies before the love of freedom will be removed from the human breast.

Nowhere is that more true today than in the Communist-dominated state of the Ukraine. For more than half a century now, the dark clouds of oppression have obscured the warm sunrays of freedom in that long-suffering land. But the quest for freedom continues to burn brightly in the breasts of the Ukrainian people.

Recently, Ukrainian Americans all across the country paused to observe the 64th anniversary of the Ukrainian declaration of independence, proclaimed in Kiev on January 22, 1918. As always, it was a bittersweet commemoration—a sad reminder of ongoing Communist domination coupled with a rededication to the goal of freedom for all Ukrainian people.

It is also a time for Ukrainian Americans to renew their commitment to preserving their rich culture in this country and to strengthen the bonds that exist between themselves and their oppressed brethren behind the Iron Curtain.

Mr. President, during the past few months, events in Poland have shown the world how quickly and brutally repression can replace freedom in Eastern Europe. As our thoughts and prayers go out to the people of Poland, so too should we express our solidarity and pay tribute to the 50 million Ukrainians under Soviet rule.

The love of freedom does indeed burn brightly in their breasts. And it will not be extinguished while those of us here remember and call attention to their plight.●

## TAIWAN IS FREE CHINA

● Mr. SYMMS. Mr. President, there is an old axiom of politics that one should never ignore one's base. However desirable it is to reach out to new constituencies, you should never forget the people who got you there.

I would like to apply that axiom to foreign policy, if I may. In the field of foreign policy, America's base can be considered to be those nations who are relatively free, relatively democratic, and relatively friendly. It is unfortunately true that there are few nations in the world that can meet the standards of the New York Times for the conduct of civil rights, but that does not mean that we cannot make distinctions.

Making those distinctions clearly reveals that the Chinese living on Taiwan are part of our base, while the Chinese living on the mainland are part of the constituency we are reaching out to. I have no objection to base-broadening in this context. I would like to have better relations with the mainland government, providing we can do so without eroding our base. After all, we used to call Taiwan—and some of us still do—Free China. No one has ever applied that adjective to the mainland nation.

I suggest, Mr. President, that in keeping our base from eroding across the Straits of Taiwan, the very least we can do is to provide the Free Chinese the defensive weapons they require. It was very disappointing, therefore, that over the recess the administration denied to the Taiwan Government the FX fighters it had asked for. I very much fear that we are ignoring our base for chimerical promises of broadened bases.

Mr. President, the syndicated columnist George Will has written very persuasively about this subject, and I ask that his remarks be printed at this point in the RECORD. Perhaps the administration will read them and rethink its political course. If not, my colleagues should be aware that we have a responsibility to keep the Nation's few friends on our side.

The article follows:

REAGAN NEEDS TO HELP TAIWAN

(By George F. Will)

Here we go again.

China (like some NATO nations, and Saudi Arabia) is acting as though it is doing America a favor by having mutually advantageous relations with America. China says the American proposal to sell arms, and especially the FX advanced fighter, to Taiwan

is "a severe test" of whether America "truly values" relations with China.

Even in the State Department there is no obsession as incorrigible as the obsession of some persons with placating Peking. In December some members of that faction sent Secretary of State Haig the sort of awful memo he should have rejected with his famous testiness. It concerned "how to move urgently toward resolution of the Taiwan arms sales problem in light of the Polish crisis."

Seizing upon Poland as a pretext for doing what this faction is determined to do anyway, they suggest sending a delegation of themselves to urge the Chinese to do unspecified things against Russia. But, they say, the delegation's success would depend on a "favorable" (that is, unfavorable to Taiwan) decision on the FX. By "removing the specter of the aircraft," America could prevent a "precipitous Chinese reaction" to even the sale of spare parts to Taiwan, which could "unravel" and "rupture" U.S.-China relations. There should be no sales "exceeding Carter levels."

These dispensable (but, alas, not dispensed with) Carterites now serving Haig are urging Carter's policies on Carter's successor. They must think President Reagan does not remember candidate Reagan noting that Congress, "reflecting the strong support of the American people for Taiwan," forced changes in Carter's proposed Taiwan Relations Act. Carter's proposal did not even mention defense cooperation with Taiwan. The final act (Congress' preemptive leash on the State Department's appeasement reflex) committed America to providing Taiwan with defense arms "in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability." This act obligates the President and Congress to determine appropriate arms "based solely upon their judgment of the needs of Taiwan." That is, based only on Taiwan's needs, not at all on Peking's desires.

Opponents of the sale argue that even with the FX, Taiwan's air force (currently 390 combat aircraft) could be overwhelmed by China's 5,000 combat aircraft. But it is tendentious to disregard the fact that deterrence is a function of the potential costs of aggression. And it is perverse to agrue that because Taiwan is vulnerable, America should make it more so.

China is too backward, economically, to cure its military weakness without the West's capital and technology. U.S.-China relations are rooted in that need, and in China's geography and culture (including ancient national and relatively recent ideological animosities that make it a counterweight to Russia). China is not apt to "rupture" relations with the United States in a fit of pique about an arms sale that is a matter of compliance with American law.

Candidate Reagan said: "I'm sure that the Chinese leaders would place no value on our relations with them if they thought we would break commitments to them if a stronger power were to demand it." Precisely right: by conforming to China's dictates regarding U.S.-Taiwan relations, America would prove that it is too pliable to serve China's interest in a cooperative balance of power against Russia.

Furthermore, the State Department's advocates of Peking's position are caught in a contradiction: if Reagan's refusal to allow Peking to veto American compliance with American law could cause an "unraveling" of U.S.-China relations, then those relations are too superficial to be important. The idea that selling FXs might provoke a rapprochement between China and Russia implies, implausibly, that the split is trivial, and that U.S. policy controls China's internal power struggle. This is a version of an apparently unsinkable fallacy, usually heard in this form: we must appease Moscow, lest the "hawks" lurking in the Kremlin's closets come to power.

The Taiwan issue waxes and wanes inversely with China's confidence in America as a partner against Russia. It waxes now in the wake of the Reagan administration's feeble response to Poland's crisis. Countering Russia is China's top priority, but if America is unserious about that, China probably reasons that it might as well gain ground on the relatively trivial issue of Taiwan.

Having sold to the uncooperative Saudis AWACS they did not need, Reagan will mock his past and undermine his future if he denies an ally aircraft it really needs. Peking recently failed to intimidate the Netherlands from selling two submarines to Taiwan, and then reduced its diplomatic representation in the Netherlands. America should be as unintimidated as the Netherlands, and should then see if Peking values relations with America as little as it values relations with the Netherlands. If Reagan does not sell the FX to Taiwan, he will have produced what he was elected to prevent: the continuation of Carterism.●

## NATIONAL HARBORS IMPROVEMENT AND MAINTENANCE ACT OF 1981

● Mr. ABDNOR. Mr. President, much attention continues to circulate in this body regarding S. 1692, the harbor development legislation that I have been pleased to sponsor. This legislation was reported to the Senate by the Committee on Environment and Public Works on a vote of 13 to 3. This bill is now on the calendar.

Some outside interests, however, now seek to derail this bill, despite the need to develop our Nation's ports to increase exports. Much of this opposition appears totally unrelated to the merits or the specifics in this bill, or to the development of our harbors. Some other groups, I fear, appear to have grossly misrepresented the impacts of S. 1692, which are clearly laid out in the committee's report on the bill, Senate Report 97-301.

To help clarify just what S. 1692 does, and what it does not do, I ask that the general statement explaining the bill, which is contained in the committee report, be printed in the RECORD.

The statement follows:

[Excerpts from Senate Report 97-301]

GENERAL STATEMENT

S. 1692 redefines the Federal and the non-Federal role in harbor dredging. All new channel improvements will henceforth be financed entirely by the local sponsor. Maintenance dredging costs will be shared between the Federal Government and the local sponsor at more than 200 coastal and Great Lakes harbors.

The bill does not abrogate Federal responsibility. Rather it recognizes the value of a marketplace test on new construction dredging while reconfirming the Federal commitment to maintain all of our Nation's deep-draft harbors at their existing dimensions.

The Committee recognizes fully that this bill proposes dramatic changes in financing future harbor development work. But the Committee is convinced that such a change represents the only practical method to establish national investment priorities. The bill will encourage the dredging of the most economically sound projects in a timely manner and thus increase the Nation's capacity to handle world trade.

Shifting the cost of channel deepening projects to the private sector depends on the willingness of shippers to pay somewhat higher port costs, in gain for early action on projects providing a net economic gain to those same shippers. The cost to shippers and the economy of perpetuating the present cumbersome and inefficient system of congressional authorizations and appropriations for harbor projects far exceeds the added cost of such projects when paid for by the non-federal sector. Given limited Federal resources, the Committee concluded that the funds available should be directed toward maintaining existing ports at authorized depths.

While S. 1692 is based on these very practical considerations, the basis for its adoption transcends the reality of the Budget. It is the Committee's view that priorities for construction dredging work, essentially a commercial decision, are best set in the marketplace. Only by the establishment of investment priorities can the Nation expect to obtain, in a timely manner, the deep-draft harbors that are necessary to meet the rising demand for coal exports, while reducing the transportation costs of petroleum imports.

The bill also establishes an equitable system that will allocate the cost between Federal and local sponsors for on-going harbor maintenance, as distinct from construction dredging to new depths. As introduced, S. 1692 would have required that local sponsors pay 25 percent of all costs for maintenance on a port-by-port basis. However, many smaller ports have high costs of maintenance relative to the commercial cargo transiting the harbor. Therefore, the Committee adopted a limitation, called a "cap," on the level of cost recovery at these higher-cost harbors.

The Committee is convinced that the maintenance cost-sharing—at a maximum of 6.9 cents a ton, a negligible fraction of existing shipping or port costs—can be absorbed without any adverse impact on any particular port or to the shipping industry. To the contrary, it is anticipated that with the users of ports more involved in maintenance decisions, the port will work more effectively and efficiently.

DISCUSSION OF MAJOR PROVISIONS

A number of bills to alter current Federal policy on harbor development and maintenance have been introduced and referred to the Committee on Environment and Public Works. The Administration's bill (S. 809) would shift to each port the full cost of its annual maintenance dredging work, as well as future construction dredging still to be performed by the Army Corps of Engineers. Other bills offered variations on the existing policy, proposing authorization of specific projects or establishing differing levels of cost sharing.

S. 1692, as reported, addresses two distinct aspects of harbor dredging activity. Section

2 establishes policy for on-going yearly maintenance dredging that is necessary to keep harbor channels free of accumulated silt. Section 3 establishes a policy for construction dredging, where channels and harbors are dredged to dimensions deeper or wider than previously existed.

1. MAINTENANCE DREDGING POLICY

Since 1824, the Federal Government has dredged the main channels and harbors of the United States. Non-Federal interests have been responsible for certain other costs, such as diking for dredged disposal areas, and the dredging of access and berthing channels.

Expenditures on operation and maintenance usually vary from year to year at any given port. During one year, the Corps will often "overdredge" (still permitted under this bill) to a depth greater than authorized to alleviate the need for dredging the next year. Generally, this is a more cost-effective approach. However, with tight budget restrictions in recent years, a number of harbor projects have not been maintained at their authorized dimensions, and the backlog of maintenance dredging has increased. Occasionally, local authorities, not always satisfied with the level of maintenance provided by the Corps of Engineers, will undertake, at their own expense, additional maintenance dredging to increase the safety and utility of their shipping channels.

S. 1692 requires that the non-Federal interests pay a share of the actual cost of maintaining the main channels of each harbor. While the concept of direct cost-sharing is new to harbor maintenance, it is quite common in other areas of transportation and public investment. Federal-aid highways are constructed on a cost-sharing basis, with full maintenance responsibilities reverting to the State. The sewage treatment plant construction program, administered by the Environmental Protection agency, requires local sponsors to cover all operation and maintenance costs of the plant, after receiving a 75 percent Federal construction grant. Local sponsors of a Corps of Engineers flood control project must agree prior to the initiation of Federal construction to operate and maintain the completed project. The cost-sharing provisions of S. 1692 are not different in concept from these other existing cost-sharing arrangements in Federal public works programs.

The Committee considered a variety of alternatives for collecting the non-Federal share of the maintenance costs. The two basic options are:

(1) Local financing of all maintenance dredging at each port; and

(2) A national uniform fee, where each port, regardless of its own costs, would be assessed a uniform fee for each ton of traffic at the port.

The Committee rejected both of these extremes. Because a wide variation in maintenance costs relative to port traffic exists, a requirement that every port pay a flat percentage of its costs could prove detrimental to a smaller port and some with extremely high maintenance costs.

The Committee also rejected the uniform fee. It would force some ports to cross-subsidize others, encouraging economic inefficiency. Furthermore, the uniform fee concept assumes that all ports: (1) are in a state of equilibrium with one another; and (2) offer shippers identical charges for other port services rendered. If this were true, the differential in dredging fees among ports might produce some minor diversion of traffic. As the charts contained in the section of this report on local effects indicates, shippers do not offer identical charges and total transportation costs for the same commodity vary considerably.

Furthermore, ports which may be near each other do not necessarily compete with one another for the same traffic. Shippers at inland origins often choose between the Gulf Coast and the East Coast or the West Coast and the Gulf Coast, rather than between two adjacent ports on the same coast. Charges for all port services along the coasts now vary considerably. Maintenance fees will not alter the general flow of traffic to various ports any more or less than common fluctuations in these other transportation costs.

The Committee considered several alternatives and agreed to a compromise intended to protect the balance among ports, while fostering the discipline of port-by-port cost recovery. The Committee approved a 25 percent non-Federal share, but limited the non-Federal share for the higher cost ports. This limitation is referred to as the "cap."

The following steps describe the process:

1. The Corps of Engineers will annually calculate its total national maintenance dredging costs for channels and harbors over 14 feet in depth for the next fiscal year.

2. Using the latest available statistics, the Corps shall also calculate the total tonnage of import, export, coastwise and lakewise traffic moving through these ports aboard vessels engaged in commercial waterway transportation, drawing 14 feet or more.

3. By dividing the total national maintenance cost by the tonnage, the Corps will calculate the average national maintenance cost per ton of cargo.

4. After the average level of cost recovery is reduced to 25 percent of that national average, the maintenance "cap" is set at 150 percent of that reduced per-ton level.

Sample Computation of Average National Fee:

Total traffic in 1978=1,839,723,900 tons

Annual operation and maintenance cost of deep-draft channels and harbors (recent five-year average, stated in 1982 dollars)=$337,000,000.

Average national maintenance fee at 100 percent recovery. ($337,000,000 divided by 1,839,723,900 tons)=18.3 cents per ton.

Average cost under S. 1692 (25 percent recovery)=4.6 cents per ton.

The cap for any port under S. 1692 (50 percent above 4.6 cents per ton)=maximum recovery level of 6.9 cents per ton of cargo.

5. For each port, the Corps will establish the annual cost of maintenance. The Corps also would establish the theoretical non-Federal share of the annual maintenance, at 25 percent of the costs to be incurred by the Corps. For example, if the Corps intends to spend $1,000,000 annually at a particular port over the next five years, the non-Federal share of the cost would be $250,000 annually.

6. The Corps will calculate the seagoing and lakewise cargo moving through a specific port for the preceding calendar year. For example, the total annual tonnage at the port might be 10,000,000 tons. In this case, the Corps would compare the theoretical non-Federal share of the maintenance cost, $250,000, to the cost if the maintenance cap were applied (6.9 cents/ton times 10,000,000 tons equals $690,000). The non-Federal interest would then be required to pay the lower figure, or $250,000.

7. If the harbor's tonnage were only 1,000,000 tons (instead of 10,000,000 tons), the maintenance cap would take effect, and the non-Federal interest would be required to pay $69,000 annually, since that is the lower figure.

The Committee recognizes that the provisions for a cap will substantially reduce the overall non-Federal share. But the Committee is convinced that the cap represents a sound compromise, protecting all ports.

This bill does not require that the non-Federal interest utilize any specific mechanism to raise funds to cover its non-Federal share of maintenance. The Committee recognizes that each non-Federal interest is best able to determine how its share should be raised. If the non-Federal interest decides to impose cost-recovery user fees, it is free to establish a fee structure best suited to its traffic volume and commodity mix. However, to provide some perspective, if a port recovered all of its maintenance costs through a user fee imposed on all tonnage, the per-ton additional costs under S. 1692 range from less than a penny a ton at ports such as Portland, Me., Los Angeles, and Seattle, to a maximum of 6.9 cents a ton at ports such as Savannah, Ga., Charleston, S.C. and Portland, Ore.

The only exception to this approach would occur if a port undertakes construction dredging after January 1, 1981. If that occurs, the non-Federal interest would be required to pay 50 percent of the maintenance costs for the particular channel expended. This will likely occur at the low-cost, high-volume ports and the cost will be substantially offset by the savings to shippers which will result from port expansion. The 25 percent and the cap would continue to apply on the remainder of the harbor.

Tables in this report analyze a variety of costs now associated with the transportation of goods and commodities. For example, the following table represents a typcial movement of grain from Montana to a customer in Japan. It shows that the maximum maintenance dredging cost of 6.9 cents per ton is only 4/100 of 1 percent of the value of the grain at a foreign market.

*Cost of transporting a ton of Montana wheat*

| | |
|---|---|
| Producers price | $133.32 |
| Seller expenses: Country elevator | 3.50 |
| Inland transport: | |
| Average railroad cost | 26.99 |
| or truck to Lewiston, Idaho | 19.60 |
| Transfer at Lewiston | 1.75 |
| Barge to Portland, Oreg | 5.43 |
| Total | 26.78 |
| Cash price, Portland | 163.81 |
| Buyer expenses: | |
| Ocean freight and current vessel port charges | 10.33 |
| Current cargo port charges | 4.45 |
| Delivered price—Japan | 178.59 |
| Maximum added cost of S. 1692 | 0.069 |

Later tables show the total estimated cost of transporting a ton of various types of cargoes from their point of origin, through the specified U.S. port, to a harbor destination in Europe or Asia (or vice-versa). For general cargo, these overall transportation costs for containerized freight (where the greatest competition appears to exist among ports), range from $180 to $280 a ton. Similar costs for grain ranges from $27 to $34 a ton, while petroleum costs range from $3.39

to $10.47 a ton, assuming delivery to a distribution terminal.

These charts also identify the substantial difference that now exists among ports in charges for handling and processing identical shipments. While some ports have expressed concern over the potential of "diversion" caused by harbor maintenance fees and the disruption of "competitive equity," equity does not exist now.

Most significant, the charts illustrate that on any criterion—from a percentage of total transportation costs to a percentage of current port fees—partial cost-recovery of harbor maintenance expense represents a very small fraction.

2. CONSTRUCTION DREDGING POLICY

S. 1692 provides a new approach to future dredging to deepen or widen harbors. The bill requires that all new construction dredging be financed by non-Federal interests, allowing the market to determine the projects with the highest priority and greatest economic efficiency. S. 1692 also includes a fast-track provision that limits the processing and review of all necessary Federal permits to a period of two years.

Current Federal policy provides for new harbor dredging decisions to be made through specific Congressional authorizations and specific appropriations. Congress authorizes a study for a construction project, the Corps of Engineers performs the study, estimating the costs and economic benefits. If the project has benefits greater than its cost, the project is likely to be authorized, and perhaps funded.

Traditionally, Federal expenditures have been spread broadly, but thinly, among the nation's ports. Rather than target the Federal investment, funds and work have been distributed widely among many ports along the four coasts; 48 ports now have authorized depths of 40 feet or more. When one port obtains a deeper channel, many others have sought and received the same.

While valuable in the past, this approach now thwarts the nation's ability to develop the deep harbors needed to handle the larger, more cost-effective superships. Most studies set the cost of a typical 55-foot harbor at close to half a billion dollars. It appears highly improbable that the Federal government will finance work, in any timely manner, on any of the 34 ports that have been identified by the Federal Coal Export Task Force as potential sites for major coal export harbors.

In a recent study, the Office of Technology Assessment came to this conclusion:

Dredging projects presently take decades to progress through the various stages from project proposal to completion. This system is seen by authorities as seriously impeding the growth of U.S. bulk-cargo capabilities.

In testimony before the Committee, a panel of port representatives agreed that only one to four deep-draft ports were needed initially for coal exports. However, the port representatives agreed that if the Federal Government funded the full cost of development, as occurs now, there could be as many as several dozens ports interested in expanding their capabilities to coal port status. If the Federal Government continues to fund new development, a number of 55-foot ports may exist by the early years of the 21st century. However, the necessary one to four 55-foot ports are unlikely to be developed in this decade.

Unless Federal policy is altered to recognize and encourage local initiative, the slow and often fruitless pace of development seems certain to continue. This means that the vast opportunities for increasing export trade will be missed. Anything that involves Congress directly in the process of port-by-port authorization or appropriation is likely to significantly delay the process of development, while attracting more ports into the bidding for 55-foot channels.

There is a need to obtain those few deep harbors quickly. To accomplish this goal, a politically neutral force—the marketplace—should become the controlling factor in site selections. The Committee has concluded that a system of local financing, where a port authority or local government must go to the bond market and potential users to test the economic viability of the project, provides such a neutral force.

The new policy to require local interests to finance all future harbor improvements recognizes that any decision to expand a particular harbor is essentially a commercial decision. Therefore, the marketplace should be utilized to determine future actions. Harbor construction dredging projects will be achieved in a more timely and economical fashion when the decision is made by the interested parties, rather than the Federal Government.

Harbor expansion at a specific location in most cases provides marginal benefits to national commerce as a whole. The major beneficiaries are the commercial enterprises that ship through the particular harbor, as well as the ocean transport companies berthing there. This view is corroborated by the Corps of Engineer's own method of calculating the benefits of deep-draft improvements.

Under the Corps' regulations on the evaluation of navigation benefits, the basic economic benefits from the deep-draft features of water resources projects are the reduction in the cost to transport commodities and the offsetting increase in the value of goods and services. Transportation savings may result from the use of larger vessels, more efficient use of vessels, reduction in transit time, lower cargo handling and tug assistance costs, reduced storage costs, and the use of water transportation rather than an alternative land mode.

This is the method used by the Corps to justify navigation projects to the Congress. All of the so-called national economic development benefits are stated in terms of benefits to commercial users of the projects. If the Federal Government uses such an evaluation to justify a $300 to $500 million construction project to the Congress, a similar analysis should be as compelling to non-Federal financing bodies. Otherwise, the very basis of the Corps' evaluation procedures must be called into question.

Present transportation costs to move coal from the East Coast to Europe are about $18 per ton. According to studies by the Office of Technology Assessment, this cost is subject to a savings of 30 to 50 percent ($5.49 to $9) through the use of larger, more efficient vessels. Other studies estimate the per-ton savings from the use of larger ships at $6 per ton of coal.

This is part of the economic equation. The other part is the anticipated growth in coal export traffic. The Federal Coal Export Task Force has estimated U.S. exports of steam coal at 197 million tons by the year 2000. The following are coal export estimates made by the National Coal Association:

U.S. COAL EXPORTS

[In million tons]

| | 1980 | 1985 | 1990 |
|---|---|---|---|
| Total exports | 90 | 110 | 143 |
| Steam coal exports | 23 | 52 | 85 |

Assuming average savings of $6 a ton, and assuming 53 million ton growth in export coal by 1990, the annual savings from deep harbors would be $318 million. This, of course, assumes only the growth in traffic is carried on the more efficient ships. If by 1990 all 143 million tons go aboard deep-draft ships, the savings would be $858 million annually.

Testimony to the Committee indicated that the annual transportation savings by 1990, through the use of deep-draft vessels nationally, would be $1.15 billion, with a $5 a ton in savings in shipment from the East Coast, and $7 a ton from New Orleans.

A recent study indicates the substantial benefits to be realized from deepening the main channels in Norfolk, Va. The report of the Chief of Engineers was submitted to the Secretary of the Army on November 20, 1981. Under this proposal, the main channels would be dredged to 55 feet, from a presently authorized depth of 45 feet. The Corps estimates, as of October 1981, that the total first cost of the project would be $480,000,000. The annual amortized cost for the project, over 50 years, is estimated at $38,334,000, using an interest rate of 7⅝ percent.

The annual cost of $38 million, of course, is considerable. If bonded by local interests over a shorter period, using more realistic interest rates on tax-exempt bonds, the annual amortized cost is likely to be higher, although it may be partially offset by the lower costs often available in non-Federal dredging contracts. But the key consideration must be the comparison between that amortized cost and the direct benefits that would flow to the shipping industry as a result of the increased depth.

The primary export traffic presently moving through Norfolk is coal. In 1980, 48,600,000 tons of coal were exported from Norfolk: traffic should be considerably higher this year and in future years. In its study, the Corps of Engineers, assumed benefits for the Norfolk project only on the basis of existing coal traffic. With coal traffic of 50 million tons a year, the annual savings in shipping costs from Norfolk would be $132,860,000. Larger ships, ones that are more economical in per-ton operations, would haul the coal.

This "savings" is nearly four times the annual amortized investment.

If traffic at Norfolk increases to 90,000,000 tons of coal a year—a tonnage on which current landside expansion plans are based—the annual savings to shippers at Norfolk from that $38,000,000 annual investment would be $224,160,000. With a crude oil refinery, the yearly savings at Norfolk rises to $253,000,000, according to the Corps' calculation.

If these economic analyses are valid, even with an error of as much as 100 percent, the private sector, working through a non-Federal public body, should be willing to make this investment on the basis of the significant return. If the non-Federal interests are unwilling to make such an investment, there would appear to be no true need for the projects, no matter who financed it.

The Corps is in the process of studying the feasibility of dredging several ports to 50 or 55 feet. Those at the top of the list include: Baltimore, Norfolk, Mobile, and New Orleans.

Estimate of costs per ton for new port construction, based on Corps feasibility studies and traffic forecasts developed by the consulting firm of Temple, Barker, and Sloane are as follows:

| Harbor | Annual amortized cost[1] | Deep-draft tonnage | Cost per ton[2] |
|---|---|---|---|
| Baltimore | $36,413,000 | 32,451,500 | $1.12 |
| Norfolk | 42,099,000 | 45,302,500 | .93 |
| Mobile | 36,652,000 | 9,365,700 | 3.91 |
| New Orleans | 43,874,000 | 65,852,200 | .67 |

[1] Based on 50 years; repaid with 10 percent interest.
[2] Assumes all costs to be borne by deep-draft vessels, benefiting from deeper channels.

With respect to Norfolk, the figures differ somewhat from those stated previously for Norfolk due to the difference in interest rate assumed. The cost-savings to deep-draft ships of using a deeper channel outweigh any potential user fees; otherwise, the project should not be built.

More importantly, however, the market would determine which ports should be constructed, and in what order. As discussed previously, port representatives testified the Nation initially needed only one to four ports at a 55 foot depth. With full Federal funding, close to 50 ports would compete for construction funds. If the Federal Government were to commit 50 percent of construction funding, the witnesses estimated that about 10 ports would be willing to finance the additional 50 percent. With requirements for 100 percent non-Federal financing for new development, the witnesses estimated three or four ports would be likely to finance this development.

The requirement to finance harbor improvements for channels is based on the assumption that our existing ports, developed over the last 200 years, provide adequate capacity for any national security need that could conceivably arise. According to the Maritime Administration of the Department of Transportation, a "Ports for National Defense" program has been established to assure that our Nation's ports could adequately and rapidly respond to a national defense emergency.

The Department of Defense has designated 27 ports throughout the Nation as necessary for the transport of troops, vehicles, and other military materiel. Other Federal agencies have further advised the Maritime Administration of their need for shipping other vital government cargoes. Our existing ports are more than adequate to acommodate increased shipments necessary to respond to any conceivable national defense emergency. It is therefore the view of the Committee that local financing of future harbor dredging will in no way jeopardize our Nation's readiness for a national emergency.

Less attention has been focused on local financing mechanisms, but it is an important issue. A number of financing methods are available for port development, and have been used in the past to finance other types of port facilities.

Ports already obtain financing for various aspects of harbor improvements. This not only includes dockage and storage facilities, but also channel improvements. There are several ways a port can finance new development.

General obligation bonds, backed by the assets of the port authority or other public agency, and repaid by an increased mil levy imposed on property. Such an option is particularly viable for ports which are part of a municipality, which have substantial assets and a sound cash flow.

Revenue bonds, with specific fees and/or assets pledged against the bonds. These are viable for ports with a sound cash flow, and those which have recently issued other bonds. Most large ports now use revenue bonds to finance new facility development. It is also an option for those ports which have long-term contracts with specific port users, because the port can demonstrate that revenues to pay back a high portion of the bonds are virtually assured.

Industrial development bonds are a mechanism to raise funds for specific facilities which will be used by corporate customers. The port authority uses its tax free status to issue bonds, while the industry pledges its assets against the bond. Numerous ports have used this approach.

Many ports have recently floated large bond issues and should be able to obtain similar financing for dredging. Mobile, New Orleans, and Norfolk, have each recently floated bond issues in excess of $100 million for facility improvements. This is also true for ports which have customers willing to enter into long-term contracts, or pledge company assets against bonds. Larger ports which seek major expansion have the financial history and the private sector customers to finance extensive development. The partnership which already exists between ports and commercial users of the ports will be strengthened as the port finances new development.

Ports of any size, of course, will be able to expand in a similar manner. Financing would be possible if the port authority obtained long-term contracts from port users, revenues from which would assure repayment of a portion of the bonds. State loan guarantees, at least for a portion of the bonds, would also facilitate financing. If the economic benefits can be realized, then the port will be able to finance this development. The private sector, and State governments will be expected to take a more aggressive role than in the past. This is appropriate, because the commercial users and non-Federal governments benefit to the greatest degree from such development.

Ports have other options to finance new development. In States where budget surpluses exist, State funds could be used to finance development, to guarantee loans, or as front money to be reimbursed with port user fees. If a port has a prospective large industrial customer, private financing could be obtained for a portion of the development, or industrial bonds could be issued. The port could employ a combination of any of these options to finance development.

### 3. HARBOR USER FEES

This bill also authorizes non-Federal public interests to collect user fees to reimburse them for their expenses under this Act. The language does not mandate user fees; rather, it is intended to give each non-Federal public interest sufficient flexibility to make its own financing decisions, and to develop a fee schedule compatible with the characteristics of its users and the benefits they receive.

The question of the constitutionality of such charges was raised by some witnesses before the Committee. The relevant sections of the Constitution, all in Article I, are as follows:

Section 8, Clause 1: The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Section 9, Clause 5: No tax or Duty shall be laid on Articles exported from any State;

Section 9, Clause 6: No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties to another.

Section 10, Clause 3: No State shall, without the Consent of Congress, lay any duty of Tonnage.

The Committee rejected the assertion that the sharing of the costs of operating and maintaining the navigable waters of the United States, or the recovery of costs for harbor improvements, could in any way be construed as a tax, duty impost, or excise on commerce between States or other nations. The maintenance fees contemplated in, but not specifically required by, this legislation are not for the purpose of raising revenue. Rather, they are to pay the costs incurred by non-Federal public bodies in servicing commerce at individual ports. Maintenance fees recovering harborwide costs are for a service rendered to vessels and their cargo. Ships now pay substantial sums in return for services rendered; the provision of a channel and its maintenance by the Corps or another agency is as surely a service to the shipper as pilotage, dockage, wharfage, or the many other services provided to a ship.●

## DETROIT DISTRICT RECRUITING COMMAND

● Mr. RIEGLE. Mr. President, I would like to congratulate the Detroit District Recruiting Command for its fine efforts to recruit qualified young men and women into the U.S. Army. Their dedication to this important job has led to great success with the recruitment of individuals wishing to serve their Nation in the Armed Forces.

During 1981, the Detroit Recruiting Command was responsible for enlisting a total of 4,365 individuals of whom 2,538 were high school graduates. The remainder were prior service members along with comparatively few non-high-school graduates. This accomplishment resulted in the Detroit District Recruiting Command being rated the best recruiting command in the Nation.

Today's Army faces the arduous task of filling an increased number of positions that require highly technical skills. Although this situation necessitates more rigorous recruiting and requires higher standards for recruits, the young men and women entering the Army have a much greater opportunity to advance in an increasingly technical society because of the experience gained through service in the U.S. Army.

The Detroit Recruiting Command faces yearly this great challenge which I am sure the command will

continue to meet and to exceed. It is because of the tenacious determination of Army personnel such as Lt. Col. Gunter Seibert and his entire command that the Army will always remain committed to producing good citizens as well as excellent soldiers.

Again, I would like to congratulate the Detroit District Recruiting Command for its exceptional recruiting performance which is a responsibility that will always be vital to keeping our country strong.●

## COAL PIPELINE IMPERATIVE

● Mr. GOLDWATER. Mr. President, shortly before the end of the session last year, I joined as a cosponsor of S. 1844, a bill to grant to interstate coal pipelines the right of eminent domain. A related bill, H.R. 4230, was favorably reported by the House Interior and Insular Affairs Committee on January 29.

Under the Senate version, the Department of Energy, or its successor agency, will review each proposed project and must find that it is in the national interest before a permit is issued. I will explain today why the early enactment of this legislation has become a national imperative.

As a native of the West, I am keenly aware of the water concerns of individual States, and I am totally committed to the proposition that each State must control the allocation of its water to interstate coal pipelines.

I am also aware of the great contributions railroads have made and must continue to make to our Nation, and I am committed to the economic viability of our Nation's railroads.

As a conservative, I am committed to the proposition that the Federal Government should not assume to itself power and responsibilities that are traditionally reserved to State or local governments.

When S. 1844 is carefully examined, I believe it will be seen to meet each of these interests. Above all, the bill promotes competition and the free enterprise system, the economic strength of our Nation and a more secure America. For these reasons, I am convinced that the time has come to extend Federal eminent domain authority to interstate coal pipelines, subject to approval of each specific project by a Cabinet-level officer, who finds the pipeline to be in the national interest.

### STATE WATER LAW

Before deciding to join in sponsoring the bill introduced by the Senator from Louisiana (Mr. JOHNSTON) I made a close study of the major arguments both for and against this measure. Primary in my review was a thorough examination of whether or not the bill would have any negative effect on State water rights. I am now completely satisfied that the bill in no way will damage, reduce, or interfere with State water law and rights.

Mr. President, it is an understatement to declare that water is the lifeblood of Arizona and most of the other Western States. And, it is true that coal pipelines require water, 1 ton of water for every ton of coal that is transported.

Coal pipelines require less water, however, than do coal gasification plants, which require 2 tons of water for every ton of coal used. Or we could look at mine electric generating facilities that require up to 7 tons of water for every ton of coal used.

The fundamental issue is not how much water is used, but who will make the decision concerning the use of a State's water resources. S. 1844 contains specific language providing as total protection of State control of water as it is humanly possible to write. Even my good friend, Secretary James Watt, who opposed the eminent domain proposal on misplaced States rights grounds, testified that the measure puts State authority over water "forever beyond reach of Federal officialdom."

The State water law protections in S. 1844 might fairly be considered a political and legal victory for the States, because these provisions may provide greater legal safeguards than the States now possess. Under the bill, each State will decide for itself whether, for how long, and under what conditions State water shall be allocated to coal pipelines.

Section 6 of S. 1844 provides that existing State water law shall not be modified or overriden by the new law, even after a pipeline is approved and starts receiving water.

Moreover, section 6 also spells out protection for State water law against any possible challenge on grounds of preemption or supremacy by the Federal Government under the interstate commerce clause of the Constitution.

In addition, section 4(c)(2) provides that nothing in the eminent domain authority created by the bill "shall be construed to permit any person to acquire any right to take, use, or develop water through exercise of the power of eminent domain."

Mr. President, I have full confidence these safeguards of S. 1844 will be legally binding and enforceable on the Federal Government. The opinion of the Supreme Court in the recent case of *California* v. *United States*, 438 U.S. Reports 645 (1978), written by Justice Rehnquist of Arizona, gives assurance that congressional directives protecting State water rights are valid.

This case involved an interpretation of section 8 of the 1902 Reclamation Act, which provides a disclaimer to the effect that nothing in the act shall be construed as affecting or interfering with any State water law relating to water used in irrigation. The California State Water Resources Control Board attached 25 conditions to a permit for a Federal dam project, and the U.S. Supreme Court ruled that the U.S. Bureau of Reclamation must observe the State water law as provided by Congress in section 8 of the Reclamation Act.

Since the language of section 4(c)(2) and section 6 of S. 1844 is more sweeping and stronger in protecting State water law than the language of section 8, which has already been upheld by the highest court in the land, I have no doubt about the effectiveness and validity of the water law protection language in S. 1844.

### RAILROAD COMPETITION

Mr. President, I will now turn to the issue of how the bill might impact on the railroad industry. Actually, I believe the bill will create a healthy competition among railroads and pipelines without injuring the railroad industry. Reputable economic studies, such as one by Data Resources, project that coal demand will be so great in coming years that even if all coal slurry pipelines proposed were to be built, rail-coal traffic must still increase by 44 percent over the next 10 years.

Passage of the bill would be in line with the efforts of Congress recently to replace Government regulation of railroad rates with market regulation. I am referring to enactment of the Staggers Rail Act in 1980. But regulation by the marketplace only works when there is competition. Coal pipelines can provide that competition.

Let me give a specific example. In 1957, the first intrastate coal pipeline was developed by Consolidation Coal Co. to transport 1.3 million tons of coal per year a distance of 108 miles from Cadiz, Ohio, to the Eastlake Power Plant of the Cleveland Electric Illuminating Co. Shortly after the pipeline began operation, the rail-coal haulage rate in Ohio was $3.47 per ton, while the pipeline haulage rate was $2.20 per ton. Eventually, the competing railroad reduced its coal rate to $1.88 per ton. The pipeline was then mothballed in 1963. By September 1973, the rail-coal haulage rate in Ohio had risen to only $2.39 per ton, attesting to the beneficial effects of competition in coal transportation.

Mr. President, it is an interesting fact that the Black Mesa coal pipeline of Arizona, which is the only active coal slurry pipeline in the Nation, is owned by a railroad. Southern Pacific Pipeline Co. is a sister company to the Southern Pacific Railroad. So pipelines are not necessarily incompatible with railroads.

The Black Mesa pipeline transports up to 4.8 million tons of coal across 273 miles of some of the most rugged terrain in my State to a powerplant located a mile inside the State of Nevada. This line has proven to be a

reliable and cost-effective method for moving coal from Arizona to the Nevada power station.

STATES RIGHTS

Mr. President, I now come to the question of whether the legislation improperly interferes with State sovereignty. This is both a legal and political question. From the legal standpoint, many States cannot approve an eminent domain statute. Their constitutions forbid the exercise of this power unless there is a direct benefit in the particular State. A State through which the pipeline crosses, but where no coal is used or mined, might not be able to grant right-of-way authority. Other States which may have such authority might burden any permit down with so many conditions that it would no longer be practical to build the pipeline.

After giving long consideration to the issue, I am persuaded that this is an area of overriding national importance, which the States cannot adequately deal with, often because of legal impairments in their own constitutions. There are precedents for the Federal eminent domain authority. For example, Congress amended the Natural Gas Act in 1947 to grant the right of eminent domain to certificated natural gas pipelines. Oil pipeline projects had been granted similar authority at an earlier time.

Coal, gas, and oil pipelines, like the railroads, are all national means of long-distance transportation for moving goods from the location where they are produced to their markets. The grant of Federal eminent domain to one of these industries is consistent with the grant of similar authority to related industries, when wrapped in adequate safeguards to protect the overall public interest.

BENEFITS

Now, Mr. President, I will discuss the major benefits of S. 1844. I would sum up these benefits as energy independence, economic gains, and export potential.

First, energy independence. One of the proposed pipeline projects alone would bring 54 million tons per year of coal from Illinois and West Virginia to Georgia and Florida. This would satisfy up to half of the utility coal needs of these two States by 1990 and reduce oil imports by 63 million barrels annually.

Our Nation is still too dependent on foreign crude oil and our dependence creates national security and defense weaknesses. Yet the United States has a vast supply of coal, the greatest supply in the free world. Our coal can replace much of the crude oil we are using today. But coal must be moved efficiently and economically from mines to powerplants and industrial facilities.

The high cost of transporting coal is delaying and preventing many industries and utilities from using domestic coal resources. In fact, testimony at a recent hearing of Senator WARNER's Subcommittee on Energy and Mineral Resources, revealed that some American utilities found it cheaper to import foreign coal than to use domestic coal. The hearing also disclosed the fact that it may be more economical during the late 1980's to use South American coal in portions of the Southeastern United States, than to use coal from our own eastern mines.

This trend must stop. The competition from pipelines will help reduce coal haulage rates and assure that our Nation makes maximum use of its coal resources.

This brings me to the second major benefit, economic gains. According to a report dated May 1981 by A. T. Kearney, a highly reputable consulting firm, the proposed Coalstream pipeline in the East would save $61 billion of transportation costs to energy consumers in the first 20 years of operation. The $3 billion cost of the pipeline would be raised entirely from private capital. No public moneys are required for construction, operation, or maintenance. This single project would give the economy a great boost and help contribute to lower coal transportation costs.

Third, there is the export potential. I will use the example of the Coalstream pipeline again. The second stage of this project includes an export facility along the southeastern coast. No harbor dredging would be required. The export potential would help our balance of payments substantially. More importantly, it would enable the United States to supply some of the energy needs of Western Europe in case the Soviet Union uses the new Siberian gas pipeline project as a political weapon.

The Soviet pipeline poses a clear economic and security threat to our Nation by making Western Europe increasingly vulnerable to Soviet pressure. Europeans need energy. We have energy, in the form of coal, to offer them. Yet Europeans see rising inland coal transportation in our Nation and the failure of our Government to assure competition in coal haulage rates. Europeans can only conclude that we are not serious about supplying coal to Europe and this contributes to driving the European nations elsewhere for energy supplies.

We must pass eminent domain legislation to assure our allies that we are serious about developing our coal resources. Otherwise, they will find themselves becoming more and more dependent on Russian fuel supplies.

For these reasons, we must grant interstate coal pipelines the right of eminent domain. This is a national matter. It is not an issue we can leave to scattered decisionmaking with different outcomes in different States.

Determining the policy under which interstate coal pipelines should have eminent domain authority is the responsibility of Congress. We must decide that issue in the affirmative at the earliest possible date and get on with the business of developing our Nation's resources to assure that we are strong both economically and militarily.●

PRAISE FOR SENATOR BARRY GOLDWATER'S COSPONSORSHIP OF COAL SLURRY PIPELINE BILL

● Mr. MURKOWSKI. Mr. President, I am extremely happy to welcome my distinguished colleague as a cosponsor of S. 1844. Senator GOLDWATER and I share many of the same views concerning our Nation's economic system, the proper relationship between the States and Federal Government and the need for a strong and secure America. I am pleased that we agree that the Nation needs interstate coal pipelines and that the national interest requires that the Congress enact this legislation to allow the development of these important facilities.

As chairman of the Water Resources Subcommittee on the Senate Energy and Natural Resources Committee, I share Senator GOLDWATER's view that the State water law protections that are contained in S. 1844 provide greater legal safeguards than the States now possess and may fairly be characterized as a political and legal victory for the States. This legislation provides unequivocally that the States will decide whether and under which conditions water resources can be used by interstate coal pipelines—and protects those State decisions against judicial challenge on commerce clause grounds. Moreover, access to Federal eminent domain authority cannot be obtained by a pipeline until water resources for the pipeline first have been obtained pursuant to State substantive and procedural law. These important provisions now give the States the flexibility to determine the best methods for developing and transporting the coal resources in their States without compromising their control over their water resources.

Mr. President, I encourage each of my colleagues to join us in supporting S. 1844. We all agree that the United States must become more productive and must develop new technology and new methods of operating if we are to compete successfully in an increasing international marketplace. This legislation will allow a vigorous new industry to be developed in our Nation and will be of real assistance in helping U.S. coal to compete effectively for both our domestic foreign markets. We will be remiss if we do not enact this legislation at the earliest possible date.●

● Mr. JOHNSTON. Mr. President, I would like to echo the remarks of my two distinguished colleagues, Mr.

GOLDWATER and Mr. MURKOWSKI. We are all quite appreciative of the outstanding support they have demonstrated for this most worthwile legislation. I would also take pleasure in announcing the recent cosponsoring of the distinguished Senator from New Hampshire (Mr. HUMPHREY). I believe his support of the bill is indicative of the broad-based consensus within the Congress that the time has come for coal slurry pipelines.

In addition, recent actions on the part of private enterprise indicated that Congress is not alone in holding to this view. On Thursday, January 28, a broad-based coalition was established to work for the adoption of Federal eminent domain legislation for interstate coal pipelines. The coalition is named the Alliance for Coal and Competitive Transportation (ACCT). Founding members include the Consumer Federation of America, the American Association of Retired Persons, five major labor unions, the three major electric utility associations, the National Coal Association and the Mining and Reclamation Council, several associations that have been formed to work for lower coal costs and coal transportation costs, the Slurry Transport Association, the American Consulting Engineers Council, Cajan Electric Cooperative, and several State and local coal associations, including the Kentucky Coal Association, the Illinois Coal Association, and the West Virginia Coal Association. Other groups are likely to join this formidable alliance.

Mr. President, this coalition illustrates well the broad group of Americans that will benefit from interstate coal pipelines. Coal producers will have more marketing opportunities; America's workers will benefit from the jobs created by the pipeline projects and by the lower costs that will result from the projects; electric utilities will benefit directly from lower coal transportation costs; and the ultimate consumers of electricity will benefit from lower electricity charges.

Mr. President, the truth is that interstate coal pipelines and the competition they will provide are good for our Nation. I encourage all of my colleagues to join Senators GOLDWATER, MURKOWSKI, HUMPHREY, WEICKER, HAWKINS, BUMPERS, BRADLEY, MATSUNAGA, and myself in cosponsoring S. 1844 which will assure that America's railroads can no longer insulate themselves from competitive with these pipelines.

Mr. President, I ask that the press release concerning the formation of ACCT and the list of founding members of ACCT be included in the RECORD at the conclusion of my remarks.

The material follows:

COALITION IS FORMED TO PROMOTE COAL TRANSPORTATION COMPETITION

WASHINGTON.—Organizations representing consumer, labor and industry groups have formed a coalition to promote more effective competition for the transportation of the growing quantities of American coal being used both here and abroad.

The Alliance for Coal and Competitive Transportation (ACCT) will concentrate its activities in support of pending legislation to grant federal eminent domain authority necessary for the expeditious construction of interstate coal slurry pipelines.

Founding members of ACCT include the American Association of Retired Persons, American Consulting Engineers Council, American Public Power Association, Building and Construction Trades Department (AFL-CIO), Consumer Federation of America, Eastern Coal Transportation Conference, Edison Electric Institute, International Brotherhood of Teamsters, International Union of Operating Engineers (AFL-CIO), Laborers International Union of North America (AFL-CIO), Mining and Reclamation Council, National Coal Association, National Rural Electric Cooperative Association, United Association of Plumbers and Pipefitters (AFL-CIO), Slurry Transport Association, Western Coal Traffic League, and Western Fuels Association.

Carl E. Bagge, chairman of ACCT, said competition in the transportation of coal is essential today to insure that railroads do not abuse their present monopoly position in shipping coal. For 85 percent of coal moved by rail there is no feasible alternative mode of transportation, he said.

"Legislation to grant coal slurry pipelines federal eminent domain authority that would allow them to cross competing railroad tracks and other properties has been consistently blocked by railroads for the last 20 years," Bagge said.

"They argue that competition from coal slurry pipelines would seriously hurt the regulated railroads by taking away profitable business. However, since Congress enacted the Staggers Rail Act, which reduced regulatory controls over the railroads, it is now absolutely essential that competition be allowed," said Bagge, who also is president of the National Coal Association.

Frederick Webber, vice chairman of the ACCT and executive vice president of the Edison Electric Institute, said that coal transportation is dominated by the railroads.

"If we are to have efficient, dependable and cost-competitive coal transportation, the nation must have an alternative system to benefit coal consumers," he said.

"Nearly every consumer in the United States will be affected in some way by sharply higher rates for moving coal to electric power plants, steel mills or other industrial plants if the railroads are allowed to continue to raise their prices without sufficient competition," Webber said.

Eighty percent of coal produced in the United States is consumed by electric utilities for the generation of electricity.

Peter Hughes, legislative counsel, American Association of Retired Persons, said, "In recent years, retired persons have been especially hard hit by rapidly rising energy prices."

"Retired people and other consumers will benefit from the construction of coal slurry pipelines even if a particular pipeline is not proposed to serve their area, because railroads will hold down pricing for coal shipments to prevent construction of this competing mode of transportation," Hughes said.

"All consumers, and especially senior citizens on fixed incomes, have an interest in seeing this transportation option have a chance to operate," he said. "More than half of the nation's electricity is now generated by coal. If coal can be more economically shipped to market, we can help moderate the rising cost of electricity," he added.

"Organized labor in the construction industry views coal slurry pipelines as an important, new transportation alternative," Robert Georgine, president, Building and Construction Trades Department, AFL-CIO, said.

"When completed, these lines will provide reasonable prices for coal which, in turn, will be of great value to consumers in the United States and they will allow our country to market more coal overseas," Georgine said. "Most importantly, they will provide thousands of jobs for workers in construction and related industries, where in some areas unemployment is over 10 percent."

Legislation that would extend eminent domain rights to coal pipelines is presently before both houses of Congress. In the House, H.R. 4230 has passed the Interior and Insular Affairs Committee in December and is under consideration by the Public Works and Transportation Committee. In the Senate, S. 1844 has been introduced and hearings by the Energy and Natural Resources Committee are expected to be held soon.●

## THE ELIMINATION OF NONESSENTIAL GOVERNMENT FUNCTIONS

● Mr. EAST. Mr. President, at a time when we are being asked to reduce projected deficits by making major cuts in defense and social spending, I would like to remind my colleagues that it is still possible to save billions of dollars every year simply by eliminating nonessential Government functions.

At all levels of our federal system, government is producing goods and performing services that it could obtain more cheaply from the private sector. This practice is self-defeating to say the least. We not only waste money by doing things "in-house," we undercut private firms that pay taxes.

Although this problem has been recognized for years, it has never been satisfactorily addressed. Recently, however, the Reagan administration has undertaken fresh initiatives in this area, and I will shortly introduce a major piece of corrective legislation myself.

The need for economy in government is attracting greater public attention now than it has in many years. I would like to call my colleagues' attention to two articles on this subject that appeared within the past few weeks.

The first of these, a column from the January 18 issue of the Wall Street Journal, argues persuasively for "privatization" of many services presently performed by government. The

second, a book review by columnist and author Allan Brownfeld, maintains that the American people can have better government at half the price if they are willing to rely more on the private sector.

I ask that both these items be printed in the RECORD as a springboard to further discussion of this issue.

The article follows:

PRIVATIZATION: NOBODY DOES IT BETTER

(By Susan Lee)

No doubt the new lean look in government spending has prompted a lot of nervous interest in just how the services traditionally provided by public agencies will be, or even can be, provided. But some of this interest also comes from a growing awareness that the government really isn't a very cost-effective provider of many of its services.

The justification for letting government provide goods and services centers on the notion of "public goods"—things that are important for people's welfare but are too expensive or too ill-defined to bill their cost to the beneficiaries of those things. National defense or some public-health activities are illustrations of public goods. It all sounds straightforward and reasonable, right? It isn't. Public goods are the result of a market failure, and that means problems.

The problem with public goods now in vogue is the problem of cost. Paying the bill for public goods, especially over the last decade, has been a rather casual affair: Government decides on what services to provide and then pays for them out of general revenues, or, in some cases, by charging a user's fee. (User fees are usually the merest of tokens and don't even begin to cover operating costs, let alone capital costs.)

However, it can—and is—being argued that if the users of public goods can be identified, then why shouldn't those users pay for the full cost of the goods? Indeed. Right off the bat, "full-cost-recovery," as it's inelegantly called, makes sense: Only the beneficiaries would pay. Creating a tie between pocketbook and service often leads to an abstemious, or more rational, use of that service.

An interesting application of full-cost-recovery user fees is about to start at the Federal Reserve. The Fed has always provided some services free to members—check collection, coin wrapping, coin and currency shipping, to name a few. Big member banks in turn offered these very services, courtesy of the Fed, to smaller non-member banks—but for a price. That clever bit of arbitrage more than repaid the member banks for having to set aside reserves at the Fed.

But under the Monetary Control Act of 1980 the Fed must offer these services at full market price to all comers. The simple fact of geography will make it possible and attractive for large banks to offer the same services to their regional banks at a lower cost or with greater speed. It is expected that these full-cost user fees will result in a stunning increase in competition and efficiency in the market for interbank services. And that will lead to a drop in the real cost of those services.

A second problem with public goods today is plain old government inefficiency. Government isn't inefficient because it's dumb or willful but because, quite simply, government lacks the flexibility and incentive to perform efficiently: The discipline of the market is absent. This immutable circumstance means that even if the burden of costs is shifted from all taxpayers to actual beneficiaries through user fees—the cost may be lower, but it will still be higher than it would be in the private sector.

The solution to this problem is bold enough to make full-cost-recovery look like so many baby steps. The solution is privatization—turning over government responsibilities to the private sector.

Privatization would be possible for the same reason that charging full-cost-recovery fees is possible—*most* services provided by the government aren't really public goods.

Often these activities have been run for the public sector for no better reason than that the government has simply been doing them for a long time. Some obvious, random examples: garbage collection and ambulance service at the local level or inland waterways operation and inspection of agricultural commodities at the federal level. There's no theoretical justification for government doing these things, especially since there is ample evidence that they would be forthcoming from the private sector if the government weren't doing them.

Air-traffic control looks like an agreeable candidate for privatization now. Airways are, after all, a "good." Just consider the number of commercial and general aviation roaring around the skies over LaGuardia—all wishing to land safely. It is a simple matter to charge these aircraft for the use of a safe landing route—the government already does that but in a way that isn't very cost effective.

Switzerland, Mexico and Saudi Arabia operate with private air-traffic control systems. The U.S. could, too. Robert W. Poole Jr., an engineer and author of "Instead of Regulation" (Lexington Books), has drawn up a plan to privatize the airways which has received an interested hearing from the FAA.

Privatization is no longer the cry of kooks, political misanthropes or earnest economists. It is an idea whose time has, well, started down the runway. Economic necessity, ideological favor and intelligent lobbying could make this historical moment an accommodating one for dismantling the public sector.

---

BETTER GOVERNMENT AT HALF THE PRICE

(By Allan C. Brownfeld)

As the Reagan Administration proceeds with its policy of cutting taxes and government spending, many have expressed concern about a possible deterioration in public services.

In a new book, Better Government At Half the Price (Caroline House, 1981) economists James Bennett and Manual Johnson of George Mason University state that taxpayers have, in fact, been paying more and getting less. They explain why government has not been and cannot be an efficient producer and show through numerous case studies that the private sector outperforms the public sector by producing goods and services for the public at a much lower cost.

They point out that, "Our interest in the comparison of the costs of production provided by both the public and private sectors is largely due to an accident. One of the authors moved to a new home a short distance from his old residence and still within the same political jurisdiction. Refuse collection was provided by local government in one location, but by the private sector in the other. When the change was made from public to private service, the price paid for trash collection was cut in half and the frequency of collection doubled. As economists who had never given much thought to such matters, the fact that private firms were willing to provide twice the service at half the price charged by local government came as a surprise . . . To our knowledge, there is not one case which has been reported that finds the public sector more efficient than the private sector."

Government employees, they argue, are no different from employees in private firms. Both respond to incentives in their economic environments to maximize their own self-interest. In government, employees are not punished for being wasteful but are, in fact, rewarded for inefficiency. In the private sector, waste cannot be tolerated because competition will eliminate inefficiency.

Discussing the incentive structure in government, the authors note that, "Incentives usually consist of two parts: the 'carrot' of reward for good performance and the 'stick' of punishment for poor performance. Unfortunately, neither the carrot nor the stick is present in government bureaucracies . . . It is all but impossible to fire an employee in the federal government . . . Nor are there any real incentives for efficient performance and cost reduction. The only income for the bureaucrat is the fixed salary from his job. If, by extra effort, he achieves cost reductions, he doesn't get a bonus or a raise. His salary is not related in any way to saving tax dollars. He has, therefore, no reason to be particularly efficient or cost-conscious."

Concerning the difficulty of removing inefficient government employees, the chairman of the Consumer Product Safety Commission described the frustrations of the termination process in a letter to Senator Charles Percy of Illinois: "A manager in the executive branch of the federal government who finds it necessary to terminate an unproductive or noncontributing employee—or even an obstructing employee—must be prepared to spend 25 percent to 50 percent of his time for a period that may run from six to 18 months. In many cases, managers have chosen to work around such a person or to promote the employee out of the office in order to quickly be rid of the problem."

If there is no incentive to be efficient in government service, Bennett and Johnson argue, there may be incentive in the opposite direction: "Government employees are driven to increase the agency's budget each year because a bureaucrat in the U.S. (and in Western Europe as well) is rewarded with higher rank, increased salary, and greater prestige for increasing the number of employees under him. To hire additional employees, additional appropriations must be obtained to pay their salaries. The very nature of bureaucracy provides powerful incentives for increasing the size and scope of government, Every bureaucrat is by nature an empire builder."

The authors propose the Bureaucratic Rule of Two: "Transfer of a service from the private to the public sector doubles its cost of production." They point to a number of communities in which services once thought of as governmental are provided—efficiently and economically—by private groups. Communities such as Scottsdale, Arizona; Grants Pass, Oregon; and Billings, Montana contract with private firms for fire protection.

It is the authors' conclusion that, "Taxes can be cut drastically at the federal, state and local levels of government without any reduction in the quality or quantity of public services. The taxpayer can 'have his

cake and eat it too' because it is possible to get many more goods and services for fewer tax dollars if the goods and services are produced more efficiently—that is, lower cost. This can be achieved by having goods and services produced by private enterprise rather than by government. The evidence proving that this can be done (and in fact already has been done) is both overwhelming and irrefutable."

There are, of course, certain things which are within the legitimate jurisdiction of government. National defense and raising an army is one of these. Maintaining police forces and courts are another. But why should government have a monopoly on the delivery of the mail, the collecting of garbage, or the putting out of fires? Why not have these things done efficiently, economically—and competitively? Professors Bennett and Johnson have an idea worthy of careful study and consideration.●

## JUDICIAL MISINTERPRETATION OF THE FIRST AMENDMENT

● Mr. EAST. Mr. President—

A careful, and not an extremely selective, search of American primary historical documents indicates, beyond a reasonable doubt, that in fact no "high and impregnable" wall between church and state was historically erected by the first amendment; and for a very simple reason—none was constitutionally intended by the framers of that amendment or the states which ratified it.

This quotation comes from an article published in the January 22, issue of National Review entitled, "Understanding the First Amendment." The author, Mr. Robert L. Cord, is a professor of political science at Northeastern University in Boston. He has recently completed a book, "Separation of Church and State: Historical Fact and Current Fiction," which will be published soon by Lambeth Press.

As is indicated by the preceding quotation, Mr. Cord's article is a thought-provoking exploration of the discrepancies between the intent of the framers as to the establishment clause of the first amendment and its subsequent interpretations by the courts. I ask that this article be printed in the RECORD.

The article follows:

[From the National Review, Jan. 22, 1982]

UNDERSTANDING THE FIRST AMENDMENT

(By Robert L. Cord)

"The first amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We could not approve the slightest breach." With those lines of fiction, written over three decades ago, Justice Hugo Black ended the first United States Supreme Court opinion which dealt comprehensively with the meaning of the constitutional concept of separation of Church and State. Certainly the Framers of the Constitution and the Bill of Rights believed in the principle of Church-State separation and quickly added it to the organic law of the infant United States of America in 1791. However, those who authored and ratified that constitutional principle were not thereby mandating a complete legal secularization of the American Republic; far from it. In matters of faith, the Founding Fathers, and the American public they represented, are best described by U.S. Supreme Court Justice William O. Douglas's characterization of 1952: "We are a religious people whose institutions presuppose a Supreme Being."

If the foregoing be true, what were the goals of Madison, Jefferson, and the other advocates of a federal constitutional separation of Church and State? Further, what evidence do we have as to their constitutional intentions? The United States Supreme Court, and recognized scholars who have written in the field of Church-State separation, traditionally have looked to American history to answer these inquiries; consequently, so shall I. Our conclusions, however, are vastly dissimilar.

The First Amendment phrase that guarantees the American constitutional doctrine of separation of Church and State is contained in the opening words of the Bill of Rights: "Congress shall make no law respecting an establishment of religion . . ." The "Establishment Clause," as it is commonly referred to by students of constitutional law, although addressed to the Congress, has by the U.S. Supreme Court been made binding on the states through the Fourteenth Amendment. Consequently, today, neither Congress, a state legislature, nor any creation of a state legislature—such as a school board or municipality—may constitutionally make any laws "respecting an establishment of religion." But what is "an establishment of religion" within the meaning of the First Amendment? Let American history guide us.

James Madison introduced the Bill of Rights in the First Congress (1789) in part because many of the State Ratifying Conventions wanted more limitations placed on the authority of the Federal Government than existed in the original Constitution drawn up in the Philadelphia Convention. Madison's first draft of what ultimately became the Establishment Clause shows his intent clearly: ". . . The Civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established.* . . . (Emphasis added.) Even after Madison's draft was changed by congressional committee deliberations, when asked in debate on the House floor what the re-worded Clause meant, Madison said he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law. . . ."

Careful historical research supports Madison's opinion. When the words and actions of the early Congresses and Presidents of the United States are viewed in their proper historical context it becomes clear that the First Amendment's Establishment Clause was designed by its Framers to *prevent the establishment of a national religion or the placing of any one religious sect, denomination, or tradition into a preferred legal status which characterized religious establishments.* Despite the fact that in 1947 the United States Supreme Court ruled that "the First Amendment has erected a wall between Church and State," which the Court characterized as "high and impregnable," American history shows otherwise. A careful, and not an extremely selective, search of American primary historical documents indicates, beyond a reasonable doubt, that in fact no "high and impregnable" wall between Church and State was historically erected by the First Amendment; and for a very simple Supreme Court rulings since 1947? Which interpretation of Church-State separation should stand: Jefferson's or Black's?

But Jefferson was not alone in church-building through treaty. Presidents James Monroe, John Quincy Adams, Andrew Jackson, and his successor, Martin Van Buren, all emulated Jefferson in committing federal tax money to build churches through treaty agreements. There was no attempt in the *Everson* opinions—either the majority or the dissenting opinions—to explain or even address these indisputable facts which make the Court's definition of the Establishment Clause historically untenable unless, of course, Jefferson et al. did not know what separation of Church and State meant or willfully violated the First Amendment and their constitutional oath of office.

The fictional version of Church-State separation in American history, endorsed in the *Everson* case, is also derived from the careful selection and explanation of historical documents which predate the Constitution. All the opinions in the *Everson* case make much of Madison and Jefferson's struggle to disestablish the Anglican Church in Virginia. Madison's well-known opposition to a state tax to support teachers of the Christian religion is discussed, as is Jefferson's famous Virginia "Bill for Establishing Religious Freedom." It is within this context that the Supreme Court's opinion indicates: "The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable." Omitted from all of the *Everson* opinions are any historical facts concerning Madison and Jefferson in Virginia that would run counter to the "high and impregnable wall" theory.

Madison's "Memorial and Remonstrance against Religious Assessments" (1785) was an argument against a discriminatory policy of supporting, with tax money, only one religion. It is not a brief for absolute separation of Church and State. Further, while mentioning Jefferson's "Religious Liberty Bill," proposed by Madison acting as Jefferson's surrogate in the Virginia Assembly in 1785 (Jefferson was U.S. Minister to France at the time), the Court makes no mention of another Jefferson bill also introduced by Madison the same day. This other bill, unmentioned by the Court, was a "Bill for Punishing . . . Sabbath Breakers." Both Jefferson bills became Virginia law in 1786. Do these laws taken together indicate that Madison and Jefferson subscribed to an "impregnable" wall between Church and State?

If the Court's precedent-setting case (*Everson*) is based on an erroneous assumption, advanced almost 35 years ago—to wit: that the Establishment Clause erected a "high and impregnable" wall between Church and State—then all the subsequent court decisions, federal and state, built upon the *Everson* case are logically questionable. This would not be the case, of course, if the Court explained the incompatibility of its "history" and American historical fact.

The U.S. Supreme Court's failure to decide Church-State cases adequately goes beyond misinterpretation of the original understanding of the First Amendment. With its expansive interpretation of what the Establishment Clause makes unconstitutional, the Court has created confusion with its Church-State decisions. Bus transportation for parochial-school students is constitutional but state money for field trips for those students is not. Relatively non-specific grants to sectarian institutions of higher education are constitutional but similar grants to elementary and secondary schools are not. Textbooks for secular subjects may

be purchased for parochial-school students with tax money but a motion-picture projector may not. Tax exemption of churches and church schools is constitutional but tuition tax credits for parents who send their children to those schools are not.

In an attempt to reduce this confusion about what is and what is not a statute impermissibly violating the constitutional separation of Church and State, Chief Justice Burger, in a 1971 opinion of the Court (*Lemon* v. *Kurtzman*, 403 U.S. 602 [1971]), spelled out the Court's collective criteria in a three-stage test of constitutionality.

"Every analysis in this area [Church-State cases] must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an 'excessive government entanglement with religion.' "

It seems somewhat remarkable that Burger could see or impose any order on the Court's doings in Establishment Clause cases. Consider: In 1971 six members of the Court embraced the three-stage test. In 1975, Justices Brennan, Douglas, and Marshall thought it insufficient and urged a fourth criterion be added. A year later, Justices White and Rehnquist also attacked the test, but, instead of wanting additional criteria, they wanted the three-stage test reduced to two because they thought one level of the test was "superflouous." Thus, the three-stage test, subscribed to by six members of the Court in 1971, failed to command even a majority of the Court only five years later. In 1976 no comprehensive judicial test of constitutionality was embraced in Church-State cases by a sufficient number of Supreme Court Justices to constitute an opinion of the Court.

In 1980, Justices White and Rehnquist reembraced the three-stage test, enabling Justice White to write the opinion of a divided Court (5 to 4). Candidly, he wrote of the Court's predicament at the end of his opinion:

"Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. . . . This course sacrifices clarity and predictability for flexibility but this promises to be the case until the interaction between the courts and the states . . . produces a single, more encompassing construction of the Establishment Clause."

As the highest appellate court on federal constitutional questions for one federal and fifty state court systems, the U.S. Supreme Court has, even by its own admission, failed to provide relatively clear standards as to what the First and Fourteenth Amendments demand in the area of Church-State separation. This failure of the High Court does not serve well a judicial system built upon previous decisions. Lower courts cannot dispose of cases with a sufficient degree of finality unless there are relatively fixed precedents and principles provided by the Supreme Court.

May contemporary scholars who write authoritatively about separation of Church and State disagree with the narrow interpretation of the Establishment Clause embraced here and which I believe my research substantiates as the original understanding of the Clause. (The narrow interpretation briefly documented here is that separation of Church and State as a constitutional concept forbids only the preferential treatment of any one religion, religious sect, or religious tradition and prohibits the establishment of a national or state religion.) Under this interpretation, nondiscriminatory aid to religion is not necessarily unconstitutional. Since the narrow interpretation of the Establishment Clause is at odds with the basic principle of the broad interpretation, which is subscription to virtually complete Church-State separation or independence, the two views are incompatible.

The broad interpretation of Church-State separation is almost always defended by scholars, as by the Supreme Court, with appeals to American history. Such is the case in the most recent (third) edition of *The American Constitution* by C. Herman Pritchett, a much respect authority in the field of American constitutional law. While I have assigned this generally excellent secondary source book to my graduate and undergraduate students, parts of the section on the Establishment Clause are misleading.

Explaining the distinction between the narrow and broad interpretations of the Establishment Clause, Pritchett devotes almost no space to the historical arguments for the narrow interpretation but proceeds at length to present several historical arguments for the broad interpretation. It is with this explanation of the broad interpretation that the danger is done. "During their terms as President . . . both Jefferson and Madison took very strict positions on establishment," Pritchett writes. "Both believed that presidential proclamations of Thanksgiving Day were contrary to the Constitution. They also regarded as unconstitutional," Pritchett continues. "tax exemption for churches . . ." What is cleary not mentioned is that James Madison as President issued at least four Thanksgiving Day Proclamations and that President Thomas Jefferson in 1802 signed into law a bill providing, among other things, for church tax exemption in Alexandria County. Did both these men as President violate their understanding of what the Constitution required as separation of Church and State?

While Pritchett's statement may be in its context only misleading, it was relied upon to produce a statement which is basically erroneous. Footnoting Pritchett, the encyclopedic *Guide to the U.S. Supreme Court* (published by *Congressional Quarterly* in 1979) in its opening discussion of the "Establishment of Religion" provides the following paragraph.

"The two men mose responsible for its [the Establishment Clause's] inclusion in the Bill of Rights construed the clause *absolutely*. Thomas Jefferson and James Madison thought that the prohibition of establishment meant that a presidential proclamation of Thanksgiving Day was just improper as a tax exemption for churches." [Emphasis added.]

Neither Jefferson nor Madison construed the Establishment Clause absolutely and only Jefferson, *when President*, believed that presidential Thanksgiving Day proclamations were unconstitutional. Inasmuch as I assume that whoever wrote this paragraph for the Guide did not intend to deceive, I must conclude that the author did not check primary historical sources. Nevertheless, this section of the Guide will be read by many who will, no doubt, consider it to be both authoritative and correct.

Perhaps the most prominent contemporary Church-State scholar and legal activist who embraces the broad interpretation of the Establishment Clause is Professor Leo Pfeffer. An attorney as well as a teacher and author in the field of American constitutional law, Pfeffer has argued and/or written amicus briefs in over one-half of the Establishment Clause cases decided by the U.S. Supreme Court. Probably his most important scholarly contributon to the Church-State separation debate is *Church, State, and Freedom*, first published in 1953 and revised in 1967. While much of Pfeffer's research appears sound, the two most important chapters of this book—"The Principle [of Church-State separation] Is Born" and "The Meaning of the Principle"—contain some clear historical errors regarding separation of Church and State in the United States. Worse still is that Pfeffer draws some major conclusions from statements which are factually erroneous. One of the most glaring examples of this is Pfeffer's conclusion to the chapter "The Principle Is Born."

After a brief discussion of Madison's proposed Amendments to the Constitution, which were ultimately fashioned into our Bill of Rights and submitted to the states for ratification by the First Congress, Pfeffer closes the chapter as follows:

"The Bill of Rights, approved by the requisite number of states in 1791, began with a guaranty of religious freedom. . . .

"What . . . is particularly significant to our study is that the last words of the last article of the Constitution (except for the purely formal article specifying when the Constitution should become effective) prohibit any religious test 'as a qualification to any office or public trust under the United States,' and the first words of the first article of the Bill of Rights prohibit 'any law respecting an establishment of religion' *The significance of this ending and beginning is more than symbolic; it indicates unmistakably that in the minds of the fathers of our Constitution*, independence of religion and government was the alpha and omega of democracy and freedom." [Emphasis added.]

Despite this statement of Professor Pfeffer's, quoted above, it is historically clear that the Framers of the Bill of Rights—including James Madison—did not intend that what is now the First Amendment should be the first addition to the federal Constitution. When Madison introduced his proposed additions to the Constitution on June 8, 1789, he wanted the religious guarantees to be added to Article I, Section 9 of the body of the original Constitution. Of course, the religious guarantees do not appear in Article I, Section 9, but that isn't Madison's doing. The point here is that if Madison's suggested positioning for the additional religious guarantees in the Constitution had been accepted, Pfeffer would be not only without his symbolism, but also without his unmistakable reading of the minds of the "Fathers of the Constitution."

Lest it be counterargued that Madison's positioning suggestion was rejected by the First Congress because it wanted to do exactly as Pfeffer has indicated, it should be noted that when the additions that became the Bill of Rights were submitted to the states, what is now the First Amendment was the third proposed congressional amendment. When the first two proposed amendments failed to gain ratification, the third proposed amendment became the first ratified and, as such, became the First Amendment to the Constitution. Consequently, unless the members of the First

Congress were clairvoyant and knew that the first two proposed amendments would not be ratified, they could not have known that the third proposed amendment would become the First Amendment. However, if it was intended that the First Amendment's being first in the Bill of Rights should serve as a key to the minds of the "fathers," as Professor Pfeffer has written, why didn't the "fathers" of the Bill of Rights simply put the First Amendment first on the list of the 12 proposed amendments?

Other statements made in *Church, State, and Freedom* are not easily reconciled with historical fact. Pfeffer writes of Jefferson: "Throughout his adult life Jefferson never swerved from his devotion to the principle of complete independence of religion and government." (Emphasis added.) Does Jefferson's church-building treaty reflect the principle of "complete independence of religion and government"? Pfeffer's book, and his selective documentation of Jefferson, do not seem to address that question, or the request by Jefferson that Congress meet its responsibilities under the treaty, which I take to include appropriating funds to help build a church and support a Roman Catholic priest.

The national organization Americans United for Separation of Church and State may, in their monthly periodical *Church and State*, choose to refer to Professor Pfeffer as "the country's leading legal expert on Church-State questions," but my research and book clearly document questionable conclusions in his major work on separation of Church and State. Unfortunately, some of these conclusions, which are, in my judgment, incompatible with a broader look at American primary historical documents, have been embraced by other scholars and by some of our nation's most important jurists.

During recent decades there has been a continuing tendency to redefine what were once considered political public-policy questions as judicial questions. As the call for resolution in the courtroom has increased, the power of elected government has decreased. The current over-broad interpretation of the Establishment Clause has, in part, aided the transformation from government by elected and accountable representatives to government by judiciary. A clear case in point is the current battle over legislation offered by Senators Packwood (R. Ore.) and Moynihan (D., N.Y.) to provide some kind of federal tax assistance to parents who send their children to elementary and secondary private schools, most of which are church-affiliated.

In 1973 (*Committee for Public Education and Religious Liberty* [*PEARL*] v. *Nyquist*), the U.S. Supreme Court held unconstitutional a New York tax-assistance bill which was similar, in part, to the Packwood-Moynihan bill. The inevitable effect of the New York legislation, the Court reasoned, would be to advance the religious mission of sectarian schools. According to *Church and State*, Leo Pfeffer, who successfully argued the *Nyquist* case before the Supreme Court in 1973, testified in May 1981 against the Packwood-Moynihan plan, indicating, among other things, that it would violate the First Amendment. The original understanding of the Establishment Clause does not generally support Pfeffer or the Supreme Court because it does not preclude federal aid (or state aid) to sectarian schools. Instead, primary historical documents show that on many occasions religious sects, and especially their schools, were used as sectarian means to accomplish federal governmental ends until the close of the nineteenth century.

Washington, John Adams, and Thomas Jefferson, as President, signed federal legislation which in effect purchased—with large grants of federal land put in a controlling trust—the services of an evangelical order to settle in Western U.S. lands to aid and teach the Christian and other Indians in the area. No doubt those federal laws were, in part, early manifestations of the U.S. policy of "civilizing the Indians." That policy was implemented, to a great degree, by federally controlled financing of Christian missionary schools of various denominations and sects until the use of sectarian schools was discontinued by an Act of Congress in 1897.

Did Washington, Adams, Jefferson, their Congresses, and their successors in the federal executive and legislative branches all betray the First Amendment until 1897? Certainly not. Since the Framers of the First Amendment saw the Establishment Clause as basically precluding federal religious partisanship, non-partisan use of religious schools to pursue the secular end of "civilizing the Indians" was constitutional. The use of these schools was apparently thought to be wise public policy until almost a century after the First Amendment was added to the Constitution. Can anyone seriously pretend that these schools did not advance their religious mission as they taught Indian children?

The point here is that those who appeal to the First Amendment to foreclose the Packwood-Moynihan bill, or state variations, from becoming practiced law do not have American history, the Framers of the Establishment Clause, or even Thomas Jefferson on their side.

Beginning in 1947, the U.S. Supreme Court, by judicial fiat, has created its own version of separation of Church and State. It has sought to justify its interpretation of that constitutional concept with little more than poor scholarship and judicial say-so. Unfortunately, in the process the Court has dealt a grievous blow to democratic decision-making. The religiously non-sectarian Packwood-Moynihan bill ought to be voted up or down on its merits. The documentation in my forthcoming book is convincing evidence that it would not violate the First Amendment.●

## JIM PHELAN

● Mr. SARBANES. Mr. President, this week many distinguished Marylanders, sports fans, and alumni of Mount St. Mary's College in Emmitsburg, Md., will be joining in honoring Jim Phelan, director of athletics and head basketball coach at the Mount. As a basketball fan and former college player, I want to express to Jim Phelan my great admiration for his remarkable record of accomplishments. In his 28th Mountaineer basketball season, he has just marked his 500th basketball victory making him the most successful coach in Mount St. Mary's history and certainly one of the most successful coaches in the Nation.

In the now defunct Mason-Dixon Conference, a small college league, Jim Phelan won 75 percent of the time and won nine conference titles. He has shepherded the Mountaineers to 24 winning seasons, and the team has participated in 10 NCAA postseason tournaments. In 1962 he was named NABC College Division Coach of the Year as well as Maryland Sportsman of the Year.

His interest in sports and basketball goes back to his own college days where he played for LaSalle College and was named three times to the All-Philadelphia team. After college he led the Marine Corps Cagers from Quantico to the All-Marine finals and then had a brief professional career with the Philadelphia Warriors of the National Basketball Association.

The Phelans are active community members both at Mount St. Mary's and in Emmitsburg. In his 28th season, Jim Phelan is continuing the outstanding record of athletic achievements. He has been awarded the NABC Division II Coach of the Year Award, the Eastern Collegiate Athletic Conference Division II Team of the Year trophy, and amassed a record of 5 weeks as the No. 1 team in the country according to the NCAA Division II poll. I join with Jim Phelan's many friends and his family in the salute to a distinguished sportsman.●

## ORDER FOR RECESS TODAY UNTIL MONDAY, FEBRUARY 8, 1982, AT 11 A.M.

Mr. STEVENS. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 11 a.m. on Monday, February 8.

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

## ORDER FOR RECOGNITION OF SENATOR BENTSEN ON MONDAY, FEBRUARY 8, 1982

Mr. STEVENS. Mr. President, I ask unanimous consent that, following the recognition of the two leaders under the standing order on Monday, the Senator from Texas (Mr. BENTSEN) be recognized for not to exceed 15 minutes under a special order.

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

## ORDER FOR PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS ON MONDAY, FEBRUARY 8, 1982

Mr. STEVENS. Mr. President, I ask unanimous consent that, following the special order allotted to Senator BENTSEN, there be a period for the transaction of routine morning business not to exceed 30 minutes with statements limited therein to 5 minutes each.

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

## EXECUTIVE SESSION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Senate go into executive session for the purpose of considering the nomination on page 3 of Powell Allen Moore.

There being no objection, the Senate proceeded to the consideration of executive business.

## DEPARTMENT OF STATE

The PRESIDING OFFICER. The nomination will be stated.

The legislative clerk read the nomination of Powell Allen Moore of Georgia, to be an Assistant Secretary of State.

Mr. STEVENS. Mr. President, speaking for this side of the aisle, we are delighted to see this appointment, having worked with Mr. Moore. We do wish him well in his new assignment.

Mr. CRANSTON. Mr. President, the nomination is agreeable to us.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

Mr. STEVENS. I move to reconsider the vote by which the nomination was considered and confirmed.

Mr. CRANSTON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. STEVENS. Mr. President, I ask unanimous consent that the President be notified of the confirmation of this nomination.

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

## LEGISLATIVE SESSION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Senate return to the consideration of legislative business.

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

## ORDER FOR RECORD TO REMAIN OPEN UNTIL 4 P.M. TODAY

Mr. STEVENS. Mr. President, I ask unanimous consent that the RECORD remain open today until the hour of 4 p.m. for the introduction of bills and for the transaction of routine business.

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

## RECESS UNTIL MONDAY, FEBRUARY 8, 1982, AT 11 A.M.

Mr. STEVENS. Mr. President, is there any further business to come before the Senate?

There being no further business, I move, in accordance with the previous order, that the Senate stand in recess until Monday at 11 a.m.

The motion was agreed to and, at 3:03 p.m., the Senate recessed until Monday, February 8, 1982, at 11 a.m.

## NOMINATIONS

Executive nominations received by the Senate February 4, 1982:

NATIONAL LABOR RELATIONS BOARD

John R. Van de Water, of California, to be a Member of the National Labor Relations Board for the term of 5 years expiring August 27, 1986, to which office he was appointed during the recess of the Senate from August 3, 1981, until September 9, 1981.

NATIONAL MEDIATION BOARD

George S. Roukis, of New York, to be a Member of the National Mediation Board for the term expiring July 1, 1984, vice George S. Ives, term expired.

U.S. POSTAL SERVICE

Frederic V. Malek, of Virginia, to be a Governor of the U.S. Postal Service for the term expiring December 8, 1989, vice Wallace Nathaniel Hyde.

POSTAL RATE COMMISSION

Henry R. Folsom, of Delaware, to be a Commissioner of the Postal Rate Commission for the remainder of the term expiring October 14, 1982, vice A. Lee Fritschler, resigned.

DEPARTMENT OF JUSTICE

Basil S. Baker, of Texas, to be U.S. Marshal for the southern district of Texas for the term of 4 years, vice Theddis R. Coney, term expired.

COMMISSION OF CIVIL RIGHTS

Clarence M. Pendleton, Jr., of California, to be a Member of the Commission on Civil Rights, vice Arthur S. Flemming.

Mary Louise Smith, of Iowa, to be a Member of the Commission on Civil Rights, vice Stephen Horn.

## CONFIRMATION

Executive nomination confirmed by the Senate, February 4, 1982:

DEPARTMENT OF STATE

Powell Allen Moore, of Georgia, to be an Assistant Secretary of State.

The above nomination was approved subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.